

A “SLAPP” IN THE FACE OF FREE SPEECH: PROTECTING SURVIVORS’ RIGHTS TO SPEAK UP IN THE “ME TOO” ERA

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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

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¹ Vander-Plas v. May, No. 07-15-00454-CV, 2016 WL 5851913, at *1 (Tex. App. Oct. 4, 2016), *reh’g denied* (Nov. 14, 2016), and *review denied* (Feb. 24, 2017).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; *Republican Ducks Texas Politician’s Libel Suit*, COURTHOUSE NEWS SERV. (Oct. 17, 2016), <https://www.courthousenews.com/republican-ducks-texas-politicians-libel-suit/>.

⁸ E-mail from Kristin Vander-Plas to author (Jan 6, 2019, 04:01 CST) (on file with author).

Bar.⁹ Eventually, right before she received her bar exam results, Kristen heard another piece of news that brought her relief.¹⁰ 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.¹¹ In the age of "Me Too," survivors¹² have been emboldened to come forward and speak up about experiences with sexual violence and harassment.¹³ Unfortunately, their speech can come with the cost of litigation initiated by those they have accused.¹⁴ Some, like Kristen, are lucky; their states have protective statutes that allow survivors to respond to frivolous defamation claims with a special motion that allows them to be dismissed quickly and easily.¹⁵ However, many jurisdictions lack these statutes or their

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).

¹⁴ See Hazel Cills, *Students Accused of Misconduct Are Increasingly Filing Defamation Suits Against Their Accusers*, JEZEBEL (Dec. 5, 2017, 5:15 PM), <https://jezebel.com/students-accused-of-sexual-misconduct-are-increasingly-1821026491>.

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.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.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.¹⁸ Next, Part II explores the state of current anti-SLAPP law.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.²⁰ Part IV discusses how applicability of some anti-SLAPP statutes may shift in the "Me Too" era.²¹ Finally, Part V makes recommendations for protecting survivors' rights to speak up about sexual violence going forward.²² These recommendations include improving existing anti-SLAPP statutes to ensure they protect survivors' free speech rights and creating additional anti-SLAPP statutes.²³

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

¹⁶ See *infra* Part II.

¹⁷ See *infra* Part I.

¹⁸ See *infra* Part I.

¹⁹ SLAPPs are Strategic Lawsuits Against Public Participation. See *infra* Part II.

²⁰ See *infra* Part III.

²¹ See *infra* Part IV.

²² See *infra* Part V.

²³ See *infra* Part V.

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.²⁴ An estimated one in five women and one in seventy-one men experience rape.²⁵ 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.²⁶ Half of all transgender and gender-expansive²⁷ individuals experience sexual violence in their lifetimes.²⁸ At least one-fourth of women experience sexual harassment in the workplace.²⁹ Despite the prevalence of these experiences, only about twenty percent of experiences of sexual violence are formally reported.³⁰ 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.³¹

²⁴ See generally BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT (2011), https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf.

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).

²⁸ SANDY E. JAMES ET AL., NATIONAL CENTER FOR TRANS EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 198 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

²⁹ CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE SELECT TASKFORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016), <https://perma.cc/2K3M-MMRL>.

³⁰ RACHEL E. MORGAN & GRACE KENA, DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 2016: REVISED 7 (2018), <https://www.bjs.gov/content/pub/pdf/cv16re.pdf>; see also BLACK ET AL., *supra* note 24.

³¹ MICHAEL PLANTY ET AL., DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010 7 (2016), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>; see also *The Criminal Justice System: Statistics*, RAPE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> (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.”³² 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.³³ 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.³⁴ The massive response to the tweet revealed to the world what many women already knew: This was not just a Hollywood problem.³⁵ 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.³⁶ Women and gender-expansive folks had been organizing around sexual violence for years, and this moment energized, centralized, and brought attention to their work.³⁷ 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.³⁸ Sexual harassers in the public eye were ousted from power and faced social consequences.³⁹

³² Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976. Milano’s original “Me Too” tweet was directly retweeted (or shared) 23,579 times and favorited 52,010 times as of April 28, 2019. *Id.* A “tweet” is a written communication shared on a popular social media website called Twitter. Twitter allows users to share brief thoughts—280 characters or less—with their followers. Users can endorse one another’s tweets by favoriting the tweet or retweeting to share with their own followers. TWITTER, https://about.twitter.com/en_us.html (last visited May 7, 2019).

³³ See Najja Parker, *Who Is Tarana Burke? Meet the Woman Who Started the Me Too Movement a Decade Ago*, ATLANTA J.-CONST. (Dec. 6, 2017), <https://www.ajc.com/news/world/who-tarana-burke-meet-the-woman-who-started-the-too-movement-decade-ago/i8NEiuFHKaIvBh9ucukidK/>; Milano, *supra* note 32.

³⁴ See Elias Leight, *Harvey Weinstein Sexual Assault Allegations: A Timeline*, ROLLING STONE (May 25, 2018, 5:43 PM), <https://www.rollingstone.com/culture/culture-news/harvey-weinstein-sexual-assault-allegations-a-timeline-628273/>.

³⁵ See Chicago Tribune Staff & K.T. Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (Jan. 23, 2019, 3:05 PM), <http://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html>.

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See* Chicago Tribune Staff & Hawbaker, *supra* note 35.

³⁹ *See id.* Consequences for men who have been named as abusers have been wide-ranging. Some—movie mogul Harvey Weinstein, music artist R. Kelly, and doctor Larry Nassar—have been charged with crimes related to their alleged sexual assault. Others—comedian Louis C.K. and actor Kevin Spacey—have seen their shows and appearances cancelled. Many—news anchor Matt Lauer, film director Bryan Singer, and music director James Levine—were fired. Unfortunately, some—President

Of course, significant backlash met the rise of this movement.⁴⁰ Critics, primarily men, expressed concern that the movement had gone “too far” in its attempt to hold harassers and abusers accountable.⁴¹ An often-voiced concern was that sexual violence allegations could irreparably damage careers.⁴² 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.⁴³ 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.⁴⁴ An overarching theme was concern about the defamation of potentially faultless people and assertions about their right to have their innocence presumed.⁴⁵ 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.⁴⁶ Defamation actions can be important

Donald Trump, Supreme Court Justice Brett Kavanaugh—have seen few concrete consequences.

⁴⁰ See Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo*, N.Y. MAG. (Jan. 12, 2018), <http://nymag.com/daily/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html>.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See Kathryn Casteel & Andrea Jones-Rooy, *We Need a Better Way to Talk About Sexual Misconduct*, FIVETHIRTYEIGHT (Apr. 17, 2018, 6:01 AM), <https://fivethirtyeight.com/features/we-need-a-better-way-to-talk-about-sexual-misconduct/>.

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.⁴⁷ 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.”⁴⁸

Put simply, a SLAPP is filed with the intention of stopping someone from exercising his or her right to speak.⁴⁹ These suits are generally filed without regard for whether the litigation will be successful.⁵⁰ Instead, they seek to silence speech through the inconvenience and cost of litigation.⁵¹ These suits also have a chilling effect by preventing others from making similar statements in the future for fear of facing a lawsuit.⁵² 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.⁵³ 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.⁵⁴

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.*

⁵³ Tyler Kingkade, *As More College Students Are Saying “Me Too,” Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017, 11:26 AM), <https://web.archive.org/web/20180725013746/https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing>.

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.⁵⁵ For most SLAPP defendants, defending against a defamation suit is financially burdensome and time consuming.⁵⁶ 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).⁵⁷ 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.⁵⁸

Furthermore, survivors of sexual violence may face a greater emotional and mental health burden than other SLAPP defendants.⁵⁹ Defending against a defamation suit may require frequent retelling of the assault or harassment and the frequent reliving of any associated trauma.⁶⁰ 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.⁶¹ Survivors are likely to face stress and trauma from the continued interaction with an abuser required by the process of litigation.⁶²

One woman, "Jane," reported to the student conduct office at Washington University at St. Louis that her ex-husband

Johnson, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips*, AM. CIV. LIBERTIES UNION (Jan. 22, 2018, 4:00 PM), <https://www.aclu.org/blog/womens-rights/worried-about-getting-sued-reporting-sexual-abuse-here-are-some-tips>.

⁵⁵ Kingkade, *supra* note 53.

⁵⁶ *Id.*

⁵⁷ The costs of defending defamation claims against large entities such as media outlets may range from between one million to seven million dollars. Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 27 (1985); PAULA HANNAFORD-AGOR & NICOLE WATERS, ESTIMATING THE COST OF CIVIL LITIGATION, 20 CASELOAD HIGHLIGHTS: NATIONAL CENTER FOR STATE COURTS 1, 7 (2013) (describing the costs of civil litigation more generally).

⁵⁸ MORGAN & KENA, *supra* note 30, at 8.

⁵⁹ Kingkade, *supra* note 53 (explaining the emotional and mental health difficulties faced by some survivors who are SLAPP-ed).

⁶⁰ See generally Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 103 (1977) (describing in depth the trauma women face when addressing sexual violence in the legal system).

⁶¹ *Id.*

⁶² See e.g., Amanda Arnold, *3 Women on What It Was Like to Testify at Their Sexual-Assault Hearings*, THE CUT (Sept 26, 2018) <https://www.thecut.com/2018/09/3-women-on-testifying-at-their-sexual-assault-hearings.html> (describing the trauma and pain experienced by a woman who testified in a criminal trial twice after one trial ended in a hung jury, who said "[i]f I'm assaulted a second time, I don't think I'll be believed. That's what I get hung up on. I think I'm actually less safe than I was before I stood up for myself. And less confident in the power of my voice. If a friend were raped and asked me whether she should testify, I'd tell her: don't do it").

had raped her. After being found responsible by the conduct board, Jane's ex-husband sued her for defamation.⁶³ The cost of defending herself against this claim was twice her monthly income, reaching \$20,000 even in the early stages of the lawsuit.⁶⁴ 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."⁶⁵

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.⁶⁶ 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."⁶⁷

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."⁶⁸ 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.⁶⁹

As the "Me Too" movement has demonstrated, free speech at its best can point out wrongs, demand accountability,

⁶³ Kingkade, *supra* note 53.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Mueller v. Swift*, No. 15-CV-1974-WJM-KLM, 2017 WL 2362137 (D. Colo. May 31, 2017). Swift countersued for assault seeking damages of \$1. Ultimately the defamation claim was dismissed with respect to Swift (but not other defendants). At jury trial, the jury ruled for Swift, who was awarded the \$1 in damages she sought for her assault on a counter-claim.

⁶⁷ Constance Grady, *Taylor Swift Won Her Day in Court: Here's What You Need to Know*, VOX NEWS (Aug. 15, 2017, 9:30 AM), <https://www.vox.com/culture/2017/8/11/16127214/taylor-swift-groping-trial-explained>.

⁶⁸ Pring & Canan, *supra* note 48, at 942–43; U.S. CONST. amend. I.; BENJAMIN FRANKLIN, *On Freedom of Speech and the Press* (Nov. 17, 1737), reprinted in *THE WORKS OF BENJAMIN FRANKLIN* 2, 285–310 (Jared Sparks ed., 1882).

⁶⁹ Stephen Rohde, *Presidential Power Free Press*, L.A. LAW 26, 28 (October 2017) (explaining the initial intent of the First Amendment to protect citizens from government tyranny).

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.⁷⁷ 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.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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.⁸¹ 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.⁸² Unfortunately, only thirty-one states and the District of Columbia have anti-SLAPP statutes, and anti-SLAPP laws vary significantly by jurisdiction.⁸³ There is no federal anti-SLAPP statute, though in

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.*

⁸⁰ See e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

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

⁹⁰ HAW. REV. STAT. § 634F-1 (2018).

⁹¹ See e.g., HAW. REV. STAT. ANN. § 634F-1 (West 2019); MO. ANN. STAT. § 537.528 (West 2019); N.M. STAT. ANN. § 38-2-9.1 (West 2019); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2019); TENN. CODE ANN. § 4-21-1003 (West 2019); WASH. REV. CODE ANN. § 4.24.510 (West 2019); *State Anti-SLAPP Laws*, *supra* note 83.

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).

⁹³ States in this category include: Arizona (ARIZ. REV. STAT. ANN. § 12-752 (2019)), Arkansas (ARK. CODE ANN. § 16-63-504 (West 2019)), Delaware (DEL. CODE ANN. tit. 10, § 8136 (West 2019)), Florida (FLA. STAT. ANN. § 768.295 (West 2019)), Georgia (GA. CODE ANN. § 9-11-11.1 (West 2019)), Massachusetts (MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2019)), Minnesota (MINN. STAT. ANN. § 554.02 (West 2019)), Nebraska (NEB. REV. STAT. ANN. § 25-21,243 (West 2019)), Nevada (NEV. REV. STAT. ANN. § 41.650 (West 2019)), New York (N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2019)), Pennsylvania (27 PA. STAT. AND CONS. STAT. ANN. § 7707 (West 2019)), Utah (UTAH CODE ANN. § 78B-6-1403 (West 2019)), and Virginia (VA. CODE ANN. § 8.01-223.2 (West 2019)). See also *State Anti-SLAPP Laws*, *supra* note 83.

⁹⁴ UTAH CODE ANN. § 78B-6-1403 (West 2018).

⁹⁵ See e.g., ARIZ. REV. STAT. ANN. § 12-752 (West 2019); ARK. CODE ANN. § 16-63-504 (West 2019); DEL. CODE ANN. tit. 10, § 8136 (West 2019); FLA. STAT. ANN. § 768.295 (West 2019); GA. CODE ANN. § 9-11-11.1 (West 2019); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2019); MINN. STAT. ANN. § 554.02; NEB. REV. STAT. ANN. § 25-21,243 (West 2019); NEV. REV. STAT. ANN. § 41.650 (West 2019); N.Y. CIV. RIGHTS LAW § 70-a (McKinney); PA. STAT. AND CONS. STAT. ANN. § 8302 (West 2019); UTAH CODE ANN. § 78B-6-1403 (West 2019); VA. CODE ANN. § 8.01-223.2 (West 2019). See also *State Anti-SLAPP Laws*, *supra* note 83.

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.⁹⁶ For example, in *Blanchard*, a hospital president's statement to the media related to an ongoing Department of Mental Health investigation was protected.⁹⁷

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.⁹⁸ California's anti-SLAPP law protects "any act . . . in furtherance of the . . . right of petition or free speech . . . in connection with a public issue."⁹⁹ 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.¹⁰⁰ These statutes protect free speech rights of individuals while providing opportunities for individuals to seek damages when speech is truly defamatory.¹⁰¹ 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.¹⁰² Because the public had an interest in

⁹⁶ *What is a SLAPP?*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/what-is-a-slapp> (last visited May 7, 2019).

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).

⁹⁸ 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. 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. § 31.150 (West 2019)), Rhode Island (9 R.I. GEN. LAWS ANN. § 9-33-2 (West 2019)), 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.

⁹⁹ CAL. CIV. PROC. CODE § 425.16 (2018).

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 (West 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.*

¹⁰² *Deaver v. Desai*, 483 S.W.3d 668, 671 (Tex. App. 2015).

statements about an attorney's fitness to represent clients, the anti-SLAPP statute protected the defendant's statements.¹⁰³

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.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."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.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.¹⁰⁷

These elements are subject to exceptions. In some cases, the defendant's statement may be protected or privileged under another statute.¹⁰⁸ Often, states consider police reports, misconduct reports to an administrative agency, and similar statements to be protected.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.¹¹⁰ The malice requirement also applies when the plaintiff is a person of public interest, such as a celebrity or a politician.¹¹¹ If a showing of actual malice is required, to overcome an anti-SLAPP motion

¹⁰³ *Id.* at 677.

¹⁰⁴ *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 599 (9th Cir. 2010).

¹⁰⁵ *Id.*

¹⁰⁶ CAL. CIV. PROC. CODE § 425.16(b)(2).

¹⁰⁷ *Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 73 (2d Cir. 2004) (describing the falsity, publication, and damages elements of a defamation claim).

¹⁰⁸ *See Cuba v. Pylant*, 814 F.3d 701, 715 (5th Cir. 2016).

¹⁰⁹ *Id.*; *see also* *Ku v. Dibaji*, No. A146032, 2017 WL 3205809 (Cal. Ct. App. July 28, 2017) (finding similarly that a report to a school Title IX officer was privileged); *Lee v. Whalen*, No. CIV.A. 97-01277, 1998 WL 156993 (Mass. Super. Mar. 25, 1998) (holding that a police report is privileged to the extent that it is true).

¹¹⁰ *Cuba*, 814 F.3d at 715.

¹¹¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

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

¹¹² *Vander-Plas v. May*, No. 07-15-00454-CV, 2016 WL 5851913, at *5 (Tex. App. Oct. 4, 2016).

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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰

Saldivar v. Momah, a Washington¹²¹ Supreme Court case, demonstrates how strictly courts interpret petitioning activity.¹²² 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.¹²³ The

¹¹⁸ 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.

¹¹⁹ See e.g., *Saldivar v. Momah*, 186 P.3d 1117, 1123 (2008), *superseded by statute*, WA. REV. CODE. § 4.24.525(1)(a) (2010), *as recognized in* *Bevan v. Meyers*, 183 Wash. App. 177, 185 (2014); *Milionis v. Newport Sch. Dist.*, No. 56-415, 2009 WL 3133152, at *4 (Wash. Ct. App. Oct. 1, 2009) (2009); *Mantell v. P & J.V. Mgmt. Corp.*, No. PLCV201200536, 2013 WL 6175642, at *6 (Mass. Super. Sept. 22, 2013).

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."¹²⁴ 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.¹²⁵

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.¹²⁶ 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,¹²⁷ 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.¹²⁸ 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.¹²⁹ Courts applying these statutes generally take a broader view of what

¹²⁴ *Id.* But see *Mantell v. P & J.V. Mgmt. Corp.*, No. PLCV201200536, 2013 WL 6175642, at *6 (Mass. Super. Sept. 22, 2013) (holding that a complaint to an employment investigatory body and a suit filed after that complaint are protected petitioning activity).

¹²⁵ *Milionis v. Newport Sch. Dist.*, No. 56-415, 2009 WL 3133152, at *4 (Wash. Ct. App. Oct. 1, 2009) (2009) (holding that a defendant's report of a teacher's past sexually abusive behavior to the school administration was sufficient to constitute a petition seeking official government action).

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

¹²⁷ PLANTY ET AL., *supra* note 31, at 6–7.

¹²⁸ States in this category include: Arizona (ARIZ. REV. STAT. ANN. § 12-752 (2019)), Arkansas (ARK. CODE ANN. § 16-63-504 (West 2019)), Delaware (DEL. CODE ANN. tit. 10, § 8136 (West 2019)), Florida (FLA. STAT. ANN. § 768.295 (West 2019)), Georgia (GA. CODE ANN. § 9-11-11.1 (West 2019)), Massachusetts (MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2019)), Minnesota (MINN. STAT. ANN. § 554.02 (West 2019)), Nebraska (NEB. REV. STAT. ANN. § 25-21,243 (West 2019)), Nevada (NEV. REV. STAT. ANN. § 41.650 (West 2019)), New York (N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2019)), Pennsylvania (27 PA. STAT. AND CONS. STAT. ANN. § 7707 (West 2019)), Utah (UTAH CODE ANN. § 78B-6-1403 (West 2019)), and Virginia (VA. CODE ANN. § 8.01-223.2 (West 2019)). See also *State Anti-SLAPP Laws*, *supra* note 83.

¹²⁹ *Id.*

constitutes petitioning activity than courts have when interpreting anti-SLAPP statutes that are only protections for petitioners.¹³⁰ Generally, filing a civil lawsuit or an administrative complaint is sufficient to establish petitioning activity for purposes of statutes that protect political participants.¹³¹

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.¹³² 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.¹³³ 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.¹³⁴ 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.¹³⁵

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.¹³⁶ 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.¹³⁷ In these

¹³⁰ See, e.g., *Mantell v. P & J.V. Mgmt. Corp.*, No. PLCV201200536, 2013 WL 6175642, at *6 (Mass. Super. Sept. 22, 2013).

¹³¹ See, e.g., *id.* (holding that an administrative complaint filed with the Massachusetts Commission Against Discrimination was petitioning activity protected under the statute.).

¹³² *Rogers v. Dupree*, 799 S.E.2d 1, 4 (Va. 2017).

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.

jurisdictions, 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. § 31.150 (West 2019)), Rhode Island (9 R.I. GEN. LAWS ANN. § 9-33-2 (West 2019)), 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.*

¹³⁹ *Olaes v. Nationwide Mut. Ins.*, 38 Cal. Rptr. 3d 467, 474 (Cal. Ct. App. 2006) (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 (Cal. Ct. App. 1999).

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, 2018), https://www.washingtonpost.com/education/2018/12/11/accused-rape-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.).

¹⁴² See *Brenner v. Hill*, No. A149758, 2017 WL 5589175 (Cal. Ct. App. Nov. 21, 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.

¹⁴⁴ See *Conroy v. Spitzer*, 83 Cal. Rptr. 2d. 443, 446 (Cal. Ct. App. 1999).

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

¹⁴⁵ *Id.*

¹⁴⁶ *Brenner*, 2017 WL 5589175, at *5–6.

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.

¹⁵⁴ *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

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.¹⁵⁶

1. False Statement

The accused-plaintiff must establish that the survivor-defendant has made a false statement.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.¹⁵⁸ Lower value speech can be regulated more significantly with less concerns that those regulations might violate the First Amendment.¹⁵⁹ More public speech, however, has higher value under the First Amendment, and is generally provided higher protections from interference.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.¹⁶¹ The common law standard places no burden on plaintiffs to demonstrate that the statements are false and assume falsity instead.¹⁶² Defendants can overcome this presumption by proving falsity as a defense.¹⁶³ On the other hand, in some scenarios, the burden of demonstrating that the statement is false falls to the plaintiff.¹⁶⁴ When the plaintiff is a public figure, they carry the burden of proving that statements are false.¹⁶⁵ When the claims are about private figures but are of public interest, the plaintiff also must demonstrate that the statement is false.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.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.¹⁶⁸

¹⁵⁶ See e.g., *Mindys*, 611 F.3d at 599.

¹⁵⁷ *Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 73 (2d Cir. 2004).

¹⁵⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–49 (1974).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See e.g., *id.*; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

¹⁶⁵ *New York Times*, 376 U.S. at 279.

¹⁶⁶ *Philadelphia Newspapers*, 475 U.S. at 776.

¹⁶⁷ See *Heineke v. Santa Clara Univ.*, No. 17-CV-05285-LHK, 2017 WL 6026248, at *14 (N.D. Cal. Dec. 5, 2017).

¹⁶⁸ *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.¹⁶⁹ 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.¹⁷⁰ In *Spelling*, the accused-plaintiff filed a defamation claim after being accused of sexually harassing his home health aide.¹⁷¹ 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.¹⁷²

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.¹⁷³ 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.¹⁷⁴ The accused-plaintiff must show that, taken as a whole, the survivor-defendant's statements are likely to identify him.¹⁷⁵ 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.¹⁷⁶ A news program reported on the story and incorrectly included a graphic stating that the accused-plaintiff was a priest.¹⁷⁷ In a voiceover paired with the graphic, the program correctly stated that Friar Bayhi was only accused of failing to report the abuse.¹⁷⁸ Despite the conflicts between the two statements, taken as a whole, the broadcast was

¹⁶⁹ *Id.*

¹⁷⁰ *Spelling v. Sessions*, No. B192406, 2008 WL 484289, at *5 (Cal. Ct. App. Feb. 25, 2008).

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.

¹⁷³ *See Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 73 (2d Cir. 2004).

¹⁷⁴ *Bayhi v. Louisiana Television Broad., L.L.C.*, 2017 WL 4082241, at *4 (La. App. 1 Cir. 2017).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

deemed to be sufficient to have potentially identified Friar Bayhi as the abuser.¹⁷⁹

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.¹⁸⁰ In most jurisdictions, allegations that an individual has committed a serious or violent crime constitute *per se* defamation;¹⁸¹ when this kind of crime is falsely alleged, it is presumed to be damaging to an accused-plaintiff's reputation.¹⁸² Allegations of sexual violence are generally considered defamatory *per se*, so the accused-plaintiff does not need to show any other damages to defeat an anti-SLAPP motion.¹⁸³ In *Miranda*, Miranda accused the plaintiff, Byles, of sexually abusing his granddaughter.¹⁸⁴ Because Miranda's statements constituted defamation *per se*, Byles was not required to demonstrate that the statements had been damaging.¹⁸⁵

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, the accused-plaintiff must show that the speaker spoke negligently, or without regard for the truth or falsehood of the statement.¹⁸⁶ 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.¹⁸⁷ For example, in *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.¹⁸⁸

In some special cases, the accused-plaintiff must reach a higher burden to establish the mental state needed for a

¹⁷⁹ *Id.*

¹⁸⁰ See *Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 73 (2d Cir. 2004).

¹⁸¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964).

¹⁸² *Id.*

¹⁸³ *Miranda v. Byles*, 390 S.W.3d 543, 552 (Tex. App. 2012).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 73 (2d Cir. 2004).

¹⁸⁷ See *Heineke v. Santa Clara Univ.*, 2017 WL 6026248, at *14 (N.D. Cal. Dec. 5, 2017).

¹⁸⁸ *Id.*

defamation claim.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.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.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.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).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.¹⁹⁴ The accused-plaintiff must generally provide support or corroboration for the claim that the allegation was made with malice.¹⁹⁵ For example, in *Vander-Plas*, the plaintiff, May, was a politician accused of sexual assault and harassment.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.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.¹⁹⁸ However, in *Picozzi*, an plaintiff was accused of sexual harassment in a privileged report made to an employer.¹⁹⁹ The accused-plaintiff established a probability of prevailing on the element of actual malice by

¹⁸⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

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).

¹⁹¹ *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 162, (1967).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *See Ku v. Dibaji*, No. A146032, 2017 WL 3205809, at *8 (Cal. Ct. App. July 28, 2017) (Cal. Ct. App. July 28, 2017); *Vander-Plas v. May*, No. 07-15-00454-CV, 2016 WL 5851913, at *5 (Tex. App. Oct. 4, 2016).

¹⁹⁵ *See Ku*, 2017 WL 3205809, at *8 (Cal. Ct. App. July 28, 2017).

¹⁹⁶ *Vander-Plas*, 2016 WL 5851913, at *5.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See generally Picozzi v. Miller*, No. G038627, 2008 WL 2487868 (Cal. Ct. App. 2008).

demonstrating that the survivor-defendant's story of assault contained several inconsistencies and that she had a motive for filing a false report.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.²⁰¹ Of the jurisdictions that have anti-SLAPP statutes, nineteen require that speech be connected to formal petitioning activity.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.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-

²⁰⁰ *Id.*

²⁰¹ See *infra* Part III.

²⁰² Jurisdictions in this category include: Arizona (ARIZ. REV. STAT. ANN. § 12-752 (2019)), Arkansas (ARK. CODE ANN. § 16-63-504 (West 2019)), Delaware (DEL. CODE ANN. tit. 10, § 8136 (West 2019)), Florida (FLA. STAT. ANN. § 768.295 (West 2019)), Georgia (GA. CODE ANN. § 9-11-11.1 (West 2019)), Hawaii (HAW. REV. STAT. ANN. § 634F-1 (West 2019)), Massachusetts (MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2019)), Minnesota (MINN. STAT. ANN. § 554.02 (West 2019)), Missouri (MO. ANN. STAT. § 537.528 (West 2019)), Nebraska (NEB. REV. STAT. ANN. § 25-21,243 (West 2019)), Nevada (NEV. REV. STAT. ANN. § 41.650 (West 2019)), New Mexico (N.M. STAT. ANN. § 38-2-9.1 (West 2019)), New York (N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2019)), Oklahoma (OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2019)), Pennsylvania (27 PA. STAT. AND CONS. STAT. ANN. § 7707 (West 2019)), Tennessee (TENN. CODE ANN. § 4-21-1003 (West 2019)), Utah (UTAH CODE ANN. § 78B-6-1403 (West 2019)), and Virginia (VA. CODE ANN. § 8.01-223.2 (West 2019)), Washington (WASH. REV. CODE ANN. § 4.24.510 (West 2019)). See also *State Anti-SLAPP Laws*, *supra* note 83.

²⁰³ Parker, *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.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.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.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.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.²⁰⁸ In these cases, the accused-plaintiff is required to make a showing that the speaker acted with malice.²⁰⁹ This standard is more difficult to meet than the standard that generally required establishing a likelihood of prevailing on a defamation claim.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.²¹¹ Even in the best-case scenario, where

²⁰⁴ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

²⁰⁵ See *Heineke v. Santa Clara Univ.*, 2017 WL 6026248, at *14 (N.D. Cal. Dec. 5, 2017).

²⁰⁶ Denison, *supra* note 77, at 21–22.

²⁰⁷ *Vander-Plas v. May*, No. 07-15-00454-CV, 2016 WL 5851913, at *5 (Tex. App. Oct. 4, 2016).

²⁰⁸ Leight, *supra* note 34.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Delaware (DEL. CODE ANN. tit. 10, § 8136 (West 2019)), Georgia (GA. CODE ANN. § 9-11-11.1 (West 2019)), Hawaii (HAW. REV. STAT. ANN. § 634F-1 (West 2019)), Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2019)), Massachusetts (MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2019)), New York (N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2019)), Rhode Island (9 R.I. GEN. LAWS ANN. § 9-33-2 (West 2019)), and Texas (TEX. CIV. PROC. & REM. CODE ANN. § 27.002 (West 2019)) all allow a plaintiff to amend a complaint while an anti-SLAPP motion is pending. In Delaware and Oregon, a plaintiff may amend and refile a complaint after an anti-SLAPP motion is granted. DEL. CODE ANN. tit. 10, § 8136

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.²¹² Median estimates for costs of defending against general civil litigation in the initial stage range from about \$2,000 (for an automobile case)²¹³ to \$9,000 (for a contract case).²¹⁴ Because defending against a SLAPP requires specialized legal knowledge, the initial fees in these cases are likely even higher.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.²¹⁶ Even so, no anti-SLAPP statute contains a

(West 2019); OR. REV. STAT. ANN. § 31.150 (West 2019). In California, the plaintiff may amend and refile after grant if the California statute is being applied in a federal case. CAL. CIV. PROC. CODE § 425.16 (West 2019). In California (CAL. CIV. PROC. CODE § 425.16 (West 2019)), the District of Columbia (D.C. CODE ANN. § 16-5501 (West 2019)), Georgia (GA. CODE ANN. § 9-11-11.1 (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 State Anti-SLAPP Laws, supra* note 83.

²¹² Denison, *supra* note 77, at 21–22.

²¹³ HANNAFORD-AGOR & WATERS, *supra* note 57, at 7.

²¹⁴ *Id.*

²¹⁵ Denison, *supra* note 77, at 21–22.

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. § 9-11-11.1 (West 2019)), Hawaii (HAW. REV. STAT. ANN. § 634F-1 (West 2019)), Illinois (735 ILL. COMP. STAT. ANN. 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)), Massachusetts (MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2019)), Minnesota (MINN. STAT. ANN. § 554.02 (West 2019)), Missouri (MO. ANN. STAT. § 537.528 (West 2019)), Nevada (NEV. REV. STAT. ANN. § 41.650 (West 2019)), New Mexico (N.M. STAT. ANN. § 38-2-9.1 (West 2019)), Oregon (OR. REV. STAT. ANN. § 31.150 (West 2019)), Pennsylvania (27 PA. STAT. AND CONS. STAT. ANN. § 7707 (West 2019)), Rhode Island (9 R.I. GEN. LAWS ANN. § 9-33-2 (West 2019)), Tennessee (TENN. CODE ANN. § 4-21-1003 (West 2019)), Texas (TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2019)), and Vermont (VT. STAT. ANN. tit. 12, § 1041 (West 2019)), Virginia (VA. CODE ANN. § 8.01-223.2 (West 2019)), and Washington (WASH. REV. CODE ANN. § 4.24.510 (West 2019)) all provide mandatory costs and fees to successful anti-SLAPP defendants. Delaware (DEL. CODE ANN. tit. 10, § 8136 (West 2019)), Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2019)), Oregon (OR. REV. STAT. ANN. § 31.150 (West 2019)), Nebraska (NEB. REV. STAT. ANN. § 25-21,243 (West 2019)), New York (N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2019)), Oklahoma (OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2019)), and Utah's (UTAH CODE ANN. § 78B-6-1403 (West 2019)) statutes do not grant mandatory costs and fees. *See also State Anti-SLAPP Laws, supra* note 83.

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.*

²²⁰ Brian Naylor, *Brett Kavanaugh Offers Fiery Defense in Hearing that Was a National Cultural Moment*, NAT’L PUB. RADIO (Sept. 28, 2018, 12:13 AM), <https://www.npr.org/2018/09/28/652239571/brett-kavanaugh-offers-fiery-defense-in-hearing-that-was-a-national-cultural-mom>.

²²¹ Dylan Scott, *Susan Collins, One of the Most Important Swing Votes on Kavanaugh’s Nomination, Explained*, VOX NEWS (Oct. 1, 2018, 8:05 AM), <https://www.vox.com/policy-and-politics/2018/9/29/17914086/susan-collins-brett-kavanaugh-senate-vote-sexual-assault>.

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.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.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.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.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.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

TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/us/politics/collins-murkowski-kavanaugh.html>.

²²⁴ Scott, *supra* note 221.

²²⁵ Chicago Tribune Staff, *How Twitter Reacted to the Kavanaugh-Ford Senate Hearing*, CHI. TRIBUNE (Sept. 27, 2018), <https://www.chicagotribune.com/news/nationworld/ct-kavanaugh-hearing-social-media-reactions-20180927-story.html>.

²²⁶ Parker, *supra* note 33.

²²⁷ *See id.*

²²⁸ *See Brenner v. Hill*, No. A149758, 2017 WL 5589175 (Cal. Ct. App. Nov. 21, 2017).

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

²²⁹ *TS Media, Inc. v. Pub. Broad. Serv.*, No. 2018 CA 001247 B, 2018 WL 2323233, at *3 (D.C. Ct. Super. May 15, 2018).

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.²³⁴ 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.²³⁵ Survivors face many barriers, including a lack of knowledge, a lack of resources, or a lack of accessible reporting mechanisms.²³⁶ These barriers are particularly high in communities in which people are already disenfranchised, including communities of color, immigrant communities, and LGBTQIA²³⁷ communities, among others.²³⁸ Survivors often do not turn to the justice system because they know the futility of doing so.²³⁹ 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.

²³⁵ See generally DIVISION OF VIOLENCE PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONT., CENTER FOR DISEASE CONT., PREVALENCE AND CHARACTERISTIC OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2011), <https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf>.

²³⁶ *Id.*

²³⁷ This acronym refers to people who identify as Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual. See Michael Gold, *The ABC's of LGBTQIA*, N.Y. TIMES (June 21, 2018),

<https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>.

²³⁸ See generally NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, *supra* note 235.

²³⁹ Emma Baty, *People on Twitter are Sharing Powerful #WhyIDidntReport Stories About Their Sexual Assaults*, COSMOPOLITAN MAG. (Sept. 21, 2018),

<https://www.cosmopolitan.com/politics/a23366420/why-i-didnt-report-assault-hashtag-donald-trump/> (explaining the challenges people face when trying to report a sexual assault).

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.²⁴⁰ 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.²⁴¹ 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.²⁴² 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.²⁴³

Furthermore, speech about sexual violence itself has broad social and public impacts. Perhaps most importantly, this speech has important public safety implications.²⁴⁴ 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.

²⁴³ See, e.g., David Bauder, *More Than 20 Million People Watched the Brett Kavanaugh Hearing*, CHI. TRIBUNE (Sept. 28, 2018) <https://www.chicagotribune.com/news/nationworld/politics/ct-brett-kavanaugh-hearing-tv-ratings-20180928-story.html> (describing the extreme public interest in Professor Christine Blasey Ford's Senate testimony about her experience of sexual assault); Najja Parker, *Lifetime Announces 'Surviving R. Kelly' Follow Up*, ATLANTA J.-CONST. (May 1, 2019) <https://www.ajc.com/news/world/lifetime-announces-surviving-kelly-follow/Ynp7KxJhhxqo9cCcGNAZ4I/> (announcing a follow-up to a successful docuseries detailing numerous allegations of sexual abuse against musical artist R. Kelly); Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (Jun. 6, 2018) <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html> (detailing how public outrage about a lenient sexual assault sentence led to a successful campaign to recall California Judge Aaron Persky).

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 in 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).

²⁴⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

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.²⁴⁹ 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.²⁵⁰ 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.²⁵¹ 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.²⁵²

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

²⁴⁹ 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).

²⁵⁰ *See generally* Saner, *supra* note 84.

²⁵¹ *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://anti-slapp.org/speak-free-act/> (last visited May 7, 2019).

²⁵² *Id.*

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.

²⁵³ Jessica Corbett, *The Consequences of Speaking Up About Abuse from a Powerful Man*, MEDIUM (Feb. 26, 2019), <https://medium.com/@JessicaCorbett/the-consequences-of-speaking-up-about-abuse-from-a-powerful-man-bb85d2604948>.

²⁵⁴ *Id.*

²⁵⁵ See *infra* Part III.A(2).

²⁵⁶ Corbett, *supra* note 253.

²⁵⁷ *Id.*