

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

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INTRODUCTION

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

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

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

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¹ 47 U.S.C. § 230 (2018).

² *See, e.g.*, Jones v. Dirty World Entm’t Recordings, L.L.C., 755 F.3d 398 (6th Cir. 2014).

³ *See, e.g.*, Goddard v. Google, Inc., 640 F. Supp. 2d 1193 (N.D. Cal. 2009).

⁴ *See, e.g.*, Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157 (9th Cir. 2008).

⁵ *See, e.g.*, Hill v. StubHub, Inc., 219 N.C. App. 227, 229–30 (2012).

⁶ Several landmark CDA 230 cases have embraced this interpretation. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1027–28 (9th Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

value: in the context of lawsuits that implicate freedom of speech concerns, as the volume of third-party content increases and the practicability of editorial control over content accordingly decreases, the affirmative responsibility of an intermediary to determine the tortious nature of such content should be relaxed.⁷ For instance, under the common law, newsstands are liable only for defamatory content of which they have specific notice,⁸ while newspaper publishers are subject to the same standard of defamation liability as the authors of articles.⁹

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

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

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

⁷ See Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 296–97, 300 (2011); see also Julio Sharp-Wasserman, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 206 (2019).

⁸ RESTATEMENT (SECOND) OF TORTS § 581 cmt. d, e (AM. L. INST. 1977).

⁹ *Id.* § 578 cmt. b.

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

¹¹ See, e.g., *Trump v. Chi. Tribune Co.*, 616 F. Supp. 1434 (S.D.N.Y. 1985) (libel suit against a newspaper by a celebrity real estate developer in response to an article describing one of the developer’s buildings as “an atrocious, ugly monstrosity”).

¹² See, e.g., CAL. CIV. PROC. CODE § 425.16(e) (West 2018) (defining protected activity as “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest”); D.C. CODE § 16-5502(b) (2018) (defining protected activity as “an act in furtherance of the right of advocacy on issues of public interest”); TEX. CIV. PRAC. & REM. CODE § 27.001(3) (2018) (defining protected activity as “a communication made in connection with a matter of public concern”); VT. STAT. ANN. tit. 12, § 1041(i)(3)

permit defendants to file a motion for expedited dismissal, upon which a pre-trial hearing must be held within a statutorily defined time period. If the suit is determined at that hearing to be meritless, it is dismissed, with costs imposed on the plaintiff. If one were to draw a Venn diagram of the scope of application of these two laws, the outer circles would contain a substantial number of applications exclusive to each law. Anti-SLAPP laws have, in some senses, a broader application than CDA 230. First, anti-SLAPP protection often applies in both an online and an offline context. Second, anti-SLAPP laws protect defendants of all kinds—including newspapers, activists, and consumer reviewers—and not just intermediaries. Anti-SLAPP cases involving CDA 230 represent only a small subset of anti-SLAPP cases.

But the scope of anti-SLAPP laws is also, in another sense, narrower than that of CDA 230. While CDA 230, with certain exemptions, immunizes intermediaries against any cause of action holding an intermediary liable for any type of third-party conduct, anti-SLAPP laws are intended to protect defendants only from lawsuits that target speech or petitioning activity that implicates First Amendment concerns. Thus, CDA 230 immunity has been applied in the context of liability for housing discrimination, false advertising, and other causes of action that are less likely to fall under the purview of anti-SLAPP statutes.¹³ This difference is a reflection of the fact that CDA 230 was drafted, like anti-SLAPP laws, with the narrow intention of protecting freedom of speech, but also, unlike anti-SLAPP laws, with the broader aim of facilitating the growth of internet commerce.¹⁴

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

(2018) (defining protected activity as “any written or oral statement concerning an issue of public interest made in a public forum or a place open to the public”). For an overview of state anti-SLAPP statutes, see *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/your-states-free-speech-protection/#4> (last visited May 7, 2019).

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

¹⁴ 47 U.S.C. § 230(b)(2) (“It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]”).

defendant's costs on the plaintiff upon dismissal,¹⁵ time limits for scheduling a pre-trial hearing,¹⁶ and a stay of discovery pending a decision on the anti-SLAPP motion.¹⁷

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

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

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

¹⁵ See, e.g., CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2018); D.C. CODE § 16-5504(a) (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(1) (West 2018).

¹⁶ CAL. CIV. PROC. CODE § 425.16(f) (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.004(a) (West 2018).

¹⁷ CAL. CIV. PROC. CODE § 425.16(g) (West 2018); D.C. CODE § 16-5502(c)(1) (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(c) (West 2018).

¹⁸ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 42 LOY. L.A. L. REV. 373, 411 (2010).

¹⁹ See *infra* Part IV.

legislative reform simultaneously reduces the scope of anti-SLAPP protection in CDA 230 cases. Second, the definition of protected activity in a federal anti-SLAPP statute inevitably would not encompass all situations in which CDA 230 applies. Specifically, while anti-SLAPP statutes with the broadest definitions of protected activity typically protect only speech on “matters of public concern,”²⁰ CDA 230 applies even to speech concerning matters of interest only to the litigants or to a small subset of the public. Finally, a federal anti-SLAPP law, unlike CDA 230, likely would have a commercial speech exemption, designed to prevent the abuse of anti-SLAPP protection by corporate defendants, primarily in the context of false advertising litigation. This exemption would preclude the use of a federal anti-SLAPP defense in some cases in which CDA 230 would apply.

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

I. OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

A. *The Text*

Section 230(c)(1) of the Communications Decency Act states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²¹ The category “Interactive Computer Service” in application covers, importantly, websites of the user-generated content model. More broadly, the term is defined to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a

²⁰ See *State Anti-SLAPP Laws*, *supra* note 12.

²¹ 47 U.S.C. § 230(c)(1) (2018).

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

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

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

²² *Id.* § 230(f)(2).

²³ *Id.* § 230(f)(3).

²⁴ *See, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (“[A] plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence.”); *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008) (finding that CDA 230 preempted a negligence claim premised on the theory that a social media site had a duty to implement certain safety features to prevent minors from interacting with sexual predators through the platform).

²⁵ *See, e.g., Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1174–75 (9th Cir. 2008) (“Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost. But in cases of enhancement by implication or development by inference . . . section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”).

²⁶ *Id.* at 1169.

²⁷ *See Danielle C. Keats & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 408–11 (2017) (arguing for the

even when they have specific notice that third-party content is unlawful.²⁸

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

[n]o provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).²⁹

Sub-section (c)(2) uniquely applies only to defendants who have made an effort to screen out objectionable content. Moreover, unlike § 230(c)(1), sub-section (c)(2) does not limit immunity based on whether the plaintiff's cause of action is premised on the defendant being a "publisher or speaker," or on whether the defendant is an "information content provider" with respect to the content that is the subject of the suit.³⁰

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

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

contrary interpretation of CDA 230, while noting the unanimity of precedent against their interpretation).

²⁸ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

²⁹ 47 U.S.C. § 230(c)(2) (2018).

³⁰ See IAN C. BALLON, *E-COMMERCE AND INTERNET LAW* § 37.05(4)(A) (2017).

³¹ See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099–110 (9th Cir. 2009) ("The statute is designed at once 'to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.'"); *Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003) ("Consistent with these provisions, courts construing § 230 have recognized as

common law theory of collateral censorship posits that imposing strict liability for third party speech—that is, liability without a knowledge requirement—on a “distributor,” or an entity that transmits large quantities of third-party speech, will cause that entity to overzealously censor out of caution, catching even lawful content in its net. Under common law doctrine, “distributors” are held liable only for third-party illegality of which they have specific knowledge. For example, bookstores and newsstands are not liable for defamatory content in books and newspapers, except where the plaintiff can show that such intermediaries specifically knew of the defamatory speech at issue.³² Newspapers, by contrast, are held liable by the same standard as the authors of articles.³³ This logic can be applied to any form of criminal or civil liability in which intermediary liability would cause an intermediary to preemptively censor the speech of third parties, such as liability under obscenity laws or in the context of lawsuits alleging defamation or privacy torts.

In addition to permitting a free market of ideas and preferences for ideas, the statute is supposed to foster internet commerce more broadly.³⁴ The statute provides a policy objective to “preserve the vibrant and competitive free market that currently exists for . . . interactive computer services, unfettered by Federal or State regulation.”³⁵ The application of CDA 230 to activities that do not implicate First Amendment Concerns, such as selling goods and services, or that are subject to more limited First Amendment protections, such as advertising goods and services,³⁶ is justifiable, if at all, in furtherance of this more general aim. In a sense, the mechanics of collateral censorship as an empirical phenomenon may operate similarly with respect to such activity in user-driven internet media, but such “censorship” does not raise the same Constitutional and policy concerns.

critical in applying the statute the concern that lawsuits could threaten the freedom of speech in the new and burgeoning Internet medium. . . . Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.” (citations and quotation marks omitted); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”).

³² RESTATEMENT (SECOND) OF TORTS § 581 cmt. d, e (AM. LAW INST. 1977).

³³ *Id.* § 578 cmt. b.

³⁴ See Sharp-Wasserman, *supra* note 7, at 205.

³⁵ 47 U.S.C. § 230(b)(2).

³⁶ See *infra* Part VII(c).

The distinction between these narrower and broader aims is crucial to understanding the imperfect overlap, discussed in Part VII, between CDA 230 and a federal anti-SLAPP law. Because anti-SLAPP laws are designed to discourage and mitigate the impact of lawsuits targeting speech and petitioning activity specifically, no anti-SLAPP law can or should apply in all cases in which a CDA 230 defense is available. Anti-SLAPP laws are not general instruments of tort reform and do not serve to facilitate freedom of commerce except where freedom of speech concerns are simultaneously implicated.

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

Despite the powerful protections CDA 230 provides to defendants on the merits, it has, as a practical matter, only partially fulfilled its promise of preventing collateral censorship by mitigating the litigation costs borne by online intermediaries. CDA 230 immunity is typically adjudicated at the motion to dismiss stage.³⁷ In an empirical study in 2012, Professor David Ardia at the University of North Carolina determined that the average CDA 230 case terminated on a motion to dismiss takes nearly a year to reach dismissal.³⁸ Cases in which courts permitted discovery before dismissal tended to last nearly twice as long.³⁹ Ardia noted, plausibly, that litigating for either length of time entails substantial defense-side costs.⁴⁰ Hiring a high-quality defense-side firm to secure dismissal in a CDA 230 case requires significant expense: a single partner at such a firm may charge as much as \$1,500 per hour for her services.⁴¹ While this Article does not attempt a precise calculation of such fees spread over the average multi-hundred day period that Ardia calculated, common sense dictates that these costs are significant.

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

³⁷ See Ardia, *supra* note 18, at 482–83.

³⁸ *Id.* at 382.

³⁹ *Id.* at 484.

⁴⁰ *Id.*

⁴¹ Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: \$1,500 an Hour*, WALL ST. J. (Feb. 9, 2016, 10:11 AM), <https://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708>.

incorporate a fee-shifting provision, a time limit for scheduling a pre-trial hearing, and a stay of discovery pending the resolution of an anti-SLAPP motion.⁴² Thus, state anti-SLAPP protection is a crucial supplement to Section 230 in the context of abusive litigation targeting online speech.

III. OVERVIEW OF STATE ANTI-SLAPP LAWS

A. History of SLAPPs

In 1966, a local branch of the NAACP instituted an economic boycott against white merchants in Claiborne County, Mississippi, to pressure elected officials to adopt several racial justice measures.⁴³ In response, the merchants sued the NAACP in 1969 for tortious interference with business in what became the landmark civil rights case *NAACP v. Claiborne Hardware Co.*⁴⁴ The trial court found for the merchants and ordered the NAACP to pay \$3.5 million in damages, a verdict the Mississippi Supreme Court upheld.⁴⁵ However, the U.S. Supreme Court overturned the verdict, holding that “the boycott clearly involved constitutionally protected activity” through which the NAACP “sought to bring about political, social, and economic change.”⁴⁶

Though not referred to as one at the time, *NAACP v. Claiborne Hardware, Co.* is a classic example of a ‘Strategic Lawsuit Against Public Participation,’ or SLAPP. SLAPPs are meritless lawsuits that some individuals and businesses use as weapons against those who speak out on public issues or petition the government. SLAPP filers do not file a lawsuit to seek justice, but rather, to silence, intimidate, and harass those who disagree with them. SLAPPs are effective because even a meritless lawsuit can take significant time and money to defend. To end or prevent a SLAPP, those who speak out on issues of public interest frequently agree to muzzle themselves, apologize, or “correct” statements.⁴⁷

⁴² See *infra* Part III(c).

⁴³ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889 (1982).

⁴⁴ *Id.* at 889–91.

⁴⁵ *Id.* at 893–94.

⁴⁶ *Id.* at 911.

⁴⁷ See, e.g., *Troll Tracker Defamation Case Settles Before Going to Jury*, PRIOR ART (Sept. 22, 2009), https://thepriorart.typepad.com/the_prior_art/2009/09/troll-tracker-defamation-case-settles-before-going-to-jury.html (discussing a lawsuit by a patent litigant against the operator of the blog Troll Tracker, which resolved with an apology); Kristine Phillips, *British Newspaper Apologies, Agrees To Pay Damages for ‘False Statements’ About Melania Trump*, WASH. POST (Jan. 28, 2019), https://www.washingtonpost.com/arts-entertainment/2019/01/26/british-newspaper-apologizes-agrees-pay-damages-false-statements-about-melania-trump/?utm_term=.6841f535d7e8 (discussing First Lady Melania Trump’s defamation lawsuit against the Daily Mail, which provoked a retraction before the trial began).

Professors George Pring and Penelope Canan first pioneered the term in a pair of articles they co-wrote in 1988.⁴⁸ In their 1996 book, “SLAPPs: Getting Sued for Speaking Out,” the authors explain, “thousands of SLAPPs have been filed in the last two decades, tens of thousands of Americans have been SLAPPED, and still more have been muted or silenced by the threat.”⁴⁹ SLAPP suits, the authors contended, “have struck thousands of typical, middle-of-the-road Americans in just the last few years. They are found in every state; they erupt at every government level, in every type of political action, and on every issue of public consequence. . . . [T]heir victims are now legion.”⁵⁰

B. Cyber SLAPPS

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

In 2003, as part of the government-sanctioned California Coastal Records Project, photographer Kenneth Adelman took more than 12,000 photos of California’s coastline to document coastal erosion.⁵¹ The photos were made publicly available online. Unhappy that her beachfront mansion was seen in one of the photos, actress Barbra Streisand filed a \$50 million privacy lawsuit against Adelman.⁵² California Superior Court Judge Allan Goodman ruled that the photo of Streisand’s estate did not invade her privacy, and that the photo was protected speech concerning a matter of public interest and thus a SLAPP.⁵³

Justin Kurtz was a college student when he was the target of a Cyber SLAPP.⁵⁴ Kurtz started a Facebook page criticizing the business practices of a towing company in Kalamazoo, Michigan. The towing company responded by filing a \$750,000 defamation lawsuit against Kurtz.⁵⁵ Kurtz’s Facebook page grew

⁴⁸ See PRING & CANAN, *supra* note 10.

⁴⁹ See *id.* at xi.

⁵⁰ *Id.* at 3.

⁵¹ Kenneth Weiss, *Streisand Sues Over Photograph of Her Coast Home on Web Site*, L.A. TIMES (May 30, 2003), <https://www.latimes.com/archives/la-xpm-2003-may-30-me-barbra30-story.html>.

⁵² *Id.*

⁵³ See *id.*; see also *Court Throws Out Streisand’s Invasion of Privacy Lawsuit*, REPS. COMM. FOR FREEDOM OF THE PRESS (Dec. 4, 2003), <http://www.rcfp.org/browse-media-law-resources/news/court-throws-out-streisands-invasion-privacy-lawsuit>.

⁵⁴ T&J Towing v. Kurtz, DIGITAL MEDIA L. PROJECT (June 7, 2010, 10:30 AM), <http://www.dmlp.org/threats/tj-towing-v-kurtz>.

⁵⁵ Rex Hall, Jr., *T&J Towing Sues Western Michigan University Student Who Created Facebook Page About It*, MLIVE (Apr. 13, 2010),

to over 14,000 supporters and his case was the subject of a front-page article in the New York Times. Kurtz's suit dragged on for more than eight months before dismissal.⁵⁶ Michigan did not have an anti-SLAPP law under which Kurtz could have been rewarded attorney's fees.

Plaintiffs angered by online posts often choose to target the operator of the website that hosted the allegedly offending third-party content, either instead of or in addition to the author herself. For example, in *Albert v. Yelp*, a consumer lawyer sued Yelp for defamation over negative reviews of her firm.⁵⁷ Lenore Albert, the proprietor of a small plaintiff-side firm in Huntington Beach, California, advertised herself as a "consumer advocate" fighting on behalf of "the [p]eople."⁵⁸ An employee of the firm became upset with Albert after she missed a filing deadline in a case brought on behalf of the employee's friend. This employee organized a campaign among her friends to lower the firm's Yelp rating by posting reviews characterizing Albert as an incompetent attorney who misses deadlines. Albert brought a defamation suit against the employee, her friends, and, most importantly for the purpose of obtaining a measurable award of damages, against Yelp itself.⁵⁹ Luckily for Yelp, California law provides robust anti-SLAPP protections. Yelp's anti-SLAPP motion was granted, and the suit was dismissed with costs.⁶⁰

In *Nunes v. Twitter et al.*, pending at the time of this article's publication, a Republican Congressman sued Twitter and political consultant Elizabeth Mair for negligence, defamation, "insulting words," and common law conspiracy, in connection with statements posted on three satirical accounts.⁶¹ The three user accounts, titled "Devin Nunes' Cow," "Devin Nunes' Mom," and "Devin Nunes' Alt-Mom," posted a variety of mocking comments from the perspective of the fictionalized characters they respectively represented. "Devin Nunes' Mom," for instance, in reference to Nunes' political stance on the Special Counsel's investigation of the Trump Campaign for collusion

https://www.mlive.com/news/kalamazoo/index.ssf/2010/04/t_j_towing_sues_western_michig.html.

⁵⁶ Rex Hall, Jr., *Western Michigan University Student Sued in Battle with Towing Company: Facebook Group Airing Complaints About T & J Towing Takes Off*, MLIVE (Apr. 14, 2010),

https://www.mlive.com/news/kalamazoo/index.ssf/2010/04/western_michigan_university_st_8.html; Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. TIMES (May 31, 2010),

<https://www.nytimes.com/2010/06/01/us/01slapp.html>.

⁵⁷ *Albert v. Yelp, Inc.*, No. G051607, 2016 Cal. App. LEXIS 5262 (July 15, 2016).

⁵⁸ *Id.* at *9.

⁵⁹ *Id.* at *2-5.

⁶⁰ *Id.* at *23.

⁶¹ See Complaint, *Nunes v. Twitter, Inc.* (Va. Cir. Ct. Mar. 18, 2019),

<https://www.scribd.com/document/402297422/Nunes-Complaint-3-18-19>.

with the Russian government, tweeted “Are you trying to obstruct a federal investigation again? You come home right this instant or no more Minecraft!”⁶²

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

⁶² *Id.* at ¶ 9.

⁶³ *Id.* at ¶¶ 33–48.

⁶⁴ *See, e.g.* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009); Doe v. MySpace, Inc., 528 F.3d 413, 422 (5th Cir. 2008). *See also* text accompanying note 24.

⁶⁵ *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283 (establishing that defamation claims by public officials require a demonstration of “actual malice”).

⁶⁶ *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55–56 (1988) (denying a defamation claim based on a satirical depiction of a public figure on account of a lack of “actual malice”).

⁶⁷ *See* Complaint, *supra* note 61, at ¶¶ 53–57.

⁶⁸ *See id.* at ¶¶ 50–52.

⁶⁹ *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *See also* Eugene Volokh, *Rep. Devin Nunes Suing Tweeters for “Insulting Words,” Claiming the Insults Caused \$250M of Damage to Him*, REASON (Mar. 20, 2019, 7:57 AM), <https://reason.com/2019/03/20/rep-devin-nunes-suing-tweeters-for-insul>.

⁷⁰ *See* Volokh, *supra* note 69; *see also* Chaplinsky, 315 U.S. at 572 (defining “fighting words” as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

⁷¹ *See* VA. CODE ANN. § 8.01-223.2(A) (West 2018) (“A person shall be immune from civil liability for . . . a claim of defamation based solely on statements . . . regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party. . .”).

C. *The Mechanics of Anti-SLAPP Protection*

To invoke the protection of an anti-SLAPP law, a defendant typically must go through two steps. First, she must show that a suit is in response to First-Amendment-related protected activity on the part of the defendant. Every anti-SLAPP law is worded differently, but some of the broader ones, like those enacted in California, Texas, and Washington, D.C., specify that they protect statements on “matters of public interest,” “issues of public concern,” or something similar.⁷² Second, a defendant must make a prima facie showing in a pre-trial proceeding that the suit is meritless. In California’s terminology, a plaintiff must show the “probability that the plaintiff will prevail on the claim.”⁷³ Many statutes indicate a specific time period within which this hearing must be held,⁷⁴ with the apparent purpose of minimizing the burden of a SLAPP on the defendant. Some statutes also include a stay of discovery, to relieve a defendant of the burden and expense of document productions and depositions until after a plaintiff has shown that her case has merit.⁷⁵ Unlike CDA 230, anti-SLAPP laws in many states impose the defendant’s costs on the plaintiff upon dismissal; more precisely, twenty-five states provide this feature.⁷⁶

D. *Current State anti-SLAPP Laws*

Thirty-four states provide some form of anti-SLAPP protection, with thirty-two states providing such protection by statute, as opposed to case law.⁷⁷ State anti-SLAPP protections vary in strength and breadth. They vary, among other ways, both in what sorts of speech or conduct they regard as protected activity, and in whether they provide for attorney’s fees upon dismissal.

Broader anti-SLAPP statutes can be found in Oregon,⁷⁸ California,⁷⁹ Texas,⁸⁰ and D.C.,⁸¹ which all provide comprehensive coverage for both speech and petitioning activity. California protects, among other categories of activity, “any written or oral statement or writing made in a place open to the

⁷² See *State Anti-SLAPP Laws*, *supra* note 12.

⁷³ CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2018).

⁷⁴ See, e.g., *id.* § 425.16(f) (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.004(a) (West 2018); VT. STAT. ANN. tit. 12 § 1041(b), (d) (2018).

⁷⁵ See, e.g., CAL. CIV. PROC. CODE § 425.16(g) (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(c) (West 2018); D.C. CODE § 16-5502(c)(1) (2018).

⁷⁶ *State Anti-SLAPP Laws*, *supra* note 12.

⁷⁷ *Id.*

⁷⁸ OR. REV. STAT. §§ 31.150–55 (2018).

⁷⁹ CAL. CIV. PROC. CODE § 425.16 (West 2018).

⁸⁰ TEX. CIV. PRAC. & REM. CODE §§ 27.001–27.011 (2018).

⁸¹ D.C. CODE §§ 16–5502–5505 (2019).

public or a public forum in connection with an issue of public interest.”⁸² This capacious definition encompasses a seemingly endless list of activities, from statements about the character of a government official,⁸³ to statements made in a hospital’s peer review proceedings established by state law,⁸⁴ to statements criticizing the manager of a homeowner’s association.⁸⁵

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

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

Cases involving New Mexico’s and New York’s narrow anti-SLAPP laws provide illustrations of the operation of weak anti-SLAPP protections. New Mexico’s anti-SLAPP law only protects statements made in “quasi-judicial proceedings,”⁹⁰ as opposed to statements made in any “official proceeding,” as several stronger state anti-SLAPP laws protect.⁹¹ In 2012, the New Mexico Court of Appeals allowed a \$4 million lawsuit to resume after it had previously been ruled a SLAPP by a federal district court judge.⁹² The district court judge ruled that a lawsuit by a development company against local landowners violated the state’s anti-SLAPP law because it was based on a previous lawsuit that the landowners had filed against the developer. The appellate court reversed this decision, stating that only speech in connection with “quasi-judicial” proceedings qualifies for anti-

⁸² CAL. CIV. PROC. CODE § 425.16(e)(3) (West 2018).

⁸³ *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1015 (2005).

⁸⁴ *See Kibbler v. N. Inyo Cty. Local Hosp. Dist.*, 138 P.3d 193 (2006).

⁸⁵ *See Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468 (2000).

⁸⁶ *Barrett v. Rosenthal*, 146 P.3d 510, 514 n.4 (2006).

⁸⁷ N.Y. CIV. RIGHTS LAW § 76-a(1) (Consol. 2019).

⁸⁸ CAL. CIV. PROC. CODE § 425.16(e)(3) (West 2018).

⁸⁹ 27 PA. CONS. STAT. §§ 7707, 8301–03 (2018).

⁹⁰ *See* N.M. STAT. ANN. § 38-2-9.2 (2018).

⁹¹ *See* CAL. CIV. PROC. CODE § 425.16(e)(1) (West 2018).

⁹² *Angel Fire Pub. Improvement Dist. v. Glaser*, No. 30,368, at *2 (N.M. Ct. App. Nov. 21, 2012), <https://casetext.com/case/angel-fire-pub-improvement-dist-v-glaser>.

SLAPP protection, and that the landowners' lawsuit was "a purely judicial proceeding, not a quasi-judicial proceeding."⁹³ By contrast, California's anti-SLAPP statute is not restricted to statements made before a particular type of government body, but rather includes protections for "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law."⁹⁴

New York's anti-SLAPP law only offers protection against SLAPPs brought by individuals or entities seeking permits or applications from a government body.⁹⁵ To prevail on an anti-SLAPP motion in New York, a SLAPP target must demonstrate two things. First, she must show that the plaintiff suing her is a "public applicant or permittee." Second, she must show that the plaintiff's claim against her is an "action involving public petition and participation."⁹⁶

But even if a defendant can establish that she meets these requirements, the court does not have to award damages. All anti-SLAPP damages, including costs and attorneys' fees, are awarded at the court's discretion under New York law.⁹⁷ This is sharp contrast to a strong anti-SLAPP law like California's, which includes a mandatory attorney's fee provision: "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."⁹⁸

In 2003, the Northwest Bronx Community and Clergy Coalition ("NWBCCC") was advocating on behalf of tenants in several buildings in Bronx, New York, picketing and posting flyers that highlighted the egregiously substandard conditions in which the tenants were living.⁹⁹ Rather than fix the conditions or otherwise address the criticisms, a realty company that owned five of the buildings filed suit against the NWBCCC, claiming trespass, libel and wrongful interference with business relationships. The trial court initially granted a temporary restraining order to prevent the organizers from "trespassing" onto the realty company's property. Although the court eventually held that the realty firms had failed to submit any evidence in support of its claims, it nonetheless allowed litigation to proceed for years. Meanwhile, the SLAPP was exceedingly

⁹³ *Id.* at *7.

⁹⁴ CAL. CIV. PROC. CODE § 425.16(e)(1) (West 2018).

⁹⁵ N.Y. CIV. RIGHTS LAW § 76-a(1) (LexisNexis 2019).

⁹⁶ *Id.* § (a)(1)(a); *see also* *Edwards v. Martin*, 158 A.D.3d 1044 (N.Y. App. Div. 2018).

⁹⁷ N.Y. CIV. RIGHTS LAW § 70A-(1)(a) (LexisNexis 2019) ("[C]osts and attorney's fees may be recovered . . .") (emphasis added).

⁹⁸ CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2018).

⁹⁹ *See New Line Realty V Corp. v. United Comms. of Univ. Heights*, No. 1021/2004, 2006 N.Y. Misc. LEXIS 2872, 236 (Sup. Ct. June 19, 2006).

effective at halting the NWBCCC's advocacy. As one staffer recounted, "we basically stopped working in most of the buildings we were involved in because we were afraid they would be added on [to the lawsuit]." ¹⁰⁰ Further, the NWBCCC racked up more than one million dollars in attorney's fees and costs. ¹⁰¹

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

Anti-SLAPP laws can supplement the protection provided by CDA 230 by combining the latter's substantive immunity with procedural mechanisms that reduce pre-trial costs. The combined application of CDA 230 and anti-SLAPP protection has occurred several times in California state courts. More precisely, California law permits defendants to assert a CDA 230 defense to demonstrate that a suit is meritless for purposes of anti-SLAPP protection. In *Albert v. Yelp*, for instance, discussed above, ¹⁰² a plaintiff-side consumer lawyer who advertised herself as a "consumer advocate" fighting on behalf of "the people" sued a Yelp commenter who accused her of missing clients' filing deadlines, as well as Yelp itself. Yelp disposed of the suit with an anti-SLAPP motion. In the first step of its anti-SLAPP analysis, the court determined that whether a lawyer who presents herself as a crusader for "the people" merits this self-description is a matter of public concern within the purview of anti-SLAPP protection. ¹⁰³ Second, the court determined that the suit was meritless, as CDA 230 clearly protects Yelp from liability for defamation committed by a third-party consumer reviewer. ¹⁰⁴

Importantly, in California, any publicly accessible website is considered a public forum. ¹⁰⁵ Hence, provided that online speech concerns a statement on an "issue of public interest," it logically must qualify as protected activity. Consequently, the "public forum" requirement is not a bar to anti-SLAPP protection in any CDA 230 cases. In *Cross v. Facebook*, plaintiff rap artist "Mikel Knight" sued Facebook for failing to remove a page titled "Families Against Mikel Knight," which plaintiff claimed incited violence and death threats against him and interfered with his business deals. ¹⁰⁶ Criticism of Knight

¹⁰⁰ See Betsy Morais, *Anti-SLAPP Ruling Cheers Tenant Advocates*, CITY LIMITS (Aug. 18, 2008), <https://citylimits.org/2008/08/18/anti-slapp-ruling-cheers-tenant-advocates/>.

¹⁰¹ *Id.*

¹⁰² *Albert v. Yelp, Inc.*, No. G051607, 2016 Cal. App. LEXIS 5262 (July 15, 2016).

¹⁰³ *Albert*, 2016 Cal. App. LEXIS 5262, at *8–9.

¹⁰⁴ See *id.* at *12–19.

¹⁰⁵ *Barrett v. Rosenthal*, 146 P.3d 510, 514 n.4 (2006).

¹⁰⁶ *Cross v. Facebook, Inc.*, 222 Cal. Rptr. 3d 250, 254 (2017).

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

V. GAPS IN STATE ANTI-SLAPP COVERAGE

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

A. Forum-Shopping Among State Courts

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

¹⁰⁷ *Id.* at 196.

¹⁰⁸ *Id.* at 199.

¹⁰⁹ *Id.* at 200.

¹¹⁰ David Carr, *Ridiculed, an N.F.L. Owner Goes to Court*, N.Y. TIMES (Feb. 6, 2011), <https://www.nytimes.com/2011/02/07/business/media/07carr.html>.

fund such as yours. Indeed, the cost of the litigation would presumably quickly outstrip the asset value of the Washington City Paper.”¹¹¹ Snyder ultimately dropped the suit.¹¹²

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

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

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

¹¹¹ *Id.*

¹¹² Mike Madden, *Dan Snyder Drops Lawsuit Against Washington City Paper*, *Dave McKenna*, WASH. CITY PAPER (Sept. 10, 2011), <https://www.washingtoncitypaper.com/news/city-desk/blog/13064052/dan-snyder-drops-lawsuit-against-washington-city-paper-dave-mckenna>.

¹¹³ 270 F. Supp. 3d 343, 349 (D. Mass. 2017). This case is currently pending before the United States Court of Appeals for the First Circuit. The Public Participation Projects intends to file an amicus brief related to the anti-SLAPP ruling in this case.

¹¹⁴ *Id.* at 351.

¹¹⁵ *See id.* at 349.

¹¹⁶ *Id.* at 355.

¹¹⁷ *Id.* at 352.

¹¹⁸ *Id.* at 368.

¹¹⁹ *Id.* at 353.

¹²⁰ *Id.*

the ‘certainty, predictability, and uniformity of result’ and ‘ease in the determination and application of the applicable law’ favors adhering to the presumption set forth in [Restatement § 150].”¹²¹

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

C. Artful Pleading of Federal Claims

State anti-SLAPP rules do not apply to federal claims, at least in federal court;¹²² thus, a plaintiff bringing a SLAPP can bypass state anti-SLAPP protections by pleading a federal claim rather than a similar state law claim. For example, in 2016, a Canadian logging company brought a lawsuit against Greenpeace in response to a media campaign accusing the company of unsustainable logging practices.¹²³ Resolute Forest Products alleged, among other claims, that Greenpeace violated both state and federal anti-racketeering laws by “conspiring to spread false reports.”¹²⁴ Resolute’s RICO claim was equivalent to its state racketeering claim and overlapped with its state law defamation cause of action, which entailed “knowingly and intentionally publish[ing] false and injurious statements.”¹²⁵ The District Court for the Northern District of California dismissed all claims against Greenpeace but only applied the anti-SLAPP law’s fee-shifting feature to the state law claims.¹²⁶ Thus,

¹²¹ *Id.* at 354.

¹²² *See, e.g.*, *Resolute Forest Prods., Inc. v. Greenpeace Int’l*, 302 F. Supp. 3d 1005, 1024 (N.D. Cal. 2017) (“While California’s anti-SLAPP statute clearly applies to state claims brought in federal courts, and even to federal claims brought in state court, it does not clearly apply to federal claims brought in federal court.”) (citations omitted); *Consumer Cellular, Inc. v. ConsumerAffairs.com*, No. 3:15-CV-1908-PK, 2016 U.S. Dist. LEXIS 72573, at *19 (D. Or. Feb. 29, 2016) (“[S]tate anti-SLAPP statutes are as a matter of law necessarily inapplicable to federal causes of action.”); *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010) (“[A] federal court can only entertain anti-SLAPP special motions to strike in connection with state law claims.”), *declined to extend by* *Greater L.A. Agency on Deafness v. Cable News Agency, Inc.*, 862 F. Supp. 2d 1021 (N.D. Cal. 2012); *Ginx, Inc. v. Soho All.*, 720 F. Supp. 2d 342, 366 (S.D.N.Y. 2010) (“In every other case this Court has located, federal courts have declined to apply Anti-SLAPP statutes to federal claims.”); *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, No. 07-12018-DPW, 2008 U.S. Dist. LEXIS 85764, at *26 (D. Mass. Sept. 30, 2008) (“There is no support for applying the anti-SLAPP statute to federal claims.”).

¹²³ *Resolute Forest Prods., Inc. v. Greenpeace Int’l*, 302 F. Supp. 3d 1005, 1011 (N.D. Cal. 2017).

¹²⁴ *Id.* at 1013.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1024–25.

Resolute partly accomplished its intended objective of forcing Greenpeace to spend money defending itself in court.

The same tactic—evading state anti-SLAPP protection by pleading a federal RICO claim parallel to a state law defamation claim—has been deployed successfully in at least one CDA 230 case. In *Consumer Cellular, Inc. v. ConsumerAffairs.com*, a cell phone service provider filed a lawsuit in federal court in Oregon against a consumer review website for defamation and RICO violations, among other claims, in connection with the defendant’s alleged manipulation of customer reviews of the plaintiff’s services.¹²⁷ The court found that Oregon’s anti-SLAPP law did not apply to the RICO claim.¹²⁸ As a separate matter, the defendant failed to demonstrate a probability of prevailing on its claims, due to the weakness of its CDA 230 defense.¹²⁹

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

Currently, Circuit Courts are split as to whether state anti-SLAPP laws should apply in diversity cases in federal court. In the landmark case *Erie Railroad Co. v. Tompkins*, the Supreme Court held that a federal court in a diversity case must apply the substantive statutory and common law of the state where the court sits.¹³⁰ By contrast, in federal court, federal procedural rules must be applied in place of state procedural rules.¹³¹ The First,¹³² Second,¹³³ Fifth,¹³⁴ and Ninth¹³⁵ Circuits have held, that state anti-SLAPP laws apply in federal diversity actions, under a variety of justifications. The Tenth Circuit¹³⁶ and the D.C.

¹²⁷ *Consumer Cellular, Inc. v. ConsumerAffairs.com*, No. 3:15-CV-1908-PK, 2016 U.S. Dist. LEXIS 72573, at *2–3 (D. Or. Feb. 29, 2016).

¹²⁸ *Id.* at *19.

¹²⁹ *Id.* at *40.

¹³⁰ 304 U.S. 64, 78 (1938).

¹³¹ *See Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

¹³² *See Godin v. Schencks*, 629 F.3d 79, 87–92 (1st Cir. 2010) (holding that Federal Rules of Civil Procedure 12(b)(6) and 56 are not sufficiently broad to control the issues under Maine’s anti-SLAPP law before the court, and that Maine’s anti-SLAPP law “substantively alters Maine-law claims that are based on a defendant’s protected petitioning activity”)

¹³³ *See Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (finding the application of the immunity and fee-shifting provisions of Nevada’s anti-SLAPP statute in federal court to be “unproblematic,” and holding that the same provisions are “substantive” and do not “squarely conflict with a valid federal rule”).

¹³⁴ *See Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168–69 (5th Cir. 2009) (holding, without explanation, that “Louisiana law, including the nominally-procedural [Louisiana anti-SLAPP law], governs this diversity case”).

¹³⁵ *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (finding that “important, substantive state interests” are furthered by California’s anti-SLAPP statute).

¹³⁶ *See Los Lobos Renewable Power, L.L.C. v. AmeriCulture, Inc.*, 885 F.3d 673 (10th Cir. 2018).

Circuit,¹³⁷ however, have both held that state anti-SLAPP motions are not allowed in federal court because they conflict with the federal rules of civil procedure.

Consequently, plaintiffs in some regions of the country may circumvent state anti-SLAPP laws by establishing federal diversity jurisdiction. One commentator has drawn attention to two instances of such forum-shopping.¹³⁸ Following *3M v. Boulter*, in which a D.C. federal district court held that state anti-SLAPP rules are procedural and thus do not apply in federal court,¹³⁹ an anti-LGBT preacher alleging several speech torts in a suit against a blogger and an MSNBC commentator who had publicly criticized him,¹⁴⁰ voluntarily dismissed his suit in the D.C. Superior Court with the stated intention of re-filing in federal court to take advantage of the rule established in *Boulter*.¹⁴¹ More recently, three businessmen who alleged that they were defamed by certain statements contained in the “Steele Dossier,” which compiled research on presidential candidate Donald Trump’s possible ties to the Russian government, filed identical defamation actions in D.C. Superior court and D.C. federal district court.¹⁴² The Superior Court dismissed the defamation claim under D.C.’s anti-SLAPP statute.¹⁴³ The federal case is still pending;¹⁴⁴ but given unambiguous precedent on the question, the federal court is likely to find that D.C.’s anti-SLAPP statute is in conflict with federal procedure and thus cannot apply in federal court.

¹³⁷ See *Abbas v. Foreign Policy Grp.*, L.L.C., 783 F.3d 1333 (D.C. Cir. 2015).

¹³⁸ Leslie P. Machado, *Why Decisions in D.C. Illustrate the Need for a Federal Anti-SLAPP Law (Part 1)*, PUB. PARTICIPATION PROJECT (Jul. 23, 2018), <https://anti-slapp.org/slapp-blog/2018/7/23/why-decisions-in-dc-illustrate-the-need-for-a-federal-anti-slapp-law-part-1>.

¹³⁹ *3M Co. v. Boulter*, 290 F.R.D. 5, 11 (D.D.C. 2013).

¹⁴⁰ Brian Lambert, ‘Rev.’ Bradlee Dean Sues Maddow, *News Site for Defamation*, MINNPOST (Jul. 28, 2011), <https://www.minnpost.com/glean/2011/07/rev-bradlee-dean-sues-maddow-news-site-defamation/>.

¹⁴¹ *Bradlee Dean v. NBC Universal*, Notice of Voluntary Dismissal Without Prejudice, No: 2011 CA 006055 B (D.C. Super. Ct. Feb. 21, 2012), https://slapp.apdayton.com/files/2012/06/Dean_Notice_of_Voluntary_Dismissal.pdf.

¹⁴² Leslie Machado, *Superior Court Opinion Shows Why We Need a Federal Anti-SLAPP Law*, LEXOLOGY (Aug. 27, 2018), <https://www.lexology.com/library/detail.aspx?g=9f18b9e6-b06d-43b7-8e03-78ecc2a43275>.

¹⁴³ *German Khan v. Orbis Bus. Intelligence Ltd.*, Order, No. 2018 CA 002667 B (D.C. Sup. Ct. Aug. 20, 2018), <https://dcslapplaw.com/files/2018/08/Fridman2-Opinion.pdf>.

¹⁴⁴ *Fridman v. Bean L.L.C.*, Complaint, Case 1:17-cv-02041 (D.D.C. Oct. 3, 2017), <https://www.politico.com/f/?id=0000015e-e8d7-d344-a55f-f8ff831f0001>.

VI. THE IMPACT OF A FEDERAL ANTI-SLAPP LAW

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

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

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

Model language for a federal anti-SLAPP law has been borrowed from the SPEAK FREE Act of 2015,¹⁴⁵ the most recently proposed federal anti-SLAPP bill. Important provisions that are not relevant to the focus of this Article have been noted briefly as well.

A. Features of a Federal Anti-SLAPP Law

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

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

¹⁴⁵ SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015).

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

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

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

¹⁴⁶ *Id.* § 4202(a).

¹⁴⁷ *Id.* § 4208(1).

¹⁴⁸ *See supra* Part III(d).

¹⁴⁹ H.R. 2304 § 4202(a).

¹⁵⁰ *Id.* § 4207(a).

¹⁵¹ *See id.*

¹⁵² *Id.* § 4207(b).

¹⁵³ *Id.* § 4202(d)(1).

case is removed to federal court under the statute's removal provision.¹⁵⁴

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

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

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

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

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

¹⁵⁴ *Id.* § 4202(e)(1).

¹⁵⁵ *Id.* § 4204.

¹⁵⁶ *Id.* § 4203(a).

¹⁵⁷ *Id.* § 4206(a).

¹⁵⁸ *See infra* Part VII(c).

about such person's or a business competitor's goods or services . . . [and] arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.¹⁵⁹

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

The above provisions and exemptions are specifically relevant to strengthening CDA 230 immunity in the context of First Amendment-related conduct. There are other important provisions and exemptions, however, that should be included a federal anti-SLAPP law.¹⁶⁰ These include but are not limited to a special motion to quash¹⁶¹ and a public interest exemption.¹⁶²

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

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

¹⁵⁹ H.R. 2304 § 4202(b)(2).

¹⁶⁰ For a comprehensive list of important components of federal anti-SLAPP legislation, see generally Samantha Brown & Mark Goldowitz, *The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA*, 19 REV. EUR. COMP. & INT'L ENVTL. L. 3 (2010).

¹⁶¹ H.R. 2304 § 4205.

¹⁶² *Id.* § 4202(b)(3).

¹⁶³ See Ardia, *supra* note 18, at 484.

C. Federal Anti-SLAPP Rules Would Apply to Federal Claims

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

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

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

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

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

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

¹⁶⁴ *Resolute Forest Prods. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1013 (N.D. Cal. 2017).

¹⁶⁵ See *supra* Part V(d).

¹⁶⁶ See *supra* Part V(b).

the federal version of that procedural rule, and thus to avoid altogether the question of which state anti-SLAPP law to apply in a cross-jurisdictional tort action. But if the court regards state anti-SLAPP rules as substantive, state anti-SLAPP rules will still apply in federal court, and the question will remain of which state's anti-SLAPP law to apply.

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

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

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

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

A. Judicial and Statutory Limitations to CDA 230 Immunity

A federal anti-SLAPP law would neither add to nor subtract from substantive CDA 230 immunity; the contours of this immunity, however, are defined by Congress and the courts. Succeeding on an anti-SLAPP motion requires a prima facie showing that a suit is meritless, and a complaint that pleads

around the bounds of CDA § 230 immunity potentially has merit. Such limitations come from both case law and statutory law.

Fair Housing Council of San Fernando Valley v. Roommates.com established that website operators can be held liable for “materially contributing” to unlawful third-party content.¹⁶⁷ Roommates.com, an online roommate matching service, by programming design required users to specify their gender preferences for roommates, displayed those preferences in users’ profiles, and limited the results of searches for roommates based on parameters established in this way.¹⁶⁸ The Ninth Circuit Court of Appeals held that because Roommates.com had “materially contributed” to the unlawfulness of the content under the Fair Housing Act, it had “developed” that content within the meaning of CDA § 230(c)(1).¹⁶⁹ The court distinguished types of editing that should not cause a defendant to lose immunity, such as removing obscenity or trimming for length, from editing that “contribute[] to the alleged illegality,” such as removing the word “not” from a third-party message reading “[Name] did *not* steal the artwork.”¹⁷⁰ Roommates.com authored specifically what was illegal about the content—its discriminatory nature—in requiring third parties to state gender-based preferences for roommates.¹⁷¹

This case has had a widespread effect on CDA 230 jurisprudence. In the leading case *Jones v. Dirty World Entertainment*, the Sixth Circuit applied the “material contribution” standard to defamation law.¹⁷² Importantly, various lower courts have denied immunity under this standard.¹⁷³ For instance, federal district courts have denied immunity where a website operator posted content herself,¹⁷⁴ conspired with a third-party commenter to defame a plaintiff,¹⁷⁵ incorporated quotes from third parties in her own editorial writing,¹⁷⁶ and made defamatory factual representations about

¹⁶⁷ Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157, 1168 (9th Cir. 2008).

¹⁶⁸ *Id.* at 1161, 1167.

¹⁶⁹ *Id.* at 1167–68.

¹⁷⁰ *Id.* at 1169.

¹⁷¹ *Id.*

¹⁷² *Jones v. Dirty World Entm’t Recordings L.L.C.*, 755 F.3d 398, 411 (6th Cir. 2014).

¹⁷³ See Sharp-Wasserman, *supra* note 7, at 217–21.

¹⁷⁴ *AMCOL Sys. v. Lemberg Law, L.L.C.*, No. 3:15-3422-CMC, 2016 U.S. Dist. LEXIS 18131, at *25–26 (D.S.C. Feb. 16, 2016).

¹⁷⁵ *Tanisha Sys. v. Chandra*, No. 1:15-CV-2644-AT, 2015 U.S. Dist. LEXIS 177164, at *22–25 (N.D. Ga. Dec. 4, 2015).

¹⁷⁶ *Diamond Ranch Acad., Inc. v. Filer*, No. 2:14-CV-751-TC, 2016 U.S. Dist. LEXIS 19210, at *60–63 (D. Utah Feb. 17, 2016).

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

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

B. The “Matter of Public Concern” Limitation on Anti-SLAPP Protection

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

¹⁷⁷ *Consumer Cellular, Inc. v. ConsumerAffairs.com*, No. 3:15-CV-1908-PK, 2016 U.S. Dist. LEXIS 72573, at *38–40 (D. Or. Feb. 29, 2016).

¹⁷⁸ Pub. L. No. 115-164, 132 Stat. 1253 (2018).

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

¹⁸⁰ *See* Eric Goldman, *CA Anti-SLAPP Cases Involving Consumer Reviews as Matters of Public Concern*, TECH. & MKTG. L. BLOG (Feb. 3, 2011), https://blog.ericgoldman.org/archives/2011/02/ca_antislapp_ca.htm.

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

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

¹⁸¹ *Dunne v. Lara*, No. B210779, 2009 WL 3808345, at *1 (Cal. Ct. App. Nov. 16, 2009).

¹⁸² *Id.*

¹⁸³ *Id.* at *2.

¹⁸⁴ *Id.* at *6.

¹⁸⁵ *Navarro v. Cruz*, No. B216885, 2010 WL 2183227 (Cal. Ct. App. June 2, 2010).

¹⁸⁶ *Id.* at *1.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at *2.

agencies.”¹⁹¹ The defendant, the court concluded, “encourage[d] others to stand up to pursue a common goal involving an ongoing controversy.”¹⁹²

In the particular context of consumer reviews, this limitation can be overcome by a provision in the statute specifying that all speech pertaining to goods, products and services constitutes protected activity. The Speak Free Act specifically provides that statements about “a good, product, or service in the marketplace” qualify as protected activity.¹⁹³

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

A federal anti-SLAPP law should contain a commercial speech exemption, and this exemption would preclude the application of an anti-SLAPP defense in some cases in which CDA 230 immunity applies. In California, prior to the passage of CCP § 425.17, which added a commercial speech exemption to California’s anti-SLAPP law through subsection (c),¹⁹⁴ anti-SLAPP motions were often filed by defendants in false advertising cases. In a case decided a few years before the passage of the commercial speech exemption, *DuPont Merck Pharmaceutical Co. v. Superior Court*, a class action against a pharmaceutical company alleging deceptive marketing of a blood-thinning medication, the court found that lobbying efforts directed at legislators and regulators constituted protected activity for purposes of the anti-SLAPP statute. The legislative history of 425.17(c) quotes a statement by Professor of Sociology Penelope Canan, who coined the acronym “SLAPP,”¹⁹⁵ in which she notes the perversity of corporate defendants invoking anti-SLAPP protection in the context of certain types of consumer litigation: “Wealthy corporate defendants, some with their own legal departments, simply do not suffer the chilling effect on their rights when faced with a lawsuit claiming, for example, false advertising or fraud or illegal business practices, that common citizens suffer when sued for speaking out.”¹⁹⁶ In false advertising cases subsequent to the enactment of the commercial speech exemption, California courts have denied corporate defendants the benefit of anti-SLAPP protection.¹⁹⁷

¹⁹¹ *Id.* at *4.

¹⁹² *Id.*

¹⁹³ H.R. 2304 § 4208(1)(E).

¹⁹⁴ CAL. CIV. PROC. CODE § 425.17(c) (West 2012).

¹⁹⁵ See PRING & CANAN, *supra* note 10.

¹⁹⁶ REPORT OF SENATE JUDICIARY COMMITTEE ON SENATE BILL NO. 515 (2003), available at http://leginfo.ca.gov/pub/01-02/bill/sen/sb_1651-1700/sb_1651_cfa_20020515_112417_sen_comm.html.

¹⁹⁷ See, e.g., Physicians Comm. for Responsible Med. v. Tyson Foods, Inc. 119 Cal. App. 4th 120, 130 (2004) (finding that a case involving alleged misrepresentations in advertisements that chicken products are “all natural” and “heart-healthy” falls

Such an exemption is justifiable not only because it prevents the abuse of anti-SLAPP protection by powerful private interests, but also because limited rights attach to commercial speech under the First Amendment, from which anti-SLAPP laws derive their legitimacy. The Supreme Court has held that content-based regulation of non-commercial speech is subject to strict scrutiny—that is, regulation must be the least restrictive means of advancing a compelling governmental interest.¹⁹⁸ By contrast, the regulation of commercial speech must withstand only intermediate scrutiny, meaning that a substantial government interest must be served by the regulation,¹⁹⁹ and that there must be only a “reasonable fit” between that purpose and the means by which it is advanced.²⁰⁰ While perhaps it is arguable that a correspondingly intermediate level of anti-SLAPP protection should apply to commercial speech, it also seems clear that an equal level of anti-SLAPP protection for both non-commercial and commercial speech is incongruous with the First Amendment.

VIII. WHY NOT AMEND CDA 230 ITSELF?

The existence of gaps in the combined CDA 230-anti-SLAPP defense might seem to suggest the wisdom of the cleaner alternative of adding anti-SLAPP’s procedural protection to CDA 230 itself. Indeed, one scholar, in confronting the problem of pre-trial costs under CDA 230, has advocated adding a fee-shifting provision to CDA 230.²⁰¹

But not only is this alternative solution politically unrealistic; it also, even if politically achievable, would have undesirable results. Adding a fee-shifting provision to CDA 230 is unrealistic at this moment in politics because CDA 230 is embroiled in controversy over the phenomenon of online sex trafficking on Backpage.com—a phenomenon thought by proponents of the recently enacted Allow States and Victims to Fight Online Sex Trafficking Act to be preventable but for CDA 230 immunity.²⁰² But adding a fee-shifting provision, even if

within the commercial speech exemption); *see also* *Metcalf v. U-Haul Int’l, Inc.*, 118 Cal. App. 4th 1261, 1266 (2004) (alleging misrepresentations in advertisements about the size of storage units).

¹⁹⁸ *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987).

¹⁹⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

²⁰⁰ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

²⁰¹ *See* Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137 (2008).

²⁰² *See, e.g.*, Christopher White, *New Anti-Sex Trafficking Legislation Lauded by U.S. Catholic Leaders*, CRUX (Mar. 23, 2018); *see also* 132 Stat. 1253 § 2(1) (“It is the sense of Congress that [CDA 230] was never intended to provide legal protection to

politically possible in spite of this climate, would be undesirable for a different reason: unlike anti-SLAPP laws, CDA 230 has many applications that advance freedom of commerce broadly speaking, rather than freedom of speech.

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

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

websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims[.]”).

²⁰³ 132 Stat. 1253.

²⁰⁴ 47 U.S.C. § 230(e)(1) (2018).

²⁰⁵ *See id.* § 4(a).

²⁰⁶ Ana Valens, *What is Backpage, and Why Did It Shut Down*, DAILY DOT (May 25, 2018), <https://www.dailydot.com/irl/what-is-backpage/>.

²⁰⁷ *See, e.g., Jane Doe No. 1 v. Backpage.com, L.L.C.*, 817 F.3d 12 (1st Cir. 2016); *Backpage.com, L.L.C. v. McKenna*, 881 F. Supp. 2d 1262, 1286–87 (W.D. Wash. 2012); *Backpage.com, L.L.C. v. Cooper*, 939 F. Supp. 2d 805, 823 (M.D. Tenn. 2013).

because the commercial speech exemption in anti-SLAPP laws has a basis in First Amendment doctrine.²⁰⁸

Admittedly, the “matter of public concern” limitation on anti-SLAPP protection provides for narrower protection than that justified by the First Amendment; and this limitation could be avoided by adding a fee-shifting provision to CDA 230 itself. The First Amendment applies in private tort lawsuits regardless of whether the content of allegedly tortious speech concerns a public or private matter. By contrast, as discussed,²⁰⁹ speech with purely private significance does not qualify for anti-SLAPP protection.

But a proper balance between two values—access to justice and freedom of speech—counsels in favor of the reform route advocated in this Article. First, as mentioned, in the specific context of consumer reviews, the limiting effect of the “matter of public concern” requirement can be eliminated by specifying that statements about goods and services constitute protected activity. Second, if California case law is any guide, the category of activities that satisfy this requirement is expansive: most online comments can be portrayed as somehow touching on an issue of public importance by a court predisposed to find as much.²¹⁰ Adding a fee-shifting provision to CDA 230 itself, in order to preclude the narrow subset of cases in which online speech touches on purely private matters, would come at the significant cost of systematically disadvantaging plaintiffs in a variety lawsuits against intermediaries in which freedom of speech concerns are not implicated.

CONCLUSION

A federal anti-SLAPP law would supplement CDA 230’s substantive immunity for online intermediaries with certain procedural mechanisms designed to address the collateral chilling effects of pre-trial costs. Specifically, a federal anti-SLAPP law would provide defendant speech distributors with a fee-shifting mechanism, a guarantee of speedy dismissal, and a means of preventing discovery in meritless cases. Codifying anti-SLAPP protection at the federal level would provide this enhanced protection in a broader range of CDA 230 cases than is covered under the current regime of state anti-SLAPP laws. This antidote to the speech-chilling effect of pre-trial costs in CDA 230 cases is more politically feasible than adding a fee-shifting provision to CDA 230 itself, in the current political

²⁰⁸ See *supra* Part VII(c).

²⁰⁹ See *supra* Part VII(b).

²¹⁰ See *supra* Part III(d).

climate. But further, this method of reform is more desirable, because it is more narrowly directed at protecting the rights of speech and petition, as opposed to serving as a broad instrument of tort reform.