

**GREEN MOUNTAIN BALANCING ACT: EXPLORING THE
CONSTITUTIONALITY OF VERMONT’S ANTI-SLAPP
STATUTE**

[T]he beauty of our rules of civil procedure is that they strike a fair balance, at the early stages of litigation, between encouraging valid, but as yet underdeveloped, causes of action and discouraging baseless or legally insufficient ones.¹

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INTRODUCTION

Many are sued simply for engaging in public discourse.² Lawsuits brought with the intent of silencing or punishing First Amendment activity are called “SLAPP” suits.³ SLAPP is an acronym for Strategic Lawsuit Against Public Participation.⁴ SLAPPs, by their nature, are meritless; the

1. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1, 11, 955 A.2d 1082, 1090.
2. See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3 (1989) (“Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making.”).
3. *Id.* at 4.
4. *Id.*

plaintiffs have no intention of recovering damages.⁵ A *David and Goliath* element is central to SLAPPs: the suits commonly pit large corporate entities against citizens of modest means who fear the expense and travails of litigation.⁶ A quintessential SLAPP might involve a defamation suit brought by a developer against a community member for circulating a neighborhood petition against the development project.⁷ The judicial system becomes a weapon, and the threat of costly litigation is the ammunition.⁸ The end-result chills free speech.⁹

SLAPPs are associated with petitioning activity on *public issues*:

SLAPPs strike at a wide variety of traditional American political activities. We have found people sued for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.¹⁰

In 1989, Washington became the first state to pass anti-SLAPP legislation.¹¹ Today a majority of states have some form of statutory anti-SLAPP protection.¹² Anti-SLAPP statutes are designed to mitigate the

5. Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 846-47 (2010).

6. *Id.* at 847.

7. *See Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 940 (Mass. 1998) (“The typical mischief that the legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publically against development projects.”).

8. *Id.*

9. *Id.* at 939.

10. Pring, *supra* note 2, at 5.

11. *Davis v. Cox*, 351 P.3d 862, 865 (Wash. 2015).

12. CAL. CIV. PROC. CODE § 425.16 (2015); UTAH CODE ANN. § 78B-6-1401 (West 2016); ME. REV. STAT. ANN. tit. 14, § 556 (2011); MASS. GEN. LAWS ANN. ch. 231, § 59H (2016); DEL. CODE ANN. 10 § 8136 (West 2016); 735 ILL. COMP. STAT. 110/1 (2007); 9 R.I. GEN LAWS § 9-33-1 (1993); 27 PA. CONS. STAT. § 8302 (2001); NEV. REV. STAT. § 41.660 (2015); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis 2016); IND. CODE § 34-7-7-1 (2016); TENN. CODE ANN. § 4-21-1003 (2016); N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2016); HAW. REV. STAT. § 634F (2015); GA. CODE ANN. § 9-11-11.1 (West 2016); FLA. STAT. § 768.295 (2016); ARK. CODE ANN. § 16-63-502 (2005); MO. REV. STAT. § 537.528.1 (2015); NEB. REV. STAT. § 25-21,243 (1994); N.M. STAT. ANN. § 38-2-9.1 (2001); ARIZ. REV. STAT. ANN. § 12-752 (2006); MINN. STAT. ANN. § 554.02 (2015); LA. CODE CIV. PROC. ANN. art. 971 (1999); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 1981); TEX. CIV. PRAC. & REM. CODE ANN. § 27.001 (2011); OR. REV. STAT. § 31.150 (2015); D.C. CODE § 16-5502 (2011).

financial hardship, time, and stress the victim of a SLAPP may face.¹³ The movant must enter an anti-SLAPP motion shortly after the initial pleadings.¹⁴ The statutes typically require an expeditious decision from the trial court¹⁵ and often mandate a stay of discovery while the court entertains the motion.¹⁶ The prevailing party recoups attorney's fees and costs.¹⁷

The design of anti-SLAPP statutes, however, raises constitutional questions.¹⁸ Indeed, various state courts have grappled with the constitutionality of these statutes.¹⁹ Anti-SLAPP statutes have a noble goal: public discourse occupies the "highest rung" on the First Amendment ladder and forms the cornerstone of American democracy.²⁰ Those who

13. *See infra* notes 14–17 (exploring the timeliness with which anti-SLAPP motions must be entered and ruled on, as well as limitations on discovery, and reimbursement of costs to the prevailing party).

14. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(f) ("The special motion may be filed within 60 days of the service of the complaint . . ."); VT. STAT. ANN. tit. 12, § 1041(b) (2016) ("A special motion to strike under this section shall be filed with the court and served on all parties not more than 60 days after the filing of the complaint.").

15. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(f) ("The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after service of the motion . . ."); MASS. GEN. LAWS ANN. ch. 231, § 59H ("The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible."); VT. STAT. ANN. tit. 12, § 1041(d) ("The court shall hold a hearing on a special motion to strike not more than 30 days after service of the motion unless good cause exists for an extension.").

16. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(g) ("All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section."); MASS. GEN. LAWS ANN. ch. 231, § 59H ("All discovery proceedings shall be stayed upon the filing of the special motion under this section . . ."); R.I. GEN. LAWS ANN. § 9-33-2(b) ("The court shall stay all discovery proceedings in the action upon the filing of the motion . . ."). It is important to note, however, that anti-SLAPP statutes also commonly allow for the continuation of limited discovery for good cause. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(g) ("The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."); MASS. GEN. LAWS ANN. ch. 231, § 59H ("[T]he court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted.").

17. *See e.g.*, CAL. CIV. PROC. CODE § 425.16(c)(1) ("[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."); ILL. COMP. STAT. ANN. 110/25(c) ("The court shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs . . ."); MASS. GEN. LAWS ANN. ch. 231, § 59H ("If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees . . .").

18. *See infra* Parts II and III (exploring the constitutional issues surrounding the burden-shifting and scope of various state anti-SLAPP statutes).

19. *See infra* Parts II and III (explaining the constitutional issues that state courts have faced).

20. *Connick v. Myers*, 461 U.S. 138, 145 (1983). *See also* *Garrison v. La.*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). Vermont has traditionally provided advanced protection for public speech as well. *See* *Grievance of Morrissey*, 149 Vt. 1, 15, 538 A.2d 678, 687 (1987) (explaining that "speech in the public interest by a public spirited citizen is entitled to greater protection than speech in the interest of the speaker . . ." (quoting *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987))).

engage in public political speech should not face financial ruin.²¹ Therefore, these statutes ideally achieve a perfect balance between the rights of one party to engage in public petitioning activity and the rights of the adverse party to have meaningful judicial redress.²² However, by protecting the First Amendment rights of one group of people, many state anti-SLAPP statutes overreach and place unconstitutional obstacles in the path of citizens with legitimate injuries.²³

Two constitutional questions plague many state anti-SLAPP statutes.²⁴ First, these statutes often feature a burden-shifting procedure.²⁵ Initially the moving party (defendant) must demonstrate that the statute covers the plaintiff's cause of action.²⁶ Once the defendant makes this initial demonstration, the burden shifts to the non-moving party (plaintiff) to—depending on the state—exhibit either that her claim has merit or that the defendant's petitioning activity was meritless.²⁷ More than one state has ruled that its anti-SLAPP, burden-shifting procedure unconstitutionally burdens the plaintiff during the early stages of litigation and thus denies access to a jury trial.²⁸ Further, the burden-shifting process requires a trial court to weigh evidence and decide disputed issues of fact.²⁹ Thus, the process exceeds the limits of acceptable procedural devices used to dismiss complaints—such as summary judgment.³⁰

Second, while anti-SLAPP statutes attempt to tackle a fairly narrow and specific problem—the SLAPPs themselves—the scope of statutorily

21. Pring, *supra* note 2, at 6.

22. *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 944 (Mass. 1998).

23. *Id.* at 943 (“By protecting one party’s exercise of its right of petition . . . the statute impinges on the adverse party’s exercise of its right to petition, even when it is not engaged in sham petitioning.”); *see also* Opinion of the Justices, 641 A.2d 1012, 1015 (N.H. 1994) (“A solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group.”).

24. *See infra* Parts II and III (explaining the main issues regarding anti-SLAPP statutes).

25. *See infra* Parts I and II (reviewing Vermont’s and other state’s anti-SLAPP burden-shifting procedures).

26. *See infra* Part II (determining the party with the burden).

27. *See infra* Part II (explaining the burden-shifting procedure).

28. *See infra* Part II (demonstrating the various state burden-shifting procedures).

29. Opinion of the Justices, 641 A.2d 1012, 1015 (N.H. 1994) (“Unlike these procedures wherein the court does not resolve the merits of a disputed factual claim, the procedure in the proposed bill requires the trial court to do exactly that.”); *see also* *Davis v. Cox*, 351 P.3d 862, 874 (Wash. 2015) (“[Washington’s anti-SLAPP statute] creates a truncated adjudication of the merits of a plaintiff’s claim, including nonfrivolous factual issues, without a trial.”).

30. *Opinion of the Justices*, 641 A.2d at 1015; *see also* *Cox*, 351 P.3d at 874 (holding that Washington’s anti-SLAPP statute violates the State Constitution).

defined protected activity sometimes casts a remarkably wide net.³¹ Protected activity under anti-SLAPP statutes ranges from state-to-state. For example, Pennsylvania permits use of the statute only in cases of environmental petitioning.³² On the other hand, Texas's anti-SLAPP statute may be broadly invoked if the "legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association"³³ States with broad statutory language face the problem of defendants acting in bad faith and entering anti-SLAPP motions in cases that are not SLAPPs.³⁴ An overly broad statutory construction exacerbates the burden-shifting issue because it allows a defendant to easily clear the initial burden.³⁵

This Note examines the constitutionality of Vermont's anti-SLAPP statute, and proposes a solution that combines the approaches taken in Vermont and California. The constitutional issues facing Vermont and California's anti-SLAPP statute form an inverse mirror image. California has an adequate solution to the problems commonly posed by anti-SLAPP burden-shifting procedures.³⁶ In California, the anti-SLAPP burden-shifting process allows the trial court to examine evidence in a similar fashion to summary judgement.³⁷ California, however, could learn from Vermont's method of limiting the statute's scope.³⁸ The Vermont Supreme Court recently confined the statute to protect only petitioning activity on *public issues*.³⁹ Vermont's method closely tracks the statute's original intent, thereby limiting an overly broad interpretation.⁴⁰ Currently, California allows the statute's use whether or not the First Amendment activity in

31. See *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998) (explaining that the original purpose of the anti-SLAPP statute was the swift dismissal of meritless suits brought to chill public discourse, but Massachusetts's broad plain statutory language "fails to track and implement such an objective")

32. 27 PA. CONS. STAT. § 8302 (2001).

33. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (2011).

34. Jeremiah A. Ho, *I'll Huff and I'll Puff—But then You'll Blow My Case Away: Dealing with Dismissed and Bad-Faith Defendants Under California's Anti-SLAPP Statute*, 30 WHITTIER L. REV. 533, 539 (2009).

35. See *infra* Part II (explaining the anti-SLAPP burden-shifting process).

36. See *infra* Part II.E (reviewing California's anti-SLAPP burden-shifting *probability* standard).

37. *Wilbanks v. Wolk*, 121 Cal. App. 4th 833, 901 (Cal. Ct. App. 2004).

38. See *infra* Part III.C (inferring that Vermont has successfully developed a solution to overly broad anti-SLAPP statutes).

39. *Felis v. Downs Rachlin Martin, PLLC*, 2015 VT 129, ¶ 32, 133 A.3d 836, 848.

40. See *infra* Part III.C (describing Vermont's solution to overly broad anti-SLAPP statutes).

question pertained to a *public issue*.⁴¹ Thus, in California, civil defendants routinely invoke the statute to defend causes of action that are not a SLAPP.⁴² California (and the rest of the country), therefore, could learn from the Vermont's attempt to limit the overly broad scope of the statute's reach. However, Vermont should amend its statute to emulate California's burden-shifting language and jurisprudential interpretation. Half of Vermont's approach and half of California's approach create an anti-SLAPP statute that will withstand constitutional challenge.

Part I of this Note parses out the plain language of Vermont's anti-SLAPP statute. Part II examines the constitutionality of Vermont's anti-SLAPP burden-shifting procedure, explores how other states have interpreted the constitutionality of their anti-SLAPP burden-shifting language, proposes adopting California's approach, and examines an alternative approach offered by Maine. Part III explores the scope of Vermont's anti-SLAPP statute, the inadequacy of the solution offered by Massachusetts, California's overly broad interpretation, and the limiting approach taken by Vermont. Finally, this Note concludes by offering a solution that combines half of the approach taken by California and half by Vermont to form one anti-SLAPP statute.

I. THE PLAIN LANGUAGE OF VERMONT'S ANTI-SLAPP STATUTE

Before any other discussion, it is important to examine the plain language of 12 V.S.A. § 1041—Vermont's anti-SLAPP statute. Section 1041(a) outlines the scope of protected activity: a defendant in an action arising from the defendant's exercise, in connection with a *public issue*, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont constitution, may file a special motion to strike under this section.⁴³ Section 1041(a) clearly requires that the defendant's exercise of First Amendment rights pertain to a *public issue*.⁴⁴

41. See *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 571 (Cal. 1999) (“The Legislature’s stated intent is best served . . . by a construction of section 425.16 that broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on ‘public’ issues.”).

42. Ho, *supra* note 34.

43. VT. STAT. ANN. tit. 12, § 1041(a) (2016).

44. The term *public issue* relates to any social, political, or other concern affecting the community. *Connick v. Myers*, 461 U.S. 138, 146 (1983). See also *Pickering v. Bd. of Educ. of Twp. High School Dist. 205*, 391 U.S. 563, 571 (1968) (holding that whether a school district needs additional funds is a matter of public concern). The Vermont Supreme Court has also explored what may or may not be a public issue. See *In re Robins*, 169 Vt. 377, 383, 737 A.2d 370, 374 (1999) (stating that issues

Section 1041(i), however, appears to nullify § 1041(a)'s *public issue* requirement. Section 1041(i) lists the specific categories of protected speech.⁴⁵ Under these categories, the exercise of free speech “in connection with a public issue” includes:

- (1) *any* written or oral statement made before a legislative, executive, or judicial proceeding, or *any* other official proceeding authorized by law;
- (2) *any* written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or *any* other official proceeding authorized by law;
- (3) any written or oral statement concerning an issue of public interest made in a public forum or a place open to the public; or
- (4) any other statement or conduct concerning a public issue or an issue of public interest which furthers the exercise of the constitutional right of freedom of speech or the constitutional right to petition the government for redress of grievances.⁴⁶

The broad scope of protected activity under §§ 1041(i)(1) and (2) appears to undermine the public issue requirement specified in § 1041(a). This creates an inconsistency within the statute.⁴⁷

Once the movant (defendant) demonstrates that her activity falls under the umbrella of § 1041(i), the burden shifts to the non-moving party (plaintiff) to show that the defendant's exercise of First Amendment activity was “devoid of any reasonable factual support and any arguable basis in law” and “caused actual injury to the plaintiff.”⁴⁸ To determine

raised by a grievant during a certification process regarding health inspections for waste disposal near a public bike path is a public issue); *Rich v. Montpelier Supervisory Dist.*, 167 Vt. 415, 422, 709 A.2d 501, 505 (1998) (holding that comments made in front of a public school board regarding the policy of a school basketball team are a public issue); *Crump v. P & C Food Mkts, Inc.*, 154 Vt. 284, 292, 576 A.2d 441, 446 (1990) (holding that “statements made privately in the employment context about an employee to agents of the employer and several other persons” is not a public issue); *Grievance of Morrissey*, 149 Vt. 1, 15, 538 A.2d 678, 687 (1987) (explaining that “[w]hether an employee's speech conduct addresses a matter of public concern is determined by an evaluation of its content, form, and context, as revealed by the whole record”); *Burns v. Times Argus Ass'n., Inc.*, 139 Vt. 381, 387–88, 439 A.2d 773, 776–77 (1981) (explaining that use of state funds by the wife of a state employee is a public issue).

45. VT. STAT. ANN. tit. 12, § 1041(i).

46. *Id.* (emphasis added).

47. *Felis v. Downs Rachlin Martin, PLLC*, 2015 VT 129, ¶ 39, 133 A.3d 836, 850.

48. VT. STAT. ANN. tit. 12, § 1041(e)(1).

whether a party met its burden of proof, the trial court will examine the pleadings, as well as any supporting and opposing affidavits.⁴⁹

Section 1041 provides a mechanism for swift dismissal of SLAPPs and mitigation of economic damage to the defendant.⁵⁰ The non-moving party must respond no later than 15 days after the motion is filed, and the court must hold a hearing no later than 30 days after the motion to strike is entered.⁵¹ The motion may stay discovery until such time as the court is able to rule.⁵² Further, if the motion is granted, the moving party shall be awarded reasonable attorney's fees.⁵³ If the court finds, however, that the motion is "frivolous or is intended solely to cause unnecessary delay," the court must award costs and attorney's fees to the non-moving party.⁵⁴ Therefore, much is at stake for both parties. The statute, by design, attempts to swiftly remove SLAPPs from the courts—and compensate the victim defendant.⁵⁵ It is this design, however, that leads to unconstitutional overreach.⁵⁶

II. THE FIRST CONSTITUTIONAL ISSUE: BURDEN SHIFTING

As this section explains, the burden-shifting procedure in § 1041(e) is unconstitutional.⁵⁷ Once the defendant demonstrates that the complaint falls under § 1041(i), the burden then shifts to the plaintiff to prove that the defendant's actions were "devoid of any reasonable factual support and any arguable basis in law"⁵⁸ The plaintiff must meet this extremely high burden without the benefit of discovery.⁵⁹ Further, the statute forces the trial court—at the pleading stage—to weigh evidence and decide disputed issues

49. *Id.* § 1041(e)(2).

50. *Id.* §§ 1041(b), (c)(1), (d), (f)(1).

51. *Id.* §§ 1041(b), (d).

52. *Id.* § 1041(c)(1). Discovery, however, is not *automatically* stayed. *See id.* § 1041(c)(2) ("The court, on motion, and for good cause shown, may order that limited discovery be conducted for the purpose of assisting its decision on the special motion to strike").

53. *Id.* § 1041(f)(1).

54. *Id.*

55. *See id.* § 1041(e) (aiming to remove unnecessary SLAPPs from courts and compensate victims accordingly).

56. *See infra* Parts II and III (explaining the unconstitutionality of SLAPP statutes).

57. *See infra* Part II.A (describing the unconstitutionality of § 1041(e)'s burden-shifting procedure).

58. VT. STAT. ANN. tit. 12, § 1041(e)(1)(A).

59. *Id.* § 1041(c)(1). Again, however, discovery is not automatically stayed. *See id.* § 1041(c)(2) (explaining that the court "may order limited discovery be conducted for the purpose of assisting its decision on the special motion to strike").

of fact.⁶⁰ The burden-shifting approach, therefore, goes beyond the methods of traditional procedural devices used for early dismissal or adjudication of claims—such as, Rule 12(b)(6) motions, summary judgment, and judgments as a matter of law.⁶¹ As such, the burden-shifting procedure in § 1041(e) unconstitutionally infringes on the right to a jury trial, and the plaintiff’s right to petition under the First Amendment.⁶² The Vermont Supreme Court has yet to interpret § 1041(e). The United States District Court for the District of Vermont and Vermont superior courts, however, have interpreted the language consistent with its plain meaning.⁶³

The burden-shifting language in § 1041(e), is modeled on a string of U.S. Supreme Court cases currently known as the *Noerr-Pennington* doctrine.⁶⁴ The *Noerr-Pennington* doctrine protects public-petitioning activity against tort liability unless said activity is shown to be a “mere sham.”⁶⁵ To test whether petitioning activity is a *mere sham*, *Noerr-Pennington* employs both objective and subjective prongs.⁶⁶ First, the petitioning activity must be objectively baseless to the point that no realistic litigant could harbor a reasonable hope of success on the merits of the

60. See *infra* Part II.B (discussing what the statute demands of the court).

61. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (explaining that credibility determinations, the drawing of legitimate inferences from fact, and the weighing of evidence are duties for a jury, not a judge, as to whether the motion is for summary judgment or judgment as a matter of law); *Opinion of the Justices*, 641 A.2d 1012, 1015 (N.H. 1994) (“Unlike these procedures wherein the court does not resolve the merits of a disputed factual claim, the procedure in the proposed bill requires the trial court to do exactly that.”).

62. VT. CONST. ch. 1, art. 12; U.S. CONST. amends. I, VII; see also *Davis v. Cox*, 351 P.3d 862, 872–74 (Wash. 2015) (holding that Washington’s anti-SLAPP statute burden-shifting procedure violated the plaintiff’s constitutional rights to a jury trial and to petition).

63. See *Ernst v. Kauffman*, 50 F.Supp 3d. 553, 564 (D. Vt. 2014) (holding that a letter read in front of a town council was protected from defamation under Vermont’s anti-SLAPP statute because the plaintiff could not prove that the entirety of the letter was devoid of reasonable factual support); *Haywood v. St. Michael’s Coll.*, No. 2:12-CV-164, 2012 WL 6552361, at *13 (D. Vt. 2012) (granting the defendants’ motion to strike defamation suit under Vermont’s anti-SLAPP statute because the plaintiff could not demonstrate that defendants’ newspaper article “was devoid of any reasonable factual support and any arguable basis in law . . .”) (quoting VT. STAT. ANN. tit. 12, § 1041(e)(1)); *Chandler v. Rutland Herald Pub.*, No. 104-3-15, 2015 WL 5176808, at *1 (Vt. Super. Ct. 2015) (awarding the motion to strike because the plaintiff failed to demonstrate that a newspaper article “was devoid of any reasonable factual support and any arguable basis in law”); *Rock of Ages Corp. v. Bernier*, No. 68-2-14, 2015 WL 5176782, at *5 (Vt. Super. Ct. 2015) (“If such a motion is filed, the court must grant it unless the plaintiff proves that: . . . the defendant’s exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law . . .”).

64. *Hearing on S. 103 Before House Judiciary Comm.*, 2005–2006 Bien. Leg. Sess. (Vt. 2006) (Statements from Legislative Counsel) [hereinafter *Hearing*]. The *Noerr-Pennington* doctrine is originally attributable to *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

65. *Noerr Motor Freight*, 365 U.S. at 144; *Pennington*, 381 U.S. at 669.

66. *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 525–26 (2002).

complaint.⁶⁷ Second, the parties' subjective motivation must be to interfere with the business practices of a competitor—through the use of governmental institutions.⁶⁸ *Noerr-Pennington* originally was applied exclusively to antitrust cases; however, the doctrine has expanded and currently encompasses general petitioning activity under the First Amendment.⁶⁹

The Vermont Legislature originally intended for § 1041(e)'s burden-shifting language to mirror that of California's anti-SLAPP statute.⁷⁰ This statute upholds the moving party's motion to strike "unless the court determines that the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim."⁷¹ The Legislature instead emulated the burden-shifting language found in Massachusetts's anti-SLAPP statute.⁷² Ironically, the Legislature examined California's anti-SLAPP burden-shifting procedure, and decided against adopting it because of perceived constitutional deficiencies.⁷³ Expedient dismissal of SLAPPs was the main reason the Legislature decided to base § 1041(e)'s burden-shifting on the *Noerr-Pennington mere sham* test.⁷⁴

A. Problems with Using *Noerr-Pennington*

Multiple constitutional issues arise when the *Noerr-Pennington* standard is used to dismiss complaints at the pleading stage. First, unlike many other anti-SLAPP statutes, the language in § 1041(e) does not track the plaintiff's *burden of proof* at trial.⁷⁵ As stated above, once the burden

67. *Id.*

68. *Id.*

69. See *New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) ("*Noerr-Pennington* has been extended beyond the antitrust laws . . . and is today understood as an application of the first amendment's speech and petitioning clauses."); *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) ("The immunity is no longer limited to the antitrust context . . .").

70. *Felis v. Downs Rachlin Martin, PLLC*, 2015 VT 129, ¶ 42, 133 A.3d 836, 851.

71. CAL. CIV. PROC. CODE § 425.16(b)(1) (2015) (emphasis added).

72. *Hearing*, *supra* note 64.

73. *Id.*

74. *Hearing*, *supra* note 64.

75. See MINN. STAT. ANN. § 554.02(3) (2015) ("[T]he court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under [the statute]."); 735 ILL. COMP. STAT. 110/20(c) (2007) ("The court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from . . . liability by this Act."); CAL. CIV. PROC. CODE § 425.16(b)(1) ("[The plaintiff] shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.").

shifts, the plaintiff must demonstrate that the defendant's speech or petitioning activity was "devoid of any reasonable factual support and any arguable basis in law" ⁷⁶ The statute, therefore, requires a court to use the *Noerr-Pennington mere sham* test to examine the defendant's actions. But § 1041(e) fails to include the plaintiff's ultimate burden of proof. ⁷⁷ There is no language in § 1041(e)—or anywhere else in the statute—that sets forth the plaintiff's burden, whether by a preponderance of the evidence, clear and convincing, or beyond a reasonable doubt. ⁷⁸ Subsection 1041(e) most resembles the *beyond a reasonable doubt* standard. This highest standard, however, is the state's burden when prosecuting a criminal defendant, rather than a plaintiff's burden at the pleading stage of civil litigation. ⁷⁹

The federal constitutional test for a plaintiff's burden at the pleading stage under a Rule 12(b)(6) motion to dismiss is a *plausibility* of success on the merits. ⁸⁰ Vermont courts are even more liberal: the mere *possibility* of success is enough to deny a 12(b)(6) motion. ⁸¹ But under Vermont's anti-SLAPP statute, the plaintiff—on the initial pleadings—must demonstrate that the defendant's actions were completely baseless in fact or law. ⁸² This is a remarkable difference. Anti-SLAPP statutes, however, *should* place a higher burden on a plaintiff than 12(b)(6) motions because public petitioning deserves heightened protection. ⁸³ Applying the 12(b)(6) standard would take the teeth out of an anti-SLAPP statute: there would be no need for a special motion to strike if the requirements placed on the plaintiff remained consistent with normal pleading standards. The problem

76. VT. STAT. ANN. tit. 12, § 1041(e)(1)(A) (2016).

77. *Hearing*, *supra* note 64.

78. VT. STAT. ANN. tit. 12, § 1041(e).

79. *See In re Winship*, 397 U.S. 358, 364 (1970) (explaining that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

80. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))); *Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

81. *See Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1, 5–6, 955 A.2d 1082, 1086 ("In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.") (internal quotations omitted).

82. VT. STAT. ANN. tit. 12, § 1041(e) (2016).

83. *See Pring*, *supra* note 2, at 6 (explaining that public petitioning is one of the most important rights citizens have, yet SLAPP suits make exercising this right risky).

with §1041(e) is that it goes too far: a vast chasm separates the 12(b)(6) *plausibility* or *possibility* standard from the *motion to strike* standard that requires demonstrating that the defendant's actions were thoroughly baseless in fact or law.⁸⁴

Besides establishing a high burden at the pleading stage, the language in § 1041(e) requires courts to examine *only* the defendant's actions and thus ignore possible merits in the plaintiff's case.⁸⁵ A defendant could theoretically engage in petitioning activity while simultaneously committing a tort.⁸⁶ In the majority of complaints, the merits of the *plaintiff's* case and injuries sustained to the *plaintiff* deserve scrutiny.⁸⁷ Section 1041 attempts to dismiss complaints swiftly, with potentially large fees available to the prevailing party.⁸⁸ Therefore, merely examining whether the defendant's actions were devoid of fact or law should not end the analysis.⁸⁹

Furthermore, the *Noerr-Pennington* doctrine should protect the plaintiff's right to petition as well as the defendant's right to petition.⁹⁰ By filing a complaint, the plaintiff engages in petitioning activity protected by *Noerr-Pennington* with equal weight—unless the suit is a *mere sham* under *Noerr-Pennington's* objective or subjective prongs.⁹¹ Section 1041(e), however, discounts the plaintiff's petitioning activity.⁹² It is unjust to have a burden-shifting process that infringes upon the plaintiff's right to petition and then justify that infringement with a constitutional doctrine that should, in actuality, protect the plaintiff.

Finally, § 1041(e) requires the trial court to weigh evidence and decide disputed issues of fact to determine whether the defendant's actions were devoid of fact or law.⁹³ Again, the plaintiff must meet this incredibly high

84. Opinion of the Justices, 641 A.2d 1012, 1015 (N.H. 1994).

85. See *Sandholm v. Keucker*, 2012 IL 111443, ¶ 53 (“The sham exception [in Illinois’ anti-SLAPP statute] tests the genuineness of the *defendants’* acts; it says nothing about the merits of the plaintiff’s lawsuit. It is entirely possible that defendants could spread malicious lies about an individual while in the course of genuinely petitioning the government for a favorable result.”).

86. *Id.*

87. *Id.*

88. See *supra* Part I (explaining the mechanisms in § 1041 that allow for swift dismissals).

89. VT. STAT. ANN. tit. 12, § 1041(e)(1)(A) (2016).

90. See *Davis v. Cox*, 351 P.3d 862, 872 (Wash. 2015) (“In sum, the United States Supreme Court has interpreted the petition clause to expansively protect plaintiffs’ constitutional right to file lawsuits seeking redress for grievances.”).

91. *Id.*; see also *supra* notes 72–73 (exploring the *Noerr-Pennington* subjective and objective prongs).

92. Cf. VT. STAT. ANN. tit. 12, § 1041(e)(1)(A) (upholding the motion unless plaintiff can demonstrate that *defendant's* First Amendment activities were devoid of factual support or basis in law).

93. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

burden without the benefit of discovery.⁹⁴ Section 1041(e), therefore, goes above and beyond the limits of other procedural mechanisms designed to resolve cases before trial and potentially blocks access to a jury for litigants with actual injuries.⁹⁵

B. Washington's Anti-SLAPP Burden-Shifting Procedure is Declared Unconstitutional

In *Davis v. Cox*, Washington's high court declared the burden-shifting language in Washington's anti-SLAPP statute unconstitutional.⁹⁶ *Cox* involved a dispute between employees and management at a food cooperative in Olympia, Washington.⁹⁷ Allegedly, the cooperative board unilaterally decided to boycott Israeli products.⁹⁸ The employees contended that the boycott violated co-op policy and sought declaratory relief.⁹⁹ The board members countered with a motion to strike under Washington's anti-SLAPP statute.¹⁰⁰ The employees opposed the motion and requested a lift on the statute's stay of discovery.¹⁰¹ The trial court denied the employee's request and granted the board's motion, awarding approximately \$222,000 in attorney's fees and damages.¹⁰² On appeal, the employees argued that Washington's anti-SLAPP statute denied the right to a jury trial under the Washington Constitution and violated Washington's separation of powers doctrine, the Petition Clause under the First Amendment of the U.S. Constitution, and the vagueness doctrine in the Fourteenth Amendment's Due Process Clause.¹⁰³ The court held that the anti-SLAPP statute blocked the right to a jury trial and thus did not reach the rest of the challenges.¹⁰⁴

The court began by examining the burden-shifting procedure in Washington's anti-SLAPP statute, which read:¹⁰⁵

A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a

94. VT. STAT. ANN. tit. 12, § 1041(c)(2).

95. *Cox*, 351 P.3d at 875.

96. *Id.*

97. *Id.* at 866.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 866–67.

104. *Id.* at 867.

105. *Id.*

preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by *clear and convincing* evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.¹⁰⁶

The board argued that this process required no more of a trial court than routine motions for summary judgment.¹⁰⁷

The court distinguished the burden found in the above language from motions for summary judgement.¹⁰⁸ If the moving party (defendant) met its initial burden, the burden shifted to the responding party (plaintiff) to establish, *clearly and convincingly*, a probability of prevailing on their cause of action.¹⁰⁹ To adjudicate this question, the trial judge had to rely on the pleadings, relevant affidavits outlining the facts, and underlying claims and defenses.¹¹⁰ The court then compared the anti-SLAPP burden-shifting procedure with summary judgment.¹¹¹ The two procedures “involve fundamentally different inquires,” because the anti-SLAPP statute “provides a burden of proof concerning whether the evidence crosses a certain threshold of proving a likelihood of prevailing on the claim.”¹¹² Conversely, summary judgment “does not concern degrees of likelihood or probability.”¹¹³ Instead, summary judgment scrutinizes for legal certainty.¹¹⁴ Summary judgment requires undisputed material facts with one side prevailing as a matter of law.¹¹⁵ The court found that, if the Washington Legislature wanted the burden-shifting process to mirror summary judgment, it could have used the “well-known” summary judgment language.¹¹⁶

The court held that Washington’s anti-SLAPP burden-shifting process impeded the right to a jury trial under the Washington Constitution.¹¹⁷ The

106. WASH. REV. CODE § 4.24.525(4)(b) (2010) (emphasis added), *invalidated by* Davis v. Cox, 351 P.3d 862 (Wash. 2015).

107. Cox, 351 P.3d at 867.

108. *Id.*

109. *Id.*

110. *Id.* Vermont’s anti-SLAPP, as well, has a provision directing the court to examine the pleadings and affidavits. VT. STAT. ANN. tit. 12, § 1041(e)(2) (2016).

111. Cox, 351 P.3d at 867; FED. R. CIV. P. 56(a).

112. Cox, 351 P.3d at 867.

113. *Id.*

114. *Id.*

115. *Id.*; FED. R. CIV. P. 56(a).

116. Cox, 351 P.3d at 867–68.

117. *Id.* at 875.

court acknowledged, however, that the right to a jury trial is “not limitless.”¹¹⁸ First, as mentioned above, summary judgment is constitutionally permissible where no issues of material fact exist.¹¹⁹ Second, the court noted that the right to a jury trial is not constitutionally guaranteed; frivolous complaints that are a *mere sham* under *Noerr-Pennington* lack a legitimate interest in adjudication.¹²⁰ Washington’s anti-SLAPP statute, however, did not use a frivolous standard.¹²¹ Instead, the statute required a judge to make factual determinations on whether the plaintiff, *clearly and convincingly*, established a probability of prevailing on the claim.¹²² The court determined that:

[Washington’s anti-SLAPP statute] creates a truncated adjudication of the merits of a plaintiff’s claim, including nonfrivolous factual issues, without a trial. Such a procedure invades the jury’s essential role of deciding debatable questions of fact. In this way, [the anti-SLAPP statute] violates the right of trial by jury under article I, section 21 of the Washington Constitution.¹²³

While the burden-shifting language in Washington’s invalidated anti-SLAPP statute differs from Vermont’s, it bears similarity in the high burden placed on the plaintiff.¹²⁴ If a *clear and convincing* standard denies access to a jury trial, then requiring a plaintiff to demonstrate that a defendant’s actions are completely devoid of fact or law does as well.¹²⁵ Vermont’s anti-SLAPP statute actually imposes a *higher* burden.¹²⁶ In addition, the Washington standard unconstitutionally required a trial court to weigh evidence and decide disputed issues of fact.¹²⁷ Vermont’s standard does as well.¹²⁸

118. *Id.* at 871.

119. *Id.*

120. It is worth noting that here the Washington Supreme Court examined *Noerr-Pennington* through the lens of the *plaintiff’s* right to enter a complaint. *Id.* at 871–73.

121. *Id.* at 873.

122. *Id.*

123. *Id.* at 874.

124. *See supra* Part II.A (discussing problems with using *Noerr-Pennington*).

125. *See id.*

126. *See id.*

127. *Cox*, 351 P.3d at 867.

128. *See supra* Part II.A (discussing problems with using *Noerr-Pennington*).

C. California's Probability Standard

In *Cox*, the board argued that the plaintiff's burden in California's anti-SLAPP statute, upon which Washington's was modeled, did not exceed the limits of summary judgment.¹²⁹ The Washington Supreme Court rejected this argument because, while many aspects of the Washington and California statutes were similar, plaintiffs in California must demonstrate a *probability* of success on the merits rather than meet the *clear and convincing* standard.¹³⁰ California's anti-SLAPP burden-shifting provision reads:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim.¹³¹

In California, a plaintiff defending against an anti-SLAPP motion must only demonstrate that her complaint has enough *prima facie* evidence to support a favorable judgment if the evidence is credited.¹³² California equates the burden on the plaintiff to summary judgment.¹³³ Instead of having to demonstrate a degree of clear and convincing evidence, or that the defendant's actions were devoid of any basis in fact or law, plaintiffs in California need only demonstrate a *probability* of success.¹³⁴ California's *probability* language adheres to a normal preponderance-of-the-evidence burden used during civil litigation.¹³⁵ As such, California's anti-SLAPP

129. *Cox*, 351 P.3d at 869.

130. *Id.*

131. CAL. CIV. PROC. CODE § 425.16(b)(1) (2015) (emphasis added).

132. *Id.*

133. *See Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 901 (2004) ("A plaintiff's burden under section 425.16 is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgement.") (internal quotations omitted).

134. CAL. CIV. PROC. CODE § 425.16(b)(1).

135. Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1162 (1983).

burden-shifting process creates a significantly lower hurdle than the *clear and convincing*¹³⁶ and *Noerr-Pennington* standards.¹³⁷

D. New Hampshire's Burden-Shifting Procedure Dies on the Cutting Room Floor

The New Hampshire Legislature proposed the *probability* standard to the New Hampshire Supreme Court, and the Court found it unconstitutional.¹³⁸ In 1994, the New Hampshire Legislature considered enacting anti-SLAPP legislation, but first sent the bill over for review.¹³⁹ Under the proposed bill, once the burden shifted to the plaintiff, a court would strike the complaint “unless . . . the plaintiff [had] established that there [was] a *probability* that the plaintiff [would] prevail on the claim.”¹⁴⁰

The New Hampshire Supreme Court interpreted this language—including the proposed *probability* standard—as more burdensome than the standards in Rule 12(b)(6) and summary judgment motions.¹⁴¹ The Court explained that—when reviewing a motion to dismiss—the trial court is required to accept that all well-pleaded factual allegations as true, and view those allegations in the light most favorable to the plaintiff.¹⁴² Summary judgment is appropriate where there is no dispute as to material facts and one party is entitled to judgment as a matter of law.¹⁴³ The trial court is required to construe pleadings, affidavits, and discovery in the light most favorable to the non-moving party, and the party with the burden of proof at trial carries that same burden of production during summary judgment.¹⁴⁴ The Court determined that, unlike motions to dismiss or summary judgment motions, New Hampshire's anti-SLAPP provision required a trial judge to resolve the merits of a disputed factual claim.¹⁴⁵ The proposed bill violated

136. See *supra* Part II.B (discussing *Davis v. Cox* invalidating Washington's anti-SLAPP statute). Minnesota's anti-SLAPP statute employs the *clear and convincing* burden, as well, MINN. STAT. ANN. § 554.02(3) (2015), and Minnesota courts interpret it as going above and beyond the summary judgment standard. *Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 231 (Minn. 2014). However, to date Minnesota has not overturned or amended its anti-SLAPP statute. *Id.*

137. VT. STAT. ANN. tit. 12, § 1041(e) (2016).

138. Opinion of the Justices, 641 A.2d 1012, 1014 (N.H. 1994). The New Hampshire Constitution allows the Senate to request opinions from the justices of the New Hampshire Supreme Court for advice on “important questions of law” in pending bills. *Id.* at 1012.

139. *Id.*

140. *Id.* at 1013 (emphasis added).

141. *Id.* at 1014–15.

142. *Id.* at 1015.

143. *Id.*

144. *Id.*

145. *Id.*

the New Hampshire Constitution “[b]ecause a plaintiff otherwise entitled to a jury trial has a right to have all factual issues resolved by the jury”¹⁴⁶ The Court explained that a statute cannot bolster the constitutional rights of one group by trampling on the rights of another.¹⁴⁷

E. Adopting California’s Probability Standard

Notwithstanding the opinion of the New Hampshire Supreme Court, the Vermont Legislature should amend § 1041(e) and adopt California’s anti-SLAPP burden-shifting *probability* standard. As explored above, anti-SLAPP burden-shifting provisions face criticism that the burden placed on the plaintiff is unconstitutional because it goes above other accepted procedural motions used to dismiss or adjudicate complaints.¹⁴⁸ Moreover, the trial court must weigh evidence and decide disputed issues of fact, which exceeds the limits of summary judgment.¹⁴⁹ The Washington and New Hampshire decisions followed these themes.¹⁵⁰ California’s approach resolves both concerns.

First, in California, the plaintiff’s burden is consistent with summary judgment.¹⁵¹ From start to finish in any court proceeding, the plaintiff must demonstrate some level of merit.¹⁵² Under summary judgment’s burden-shifting standard, the party with the burden of proof at trial must produce enough evidence to meet that burden (preponderance of the evidence, clear and convincing, or beyond a reasonable doubt).¹⁵³ Under California’s anti-SLAPP statute—as in summary judgment—the courts construe evidence in the light most favorable to the non-moving party.¹⁵⁴ The non-moving party (plaintiff) is required to produce only sufficient prima facie evidence to signal a probability of success on the merits.¹⁵⁵ The requirement remains consistent with a preponderance-of-the-evidence burden, which typically equates to the plaintiff’s evidentiary burden during a civil trial.¹⁵⁶

146. *Id.*

147. *Id.*

148. See *supra* Part II.A (discussing problems with using *Noerr-Pennington*).

149. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

150. *Davis v. Cox*, 351 P.3d 862, 867 (Wash. 2015); *Opinion of the Justices*, 641 A.2d at 1015.

151. *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 901 (Cal. Ct. App. 2004).

152. See *Anderson*, 477 U.S. at 252 (explaining that in summary judgment, “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff”).

153. *Id.* at 255.

154. *Wolk*, 121 Cal. App. 4th at 905.

155. *Id.*

156. *Opinion of the Justices*, 641 A.2d 1012, 1013 (N.H. 1994).

Therefore, California's anti-SLAPP statute is no more cumbersome than summary judgment.

Second, the process courts in California undergo during anti-SLAPP motions does not exceed the limits of summary judgment. In the course of procedural motions to dismiss, trial courts are not supposed to weigh evidence to determine probabilities of success.¹⁵⁷ However, during summary judgment, a court will examine evidence through the lens of the plaintiff's evidentiary burden.¹⁵⁸ Trial judges examine whether "a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not."¹⁵⁹ In this way, during summary judgment, trial courts *do* weigh evidence to some degree, but only in deciphering whether the plaintiff met her evidentiary burden.¹⁶⁰ California's anti-SLAPP burden-shifting standard uses the same approach. It asks the court to inquire whether the plaintiff put forth prima facie evidence, which—if taken in a light favorable to the plaintiff—demonstrates a probability of success on the merits.¹⁶¹ Consequently, the anti-SLAPP burden-shifting process stays within the lanes of the plaintiff's minimal evidentiary burden at trial.¹⁶²

F. Maine's Alternative Solution

Maine offers one other possible solution. Maine's and Vermont's anti-SLAPP statutes contain identical burden-shifting language.¹⁶³ In *Nader v. Maine Democratic Party*, the Maine Supreme Court modified the method it used for anti-SLAPP burden-shifting.¹⁶⁴ In *Nader*, 2004 presidential candidate Ralph Nader sued the Maine Democratic Party for allegedly conspiring to keep him off of the ballot rolls in Maine.¹⁶⁵ The Maine Democratic Party filed a motion to strike under Maine's anti-SLAPP statute.¹⁶⁶ The trial court found that the Maine Democratic Party met its initial burden of demonstrating that the statute covered its petitioning

157. *Anderson*, 477 U.S. at 255.

158. *Id.* at 254.

159. *Id.*

160. *Id.* at 255.

161. *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 901 (Cal. Ct. App. 2004).

162. *Id.*

163. See ME. REV. STAT. ANN. tit. 14, § 556 (1995) ("The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law . . .").

164. *Nader v. Me. Democratic Party*, 41 A.3d 551, 563 (Me. 2012).

165. *Id.* at 555.

166. *Id.*

activity.¹⁶⁷ The burden then shifted to Nader, who was unable to establish that the Maine Democratic Party's actions were "devoid of any reasonable factual support or any arguable basis in law."¹⁶⁸ Then, something interesting happened. The defendants were awarded only one dollar in attorney's fees.¹⁶⁹ The trial court explained that "[b]ut for the impact of legal authority in this State relating to [the anti-SLAPP statute] this [c]ourt is of the opinion that [Nader's] action warranted further analysis and development through the evolution of normal civil litigation process."¹⁷⁰

On appeal, the Maine Supreme Court amended its anti-SLAPP burden-shifting precedent.¹⁷¹ Maine's previous case law adhered to a plain reading of the statute: once the defendant demonstrated that the cause of action was based on the statutorily defined petitioning activity, the burden shifted to the plaintiff to demonstrate that the defendant's actions were devoid of fact or law.¹⁷² In changing course, the Court sought to balance the Maine Democratic Party's constitutional right to petition with Nader's constitutional rights to petition, to a jury trial, and to the ballot.¹⁷³ The Court, therefore, employed the constitutional avoidance canon to side-step the unconstitutional consequences of the statute's plain language.¹⁷⁴

Using the constitutional avoidance canon, the Court examined the plaintiff's burden under the second step of the burden-shifting process.¹⁷⁵ The Court held that the plaintiff must demonstrate only prima facie evidence that the defendant's activities were devoid of fact or law.¹⁷⁶ "Some evidence" is sufficient to meet this burden.¹⁷⁷ Additionally—and most importantly—the plaintiff does not have to prove that *all* of the defendant's actions were devoid of fact or law; demonstrating that *any* of the defendant's actions were devoid of fact or law suffices.¹⁷⁸ Moreover, up until *Nader*, Maine courts applied a "converse summary-judgment-like standard" under the anti-SLAPP statute: the court construed all facts in a light favorable to the moving party.¹⁷⁹ This process was the inverse of

167. *Id.* 555–56.

168. *Id.* at 556.

169. *Id.*

170. *Id.*

171. *Id.* at 563.

172. *Id.* at 557.

173. *Id.* at 557–61.

174. *Id.* at 558.

175. *Id.* at 561.

176. *Id.* at 562.

177. *Id.*

178. *Id.*

179. *Id.* at 561.

summary judgment—where all facts are viewed in a light most favorable to the non-moving party.¹⁸⁰ With *Nader*, the Maine Supreme Court changed course and used the traditional summary judgment method of viewing facts in a light most favorable to the non-moving party.¹⁸¹

Maine offers an interesting solution to Vermont's anti-SLAPP burden-shifting problem. The Maine approach limits the plaintiff's burden by requiring that she merely provide prima facie evidence that *some* of the defendant's activities were baseless, thus significantly lowering the plaintiff's burden.¹⁸² Moreover, Maine now construes the evidence in a light most favorable to the non-moving party (plaintiff).¹⁸³ In this way, Maine courts examine the evidence through the lens of the plaintiff's evidentiary standard—which is consistent with summary judgment.¹⁸⁴

While Maine provides a satisfactory alternative approach, the Vermont Legislature should still amend its anti-SLAPP burden-shifting language to emulate California. *Nader* required the Court to look past the plain language of the statute and employ the constitutional avoidance canon.¹⁸⁵ The constitutional avoidance canon *is* a perfectly acceptable way to interpret a statute.¹⁸⁶ Employing the canon, however, signifies that there was confusion in interpreting the statute—as shown by Maine's shift in jurisprudence.¹⁸⁷ The California approach is explicit and avoids confusion and judicial re-drafting of the statute.¹⁸⁸ To cover its bases, the Vermont Legislature should additionally amend the statute to explicitly state that the burden-shifting process—and the burden it places on the plaintiff—must remain on par with summary judgment. If the legislature decides not to amend its statute, however, the Vermont Supreme Court can look to Maine because the *Nader* test addresses the constitutional pitfalls found in Vermont's anti-SLAPP burden-shifting process.

180. *Id.*

181. *Id.* at 562.

182. *Id.*

183. *Id.* at 563.

184. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

185. *Nader*, 41 A.3d at 558.

186. William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 832 (2001).

187. *Nader*, 41 A.3d at 563.

188. *See supra* Part I.E (discussing California's probability standard).

III. THE SECOND CONSTITUTIONAL ISSUE: THE SCOPE OF THE STATUTE

The potential breadth and width of activity protected under the plain language of Vermont's anti-SLAPP statute goes far beyond its original intent. An overly broad interpretation unconstitutionally obstructs the right to a jury trial.¹⁸⁹ Many states have grappled with the scope of protected activity and attempted to strike a balance between shielding people from SLAPPs and preventing the statute's plain language from casting an unconstitutionally wide net.¹⁹⁰ With its decision in *Felis v. Downs Rachlin Martin, PLLC*, the Vermont Supreme Court offered the best solution to date.¹⁹¹ Vermont's anti-SLAPP statute now covers petitioning activity pertaining only to *public issues*.¹⁹² As explained below, other states should adopt Vermont's approach.

The plain language in Vermont's anti-SLAPP statute broadly defines protected activity—depending on how one chooses to interpret it. Section 1041(a) states that a defendant in an action based on the defendant's exercise of First Amendment activity “in connection with a *public issue*” may file a motion to strike.¹⁹³ Section 1041(i)(1), however, explains that statements made “in connection with a public issue” includes “*any* written or oral statement made before a legislative, executive, or judicial proceeding, or *any* other official proceeding authorized by law”¹⁹⁴ Further, under § 1041(i)(2), “*any* written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law” is protected.¹⁹⁵ There are two divergent ways to read the above language.¹⁹⁶ First, one could argue that the *public issue* requirement specified in § 1041(a) is incorporated into § 1041(i). Under this interpretation, any written or oral statement made in front of a legislative or judicial body must concern a *public issue* to be protected.¹⁹⁷ The second interpretation reads § 1041(i) as declaring that any statement made in front of a judicial or legislative body automatically concerns a *public issue* just

189. *Felis v. Downs Rachlin Martin, PLLC*, 2015 VT 129, ¶ 41, 133 A.3d 836, 851.

190. *See supra* Parts II A–F (discussing various states' attempts to narrow their anti-SLAPP statutes).

191. *Felis*, 2015 VT 129, ¶ 35.

192. *Id.* ¶ 34.

193. VT. STAT. ANN. tit. 12, § 1041(a) (2016) (emphasis added).

194. *Id.* § 1041(i)(1) (emphasis added).

195. *Id.* § 1041(i)(2) (emphasis added).

196. *Felis*, 2015 VT 129, ¶¶ 34–35.

197. *Id.*

by virtue of the setting in which the words were uttered.¹⁹⁸ This second interpretation swells the statutory scope beyond its original intent—combating SLAPPs.¹⁹⁹

A. Massachusetts's Limiting Attempt

The language of Vermont's and Massachusetts's anti-SLAPP statutes is nearly identical in terms of activity protected.²⁰⁰ The Massachusetts Supreme Court narrowed its statute's scope in *Duracraft Corp. v. Holmes Products Corp.*²⁰¹ *Duracraft* involved a conflict between two corporations, Duracraft and Holmes, regarding statements made before the Massachusetts Trademark Trial and Appeal Board.²⁰² Duracraft accused a Holmes employee of violating a non-disclosure agreement.²⁰³ Holmes countered with a motion to strike under Massachusetts's anti-SLAPP statute.²⁰⁴ The trial court found that the complaint fell outside the statute's scope and denied the motion.²⁰⁵

On appeal, the Massachusetts Supreme Court affirmed.²⁰⁶ The Court examined Massachusetts's legislative history and determined that the anti-SLAPP statute was never intended to cover private disputes between two large corporate entities.²⁰⁷ In reaching this conclusion, the Court engaged in a familiar balancing act: protecting both the right of the defendant to freely engage in public speech, and the right of the plaintiff to seek judicial redress.²⁰⁸ The original purpose of Massachusetts's anti-SLAPP statute was the swift dismissal of meritless suits brought to chill public discourse.²⁰⁹

198. *Id.*

199. *Id.* ¶ 45.

200. VT. STAT. ANN. tit. 12, § 1041(i); MASS. GEN. LAWS ANN. CH. 231 § 59H (2016). However, while Vermont's statute clearly lays out a *public issue* requirement in § 1041(a), there is no such language concerning *public issue* in Massachusetts's statute. There was originally public issue language, but the Massachusetts Legislature cut this language before finalizing the bill. *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 941 (Mass. 1998).

201. *Duracraft Corp.*, 691 N.E.2d at 941.

202. *Id.* at 938.

203. *Id.*

204. The trial court found that the testimony from the executive was not related to a *public issue* and, thus, was outside the scope of Massachusetts's anti-SLAPP statute. *Id.* at 941. The Massachusetts Supreme Court affirmed the trial court's decision but explained that it could not use the *public issue* requirement as a basis because the term *public issue* does not appear anywhere in the statute. *Id.*

205. *Id.* at 935.

206. *Id.* at 941.

207. *Id.* at 940–41.

208. *Id.* at 944.

209. *Id.* at 943.

The Court determined, however, that Massachusetts's plain language "fail[ed] to track and implement such an objective."²¹⁰ Put simply, the court did not believe that the Massachusetts Legislature intended the likely subsequent consequences of an overly broad statutory interpretation. Massachusetts's anti-SLAPP statute "on its face alter[ed] procedural and substantive law in a sweeping way"²¹¹

The Court devised a test that it hoped would narrow the statute's scope to adhere to the original legislative purpose.²¹² The Massachusetts Legislature intended to protect parties from meritless claims based on their petitioning activities.²¹³ The Court, therefore, adopted a statutory construction that excludes anti-SLAPP motions brought to quash complaints that have a substantial basis in addition to, or other than, the petitioning activity in question.²¹⁴ To succeed on an anti-SLAPP motion, the moving party (defendant) must make "a threshold showing" that the plaintiff's complaint lacks any substantial basis in addition to the defendant's petitioning activity.²¹⁵ If the defendant meets this *based on* criteria, the trial court's task of distinguishing meritless from meritorious suits ostensibly becomes easier.²¹⁶ After applying the *based on* test, the Court ultimately denied the anti-SLAPP motion because the alleged violation of the non-disclosure agreement constituted a substantial basis other than Holmes's petitioning activity.²¹⁷

The *Duracraft* test is flawed; the Massachusetts anti-SLAPP statute remains overly broad.²¹⁸ By examining whether a complaint has any substantial basis other than the defendant's petitioning activity, the *Duracraft* test fails to adequately and specifically track the statute's original intent—to protect private citizens targeted for speaking out on public political issues.²¹⁹ SLAPPs are brought under a fairly limited set of circumstances.²²⁰ Hypothetically, a meritorious claim—and therefore not a

210. *Id.*

211. *Id.*

212. *Id.* at 941.

213. *Id.* at 941, 943.

214. *Id.* at 941.

215. *Id.* at 943.

216. *Id.*

217. *Id.* at 943–44.

218. See *Felis v. Downs Rachlin Martin, PLLC*, 2015 VT 129, ¶ 40, 133 A.3d 836, 851 (referencing that the Massachusetts anti-SLAPP statute is overly broad).

219. Pring, *supra* note 2, at 9.

220. *Id.* at 4.

SLAPP—could be based solely on the defendant’s petitioning activity.²²¹ Under the *Duracraft* test, this meritorious claim would probably be deemed a SLAPP even though, in actuality, it is not.²²²

For example: an economically disadvantaged citizen brings suit against a multinational corporate defendant for copyright infringement. The corporate defendant, in turn, colludes with another corporation to provide fraudulent testimony as an expert witness during the trial. After the conclusion of the trial, the plaintiff files a fraud complaint against the corporate witness. This complaint, we can all agree, is not a SLAPP. It has none of the makings of a SLAPP; the suit was not filed to silence or intimidate public discourse, and the plaintiff is *less* economically powerful than the defendant.²²³ Nonetheless, the complaint will not pass the *Duracraft* test because it is substantially based on the corporate defendant’s testimony.²²⁴ In addition, even if the plaintiff were to pass the *Duracraft* test, she would then have to demonstrate under Massachusetts’s and Vermont’s burden-shifting procedure that the corporate defendant’s testimony was completely devoid of any factual basis.²²⁵ To add insult to injury, if the corporate defendant prevailed, the plaintiff would then have to pay the corporation’s attorney’s fees and expenses.²²⁶

The above hypothetical provides a clear illustration of what might happen when anti-SLAPP statutes are over-broad. The lone, economically disadvantaged citizen becomes the victim of a statute originally designed to help people of exactly that profile.²²⁷ *Duracraft*, therefore, makes an admirable attempt but does not go far enough.

221. In *Felis*, the plaintiff brought a fraud complaint against an accounting firm based on the firm’s testimony during the plaintiff’s divorce proceeding. *Felis*, 2015 VT 129, ¶¶ 8–9. The court ultimately determined that the plaintiff’s complaint was meritless. *Id.* However, a similar situation where the plaintiff’s case does have merit is not hard to imagine. The complaint would not survive the *Duracraft* based on test because it would have arisen out of statutorily designated petitioning activity. *Duracraft Corp.*, 691 N.E.2d at 943–44.

222. *Duracraft Corp.*, 691 N.E.2d at 943–44.

223. See *supra* Introduction (discussing advantages and disadvantages of anti-SLAPP statutes).

224. *Duracraft Corp.*, 691 N.E.2d at 943–44.

225. VT. STAT. ANN. tit. 12, § 1041(e)(1)(A) (2016); MASS. GEN. LAWS ANN. ch. 231, § 59H (2016).

226. VT. STAT. ANN. tit. 12, § 1041(f)(1); MASS. GEN. LAWS ANN. ch. 231, § 59H.

227. *Felis v. Downs Rachlin Martin, PLLC*, 2015 VT 129, ¶ 40, 133 A.3d 836, 851.

B. California's Broad Anti-SLAPP Surf

The bulk of Vermont's anti-SLAPP statute—including the language in § 1041(i)—is modeled on California's statute.²²⁸ The language in the two statutes is nearly identical, aside from the burden-shifting process.²²⁹ There is, however, one telling difference. In 1997, the California Legislature amended the language to clarify that the statute covers a broad range of cases beyond what is normally considered SLAPP litigation.²³⁰ The amendment was a reaction to a series of California appellate cases.²³¹ These decisions had previously attempted to narrow the statute's scope to protect only petitioning activity related to *public issues*.²³² In response, the California Legislature added a sentence specifying that the statute “[shall] be construed broadly.”²³³ Interestingly, Vermont never adopted this amended language, even though Vermont's statute was drafted almost ten years after the California amendment.²³⁴

In *Briggs v. Eden Council for Hope and Opportunity*, the California Supreme Court had an opportunity to interpret this newly amended language and to clarify any confusion regarding the statute's scope.²³⁵ In *Briggs*, a landlord plaintiff filed a complaint against a non-profit organization that provided housing counseling through city and county grants.²³⁶ The landlord sued for defamation regarding statements made to clients and during staff meetings.²³⁷ The non-profit moved to strike the complaint under California's anti-SLAPP statute because the statements in question concerned issues pending before executive or judicial bodies.²³⁸ In opposition, the landlord argued that the alleged activities did not involve matters of public significance, and were therefore not covered by the statute.²³⁹ The trial court granted the motion to strike, and awarded the non-

228. *Hearing*, *supra* note 64.

229. VT. STAT. ANN. tit. 12, § 1041; CAL. CIV. PROC. CODE § 425.16 (2015).

230. S.B. 1296, 1997-1998 Reg. Sess. (Ca. 1997).

231. *Id.* See also *Zhao v. Wong*, 55 Cal. Rptr. 2d 909, 915 (Cal. Ct. App. 1996) (holding that “[t]he statute represents a clear recognition of the need to provide maximum protection of a citizen's right to exercise free speech and petition where such rights are exercised in relation to issues of public concern”), *overruled by* *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 568 (Cal. 1999).

232. *Id.* at 915.

233. S.B. 1296, 1997-1998 Reg. Sess. (Ca. 1997).

234. VT. STAT. ANN. tit. 12, § 1041; CAL. CIV. PROC. CODE § 425.16.

235. *Briggs*, 969 P.2d at 574.

236. *Id.* at 566.

237. *Id.*

238. *Id.*

239. *Id.*; CAL. CIV. PROC. CODE § 425.16(a).

profit's attorney's fees and costs.²⁴⁰ The California Court of Appeals reversed, holding that the non-profit had not made a prima facie showing that the lawsuit arose out of the furtherance of rights to speech and petition in connection with a *public issue*.²⁴¹

The California Supreme Court reversed the decision of the Court of Appeals.²⁴² The high court held that the term *public issue*—for the purposes of California's anti-SLAPP statute—concerns *any* written or oral statements regarding *any* issue pending before any judicial, legislative, or executive body.²⁴³ *Briggs* held that speech can concern a public issue based on the “context or setting” in which it is uttered.²⁴⁴ Under California's anti-SLAPP statute, if First Amendment activity occurs within the realm of an official proceeding it is automatically a *public issue*, even if the speech would not normally otherwise concern a public issue.²⁴⁵ The court explained that:

Any matter pending before an official proceeding possesses some measure of “public significance” owing solely to the public nature of the proceeding The Legislature's stated intent is best served, therefore, by a construction of section 425.16 that broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on “public” issues.²⁴⁶

The Court additionally noted that the statute's 1997 amendment reflects the California Legislature's desire for broad application.²⁴⁷ California's expansive anti-SLAPP statute, therefore, easily covered the non-profit's statements.²⁴⁸

Briggs featured a strong dissent.²⁴⁹ The dissent concurred with the majority's holding that California's anti-SLAPP statute protected the non-profit because the speech in question related to a public issue.²⁵⁰ The dissent, however, disagreed with the majority's broad statutory

240. *Briggs*, 969 P.2d at 567.

241. *Id.*

242. *Id.* at 575.

243. *Id.* at 573; CAL. CIV. PROC. CODE § 425.16(e)(2).

244. *Briggs*, 969 P.2d at 570.

245. *Id.*

246. *Id.* at 571.

247. *Id.* at 575.

248. *Id.*

249. *Id.* at 575 (Baxter, J., dissenting).

250. *Id.*

interpretation.²⁵¹ Instead, the dissent suggested a threshold showing by the defendant that its First Amendment activity was connected to a public issue.²⁵² Given the original intent behind anti-SLAPP legislation, the dissent found it dubious that the California Legislature intended that *any* litigation connected to *any* oral or written statement before *any* executive, legislative, or judicial proceeding must be categorized as a SLAPP.²⁵³ The dissent then examined the procedural implications of an overly broad interpretation.²⁵⁴ The majority's decision vastly expanded the definition of a SLAPP, "thereby making the special motion to strike available in an untold number of legal actions that will bear no resemblance to the paradigm retaliatory SLAPP suit to which the remedial legislation was specifically addressed."²⁵⁵

C. Vermont's Solution

In *Felis*, the Vermont Supreme Court had its first opportunity to interpret § 1041's broad language.²⁵⁶ The Court used this opportunity to limit the scope of § 1041(i) to petitioning activity directly concerning a *public issue*.²⁵⁷ After a high-asset divorce, Felis brought a fraud complaint against his ex-wife's law firm, and the accounting firm Gallagher, Flynn & Company (GFC), which was hired during the divorce to provide expert testimony and business valuations.²⁵⁸ Felis alleged that his ex-wife's law firm colluded with GFC to build fees and bilk the marital estate.²⁵⁹ The complaint against GFC rested on the content of its expert testimony.²⁶⁰ At the conclusion of the divorce proceeding, the law firm billed Felis over \$800,000, and GFC presented an additional amount totaling \$248,000.²⁶¹

GFC filed a special motion to strike, arguing that testimony during a divorce proceeding is protected under § 1041(i).²⁶² The trial court concluded that witness immunity barred the complaint against GFC and dismissed the claim; therefore, the Court held that GFC's anti-SLAPP

251. *Id.* at 576.

252. *Id.*

253. *Id.* at 577–78.

254. *Id.* at 579.

255. *Id.*

256. *Felis v. Downs Rachlin Martin, PLLC*, 2015 VT 129, ¶ 29, 133 A.3d 836, 847.

257. *Id.* ¶ 34.

258. *Id.* ¶ 8.

259. *Id.* ¶ 6.

260. *Id.* ¶ 5.

261. *Id.* ¶ 6.

262. *Id.* ¶ 8.

motion was moot.²⁶³ Felis appealed to the Vermont Supreme Court.²⁶⁴ GFC counter-appealed and argued that the anti-SLAPP motion remained active because of the possible attorney's fees.²⁶⁵

The Vermont Supreme Court determined that the central issue in GFC's counter-appeal was whether, under the language of § 1041, Felis had brought a SLAPP against GFC.²⁶⁶ GFC contended that the plain language of § 1041(i)(1) protected testimony given during a divorce proceeding.²⁶⁷ The Court disagreed and held that Vermont's anti-SLAPP statute requires, as a threshold matter, that the protected speech concern a *public issue*.²⁶⁸ Section 1041 did not apply to GFC's testimony because a divorce proceeding is not a *public issue*.²⁶⁹

The "interplay" between §§ 1041(a) and (i) influenced the Court's limiting construction.²⁷⁰ The Court noted the *public issue* requirement in § 1041(a) and then turned to § 1041(i), which lists four specific categories of protected speech.²⁷¹ GFC argued that its divorce testimony did not need to concern a *public issue* because statements made to a judicial body fall under § 1041(i)(1), which lacks a specific *public issue* requirement.²⁷² Phrased differently, "GFC's [argument] reads the statute to mean that all testimony in a judicial proceeding inherently concerns a public issue."²⁷³ The Court acknowledged that GFC's construction was consistent with a plain reading of the statute, but ultimately disagreed with this broad interpretation.²⁷⁴ The Court noted an "internal[] inconsisten[cy]" between § 1041(a), which controls the general scope of the statute and contains a *public issue* element, and § 1041(i), which outlines the context or place the statements are made but fails to articulate a *public issue* requirement.²⁷⁵ For the Court, this internal inconsistency rendered the language "ambiguous."²⁷⁶ Further, when the plain meaning of the words in a statute

263. *Id.* ¶ 10.

264. *Id.* ¶ 11.

265. *Id.*

266. *Id.* ¶ 33.

267. *Id.* ¶ 35.

268. *Id.* ¶ 34.

269. *Id.* ¶ 35.

270. *Id.* ¶ 34. *See also supra* Part I (exploring the sub-sections of VT. STAT. ANN. tit. 12, § 1041(1) (2016)).

271. *Felis*, 2015 VT 129, ¶ 34.

272. *Id.* ¶ 35.

273. *Id.* ¶ 37.

274. *Id.* ¶ 38.

275. *Id.* ¶ 39.

276. *Id.*

contradict the statute's original purpose, the Court is "not confined to a literal interpretation."²⁷⁷

In an effort to examine § 1041's original purpose, the Court looked to the legislative history and highlighted two important findings from the Vermont Legislature.²⁷⁸ First, the Legislature was concerned with the increase in Vermont "lawsuits brought to chill" First Amendment activity.²⁷⁹ Second, the Legislature declared that "[i]t is in the public interest to encourage continued participation *in matters of public significance*, and this participation should not be chilled through the abuse of judicial process."²⁸⁰ The Court noted the historical context that gave rise to anti-SLAPP statutes—lawsuits designed to quell political speech—and found that the Legislature shared these concerns.²⁸¹ The Legislature, however, likely did not intend for the statute to reach beyond this narrow set of circumstances.²⁸² The Court, therefore, implemented the *public issue* test to more adequately track the Legislature's original intent.²⁸³

The Court also observed the constitutional implications of an overly-broad construction.²⁸⁴ Under normal circumstances, the Court gives remedial legislation like § 1041 a "liberal construction."²⁸⁵ But "[h]ere, however, the statute is attempting to define the proper intersection between two constitutional rights—a defendant's right to free speech and petition and a plaintiff's right to petition and free access to the courts."²⁸⁶ Based on this delicate equilibrium of constitutional interests, the court rejected an overly broad interpretation.²⁸⁷

The Court recognized that § 1041 was based primarily on California's statute and looked at *Briggs*, California's hallmark case for broad anti-SLAPP statutory interpretation.²⁸⁸ The Court noted its usual rule about following another state's construction of borrowed statutory language, but articulated two reasons why it was not going to follow this tradition. First, the language in § 1041(a) is inconsistent with California's interpretation.²⁸⁹

277. *Id.* ¶ 40 (quoting *Town of Killington v. State*, 172 Vt. 182, 189, 776 A.2d 395, 401 (2001)).

278. *Id.* ¶ 46.

279. *Id.*

280. *Id.*

281. *Id.* ¶ 47.

282. *Id.* ¶ 51.

283. *Id.* ¶ 52.

284. *Id.* ¶ 41.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* ¶ 39.

Historically, there had been a split in the California Courts between those that wanted a broad anti-SLAPP statutory construction versus the narrow construction found in *Zhao*.²⁹⁰ In *Briggs* the California Supreme Court settled this dispute by holding that the statute covered a broad range of activity outside of what is normally considered SLAPP circumstances.²⁹¹ California desired a bright-line rule: some cognizable way to determine the statute's scope.²⁹² Furthermore, the Court observed that *Briggs* was heavily influenced by the California amendment specifying broad statutory interpretation.²⁹³ The Vermont Legislature enacted § 1041 ten years after the California amendment, but omitted the amended language.²⁹⁴

The Court then examined the policy behind California's bright-line rule and found that this overly broad construction did not have its intended effect; it only complicated matters.²⁹⁵ While "the establishment of a bright-line rule may have simplified" some litigation, "it nevertheless dramatically increased the use of the anti-SLAPP remedy in suits far afield from the SLAPP suit paradigm"²⁹⁶ Subsequent to the *Briggs* decision, California's anti-SLAPP statute has been cited widely—indeed, in "thousands of cases," covering a plethora of issues.²⁹⁷ Approximately 5,000 California appellate decisions since 1992 have cited to California's anti-SLAPP statute—most of them after the 1997 amendment.²⁹⁸ In California, "filing a motion under the statute has become almost a matter of course."²⁹⁹ One way to reduce this overuse is through a narrow construction.³⁰⁰ In *Felis*, the Vermont Supreme Court concluded that the Vermont Legislature could not have intended for the anti-SLAPP statute to be applied as broadly as California's.³⁰¹

Finally, the Court examined GFC's divorce testimony to determine whether it met the *public issue* requirement, and concluded that a divorce

290. *Id.* ¶ 42.

291. *Id.* ¶ 43.

292. *Id.* ¶ 44.

293. *Id.* ¶ 43.

294. VT. STAT. ANN. tit. 12, § 1041 (2016); CAL. CIV. PROC. CODE § 425.16 (2015).

295. *Felis*, 2015 VT 129, ¶ 49.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* ¶ 43.

301. *Id.* ¶ 51.

proceeding is not a *public issue*.³⁰² Therefore, the Court held that the trial court's decision not to rule on GFC's motion was a harmless error.³⁰³

Felis settled on an appropriate interpretation of § 1041(i)'s broad language.³⁰⁴ As noted above, anti-SLAPP statutes originally were drafted to protect discourse on *public issues*, including: demonstrating and boycotting peacefully, petitioning against development, lobbying legislative bodies, writing to elected officials, and whistleblowing. These limited SLAPP circumstances warrant a strong remedial punch. To avoid the abuse of strong anti-SLAPP measures, however, the statute's scope should mirror the problem.³⁰⁵ The *public issue* test provides a solution and confines the statute's scope to its original intent.³⁰⁶ Additionally, this test strikes the right balance between public petitioning rights for one group of citizens, while maintaining the right of redress for another.³⁰⁷ Vermont's approach, therefore, serves as a model for other states examining the outer limits of anti-SLAPP statutes.

CONCLUSION

Anti-SLAPP statutes seek to remedy a hidden evil.³⁰⁸ This Note supports anti-SLAPP measures; it is this admiration that motivates the constitutional inquiry, and the quest to make sure that Vermont's statute passes constitutional muster. Currently, Vermont is halfway there. Unfortunately, the burden-shifting procedure in § 1041 unconstitutionally burdens the plaintiff's access to our courts.³⁰⁹ The Vermont Legislature should amend the statute to emulate California's anti-SLAPP burden-shifting procedure.³¹⁰ On the other hand, Vermont's *public issue* test provides a solution for states—including California—that interpret anti-SLAPP statutes far beyond the scope of the original intent.³¹¹ Vermont and California share an interesting dichotomy; or, put another way, an inverse

302. *Id.* ¶ 53.

303. *Id.*

304. *See supra* Introduction (discussing advantages and disadvantages of anti-SLAPP statutes).

305. *See Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 579 (Cal. 1999) (Baxter, J., dissenting) ("The special motion to strike a SLAPP suit is a drastic and extraordinary remedy.").

306. *Id.*

307. *Felis*, 2015 VT 129, ¶ 41.

308. *See supra* Introduction (discussing advantages and disadvantages of anti-SLAPP statutes).

309. *See supra* Part II (explaining the burden-shifting issue of anti-SLAPP statutes).

310. *See supra* Part II.E (discussing California's probability standard).

311. *See supra* Part III.C (analyzing Vermont's solution to the scope issue of anti-SLAPP statutes).

mirror image. Vermont should learn from the California approach to anti-SLAPP burden-shifting procedure; California should learn from Vermont's method of limiting the statute's scope.

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