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## The Dark Side of Direct Democracy: Protecting Political Speech From the Use of SLAPPs in North Dakota's Political Process

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# THE DARK SIDE OF DIRECT DEMOCRACY: PROTECTING POLITICAL SPEECH FROM THE USE OF SLAPPS IN NORTH DAKOTA’S POLITICAL PROCESS

## ABSTRACT

A “SLAPP” is a Strategic Lawsuit Against Public Participation. SLAPPs are designed to silence individuals by forcing them to spend time and money to defend themselves in court. They are not designed to be winning suits based on the merits of the claim. Originally, SLAPPs involved real estate developers suing anti-developers in tort for interfering with economic advantage. Their use in silencing political opponents has taken a new and ugly turn in North Dakota. In *Empower the Taxpayer v. Fong*,<sup>1</sup> a group promoting Measure 2 on the 2012 primary ballot, eliminating property taxes in the state, sued dozens of public officials speaking out against the measure in their capacities as public officials. Political speech is considered the most protected form of speech in the United States. This article outlines the history of SLAPPs, identifies the suit litigated against public officials in North Dakota as a SLAPP, and addresses the possible remedies and deterrent measures available to defendants. North Dakota has no specific laws to address the deleterious effects of SLAPPs on defendants. This article provides judicial and legislative guidance on remedying their effects on political speech.

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1. 2012 ND 119, 817 N.W.2d 381.

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## I. WHAT IS A SLAPP?

Strategic Lawsuits Against Public Participation, or SLAPPs,<sup>2</sup> are meritless lawsuits designed to silence a defendant by forcing them to spend time and energy defending themselves in court. SLAPP plaintiffs, by definition, have improper motives.<sup>3</sup> A plaintiff's motive in an identified SLAPP is to chill a defendant's speech or activity and to send a message to others who echo the defendant's action.<sup>4</sup> SLAPP suits are not brought with the intention of winning on the merits but to intimidate and harass political critics into silence.<sup>5</sup> The message sent to the critics of SLAPP plaintiffs' activity presents a disturbing chilling effect and an "attempt to prevent expected future, competent opposition on subsequent public policy issues; [and] the intent to intimidate and, generally, to send a message that opposition will be punished . . . ."<sup>6</sup> The primary, practical motivations of SLAPP plaintiffs are delay, expense, and distraction.<sup>7</sup> Another motivation for plaintiffs is to depoliticize the activity by removing the controversy from the public or legislative realm into the judiciary where the process can be more easily controlled. This gives the plaintiffs a win-loss scenario, and thereby further stifle public debate.<sup>8</sup> Winning, however, is not the goal of SLAPP plaintiffs. Defendants win eighty to ninety percent of all SLAPPs on the merits.<sup>9</sup> SLAPPs have an interesting history in the United States and more than a few states have taken measures to curb their effect.

## A. HISTORY OF SLAPPS

Professor George W. Pring in his article *SLAPPs: Strategic Lawsuits Against Public Participation*<sup>10</sup> coined the term "SLAPP" and provides an

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2. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989).

3. *Id.* at 3-9.

4. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 403 (1993).

5. Robert H. Boyle, *Activists at Risk of Being SLAPPed*, SPORTS ILLUSTRATED, Mar. 25, 1991, at 6.

6. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 30 (1989).

7. Barker, *supra* note 4, at 405.

8. *Id.*

9. See George W. Pring, "SLAPPs": *Strategic Lawsuits Against Public Participation: A New Ethical, Tactical, and Constitutional Dilemma*, C534 ALI-ABA 937, \*23, June 25, 1990, available in WESTLAW, JLR Database.

10. Pring, *supra* note 2, at 4.

exhaustive examination of what he terms suits that “stop citizens from exercising their political rights or to punish them for having done so.”<sup>11</sup> SLAPPs date back to the 1970s, involving suits against environmental and community advocates. These groups found themselves in a “role reversal”<sup>12</sup> when brought into court by corporations and business interests to defend their advocacy activities.<sup>13</sup> He found four commonalities: “(1) a civil complaint or counterclaim for monetary damages and/or injunction; (2) filed against non-governmental individuals and/or groups; (3) because of their communications to a government body, official, or the electorate; (4) on an issue of some public interest or concern.”<sup>14</sup> His study of SLAPPs found suits in all corners of judicial activity, including urban/suburban development and zoning, complaints against public officials and employees, environmental/animal rights, civil/human rights, neighborhood problems, and consumer protection.<sup>15</sup>

SLAPPs were pervasive, despite federal<sup>16</sup> and state<sup>17</sup> constitutional provisions, civil rights laws, privilege and immunity statutes, and court decisions that “expressly protect citizens in their efforts to participate in and influence governmental decision making.”<sup>18</sup> The Petition Clause of the First Amendment has been expanded to protect any lawful attempt by citizens to promote or discourage government action at all levels, including the electorate.<sup>19</sup> The right to petition is said to be “among the most precious of the liberties guaranteed by the Bill of Rights”<sup>20</sup> and one of the “fundamental principles of liberty and justice which lie at the base of all civil and political institutions.”<sup>21</sup> These fundamental principles serve as the backdrop for the reasons SLAPPs must be identified and quashed. Public participation in the political process is vital to effective representative democracy and the free market of ideas.<sup>22</sup> SLAPPs run counter to these

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11. *Id.* at 5-6.

12. *Id.* at 7.

13. *Id.*

14. *Id.* at 8.

15. *Id.* at 9.

16. *See* U.S. CONST. amend. I.

17. *See* N.D. CONST. art. 1, § 5.

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

19. *Id.* (citing S. DOC. NO. 96-16, at 1141-45 (1982); *see also* Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Anti-trust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1244 (1984); John E. Thurman, Annotation, *Right of Petition and Assembly Under Federal Constitution's First Amendment—Supreme Court Cases*, 86 L. Ed. 2d 758 (1987)).

20. *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967).

21. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

22. Pring, *supra* note 2, at 11-12.

fundamental principles as violations of “petition-clause-protected activity.”<sup>23</sup>

SLAPPs come in the guise of torts against defendants, such as defamation, business torts (interference with contract, business, economic expectancy), judicial torts (abuse of process and malicious prosecution), conspiracy, constitutional-civil rights violations, and nuisance.<sup>24</sup> The most egregious and expensive SLAPPs were originally brought by real estate developers against private citizens who were opposed to massive development projects.<sup>25</sup> Their voices were suddenly silenced by multi-million dollar lawsuits. One example pitted a developer against nine homeowner groups who testified against township approval of a proposed thirty-six home luxury development on prime shorefront acreage.<sup>26</sup> The suit was brought as a libel action with damages in the amount of \$11,200,000.<sup>27</sup> The suit was dismissed three and a half years later on appeal.<sup>28</sup> After SLAPPs were identified by legal scholars and their impact shown, many states moved to address their deleterious effects.

#### B. BRIEF OVERVIEW OF STATE ANTI-SLAPP MEASURES

Twenty-eight states, the District of Columbia, and the U.S. Territory of Guam have enacted anti-SLAPP statutes.<sup>29</sup> States have developed different

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23. *Id.* at 12.

24. *Id.* at 9.

25. *Id.* at 13-15.

26. *SRW Assocs. v. Bellport Beach Prop. Owners*, 517 N.Y.S.2d 741, 742 (N.Y. App. Div. 1987).

27. *Id.*

28. *Id.* at 334.

29. *See* ARIZ. REV. STAT. ANN. §§ 12-751 to 752 (2011); ARK. CODE ANN. §§ 16-63-501 to 508 (2005); CAL. CIV. PROC. CODE § 425.16 (West 2004); DEL. CODE ANN. tit. 10, §§ 8136 to 8138 (1999); D.C. CODE §§ 16-5501 to 5505 (Supp. 2011); FLA. STAT. § 720.304(4) (2010); FLA. STAT. § 768.295 (2011); GA. CODE ANN. § 9-11-11.1 (2006); GA. CODE ANN. § 51-5-7(4) (2000); 7 GUAM CODE ANN. §§ 17101-17109 (2005); HAW. REV. STAT. §§ 634F-1 to 4 (2007); 735 ILL. COMP. STAT. 110/15-/25 (2011); IND. CODE §§ 34-7-7-1 to 10 (2008); LA. CODE CIV. PROC. ANN. art. 971 (2005); ME. REV. STAT. tit. 14, § 556 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis 2006); MASS. GEN. LAWS ch. 231, § 59H (2009); MINN. STAT. §§ 554.01-.05 (2010); MO. REV. STAT. § 537.528 (2008); NEB. REV. STAT. §§ 25-21, 241, 246 (2004); NEV. REV. STAT. §§ 41.637, .650-.670 (2012); N.M. STAT. ANN. § 38-2-9.1 (Supp. 2011); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2009); N.Y. C.P.L.R. 3211(g) (McKinney Supp. 2012); OKLA. STAT. tit. 12, § 1443.1 (2010); OR. REV. STAT. §§ 31.150-.155 (Supp. 2011); 27 PA. CONS. STAT. §§ 7707, 8301-8303 (2009); R.I. PUB. LAWS §§ 9-33-1 to 4 (1997); TENN. CODE ANN. §§ 4-21-1001 to 1004 (2011); TEX. CIV. PRAC. & REM. CODE §§ 27.001-.011 (Supp. 2011); UTAH CODE ANN. §§ 78B-6-1401 to 1405 (West 2009 & Supp. 2011); VT. STAT. ANN. tit. 12, § 1041 (2012); WASH. REV. CODE §§ 4.24.510-.525 (2010). In addition, the Michigan and North Carolina legislatures, and the U.S. Congress, recently introduced anti-SLAPP bills; however, none has become law. *See* Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009); H.B. 5036, 95th Leg., Reg. Sess. (Mich. 2009); Citizen Participation Act, H.B. DRH30241-MH-45, 2011 Gen. Assemb. of N.C. (N.C. 2011). In addition, although Colorado, Connecticut, and West

approaches to SLAPPs, some drawn narrowly to protect limited forms of speech, while others are drawn more broadly.<sup>30</sup> The various statutes provide a “mechanism for a defendant to file a dispositive motion that requires the plaintiff to come forward with evidence showing the claims are viable . . . .”<sup>31</sup> Attorneys’ fees and other penalties for bringing meritless claims attempting to stifle the defendant’s free speech or petition rights are also a hallmark of state anti-SLAPP statutes.<sup>32</sup> When an anti-SLAPP motion is invoked by the defendant, many of the statutes shift the burden to the plaintiff in the pleading stage to require the plaintiff to show probability or possibility of success on the merits.<sup>33</sup> This is in sharp contrast to the traditional pleading standard of a “short and plain statement” required by plaintiffs in civil litigation.<sup>34</sup>

In states like Arizona, the anti-SLAPP statute narrowly protects statements to government authorities in the context of an initiative, referendum or recall effort, statements made to a government body in connection with an issue up for consideration, or statements made for the purpose of influencing a government action.<sup>35</sup> Statements made to the general public, such as a letter to the editor of a paper denouncing a development company’s proposed construction, would not qualify for the immunity.<sup>36</sup> Treating identical statements differently depending on whether they are in front of a government panel or in a newspaper seems illogical and antithetical to notions of protected First Amendment freedom of speech.<sup>37</sup>

In contrast to Arizona, California’s anti-SLAPP statute is broad and protects any act of a person in furtherance of that person’s right to petition

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Virginia do not have anti-SLAPP statutes, the courts in those states have recognized a common law defense to lawsuits that retaliate against efforts by citizens to petition the government. *See* *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859, 862 (Colo. 2004) (holding that a First Amendment defense to a retaliatory lawsuit be handled as a motion for summary judgment); *Royce v. Willowbrook Cemetery, Inc.*, No. X08CV010185694, 2003 WL 431909 (Conn. Super. Ct. Feb. 3, 2003) (recognizing that a plaintiff’s objectively baseless defamation suit could violate the Connecticut Unfair Trade Practices Act); *Harris v. Adkins*, 432 S.E.2d 549, 552 (W. Va. 1993) (concluding that because the defendant’s speech involved the exercise of the right to petition, his statements were absolutely protected).

30. Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State’s New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495, 502 (2012).

31. *Id.* at 502-03.

32. *Id.*

33. *Id.*

34. FED R. CIV. P. 8(a)(2).

35. ARIZ. REV. STAT. ANN. § 12-751 (2006).

36. Johnson, *supra* note 30, at 507.

37. *Id.*

or free speech “in connection with a public issue.”<sup>38</sup> California defined an “act in furtherance” broadly as:

[A]ny 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; . . . or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.<sup>39</sup>

This broad protection from SLAPPs does seem to invite misuse, as well as the possibility that the definition of “public interest” could be construed too broadly by reviewing courts.<sup>40</sup>

Other states have struggled to strike a medium between the narrow Arizona style anti-SLAPP statute and California’s broad rendition of the protective measure. Florida’s statute prevents governmental entities from filing SLAPPs and prohibits suits regarding statements made in the context of homeowners’ associations.<sup>41</sup> Florida’s statute is a unique example of the legislature taking notice of the increase in SLAPP lawsuits filed against private individuals by various commercial entities, but it fails to protect any speech outside the realm of homeowner association proceedings.<sup>42</sup> Washington evolved from protecting only speech made to government officials<sup>43</sup> to adding speech protection if made to the public that relates to a matter of public concern.<sup>44</sup>

### C. SLAPPS AND POLITICAL SPEECH

SLAPPs have a chilling effect on political speech and an undeniable negative impact on public participation. Canan identifies four general motivations of plaintiffs who bring these meritless claims:

(1) The intent to retaliate for successful opposition on an issue of public interest; (2) the attempt to prevent expected future, competent opposition on subsequent public policy issues; (3) the intent to intimidate and, generally, to send a message that opposition will be punished; and (4) a view of litigation and the

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38. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2011).

39. *See id.* § 425.16(e).

40. *See* discussion *infra* Part IV.

41. *See* FLA. STAT. § 720.304 (2010); FLA. STAT. § 768.295 (West 2011).

42. Johnson, *supra* note 30, 508 n.81.

43. WASH. REV. CODE § 4.24.510 (2010).

44. WASH. REV. CODE § 4.24.525 (2010).

use of the court system as simply another tool in a strategy to win a political and/or economic battle.<sup>45</sup>

Such motivations provide insight into the “total disregard for the citizenship rights of others and a lack of concern over what reduced political debate means for American democracy.”<sup>46</sup> The effect of one SLAPP in California chilled the participation of over five hundred families who wished to comment on the desirability of maximum housing development in their community.<sup>47</sup> In a liberal democracy, free speech is the cornerstone that allows for efficient and effective self-rule. Here, an entire community is stunned into silence by a multi-million dollar lawsuit alleging their complicity in a tortious act of interference with business advantage, development, or pollution that lacked a countervailing voice to curb its negative effects on the community.<sup>48</sup> The effect travels further outside of the community as citizens read of significant lawsuits laid at the feet of those who would dare make statements against unbridled development.<sup>49</sup>

The Petition Clause<sup>50</sup> facilitates informed political change.<sup>51</sup> It is designed to protect the individual by limiting the ability of government or entities from stifling political debate. The sovereignty of the individual, in the context of political discussion, shines as one of our brightest achievements in American democracy. One writer put it eloquently:

Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin.

The principal of the sovereignty of the people, which is always to be found, more or less, at the bottom of almost all human institutions, generally remains there concealed from view. It is obeyed without being recognized, or if for a moment it be brought to light, it is hastily cast back into the gloom of the sanctuary.

In America, the principle of the sovereignty of the people is not either barren or concealed, as it is with some other nations; it is recognized by the customs and proclaimed by the laws; it spreads freely, and arrives without impediment at its most remote

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45. Canan, *supra* note 6, at 30.

46. *Id.*

47. *Id.*

48. *Id.* at 31.

49. *Id.*

50. *See* U.S. CONST. amend. I.

51. Canan, *supra* note 6, at 31.



consequences. If there be a country in the world where the doctrine of the sovereignty of the people can be fairly appreciated, where it can be studied in its application to the affairs of society, and where its dangers and its advantages may be judged, that country is assuredly America.<sup>52</sup>

It is against this backdrop of lofty, fundamental democratic principles that the purveyors of an insidious SLAPP in North Dakota silenced dozens of public officials. North Dakota has no specific laws aimed at reducing or eliminating the effects of SLAPPs. The special-interest group, Empower the Tax Payer, took full advantage of this deficiency.

## II. EMPOWER THE TAXPAYER V. FONG

The ballot initiative process in North Dakota is enshrined in the state's constitution.<sup>53</sup> While the legislative process is vested in the legislature, "the people reserve the power to propose and enact laws by the initiative, including the call for a constitutional convention; to approve or reject legislative Acts, or parts thereof, by the referendum; to propose and adopt constitutional amendments by the initiative."<sup>54</sup> Whether this process of ballot initiative, or direct democracy, is wise for a self-governing people is beyond the scope of this article. Also beyond the scope of this article, is the question of whether eliminating North Dakota's property tax is good public policy. This article focuses on the deleterious effect the special interest group, Empower the Taxpayer, had on the political process. In *Empower*, a group of public officials was hauled into court for taking a position allegedly in violation of state law contrary to the proponents of Measure 2. Measure 2 was placed on the June 12, 2012 primary ballot. The initiative sought to eliminate property taxes in the state and mandate the legislature replace the money with different sources of revenue to be distributed to the various political subdivisions which currently rely on property tax revenue. The measure read:

This initiated constitutional measure would amend sections 1, 4, 14, 15, and 16 of Article X of the North Dakota Constitution and repeal sections 5, 6, 7, 9, and 10 of that same article, eliminating property taxes, poll taxes, and acreage taxes, effective January 1, 2012. The measure would require the Legislative Assembly to replace lost revenue to cities, counties, townships, school districts,

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52. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 55-56 (University of Michigan Press, 1863).

53. N.D. CONST. art. III, § 1.

54. *Id.*

and other political subdivisions with allocations of various state-level taxes and other revenues, without restrictions on how these revenues may be spent by the political subdivisions.<sup>55</sup>

Empower the Taxpayer, on behalf of itself and signatories to the ballot initiative, filed an action on February 14, 2012, requesting a temporary restraining order that defendants comply with the North Dakota Corrupt Practices Act<sup>56</sup> and discontinue distributing false or misleading statements or take a position on Measure 2.<sup>57</sup> After the defendants asserted the suit was having a chilling effect, the court scheduled a hearing in early April.<sup>58</sup> In mid-April, the court issued a decision as a matter of law dismissing the action.<sup>59</sup> The court reflected that North Dakota's Corrupt Practices Act is a criminal statute that failed to provide any statutory right to private cause of action.<sup>60</sup> In other words, unless the legislature includes a provision in a criminal statute for private citizens to sue, no civil right exists to sue in court.

Seven days before the vote on Measure 2, the North Dakota Supreme Court heard the appeal.<sup>61</sup> The dismissal was affirmed on the same grounds the lower court posited.<sup>62</sup> The court looked to the language of the Corrupt Practices Act<sup>63</sup> as to whether the legislature impliedly intended to create a private right of action, as it was not expressly state in the Act.<sup>64</sup> The court pointed directly to a 1991 case where the court held that an alleged violation of the Act<sup>65</sup> is not grounds for a civil action.<sup>66</sup> The court's decision was handed down only two days after oral argument on June 7,

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55. Initiated Constitutional Measure No. 2, North Dakota Secretary of State Office, *available at* <https://vip.sos.nd.gov/pdfs/Portals/BallotLanguageMeasure2-June12,2012.pdf>.

56. N.D. CENT. CODE § 16.1-10 (2011).

57. Brief for Appellant, ¶ 8, *Empower the Taxpayer v. Fong*, 2012 ND 119, 817 N.W.2d 381, *available at* <http://www.ndcourts.gov/court/briefs/20120191.atb.htm>.

58. *Id.* ¶ 10.

59. *Id.* ¶ 11.

60. *Id.*

61. *Empower the Taxpayer v. Fong*, 2012 ND 119, ¶ 1, 817 N.W.2d 381, 382. It is noteworthy to mention that North Dakota is one of the few states that do not regularly employ an appellate level court. Consequently, the North Dakota Supreme Court is typically the main appellate body in the state judiciary. All lower court rulings are appealable by statute to the court. *See* N.D. CONST. art. VI, § 2.

62. *Empower the Taxpayer*, ¶ 6, 817 N.W.2d at 384.

63. N.D. CENT. CODE § 16.1-10 (2011).

64. *Empower the Taxpayer*, ¶ 4, 817 N.W.2d at 383.

65. *Id.*

66. *District One Republican Comm. v. District One Democrat Comm.*, 466 N.W.2d 820, 827-28 (N.D. 1991). Although in *District One* the ruling involved an election contest and not a ballot initiative dispute, the court adopted the reasoning. *Empower the Taxpayer*, ¶ 5, 817 N.W.2d at 383.

2012 and five days before the vote on Measure 2.<sup>67</sup> Considering the claim, the defendants in *Empower* failed to include any counter-claim for malicious prosecution, Rule 11<sup>68</sup> relief, or request for attorney's fees. Sanctions for violation of Rule 11 of the North Dakota Rules of Civil Procedure must be made on motion and can include monetary damages and other non-monetary sanctions that suffice to deter repetition of the conduct.<sup>69</sup>

The court opinion failed to mention anything about the chilling effect the suit had on the defendants. However, during oral argument Justice Sandstrom asked the SLAPP plaintiffs' attorney, "[Y]our interpretation would say that elected officials surrender their First Amendment rights on classic political questions, the most protected area under the first amendment as far as speech is concerned?"<sup>70</sup> Three things indicate that this suit is a classic example of a SLAPP. First, both the lower court and the Supreme Court spoke to the impact the suit had on the ability of a defendant to exercise a First Amendment right to free speech. Second, at both levels, the case was expedited because of those concerns. Third, the high court handed down its decision affirming the suit's dismissal a mere two days after oral argument. Although no specific study of the average length of time between oral argument and a decision exists, from a cursory gloss of periods in the past year, parties typically expect a decision published months after oral arguments. Because of the nature of *Empower*, and its implications on a ballot measure vote a mere handful of days from oral argument, an assumption can be made that the court wished to hand down its decision as quickly as possible.

Despite the state high court's efficiency in deciding *Empower*, the damage had been done. The state's tax commissioner, various school board

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67. *Empower the Taxpayer*, at ¶ 5, 817 N.W.2d 384.

68. Arguably, N.D. R. CIV. P. 11(b)(1)-(2) was violated when the case was filed in the first instance in February, 2012. Rule 11 reads:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper, whether by signing, filing, submitting, or later advocating it, an attorney or self-represented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . .

*Id.*

69. N.D. R. CIV. P. 11(c)(4). Limitations on monetary sanctions are found in N.D. R. CIV. P. 11(c)(5).

70. Oral Argument at 5:01, *Empower the Taxpayer v. Fong*, 2012 ND 119, 817 N.W.2d 381, available at <http://www.ndcourts.gov/Broadcast/20120191.rm>.

members, state representatives, state senators, and other public officials with first-hand knowledge and experience with the tax structure of North Dakota, and the implications of changing the structure, were sued based on what can be colored as a specious legal argument at best. No legal authority in statute or case law pointed to plaintiffs' argument that the North Dakota Corrupt Practices Act<sup>71</sup> provided a private right of action. These public officials were asked by private citizens to comment on the effects of Measure 2. They were silenced by Empower the Taxpayer. The result of *Empower the Taxpayer* demands that North Dakota take a serious look at anti-SLAPP measures to protect political speech from SLAPPs' deleterious effects.

### III. POSSIBLE REMEDIAL AND DETERRENT SOLUTIONS

Proponents of anti-SLAPP measures have proposed a myriad of procedural tools to combat SLAPPs such as court-ordered discovery costs, specific pleading standards, and accelerated preemptive judicial review.<sup>72</sup> These rules could be proffered by the legislature or by the courts. Substantive remedies include variations on traditional tort defenses and what are commonly referred to as SLAPP-back measures.<sup>73</sup>

#### A. PROCEDURAL REMEDIES

Probably the most basic procedural remedial measure that a party defending a SLAPP could utilize is specific pleading standards set by the rules of civil procedure. The current standard in federal court, and most state courts, including North Dakota, requires a plaintiff to plead "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>74</sup> The pleading standard for claims alleging fraud or mistake require a heightened standard where a "party must state with particularity the circumstances constituting fraud or mistake."<sup>75</sup> A heightened standard of pleading for claims thought to be SLAPPs will allow "judicial triage that is essential to dismiss SLAPPs early."<sup>76</sup> Of course, some procedural mechanism, such as a defendant pleading stage motion to invoke an anti-SLAPP statute, could require plaintiffs to meet the heightened pleading standard. The value of this pleading standard is evident when utilized in

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71. N.D. CENT. CODE § 16.1-10 (2009).

72. Barker, *supra* note 4, at 407-09.

73. *Id.* at 414-48.

74. *Id.* at 407.

75. FED R. CIV. P. 9(b); N.D. R. CIV. P. 9(b).

76. Barker, *supra* note 4, at 407.

conjunction with other procedural requirements, such as discovery costs, accelerated review, and dismissal standards.<sup>77</sup>

Discovery generally incurs the greatest expense for parties in terms of time and money.<sup>78</sup> The liberal discovery rules allowed by rules of civil procedure are generally to the benefit of SLAPP plaintiffs since one of their major motivations is to tie up defendants' time and resources.<sup>79</sup> A dissenting judge in a West Virginia case advocated for the possibility of amending the rules of procedure to require plaintiffs in identified SLAPP-like claims to pay upfront costs of discovery and legal fees that would be refundable if the claim was won by the plaintiffs on the merits.<sup>80</sup> Another possible measure allows a special motion to strike that defendants may use to stay discovery pending a determination of whether the claim is a SLAPP.<sup>81</sup> These discovery measures would alleviate the intimidation associated with onerous discovery requests and deny SLAPP plaintiffs an important tool to cause delay and require defendants to incur unaffordable discovery costs.<sup>82</sup>

Preventing SLAPPs by expediting judicial proceedings is one of the most important components of any court or statutory scheme.<sup>83</sup> Expediting the judicial process "will not only alleviate its chilling effect on defendants, but it will also create disincentives for plaintiffs seeking primarily to delay and distract their opponents."<sup>84</sup> Some courts, in lieu of anti-SLAPP procedural statutes, have determined that challenges to plaintiff allegations based on constitutional rights moves the summary judgment phase back to

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77. *Id.* at 407-08.

78. *Id.* at 408.

79. See FED R. CIV. P. 26(b)(1); Victor J. Cosentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 407-08 (1991); see also *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), cert. denied, 430 U.S. 940 (1977)).

The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case.

*Id.*

80. *Webb v. Fury*, 282 S.E.2d 28, 47 (W. Va. 1981) (Neely, J., dissenting).

[D]iscovery and the costs of discovery and attendant legal fees themselves may chill the free exercise of first amendment rights, in appropriate circumstances of gross imbalance of assets, I would permit the trial court to order the advance of defendant's costs associated with discovery from plaintiff. Should the plaintiff succeed on the merits, these payments would be refunded.

*Id.*

81. See CAL. CIV. PROC. CODE § 425.16(g) (2011).

82. *Barker*, *supra* note 4, at 408.

83. *Id.*

84. *Id.*

the dismissal stage of the pre-trial process.<sup>85</sup> California implemented a standard of review which subjects claims involving First Amendment rights and a “public issue” to an immediate motion to strike and review of whether or not the plaintiff has a “probability” of prevailing on the merits.<sup>86</sup>

The standard of dismissal poses a challenge to anti-SLAPP procedural measures as courts dislike dismissing claims at the demurrer stage of litigation.<sup>87</sup> The rules of civil procedure at the pre-discovery phase will typically only allow dismissal if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>88</sup> Implementing a standard of review for potential SLAPPs would involve judicial review of the “probability” or “possibility” of the plaintiff winning on the merits outlined in the pre-discovery phase; though using the term “probability” would likely invoke a preponderance test and “possibility” would likely utilize a substantial evidence test.<sup>89</sup> Both tests would also likely require some level of evidence, perhaps submitted by affidavit, speaking to the merits of the claim.<sup>90</sup> These tests could be codified by statute or courts could use their common-law holdings in cases to act separately.

All of these procedural remedies to protect defendants against unwarranted, meritless claims could be employed in some version by the legislature of the state of North Dakota or by the Supreme Court. In terms of *Empower*, the lower court, prompted by the defendants, did the right thing and expedited hearing the case when the chilling effect of speech was asserted.<sup>91</sup> The process could have been further expedited if an accelerated review mechanism had been in place. Also, an accelerated appellate review measure could have moved the case more quickly to the high court where

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85. See *Protect Our Mountain Env't, Inc. v. Dist. Court*, 677 P.2d 1361, 1370 (Colo. 1984).

86. See CAL. CIV. PROC. CODE § 425.16(b)(1) (2011).

87. Barker, *supra* note 4, at 409.

88. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see FED. R. CIV. P. 12(b)(6); North Dakota follows the federal standard set forth in *Conley*. See also *Rose v. United Equitable Ins. Co.*, 2001 ND 154, ¶ 10, 632 N.W.2d 429, 434 (citing *Johnson & Maxwell, Ltd. v. Lind*, 288 N.W.2d 763, 765 (N.D.1980)). Massachusetts also follows the federal standard set forth in *Conley*. *Bell v. Mazza*, 474 N.E.2d 1111, 1115 (Mass. 1985). Similarly, in New York a defendant must show “conclusively that [the] plaintiff has no cause of action.” [And] that, in light of the evidence presented, ‘no significant dispute exists.’” *SRW Assocs. v. Bellport Beach Prop. Owners*, 517 N.Y.S.2d 741, 743 (N.Y. App. Div. 1987) (citations omitted). Colorado courts will dismiss “if recovery would be constitutionally prohibited, and . . . such infirmity appears on the face of the complaint.” *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249, 1251 (Colo. App. 1983).

89. Barker, *supra* note 4, at 411-13.

90. *Id.* at 409-13.

91. Brief for Appellant, ¶ 10, *Empower the Taxpayer v. Fong*, 2012 ND 119, 817 N.W.2d 381, available at [http://www.ndcourts.gov/\\_court/briefs/20120191.atb.htm](http://www.ndcourts.gov/_court/briefs/20120191.atb.htm).

the dismissal was affirmed. A heightened pleading standard would also have moved the case quickly through the process. These measures deal mainly with the pleading stage of the SLAPP. Substantive anti-SLAPP measures to complement the procedural measures are available as well.

#### B. SUBSTANTIVE REMEDIES

Substantive remedies include variations on traditional tort defenses, duties owed to the court, and other common defensive counterclaims or countersuits referred to as SLAPP-backs. The implementation of most substantive remedies relies heavily on the courts to use holdings in case law that potentially benefit a defendant in SLAPPs. Privileges, certain forms of immunities, and attorney's fees are also aspects of substantive statutory law possibly helpful to SLAPP defendants.

The best defense to a SLAPP is to be informed of the possibility of becoming a SLAPP defendant due to your actions.<sup>92</sup> Citizens concerned with SLAPPs in some of the more common claims may take specific measures.<sup>93</sup> In considering speaking out against a powerful real estate developer or public figure, citizens would be wise to avoid personal or ad hominem attacks, insults, or inflammatory statements.<sup>94</sup> Advocacy groups can nullify some of the more serious outcomes by incorporating and purchasing insurance that would cover potential litigation arising from their activities.<sup>95</sup> These practical, prophylactic measures hardly soften the blow of SLAPPs and are inadequate if a lay person unfamiliar with the workings of the court system finds themselves victims of a SLAPP.

Also inadequate, but presently available, are provisions in attorney ethical codes that carry with them sanctions designed to deter bad behavior.<sup>96</sup> Under Rule 11 of the Rules of Civil Procedure, an attorney may not file suit to only harass or delay.<sup>97</sup> Under the ABA Model Rules of Professional Conduct, the lawyer need not subjectively believe the argument will prevail; however, the lawyer must believe an argument is made in good faith including that modification or reversal of existing law be made in good faith.<sup>98</sup> Rule 11 violations, and violations of the Rules of Professional Responsibility are generally difficult to prove and sanctions do

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92. Barker, *supra* note 4, at 414.

93. *Id.* at 414-15.

94. *Id.*

95. *Id.*

96. *Id.* at 416.

97. See FED. R. CIV. P. 11(b); N.D. R. CIV. P. 11(b)(1)-(2) (*see supra* note 68 for full text).

98. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2012); N.D. RULES OF PROF'L CONDUCT R. 3.1 (2006).

not in general provide enough deterrence to SLAPP plaintiffs and their counsel.<sup>99</sup> In *Empower*, defendants offered no motion to the court that Rule 11 had been violated. One explanation is that it would extend the dispute further since plaintiffs' attorneys are afforded the opportunity to defend their actions which requires more pleading and briefing on issues related to the violation. Again, the motivation of forcing defendants to incur costs and spend time would be satisfied in some respect with further litigation.

The right to petition the government for redress of grievances offers citizens a cognizable privilege to political advocacy.<sup>100</sup> The First Amendment right includes "the right of public debate, including the right to publish truthful statements, the right to demonstrate in public, and the right to report violations or make complaints to government bodies."<sup>101</sup> The right to petition is powerful, and one of the most effective defenses to SLAPPs that involve private citizens making statements to governmental bodies or the public in general.<sup>102</sup> Courts have stressed time and again the fundamental importance of the right to petition.<sup>103</sup> Even if a SLAPP defendant does not raise the petition privilege, it is not considered waived.<sup>104</sup> The right to petition does not rely on the outcome of the case based on its merits; instead it is a nearly absolute privilege collateral to any tort liability alleged or proven by a plaintiff.<sup>105</sup> A defendant having a financial or personal interest at stake in the SLAPP does not overcome the petition privilege.<sup>106</sup> The Noerr-Pennington doctrine,<sup>107</sup> or the sham

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99. Barker, *supra* note 4, at 419.

100. U.S. CONST. amend. I.

101. Paula Goedert, *The SLAPP Suit Threat: Squelching Public Debate*, 22 AM. LIBR. 1003, 1003 (1991).

102. Barker, *supra* note 4, at 426.

103. See, e.g., *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); *Sierra Club v. Butz*, 349 F.Supp. 934, 936 (N.D. Cal. 1972); *Matossian v. Fahmie*, 161 Cal. Rptr. 532, 535 (Ct. App. 1980) (citing *Am. Civil Liberties Union v. Bd. of Educ.*, 10 Cal. Rptr. 647 (Ct. App. 1961)); see also *Edwards v. Habib*, 397 F.2d 687, 690 (D.C. Cir. 1968) (noting "it is clear beyond peradventure that [the right of the people to petition the government for redress of grievances] is at the core of protected First Amendment speech . . .").

104. See *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249, 1251 (Colo. App. 1983).

105. See *Matossian*, 161 Cal. Rptr. at 535-36.

106. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). This landmark case extended the petitioning privilege to defendants who were financially interested in the subject matter of their petitioning and were therefore inferably malicious or at least selfishly motivated.

107. The original line of cases articulating the Supreme Court's sham exception rules was in the antitrust area. See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Noerr Motor Freight, Inc.*, 365 U.S. at 144. Subsequent courts, however, have applied the sham exception outside the antitrust setting. See, e.g., *Matossian*, 161 Cal. Rptr. at 536; *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361, 1366 (Colo. 1984).



exception rule, states that petitioning cannot be “completely to prevent a competitor from gaining access to government; the petitioner must be genuinely seeking redress.”<sup>108</sup> In *Empower*, defendants could have made a claim of petition privilege based on their right of free speech and privilege to take part in the political process. Although it seems counterintuitive, since they are public officials not petitioning the government, the privilege includes petition to the electorate and a general privilege of participating in public discourse.<sup>109</sup>

SLAPP-backs generally involve claims for malicious prosecution and/or abuse of process.<sup>110</sup> SLAPP-backs are only effective as counterclaims and may be too little, too late.<sup>111</sup> They generally involve a large damage award<sup>112</sup> if successful and are highly publicized, but very rarely do they succeed.<sup>113</sup> Their main drawback is SLAPP-backs fail to “actually prevent the negative effects of SLAPPs, such as delay, initial cost, and intimidation.”<sup>114</sup>

Abuse of process in terms of SLAPP-backs involves claiming the suit is proper or legitimate but for some improper, collateral purpose.<sup>115</sup> The elements of an abuse of process counterclaim are: (1) an “ulterior motive,” (2) wrongful use of process, and (3) proximate causation of damage or harm.<sup>116</sup> A SLAPP defendant must prove the plaintiff used the initial suit as a threat or blackmail.<sup>117</sup> These elements, especially “ulterior motive,” are difficult to prove as with most lawsuits that require an explanation of motive. Abuse of process is procedural in that it is unrelated to the merits of the original SLAPP.<sup>118</sup> Unlike malicious prosecution, which attacks the merits of the SLAPP, abuse of process seeks to prove the initial suit was used “as a threat or a club . . . a form of extortion.”<sup>119</sup>

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108. Barker, *supra* note 4, at 428.

109. See discussion *infra* Part I.A., note 19.

110. Barker, *supra* note 4, at 431.

111. *Id.*

112. *Id.* at 431-32.

113. *Id.*

114. *Id.* at 432.

115. *Id.* at 433.

116. *Id.*

117. *Id.* at 434.

118. *Id.*

119. *Spellens v. Spellens*, 317 P.2d 613, 627 (1957) (quoting WILLIAM L. PROSSER, PROSSER ON TORTS § 100 (2d. ed. 1955)); see also *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 232 Cal. Rptr. 567, 575 (1986) (explaining that “lack of probable cause” element of malicious prosecution cannot be circumvented by expanding abuse of process to encompass alleged improper filing of lawsuit).

Malicious prosecution, on the other hand, requires: (1) the original SLAPP plaintiff won the initial action; (2) the SLAPP plaintiff must not have had probable cause to bring the suit; and (3) the SLAPP defendant as plaintiff in a malicious prosecution claim must show the original SLAPP was filed for an improper purpose.<sup>120</sup> “In malicious prosecution, the filing of the suit itself is improper because the plaintiff had no probable cause and a malicious purpose.”<sup>121</sup> The defense to malicious prosecution is “advice of counsel” which requires that the defendant had sought and followed the lawyer’s advice and followed it before commencing or maintaining the action and had made “full, fair and complete disclosure” to the attorney of all relevant information.<sup>122</sup> And, the defendant must have actually believed the plaintiff was liable.<sup>123</sup> The advantage of a malicious prosecution is the potential for large damage awards.<sup>124</sup> The drawback is delay caused by the required element that the original SLAPP plaintiff won the SLAPP suit.<sup>125</sup>

The defendants in *Empower* could have pursued any number of the aforementioned options. The fact that they did not may speak to their inadequacy as deterrents. Attorney’s fees and punitive damages are available to plaintiffs of successful SLAPP-back counterclaims and are largely determined by state law limits on awards. It would be fitting for the legislature to consider tailoring larger damage awards for counterclaims involving SLAPPs if only to publicize their displeasure with SLAPPs and, hopefully, deter potential SLAPP plaintiffs. A close look to a jurisdiction like California, with a history of anti-SLAPP legislation and case law, may provide insight into how North Dakota might best protect political speech in the context of SLAPPs.

#### IV. CALIFORNIA’S HISTORY WITH SLAPPS

California enacted its first anti-SLAPP law in 1992.<sup>126</sup> Since then, it has been amended six times.<sup>127</sup> Since anti-SLAPP measures are relatively new in American jurisprudence, many issues arose out of early

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120. *Id.*

121. Barker, *supra* note 4, at 435.

122. Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 444 n.87 (1991).

123. *Id.*

124. Barker, *supra* note 4, at 434.

125. *Id.* at 434-35.

126. 1992 Cal. Legis. Serv. Ch. 726 (West).

127. See 1993 Cal. Legis. Serv. Ch. 1239 (West); 1999 Cal. Legis. Serv. Ch. 960 (West); 2005 Cal. Legis. Serv. Ch. 535 (West); 2009 Cal. Legis. Serv. Ch. 65 (West); 2010 Cal. Legis. Serv. Ch. 328 (West).

applications.<sup>128</sup> Most questions have been answered as the statute has matured.<sup>129</sup> The questions most vital for examination in this article as potential difficulties the North Dakota courts might encounter involve scope, discovery, and the award of attorney's fees to successful SLAPP defendants.

#### A. CALIFORNIA: A MODEL FOR NORTH DAKOTA?

One of the threshold issues that California faced in applying its relatively new anti-SLAPP statute was its reach and scope.<sup>130</sup> California courts wrestled with whether the special motion to strike<sup>131</sup> required a defendant to show that the lawsuit was initiated with a forbidden purpose. The California Supreme Court in *Equilon Enterprises, LLC v. Consumer Cause, Inc.*<sup>132</sup> held the defendant need not make a showing of improper purpose and the subjective intent of the SLAPP plaintiff is immaterial.<sup>133</sup> The court stated "a neutral, easily applied definition for SLAPP's avoids subjective judgments about filers' or targets' motives, good faith, or intent."<sup>134</sup> In a companion case, the court also addressed whether to apply an intent-to-chill test on the plaintiff's motives.<sup>135</sup> Subjective intent of SLAPP plaintiffs is difficult to prove with certainty. Thus, the court stuck to the objective legal standard of whether the chilling occurred.<sup>136</sup>

Similarly, the courts struggled early as to whether the statute should be applied in "paradigm" cases.<sup>137</sup> That is, should the statute solely serve to

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128. Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 735 (2003).

129. *Id.*

130. *Id.* at 736-37.

131. See CAL. CIV. PROC. CODE § 425.16(b) (1995).

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.

*Id.*

132. 52 P.3d 685 (Cal. 2002).

133. Braun, *supra* note 128, at 737.

134. *Equilon Enterprises*, 52 P.3d at 690 (internal quotations omitted). The Court also noted that an "intent to chill" requirement could conflict with the privilege statute, Civil Code section 47. "Were we to impose an intent-to-chill proof requirement, petitioning that is absolutely privileged under the litigation privilege would be deprived of anti-SLAPP protection whenever a moving defendant could not prove that the plaintiff harbored an intent to chill that activity. Our construction avoids that anomalous result." *Id.* Finally, the Court referred to policy reasons against imposing such a requirement. *Id.* at 692-93.

135. *City of Cotati v. Cashman*, 52 P.3d 695 (Cal. 2002).

136. Braun, *supra* note 128, at 737-38.

137. *Id.* at 738.

quash attempts by large land developers from silencing their critics, or should it apply more broadly to various defendants facing a SLAPP's chilling effect?<sup>138</sup> It eventually became accepted that the anti-SLAPP measure applied broadly and “[b]oth legislative mandate and judicial interpretation have expanded the application of the anti-SLAPP statute beyond its paradigmatic origins.”<sup>139</sup> Questions also arose as what was meant by “a public issue or an issue of public interest.”<sup>140</sup> In *Rivero v. American Federation of State, County and Municipal Employees*,<sup>141</sup> the court held broadly the public issue requirement of the statute was met where “the subject statements . . . concerned a person or entity in the public eye, conduct that could directly affect a large number of people beyond the direct participants[,] or a topic of widespread, public interest.”<sup>142</sup> The California courts broadened the application of public issue even further, stating:

More particular questions about the reach of the statute also have been answered. Speech by governments and public officials is covered by the statute.<sup>143</sup> Speech by mail is covered.<sup>144</sup> Things said about candidates or issues in an election campaign are covered.<sup>145</sup> The same seems to be true of prominent election participants who are not themselves candidates.<sup>146</sup> Union elections

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138. *Id.*

139. *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504, 508 (Ct. App. 2001); *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1109 (9th Cir. 2003). Years earlier, *Matson v. Dvorak*, 46 Cal. Rptr. 2d 880, 885 (Ct. App. 1995), held the same way: although the paradigm “provides useful background regarding SLAPP suits, we are governed by familiar rules of statutory interpretation in evaluating whether section 425.16 can be applied to this action.” *Id.* As the statute provided no paradigmatic limitation, the courts would not add one. *Id.*

140. Braun, *supra* note 128, at 745.

141. 130 Cal. Rptr. 2d 81 (Ct. App. 2003).

142. *Id.* at 89 (citations omitted).

143. *See Bradbury v. Superior Court*, 57 Cal. Rptr. 2d 207 (Ct. App. 1996) (ruling that the statute covers district attorney's speech); *Mission Oaks Ranch, Ltd. v. Cnty. of Santa Barbara*, 77 Cal. Rptr. 2d 1, 11 (Ct. App. 1998) (ruling county government speech is protected); *Schroeder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 337 n. 3 (Ct. App. 2002) (ruling city council speech is protected). In *Schroeder*, the court inserted a disclaimer into its footnote, saying “we do not categorically hold that all lawsuits against governmental agencies and officials automatically qualify for treatment under section 425.16. . . .” *Id.*

144. *See Macias v. Hartwell*, 64 Cal. Rptr. 2d 222, 225 (Ct. App. 1997).

145. *See, e.g., Conroy v. Spitzer*, 83 Cal. Rptr. 2d 443, 447-48 (Ct. App. 1999). Section 425.16 applies to suits involving statements made during a political campaign, statements made in connection with a recall election, statements made in a political flyer concerning a candidate and statements made in a recall petition. *Macias*, 64 Cal. Rptr. 2d at 222-24. *Roberts v. Los Angeles Cnty. Bar Ass'n.*, 129 Cal. Rptr. 2d 546, 552 (Ct. App. 2003) (Bar Association's evaluation of judicial candidate). “Our Constitution protects everyone—even politicians.” *Beilenson v. Superior Court*, 52 Cal. Rptr. 2d 357, 359 (Ct. App. 1996).

146. *See Sipple v. Found for Nat'l Progress*, 83 Cal. Rptr. 2d 677, 685 (Ct. App. 1999) (“[T]he details of appellant's career and appellant's ability to capitalize on domestic violence

count as elections for this purpose.<sup>147</sup> But although activities related to an election are covered, where the election-related activity is itself illegal, the statute offers no protection, because the activity was not a “valid” exercise of constitutional rights as stated in the preamble.<sup>148</sup> It does not matter whether the speech is made on behalf of others,<sup>149</sup> and “[t]here is no requirement that the writing or speech be promulgated directly to the official body,<sup>150</sup> recruiting and encouraging others to speak out on a matter of public interest [comes] within the protection of section 425.16.<sup>151</sup>”

For the purpose of analysis in the context of scope and reach, the above list deals mainly with types of political speech that should be protected from SLAPPs in North Dakota. Although seemingly broad, the above forms of protected speech address California’s treatment of the type of political activity found in *Empower*.

The California courts also dealt with their discretionary role in limiting or granting discovery when a plaintiff is attempting to show a prima facie case.<sup>152</sup> Subsection (g) of the statute provides:

All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.<sup>153</sup>

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issues in his advertising campaigns for politicians known around the world, while allegedly committing violence against his former wives, are public issues, and the article is subject to the protection of section 425.16.”).

147. See Macias, 64 Cal. Rptr. 2d at 224.

148. See Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 866-67 (Ct. App. 2001) (discussing the laundering of campaign contributions). Cf. CAL. CIV. PROC. CODE §425.16(a) (2003) (“the valid exercise of the constitutional rights . . .”). In *Paul for Council*, “the court noted that the probability that the Legislature intended to give defendants section 425.16 protection from a lawsuit based on injuries they are alleged to have caused by their illegal campaign money laundering scheme is as unlikely as the probability that such protection would exist for them if they injured plaintiff while robbing a bank to obtain the money for the campaign contributions or while hijacking a car to drive the campaign contributions to the post office for mailing. Under the facts demonstrated by this record, we cannot permit defendants to wrap themselves in this vital legislation.” Paul, 102 Cal. Rptr. 2d at 871.

149. See Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564 (Cal. 1999).

150. Ludwig v. Superior Court, 43 Cal. Rptr. 2d 350, 357 (Ct. App. 1995).

151. Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 54 Cal. Rptr. 2d 830, 835 (Ct. App. 1996) (citing Ludwig, 43 Cal. Rptr. 2d at 357); see also Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 456-57 (Ct. App. 1994); Braun, *supra* note 128, at 745-47.

152. *Id.* at 763.

153. CAL. CIV. PROC. CODE § 425.16(g) (2011).

California courts have held that unless there is a showing the matter proposed to be discovered materially implicates the elements of the prima facie showing in order to avoid a strike, a court may deny and stay the request.<sup>154</sup> The threshold requirement here seems reasonable in the context of a possible suit that has the potential to chill the type of political speech found in *Empower*.

How and when to award attorney's fees to a prevailing defendant in a SLAPP suit has posed two major problems for the California courts. First, if a SLAPP plaintiff is subject to a motion to strike and voluntarily dismisses the suit, whether attorney's fees should be awarded has become an issue in the courts.<sup>155</sup> One court held that a defendant was not required by statute to receive fees after the SLAPP was dismissed prior to a ruling on the motion to strike.<sup>156</sup> Second is the determination of what is a "reasonable" fee within the discretion of the court.<sup>157</sup> Both of these questions regarding attorney's fee awards to prevailing defendants would fall within the discretion of North Dakota judges. The award of fees is an important tool, not just deter SLAPP suits, but to guarantee that SLAPP defendants are not rolled over by interests with deep pockets. The ultimate goal of these measures is to level the playing field to a degree where plaintiffs will think twice before deciding to bring a SLAPP suit to silence their political or economic opponents.

In *Empower*, California's motion to strike anti-SLAPP measure would have expedited the process and un-chilled the public officials' rights to political speech. The question here is whether North Dakota should broadly apply the SLAPP statutes to protect all manner of public interest issues, or narrowly draft a statute to cover only the political speech that was denied in *Empower*. I would advocate for somewhere in the middle. The statute should not be so narrow that it only covers public officials and their petition privilege to make statements to the electorate. Instead, it should be tailored to protect the political speech itself. It seems simple to assume that only public officials could be subject to the type of suit that Empower the Taxpayer brought. Speech is the object of protection. It just so happens that a SLAPP affected the political speech of public officials in *Empower*. Nor should the political speech be protected with anti-SLAPP legislation in the context of only ballot initiatives. The protection proffered in such

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154. *Schroeder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 343 (Ct. App. 2002).

155. Braun, *supra* note 128, at 764.

156. *Coltrain v. Shewalter*, 77 Cal. Rptr. 2d 600, 608 (Ct. App. 1998).

157. *See Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620, 638 (Ct. App. 1996); *Metabolife Int'l, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1222 (S.D. Cal. 2002).

legislation should protect all political activity, including, but not limited to, elections, advocacy, notice and comment, and union organizing.

## V. CONCLUSION

In sum, there seems to be little dispute that political speech should be protected from the chilling effects of meritless lawsuits. SLAPPs are a common tool that powerful interests use to silence, delay, diffuse, or otherwise gain unfair political advantage. Empower the Taxpayer, as a citizen group, took full advantage of North Dakota's lack of anti-SLAPP measures when they brought dozens of public officials into court. North Dakota's court system wisely rejected the suit, but the damage had been done. As a liberal democratic society, we want public officials and the electorate to have a rigorous debate of the issues. If the public does not like the outcomes, the ballot box should be the final arbiter. Over half of the states have passed laws to deal with the deleterious effect of SLAPPs. The substantive and procedural mechanisms mentioned here provide guidance to North Dakota's legislature and courts. Political speech is of vital importance to our democracy and should be protected when the occasion calls for it. This is such an occasion.

*Brent Jaenicke*

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\* 2014 J.D. candidate, University of North Dakota School of Law. I would like to dedicate this article to my parents Beverly and Duane without whom I would not have this opportunity to pursue my dreams. I love you both dearly.