SLAPP to the Face: Why Iowa's New Anti-SLAPP Statute Should Apply in Federal Court

Andrew J. Brueck[*]

ABSTRACT: The First Amendment prevents the government from interfering with certain fundamental rights. Of particular importance are the right to speak freely on matters of public concern and the right to petition the government for the redress of grievances. These rights allow Americans to freely discuss issues of public concern without fear of official retaliation. However, a disturbing trend has developed in recent decades. Powerful individuals and organizations have taken advantage of procedural flaws in civil codes to file harassing lawsuits against critics. These suits pressure critics into silence under threat of financial ruin and pose a serious threat to the free speech rights of the average American. To combat these abusive lawsuits, many states have amended their civil codes to close loopholes and provide defendants with procedural vehicles to dispose of these lawsuits while enduring little to no financial harm. Iowa has recently joined the ranks of these states. This Note argues Iowa's federal courts should allow this new statute to apply in federal court to offer full protection to Iowans and their free speech rights.

[*] J.D. Candidate, The University of Iowa College of Law, 2026; B.A., Political Science, Iowa State University of Science and Technology, 2023.

INTRODUCTION

The First Amendment to the U.S. Constitution protects many of the freedoms Americans hold most dear.[1] The amendment protects these freedoms from governmental infringement.[2] The U.S. Supreme Court has interpreted this provision to broadly protect these rights to allow public discussion to flourish.[3] This interpretation applies even where the government is not directly performing the suppression.[4]

However, a new trend has developed that threatens Americans' First Amendment rights, particularly the rights to speak freely on matters of public concern and to petition the government for the redress of grievances.[5] Large organizations and powerful individuals are filing frivolous lawsuits against their critics.[6] These suits, often called strategic lawsuits against public participation ("SLAPP"), are designed to force dissenters to refrain from criticism or face substantial legal fees.[7] In response to the threat posed by these lawsuits, many states have passed anti-SLAPP laws.[8] These laws create new procedural processes for defendants to quickly dispose of SLAPPs.[9]

This Note argues that Iowa's new anti-SLAPP law should be applied in federal court. Part I discusses the importance of the freedoms of speech and petition, explains how SLAPPs work, analyzes how anti-SLAPP laws combat SLAPPS, and highlights the hallmarks of an effective anti-SLAPP law. Part I

1. U.S. CONST. amend. I.
2. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268–71 (1964).
3. *Id.*
4. *See id.* at 265.
5. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 3–6 (1989).
6. *Id.*
7. *Id.*
8. DAN GREENBERG, DAVID KEATING & HELEN KNOWLES-GARDNER, INST. FOR FREE SPEECH, ANTI-SLAPP STATUTES: A REPORT CARD 4–8 (2023), https://www.ifs.org/wp-content/uploads/2023/10/2023-Anti-SLAPP-Report-Card.pdf [https://perma.cc/GUE9-YCZW].
9. *Id.*

also notes the Iowa General Assembly's attempts to pass an anti-SLAPP law, culminating in the passage of House File 472. Part II reviews the new anti-SLAPP law, discussing how it remedies the issues faced by Iowans, and then examines the Federal Rules of Civil Procedure and how courts have limited the application of anti-SLAPP laws in federal court. Part III proposes that, rather than limiting the application of state anti-SLAPP laws, the Iowa federal courts should allow them to apply fully.

I. WHAT ARE SLAPP SUITS AND WHY ARE THEY A PROBLEM?

This Part explains what a SLAPP is and how they threaten Americans' fundamental, First Amendment rights. Section I.A gives a brief history of the First Amendment by focusing on the U.S. Supreme Court's free speech jurisprudence and emphasis on open public dialogue,[10] highlighting how the Iowa Supreme Court has emphasized similar values in First Amendment cases,[11] and discussing the right to petition jurisprudence. Section I.B analyzes how SLAPPs target protected speech and undermine both the U.S. Supreme Court and Iowa Supreme Court's goals in protecting free speech. Section I.C explains what anti-SLAPP statutes are and how they remedy the harm posed by SLAPPs. Finally, Section I.D examines the differences between state anti-SLAPP statutes and what makes an anti-SLAPP statute good or bad.

A. *THE FIRST AMENDMENT: WHY DO WE HAVE IT?*

The First Amendment to the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[12] The rights this amendment protects are essential aspects of the freedom Americans enjoy. Of particular importance to this Note are the freedom of speech and the freedom to petition the government.

1. Freedom of Speech

The right to free speech is a particularly important part of our scheme of constitutional freedom.[13] Over the course of history, the Free Speech Clause has come to be seen as a core American liberty.

Although the modern U.S. Supreme Court has robustly protected speech from governmental interference,[14] the Supreme Court's early First

10. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (citing Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937))).

11. *See* Bertrand v. Mullin, 846 N.W.2d 884, 899 (Iowa 2014).

12. U.S. CONST. amend. I. The First Amendment is often subdivided into its various clauses. For example, the section reading "Congress shall make no law . . . abridging the freedom of speech" is often called the Free Speech Clause. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 472 (2010).

13. *See* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

14. *See, e.g.*, *Stevens*, 559 U.S. at 468–82.

Amendment cases offered little protection to speakers who criticized matters of public interest. In *Schenck v. United States*, for instance, the Supreme Court refused to protect a person from criminal sanctions for criticizing conscription.[15] But even as the Supreme Court allowed governments to criminalize "bad" speech, some Justices recognized the importance of open discussion and criticism in a democratic society.[16] In *Abrams v. United States*, the Supreme Court upheld a man's sedition conviction for urging industrial workers to oppose intervention in Russia.[17] In dissent, Justice Holmes argued that the government had no place regulating unpopular speech.[18] In Holmes's view, the First Amendment required the government to stay out of the "market" of ideas.[19] Rather than allowing the government to suppress speech, Holmes proposed allowing the public to judge for themselves whether to agree with another's ideas.[20]

Justice Holmes was not the only justice who took issue with the Court's approach to the First Amendment. In *Whitney v. California*, the Court upheld a sedition conviction for being a member of the communist party.[21] Building upon *Schenck* and *Abrams*, the *Whitney* Court held that speech that "tend[s] to incite" unlawful action may be punished consistent with the First Amendment.[22] In a concurring opinion,[23] Justice Brandeis also criticized the majority's interpretation of the First Amendment.[24] Justice Brandeis argued that the Founding Fathers intended the First Amendment as a bulwark for the discovery of political truth through discussion of ideas.[25] As such, the First Amendment protects "the power of reason as applied through public discussion."[26] Put another way, the First Amendment empowers Americans to criticize and express their opinions as they see fit, which is necessary for a robust public discourse.

Though Justices Holmes and Brandeis argued valiantly, their views failed to command a majority at the time. However, as the composition of the Supreme Court changed, the Court's view of the First Amendment changed, too. Notably, the Supreme Court overruled its decision in *Whitney* and

15. Schenck v. United States, 249 U.S. 47, 51–53 (1919).

16. Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

17. *Id.* at 619–20, 624 (majority opinion).

18. *Id.* at 630–31 (Holmes, J., dissenting).

19. *Id.* at 630.

20. *See id.* at 630–31; *see also* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

21. Whitney v. California, 274 U.S. 357, 371–72 (1927).

22. *Id.* at 371.

23. Justice Brandeis concurred on jurisdictional grounds but did not join the majority holding with respect to the First Amendment. *See id.* at 380 (Brandeis, J., concurring); *see also id.* at 359–62 (majority opinion) (discussing the jurisdictional issue).

24. *Id.* at 372–80 (Brandeis, J., concurring).

25. *Id.* at 375–76.

26. *Id.* at 375.

strengthened protections for free speech in accordance with the views of Justices Brandeis and Holmes.[27]

No case better reflects the Supreme Court's shift than *New York Times Co. v. Sullivan*.[28] In *Sullivan*, the Supreme Court considered a libel judgment against the New York Times ("Times").[29] The Times published an advertisement criticizing the Montgomery, Alabama police for their handling of civil rights protests.[30] Some of the claims in the advertisement were inaccurate, though the Times claimed they had no reason to doubt their accuracy at the time of publication.[31] The Supreme Court reversed the judgment against the Times, holding that a speaker commenting on the actions of a public official can only be held liable for defamation when they make a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[32] In support of the decision, the Court's reasoning closely resembles the reasoning employed by Justices Holmes and Brandeis.[33] The Court went so far as to call Justice Brandeis's opinion in *Whitney* the "classic formulation" of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[34] *Sullivan* clearly signaled the Supreme Court's assent to the idea that the First Amendment protects robust public discussion.

The Iowa Supreme Court has also understood the First Amendment as protecting public discussion.[35] In *Bertrand v. Mullin*, a candidate for public office sued his opponent for libel based on an attack ad that accused the candidate of "marketing a dangerous sleep drug to children."[36] The opponent subsequently admitted that he had no knowledge of whether the candidate had actually marketed dangerous drugs to children and an associate of the candidate acknowledged that the ad "was a 'pretty flimsy attack.'"[37] The Iowa Supreme Court, applying *Sullivan*, held that the defendant did not act with the requisite "disregard for the truth."[38] It explained that the First Amendment

27. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam); *see also id.* at 450–54 (Douglas, J., concurring) (arguing that the Court's prior First Amendment case law was not faithful to Holmes's dissent in *Gitlow*).

28. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264–74 (1964).

29. *Id.*

30. *Id.* at 256–58.

31. *Id.* at 258–61.

32. *Id.* at 280.

33. *Compare* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."), *and* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."), *with Sullivan*, 376 U.S. at 269–70 (emphasizing the importance of free expression on matters of public concern to the constitutional structure).

34. *Sullivan*, 376 U.S. at 270.

35. Bertrand v. Mullin, 846 N.W.2d 884, 899–900 (Iowa 2014).

36. *Id.* at 888–90.

37. *Id.* at 889.

38. *Id.* at 891, 901.

protects "trenchant public discourse"[39] and "pillorying barbs some may regard as offensive and outrageous."[40] The *Bertrand* opinion shows that the Iowa Supreme Court construes the First Amendment in a similar manner to the U.S. Supreme Court.[41]

2. Freedom to Petition the Government for Redress of Grievances

Another important right protected by the First Amendment is the right to petition. The right to petition is considered a "cognate right[]" of the right to speech—two rights of the same general nature.[42] "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives."[43] The right has several aspects, protecting the ability to bring suit in court[44] and the ability to communicate with public officials.[45] The U.S. Supreme Court has said that the Petition Clause has deep roots in the history of the United States and was a core value of the Framers.[46] According to the Court, the petition right was born of the "same ideals . . . [as] the freedoms to speak, publish, and assemble."[47] Just like the freedom of speech, the Supreme Court considers the freedom to petition to be an essential part of the democratic process.

B. WHAT IS A SLAPP?

SLAPP stands for "Strategic Lawsuit Against Public Participation."[48] The term "SLAPP" was coined by Professors George Pring and Penelope Canan.[49] The term refers to meritless civil lawsuits intended to prevent citizens from exercising their right to speak out on matters of public concern.[50] For example, *New York Times Co. v. Sullivan* is arguably a SLAPP given the relatively trivial inaccuracies alleged by the plaintiffs.[51] SLAPPs appear like any normal

39. *Id.* at 899 (citing Garrison v. Louisiana, 379 U.S. 64, 73–74 (1964)).

40. *Id.* at 900 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

41. *Compare id.* at 899–900 (noting that the First Amendment protects "withering criticism" as part of robust public debate), *with* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–71 (1964) (explaining that the First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

42. Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

43. *Id.*

44. *Id.* at 387.

45. McDonald v. Smith, 472 U.S. 479, 482 (1985).

46. *Id.* at 482–83.

47. *Id.* at 485.

48. Pring, *supra* note 5, at 4.

49. Julio Sharp-Wasserman & Evan Mascagni, *A Federal Anti-SLAPP Law Would Make Section 230(c)(1) of the Communications Decency Act More Effective*, 17 FIRST AMEND. L. REV. 367, 377 (2019).

50. *See* Pring, *supra* note 5, at 5–6; Sharp-Wasserman & Mascagni, *supra* note 49, at 376; Cheryl Mullin & Erica Mahoney, *Strategic Lawsuits Against Public Participation: Avoiding the Sting of an Anti-SLAPP Challenge*, 40 FRANCHISE L.J. 647, 648 (2021).

51. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 258–59 (1964) ("It is uncontroverted that some of the statements . . . were not accurate descriptions of events which occurred in Montgomery. Although [Black] students staged a demonstration on the State Capitol steps, they

civil suit, the majority of which involve claims for defamation.[52] However, the primary purpose underlying these suits is not to recover damages for a legal wrong, but instead to force the defendant to spend time, money, and emotional energy fighting against the suit.[53]

SLAPPs are intended to pressure speakers who make critical statements into withdrawing or retracting their criticisms.[54] Frequently, plaintiffs in SLAPPs are businesses, public officials, and governmental organizations—parties with deep pockets that can pursue meritless litigation.[55] Meanwhile, defendants are often local community members participating in public discourse and commenting on matters of public concern.[56] Thus, they struggle to cover the costs of maintaining their defense.[57] The median cost of defending a meritless defamation suit is around $39,000, but defending a SLAPP has the potential to run into the millions.[58] Because the American rule generally requires each party to bear their own legal costs, even a favorable resolution for the defendant constitutes a pyrrhic victory.[59] Rather than bear the cost of litigation, defendants who lack financial resources often opt to retract their speech.[60]

When the SLAPP phenomenon first began, existing civil procedure codes and common law remedies provided little protection to defendants.[61] For example, courts look only at the four corners of a civil complaint when considering a motion to dismiss.[62] Because SLAPP plaintiffs seek primarily to harass and annoy the defendant, they can creatively draft their complaints to

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sang the National Anthem and not 'My Country, 'Tis of Thee.' Although nine students were expelled by the State Board of Education, this was . . . for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion . . . . Although the police were deployed near the campus in large numbers on three occasions, they did not at any time 'ring' the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.").

52. Pring, *supra* note 5, at 9.

53. Mullin & Mahoney, *supra* note 50, at 648.

54. Sharp-Wasserman & Mascagni, *supra* note 49, at 376.

55. *See* Jeffrey Vizcaino, Note, *Sinclair's Nightmare: SLAPP-ing Down Ag-Gag Legislation as Content-Based Restrictions Chilling Protected Free Speech*, J. ANIMAL & ENV'T L., Spring 2016, at 49, 71.

56. Pring, *supra* note 5, at 3–5, 8.

57. Mullin & Mahoney, *supra* note 50, at 648.

58. David Keating, *Estimating the Cost of Fighting a SLAPP in a State with No Anti-SLAPP Law*, INST. FOR FREE SPEECH (June 16, 2022), https://www.ifs.org/blog/estimating-the-cost-of-fighting-a-slapp-in-a-state-with-no-anti-slapp-law [https://perma.cc/BC4N-BT8B].

59. *See* Vizcaino, *supra* note 55, at 71.

60. *See id.*

61. Mullin & Mahoney, *supra* note 50, at 648–49; Vizcaino, *supra* note 55, at 71–72.

62. *See, e.g.*, Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 164 (1993) ("We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.").

survive a motion to dismiss.[63] This forces defendants to submit to discovery, which can be ruinously expensive.[64] Though a motion for summary judgment can dispose of cases that lack a genuine dispute of material fact, the costs associated with such motions are very high.[65] If the SLAPP survives a motion for summary judgment, the defendant is required to incur even more costs to defend the case at trial.[66] And even if the defendant wins at trial, they usually do not get their legal fees back.[67]

Further, the common law causes of action that successful defendants can bring in response to bogus lawsuits are not a meaningful remedy.[68] Claims for malicious prosecution and abuse of process do provide potential avenues for victims of SLAPPs to recover their losses,[69] but given the high costs of defending against a SLAPP in the first place, it is often difficult for victims of SLAPPs to spare the expense of a new lawsuit.[70] And as the plaintiff in the new suit, a successful SLAPP defendant must prove that the SLAPP plaintiff abused the judicial process, which is typically more difficult to show than merely defending against an unfounded claim.[71]

SLAPP suits pose a serious threat to open trade in ideas that the Supreme Court says the First Amendment protects. The First Amendment protects free speech from governmental interference.[72] Civil actions use the power of the courts to resolve disputes and therefore implicate the First Amendment.[73] Accordingly, SLAPPs abuse the right to petition to use the power of the government to interfere with the right of citizens to speak freely, either in communications to government officials or to the public at large.[74] Left unchecked, SLAPPs allow private actors to weaponize the government to censor protected speech or petitioning that a SLAPP plaintiff finds inconvenient or undesirable.

C. WHAT IS AN ANTI-SLAPP LAW?

Recognizing the threat posed by SLAPPs, states began to respond by passing anti-SLAPP laws.[75] These laws aim to reduce the power of a SLAPP by

63. Vizcaino, *supra* note 55, at 71–72; *see also* Ken White, *Chapter One: How Do Lawsuits Work Without an Anti-SLAPP Statute, and Why Is That a Problem?*, POPEHAT REP. (Oct. 26, 2020), https://popehat.substack.com/p/what-is-an-anti-slapp-anyway-a-lawsplainer [https://perma.cc/C8UT-3GMG] (discussing the ways a SLAPP plaintiff can tailor their complaint to survive a motion to dismiss).

64. White, *supra* note 63; *cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (discussing the high expenses associated with antitrust discovery).

65. FED. R. CIV. P. 56(a); White, *supra* note 63.

66. White, *supra* note 63.

67. Vizcaino, *supra* note 55.

68. Mullin & Mahoney, *supra* note 50, at 648–49.

69. *Id.*

70. *Id.* at 648.

71. *Id.* at 649.

72. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468 (2010).

73. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

74. Pring, *supra* note 5, at 11–12.

75. Vizcaino, *supra* note 55, at 72 (noting that California passed the first anti-SLAPP law).

removing some of the hurdles that defendants face to dispose of one.[76] Anti-SLAPP laws vary in scope, but they all aim to address the threat to free expression that SLAPPs pose.[77] As of October 2023, thirty-three states and the District of Columbia have some form of anti-SLAPP law.[78]

1. How Do Anti-SLAPP Laws Work?

Anti-SLAPP statutes weaken SLAPPs by changing the procedural rules defendants have at their disposal when defending against a suit.[79] In order to invoke these procedures, the defendant must file a motion showing the plaintiff's suit implicates a type of expression covered by the anti-SLAPP statute.[80] States vary in the scope of their particular statutes, meaning speech covered in one state is not necessarily covered in another.[81] If the defendant demonstrates that the suit implicates covered speech, the burden shifts to the plaintiff to provide evidence showing they are likely to prevail.[82] If the plaintiff meets their burden, then the defendant's anti-SLAPP motion is denied and the case proceeds as normal.[83] If the plaintiff fails, however, then the defendant's motion is granted and the case gets dismissed.[84] Typically, a prevailing defendant is also entitled to have their attorney's fees covered by the plaintiff.[85]

It is hard to overstate how much anti-SLAPP statutes level the playing field. As shown above, SLAPPs are effective because they are hard to dispose of and are a significant financial drain.[86] Anti-SLAPP laws provide a way to quickly discharge a SLAPP suit without having to accept the plaintiff's allegations as true,[87] taking away the plaintiff's pleading advantage.[88] And by shifting the defendant's fees to the plaintiff, anti-SLAPPs remove the primary method by which SLAPP plaintiffs pressure defendants.[89] Put another way, anti-SLAPP statutes prevent the use of the judicial process to silence critical speech by remedying the structural issues that allow SLAPP plaintiffs to intimidate defendants into retreat.[90] Anti-SLAPP statutes are therefore essential to protecting the First Amendment rights of Americans.

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76. GREENBERG ET AL., *supra* note 8, at 4–5.

77. Mullin & Mahoney, *supra* note 50, at 649.

78. GREENBERG ET AL., *supra* note 8, at 6–8.

79. Ken White, *Chapter Two: How Do Anti-SLAPP Statutes Fix Problems with Civil Litigation and Help Defendants?*, POPEHAT REP. (Oct. 29, 2020), https://popehat.substack.com/p/what-is-an-anti-slapp-anyway-a-lawsplainer-44b [https://perma.cc/QH7S-7XJ8].

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See supra* Section I.B.

87. White, *supra* note 79.

88. *See supra* text accompanying note 59.

89. *See supra* text accompanying notes 50–57.

90. GREENBERG ET AL., *supra* note 8, at 6–7.

2. Strong and Weak Anti-SLAPP Laws

Although anti-SLAPP laws generally provide strong protection against SLAPPs, not all anti-SLAPP statutes are created equal. Because anti-SLAPP laws are passed at the state level, statutes vary wildly in terms of what speech is covered and what procedural vehicles are available for defendants.[91] The Institute for Free Speech publishes an annual report cataloging every state's anti-SLAPP law and grading their effectiveness.[92] Of the thirty-eight jurisdictions with anti-SLAPP statutes, eighteen received an A-range grade, three received a B-range grade, four received a C-range grade, and nine received a D-range grade.[93] Jurisdictions without an anti-SLAPP statute received F grades.[94] States with strong anti-SLAPP laws provide protection to a broad range of speech.[95] Hawaii's anti-SLAPP law, for example, applies to any "[e]xercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the [U.S.] Constitution or the Hawaii State Constitution, on a matter of public concern."[96] On the other hand, states with weak anti-SLAPP laws only provide coverage to a narrow range of speech.[97] Delaware's anti-SLAPP only covers actions brought by "public applicant[s] or permittee[s],"[98] while Pennsylvania's only applies to speech concerning environmental regulations.[99] As one can see, the effectiveness of an anti-SLAPP depends heavily on the scope of coverage.

An anti-SLAPP law's effectiveness is also defined by the procedural protections that are available.[100] Strong anti-SLAPP statutes provide various procedural safeguards in conjunction with an anti-SLAPP motion, such as staying all proceedings upon the filing of a motion and providing a right for immediate appeal in the event the motion is denied in addition to the burden-shifting and fee-shifting provisions.[101] Weak anti-SLAPP statutes do not provide one or more of these procedural safeguards.[102] For instance, Nebraska's anti-SLAPP law does not provide a right of interlocutory appeal, nor does it stay proceedings upon the filing of an anti-SLAPP motion.[103] Although this

91. *See id.* at 12–14.

92. *Id.* at 3.

93. *Id.* at 7. Five jurisdictions (Montana, Idaho, Ohio, Minnesota, and Iowa) have enacted anti-SLAPP laws since the Institute for Free Speech's 2023 report. *Updates to the Anti-SLAPP Report Card*, INST. FOR FREE SPEECH (May 1, 2024), https://www.ifs.org/blog/updates-to-the-2023-anti-slapp-report-card [https://perma.cc/3EWQ-3DSV]. Additionally, Maine and Pennsylvania have enacted new anti-SLAPP laws that offer expanded protections for defendants. *Id.*

94. GREENBERG ET AL., *supra* note 8, at 7.

95. *Id.* at 18–20.

96. HAW. REV. STAT. § 634G-2 (2023).

97. GREENBERG ET AL., *supra* note 8, at 18–20.

98. DEL. CODE ANN. tit. 10, § 8136 (2025).

99. 27 PA. CONS. STAT. § 8302 (2024).

100. GREENBERG ET AL., *supra* note 8, at 20–22.

101. *Id.*

102. *Id.*

103. *Id.* at 49–51. While Nebraska does not stay proceedings upon the filing of an anti-SLAPP motion, the law does provide for expedited consideration of the motion. *Id.*

patchwork of coverage schemes and procedural safeguards is better than nothing, it is not ideal if the goal is to protect the free speech rights that every American enjoys.

In order to aid states in creating strong anti-SLAPP laws, the nonpartisan Uniform Law Commission created the Uniform Public Expression Protection Act ("UPEPA").[104] UPEPA contains all the relevant provisions of a comprehensive anti-SLAPP statute.[105] UPEPA breaks down the anti-SLAPP process into three phases.[106] The first phase tracks the coverage process explained above.[107] The second and third phases are also similar to the burden-shifting process described above.[108] However, one interesting aspect of UPEPA is that in addition to requiring the plaintiff to make a prima facie case,[109] the law also incorporates the summary judgment standard into its analysis, allowing the defendant to prevail if they can show there is no "there is no genuine issue as to any material fact and the [defendant] is entitled to judgment as a matter of law."[110] UPEPA also includes provisions for staying proceedings,[111] the consideration of evidence outside the plaintiff's complaint,[112] interlocutory appeal,[113] and fee-shifting.[114] Finally, the Act asks courts applying it to read its provisions "broadly . . . to protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the [U.S.] Constitution."[115]

The Uniform Law Commission designed UPEPA to give states a starting point for their anti-SLAPP laws. Many states have utilized the law for exactly such a purpose.[116] In 2023 alone, Hawaii, Kentucky, New Jersey, and Utah improved their Institute for Free Speech grade from a D or F to an A by enacting statutes based on UPEPA.[117] In addition, several states with weak anti-SLAPPs could significantly improve their statutes merely by adopting

104. *See* UNIF. PUB. EXPRESSION PROT. ACT prefatory note (UNIF. L. COMM'N 2020); Carol Hunter, Opinion, *Why Iowa Needs a New Law to Protect Your Right to Free Expression on Matters of Public Concern*, DES MOINES REG. (July 10, 2022, 6:30 AM), https://www.desmoinesregister.com/story/opinion/columnists/from-the-editor/2022/07/10/iowa-needs-anti-slaap-law-protect-your-first-amendment-rights/10014676002 [https://perma.cc/A82Q-U2VU] (urging adoption of anti-SLAPP bill supported by the Iowa Commission on Uniform Laws).

105. UNIF. PUB. EXPRESSION PROT. ACT prefatory note.

106. *Id.*

107. *See supra* text accompanying note 80; UNIF. PUB. EXPRESSION PROT. ACT prefatory note.

108. *See supra* text accompanying note 82; UNIF. PUB. EXPRESSION PROT. ACT prefatory note.

109. UNIF. PUB. EXPRESSION PROT. ACT § 7(a)(3)(A).

110. *Compare id.* § 7(a)(3)(B)(ii) (requiring dismissal if "there is no genuine issue as to any material fact and the [defendant] is entitled to judgment as a matter of law"), *with* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

111. UNIF. PUB. EXPRESSION PROT. ACT § 4.

112. *Id.* § 6.

113. *Id.* § 9.

114. *Id.* § 10.

115. *Id.* § 11.

116. GREENBERG ET AL., *supra* note 8, at 9–10.

117. *Id.*

UPEPA's scope provision in section 2.[118] UPEPA provides state lawmakers with an effective benchmark with which to draft an anti-SLAPP law for their states.

D. SLAPPs IN IOWA

In Iowa, the SLAPP problem is more than theoretical. Many Iowans have been subjected to expensive lawsuits in response to their protected speech.[119] The existing laws governing civil actions failed these people and they were faced with financial ruin as a result.

Josh Harms of Sibley, Iowa knows how damaging it can be when organizations are willing to exploit Iowa's civil procedure laws.[120] After Harms created a blog criticizing the unpleasant odor in Sibley emanating from a local industrial plant, city officials in Sibley threatened to sue him.[121] Harms then sued the city, alleging that they were attempting to chill his free speech rights by threatening a meritless lawsuit.[122] Assisted by the American Civil Liberties Union, Harms won his case and earned a permanent injunction against the City, $20,475 in attorneys' fees, and $6,500 in damages.[123] Remarkably, Harms's case lasted only one month before the settlement with the City was completed.[124] Despite this, he still accumulated $20,475 in legal costs.[125] Though Harms got his attorneys' fees covered and received damages as compensation for the trouble the city's threat caused, other Iowans are often not as lucky.

In 2018, an Iowa newspaper was sued after it reported on a local police officer's inappropriate relationship with several teenage girls.[126] Though the officer "acknowledged having sex with one of the [girls]," he nonetheless proceeded with a lawsuit.[127] A state judge threw out the lawsuit, holding that the paper's reporting was accurate and not defamatory.[128] The state law enforcement board later decertified the officer, finding the sexual misconduct

118. *See id.* at 17–23, 27.

119. *See, e.g.*, Hunter, *supra* note 104.

120. Donnelle Eller, *Iowa Town Threatens Resident with Lawsuit for Critical Website*, DES MOINES REG. (Mar. 9, 2018, 9:35 AM), https://www.desmoinesregister.com/story/money/business/2018/03/08/odor-battle-sibley-wants-force-local-resident-take-down-website-critical-leaders-efforts-battle-plan/406903002 (on file with the *Iowa Law Review*).

121. *Id.*

122. *See Iowa Man Wins Legal Battle to Say Hometown Stinks*, BBC (Mar. 30, 2018), https://www.bbc.com/news/world-us-canada-43598832 [https://perma.cc/FN4T-ZHP7].

123. Press Release, ACLU, Sibley Man Wins Lawsuit; Now Free to Criticize City's Response to Pork Blood Processing Plant Odor (Mar. 29, 2018), https://www.aclu.org/press-releases/sibley-man-wins-lawsuit-now-free-criticize-citys-response-pork-blood-processing-plant [https://perma.cc/JA3R-2TYK].

124. *Id.*

125. *Id.*

126. Hunter, *supra* note 104.

127. *Id.*

128. *Judge Dismisses Former Officer's Lawsuit Against Daily Times Herald*, CARROLL TIMES HERALD (Oct. 7, 2019), https://carrollspaper.com/news/judge-dismisses-former-officer-s-lawsuit-against-daily-times-herald/article_133d2692-e93b-11e9-845b-63d6bc411edf.html [https://perma.cc/7SKR-CE4R].

allegations were true.[129] Despite the complete lack of merit in the officer's lawsuit, the newspaper was forced to turn to GoFundMe to cover its litigation expenses, setting a goal of $140,000.[130] A reporter for the paper estimated that the paper's legal fees "would have doubled if the lawsuit went to trial."[131]

Sometimes, SLAPPs reach the Iowa Supreme Court.[132] In *Bauer v. Brinkman*, apartment manager Richard Bauer sued Bradley Brinkman for calling him a "Slum Lord."[133] The Iowa Supreme Court held that Brinkman's comments were protected speech and could not form the basis for a defamation claim.[134] Though there is no information on how much Bradley Brinkman spent to defend the case, it would be safe to assume it was quite expensive. As a comparison, Josh Harms accumulated over $20,000 worth of attorneys' fees in a case that ended at the trial court level after less than a month.[135]

Though the push for anti-SLAPP laws is somewhat recent, SLAPPs are not a new phenomenon in Iowa.[136] In December 1998, Alice Rodine, a local community activist in Des Moines, Iowa, was sued by a property company.[137] Rodine had been critical of the company at a city council meeting, pointing out its poor track record at managing property.[138] In response to her criticism, the company filed a defamation claim against her.[139] As Alice Rodine's case demonstrates, Iowa's statutes and court rules have been inadequate to protect Iowans from SLAPPs for a long time.

The stories referenced above are only a fraction of the SLAPPs that have been filed in Iowa.[140] Because of their harm and prevalence, SLAPPs pose a serious threat to Iowans' freedom of speech and freedom to petition.

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129. Clark Kauffman, *Judge Upholds State's Decision to Decertify Officer Who Had Sex with Teen*, IOWA CAP. DISPATCH (Jan. 24, 2023, 3:49 PM), https://iowacapitaldispatch.com/2023/01/24/judge-upholds-states-decision-to-decertify-officer-who-had-sex-with-teen [https://perma.cc/5MQH-HRCN].

130. Gage Miskimen, *Iowa Newspaper That Exposed Police Officer's Relationship with Teenager Raises Money After Beating Libel Lawsuit*, DES MOINES REG. (Oct. 11, 2019, 11:45 AM), https://www.desmoinesregister.com/story/news/2019/10/10/iowa-newspaper-gofundme-libel-lawsuit-police-sex-scandal-carroll-times-herald-jared-strong-burns/3932118002 (on file with the *Iowa Law Review*).

131. Sara George, *If Your State Doesn't Have an Anti-SLAPP Law, You Should Read This*, REYNOLDS JOURNALISM INST. (July 23, 2024), https://rjionline.org/news/if-your-state-doesnt-have-an-anti-slapp-law-you-should-read-this [https://perma.cc/9Z94-UESV].

132. *See* Bauer v. Brinkman, 958 N.W.2d 194, 196 (Iowa 2021); Hunter, *supra* note 104.

133. *Bauer*, 958 N.W.2d at 197; Hunter, *supra* note 104.

134. *Bauer*, 958 N.W.2d at 201–02.

135. *See supra* text accompanying notes 123–25.

136. Press Release, ACLU, ACLU Defends Iowa Community Activist Sued for Speaking Out at City Council Meeting (June 30, 1999), https://www.aclu.org/pressreleases/aclu-defends-iowa-community-activist-sued-speaking-out-city-council-meeting [https://perma.cc/6RNX-RB6B].

137. *Id.*

138. *Id.*

139. *Id.*

140. *See, e.g.*, Hunter, *supra* note 104.

E. IOWA'S NEW ANTI-SLAPP

Fortunately, in 2022 the SLAPP problem finally caught the attention of Iowa lawmakers. In 2022, House File 456 was introduced,[141] passed the House unanimously with ninety-six representatives voting in favor while four were absent,[142] was sent to the Iowa Senate (where it was referred to the Judiciary Committee),[143] and the Judiciary Subcommittee recommended that the bill be passed.[144] However, the Judiciary Committee took no further action on the bill and it failed to become law.[145]

One year after House File 456 failed to pass the Iowa Senate, the Iowa General Assembly once again tried to pass an anti-SLAPP law.[146] House File 177 followed a similar path through the General Assembly as House File 456.[147] After introduction, the bill passed overwhelmingly with ninety-four representatives in favor, one against, and five not present.[148] It was once again referred to the Senate, where a judiciary subcommittee recommended passage.[149] However, the bill met the same fate as the others, receiving no further action from the Senate.[150]

Support for both House File 456 and House File 177 came from across the political spectrum. As indicated by the voting numbers in the Iowa House, representatives from both political parties supported the passage of these bills.[151] Further, political advocacy groups on both sides of the aisle supported the passage of these bills.[152] Right-wing gun rights groups and the American Civil Liberties Union are among the various supporters of efforts to pass an anti-SLAPP law.[153] This is remarkable in light of the political polarization that is often said to be disrupting American society.[154] The bipartisan unity behind anti-SLAPP bills demonstrated the need for the Iowa General Assembly to reform the existing civil code.

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141. H. File 456, 89th Gen. Assemb., Reg. Sess. (Iowa 2022).

142. H. JOURNAL, 89th Gen. Assemb., Reg. Sess. 462–63 (Iowa 2022).

143. Iowa H. File 456; *Bill History for House File 456*, IOWA LEGISLATURE, https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=HF%20456&ga=89 [https://perma.cc/8CJ4-W2JE].

144. *Bill History for House File 456*, *supra* note 143.

145. *Id.*

146. H. File 177, 90th Gen. Assemb., Reg. Sess. (Iowa 2023).

147. *Id.*; *Bill History for House File 177*, IOWA LEGISLATURE, https://www.legis.iowa.gov/legislation/billTracking/billHistory?enhanced=false&ga=90&billName=HF177 [https://perma.cc/GK3H-W7N4].

148. H. JOURNAL, 90th Gen. Assemb., Reg. Sess. 289 (Iowa 2023).

149. Iowa H. File 177; *Bill History for House File 177*, *supra* note 147.

150. Iowa H. File 177; *Bill History for House File 177*, *supra* note 147.

151. *See* H. JOURNAL, 89th Gen. Assemb., Reg. Sess. 462–63 (Iowa 2022); H. JOURNAL, 90th Gen. Assemb., Reg. Sess. 289 (Iowa 2023).

152. Hunter, *supra* note 104.

153. *Id.*

154. *See, e.g.*, Blake Hounshell, *Measuring America's Divide: 'It's Gotten Worse,'* N.Y. TIMES (July 27, 2022), https://www.nytimes.com/2022/07/27/us/politics/vanderbilt-unity-index.html (on file with the *Iowa Law Review*).

Finally, the Iowa General Assembly listened to the public's calls for anti-SLAPP reform. House File 472 was introduced on February 19, 2025.[155] Like the two bills prior, House File 472 passed the Iowa House, with ninety-one representatives voting in favor, none voting against, and nine representatives absent or not voting.[156] This time, however, the Iowa Senate passed the bill unanimously, voting forty-seven to zero, with three senators absent.[157] The Senate added one amendment, which made the law apply only to civil actions filed after the bill became law.[158] The House unanimously concurred in this amendment and sent the bill to Governor Kim Reynolds,[159] who then signed the bill into law.[160]

After three attempts, Iowans finally have a strong anti-SLAPP law that protects their First Amendment rights. Despite this victory, there is still one potential avenue for bad actors to silence their critics through litigation: the federal courts.

II. THERE'S ALWAYS A CATCH: WHAT ABOUT FEDERAL COURTS?

So far, this Note has discussed the general problem with SLAPPs, the need for anti-SLAPP laws, and the issues that led the Iowa General Assembly to pass an anti-SLAPP law. However, the important push for anti-SLAPP laws should not stop at the state. This Part illustrates why Iowa's new anti-SLAPP law needs to apply in federal court. To do so, this Part analyzes how Iowa's new anti-SLAPP law changes the status quo for the better, highlights how federal courts in other states have refused to apply anti-SLAPP laws in their proceedings, and discusses the relevant provisions of the Federal Rules of Civil Procedure currently in effect to elucidate the inadequacy of the existing law.

A. IOWA HAS AN ANTI-SLAPP: SO WHAT?

Before discussing federal application, it is important to understand the effect the anti-SLAPP law will have on Iowa law. The new sections of the law have made it far more difficult for SLAPP plaintiffs to target Iowans' First Amendment protected activity. To illustrate this, the provisions of the new anti-SLAPP law should be compared to the already existing civil procedure rules and court precedent.

Pleading standards in Iowa are generally governed by the Iowa Civil Procedure Code and the Iowa Rules of Civil Procedure.[161] The Civil Procedure

155. H. File 472, 91st Gen. Assemb., Reg. Sess. (Iowa 2025); *Bill History for House File 472*, IOWA LEGISLATURE, https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=HF%20472&ga=91 [https://perma.cc/V65T-MFHP].

156. H. JOURNAL, 91st Gen. Assemb., Reg. Sess. 603–04 (Iowa 2025).

157. S. JOURNAL, 91st Gen. Assemb., Reg. Sess. 810–11 (Iowa 2025).

158. *Id.*; *Bill History for House File 472*, *supra* note 155.

159. H. JOURNAL, 91st Gen. Assemb., Reg. Sess. 1066–67 (Iowa 2025).

160. *Bill History for House File 472*, *supra* note 155.

161. *See generally* IOWA CODE §§ 611.1–631.17 (2024); IOWA R. CIV. P. 1.101–1.1901.

Code sets a low amount of proof for petitions,[162] and the Rules of Civil Procedure require plaintiffs to give "a short and plain statement of the[ir] claim" in their petition.[163] Court rulings also govern pleading standards in Iowa, and the Iowa Supreme Court has held that ambiguities in a petition should be resolved in favor of the plaintiff.[164] Further, Iowa courts have ruled that pleadings only need to put the defendant on notice of the plaintiff's allegations to survive court scrutiny.[165] As a result, motions to dismiss are strongly disfavored by Iowa courts, even when they are meritorious.[166] Together, these provisions set a low pleading standard for plaintiffs, allowing SLAPP plaintiffs to engage in creative pleading to get past a motion to dismiss.[167]

Iowa's anti-SLAPP law allows defendants to attack these pleadings in cases involving petitioning activity or speech on matters of public concern in two key ways. First, a defendant may file a special motion to strike that requires the plaintiff to adhere to a higher standard of proof.[168] In order for a SLAPP to survive such a motion, the plaintiff must introduce evidence to "establish a prima facie case as to each essential element of the cause of action."[169] Secondly, the defendant may prevail on a motion to strike by demonstrating that "[t]here is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[170] In ruling on this motion, a judge must consider "the pleadings, the motion, any reply or response to the motion, and any evidence that could be considered in ruling on a motion for summary judgment under [the] rule[s] of civil procedure."[171] These sections require the plaintiff to produce admissible evidence to support their claims and allow a court to look beyond the four corners of the complaint, making it difficult for a plaintiff to creatively plead themselves through to discovery.

Turning to fee-shifting, like most states, "Iowa follows the American Rule";[172] prevailing Iowa litigants are still required to bear their own attorneys' fees.[173] House File 472 flips this assumption by requiring a court to award fees to a prevailing defendant.[174] Awarding the defendant fees disincentivizes a plaintiff from filing a SLAPP altogether.[175] Iowa's anti-SLAPP statute also

162. *See* IOWA CODE § 619.9 ("A party shall not be compelled to prove more than is necessary to entitle the party to the relief asked for, or any lower degree included therein, nor more than sufficient to sustain the party's defense.").

163. IOWA R. CIV. P. 1.403(1).

164. Van Camp v. McAfoos, 156 N.W.2d 878, 881 (Iowa 1968).

165. *See* Estate of Kuhns v. Marco, 620 N.W.2d 488, 491 (Iowa 2000).

166. *See* Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178, 181 (Iowa 1991).

167. *See supra* note 63 and accompanying text.

168. H. File 472, 91st Gen. Assemb., 2025 Reg. Sess. § 3 (Iowa 2025).

169. *Id.* § 7(1)(c)(1).

170. *Id.* § 7(1)(c)(2)(b).

171. *Id.* § 6.

172. Iowa Individual Health Benefit Reins. Ass'n v. State Univ. of Iowa, 999 N.W.2d 656, 668 (Iowa 2023).

173. *Id.*

174. Iowa H. File 472 § 10.

175. First Am. Bank v. Fobian Farms, Inc., 906 N.W.2d 736, 745–46 (Iowa 2018) ("[A] monetary sanction . . . sends a message . . . to refrain from filing improper or frivolous pleadings.").

allows defendants who lose their motion at the trial level to appeal immediately as a matter of right.[176] This right is unlike other interlocutory appeals which require permission from the Iowa Supreme Court.[177] Together, the fee-shifting and immediate appeal provisions prevent a plaintiff from drawing out litigation and wreaking havoc on a defendant's finances.

Iowa's anti-SLAPP law changes the landscape for defendants faced with lawsuits intended to punish their protected speech. Although Iowa's anti-SLAPP awakening came too late for Josh Harms, Bradley Brinkman, and Alice Rodine, the new anti-SLAPP law allows Iowans to speak on issues of public concern without fear of drawing the retaliatory wrath of a SLAPP plaintiff.

B. THE CATCH: FEDERAL COURTS AND STATE ANTI-SLAPP LAWS

Although Iowa's anti-SLAPP law is comprehensive, its application in federal courts is uncertain. Cases such as *Trump v. Selzer* indicate that federal courts can still provide a forum for SLAPPs.[178] Though federal courts are courts of limited subject-matter jurisdiction,[179] they are still accessible to SLAPP plaintiffs that wish to silence out-of-state critics[180] or those that plead violations of federal law.[181] Because SLAPP plaintiffs can creatively plead, fashioning a federal claim is not particularly difficult.[182] Unfortunately, extending anti-SLAPP protections to federal courts is not a decision for Iowa lawmakers. Instead, the decision rests with Congress and the federal courts themselves. To date, Congress has not passed an anti-SLAPP statute.[183] In the absence of a federal anti-SLAPP statute, the federal courts are left to determine the applicability of state anti-SLAPP laws.

The application of state laws in federal court is governed by the line of cases beginning with *Erie Railroad Co. v. Tompkins*.[184] In *Erie*, the Supreme Court held that in federal cases not governed by the Constitution or federal statutes, "the law to be applied . . . is the law of the State."[185] The *Erie* Court was motivated by concerns about forum-shopping, where noncitizen litigants

176. Iowa H. File 472 § 9.

177. IOWA R. APP. P. 6.104.

178. *See* Katherine Doyle, *Trump Sues Iowa Pollster Ann Selzer and Des Moines Register Newspaper*, NBC NEWS (Dec. 17, 2024, 9:52 AM), https://www.nbcnews.com/politics/2024-election/trump-files-suit-iowa-pollster-ann-selzer-des-moines-register-newspap-rcna184494 [https://perma.cc/T5T9-HCLQ].

179. *See, e.g.*, Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 27–28 (2025).

180. *See* 28 U.S.C. § 1332 (2018).

181. *Id.* § 1331.

182. *See supra* text accompanying notes 63–64. Indeed, one of the primary causes of action pled in SLAPPs is restraint of trade, which could provide a plaintiff with a cause of action under antitrust laws. Pring, *supra* note 5, at 9 & n.12; *Understanding Restraint of Trade*, LAW OFFS. DAVID H. SCHWARTZ (Mar. 22, 2023), https://www.lodhs.com/blog/understanding-restraint-of-trade [https://perma.cc/798F-PNEW].

183. Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/introduction-anti-slapp-guide [https://perma.cc/S2XL-9EXN].

184. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938).

185. *Id.* at 78.

choose between state or federal court depending on which court will apply more favorable law.[186] By applying state law in federal court, the *Erie* Court eliminated this possibility.

Though *Erie* intended to settle the debate regarding the use of state law in federal court, questions remained: Namely, were federal courts required to apply *all* state law in federal cases, even if the state law was a matter of procedure? In *Guaranty Trust Co. v. York*, the Court provided the answer.[187] The *York* Court rejected any distinction between substantive and procedural state laws.[188] Instead, the Court held that federal courts should apply state law in cases where said law would control the outcome of the case.[189] The Court reasoned that failing to apply state law that would decide the case would allow the forum-shopping that the *Erie* Court sought to prevent.[190]

The outcome-determinative test in *York* provided greater clarity, but it did not end the *Erie* line of cases. The Federal Rules of Civil Procedure complicated *Erie* analysis, as these federal rules often conflicted with state rules of procedure in ways that determined the outcome of cases.[191] In *Hanna v. Plumer*, the Supreme Court determined that, where the Federal Rules of Civil Procedure were concerned, a new test was needed to protect the federal courts' ability to control their procedure without interference from the states.[192] The Court then held that, when considering the application of a state procedural rule in federal court, courts must determine if the state rule conflicts with an applicable Federal Rule of Civil Procedure.[193] If there is a conflict, the courts must determine if the federal rule is valid under the Rules Enabling Act and the Constitution.[194] Assuming both tests are satisfied, the Federal Rule of Civil Procedure controls, even if applying the federal rule would determine the outcome of the proceeding.[195]

The *Hanna* framework left yet another question unanswered: What happens when a state procedural rule is so closely related to state substantive law that failing to apply the rule effectively vitiates the substantive law? The Supreme Court attempted to answer this question in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[196] The Court in that case agreed that the class action rule before it should not apply in federal court.[197] However, the majority split on the rationale.[198] Four justices argued that the relationship between the state procedural rule and state substantive law was irrelevant

186. *Id.* at 74–77.
187. Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109–10 (1945).
188. *Id.*
189. *Id.*
190. *See id.* at 111.
191. Hanna v. Plumer, 380 U.S. 460, 465–66 (1965).
192. *See id.* at 469–71.
193. *Id.* at 469–74.
194. *Id.*
195. *Id.*
196. *See generally* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).
197. *Id.* at 398–406 (majority opinion); *id.* at 406–10, 416 (plurality opinion).
198. *Id.* at 416–17 (Stevens, J., concurring).

when applying the *Hanna* test.[199] Justice Stevens, concurring in part and in the judgment, disagreed, arguing that in some situations, state law that takes the form of a procedural rule "actually is part of a State's framework of substantive rights or remedies" if it is "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."[200] As an example, Justice Stevens pointed to state procedural rules "that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim."[201] *Shady Grove* thus left the question of closely related state procedural rules unanswered, with the Supreme Court fractured over how to apply such rules in federal court.

When faced with anti-SLAPP laws, the federal courts of appeals have looked at the *Erie* and *Hanna* line of cases to determine whether to apply state anti-SLAPP laws in federal court. Applying these doctrines, many of the courts of appeals have found that anti-SLAPP laws should not apply in federal court. In the Fifth Circuit, the court held that the Texas anti-SLAPP law did not apply in federal court, reasoning that it imposed additional requirements beyond what the Federal Rules of Civil Procedure require and therefore yielded to the federal rules under *Hanna*.[202] The Eleventh Circuit took a similar approach, reasoning that Georgia's anti-SLAPP law would supplant the Federal Rules of Civil Procedure if applied in federal court.[203] The approach taken by the Fifth and Eleventh Circuits is mirrored by the Tenth and D.C. Circuits.[204] Americans in these circuits remain vulnerable to SLAPPs despite their states' legislators taking action to protect them.

C. THE INADEQUACY OF THE FEDERAL RULES OF CIVIL PROCEDURE

In circuits where anti-SLAPP laws do not apply in federal court, defendants faced with SLAPPs must rely on the Federal Rules of Civil Procedure. These rules are inadequate to protect Americans from SLAPPs.

Pleadings in federal court are governed by Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[205] In order for a plaintiff's complaint to satisfy this standard and survive a motion to dismiss under Rule 12(b)(6), the plaintiff must "state a claim to relief that is plausible on its face" by alleging facts sufficient to allow a "court to draw the reasonable inference that the defendant is liable."[206] Although this standard is higher than the standard required by Iowa law,[207] federal courts only consider the four corners of the plaintiff's complaint when ruling

199. *Id.* at 406–10 (plurality opinion).

200. *Id.* at 419–20 (Stevens, J., concurring).

201. *Id.* at 420.

202. Klocke v. Watson, 936 F.3d 240, 245–46 (5th Cir. 2019).

203. Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1350–57 (11th Cir. 2018).

204. *See* Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 662, 673 (10th Cir. 2018); Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1332–33 (D.C. Cir. 2015).

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

206. Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

207. *See supra* notes 161–66 and accompanying text.

on a motion to dismiss.[208] SLAPP plaintiffs can still engage in creative pleading to survive a motion to dismiss and force a defendant to submit to costly discovery.[209] This means that, although Rule 56 requires the plaintiff to provide some evidence to support their claim,[210] the damage to the defendant is often already done.[211] The Federal Rules of Civil Procedure are thus unable to adequately protect Americans from SLAPPs.

III. IOWA'S CITIZENS NEED PROTECTION IN FEDERAL COURT

The situation is clear: Iowans' free speech rights cannot be fully protected without anti-SLAPP protections in federal court. This Part explores potential solutions to this dire problem. First, it analyzes the approach taken by federal courts that have allowed state anti-SLAPPs to apply in their proceedings. Next, this Part makes the case that the circuits that have allowed anti-SLAPPs to apply in federal court have taken the wrong approach to reach the right result. Because the other circuits' approaches are weak, this Note argues that the Northern and Southern Districts of Iowa and the Eighth Circuit should adopt Justice Stevens's test from *Shady Grove*.

A. THE COMMON APPROACH: THE FIRST, SECOND, AND NINTH CIRCUITS' APPROACH

Although some circuits have prohibited the federal application of state anti-SLAPPs, the Second, First, and Ninth Circuits have taken steps to protect their citizens by applying state law in their federal courts.[212] This Section will explain these key decisions.

The Second Circuit considered the application of Nevada's anti-SLAPP law in *Adelson v. Harris*.[213] The court reasoned that the rule did not "squarely conflict" with the Federal Rules of Civil Procedure.[214] Because the anti-SLAPP law "would apply in state court had suit been filed there . . . [and] is substantive within the meaning of *Erie,* [as] it is consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity," the Second Circuit held that *Erie* required it to apply Nevada's anti-SLAPP statute.[215]

The First Circuit in *Godin v. Schencks* reached a similar conclusion.[216] The court distinguished Federal Rules of Civil Procedure 12 and 56 from Maine's anti-SLAPP law, arguing that these provisions cover different issues such that

208. Ashford v. Douglas County, 880 F.3d 990, 992 (8th Cir. 2018) (including, however, the public record and materials embraced by the pleadings).

209. *See supra* text accompanying notes 63–64.

210. FED. R. CIV. P. 56(a), (c).

211. *See supra* text accompanying notes 65–66.

212. *See generally* Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010); Adelson v. Harris, 774 F.3d 803 (2d Cir. 2014); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999).

213. *Adelson*, 774 F.3d at 809.

214. *Id.*

215. *Id.*

216. *Godin*, 629 F.3d at 81.

they are not in conflict.[217] Further, failing to apply Maine's law would allow "forum shopping and inequitable administration of the law," which *Erie* sought to prevent.[218] The First Circuit thus applied Maine's anti-SLAPP statute.

The Ninth Circuit took a slightly different approach than the Second and First Circuits through the case of *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*[219] There, the Ninth Circuit held that *Hanna* requires a "direct collision" between a state procedural rule and the Federal Rules of Civil Procedure for the Federal Rules to preclude the application of the state law.[220] Though Federal Rules of Civil Procedure 8, 12, and 56 along with California's anti-SLAPP law served "similar purposes," the federal rules did not "occupy the field" such that California's anti-SLAPP law could not apply.[221] Noting that if California's anti-SLAPP law did not apply in federal court, "a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum," the court held that California's anti-SLAPP law does apply in federal court.[222]

In isolating the issues of forum-shopping and potential workability with both federal rules and state laws, the Second, First, and Ninth Circuits established more comprehensive protections for defendants impacted by malicious SLAPP suits. Despite the important improvements each circuit made, several issues persist that call for a different methodology.

B. THE BETTER APPROACH: JUSTICE STEVENS'S FRAMEWORK

The approaches explained above are good, but they each have shortcomings. For example, while the Second Circuit applied the civil immunity and fee-shifting provisions of Nevada's anti-SLAPP law, it noted that other provisions, such as the stay of discovery, posed a more difficult question and may not apply under the court's framework.[223] Similarly, the Ninth Circuit only addressed the special motion to strike and fee-shifting provisions of California's anti-SLAPP law.[224] This leaves other provisions of state anti-SLAPP laws vulnerable to being ignored in federal court. More fundamentally, these approaches address the anti-SLAPP issue from the same perspective as the circuits that have not allowed anti-SLAPP laws to apply in federal courts.[225]

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217. *Id.* at 87–89.

218. *Id.* at 91–92 (quoting Com. Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 773 (1st Cir. 1994)).

219. United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972–73 (9th Cir. 1999).

220. *Id.*

221. *Id.* at 972.

222. *Id.* at 973.

223. Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014).

224. *Lockheed Missiles & Space Co.*, 190 F.3d at 972.

225. *Compare* Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010) (permitting the application of anti-SLAPP provision in federal court), *Adelson*, 774 F.3d at 809 (same), *and* Lockheed Missiles & Space Co., 190 F.3d at 973 (same), *with* Klocke v. Watson, 936 F.3d 240, 245–46 (5th Cir. 2019) (declining to apply state anti-SLAPP provision in federal court), Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1350–53 (11th Cir. 2018) (same), Los Lobos Renewable Power,

This makes the decision of whether to apply state anti-SLAPP laws in federal court a choice between sides of a circuit split, rather than a clear application of Supreme Court precedent.

Instead of relying on the *Hanna v. Plumer* test, federal courts in Iowa should look to Justice Stevens's concurrence in *Shady Grove* as the basis for applying Iowa's anti-SLAPP in federal court. Though Justice Stevens's opinion was merely a concurrence, it represented the necessary fifth vote in favor of the Court's judgment.[226] Stevens's concurrence joined the Court's judgment on narrower grounds than the plurality, favoring a rule that allowed some state rules that conflicted with the Federal Rules of Civil Procedure to apply in federal court, rather than the categorical prohibition favored by Justice Scalia.[227] Under the *Marks* rule, "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[228] Thus, the Stevens opinion is arguably the holding of the Court in *Shady Grove*.

Applying Stevens's *Shady Grove* framework, Iowa's anti-SLAPP law constitutes a procedural rule that "actually is part of a State's framework of substantive rights or remedies."[229] As Stevens notes, "rules that make it significantly more difficult to bring or to prove a claim" are often substantive in nature despite their designation as rules of procedure.[230] Iowa's anti-SLAPP does precisely that by heightening the standards plaintiffs must satisfy to bring claims implicating substantive First Amendment protected activity and implementing procedures to prevent the abuse of the judicial process.[231] By its own terms, House File 472's procedural rules are intended to broadly protect "the exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the Constitution of the United States or the Constitution of the State of Iowa."[232] It also instructs courts to apply the statute with a view toward maintaining the uniformity of the law,[233] which tracks the Court's concern in *Erie*.[234] By viewing Iowa's anti-SLAPP law through Stevens's framework, the need to apply House File 472 in federal court is clear. Thus, the Northern and Southern Districts of Iowa and

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LLC v. Americulture, Inc., 885 F.3d 659, 662 (10th Cir. 2018) (same), *and* Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (same).

226. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 395–96 (2010).

227. *Id.* at 416–17, 424–28 (Stevens, J., concurring).

228. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

229. *Shady Grove*, 559 U.S. at 419 (Stevens, J., concurring); *cf. supra* notes 196–201 and accompanying text (echoing the substantive and procedural rights discussion in *Hanna*).

230. *Shady Grove*, 559 U.S. at 420.

231. H. File 472, 91st Gen. Assemb., Reg. Sess. (Iowa 2025); *see supra* notes 167–75 and accompanying text.

232. Iowa H. File 472 § 11.

233. *Id.* § 12.

234. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–78 (1938).

the Eighth Circuit must adopt Justice Stevens's framework from *Shady Grove* and apply Iowa's anti-SLAPP law in federal court.

CONCLUSION

SLAPPs pose a significant threat to Iowans' First Amendment rights. House File 472 provides strong protections against SLAPPs, reducing the likelihood that Iowans will be ruined by meritless lawsuits intended to suppress their protected First Amendment activity. However, Iowans will not be fully protected from SLAPPs unless Iowa's anti-SLAPP applies in federal court. By applying the *Shady Grove* framework, Iowa's federal courts can make that happen. Until they do so, Iowans' free speech rights will continue to face litigation-based financial ruin.