



Spring 2024 Comment

Protection From Warlords & Celebrities: How Anti-SLAPP Legislation is Making International Headway to Protect Free Speech

Olivia Augustat

Protection From Warlords & Celebrities: How Anti-SLAPP Legislation is Making International Headway to Protect Free Speech

By: Olivia Augustat*

Strategic Lawsuits Against Public Participation (SLAPPs) are increasingly being used by powerful individuals and entities to silence dissent and criticism, posing a significant threat to free speech globally. This misuse of legal systems undermines democratic principles by intimidating those who speak out on matters of public interest. My paper argues for the urgent need for effective Anti-SLAPP legislation, focusing on a comparative analysis of the U.S. and European Union (EU) approaches. While the U.S. has a fragmented but largely pro-defendant framework, the EU is moving toward an arguably vaguer but more unified, cross-border solution. This paper takes a unique approach by comparing the strengths and weaknesses of the U.S.'s states legislation, in particular the Texas Citizen's Participation Act (TCPA), with the EU's proposed Anti-SLAPP directive, highlighting the potential benefits of combining the U.S.'s detailed, case law-driven approach with the EU's efforts to create a uniform legal framework. The analysis reveals gaps in both systems and suggests that harmonizing these approaches could provide a more robust defense against SLAPPs globally. By examining how these regions address SLAPPs, this paper contributes to the ongoing discussion about how to best protect free speech in an increasingly interconnected world.

I. Introduction

As the world becomes more connected and citizens have more opportunities than ever to be outspoken, the legal structures in place to protect free speech have become the focus of international debate.¹ As the Internet pushes the average citizen into a more global marketplace and community, open communication without fear of persecution is important not only for communication, but also for the promotion of responsible governance and accountability.² Powerful individuals and corporations abusing their power to silence voices that speak out against them is not a new problem in the global scene, however, the discussions of these problems often focus around corruption, physical threats and violence.³ It may be more palatable to think that individuals, such as politicians, business moguls and other influential figures would resort to more overt forms of suppression to maintain their status quo; yet, underscoring these actions rests a subtler but equally pernicious tactic that has garnered international attention for its ability to quietly undermine the very foundations of free speech and accountability.⁴

Representing a common barrier to free speech, Strategic Lawsuits Against Public Participation (SLAPPs) have become a common tool used by those in powerful positions to erode opposition

* Olivia Augustat: J.D. Candidate, SMU Dedman School of Law, 2025; Articles Editor for the International Law Review Association.

¹ Jeffrey W. Howard, "Freedom of Speech", STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman 2024 ed.), <https://plato.stanford.edu/archives/spr2024/entries/freedom-speech/>.

² *The Role of Communication in Governance: Detailed Analysis*, COFFEY INTERNATIONAL DEVELOPMENT (2007), <https://perma.cc/676Q-33UN>.

³ Janna Anderson et al., *Worries About Life in 2025*, PEW RESEARCH CENTER (Feb. 2021), <https://perma.cc/Y3Q4-VECB>.

⁴ Francesca Farrington & Magdalena Zabrocka, *Punishment by Process: The Development of Anti-SLAPP Legislation in the European Union*, ERA FORUM (Dec. 13, 2023), <https://perma.cc/7B34-PYT7/>.

by using the legal system to act as a proxy for their threats.⁵ SLAPPs are loosely defined as lawsuits that lack substantial merit whose sole purpose is to censor, intimidate, and place undue financial burden on individuals until they cease speaking critically.⁶ Importantly, while they constitute legal harassment, they are cloaked in a dangerous air of legitimacy, especially if filed against a lay person who is simply trying to assert their rights to free speech.⁷ Thus, even though those who file SLAPPs do not seek to win the lawsuit in a legitimate sense, they seek to pressure defendants with the looming fear of legal bills, or worse, until they concede.⁸

Generally, the definition of SLAPPs contains two parts.⁹ First, they have a legal claim or threats of legal action which in themselves are abusive or infringe improperly on a person's right to speak on a topic of public interest and, second, the conduct surrounding the initiation or the threat of legal action abuses the legal system for the gain of the filer.¹⁰ On its face, this definition seems simple, but there has been significant debate as to whether this definition is all encompassing or clear enough.¹¹ Particularly, it has been suggested amongst scholars that the purpose of the SLAPP should be directly examined within the context of free speech, demanding that the direct aim of the SLAPP be to suppress free speech and not some other form of intimidation.¹² Additionally, some SLAPP advocates and legislation seek to define SLAPPs in the context of the public positions of the party's involved, for example, if the party bringing the SLAPP is a public figure.¹³ But, it seems that there is a trend to operationalize SLAPPs broadly, with further delineations stemming from how widely categorized a "matter of public interest" is working in tandem with the above definitional challenges.¹⁴

Contextual to this conversation, the filing of SLAPP suits is not restricted to any one system of governance or country.¹⁵ SLAPP lawsuits have been on a steep incline, with an upward trend in SLAPP cases being reported over a decade-long study in Europe.¹⁶ Startlingly, the Coalition Against SLAPPs in Europe or "CASE," reported an almost two-fold increase in SLAPP cases

⁵ Juliette Garside, 'Designed to Distress and Deter': the Impact of SLAPP Lawsuits on Journalists and Free Speech, THE GUARDIAN (Nov. 3, 2023), perma.cc/WW2T-AT26.

⁶ Francesca Farrington & Justin Borg-Barthet, *SLAPPs: Inside Europe's Struggle to Protect Journalist from Malicious Lawsuits*, THE CONVERSATION (Nov. 28, 2023), <https://perma.cc/B8MT-8BXM>.

⁷ *Id.*

⁸ Garside, *supra* note 5.

⁹ *Proposal for a Directive of the European Parliament and of the Council on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits Against Public Participation")*, COM (2022) 177 final (April 27, 2022), <https://perma.cc/5MX7-ESNK>.

¹⁰ *Id.*

¹¹ *Anti-SLAPP Directive: CASE statement on the Political Agreement*, SHERPA (Jan. 11, 2024), <https://perma.cc/E88G-QCGF>.

¹² *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, POL'Y DEP'T FOR CITIZENS' RTS. & CONST. AFF. DIRECTORATE-GENERAL FOR INTERNAL POL'YS (June 2021), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf).

¹³ Tex. Civ. Prac. & Rem. Code § 27.005(b).

¹⁴ *Open SLAPP Cases in 2022 and 2023: The Incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union*, POL'Y DEP'T FOR CITIZENS' RTS. & CONST. AFF. DIRECTORATE-GENERAL FOR INTERNAL POL'YS (Nov. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU\(2023\)756468_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU(2023)756468_EN.pdf).

¹⁵ Evan Brander & James Turk, *Global Anti-SLAPP Ratings: Assessing the Strength of Anti-SLAPP Laws*, CENTER FOR FREE EXPRESSION (Mar. 23, 2023), <https://perma.cc/89ZW-6KME>.

¹⁶ *SLAPPs: A Threat to Democracy Continues to Grow*, THE COALITION AGAINST SLAPPS IN EUROPE (July 2023), <https://perma.cc/4HZM-KQPY>.

being filed in only one year's time.¹⁷ This was mirrored in findings by the Thomson Reuters Foundation, who found that SLAPPs had been threatened against almost half of all media organizations they polled.¹⁸ Further, SLAPPs are a dangerous threat in countries that are currently facing political unrest, like Malta, where the murder of Maltese journalist Daphne Caruana Galizi in connection with a SLAPP sparked a wave of conversation and activism concerning how SLAPPs indicate a greater system of institutional injustice.¹⁹

SLAPPs are not only an established issue of global concern due to their prevalence, but also because of the typical parties that are involved.²⁰ Though parties can be as diverse as kings who are attempting to squash outspoken expats, to celebrities who are seeking to snuff the voices of former nannies, the dynamic amongst the parties often remains the same—one powerful party seeking to squash an unsophisticated party.²¹ Particularly, those who employ SLAPPs are overwhelmingly political figures, public officials, companies, political parties, local government, and states.²² Reflective of SLAPP's close relationship to issues of free speech, most defendants are individual journalists, media outlets, editors-in-chief or directors of media outlets, non-governmental organizations, and publishers.²³ In addition to these categories of activists, journalistic sources, and individuals round out the typical list of defendants.²⁴ Looking at these statistics alone, it becomes clear that the underlying dynamics of SLAPPs frequently involve a imbalance of power, exemplifying how dangerous SLAPPs are to public liberty and justice if allowed to proliferate.²⁵

Further, the subject matter of SLAPPs is also reflective of a larger danger, because the speech that SLAPPs often seek to bury involves “corruption, public procurement, criminal justice and the legal system, labour rights, social housing, migration, taxation, organised crime, financial crime, international relations, media pluralism, privacy, cybercrimes, insurance, health, disinformation, environment, defence and security, satirical political commentary, and international crimes.”²⁶ Additionally, SLAPPs, though not limited to specific categories of claims, can take a variety of forms both criminal and civil, defamation claims, privacy actions, copyright infringement, and data protection.²⁷ But, regardless of the underlying action of the suit, SLAPPs by their definition are riddled with abuses of judicial process, including exaggerated or unfounded claims for

¹⁷ *Id.*

¹⁸ Joel Simon et al., *Weaponizing the Law: Attacks on Media Freedom*, THOMAS REUTERS FOUNDATION (April, 2023) <https://perma.cc/CY4U-MUKR>.

¹⁹ *Commission Welcomes Political Agreement on Countering Abusive Lawsuits Against Public Participation (SLAPP)*, EUROPEAN COMMISSION (Nov. 2023), <https://perma.cc/N2A9-G8PA>.

²⁰ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14.

²¹ Diego A. Zambrano, *Foreign Dictators in U.S. Court*, 89 U. CHICAGO L.R. 157 (2022), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6279&context=uclev>; Tamara Freeze, *Being Famous Is Not Enough: The Onslaught of Anti-SLAPP Litigation Requires Us to Preemptively Research the Viability of a Potential Anti-SLAPP Response by the Opposing Party*, ADVOCATE (Dec. 2022), <https://perma.cc/5KHK-2J5M>.

²² *Open SLAPP Cases in 2022 and 2023*, *supra* note 14.

²³ *Id.*

²⁴ Simon et al., *supra* note 18.

²⁵ European Commission Press Release, *Anti-SLAPP: MEPs Reach Deal with Member States to Defend Critical Voices* (Nov. 30, 2023), <https://perma.cc/4YGG-HE7P>.

²⁶ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14.

²⁷ *Id.*

damages, amending or withdrawing claims or pleadings, and exploitation of appeals procedures.²⁸ Additionally, SLAPPs frequently employ “multiple lawsuits, multiple targets, targeting an individual, excessive damages and claims for moral damage” which further complicate them, demanding even more legal fees from their already often unsophisticated defendants.²⁹

Considering the profile of SLAPP lawsuits and the profile of the typical defendants, SLAPP lawsuits are a significant threat to free-speech and democracy.³⁰ SLAPPs not only allow for the suppression of speech but, by association, the proliferation of human rights violations.³¹ In the worst cases, they can cause so much despair and fear that they lead to the death of those trying to speak up.³² Using abrupt language, the Supreme Court of New York describes SLAPPs as, “short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.”³³ In summation, SLAPPs not only attack fundamental rights, but at their core they undermine the system that is designed to protect those same rights; thus, they are a double-edged threat.³⁴ As the EU’s legislature has stated, “[d]emocracy requires that citizens are able to participate actively in public debate without undue interference . . . citizens must be able to access reliable information, which enables them to form their own opinions and exercise their own judgement in a public space . . . freely.”³⁵ Thus, it is critical that mechanisms be put in place to address SLAPPs in an effective way that does not unduly burden the defendants or, in reverse, overly weaken defamation law.³⁶ Anti-SLAPP legislation that prevents, penalizes, or provides action against SLAPPs has been pioneered in Canada, as well as in a limited capacity in Australia.³⁷ But, the U.S. has perhaps made the most tremendous effort in proliferating Anti-SLAPP legislation, providing an excellent framework for understanding the European Union’s (EU) on-going legislative moves towards the U.S.’s Anti-SLAPP system.³⁸ This comment will dissect the development of Anti-SLAPP legislation in the EU within the larger context of the U.S.’s model.³⁹ Further, this article will analyze how effective these changes have been at discouraging SLAPPs and, as the EU has moved to finalizing a union-wide version of Anti-SLAPP legislation, this comment will compare how the U.S., where this legislation primarily originated, can learn from the EU’s advancements.⁴⁰ When comparing the U.S.’s admittedly patchwork—but extremely pro-defendant—Anti-SLAPP statutes

²⁸ Garside, *supra* note 5.

²⁹ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14.

³⁰ Simon et al., *supra* note 18.

³¹ *SLAPPs: A Threat to Democracy Continues to Grow*, *supra* note 16.

³² *Commission Welcomes Political Agreement*, *supra* note 19.

³³ *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992).

³⁴ *Id.*

³⁵ *Proposal for a Directive of the European Parliament*, *supra* note 9.

³⁶ *Id.*

³⁷ *The Use of SLAPPs to Silence Journalists*, *supra* note 12; *Defending Defenders: Challenging Malicious Lawsuits in Southeast Asia*, BUS. & HUM. RTS. RES. CTR. (March 2020) <https://perma.cc/6BST-WQ4E>; *Corporate Legal Accountability Resource Sheet: Anti-SLAPP Legislation*, BUS. & HUM. RTS. RES. CTR. (Oct. 27, 2023), <https://perma.cc/J5FY-X577>.

³⁸ *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

³⁹ *Id.*

⁴⁰ *Proposal for a Directive of the European Parliament*, *supra* note 9; Kirk Herbertson, *An In-Depth Look at Congressman Raskin’s Federal Anti-SLAPP Legislation*, EARTHRIGHTS INT’L (Sept. 19, 2022), <https://perma.cc/58WK-6FCC>; Oliver Kessenbrock, *Don’t Let Them SLAPP You Around: The Case for Federal Anti-SLAPP Legislation*, U.I.C. L. REV. (Jan. 25, 2023), <https://perma.cc/63JA-9CEK>.

to the EU's efforts for uniform Anti-SLAPP laws across borders, the strengths of both emerge.⁴¹ Perhaps merging the pro-defendant outlook with international efforts could truly liberate the global public's power of the press.⁴²

II. U.S. Anti-SLAPP Legislation: An Examination of Texas's Pro-Defendant Model of Legislation, It's Content, Interpretation, and Consequences

The U.S. is no stranger to the use of the legal system being used for intimidation, as SLAPP lawsuits have stretched back in U.S. history for over 200 years, illustrating their prevalence in the legal system.⁴³ Despite this long history, the formal recognition of SLAPPs and what they definitionally constitute is still an ongoing debate amongst various state legislators.⁴⁴ While it is true that other countries, such as Canada, have enlisted Anti-SLAPP laws before the U.S., the U.S. model arguably has some of the richest case law.⁴⁵ Additionally, it has some unique factors that mirror the EU's current situation, specifically that the Anti-SLAPP laws in both countries require that the independent states, or in the EU's case countries, ratify a version of the legislation individually into their separate codes rather than enlisting one uniform code for a whole country or region.⁴⁶ Currently, though there are thirty-three U.S. states that have adopted Anti-SLAPP statutes, with the levels of protection and the mechanisms enlisted by these different adoptions widely varying.⁴⁷ Currently, there are no federal or nationwide Anti-SLAPP laws, though efforts to pass a federal solution have been proposed.⁴⁸ Further, compounding this "patchwork" problem, the application of these various state laws in federal court has been inconsistent, with circuit courts taking different interpretations and applications of the law.⁴⁹

Given this inconsistency, a comprehensive overview of the totality of the U.S.'s Anti-SLAPP legislation is beyond the scope of this paper, however, studies to this end have been performed.⁵⁰ Instructively, one study rated all of the Anti-SLAPP legislation in the U.S. and scored their effectiveness, identifying Texas as having one of the most robust versions of Anti-SLAPP legislation.⁵¹ Texas's law is an extremely detailed, pro-defendant version of Anti-SLAPP and with voluminous caselaw, making it an excellent example for understanding how an effective Anti-SLAPP statute works.⁵² Through first moving through the legal mechanism, definition, and purpose of the Texas statute, and then transitioning into how courts have interpreted this statute,

⁴¹ *Proposal for a Directive of the European Parliament*, *supra* note 9; Herbertson, *supra* note 40; Kessenbrock, *supra* note 40.

⁴² *Proposal for a Directive of the European Parliament*, *supra* note 9; Herbertson, *supra* note 40; Kessenbrock, *supra* note 40.

⁴³ *A Brief History of SLAPP Suits*, ACLU OHIO (2024), <https://perma.cc/9P3J-ER3A>.

⁴⁴ Shannon Jankowski & Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, AMERICAN BAR ASSOCIATION (Mar. 2022), <https://perma.cc/J43F-6R62>; Dan Greenberg et al., *Anti-SLAPP Statutes: 2023 Report Card*, INSTITUTE FOR FREE SPEECH, (Nov. 2023), <https://www.ifs.org/anti-slapp-report/>.

⁴⁵ *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

⁴⁶ European Commission Press Release, *supra* note 25; Greenberg et al., *supra* note 44.

⁴⁷ Greenberg et al., *supra* note 44.

⁴⁸ Herbertson, *supra* note 40; Kessenbrock, *supra* note 40.

⁴⁹ Herbertson, *supra* note 40; Kessenbrock, *supra* note 40.

⁵⁰ Greenberg et al., *supra* note 44.

⁵¹ *Id.*

⁵² *Id.*; Tex. Civ. Prac. & Rem. Code § 27.005(b).

this section aims to provide a detailed look into how the Texas Anti-SLAPP statute functions for comparative and exemplary purposes for the later discussion on the EU’s proposed solution.⁵³

The Texas Citizen’s Participation Act (TCPA) is commonly known as Texas’s Anti-SLAPP law.⁵⁴ In a relevant section, it states that the purpose of the statute is: “[t]o encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” Broadly, it aims to “protects citizens from retaliatory lawsuits that seek to intimidate or silence them,” and provides for the “expedited dismissal of such suits.”⁵⁵ Specifically, the TCPA is intended to identify and summarily dispose of lawsuits “designed only to chill First Amendment rights, not to dismiss meritorious lawsuits.”⁵⁶ To achieve these ends, the TCPA provides that a legal action can be brought in response to suit against an individual’s right of free speech, right to petition, or right of association.⁵⁷ Contextually, in the definition section of the statute, it states that a statement or activity that would invoke review under that statute would include something about or concerning: “(A) a public official, public figure, or other person who has drawn substantial public attention due to the person’s official acts, fame, notoriety, or celebrity; (B) a matter of political, social, or other interest to the community; or (C) a subject of concern to the public.”⁵⁸

Courts tend to breathe full life into the TCPA, as even the text of the statute explicitly states that “this chapter shall be construed liberally to effectuate its purpose and intent fully.”⁵⁹ Texas courts specifically have acted to reinforce the plain language of the statute, holding that the TCPA is designed to balance constitutional interests in protecting rights, such as the freedom to comment on matters of public concern, with accountability for abusing those privileges.⁶⁰ But, while liberally interpreting the plain language of the TCPA, courts limit its scope to communications involving a public subject, not communications in public form.⁶¹ For example, the TCPA

⁵³ Tex. Civ. Prac. & Rem. Code § 27.005(b).

⁵⁴ See, e.g., *Kinney v. BCG Att. Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *1 (Tex. App.—Austin Apr. 11, 2014); *In re Lipsky*, 411 S.W.3d 530, 536 (Tex. App.—Fort Worth 2013); *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 719 (Tex. App.—Houston [14th Dist.] 2013); *Serafine v. Blunt*, 466 S.W.3d 352, 364 (Tex. App.—Austin 2015).

⁵⁵ *Epperson v. Mueller*, No. 01-15-00231-CV, 2016 WL 4253978, at *8 (Tex. App.—Houston [1st Dist.] Aug. 11, 2016).

⁵⁶ *Lipsky*, *supra* note 54, at 589.

⁵⁷ Tex. Civ. Prac. & Rem. Code § 27.005(b).

⁵⁸ *Id.*

⁵⁹ *Id.* § 27.011(b); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017); *Hayman v. Khan*, No. 14-20-00745-CV, 2023 Tex. App. LEXIS 5673, at *5 (Tex. App.—Houston [14th Dist.] Aug. 1, 2023).

⁶⁰ *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 433-34 (Tex. 2017); *Universal Plant Servs. v. Dresser-Rand Grp., Inc.*, 571 S.W.3d 346, 357 (Tex. App.—Houston [1st Dist.] 2018).

⁶¹ *TotalGen Servs., LLC v. Thomassen Amcot Int’l*, No. 02-20-00015-CV, 2021 Tex. App. LEXIS 471, at *12-13 (Tex. App.—Fort Worth Jan. 21, 2021); *ExxonMobil Pipeline Co.*, *supra* note 59, at 900 (Tex. 2017); *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 830 (Tex. App. Dallas 2020) (holding private buy-sell offers that did not mention tangential recycling benefits did not rise to the level of public concern); *Nguyen v. ABLE Communs., Inc.*, No. 02-19-00069-CV, 2020 WL 2071757, at *5 (Tex. App.—Fort Worth Apr. 30, 2020) (holding communication on a public bidding process were a matter of public concern); *Bui v. Dangelas*, No. 01-18-01146-CV, 2019 WL 5151410, at *4 (Tex. App.—Houston [1st Dist.] Oct. 15, 2019) (considering if posts on social media constituted a public forum); *Baumgart v. Archer*, 581 S.W.3d 819, 825 (Tex. App.—Houston [1st Dist.] 2019, pet.

definition of the “exercise of the right of free speech” was held to be “not fully coextensive with the constitutional . . . right” but a right that was more fact-intensive.⁶² Particularly, court thereby hinge the free speech analysis within the context of how connected it is to the aforementioned “matter of public concern” and its ancillaries.⁶³

A communication, defined as a statement or document in any form, if private needs to have an element of public concern to eligible for protection, as: “A private contract dispute affecting only the fortunes of the private parties involved is simply not a ‘matter of public concern’ under any tenable understanding of those words.”⁶⁴ This functions as a safeguard from private disputes being drug out into the public forum for no cause; furthermore, to rise to the level of a matter that concerns the public, “a communication must regard ‘a matter of political, social, or other interest to the community’ or ‘a subject of concern to the public.’”⁶⁵ But, even though private conversations are sometimes covered by the act, an issue is not a public issue simply because it is a controversy of interest to the public.⁶⁶ Instead, the inquiry concerns whether people in the public were debating the specific issue and whether the media was covering that debate.⁶⁷ A matter can be a public issue because people in the public are discussing it, or the people involved, or because people other than the immediate participants in the controversy are likely to feel the impact of its resolution.⁶⁸

When the communication involved does not itself relate to a matter of public concern, the assertion that the communication could result in a matter of public concern is beyond the reach of the act.⁶⁹ As the Supreme Court of Texas recently reiterated, communications that are merely “related somehow to one of the broad categories” set out in the statute but that otherwise have no relevance to a public audience are not “communications made in connection with a matter of public concern.”⁷⁰ Additionally, turning briefly to California caselaw which is demonstrably identical to Texas in regard to Anti-SLAPP legislation and interpretation, “[a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.”⁷¹ Moreover, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure for the purposes of making the community by proxy a matter of public interest.⁷²

denied) (holding that the reporting of crimes constituted a matter of public concern); *Conrad v. Joiner*, No. 01-22-00450-CV, 2023 Tex. App. LEXIS 4832, at *8-9 (Tex. App.—Houston [1st Dist.] July 6, 2023).

⁶² *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018) (holding the right of free speech under the TCPA is not entirely analogous to constitutional rights).

⁶³ *Id.*

⁶⁴ *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 136-37 (Tex. 2019).

⁶⁵ *Hayman*, *supra* note at 59, at *5.

⁶⁶ *Klantzman v. Brady*, 312 S.W.3d 886, 905 (Tex. App.—Houston [1st Dist.] 2009).

⁶⁷ *Id.* (citing *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 572 (Tex. 1998)).

⁶⁸ *See Miranda v. Byles*, 390 S.W.3d 543, 554 (Tex. App.—Houston [1st Dist.] 2012) (holding that where there was no evidence in the record that a matter, arguably of interest to the public, was discussed by anyone other than investigators and family, it was not a “public matter” under the TCPA).

⁶⁹ *Erdner v. Highland Park Emergency Ctr., LLC*, 580 S.W.3d 269, 276 (Tex. App.—Dallas 2019).

⁷⁰ *McLane Champions, LLC v. Houston Baseball Partners LLC*, No. 21-0641, 2023 WL 4306378, at *6 (Tex. June 30, 2023).

⁷¹ *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1133 (2003).

⁷² *See Kevin Zhang v. Rozsa*, No. 2:20-cv-6247-SVW, 2021 U.S. Dist. LEXIS 79916, at *8 (C.D. Cal. 2021); *but see Deaver v. Desai*, 483 S.W.3d 668, 673–74 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (statements on website

In summation, communications are a matter of public concern when they can “be fairly considered as relating to any matter of political, social or other concern to the community” or when it “is a subject of general interest and of value and concern to the public.”⁷³ Particularly, courts consider “content, form, and context” of the communication.⁷⁴ It is important to be mindful of the fact that Texas “look[s] to the entire communication as well as the context of the communication in which the allegedly defamatory statement is made.”⁷⁵ Similarly, whether a matter of public concern is determined by the entire context and surrounding circumstances of the communication.⁷⁶ Thus, matters of public concern are highly fact-intensive to decide.⁷⁷

TCPA also defines matters of public concern in respect to whom the speech was about, considering speech about “public figures” or “limited public figures” to be matters of public concern.⁷⁸ While the TCPA does not provide a definition for the term “public figure,” it has been recommended by courts to understand the term “public figure” in relation to First Amendment cases.⁷⁹ Under the TCPA there are two classes of “public figures”: (1) general-purpose public figures, who are individuals who “achieve such pervasive fame or notoriety that [they] become[] . . . public figure[s] for all purposes and in all contexts”; and (2) limited-purpose public figures, who are persons who “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved” or those who voluntarily “inject [themselves] . . . into a particular public controversy . . . assum[ing] special prominence” throwing themselves into the “vortex of [a] public issue.”⁸⁰ Determining if a person is a general-purpose public figure or limited-purpose figure is a matter of law decided by the court.⁸¹

To decide whether a person is a limited-purpose public figure, Texas courts apply a three-part test: (1) the controversy at issue must be public in both its debate and impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff’s participation in the controversy.⁸² Conjunctively, regarding general-purpose public figures, courts parallel to Texas’s jurisprudence have considered that it “without doubt [includes] . . . professional athletes, nightclub and concert singers, television movie actors, and recording artists,” with the analysis revolving around the public’s continuing

that attorney for former wife should be disbarred because she was unethical and “would lie to win a case” concerned attorney’s legal services and ethical responsibility, so TCPA applied).

⁷³ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

⁷⁴ *Id.*

⁷⁵ *Cruz v. Van Sickle*, 452 S.W.3d 503, 514 (Tex. App.—Dallas 2014).

⁷⁶ *Shipp v. Malouf*, 439 S.W.3d 432, 439 (Tex. App.—Dallas 2014) (holding that entirety of a broadcast be considered in regarding whether particular statements within it were public concern).

⁷⁷ *Id.*

⁷⁸ Tex. Civ. Prac. & Rem. Code § 27.001; 27.010.

⁷⁹ *Rauhauser v. McGibney*, 508 S.W.3d 377, 386 (Tex. App.—Fort Worth 2014, no pet.).

⁸⁰ *Klantzman v. Brady*, 312 S.W.3d 886, 904-05 (Tex. App.—Houston [1st Dist.] 2009) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351, 352, (1974)); see also *Rivero v. Am. Fed’n State, Cnty., & Mun. Emps.*, 105 Cal.App.4th 913, 924 (Cal. Ct. App. 2003) (stating identical standard in Californian law).

⁸¹ *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966).

⁸² See *WFAA-TV*, *supra* note 67, at 572; *Vice v. Kasprzak*, 318 S.W.3d 1, 15-16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); Notably this test has also been adopted by the Court of Appeals for the Fifth Circuit. See *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433 (5th Cir. 1987).

interest in them.⁸³ Broadening these categories, courts have identified a “critical consideration” as whether the plaintiff “had taken affirmative steps to attract personal attention or had strived to achieve a measure of public acclaim.”⁸⁴ With this context, although the terms “public official” and “public figure” have been variously interpreted, the public official designation has been held to apply to someone who, at the very least, is among “the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”⁸⁵ If it is unclear, the Supreme Court of the U.S. in *Gertz v. Robert Welch* made the following statement:

We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy.⁸⁶

But, even if there is this caution, in *Durham v. Cannan Communs* the Texas court held that a party that was not well known in his immediate community was a public figure due to press coverage of appellant's activities, particularly conduct as special counsel for the court of inquiry and the appellant's general availability to the press.⁸⁷ No one factor is dispositive.⁸⁸ For further extra-jurisdictional definitions, media seems to be a uniting factor.⁸⁹

Provided that the above analysis is satisfied and that a communication addresses a matter of public concern, an allegation that the communication would not be constitutionally protected under the First Amendment does not remove it from the coverage of the TCPA.⁹⁰ Instead, whether the

⁸³ *James v. Gannett Co.*, 386 N.Y.S.2d 871, 876 (1976).

⁸⁴ *Maule v. NYM Corp.*, 54 N.Y.2d 880, 881-82, (1981); *Rivero v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 105 Cal.App.4th 913, 924 (Cal. Ct. App. 2003) (stating identical standard in Californian law that individuals satisfying the definition of general public figure are typically “nationally known figure[s]” with “extensive media coverage” or “participant[s] in a television show of significant interest to the public and the media”).

⁸⁵ *Gertz v. Robert Welch*, 418 U.S. 323, 352 (1974); *Campbell v. Clark*, 471 S.W.3d 615, 624 (Tex. App.—Dallas 2015, no pet.) (holding statements concerning alleged crimes and government corruption implicating incumbent county commissioner were matter of public concern as it related to a public figure).

⁸⁶ *Gertz*, *supra* note 85, at 352.

⁸⁷ *Durham v. Cannan Communs.*, 645 S.W.2d 845, 850 (Tex. App.—Amarillo 1982).

⁸⁸ *Id.*

⁸⁹ *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 760 (Ky. 1990) (holding that plaintiff, an assistant school basketball coach was not a public figure because had no regular and continuing access to the media); *Horton v. Guillot*, No. 1:14-CV-1050, 2016 U.S. Dist. LEXIS 112005, at *13-14 (N.D.N.Y. 2016) (holding that a prominent jockey participating in nationally televised horse races who has granted interviews to reporters before and after events had thrust himself into the public discussion on issues related to that sport); *but see Kevin Zhang*, *supra* note at 72, *6-7 (holding that despite a party stating that he is a “renowned eCommerce and digital marketing businessman and guru,” he was not actually a person or entity, respectively, “in the public eye”).

⁹⁰ *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 202–204 (Tex. App.—Austin 2017, pet. dismissed) (though communications that constitute misappropriation of trade secrets or confidential information are not protected by First Amendment, that does not make TCPA inapplicable, because definition of “communication” is not confined solely to speech that enjoys constitutional protection); *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 294–297 (Tex. App.—Austin 2018, pet. denied) (using *Autocraft* and holding that term “communication” in TCPA “is not explicitly limited to constitutionally protected expression”).

communication is constitutionally protected is considered in the second step of the TCPA analysis. For example, whether the claimant has established a prima facie case to defeat a motion for dismissal.⁹¹ Although the TCPA recognizes that the exercise of constitutional rights is sometimes related to participation in government, it is not a requirement as the purpose of TCPA is to protect constitutional rights and “otherwise participate in government.”⁹² For example, the TCPA does not require any connection to participation in government, so a business review made to assist the public in selecting reliable companies was a communication relating to matter of public concern.⁹³ Notably, the applicable definition of “matter of public concern” is narrower now than during the act’s inception.⁹⁴ Specifically, the legislature substantively amended the definition of “matter of public concern” in 2019 and deleted sections relating to “good[s], product[s], or service[s] in the marketplace” and “environmental, economic, or community well-being.”⁹⁵ This new definition shifts the focus of the TCPA from the mere content of the communication to whether the public at large has any interest in that content.⁹⁶ For example, an individual employer’s racist comments, expressed in a private company about a single employee, are not likely to impact a larger part of the community or have broader relevance to a public audience outside the company, though racism is a general topic that the community debates.⁹⁷ In contrast, under the former provision, statements about a person’s private sexual conduct could be a matter of public concern if that person happened to be offering a good, product, or service in the marketplace.⁹⁸ Or, similarly, under the original version of the statute, statements made by parents about their adult daughter’s marital decisions fell within the TCPA because they alleged mental illness and domestic abuse and, therefore, the topic related to the health or safety of the community.⁹⁹

A. IMPACTS OF THE LEGISLATION: PROS AND CONS

Now that a foundational understanding of the TCPA has been formed, it is time to highlight the fact that the TCPA is, by no means, a perfect system and does have some drawbacks.¹⁰⁰ First, by introducing more procedural steps and potential for appeal, Anti-SLAPP laws can contribute to an already overburdened court system.¹⁰¹ This congestion can delay the resolution of cases, including those unrelated to SLAPP concerns.¹⁰² Additionally, the TCPA might cover too much, as critics argue that the broad scope may unfairly favor defendants, making it overly challenging for

⁹¹ See *Elite Auto*, *supra* note 90.

⁹² See Tex. Civ. Prac. & Rem. Code § 27.002 (purpose of TCPA is to protect constitutional rights and “otherwise participate in government”); *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353–354 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (TCPA does not require any connection to government).

⁹³ *Better Bus. Bureau of Metro. Houston, Inc.*, *supra* note 92.

⁹⁴ See *Vaughn-Riley v. Patterson*, No. 05-20-00236-CV, 2020 WL 7053651, at *3 (Tex. App.—Dallas Dec. 2, 2020, no pet.) (mem. op.) (citing S.J. of Tex., 86th Leg., R.S. 2023-24 (May 17, 2019)).

⁹⁵ See *Id.*; Tex. Civ. Prac. & Rem. Code § 27.001(7)

⁹⁶ *Vaughn-Riley*, *supra* note 94.

⁹⁷ *Hayman*, *supra* note at 59, at *9

⁹⁸ *Bedford v. Spassoff*, 485 S.W.3d 641, 646–647 (Tex. App.—Fort Worth 2016).

⁹⁹ *Cavin v. Abbott*, 545 S.W.3d 47, 60–64 (Tex. App.—Austin 2017, no pet.).

¹⁰⁰ Joe Mullin, *Don’t Mess With Texas’ Anti-SLAPP Law*, ELECTRONIC FRONTIER FOUNDATION (May, 2023) <https://perma.cc/X6T5-8VRG>.

¹⁰¹ *Id.*

¹⁰² *Id.*

plaintiffs to pursue legitimate defamation claims.¹⁰³ This has sparked discussions and calls for reform, particularly in Texas, where continued efforts are being made to narrow the TCPA's applicability.¹⁰⁴ Further, speaking towards problems at the national level, Texas, while having a very good example of pro-defendant Anti-SLAPP statute, still exists within the patchwork of the greater U.S.¹⁰⁵ Texas's strong laws can simply be avoided by a powerful party forum shopping in other states, and the lack of uniformity or federal laws on the subject further complicates interstate SLAPPs, serving to produce confusion at the expense of both innocent defendant and substantive lawsuits.¹⁰⁶ Lastly, privacy is a concern when discussing Anti-SLAPP laws that are very pro-defendant, as they may inadvertently treat public figures disparately in private matters.¹⁰⁷ For example, even if the speech is related entirely to a private or family matter of the celebrity, due to that person's status as a "general" public figure, that speech could be of interest to the public.¹⁰⁸

Despite these cons, there are many pros as, at its core, Anti-SLAPP legislation safeguards the fundamental right to free speech, and empowers the public to express their views, reinforcing the principles of democracy.¹⁰⁹ Importantly, as the TCPA specifically points out, suspect classes of litigants like public figures to protect the "common man" from the forces of the rich and powerful who are often the culprits of SLAPPs.¹¹⁰ Additionally, by reinforcing and factually intensifying how SLAPPs are defined within the context of "public matters," the TCPA ensures that each case will be regarded with specificity.¹¹¹ Though it could slow the court system, it seems far more likely that it would expedite and discourage the unneeded filling of SLAPPs in the first place.¹¹² Overall, all these pros seem to outweigh the cons, as the fundamental liberties that the TPCA protects encourage an engaged, vocal, and responsive democracy.¹¹³

III. The EU's Burgeoning Response

The issue of SLAPP lawsuits in the EU is as long and as rich as the history of SLAPP lawsuits in the U.S., and it has only become an increasing issue.¹¹⁴ For instance, in a series of studies conducted by the EU, a startling increase in SLAPPs was found to be characteristic of the overall upward trend.¹¹⁵ The EU has a host of issues distinct to the architecture of its governance, particularly that the various countries under its sphere of influence all have different legal codes and must ratify proposals that EU makes separately.¹¹⁶ Compounding this, due to the EU's connectivity and the high level of cross-borders exchange amongst the nations of the EU, SLAPPs uniquely pose a jurisdictional issue, with forum shopping in the EU and EU-adjacent countries

¹⁰³ *Id.*

¹⁰⁴ Amy Leila Saberian Prueger & Zackery L. Horton, *The Narrowed Texas Citizens Participation Act: A Look at What it Means For SLAPP Suits*, STATE BAR OF TEXAS (Feb. 2022) <https://perma.cc/A5F6-96J6>.

¹⁰⁵ Greenberg et al., *supra* note 44.

¹⁰⁶ Herbertson, *supra* note 40; Kessenbrock, *supra* note 40.

¹⁰⁷ Freeze, *supra* note 21.

¹⁰⁸ *Id.*

¹⁰⁹ Mullin, *supra* note 100.

¹¹⁰ *The Use of SLAPPs to Silence Journalists*, *supra* note 12; *Open SLAPP Cases in 2022 and 2023*, *supra* note 14.

¹¹¹ Cruz, *supra* note 75, at 514.

¹¹² Mullin, *supra* note 100.

¹¹³ *Id.*

¹¹⁴ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14.

¹¹⁵ *Id.*

¹¹⁶ Farrington & Zabrocka, *supra* note 4.

proliferating in the absence of a unified system.¹¹⁷ Specifically, as the United Kingdom has left the EU, it has become a frequent target of forum shopping parties, highlighting not only the “cross-border” issue within the EU but within Europe at large.¹¹⁸

As noted by the EU’s press release, “SLAPPs often have a cross-border nature and where cross-border implications exist, they add an extra layer of complexity and costs, with even more adverse consequences for defendants . . . online media content . . . accessible across jurisdictions may open the way for forum shopping and hamper effective access to justice.”¹¹⁹ Furthermore, there is an ever-growing concern that the “cross-border” nature of claims may give rise to even more malignant SLAPP strategies that force victims to appear or contest multiple lawsuits in multiple countries within the EU at the same time.¹²⁰ This multiple-front lawsuit strategy is a hallmark of SLAPPs that is emphasized when there is libel tourism or lawsuits launch outside of the EU in addition to the internal lawsuits.¹²¹

In response to this, a wave of activism has pushed for a powerful and uniform Anti-SLAPP statute to be approved by the EU and incorporated into the laws of the EU member states.¹²² Specifically, Members of the European Parliament (MEPs) have recently recognized proposals stretching back to 2018 in a comprehensive Anti-SLAPP resolution in April 2022.¹²³ Encouragingly, as of two months ago, the EU’s MEPs have reached a collective agreement on the Anti-SLAPP proposal and now are only awaiting it to be formally approved by member states.¹²⁴ As this proposal now only awaits ratification, the following discussion will focus on the proposal’s legal defined purpose, mechanisms, remedies, and on-going controversies.¹²⁵ Lastly, in the section following, the discussion will examine potential pitfalls of the proposal and the benefits of it as a law before comparing its adoption with the U.S.’s law.¹²⁶

Broadly, the proposal applies to “abusive court proceedings against public participation,” defined as unfounded proceedings to prevent or penalize public participation.¹²⁷ It broadly “aims to protect targets of SLAPPs and prevent the phenomenon,” as no member states have Anti-SLAPP laws, and there are no EU specific statutes on the burgeoning subject.¹²⁸ The EU proposal, is therefore both a corrective and an educative matter, seeking to reform and introduce the subject of Anti-SLAPP legislation to its member states.¹²⁹ Regarding education, the EU proposal includes objectives concerning the continuing education of the legal field within the EU on SLAPPs, what

¹¹⁷ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14.

¹¹⁸ *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

¹¹⁹ *Proposal for a Directive of the European Parliament*, *supra* note 9.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Europe: ‘We refuse to let the anti-SLAPP directive be a missed opportunity’*, ARTICLE 19 (Nov. 2023) <https://perma.cc/2UEX-FQW4>.

¹²³ *Proposal for a Directive of the European Parliament*, *supra* note 9.

¹²⁴ *Id.*

¹²⁵ Farrington & Zabrocka, *supra* note 4.

¹²⁶ Farrington & Zabrocka, *supra* note 4; Herbertson, *supra* note 40; Kessenbrock, *supra* note 40.

¹²⁷ *Proposal for a Directive of the European Parliament*, *supra* note 9.

¹²⁸ *Id.*

¹²⁹ Farrington & Zabrocka, *supra* note 4

they are, who they effect, and how they should be dealt with.¹³⁰ Additionally, it has provisions providing financial support for journalists, human activists, and others unjustly targeted by SLAPPs so such parties can combat SLAPPs without incurring egregious legal fees.¹³¹ Further, somewhat ambitiously, the proposal also seeks to protect citizens of the EU member states from the threat of extra-jurisdictional SLAPPs against them.¹³²

Turning from these goals to the operating definitions of the proposal, it defines “public participation” broadly in two categories: (1) activities involving the right to free speech and information (2) activities related to the right to assemble and associate freely.¹³³ Under this umbrella, activities and statements on matters of public interest like public health, fundamental rights, and corruption are encompassed, but, it does place an outer boundary on “public participation,” noting that commercial speech or speech that is not directly related to public participation is not covered by the act.¹³⁴

Additionally, the statute seeks to address the “cross-border” problem somewhat unique to the EU, attempting to broadly protect the fundamental rights and investigative power of individuals and institutions from forum shopping.¹³⁵ Unless all individuals are domiciled in one state and the case itself is only relevant to that state, the SLAPP will be considered “cross-border,” and therefore subject to the broader statute, rather than just that member state’s specific adoption of the proposal.¹³⁶ While only a minority of SLAPPs would classify as cross-border under a traditional understanding, the proposal acknowledgement of and solution to the “cross-border” problem is promising and novel.¹³⁷ This section also has growing importance as digital media defamation cases could meet the “cross-border” definition.¹³⁸

Under the proposal, defendants in SLAPP cases can now petition for dismissal of the SLAPP unless the SLAPP filers prove that the case is well founded, effectively shifting the burden from defendant onto the claimant.¹³⁹ This should result in swift verdicts, especially in those cases falling under the broad “cross-border” definition. Without the proposal, litigants in “cross-border” cases would have to pursue justice in multiple courts at the same time.¹⁴⁰ Further, seeking to protect citizens of the EU member states against tyranny perpetuated in foreign jurisdictions, the proposal incorporates a series of provisions that “ensure . . . third-country judgment . . . is refused as manifestly contrary to public policy . . . if those proceedings would have been considered manifestly unfounded or abusive if they had been brought before . . . the Member State.”¹⁴¹ This functions to effectively bar the unjust pursuit of ex-patriots and others who are speaking out against

¹³⁰ *Proposal for a Directive of the European Parliament*, *supra* note 35; European Commission Press Release, *supra* note 25.

¹³¹ *Id.*

¹³² Farrington & Zabrocka, *supra* note 4; European Commission Press Release, *supra* note 25.

¹³³ *Proposal for a Directive of the European Parliament*, *supra* note 35.

¹³⁴ *Id.*

¹³⁵ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14; *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

¹³⁶ *Proposal for a Directive of the European Parliament*, *supra* note 9.

¹³⁷ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14.

¹³⁸ *Id.*

¹³⁹ *Proposal for a Directive of the European Parliament*, *supra* note 9.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

global injustice if currently residing in, or under the protection of, the EU.¹⁴² Additionally in this vein, the proposal integrates other sections that provide further protection for defendants from forum shopping, allowing for compensation claims to be brought in the EU against unjust SLAPP judgements that occurred in a non-member state.¹⁴³

Generally, the proposal itself is pro-defendant as it includes many pro-defendant compensatory provisions.¹⁴⁴ For example, defendants can apply for special relief in cases where not only the SLAPP is unfounded, but additionally abusive or harassing.¹⁴⁵ Specifically, they can file claims against both material and immaterial damage incurred during or caused by the litigation.¹⁴⁶ Material damage encompasses non-reimbursable legal fees, travel expenses, and medical costs, including psychological assistance, directly tied to court proceedings, as well as pre-trial costs not covered by national laws; and immaterial damage encompass physical or psychological harm from the proceedings, such as pain, suffering, emotional distress, life impairment, reputational damage, and other forms of intangible harm.¹⁴⁷ Together, these two avenues provide extensive protective coverage for those targeted by SLAPPs.¹⁴⁸ Doubling down on its pro-defendant stance, the EU's proposal further pushes that even when national laws of the member state prevent the court assigning the whole cost of the litigation on the SLAPP filer, the EU will ensure that the reasonable costs of the litigation do not fall on the defendant.¹⁴⁹

While the proposal is pro-defendant, there is debate concerning how restrictive or broad the statute's definition of "manifestly unfounded" and "cross-border" are.¹⁵⁰ Notably, within the EU itself there has been an ongoing disagreement between the Parliament and Council on the interpretation, as parliament is encouraging that the proposed statute is applied broadly, even reinforcing their pro-defendant disposition by also including "access to information, legal aid, and ethical standards for legal professionals" for defendants that are victims of SLAPPS.¹⁵¹ The Council, however, favors a more restrictive neutral reading of the proposal.¹⁵² It should be noted that in either case, the proposal merely sets a minimum for member states, and member states can enact the statute both restrictively and broadly if they so wish.¹⁵³ This burgeoning space of law is still in its infancy in the EU, and how the nation states choose to adopt or add to the proposal will be instrumental in directing the future of free speech on the global stage.¹⁵⁴

A. IMPACTS OF THE LEGISLATION: PROS AND CONS

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Farrington & Zabrocka, *supra* note 4.

¹⁴⁵ European Commission Press Release, *Commission Tackles Abusive Lawsuits Against Journalists and Human Rights Defenders 'SLAPPS'*, (April, 2022), <https://perma.cc/73KF-YYTK>.

¹⁴⁶ Farrington & Zabrocka, *supra* note 4.

¹⁴⁷ *Proposal for a Directive of the European Parliament*, *supra* note 35.

¹⁴⁸ Farrington & Zabrocka, *supra* note 4; European Commission Press Release, *supra* note 145.

¹⁴⁹ *Proposal for a Directive of the European Parliament*, *supra* note 9.

¹⁵⁰ Farrington & Zabrocka, *supra* note 4.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14. Brander & Turk, *supra* note 15.

Since the general focus of the EU's proposal has been outlined, it is important to understand just as there is debate regarding how it is interpreted, there is also debate going on how impactful it will be against SLAPPs.¹⁵⁵ First, it is essential to point out that no matter how effective it is as a whole, it is a step in the right direction for Europe and the global legal field.¹⁵⁶ Currently, there are no countries in Europe that have legislation directed at SLAPPs at all.¹⁵⁷ The EU's proposal will in effect push the overall conversation forward if nothing else by bringing awareness in these jurisdictions of SLAPPs and requiring that these member states propose and develop Anti-SLAPP legislation in accordance with the proposal.¹⁵⁸ Additionally, by aiming loftily to harmonize the legal standards in the EU, the EU will ensure at least some level of uniformity amongst jurisdictions and provide a guideline for the lay person seeking to protect their rights.¹⁵⁹ Overall, even if not robust, this will aid in reducing disparity in the legal protections and lower the risk of forum shopping, especially as it includes damages incurred by suits launched outside of a member state.¹⁶⁰

On the subject of the "cross border" problem, the EU's approach is important in its novelty alone, as it is perhaps the first substantial effort to internationalize protection against SLAPPs in a comprehensive way.¹⁶¹ Even if prototypical in its efficacy, the EU is taking the first step towards these unique challenges, providing valuable insight into methods to identify and stop international cross boarder SLAPPs.¹⁶² Those that perpetrate SLAPPs themselves often are not constrained by borders, as they often are powerful corporations or individuals, therefore, the EUs proposal is essential in understanding this space.¹⁶³

Further, the EUs intense focus on education and awareness is something that is unique.¹⁶⁴ While other jurisdictions have legislation on the topic, the EU recognizes that fighting SLAPPs is broader than just the legislative system, and that it requires widespread effort and education.¹⁶⁵ By including provisions that aim at continuing education for lawyers and the public at large, it is clear the EU might understand that it can only do so much without a truly integrated and corporative effort between itself, its member states, and their citizens.¹⁶⁶ Together, this will create a network that is far more resilient than any piece of legislation, as a mobilized public that knows their rights and how to assert them is a more fluid and formidable force against tyranny.¹⁶⁷

¹⁵⁵ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, EUROPEAN FEDERATION OF JOURNALISTS (Sept. 6, 2023), <https://perma.cc/M6MM-ZJKL>.

¹⁵⁶ *Protecting journalists against SLAPPs : a promising European directive, but Member States must be ambitious when transposing it*, REPORTERS WITHOUT BORDERS (Dec. 12, 2023), <https://rsf.org/en/protecting-journalists-against-slapps-promising-european-directive-member-states-must-be-ambitious>.

¹⁵⁷ Paulina Milewska, *Countering SLAPPs in Hungary, Poland, and the Rest of the EU*, RETHINK.CEE (May, 2023), <https://perma.cc/44EX-6DTL>.

¹⁵⁸ *Id.*

¹⁵⁹ *Protecting journalists against SLAPPs*, *supra* note 156.

¹⁶⁰ *Proposal for a Directive of the European Parliament*, *supra* note 9.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

¹⁶⁴ *Proposal for a Directive of the European Parliament*, *supra* note 9.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Collectively, all of these pros of the proposal speak towards the EU's commitment to the protection of fundamental rights and free speech.¹⁶⁸ By seeking to tackle SLAPPs in such a broad way the EU cements the EU's political position strongly in favor of essential democratic principles, ensuring that public debate and progress can be made in Europe without fear.¹⁶⁹ By seeking to preserve free speech the EU is striving towards preserving democracy within the European Continent, something that is vital in today's conflict-ridden times.¹⁷⁰

Despite these pros, there are those that while not disagreeing with the goals of legislation find that it provides little protection, is too ill focused, and together is a mere representative of "good will" with no force behind it.¹⁷¹ There are a lot of critiques directed at the Council and its failure to give full effect to the original drafts of the proposal.¹⁷² The revisions that the Council undertook were largely based on concerns some member states expressed about the scope potential for overreached and potential misalignment with the subsidiarity principles that underscore the EU.¹⁷³ This prompted the initial revision and the introduction of the revised proposal, which though was still substantially the same, contained within it key features that altered the overall efficacy and function of the proposal.¹⁷⁴

While some have described it as a more balanced approach, others disagree with that sentiment, such as the EFJ General Secretary Ricardo Gutiérrez who said: "It is far too restrictive to have a meaningful impact. Let's be clear: very few cases fall within the scope of what the council is proposing. . . . [P]ublic commitments are not being translated into concrete action when it comes to providing a favorable environment for journalists and media outlets."¹⁷⁵ Echoing this the EU Commissioner for Justice, Didier Reynders, stated that he "would like to express my regret concerning the weakening of the remedies against abusive court proceedings, in particular the deletion of the provision on compensation of damages and the weakening of the provision on award of costs."¹⁷⁶ Interestingly, Malta, which was previously noted in this text as having a strong uptick in SLAPP cases agrees with these sentiments, arguing that the proposal should be more pro-defendant.¹⁷⁷ This suggests that the countries that need it the most are being disenfranchised by the proposal's watered down approach.¹⁷⁸

The concern stems mainly from the revisions outlined below.¹⁷⁹ The new proposal's framework forwards several alterations, including an altered definition and application of the "cross-border"

¹⁶⁸ *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

¹⁶⁹ *ECPMF Welcomes European Parliament Adoption of the Anti-SLAPP Directive*, ECPMF (Feb. 27, 2024), <https://perma.cc/L49X-XGSQ>.

¹⁷⁰ *Id.*

¹⁷¹ Satyajit Sarna, *The EU Anti-SLAPP Directive – Betrayal of an Idea?*, HYPOTHESES (July 3, 2023), <https://perma.cc/5T3F-B7PN>.

¹⁷² Vitor Teixeira, *European Anti-SLAPP Directive Under Threat*, CASE COALITION (Mar. 15, 2023), <https://perma.cc/BWZ5-EFJV>.

¹⁷³ Sarna, *supra* note 171.

¹⁷⁴ *Id.*

¹⁷⁵ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, *supra* note 155; Sarna, *supra* note 171.

¹⁷⁶ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, *supra* note 155.

¹⁷⁷ Sarna, *supra* note 171.

¹⁷⁸ *Id.*

¹⁷⁹ Milewska, *supra* note 157.

categorization that is substantially narrower than initially entertained.¹⁸⁰ The new definition limits “cross-border” categorization to situations where parties are simply domiciled in different member states.¹⁸¹ This revision diverges from the more nuanced and broader “cross-border” definition which posited that a case was “cross-border” if it was factually significant across borders.¹⁸² As noted by the Coalition Against SLAPPS in Europe (CASE) under this definition: “of . . . 570 European SLAPP cases . . . only 10% would qualify as ‘cross border’ using the interpretation applied in the Council’s compromise proposal,” bringing to light the questionable actionability of the new proposal.¹⁸³

Additionally, the proposal includes a much more restrained evidentiary standard for dismissal, modifying the definition for “manifestly unfounded” in relation to a lawsuit qualification as a SLAPP to be significantly harder to achieve.¹⁸⁴ In particulars it was revised to mean “a claim which is so obviously unfounded that there is no scope for any reasonable doubt.”¹⁸⁵ Since it is through this definition that SLAPPs suits are identified for dismissal, it in the words of CASE “renders the proposed early dismissal mechanism useless.”¹⁸⁶ The new proposal also has changed the burden of proof, lowering the burden to mere substantiation that the suit in question has merit, a burden most professionally prepared cases, SLAPPs or not, should be able to meet.¹⁸⁷

Further, the new proposal also has restricted the role of third parties to intervene and help shoulder the burden of litigation, further weakening the original draft’s mission to provide strong protections against SLAPPs.¹⁸⁸ Additionally, while still providing compensation, the new proposal lowers the bar for what can be claimed by allowing the member states to determine the compensation for victims of SLAPPs.¹⁸⁹

As CASE outlined in their letter to the Permanent Representative of the Kingdom of Sweden to the EU, overall the revisions could set such a burden on the defendant that in considering “pre-trial dismissal . . . most cases render the proposed early dismissal mechanism entirely redundant [as] most EU Member States already have pre-trial mechanisms . . . and in most cases the threshold included . . . represents a lower hurdle for SLAPP plaintiffs than existing mechanisms.”¹⁹⁰ Deeply cynical about the proposal, the letter continues stating the following:

It is difficult to see how the mechanisms proposed in the compromise proposal would make any material difference to those targeted by SLAPPs. It is crucial therefore that national governments act now to ensure that the European Council does not water down the

¹⁸⁰ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, *supra* note 155; Sarna, *supra* note 171.

¹⁸¹ Sarna, *supra* note 171.

¹⁸² *Id.*

¹⁸³ Teixeira, *supra* note 172.

¹⁸⁴ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, *supra* note 155; Sarna, *supra* note 171.

¹⁸⁵ Sarna, *supra* note 171.

¹⁸⁶ Teixeira, *supra* note 172.

¹⁸⁷ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, *supra* note 155; Sarna, *supra* note 171; Teixeira, *supra* note 172.

¹⁸⁸ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, *supra* note 155; Sarna, *supra* note 171; Teixeira, *supra* note 172.

¹⁸⁹ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, *supra* note 155; Sarna, *supra* note 171; Teixeira, *supra* note 172.

¹⁹⁰ Teixeira, *supra* note 172.

provisions in the EC's proposed directive, but rather builds on them to ensure robust protections are in place against SLAPPs in Europe.¹⁹¹

While these concerns are evidence of a deep friction between activists and the legislature this friction might be simply an inherit challenge of an international law with lofty aims.¹⁹² Organizations like the EU and the UN have long faced deep systemic issues concerning managing international governance, both in the enactment and the legislative side of the issue. Importantly, there are contextual questions, jurisdictional questions, and questions about the true efficacy of the legal system in such diverse spaces.¹⁹³ This exact problem has been noted in other more apparently international topics such as the cyberspace.¹⁹⁴ Yet, this legislation and problem is unique because often the challenge of international law revolves around the suppression of rights by global powerhouses such as China, and in this case the law in question is seeking the opposite result.¹⁹⁵ Together, the space of international law has been noted to be in a period of flux and development, so such conflict is to be expected.¹⁹⁶

In the perspective of international law and after outlining these challenges to it, the proposal still has significant support from countries that want a balanced approach such as “Austria, Hungary, Slovenia, Germany, Poland, Italy, Croatia, Lithuania, Netherlands, Luxembourg, Slovakia, Estonia, Bulgaria and Greece.”¹⁹⁷ Together, while perhaps not as strong or as effective as activist had hoped, it is no doubt that the proposal is at least a step into a future that ensures rights for all.¹⁹⁸

IV. Comparative Analysis: EU vs. U.S.

It is apparent that the EU and the U.S. have two separate approaches when it comes to Anti-SLAPP with the EU, while generally following the U.S.'s footsteps in supporting pro-defendant legislation, has a more uniform directive in comparison to the U.S.¹⁹⁹ Specifically, this is apparent not only from the different forms of governance, but also from the U.S. declination to create a federalized version of Anti-SLAPP.²⁰⁰ The lack of federal statute in conjunction with the patchwork nature of Anti-SLAPP's adoption amongst the states leads to inconsistencies within the U.S. and, though there is legislation that has been proposed in the U.S. to rectify this issue, it has not advanced as far as in the EU.²⁰¹ The EU's former position on Anti-SLAPP, with individual member states being left completely on their own to form Anti-SLAPP laws without any guidance

¹⁹¹ *Id.*

¹⁹² John Louth & Merel Alstein, *Challenges for International Law*, OUP BLOG (Dec. 3, 2012), <https://perma.cc/5ZZV-SBUB>.

¹⁹³ *Id.*

¹⁹⁴ Chatham House, *How International Law is Being Reshaped and the Challenges it Faces*, WORLD ECONOMIC FORUM (Jul. 25, 2018), <https://perma.cc/QM7Z-KKAD>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, *supra* note 155; Sarna, *supra* note 171

¹⁹⁸ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14; *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

¹⁹⁹ *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

²⁰⁰ Herbertson, *supra* note 40; Kessenbrock, *supra* note 40.

²⁰¹ Herbertson, *supra* note 40; Kessenbrock, *supra* note 40; *Proposal for a Directive of the European Parliament*, *supra* note 9.

or corporate structure, is comparatively similar to the current environment of the U.S.²⁰² Conjunctively, the cross-border complexity that the EU seeks to address is unique and should be observed closely by the U.S. and the greater world.²⁰³ As the EU noted:

Furthermore, the existing divergences in national procedural laws risk increasing forum shopping and multiple court proceedings being initiated in different EU jurisdictions. Evidence shows that national civil procedural law is not always well equipped to deal with the additional complications arising out of the cross-border proceedings. The divergences in national laws also make it highly unlikely that the Member States acting individually would successfully tackle the phenomenon or be able to ensure overall coherence of such rules across Member States to ensure an equally high standard of protection across the Union.²⁰⁴

While the U.S. does have a federal system built of different forums, the cultural and legal divides amongst the states are not as vast as those between member countries of the EU, implicating that if the EU's reforms are successful, it is a strong indicator that federal Anti-SLAPP laws should be adopted in the U.S.²⁰⁵ Tangential to this is the EU committed goal to promote education and relief for those persecuted by SLAPPs.²⁰⁶ While the TCPA does provide for the awarding of fees, it is not as comprehensive in scope as the EU's proposal in this regard.²⁰⁷ Though pro-defendant in action, this implies that the TCPA is not as pro-defendant in result as it could be in comparison.²⁰⁸

Additionally, the U.S. seems firmly affixed to supporting defendants and free speech, while the EU still seems torn and subject to internal discussions over how to interpret their own proposal.²⁰⁹ Turning toward the TCPA, it is apparent that providing both clear definitional terms within the statute, attaching classes of suspect SLAPP petitioners, and allowing for courts to interpret cases based on their facts permits for fluidity within results and a highly actionable statute.²¹⁰ While the EU's proposal is promising in broadness and uniformity, it lacks clarity, partially due to the lack of caselaw surrounding it and the lack of affirmative definitions.²¹¹ Critics might point to the TCPA being recently being narrowed as a sign that it is too aggressive, and cite to its estimated 90% success rate in dismissing suits as being egregiously damaging to legitimate defamation suits.²¹² But when considering the values at stake, mainly the right to participate in a free democracy with a free press, and the disbalance of power frequently present within SLAPP cases,

²⁰² Herbertson, *supra* note 40; Kessenbrock, *supra* note 40; *Proposal for a Directive of the European Parliament*, *supra* note 9.

²⁰³ Farrington & Zabrocka, *supra* note 4.

²⁰⁴ *Proposal for a Directive of the European Parliament*, *supra* note 9.

²⁰⁵ Herbertson, *supra* note 40; Kessenbrock, *supra* note 40; *Proposal for a Directive of the European Parliament*, *supra* note 35.

²⁰⁶ *Proposal for a Directive of the European Parliament*, *supra* note 35.

²⁰⁷ Mark C. Walker, *The Essential Guide to the Texas Anti-SLAPP Law, the Texas Defamation Mitigation Act, and Rule 91A*, DICKINSON WRIGHT (Jan. 30, 2020), <https://perma.cc/6A2D-V2TW>.

²⁰⁸ Walker, *supra* note 207; *Proposal for a Directive of the European Parliament*, *supra* note 35.

²⁰⁹ Farrington & Zabrocka, *supra* note 4.

²¹⁰ Walker, *supra* note 207.

²¹¹ Farrington & Zabrocka, *supra* note 4.

²¹² Prueger & Horton, *supra* note 104; Walker, *supra* note 207.

it feels more than apparent that with few exceptions pro-defendant Anti-SLAPP statutes are pro-democratic statutes.²¹³

In consideration of this assertion, the EU's uniformity, international outlook, and supportiveness of defendants and the education of the legal field, in combination with the U.S. specifically defined, fact intensive, and caselaw tested TCPA could form the pathway forward.²¹⁴ Yet, as the U.S. seems reluctant to adopt even federal safeguards for SLAPPs, the US adopting an internal outlook seems grim.²¹⁵ As the legislation progresses in the EU towards ratification, however, it will become apparent how the EU wishes to go forward, as either pro-defendant or pro-censorship.²¹⁶

V. Conclusion

Collectively, it is encouraging that the EU and many other countries are seeking to protect free speech through active legislation.²¹⁷ In our ever-connected world, enhancing safe-guards for journalists, investigators, and individuals that have been victimized by SLAPPs ensures a flow of information where it otherwise might be silenced.²¹⁸ The EU especially shows how international cooperation could be the key in forwarding rights and, in conjunction, allowing humanitarian crimes to be freely spoken upon.²¹⁹ Furthermore, despite somewhat divided, the U.S.'s pro-defendant Anti-SLAPP laws have already been used to great effect.²²⁰ Moving forward, a synthesis of the pro-defendant outlook and international, or in the U.S.'s case federal, efforts could truly liberate the global public's power of the press.²²¹

²¹³ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14; *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

²¹⁴ *Proposal for a Directive of the European Parliament*, *supra* note 35; Prueger & Horton, *supra* note 104; Walker, *supra* note 207.

²¹⁵ Herbertson, *supra* note 40; Kessenbrock, *supra* note 40; *Proposal for a Directive of the European Parliament*, *supra* note 9.

²¹⁶ Farrington & Zabrocka, *supra* note 4.

²¹⁷ Brander & Turk, *supra* note 15.

²¹⁸ *The Use of SLAPPs to Silence Journalists*, *supra* note 12.

²¹⁹ *Proposal for a Directive of the European Parliament*, *supra* note 9.

²²⁰ Walker, *supra* note 207.

²²¹ *Open SLAPP Cases in 2022 and 2023*, *supra* note 14; *Proposal for a Directive of the European Parliament*, *supra* note 9.