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FIRST AMENDMENT RIGHTS—“SEE YA IN BOSTON,
BRUH”¹: MAKING THE LINK BETWEEN THE RIGHT TO
PETITION, ACTIVISM, AND THE MASSACHUSETTS ANTI-
SLAPP STATUTE*Heidi K. Waugh**

Conceptual understandings of political engagement in the digital age continue to evolve as social media and the real-time web reconfigure the ways in which we exchange information. Despite the increasing application of e-campaigns, online petitions, and large-scale digital protests, reciprocity between the governed and the government continues to endure as the hallmark of representative democracy. The right to petition, contained within the final clause of the First Amendment, embodies this central tenet and constitutes the core of the Massachusetts Anti-SLAPP Statute—legislation that provides a special motion to dismiss lawsuits designed to chill public participation in government.

Massachusetts anti-SLAPP jurisprudence is at a critical juncture. As each special motion to dismiss comes to pass, the courts must grapple with the statute’s expansive scope and the shifting contours of political engagement in the twenty-first century. Increasingly, citizens are engaging in activities that were not originally contemplated by the statute and seeking protection under the anti-SLAPP paradigm. As ever more complex scenarios arise, how are courts to determine which activities meet the statutory definition of petitioning? This Note

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1. Barry Meier, *Science Consultant Pushes Back Against Unlikely Opponents*, N.Y. TIMES (Oct. 11, 2015), <https://www.nytimes.com/2015/10/12/business/energy-environment/years-after-criticism-of-its-practices-science-consultant-pushes-back.html>.

argues that courts must objectively assess a statement's content, manner of issuance, and proximity to government action when determining the scope of petitioning activity. In the absence of an interpretive framework that is both consistent with the language and the policies underlying the statute—namely promoting and protecting an involved citizenry—the judiciary is bound to frustrate, rather than effectuate, the statute's legislative intent.

INTRODUCTION

In 1996, Professors Penelope Canan and George W. Pring warned Americans that a new breed of intimidation litigation was stalking the nation.² In their capacity as advocates and scholars, Canan and Pring observed a proliferation of cases in which citizens were being sued for circulating petitions, testifying at public hearings, and reporting violations of law.³ In an effort to draw attention to the dire consequences posed by such suits—namely, the chilling of public participation—the pair created the term “strategic lawsuits against public participation” (SLAPPs) in government.⁴ Since that time, scholars have characterized the typical SLAPP scenario as an instance in which a powerful entity files a frivolous action against an opponent with fewer resources in order to stifle political activity.⁵ Often, these meritless lawsuits are either dropped or dismissed.⁶

2. GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 1 (1996). In 1996, George W. Pring was a professor of law and Penelope Canan was an associate professor of sociology at the University of Denver. *Id.* at cover copy. At that time, Pring and Canan were also co-directors of the Political Litigation Project at the University of Denver; an interdisciplinary initiative instituted in 1984 for the purposes of research and education. *Id.* Today, Pring is professor of law emeritus at the University of Denver. *Faculty & Staff Directory*, UNIV. DENVER, <https://www.law.du.edu/faculty-staff/george-pring> [<https://perma.cc/UXU2-DVFN>]. Canan is professor emerita of the Sociology Department at the University of Central Florida; she retired from the UCF Sociology Department in December 2012. UCF Sociology, *People*, UNIV. CENT. FLA., <https://sciences.ucf.edu/sociology/people/canan-penelope/> [<https://perma.cc/LJ74-5TNW>].

3. PRING & CANAN, *supra* note 2, at 2–3; *see also* *Citizen Activism Under Attack: Lawsuits Used to Silence Critics*, NEW CITIZEN (1992), http://www.main.nc.us/cml/new_citizen/TNCv1n1.html#9 [<https://perma.cc/A4K5-FM8W>] (recounting examples of citizens being sued for petitioning against development projects in their communities).

4. PRING & CANAN, *supra* note 2, at 3.

5. Rebecca Ariel Hoffberg, *The Special Motion Requirements of the Massachusetts Anti-SLAPP Statute: A Real Slap in the Face for Traditional Civil Practice and Procedure*, 16 B.U. PUB. INT. L.J. 97, 97 (2006); *see* Richard J. Yurko & Shannon C. Choy, *Reconciling the Anti-SLAPP Statute with Abuse of Process and Other Litigation-Based Torts*, 51 BOS. B.J. 15, 15–16 (2007).

6. PRING & CANAN, *supra* note 2, at 1. Although early SLAPPs rarely prevailed in court, mounting a successful defense consumed a substantial amount of time. *Id.* at 218. Pring and

But the underlying purpose of the action—detering citizens from freely engaging in government by imposing the costly and stressful burdens of litigation—is often achieved.⁷

Because SLAPPs target “the right of the people . . . to petition the government for a redress of grievances,”⁸ the lawsuits’ negative implications arguably affect all citizens.⁹ As Canan and Pring explained:

The ominous new risk for those who express their views to the government is that opponents—not content with rebuttal in the same public forums—will drag citizens out of the political arena and into the courthouse with staggering personal lawsuits. The “chilling” effect [of] this new breed of cases on public debate and citizen involvement is already significant; the possible effect on the future of our society and its public-participatory form of government is even more threatening.¹⁰

In recognition of this threat, and in an effort to preserve a core feature of the democratic process, over thirty states—including Massachusetts—have enacted anti-SLAPP statutes.¹¹ Anti-SLAPP statutes target lawsuits that are intended to chill a party’s exercise of its right to petition by

Canan found that on average, the lawsuits lasted forty months. *Id.* Some suits, however, endured for as long as thirteen years. *Id.*

7. *See id.* at 3 (“[W]e conservatively estimate that thousands have been sued into silence, and that more thousands who heard of the SLAPPs will never again participate freely and confidently in the public issues and governance of their town, state, or country.”); *see also What is a SLAPP Suit?*, ACLU OHIO, <https://www.acluohio.org/slapped/what-is-a-slapp-suit> [<https://perma.cc/S2UL-P42Q>] (“In addition to engendering fear and intimidation, the party initiating the suit (SLAPPOR) often seeks to bleed the other party (SLAPPEE) of resources and produce a chilling effect . . .”).

8. U.S. CONST. amend. I.

9. *See* PRING & CANAN, *supra* note 2, at 2.

10. *Id.*

11. ARIZ. REV. STAT. ANN. § 12-752 (2018); ARK. CODE ANN. § 16-63-504 (2018); CAL. CIV. PROC. CODE § 425.16 (West 2018); DEL. CODE ANN. tit. 10, § 8136 (2018); D.C. CODE § 16-5502 (2018); FLA. STAT. § 768.295 (2018); GA. CODE ANN. § 9-11-11.1 (2018); HAW. REV. STAT. § 634F-2(9) (2018); 735 ILL. COMP. STAT. 110/15 (2018); IND. CODE §§ 34-7-7-1 to 34-7-7-10 (2018); KAN. STAT. ANN. § 60-5320 (2018); LA. CODE CIV. PROC. ANN. art. 971 (2018); ME. REV. STAT. ANN. tit. 14, § 556 (2018); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2018); MASS. GEN. LAWS ch. 231, § 59H (2018); MINN. STAT. § 554.02 (2018); MO. ANN. STAT. § 537.528 (West 2018); NEB. REV. STAT. ANN. § 25-21 (West 2018); NEV. REV. STAT. ANN. §§ 41.635–670 (West 2018); N.M. STAT. ANN. § 38-2-9.1 (West 2018); N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2018); OKLA. STAT. ANN. tit. 12, § 1430–38 (West 2018); OR. REV. STAT. § 31.150 (2018); 27 PA. CONS. STAT. § 8302 (2018); 9 R.I. GEN. LAWS § 9-33-2 (2018); TENN. CODE ANN. § 4-21-1003 (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West 2017); UTAH CODE ANN. § 78B-6-1403 (West 2018); VT. STAT. ANN. tit. 12, § 1041 (2018); VA. CODE ANN. § 8.01-223.2 (2018); WASH. REV. CODE § 4.24.510 (2018); 7 GUAM CODE ANN. § 17104 (2018).

creating a special motion to dismiss that the targeted party may file prior to any discovery.¹² Although the text of the statutes vary from jurisdiction to jurisdiction, all anti-SLAPP legislation recognizes that “the single element of reaction to political action . . . distinguishes SLAPPs from the everyday retaliatory lawsuit[.]”¹³ Therefore, in determining whether a lawsuit is in fact a SLAPP, and whether a statement is entitled to immunity under anti-SLAPP legislation, courts must frequently decide whether the party seeking protection exercised their constitutional right to petition the government.¹⁴

Enter Cherri Foytlin and Karen Savage: environmental activists who penned and published an article on the *Huffington Post’s Green Blog* in October of 2013.¹⁵ The blog post, titled *ChemRisk, BP and Purple Strategies: A Tangled Web of Not-So-Independent Science*,¹⁶ concerned a specific study that ChemRisk, a scientific consulting company, conducted and released on behalf of British Petroleum (BP) following the Deepwater Horizon oil spill.¹⁷ In furtherance of the study, ChemRisk considered “the extent to which [off-shore] cleanup workers responding to the Deepwater Horizon spill had been exposed to the [airborne] chemicals benzene, toluene, ethylbenzene, and xylene (collectively known as BTEX).”¹⁸ Whereas the final report indicates that cleanup workers endured levels of exposure “well below the Permissible Exposure Limits (PELs) established by the U.S. Occupational Safety and Health Administration (OSHA).”¹⁹

12. See, e.g., MASS. GEN. LAWS ch. 231, § 59H (2018).

13. PRING & CANAN, *supra* note 2, at 8.

14. *Id.*; see also Jeffrey J. Pyle, *Cardno ChemRisk v. Foytlin: Supreme Judicial Court Holds That Anti-SLAPP Law Protects Opinion Writing*, BOS. B.J. (May 11, 2017), <https://bostonbarjournal.com/2017/05/11/cardno-chemrisk-v-foytlin-supreme-judicial-court-holds-that-anti-slapp-law-protects-opinion-writing/> [https://perma.cc/7M7N-YVHW] (contending that special motions to dismiss under anti-SLAPP statutes “are typically won or lost on the question of whether [the activity] . . . is ‘petitioning.’”).

15. *Cardno ChemRisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1184 (Mass. 2017); see Meier, *supra* note 1.

16. Cherri Foytlin & Karen Savage, *ChemRisk, BP and Purple Strategies: A Tangled Web of Not-So-Independent Science*, HUFFPOST (Oct. 14, 2013, 12:29 PM), http://www.huffingtonpost.com/entry/chemrisk-bp-and-purple-st_b_4095131.html [https://perma.cc/9C2E-56GX].

17. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1183. The oil spill occurred on April 20, 2010. *Id.* The explosion of Deepwater Horizon, a BP oil rig, resulted in “approximately 4.9 million barrels of oil . . . flow[ing] into the Gulf of Mexico, some forty miles off the coast of Louisiana.” *Id.*

18. *Id.* at 1184; Foytlin & Savage, *supra* note 16.

19. *ChemRisk LLC, Study by Leading Scientific Consulting Firm Finds No Evidence of Health Dangers for Gulf Coast Cleanup Workers*, CISION (Sept. 2, 2011, 4:04 PM),

Foytlin and Savage suggest that ChemRisk's "science" is a product of "truth-for-hire" that fails to tell the whole story.²⁰

In the blog post, Foytlin and Savage initially contextualize their skepticism of ChemRisk's BTEX report against the backdrop of litigation then-ongoing in the United States District Court for the Eastern District of Louisiana.²¹ According to the authors, the trial bore witness to a "scientific battle" between the Department of Justice (DOJ) and BP experts over the amount of oil that escaped in 2010.²² The blog continues by stating:

As [the DOJ] alluded [at trial], BP does not exactly have a reputation for coming clean on the facts surrounding the disaster. Early on, the oil giant told the public that the leak was an estimated 5,000 barrels per day, yet according [to] the company's own internal emails BP knew that up to 100,000 barrels per day were flowing unchecked into the Gulf of Mexico ecosystem.

BP has consistently used their "science" to low-ball the amount of the spill and minimize its impacts on Gulf Coast residents and ecosystems.

Additionally, contracted clean-up workers[,] who continue to struggle daily with serious health concerns brought on by their exposure to BP's toxic crude and the oil dispersant Corexit, have often hit a wall of BP's "independent" data.²³

The authors then introduce the ChemRisk BTEX report as an example of BP's failure to "come clean" on the facts—an instance in which the company "tout[ed] industry-friendly scienc[ce] to cloud the truth."²⁴ Following several passages concerning the report's findings, the blog's investigatory gaze shifts from BP's tactics of mitigation to ChemRisk's history of "truth-clouding."²⁵

<https://www.prnewswire.com/news-releases/study-by-leading-scientific-consulting-firm-finds-no-evidence-of-health-dangers-for-gulf-coast-cleanup-workers-129139328.html>.

20. See Foytlin & Savage, *supra* note 16.

21. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1184; see also *In re Oil Spill by the Oil Rig "Deepwater Horizon" in Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 900–03 (E.D. La. 2012).

22. Foytlin & Savage, *supra* note 16.

23. *Id.*

24. *Id.*

25. *Id.* (referencing public relations firms' practice of disseminating "industry-friendly scienc[ce] to cloud the truth").

As it turns out, ChemRisk has a long, and on at least one occasion fraudulent, history of defending big polluters, using questionable ethics to help their clients avoid legal responsibility for their actions.

One well-known example is the case that became the basis for the movie *Erin Brockovich*, where the polluter and defendant Pacific Gas and Electric (PG & E) was found to have paid ChemRisk to discredit research done by Chinese scientist Dr. Jian Dong Zhang.²⁶

Ultimately, the blog closes with a claim and stark comparison: while public relations firms continue to work tirelessly to minimize BP's liability for the Deepwater Horizon oil explosion, residents of the Gulf Coast are left to wonder if anyone will ever "make it right."²⁷

Following the blog's publication on *Huffington Post*, a ChemRisk representative requested its retraction.²⁸ Upon learning of the request, Foytlin posted the blog on her Facebook page and told ChemRisk, "kiss my derriere."²⁹ Foytlin informed the *Huffington Post* editor that she believed the blog's content was factually accurate; thereafter, the piece remained posted on the website.³⁰ In response, ChemRisk filed suit for defamation in both New York and Massachusetts.³¹ The authors, initially appearing pro se, successfully filed a motion to dismiss for lack of personal jurisdiction in the New York state court.³² With respect to the suit filed in Massachusetts, Foytlin once again took to Facebook: "'That's cool fellas,' . . . 'We're up for Round Two. Bring it, but you betta go tell ya Daddy that people with nothing to lose rarely do. See ya in Boston, Bruh.'"³³

Thereafter, in August 2015, Foytlin and Savage filed a special motion to dismiss under Massachusetts' anti-SLAPP statute.³⁴ Despite "asserting that the claim against them was based solely on their exercise of the right

26. *Id.* The blog post explains that Dr. Zhang had conducted research on chromium-6—a chemical compound found in Hinkley, California's drinking water supply. *Id.* Dr. Zhang unearthed strong connections between chromium-6 and cancer. *Id.* The authors of the blog contend that "ChemRisk obtained Dr. Zhang's data, and without his knowledge, intentionally manipulated the findings to contradict his own earlier studies. The erroneous data was then submitted to the *Journal of Occupational and Environmental Medicine* (JOEM) as though it had been re-worked by Dr. Zhang personally." *Id.*

27. *Id.*

28. Meier, *supra* note 1.

29. *Id.*; see also *Cardno ChemRisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1185 (Mass. 2017).

30. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1185.

31. *Id.*

32. *Id.*; see also Meier, *supra* note 1.

33. Meier, *supra* note 1.

34. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1185.

to petition, that they had a reasonable factual basis for their statements, and that they caused no injury[.]" the Massachusetts Superior Court denied the motion.³⁵ The judge determined that the defendants were not engaged in petitioning activity.³⁶ In response, the defendants filed an interlocutory appeal and the Massachusetts Supreme Judicial Court (SJC) granted direct appellate review.³⁷ Several months later, with the final decision pending, the *New York Times* reported that Foytlin and Savage seemed "unfazed."³⁸ In Savage's opinion, the blog would have "slipped off into obscurity" but for ChemRisk's defamation suit.³⁹ In addition to drawing attention to the blog, the lawsuit "highlight[ed] how the Internet has blurred the line between activists and journalists"⁴⁰ and created an opportunity for the SJC to draw a distinction between petitioning and non-petitioning activity under the anti-SLAPP statute.

On direct appellate review, the SJC found that the blog post qualified as petitioning activity.⁴¹ Although the court extensively analyzed whether the blog writers had exercised their *own* right to petition, it provided scarce reasoning with regard to the manner in which the blog post itself met the

35. *Id.*

36. *Cardno ChemRisk, LLC v. Foytlin*, No. 2014-3932, 2015 WL 13016335, at *1 (Mass. Super. Ct. Oct. 23, 2015), *rev'd*, 68 N.E.3d 1180 (Mass. 2017). In denying the special motion, Judge Edward P. Leibensperger compared the conduct of Foytlin and Savage to that of the defendant in *Fustolo v. Hollander*, 920 N.E.2d 837, 838–40 (Mass. 2010). *Id.* Of note, in *Fustolo*, the Massachusetts Supreme Judicial Court affirmed the denial of a journalist's anti-SLAPP special motion to dismiss because the statements at issue—newspaper articles Hollander penned pertaining to real estate development—did not constitute the seeking of redress for a grievance of her own. *See Fustolo*, 920 N.E.2d at 842–43. In short, in *Cardno ChemRisk, LLC*, Judge Leibensperger determined that Foytlin and Savage were not petitioning the government to redress a grievance of their own. *Cardno ChemRisk, LLC*, 2015 WL 13016335, at *1. *See generally* Kobrin v. Gastfriend, 821 N.E.2d 60, 68 n.14 (Mass. 2005) ("[O]ur only concern, as required by the statute, is that the person be truly 'petitioning' the government in the constitutional sense.").

37. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1185.

38. Meier, *supra* note 1.

39. *Id.* Savage informed *The New York Times* "that the article was initially read by only 400 people." *Id.*

40. *Id.*; *see also* Noor Tagouri, *Blurred Lines: Journalism or Activism?*, HUFFPOST (Sept. 2, 2014, 4:18 PM), https://www.huffingtonpost.com/noor-tagouri/blurred-lines-journalism-or-activism_b_5742944.html [<https://perma.cc/ZY7A-UBSD>]; *cf.* Patrick Butler, *How to Define the Line Between Journalism and Activism in the Digital Age*, INT'L CTR. FOR JOURNALISTS (May 2, 2016), <https://www.icfj.org/blogs/how-define-line-between-journalism-and-activism-digital-age> [<https://perma.cc/YQY8-DDAB>] (reporting on discussions held at the International Symposium on Online Journalism regarding methods for distinguishing activism from journalism).

41. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1183.

statute's definition of the right to petition.⁴² Nonetheless, civil rights activists lauded the decision as a triumph in an era in which the right to speak out must be protected.⁴³ The decision came, however, merely weeks after the *Economist Intelligence Unit* reported that the United States had fallen from a full democracy to a flawed democracy because of its high levels of distrust of government and low levels of political participation.⁴⁴ In juxtaposition, the *Cardno ChemRisk* decision and the *Economist Intelligence Unit* report highlight an inconvenient truth: we are living in an era in which the right to petition must be realized before it can be protected. Without question, low levels of civic engagement threaten the future of democracy,⁴⁵ but what are the consequences of classifying activities with attenuated ties to government action as political participation? The value at stake—"a government 'by the people, for the people, and of the people'"—remains the same.⁴⁶ The threat to that value, however, becomes compounded when the importance of the connection between public participation and engagement with the government is overlooked.⁴⁷

42. See *id.* at 1187–88. Although this Note does not focus on the debate pertaining to whether or not the Massachusetts anti-SLAPP statute requires special movants to have petitioned in their own right—that is, petitioned for the redress of their own grievances—others have broached the topic. See David Kluff, *Blogger-Journalist Protected from Defamation Suit by Anti-SLAPP Statute*, TRADEMARK & COPYRIGHT L. (Feb. 28, 2017), <http://www.trademarkandcopyrightlawblog.com/2017/02/blogger-journalist-protected-from-defamation-suit-by-anti-slapp-statute/> [https://perma.cc/6KYD-3UFM] (reconciling the seemingly divergent opinions in Massachusetts' anti-SLAPP jurisprudence on the matter of petitioning in one's own right); see also Vince Pisegna & Tony Cichello, *Blog Posts by Environmental Activists Protected by Massachusetts "Anti-SLAPP" Statute*, LITIGATORS' BLOG (Feb. 28, 2017), <http://kb-law.com/blog/?p=410> (discussing the distinction between persons seeking redress on their own behalf and individuals who engage in petitioning activity, but not within their own right—such as hired consultants and paid experts).

43. John R. Ellement, *SJC Rules in Favor of Environmental Activists Who Questioned Part of Deepwater Horizon Cleanup*, BOS. GLOBE (Feb. 14, 2017), <https://www.bostonglobe.com/metro/2017/02/14/sjc-rules-for-environmental-activists-who-questioned-part-deepwater-horizon-cleanup/uRUC8hmy0bfyZSQW2h8QmO/story.html> [https://perma.cc/H43E-PE8D].

44. See DEMOCRACY INDEX 2016: REVENGE OF THE "DEPLORABLES", ECONOMIST INTELLIGENCE UNIT 24 (2017), <http://felipesahagun.es/wp-content/uploads/2017/01/Democracy-Index-2016.pdf> [https://perma.cc/8FMC-DSQM] [hereinafter DEMOCRACY INDEX]; see also Amanda Erickson, *The U.S. is No Longer a 'Full Democracy,' a New Study Warns*, WASH. POST (Jan. 26, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/01/26/america-is-no-longer-a-full-democracy-a-new-study-warns>.

45. See DEMOCRACY INDEX, *supra* note 44.

46. PRING & CANAN, *supra* note 2, at 8.

47. See RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE 153–55 (2012) (framing representative democracy as a "collaborative enterprise"). "The ability to

This Note contends that through its decision in *Cardno ChemRisk, LLC v. Foytlin*, the court revealed a paradox: the potential for judicial interpretation of the Massachusetts anti-SLAPP statute to obscure the statute's underlying policy objective of promoting and protecting an involved citizenry.⁴⁸ Part I begins by surveying the emergence of SLAPPs, the historical development of the First Amendment's Petition Clause, and the SJC's early SLAPP jurisprudence. Part II discusses the enactment of the Massachusetts anti-SLAPP statute and traces its trajectory, focusing specifically on the method of statutory interpretation undertaken by the courts.

Part III examines the judicial construction of the definition of the right to petition under the anti-SLAPP statute and demonstrates the ways in which courts have invoked objective, conduct-focused standards in order to preserve the statute's legislative intent. Part IV of this Note explores the court's result-oriented approach in *Cardno ChemRisk, LLC v. Foytlin*.⁴⁹ Part V demonstrates the court's deviation from existing anti-SLAPP jurisprudence and details the manner in which the court's analysis obscures the statute's underlying policy objectives. In an effort to reconcile the statute's language and legislative intent, Part V introduces alternative interpretive frameworks used in other jurisdictions to determine the scope of petitioning activity.

Ultimately, this Note argues that in construing the definition of the right to petition, the SJC should objectively assess a statement's content, manner of issuance, and proximity to government action. In the absence of an interpretive framework that is consistent with both the language and the policies underlying the statute—namely promoting and protecting an involved citizenry—the judiciary is bound to frustrate, rather than effectuate, the statute's legislative intent.

I. THE CONSTITUTIONAL UNDERPINNINGS OF ANTI-SLAPP LEGISLATION AND INTERPRETATION

SLAPPs are normally disguised as legitimate cases worthy of remedy.⁵⁰ Most often, filers of such suits attempt to conceal the essence of the dispute by characterizing their claim as a defamation suit, an

access and engage government, in a meaningful way, remains central to the success of the project of democratic self-government." *Id.* at 153.

48. See *Cardno ChemRisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1186 (Mass. 2017).

49. *Id.* at 1187–88.

50. See PRING & CANAN, *supra* note 2, at 150.

antitrust action, or an abuse-of-process claim.⁵¹ Despite this variation, SLAPPs are uniformly “triggered by defendants’ attempts to influence government action—the exact activity covered by the Petition Clause of the First Amendment.”⁵² The narrative below details the development of the First Amendment’s right to petition and traces the trajectory of the Supreme Court’s Petition Clause jurisprudence.

A. *The First Amendment Right to Petition*

The Petition Clause concludes the First Amendment’s earnest enumeration of expressive rights, and safeguards a foundational American liberty.⁵³ In pertinent part, the First Amendment provides that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.”⁵⁴ Although the First Amendment established a number of rights, such as the freedom of speech and the right to assemble, the Petition Clause “enshrined as a right[,] a pre-existing and formalized system of petitioning for public and private grievances.”⁵⁵ In an effort to distinguish the right to petition from other First Amendment rights, scholars have noted the early origins of petitioning.⁵⁶

In the years preceding the American Revolution, colonists understood the right to petition as “an affirmative, remedial [practice] which required governmental hearing and response.”⁵⁷ Moreover, throughout the colonial

51. *Id.*

52. *Id.* at 3.

53. Catherine Phillips, Note, *The Lost Democratic Institution of Petitioning: Public Employee Collective Bargaining as a Constitutional Right*, 10 FIRST AMEND. L. REV. 652, 671–72 (2012).

54. U.S. CONST. amend. I.

55. Phillips, *supra* note 53, at 672 (emphasis omitted).

56. See PRING & CANAN, *supra* note 2, at 15 (“[Notably], the right to petition is far older than its better-known cousins. . . . It appears in the earliest English laws of more than 1,000 years ago.”); see also Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2163 (1998) (“The practice of petitioning the King for redress long antedated [the] Magna Carta.”). Although the practice of petitioning precedes formal English law, the right of certain nobles to petition the king was first recognized in the Magna Carta. David Bernstein, *Freedom of Assembly and Petition*, HERITAGE GUIDE TO THE CONST., <https://www.heritage.org/constitution/#!/amendments/1/essays/141/freedom-of-assembly-and-petition> [<https://perma.cc/D2BH-K5W7>]. Thereafter, in 1669, Parliament extended the right to petition to all British subjects. *Id.* Petitions were essentially the public’s sole means of communicating with the government, and as such, the right to petition boasts “a long-standing Anglo-American pedigree as a right independent of general free speech and press rights.” *Id.*

57. Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142 (1986); accord Mark, *supra* note 56, at 2160–

and post-colonial eras, petitioning was held as a central tenet of representative democracy because the practice served as a means for citizens to not only communicate their concerns to elected officials, but also to obtain governmental relief.⁵⁸ The precise language of the Declaration of Independence demonstrates the fundamental nature of petitioning as a democratic practice necessitated by the notion of a government "of the people, by the people, and for the people."⁵⁹ The Declaration states, "[i]n every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."⁶⁰ Here, the particular phrasing succinctly illustrates that petitioning was initially understood as an affirmative process in which a request for government assistance received a hearing and governmental response.⁶¹

In the years following the American Revolution, the practice of petitioning the government for a redress of grievances was implicit in the very notion of the new nation.⁶² At the time of the Constitution's drafting, there was an expectation that petitioning, as a process, would continue and encompass "political receptiveness to public concern[]." ⁶³ It follows, therefore, that the primary focus of the founders' debate was not whether petitioning itself was a right.⁶⁴ Rather, the founders sought to determine whether petitioning should include a right of the people to instruct the

62. Upon adoption of the Massachusetts Body of Liberties in 1642, Massachusetts became one of the first colonies—if not *the* first—to explicitly safeguard the right to petition and codify its remedial function. Compare Bernstein, *supra* note 56 (contending that the Massachusetts Body of Liberties was the first colonial charter to explicitly protect the right to petition), with Mark, *supra* note 56, at 2177 ("Massachusetts was among the first colonies explicitly to affirm the right [to petition].").

58. Phillips, *supra* note 53, at 672–73; cf. Bernstein, *supra* note 56 (noting that colonial assemblies did not grant every petition but answered every petition in an effort to keep with the English tradition of responding to legitimate prayers for relief).

59. PRING & CANAN, *supra* note 2, at 8.

60. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

61. See Phillips, *supra* note 53, at 674 (relating the Declaration of Independence's "long list of grievances" to the notion of petitioning as a process of hearing and response); see also Higginson, *supra* note 57, at 155 ("That the Framers meant to imply a corresponding governmental duty of a fair hearing seems clear given the history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances.").

62. See, e.g., McDonald v. Smith, 472 U.S. 479, 482–83 (1985) (discussing the extensive history of the Petition Clause and its fundamental role in the Declaration of Rights enacted by state conventions); see also Mark, *supra* note 56, at 2191.

63. Adam Newton, *Freedom of Petition Overview*, FREEDOM F. INST. (Oct. 10, 2002), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-petition/freedom-of-petition-overview/> [<https://perma.cc/TL4E-YATG>].

64. Phillips, *supra* note 53, at 674.

government.⁶⁵ Significantly, debates at the time “centered on understandings of representative democracy and the relationship between citizens and their representatives.”⁶⁶ The connection between public participation and government—the very essence of the right to petition—was implicitly assumed as an element bound for preservation as a right under the new nation.⁶⁷ The historical record, therefore, indicates that “the right of the people . . . to petition the government for a redress of grievances”⁶⁸ was designed to assure a particular freedom of expression—one that reveres the relationship between public participation and government as a hallmark of American political life.⁶⁹

Today, conceptual understandings of the Petition Clause are at once expansive and limited in scope.⁷⁰ In general terms, the right to petition is considered to protect “any peaceful, legal attempt to promote or discourage government action at any level (federal, state, or local) and in any branch (legislative, executive, judicial, and the electorate).”⁷¹ An activity need not consist of the literal filing of a petition in order to constitute an exercise of the right to petition, but citizens must engage in an activity that stands as a means of expressing their views to government.⁷² While the definition of the right has been extended beyond its literal text, knowledge of the right itself—and of its vital role in

65. Mark, *supra* note 56, at 2206–07. Specifically, the founders considered investing citizens with the power to tell elected representatives how to redress particular grievances and subsequently bind the representatives to the prescribed method. *See* Phillips, *supra* note 53, at 675.

66. Phillips, *supra* note 53, at 675.

67. Mark, *supra* note 56, at 2191–92. The “near universal acceptance of petitioning” in the colonial era created a sense of resolve among colonists: “[P]etitioning [became] a constitutional right because people thought it was one and defended it as one.” *Id.* at 2191. “Given the English and colonial heritage . . . it is unsurprising to find the right to petition unequivocally claimed by the people in the earliest state constitutions.” *Id.* at 2195.

68. U.S. CONST. amend. I.

69. *See* PRING & CANAN, *supra* note 2, at 15.

70. *See, e.g.*, Mark, *supra* note 56, at 2155 n.2 (discussing the manner in which the Petition Clause has become “peripheral . . . to mainstream constitutional discourse”).

71. PRING & CANAN, *supra* note 2, at 16 (footnote omitted).

72. *See id.* (“Protected activities include . . . filing complaints, reporting violations of law, testifying before government bodies, writing letters, lobbying legislatures, advocating before administrative agencies, circulating petitions, conducting initiative and referendum campaigns . . . filing lawsuits. . . . [P]eaceful demonstrations, protests, picketing, and boycotts aimed at producing government action.”).

affecting government action—constitutes a small fraction of the American public's political consciousness.⁷³

The vast array of protected petitioning activities arguably mirrors the Petition Clause's magnitude as "one of the 'fundamental principles of liberty and justice which lie at the base of all civil and political institutions.'"⁷⁴ Legal scholars, however, contend that the Petition Clause has fallen into desuetude; the right to petition no longer serves as the critical bond between the government and the governed.⁷⁵ Despite Americans' renowned attachment to the right to speak out, only three percent of Americans are aware that the First Amendment includes the Petition Clause.⁷⁶ Unlike the First Amendment's guarantees of freedom of speech, press, and religion, the right to petition is seldom addressed by scholars and scarcely covered in law school curriculums.⁷⁷ Whereas the Petition Clause "recognizes that the 'word of the represented' . . . is a vital part of controlling the way government affects [Americans'] lives," the "represented" largely fail to recognize that the Petition Clause provides the connective tissue that maintains the relationship between citizens and government.⁷⁸

Although Americans are largely unaware of the Petition Clause,⁷⁹ they operate under a number of assumptions reflecting its underlying

73. See, e.g., *Doh! Americans Know 'The Simpsons' Better Than First Amendment*, LIVE SCI. (Mar. 1, 2006 5:48 AM), <https://www.livescience.com/7069-doh-americans-simpsons-amendment.html> [<https://perma.cc/FDZ7-U7CN>].

74. *Id.* (quoting *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)).

75. David J. Shestokas, *US Constitution's First Amendment: Right to Petition for Redress of Grievances*, DAVID J. SHESTOKAS (July 1, 2013), <http://www.shestokas.com/constitution-educational-series/us-constitutions-first-amendment-right-to-petition-for-redress-of-grievances/> [<https://perma.cc/5M8W-QWHG>] ("The Right to Petition is unknown to most Americans, or if known, considered to be an extension of the first four rights, and not a right that stands on its own."); see also Mark, *supra* note 56, at 2155 ("To say that the right is today moribund is grossly to understate the case.").

76. 2017 ANNENBERG CONSTITUTION DAY CIVICS SURVEY, ANNENBERG PUB. POL'Y CTR. (2017), https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/2017/09/Appendix_Civics_survey_2017.pdf [<https://perma.cc/F4VZ-YMP8>] [hereinafter CIVICS SURVEY].

77. KROTOSZYNSKI, *supra* note 47, at 81 (noting the Petition Clause's "relative obscurity" to contemporary practitioners and legal scholars); PRING & CANAN, *supra* note 2, at 18.

78. PRING & CANAN, *supra* note 2, at 16; see also The Associated Press, *We Know 'Simpsons' Better Than Freedoms*, QUAD-CITY TIMES (Mar. 1, 2006), https://qctimes.com/news/local/we-know-simpsons-better-than-freedoms/article_f7e3d53a-ec21-5c55-aa60-8987d44b2bdd.html [hereinafter *We Know 'Simpsons'*] (discussing Americans' misconceptions and misidentification of First Amendment rights).

79. *The 2015 State of The First Amendment*, FREEDOM F. INST. 2 (2015), https://www.freedomforuminstitute.org/wp-content/uploads/2015/07/FAC_SOFA15_

policies.⁸⁰ Americans, for instance, presume that they can speak out.⁸¹ They also assume that the political system that encourages them to do so will protect them.⁸² A number of Americans believe the right to speak out is absolute.⁸³ Although the clause itself validates Americans' presumptions pertaining to the existence of the right, the judicial system's interpretation of the clause disproves their presumptions pertaining to the extent of protection it affords.⁸⁴

B. *The Supreme Court's Interpretation of the Petition Clause*

Although the Supreme Court's Petition Clause jurisprudence is neither robust nor extensive,⁸⁵ the Court has consistently held that the right to petition does not constitute an absolute immunity for communications made to the government.⁸⁶ In its initial consideration of the Petition Clause, the Court recognized the critical relationship between the exercise of the right to petition and the productive operation of government.⁸⁷ Over the course of the twentieth century, the Court reiterated its earlier

report.pdf [https://perma.cc/P9G5-KMCY] (reporting that only two percent of American adults sampled were familiar with the right to petition); *We Know 'Simpsons'*, *supra* note 78 (discussing findings that one percent of Americans are aware of the right to petition); CIVICS SURVEY, *supra* note 76, at 2 (finding that only three percent of respondents knew of the First Amendment's Petition Clause).

80. See KROTOSZYNSKI, *supra* note 47, at 81.

81. PRING & CANAN, *supra* note 2, at 2; see also Barack Obama (@barackobama), FACEBOOK (Sept. 5, 2017), <https://www.facebook.com/barackobama/posts/10155227588436749> [https://perma.cc/K4JB-PB56] ("What makes us American is our fidelity to a set of ideals . . . that all of us share an obligation to stand up, speak out, and secure our most cherished values for the next generation.").

82. PRING & CANAN, *supra* note 2, at 2; see also J. Gerald Herbert, *Symposium: The Right to Vote in Peace*, SCOTUSBLOG (Jan. 23, 2018, 3:13 PM), <http://www.scotusblog.com/2018/01/symposium-right-vote-peace/> [https://perma.cc/NLJ5-3S6N] ("The First Amendment protects every American's right to speak out on contentious issues . . ."). But see Amanda A. Konarski, Comment, *The Reporter's Privilege is Essential to Checks and Balances Being Accessible to the American Electorate*, 11 SETON HALL CIR. REV. 258, 275 (2014) (contending that the American government vehemently pursues legal action against those who "speak out" about questionable governmental practices).

83. See Emily Swanson, *Nearly Half of Americans Grasp the First Amendment About as Well as Sarah Palin Does*, HUFFPOST (Jan. 15, 2014, 4:33 PM), https://www.huffingtonpost.com/2014/01/15/first-amendment-poll_n_4603896.html [https://perma.cc/2PWY-3FVZ].

84. See, e.g., *McDonald v. Smith*, 472 U.S. 479, 483 (1985).

85. PRING & CANAN, *supra* note 2, at 18.

86. See, e.g., *McDonald*, 472 U.S. at 483.

87. See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.").

sentiments, but indicated with clarity that the Petition Clause does not afford an absolute privilege despite its "assurance of a particular freedom of expression."⁸⁸ For instance, in *McDonald v. Smith*, the Court reasoned that "[a]lthough the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity."⁸⁹ The Court declined to "elevate the Petition Clause to special First Amendment status" by deviating from its dedicated course of interpreting the Petition Clause as the conference of a qualified privilege.⁹⁰

Despite the Supreme Court's consistent characterization of the right to petition as a qualified immunity, the Court has wavered in its articulation of the qualification.⁹¹ Quite similarly, in the latter half of the twentieth century, federal and state courts were unable to "agree on a single, clear-cut standard for petitioning activity that [was] 'over the line' and unworthy of protection."⁹² In interpreting the right to petition, courts often invoked ill-defined tests that necessitated a subjective inquiry into the petitioner's mental state.⁹³ While some judges "refused to protect [petitioners] whose government petitioning was done out of 'malice,'" others deemed petitioning done with an intent to harass as an unqualified activity.⁹⁴

In 1991, however, the Court articulated an objective standard for determining whether an activity warranted immunity under the Petition Clause, and created the potential for more consistent applications of the immunity assured by the right to petition.⁹⁵ Although the objective standard originated from a line of antitrust litigation involving the Sherman Antitrust Act,⁹⁶ courts have applied the standard in a number of

88. *McDonald*, 472 U.S. at 482–83.

89. *Id.* at 483.

90. *Id.* at 485.

91. PRING & CANAN, *supra* note 2, at 19.

92. *Id.*

93. *Id.*

94. *Id.*

95. See *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991).

96. See 15 U.S.C. § 1 (2018). Congress passed its first antitrust law, The Sherman Antitrust Act, in 1890. *The Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/MM2V-XP25>]. Enacted with the purpose of preserving free competition in trade, the Act prohibits unreasonable restraints on trade and monopolization. *Id.* See generally Jenny Pacquette, *Old is Not Always Wise: The Inapplicability of the Sherman Act in the Age of the Internet*, 89 TEMP. L. REV. ONLINE 1, 13–21 (2017) (discussing the purpose of the Sherman Antitrust Act and its judicial trajectory).

cases involving petitioning activities.⁹⁷ The case law, briefly surveyed below, upholds significant First Amendment principles pertaining to the right to petition and provides instructive guidance regarding the manner in which immunity under the Petition Clause should be granted.⁹⁸

1. The Sham Exception

In 1957, forty-one long-distance trucking operators commenced an action in the United States District Court of Pennsylvania against twenty-four major railroads for alleged violations of the Sherman Antitrust Act.⁹⁹ The operators claimed that the railroads conducted an intentionally injurious public relations campaign in an effort to suppress deregulation of the trucking industry.¹⁰⁰ Whereas the district court found in favor of the trucking operators, the Supreme Court held that the Petition Clause immunized the activities of the railroads “at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.”¹⁰¹ The Court reasoned:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.¹⁰²

Although the Court advanced an expansive articulation of the right to petition, it refused to construe the privilege as an absolute immunity.¹⁰³ Rather, the Court acknowledged that situations may arise in which

97. See Kathleen L. Daerr-Bannon, *Causes of Action: Bringing and Defending Anti-SLAPP Motions to Strike or Dismiss*, 22 CAUSES OF ACTION 2D 317, § 4 (2003) (“[L]ower courts have not been reluctant at all to apply the principles enunciated beyond the antitrust arena, and it is generally accepted that these holdings are broadly applied.”).

98. See *Omni Outdoor Advert., Inc.*, 499 U.S. at 365; *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 660 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 128 (1961).

99. *Noerr Motor Freight, Inc.*, 365 U.S. at 128–29.

100. *Id.* at 129–30.

101. *Id.* at 138.

102. *Id.* at 137.

103. See PRING & CANAN, *supra* note 2, at 24.

publicity campaigns—seemingly designed to influence governmental action—are “mere shams” to cloak actual attempts to interfere with the operations of business competitors.¹⁰⁴ In such an instance, application of the Sherman Antitrust Act would be justified, despite countervailing constitutional considerations.¹⁰⁵

2. The Rise of the *Noerr-Pennington* Doctrine

In *United Mine Workers of America v. Pennington*, the Supreme Court further developed the principle put forth in *Noerr* and thereby established what has become known as the *Noerr-Pennington* Doctrine.¹⁰⁶ In *Pennington*, small coal mine operators initiated an antitrust action against the coal miners’ union for allegedly conspiring with large coal companies to force small miners out of business.¹⁰⁷ Operators argued that the union and large companies jointly—and successfully—petitioned the Secretary of Labor to increase minimum wage beyond the point that operators could afford for the purpose of driving them out of the competitive market.¹⁰⁸

The Court extended immunity to the activities of the coal miners’ union in holding that “a concerted genuine effort to influence public officials is shielded from the Sherman Act ‘regardless of intent or purpose. Joint efforts to influence public officials do not violate antitrust laws even though intended to eliminate competition.’”¹⁰⁹ Although the Court did not expressly include a discussion of the “sham exception,” its analysis makes clear that “[i]t is not the intent [of the conduct] that counts.”¹¹⁰ Rather, the determinative “issue is whether efforts to influence government officials [are] genuine.”¹¹¹

3. Outcome over Process: The *Omni* Standard

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,¹¹² the Court illustrated the importance of evaluating conduct—rather than intent—in its narrow construction of the “sham exception” of the *Noerr-Pennington*

104. *Noerr Motor Freight, Inc.*, 365 U.S. at 144.

105. *See id.*

106. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669–72 (1965); *see also* Daerr-Bannon, *supra* note 97.

107. *Pennington*, 381 U.S. at 659–60.

108. *Id.*; *see also* PRING & CANAN, *supra* note 2, at 25.

109. Daerr-Bannon, *supra* note 97 (quoting *Pennington*, 381 U.S. at 670).

110. *Id.*

111. *Id.*

112. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 365 (1991).

Doctrine.¹¹³ *Omni* involved an antitrust action wherein Omni Outdoor Advertising (OOA) alleged that Columbia Outdoor Advertising (COA) violated the Sherman Antitrust Act when it lobbied city council members to adopt restrictive zoning ordinances that created anticompetitive impacts.¹¹⁴ OOA argued that COA's petitioning of the city council triggered the "sham exception" of the *Noerr-Pennington* Doctrine; the Court disagreed.¹¹⁵ The Court stated that the exception is limited to "situations in which persons use the governmental *process* itself—as opposed to the *outcome* of that process—as an anticompetitive weapon."¹¹⁶ The Court reasoned that COA unquestionably intended to interfere with OOA's business, but it did not attempt to do so through the lobbying process; instead, it relied on "the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances."¹¹⁷

Courts have invoked the objective, outcome-focused *Noerr-Pennington-Omni* standard in contexts far beyond the bounds of antitrust litigation.¹¹⁸ Moreover, it is generally accepted that its foundational principles apply broadly to any instance involving activity that falls within the scope of the Petition Clause.¹¹⁹ As the Court reflected in *Omni*:

[I]t is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," to establish a category of lawful state action that citizens are not permitted to urge. Thus, beginning with [*Noerr*], we have [ruled that the] federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine . . . rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena."¹²⁰

113. See Daniel O. Conkle, *Combatting SLAPPs: Absolutism Is Not the Answer*, 49 FED. COMM. L.J. 761, 764 (1997).

114. *Omni Outdoor Advert., Inc.*, 499 U.S. at 368–69.

115. *Id.* at 380–81.

116. *Id.* (first emphasis added). In this instance, the phrase "outcome of [the] governmental process" refers to judgments, legislation, and other forms of government action and/or inaction. PRING & CANAN, *supra* note 2, at 27. Using the "governmental process" as an anticompetitive weapon refers to "invok[ing] the costs, delays, and inconveniences of the government procedure only, without regard to outcome." *Id.*

117. *Omni Outdoor Advert., Inc.*, 499 U.S. at 381.

118. See PRING & CANAN, *supra* note 2, at 28; see also Daerr-Bannon, *supra* note 97.

119. Daerr-Bannon, *supra* note 97.

120. Conkle, *supra* note 113, at 764 n.29 (quoting *Omni Outdoor Advert., Inc.*, 499 U.S. at 379–80).

In essence, the Court's antitrust jurisprudence demonstrates that activity in the political arena demands safeguarding against legal actions that arise in response to conduct that constitutes First Amendment petitioning.¹²¹

II. THE MASSACHUSETTS ANTI-SLAPP STATUTE

On December 29, 1994, the Massachusetts Legislature enacted Chapter 231, Section 59H, of the Massachusetts General Laws—legislation commonly known as the Massachusetts Anti-SLAPP Statute.¹²² Enacted over the veto of Governor William Weld, the statute reflected the legislature's recognition of, and response to, the "disturbing increase" in lawsuits brought to intimidate and discourage citizens from exercising their right to petition.¹²³ Courts and scholars alike, however, have identified one particular lawsuit as the "impetus for [the] introduction of the anti-SLAPP legislation."¹²⁴ The lawsuit arose in 1991 between fifteen residents of Rehoboth, Massachusetts and a developer seeking residential construction permits.¹²⁵ Out of concern for local wetland protection, the residents signed a petition opposing the construction project.¹²⁶ In response, the developer brought suit.¹²⁷ After nine months of litigation and \$30,000 in legal fees, the lawsuit's dismissal provided relief to the Rehoboth residents and prompted legislators to create a procedural remedy for the early dismissal of such burdensome, costly, and vexatious litigation.¹²⁸ Although "[t]he typical mischief that the legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development

121. See PRING & CANAN, *supra* note 2, at 28.

122. MASS. GEN. LAWS ch. 231, § 59H (2018); David A. Kluft, *The Scalpel or the Bludgeon? Twenty Years of Anti-SLAPP in Massachusetts*, BOS. B.J. (Jul. 9, 2014), <https://bostonbarjournal.com/2014/07/09/the-scalpel-or-the-bludgeon-twenty-years-of-anti-slapp-in-massachusetts/> [<https://perma.cc/X8KR-BRFJ>].

123. *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 939 (Mass. 1998).

124. *Id.*; Kluft, *supra* note 122.

125. *Duracraft Corp.*, 691 N.E.2d at 939.

126. *Id.*

127. *Id.* See generally Linda Borg, *Citizens Favor Ban on SLAPP Suits: Residents Testify That the Lawsuits Brought By Big Businesses Deprive Them of Their First Amendment Rights*, PROVIDENCE J., Mar. 23, 1993, at C01, 1993 WLNR 5768283. The developer, South State Savings Bank of Brockton, claimed the residents' petition was "a 'conspiracy' that 'interfered with the advantageous business relations of the bank.'" *Id.*

128. *Duracraft Corp.*, 691 N.E.2d at 939.

projects,”¹²⁹ judicial interpretation of the statute has vastly expanded its reach.¹³⁰

A. *Procedural Elements of the Massachusetts Anti-SLAPP Statute*

The Massachusetts anti-SLAPP statute adjusts state civil procedure by permitting a defendant to bring an expedited special motion to dismiss when the claims asserted against the defendant are based on his or her petitioning activity.¹³¹ In relevant part, the statute provides:

In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party’s exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party’s exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party’s acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.¹³²

A defendant may file the special motion to dismiss “within sixty days of the service of the complaint.”¹³³ Typically, once the special motion is filed, discovery proceedings are stayed.¹³⁴ In addition to creating a procedure to stay and terminate lawsuits based on petitioning, the statute states that “[i]f the court grants [the] special motion to dismiss, the court shall award the moving party costs and reasonable attorney’s fees.”¹³⁵

Special motions to dismiss under the anti-SLAPP statute are subject to a now well-established two-step burden-shifting test.¹³⁶ In the first

129. *Id.* at 940.

130. *See, e.g.,* Kluft, *supra* note 122.

131. Yurko & Choy, *supra* note 5, at 16.

132. MASS. GEN. LAWS ch. 231, § 59H (2018).

133. *Id.*

134. *Id.*

135. *Id.* Under the anti-SLAPP statute, judges have no discretion with respect to the payment of attorney’s fees and costs. McLarnon v. Jokisch, 727 N.E.2d 813, 818 (Mass. 2000).

136. *See* Duracraft Corp. v. Holmes Prods. Corp., 691 N.E.2d 935, 943 (Mass. 1998). The two-part test arose from the court’s acknowledgement that a persistent conundrum had “bedeviled the statute’s application.” *Id.* Specifically, “[b]y protecting one party’s exercise of its right of petition, unless it can be shown to be sham petitioning, the statute impinges on the

stage, the special movant must "make a threshold showing through the pleadings and affidavits that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities."¹³⁷ If the special movant meets its initial burden, the statute requires the burden to shift to the nonmoving party.¹³⁸ The nonmoving party must then "show by a preponderance of the evidence that the moving party lacked any reasonable factual support or any arguable basis in law for its petitioning activity."¹³⁹ If the special motion to dismiss is denied, defendants have a right to interlocutory appellate review.¹⁴⁰

B. *Five Statutorily Enumerated Definitions of Petitioning*

Litigation under the Massachusetts anti-SLAPP statute often turns on whether the lawsuit is based on the defendant's petitioning activity.¹⁴¹ As an initial matter, therefore, allowance or denial of the special motion to dismiss requires courts to determine whether the conduct at issue constitutes petitioning.¹⁴² The statute broadly defines the protected right to petition¹⁴³:

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other

adverse party's exercise of its right to petition, even when it is not engaged in sham petitioning." *Id.* Whereas the Massachusetts appeals court interpreted "the statutory language 'shall grant . . . [the] special motion' as 'may' grant," the SJC developed the two-part test and thereby disallowed "committing decisions on such special motions to dismiss wholly to judicial discretion." *Id.* (second alteration in original).

137. *Id.*

138. *Id.* *But see* *Blanchard v. Steward Carney Hosp., Inc.*, 75 N.E.3d 21, 38 (Mass. 2017) ("A nonmoving party's claim is not subject to dismissal as one 'based on' a special movant's petitioning activity if, when the burden shifts to it, the nonmoving party can establish that its suit was not 'brought primarily to chill' the special movant's legitimate exercise of its right to petition."). The augmentation of the *Duracraft* framework warrants recognition, but because it does not impact the original two-step test, or judicial determinations regarding the definition of petitioning, discussion of the alternative showing exceeds the scope of this Note. *Id.*

139. *Baker v. Parsons*, 750 N.E.2d 953, 961 (Mass. 2001).

140. *Fabre v. Walton*, 781 N.E.2d 780, 784 (Mass. 2002) ("As in the governmental immunity context, the denial of a special motion to dismiss interferes with rights in a way that cannot be remedied on appeal from the final judgment.").

141. *Pyle*, *supra* note 14 (explaining that a special motion to dismiss under an anti-SLAPP statute is typically won or lost on the question of whether the activity is petitioning).

142. *Id.*

143. *N. Am. Expositions Co. v. Corcoran*, 898 N.E.2d 831, 840–41 (Mass. 2009) ("Consistent with the expressed legislative intent, 'petitioning' has been consistently defined to encompass a 'very broad' range of activities in the context of the anti-SLAPP statute.").

governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.¹⁴⁴

Following the statute's enactment, the SJC recognized that specific activities meet the definition of petitioning: campaigning in elections, lobbying governmental bodies, and performing demonstrations all amount to petitioning activity apt for a SLAPP attack.¹⁴⁵ Not all activities, however, clearly fall within the definition of petitioning activity.¹⁴⁶ Because the statute enumerates five categories of a party's exercise of its right to petition,¹⁴⁷ courts must employ canons of statutory construction to determine whether the activity seeking the statute's special motion to dismiss constitutes petitioning.¹⁴⁸

C. *Initial Interpretations of the Massachusetts Anti-SLAPP Statute*

The SJC interpreted the anti-SLAPP statute for the first time in its landmark decision, *Duracraft Corp. v. Holmes Products Corp.*¹⁴⁹ The court identified the legislature's failure to "address concerns over [the statute's] breadth and reach"¹⁵⁰ as the impetus for its initial attempt to construe the statute in a way that averted unconstitutionality and "preserve[d] as much of the legislative intent as . . . possible."¹⁵¹ Judicial interpretation of the statute following the *Duracraft* opinion has similarly

144. MASS. GEN. LAWS ch. 231, § 59H (2018).

145. *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940 (Mass. 1998) (citing George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5-6 (1989)).

146. See, e.g., Andrew R. Dennington, *Do Anti-SLAPP Statutes Protect Bloggers?*, 59 DRI FOR DEF. 36, 39 (2017) (explaining that there is no "bright-line rule" for determining whether a particular blog constitutes protected petitioning activity).

147. MASS. GEN. LAWS ch. 231, § 59H (2018).

148. *Kobrin v. Gastfriend*, 821 N.E.2d 60, 63 (Mass. 2005); see also SHAMBIE SINGER, 3A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 67.2 (8th ed. 2018) ("The key to interpreting a procedural statute is to ascertain and effectuate legislative intent as expressed in the statute.").

149. *Duracraft Corp.*, 691 N.E.2d at 939; see also Hoffberg, *supra* note 5, at 100.

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

151. *Id.* at 943.

sought to preserve the statute's legislative intent.¹⁵² For instance, in *Kobrin v. Gastfriend*, the court explained that in determining whether an activity falls within the scope of the anti-SLAPP statute, the court applies

[T]he general rule of statutory construction that a statute is to be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated."¹⁵³

Accordingly, Massachusetts courts have ascertained from the text of the statute and the cause of its enactment that the right to petition protected by the anti-SLAPP statute is the right contained within the Petition Clause of the First Amendment to the United States Constitution and the Massachusetts Declaration of Rights.¹⁵⁴ Although the SJC has acknowledged that a broad definition of petitioning activity is consistent with the statute's legislative intent, it has also recognized that the "scope of the statute has its limits."¹⁵⁵ In finding that "[t]he right of petition contemplated by the Legislature is . . . one in which a party seeks some redress from the government," the court established a critical limitation—one that "expressly implicat[es] the term's constitutional meaning" in the process of determining whether an activity constitutes petitioning under the anti-SLAPP statute.¹⁵⁶

152. See *Fustolo v. Hollander*, 920 N.E.2d 837, 840 (Mass. 2010); *N. Am. Expositions Co. v. Corcoran*, 898 N.E.2d 831, 840 (Mass. 2009); *Kobrin*, 821 N.E.2d at 64; *Fabre v. Walton*, 781 N.E.2d 780, 783 (Mass. 2002); *Baker v. Parsons*, 750 N.E.2d 953, 959 (Mass. 2001).

153. *Kobrin*, 821 N.E.2d at 63–64 (quoting *Triplett v. Oxford*, 791 N.E.2d 310, 313 (Mass. 2003)); see also SINGER, *supra* note 148 ("The statute's language is the best and most reliable index of the statute's meaning and must be consulted first. The language of the statute may be construed in view of the statute's purpose.").

154. See *Kobrin*, 821 N.E.2d at 65 ("The constitutional 'right of petition' is a term of art that the Legislature did not adopt casually or accidentally. The Legislature's decision to refer to the right of petition secured in the Federal and State Constitutions must be accorded significance in order to effectuate the legislative intent.").

155. *Id.* at 67; see also *Corcoran*, 898 N.E.2d at 840–41 ("Consistent with the expressed legislative intent, 'petitioning' has been consistently defined to encompass a 'very broad' range of activities in the context of the anti-SLAPP statute.").

156. *Kobrin*, 821 N.E.2d at 65.

III. INVOKING OBJECTIVITY TO EFFECTUATE THE MASSACHUSETTS ANTI-SLAPP STATUTE'S LEGISLATIVE INTENT

Prior to the enactment of the Massachusetts anti-SLAPP statute, Governor William Weld described the legislation “as ‘a bludgeon when a scalpel would do.’”¹⁵⁷ Against the backdrop of this characterization, practitioners and legal scholars have argued that the Massachusetts courts have wavered between each metaphor in applying the statute’s provisions.¹⁵⁸ David A. Kluft, for instance, observed that “[w]hile some decisions have expanded—or confirmed—broad access to the statute’s protections, other decisions have sharpened and narrowed the kind of activity it protects.”¹⁵⁹ Although examinations of Massachusetts’s anti-SLAPP jurisprudence have reviewed the courts’ record of expanding access to effectuate the legislative intent, while also simultaneously limiting the scope of “petitioning activity,” the significance of objectively evaluating statements has gone largely undiscussed.¹⁶⁰ In the following subparts, this Note illustrates two instances in which the courts have invoked objectivity to reconcile the expansive reach of the statute with the legislature’s intent to promote a fully involved citizenry and protect the constitutional right to petition. The first subpart addresses judicial removal of the public concern element,¹⁶¹ and the second subpart discusses the judiciary’s development of the mirror image rule.¹⁶²

A. *The Public Concern Element*

Although a sizeable number of state legislatures have limited citizens’ access to special anti-SLAPP procedural protections by inserting

157. Kluft, *supra* note 122.

158. *See id.*

159. Kluft, *supra* note 122. David A. Kluft is a partner at Foley Hoag in Boston, Massachusetts. *Our People*, FOLEY HOAG, <http://www.foleyhoag.com/people/kluft-david> [<https://perma.cc/WUQ7-MA62>].

160. *But see* Richard J. Yurko, *Fasten Your Seatbelt: The SJC Revises the Standard for Anti-SLAPP Motions*, BOS. B.J. (Aug. 9, 2017), <https://bostonbarjournal.com/2017/08/09/fasten-your-seatbelt-the-sjc-revises-the-standard-for-anti-slapp-motions/> [<https://perma.cc/J5CG-BNXQ>].

161. *See infra* Section III.A; *see also* *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 941 (Mass. 1998) (holding that petitioning activity need not involve a matter of public concern in order to qualify for protection under the statute).

162. *See infra* Section III.B; *see also, e.g.*, *Wynne v. Creigle*, 825 N.E.2d 559, 566 (Mass. App. Ct. 2005) (finding that the repetition of statements to media may possess the characteristics of petitioning as defined in the statute).

a public concern requirement,¹⁶³ the Massachusetts anti-SLAPP statute invokes no such condition.¹⁶⁴ Initially, judicial interpretation of the statute—in the time between its enactment and the issuance of the *Duracraft* opinion—confined its application to instances in which citizens were sued for speaking out on matters of public concern.¹⁶⁵ In *Duracraft*, however, the court reasoned “that the phrase ‘public concern’ was struck from the [anti-SLAPP] bill before it was passed in final form.”¹⁶⁶ The court acknowledged that legislative debate relating to the statute’s enactment included discussions about the “need to protect the right of petition on matters of public concern,” but placed significant weight on the fact that “the phrase was removed from the text of the statute.”¹⁶⁷ It would be inappropriate, the court reasoned, to read a public concern element into the statute when the condition was expressly removed by the legislature.¹⁶⁸ With its firm rejection of the public concern requirement, the court underscored an important feature of the Massachusetts statute—one that both reflects and effects the legislature’s “inten[t] to enact very broad protection for petitioning activities.”¹⁶⁹

Critics of the *Duracraft* decision contend that foregoing the public concern requirement consigns the anti-SLAPP statute’s original objective to oblivion.¹⁷⁰ For instance, one scholar argues that while “[*Duracraft*] is consistent with the language in the statute, [it is] inconsistent with the policies underlying the concept of anti-SLAPP statutes, namely, to remove legal impediments on citizens seeking to speak out on matters of public concern.”¹⁷¹ The Massachusetts anti-SLAPP statute, however, was specifically designed to safeguard the constitutional right to petition.¹⁷²

163. See, e.g., IND. CODE § 34-7-7-1(a) (2018) (“This chapter applies to an act in furtherance of a person’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana in connection with a public issue or an issue of public interest.”); 9 R.I. GEN. LAWS § 9-33-2 (2018) (protecting claims based on a person’s exercise of the right to petition or right of free speech “in connection with a matter of public concern”); VT. STAT. ANN. tit. 12, § 1041 (2018) (requiring exercise of the right to petition or right of free speech to be “in connection with a public issue”).

164. *McLarnon v. Jokisch*, 727 N.E.2d 813, 816 (Mass. 2000).

165. Hoffberg, *supra* note 5, at 102.

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

167. *Id.*

168. See *id.*

169. *Id.* at 940. But see Hoffberg, *supra* note 5, at 102–06 (arguing the removal of the public concern element is inconsistent with the anti-SLAPP statute’s underlying policy objectives).

170. See Hoffberg, *supra* note 5, at 106; see also Kluff, *supra* note 122.

171. Hoffberg, *supra* note 5, at 105–06.

172. *Kobrin v. Gastfriend*, 821 N.E.2d 60, 66 (Mass. 2005).

“The Legislature intended the statute to encourage ‘full participation by persons and organizations and robust discussion of issues before legislative, judicial, and administrative bodies.’”¹⁷³ Conceivably, “full participation” and “robust discussion”—two fundamental aspects of the democratic process reflected in petitioning activities¹⁷⁴—encompass matters beyond the classic SLAPP paradigm.¹⁷⁵ Nonetheless, proponents of the public interest requirement argue that in its absence, there exists no clear criteria for determining an individual’s eligibility to assert the status of “petitioner.”¹⁷⁶ Post-*Duracraft* anti-SLAPP jurisprudence, however, indicates otherwise.

The Massachusetts courts’ resolution of lawsuits involving private disputes and the anti-SLAPP statute demonstrate that the qualification—the criteria for eligibility—lies with the nature of the special movant’s conduct.¹⁷⁷ Implicated by the first-prong of the two-prong anti-SLAPP framework, a court’s evaluation of the alleged petitioning activity necessitates a focus on conduct.¹⁷⁸ For instance, in *Office One, Inc. v. Lopez*, the court stated that initially, “[t]he focus solely is on the conduct complained of, and, if the *only* conduct complained of is petitioning activity, then there can be no other ‘substantial basis’ for the claim.”¹⁷⁹ In *Office One*, the purchasers of commercial condominium units filed suit against the condominium’s board of trustees for defamation and alleged business interference.¹⁸⁰ The court determined that the suit was based on the board members’ communications with the Federal Deposit Insurance Corporation (FDIC), which urged against the sale of condominium units to the plaintiff.¹⁸¹ Because the “FDIC acts ‘in the name of, or on behalf

173. *Id.* (quoting Preamble to 1994 House Doc. No. 1520).

174. *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 939 (Mass. 1998).

175. *See generally* Hoffberg, *supra* note 5, at 97–99 (illustrating the classic SLAPP paradigm).

176. *See id.* at 104–06 (contending there is a “near limitless eligibility” to qualify for immunity under the Massachusetts anti-SLAPP statute).

177. *See* *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 756–57 (Mass. 2002); *McLarnon v. Jokisch*, 727 N.E.2d 813, 817 (Mass. 2000); *Donovan v. Gardner*, 740 N.E.2d 639, 641–44 (Mass. App. Ct. 2000).

178. *See supra* Section II.B.

179. *Office One, Inc.*, 769 N.E.2d at 757.

180. *Id.* at 749.

181. *Id.* at 757 (“All of the conduct alleged as unlawful falls within the broad definition of petitioning activity protected by the statute.”). In addition to the board members’ direct communications with the FDIC, the court also considered communications between unit owners urging one another to petition against the FDIC’s sale of units to plaintiff as petitioning activity. *Id.*

of, the United States' to promote stability [in the] banking system,"¹⁸² the conduct at issue reflected the very core of petitioning—that is, the seeking of governmental redress. The nature of the allegedly unlawful conduct was dispositive of whether the special movants were eligible to invoke the anti-SLAPP statute's protection.¹⁸³ Consequently, because "[t]he right to petition a governmental body for redress of a grievance is the very essence of petitioning activity,"¹⁸⁴ the court's extension of protection to special movants who have sought governmental redress on a matter of private concern seemingly effectuates, rather than subverts, the statute's legislative intent.

B. *The Mirror Image Rule*

Consistent with the text and expressed legislative intent of the Massachusetts anti-SLAPP statute, courts often find that statements made apart from official government proceedings constitute petitioning activity.¹⁸⁵ Special motions seeking protection for statements made to the media have generated a great deal of debate within the Massachusetts Appeals Court's anti-SLAPP jurisprudence.¹⁸⁶ Because the statute "was enacted by the Legislature to protect citizens from lawsuits designed to chill their constitutional right to petition the government for redress of grievances,"¹⁸⁷ the appeals court—in line with the SJC—reasoned "that the protection of the statute extends only to petitioning in a constitutional sense, that is, activities that involve a seeking [of redress] from the government."¹⁸⁸ In the context of statements made to the media, the issue became whether a statement made to the press can satisfy the standard of seeking governmental redress. Massachusetts courts answered this question in the affirmative.¹⁸⁹ But how can a statement directed to the press, as opposed to the government, qualify as a petition in the

182. *Id.* at 757 n.15 (quoting *United States v. Sweeney*, 226 F.3d 43, 46 (1st Cir. 2000)).

183. *See id.* at 757.

184. *N. Am. Expositions Co. v. Corcoran*, 898 N.E.2d 831, 841 (Mass. 2009).

185. *Id.* at 840–41.

186. *See generally* *Kalter v. Wood*, 855 N.E.2d 421 (Mass. App. Ct. 2006); *Global Naps, Inc. v. Verizon New Eng., Inc.*, 828 N.E.2d 529 (Mass. App. Ct. 2005); *Wynne v. Creigle*, 825 N.E.2d 559 (Mass. App. Ct. 2005).

187. *Wynne*, 825 N.E.2d at 564.

188. *Id.* at 565.

189. *See, e.g., Blanchard v. Steward Carney Hosp., Inc.*, 75 N.E.3d 21, 32 (Mass. 2017) (finding statements made to the *Boston Globe* constituted petitioning activity under the Massachusetts anti-SLAPP statute).

constitutional sense of the term? The answer lies with the mirror image rule.

The appeals court first developed the mirror image rule in *Wynne v. Creigle*.¹⁹⁰ The rule serves as a means of identifying a statement's connection to the seeking of governmental redress; in applying the rule, courts jointly consider a statement's content and the context in which it occurred.¹⁹¹ In *Wynne*, Thomas Wynne, Jr., a discharged firefighter, brought a defamation action against Amy Creigle, the surviving spouse of a former firefighter.¹⁹² Prior to the lawsuit, Wynne was under investigation for professional misconduct by the Greenfield Fire Department.¹⁹³ In connection with the investigation, Creigle submitted written testimony to the department indicating that she and her deceased husband had been repeatedly harassed by Wynne.¹⁹⁴ Thereafter, Creigle made statements to the *Greenfield Recorder* regarding the harassment she endured before and after her husband's death.¹⁹⁵ Three years after the pertinent article's publication, Wynne filed suit against Creigle for defamation on May 4, 2001.¹⁹⁶ In response, Creigle filed an anti-SLAPP special motion to dismiss.¹⁹⁷ In considering the anti-SLAPP motion on appeal, the court reasoned that the statements made to *The Recorder*

[M]ust be viewed in the context in which they occurred: as a response to the plaintiff's providing the newspaper with the statements of the firefighters, other documents from the hearing of June 15, 1998, and his dismissal letter. The later statements of the defendant to *The Recorder* were essentially mirror images of those she made during and "in connection with" the departmental investigation of the plaintiff.

190. *Wynne*, 825 N.E.2d at 566. Although the SJC has not explicitly invoked the mirror image rule, it has referenced the standard. See *Corcoran*, 898 N.E.2d at 841 (citing to the court's use of "mirror image" language in *Wynne*); see also *Cadle Co. v. Schlichtmann*, 859 N.E.2d 858, 865 (Mass. 2007) (finding challenged statements were not repetitions of statements initially made to a government body, and therefore not petitioning activity under the anti-SLAPP statute).

191. See *Wynne*, 825 N.E.2d at 565–66.

192. *Id.* at 563.

193. *Id.* at 562.

194. *Id.* at 562–63.

195. *Id.* at 563 ("[Creigle] also reiterated many of the comments she made in her May 15, 1998 statement to the fire department, namely that the plaintiff harassed her family shortly before and after her husband's death.").

196. *Id.*

197. *Id.* at 564. Initially, the defendant's special motion to dismiss was allowed. *Id.* Plaintiff made a motion for relief from the judgment of dismissal, but that motion was denied. *Id.* In a second judgment, under the Massachusetts anti-SLAPP statute, the defendant was awarded attorney's fees and costs. *Id.* Thereafter, the plaintiff appealed. *Id.*

Taken in context, her mere repetition of those statements to the media was also possessed of the characteristics of petitioning activity.¹⁹⁸

In other words, the content of the statement, in conjunction with the context in which the statement was given, satisfied the statutory requirement of exercising the right to petition because it reflected the essence of petitioning activity—that is, the seeking of governmental redress.

In cases following *Wynne*, the appeals court further refined the mirror image rule as a means of limiting the statute's expansive scope.¹⁹⁹ For instance, in *Global Naps, Inc. v. Verizon New England, Inc.*, the court rejected Verizon's claim that its employee's statement to the *Boston Globe* satisfied the statutory definition of petitioning.²⁰⁰ Verizon argued that the statement at issue met the "in connection with" definition of petitioning because the statement referenced a matter under review by the Department of Telecommunications and Energy (DTE).²⁰¹ Referencing *Wynne*, the court reasoned that "the statements [at issue] were not 'mirror images' of what was said in a governmental forum, nor were they made in conjunction with any legislative petitioning. . . . Instead, the comments were incidental observations that were not tied to the petitioning activity in a direct way."²⁰² Based on the content of the statement—and the context in which it occurred—the court narrowly tailored the "in connection with" definition of petitioning.²⁰³ In recognition of the fact that the right to petition contemplated by the statute encompasses the seeking of government redress, the court reasoned that "tangential statements" unrelated to the petitioning process fall beyond the ambit of the statute.²⁰⁴ "That a statement concerns a topic that has attracted

198. *Id.* at 565–66 (footnote omitted).

199. *See, e.g., Global Naps, Inc. v. Verizon New Eng., Inc.*, 828 N.E.2d 529, 533–34 (Mass. App. Ct. 2005).

200. *Id.* at 530.

201. *See id.* at 531; *see also* MASS. GEN. LAWS ch. 231, § 59H (2018).

202. *Global Naps, Inc.*, 828 N.E.2d at 534 (citation omitted).

203. *Id.* at 532. The court also reasoned that the context of the statute must be taken into account when evaluating a statement's eligibility for protection. *Id.* The other enumerated definitions of petitioning—specifically the first, third, and fourth definitions—"support reading 'in connection with' as embodying, to some extent, similar purposive elements." *Id.* In a similar vein, the court faulted Verizon's argument for failing to recognize the significance of the anti-SLAPP statute's reference "to a 'party's exercise of its right of petition under the constitution of the United States or of the Commonwealth.'" *Id.* (quoting MASS. GEN. LAWS ch. 231, § 59H). The statutory language precludes the inclusion of statements made "to influence public opinion in a general way unrelated to government involvement." *Id.* at 534.

204. *See id.* at 534.

governmental attention, in itself, does not give that statement the character contemplated by the statute.”²⁰⁵

Although the SJC has yet to formally apply the mirror image rule in its anti-SLAPP jurisprudence, it has recognized and relied on the rule’s underlying principles.²⁰⁶ Statements directed to the press may very well constitute petitioning under the broad definition afforded by the statute, but such statements must possess the essential characteristics of the constitutional right to petition as contemplated by the legislature.²⁰⁷ Considerations of a statement’s content and context are critical in determining whether a statement constitutes petitioning activity.²⁰⁸

IV. VEERING OFF COURSE: THE *CARDNO CHEMRISK* ANALYSIS

The way in which a court reaches its result is just as important—if not more important—than the result itself.²⁰⁹ Principled decision making is preferred over result-oriented jurisprudence.²¹⁰ In *Cardno ChemRisk, LLC v. Foytlin*, the analysis wavered between principled and result-oriented.²¹¹ The court persuasively recounted the facts to establish the defendants—Cherri Foytlin and Karen Savage—as citizens of modest means with an extensive record of environmental advocacy.²¹² After identifying Foytlin as a full-time activist and Savage as a participant in environmental advocacy, the court relayed that “both defendants have devoted substantial time to exploring [the oil spill’s] environmental consequences, particularly its effects on cleanup workers, and to advocating on behalf of those adversely affected.”²¹³ Foytlin, the court explained, “is a mother of six [who] support[s] herself with modest monthly stipends” and Savage is a former middle school teacher and a single mother of four.²¹⁴ Moreover, the court chronicled the defendants’

205. *Id.* at 533.

206. *See* *N. Am. Expositions Co. v. Corcoran*, 898 N.E.2d 831, 841 (Mass. 2009). With reference to the concept of “mirror images” discussed in *Wynne*, the SJC stated that “[i]n order to determine if statements are petitioning, we consider them in the over-all context in which they were made.” *Id.*

207. *See* *Kobrin v. Gastfriend*, 821 N.E.2d 60, 65–66 (Mass. 2005).

208. *See* *N. Am. Expositions Co.*, 898 N.E.2d at 841.

209. LEONARD W. LEVY, *AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE* 437 (1974).

210. *See id.*

211. *Cardno ChemRisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1186–91 (Mass. 2017).

212. *Id.* at 1184.

213. *Id.*

214. *Id.* at 1186 n.10.

efforts to raise awareness of the consequences of the spill,²¹⁵ which included "marching from New Orleans to Washington, D.C.[,] . . . meeting with federal officials[,] and corresponding with federal agencies such as . . . the Environmental Protection Agency [and] . . . the Department of Health and Human Services."²¹⁶ Importantly, the court couched the blog post, the statement at issue under the statute, as one of the defendants' efforts in this regard.²¹⁷

The court's portrayal of the "pertinent" factual background material was not haphazard; indeed, it was integral to the finding that the defendants were petitioning in their own right as citizens.²¹⁸ Intentions aside, the court effectively shifted its focus from the substance of the statement at issue to the standing of the defendants that drafted it. As a result, the court's assessment of the well-established threshold question—whether the statement fits within one of the five statutorily enumerated categories²¹⁹—and ultimate determination possessed an element of inevitability:

The Huffington Post blog posting falls within at least one of the enumerated definitional categories. It formed part of the defendants' ongoing efforts to influence governmental bodies by increasing the amount and tenor of coverage around the environmental consequences of the spill, and it closes with an implicit call for its readers to take action. Given this, the article fits squarely within the second [sic] clause of G. L. c. 231 § 59H: "any statement reasonably likely to enlist public participation."²²⁰

In this passage, the court proffered two factors to support its finding: the blog "formed part of the defendants' ongoing efforts" and it includes an implicit call for action.²²¹ Here, the court focused chiefly on the defendants' intent²²²—a factor the court previously deemed irrelevant to

215. *Id.* at 1187.

216. *Id.* at n.13.

217. *Id.* at 1184.

218. *See id.* at 1184–85, 1190.

219. *See supra* Section II.B.

220. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1187–88 (footnotes omitted).

221. *Id.*

222. *See* Dennington, *supra* note 146, at 37 (discussing *Cardno ChemRisk, LLC* and the tendency of courts to engage in scierenter-like analyses when determining whether particular online statements are petitioning activity).

the first prong of the anti-SLAPP two-part test.²²³ Rather than distinguishing the statement at issue from the motive behind the statement, the court invested substantial weight in the defendants' intent in determining that the blog post fit the statute's definition of petitioning.²²⁴

Similarly, with respect to the second factor, the implicit call, the court attributed great significance to the final sentence of the blog post.²²⁵ Earlier in the opinion, the court framed the final sentence as a question: "The article closes by asking whether 'anyone will ever . . . make [things] right' in the Gulf Coast."²²⁶ In actuality, the article does not close with a question, but rather an assertion:

Meanwhile, and while the BP trial continues in New Orleans, Gulf Coast residents are left wondering if BP will ever be held responsible for the damage done to their fisheries, ecosystems and livelihoods, wait to see if their bodies will ever recover from an assault of BP's oil and dispersants, and wonder if anyone will ever—in the words of Purple Strategies' spin writers, found in the mouth of former BP President Tony Hayward—"make it right."²²⁷

Nonetheless, the court held that the statement was an implicit call for action and thereby an exercise of the defendants' right to petition.²²⁸ In so holding, the court vastly expanded the scope of the phrase "reasonably likely."²²⁹ Moreover, in its analysis, the court did not include the entirety of the fourth definitional category, which reads as follows: "any statement reasonably likely to enlist public participation in an effort to effect such consideration."²³⁰ The portion of the clause omitted from the opinion refers to the third clause: "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial

223. *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 757 (Mass. 2002) (holding a petitioner's motive is irrelevant with respect to the first prong of the test because the conduct complained of is the sole focus).

224. *See Cardno ChemRisk, LLC*, 68 N.E.3d at 1187–88.

225. *See id.*

226. *Id.* at 1185 (alteration in original).

227. *Foytlin & Savage*, *supra* note 16.

228. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1187.

229. *See Fustolo v. Hollander*, 920 N.E.2d 837, 841 (Mass. 2010) (assuming without deciding that the contents of an article fit the enlistment clause because the article created so much community opposition that developer had to withdraw variance application); *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 757 (Mass. 2002) (holding condominium unit owners urging other unit owners to petition the Federal Deposit Insurance Corporation against the sale of the condominiums fit the enlistment clause of the anti-SLAPP statute).

230. MASS. GEN. LAWS ch. 231, § 59H (2018); *see also Cardno ChemRisk, LLC*, 68 N.E.3d at 1187–88.

body or any other governmental proceeding.”²³¹ In failing to include the full text of the definition, the court failed to give effect to the full text of the clause; specifically, the relevance of the public’s effort to effect governmental consideration to the definition of petitioning activity.²³²

Under close inspection, the conclusory method of analysis undertaken by the court with respect to the definition of petitioning marks a departure from Massachusetts’ existing anti-SLAPP jurisprudence.²³³ In its opinion, the court stated that its “cases recognize that the anti-SLAPP statute, like the constitutional right it safeguards, protects those looking to ‘advanc[e] causes in which they believe,’ as well as those seeking to protect their own private rights.”²³⁴ Importantly, however, the court has previously recognized that despite the legislature’s intent to enact very broad protection, “the scope of the statute has its limits.”²³⁵ Moreover, the court has acknowledged that the Massachusetts anti-SLAPP statute—unlike similar statutes in other states—only protects the right to petition, not all First Amendment rights.²³⁶ Therefore, while the statute may afford courts the opportunity to protect those looking to advance causes in which they believe, the statute *only* extends its procedural protections to those who exercise their right to petition—regardless of intent, purpose, or cause.²³⁷

Despite the SJC’s recognition of boundaries in its previous anti-SLAPP jurisprudence, its extension of the statute’s protection in *Cardno ChemRisk, LLC v. Foytlin* was heralded by attorneys and civil rights activists as an important decision in an era in which the right to petition

231. *Supra* note 230.

232. *See Kobrin v. Gastfriend*, 821 N.E.2d 60, 68 (Mass. 2005) (reasoning courts are obligated to give meaning to all of a statute’s words); *see also* SINGER, *supra* note 148. “Courts assume every word, phrase, and clause in a legislative enactment is intended and has some meaning and none is inserted accidentally. Courts give effect to all the language of a statute as a harmonious whole, rendering no portion meaningless or superfluous.” SINGER, *supra* note 148 (footnotes omitted).

233. *See Yurko*, *supra* note 160, at 38 n.3 (“[T]he Supreme Judicial Court [has] repeatedly eschewed any inquiry into defendant’s subjective motive for petitioning in the first part of the test.”).

234. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1189 (alteration in original) (citation omitted) (quoting *Town of Hanover v. New Eng. Reg’l Council of Carpenters*, 6 N.E.3d 522, 528 (Mass. 2014)).

235. *Fustolo v. Hollander*, 920 N.E.2d 837, 844 (Mass. 2010) (quoting *Kobrin*, 821 N.E.2d at 67).

236. *Cardno ChemRisk, LLC*, 68 N.E.3d at 1186 n.11; *see also Fustolo*, 920 N.E.2d at 844 n.12 (“The Massachusetts Legislature did not include ‘free speech’ in [the provisions of the anti-SLAPP statute].”).

237. MASS. GEN. LAWS ch. 231, § 59H (2018).

must be safeguarded.²³⁸ In celebrating the decision as a “complete victory,” Attorney John H. Reichman explained that “[t]he court made it clear that a blogger who is writing about an issue of public concern, and seeking to get the public involved . . . will be protected.”²³⁹ Ironically, however, the court’s broad construction of the definition of the right to petition obscures the legislative purpose underlying the anti-SLAPP statute.²⁴⁰ The Massachusetts Legislature intended the statute to promote and protect a fully involved citizenry,²⁴¹ but the court’s conclusory analysis diminishes the significance of a statement’s connection to governmental participation under the anti-SLAPP statute.

V. ALTERNATIVE APPROACHES

After the *Cardno ChemRisk, LLC v. Foytlin* opinion, Massachusetts courts are well-positioned to significantly weaken the critical connection between petitioning activity and governmental participation under the anti-SLAPP statute. The potential for further deviation from the statute’s underlying policy objectives necessitates that Massachusetts adopt an alternative interpretive framework—one that echoes its own early anti-SLAPP jurisprudence²⁴² and reflects methods of statutory construction undertaken in other jurisdictions.²⁴³ In order to effectuate the legislative policies underlying the anti-SLAPP statute, courts must objectively distinguish between statements made to influence public opinion and statements made to petition the government in the constitutional sense of the phrase. The approaches undertaken by courts in Minnesota and Pennsylvania serve as examples of invoking objective criteria to evaluate a statement’s standing as petitioning activity.²⁴⁴ In each jurisdiction, judicial interpretation effectuates the legislative intent of the state’s anti-SLAPP statute by upholding the importance of the connection between the right to petition and participation in government.

238. Ellement, *supra* note 43.

239. *Id.*

240. See *Cardno ChemRisk, LLC*, 68 N.E.3d at 1186–87; see also *Kobrin*, 821 N.E.2d at 68 (discussing the manner in which a broad interpretation of the anti-SLAPP statute may fail to effect its legislative intent).

241. *Kobrin*, 821 N.E.2d. at 66.

242. See *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 750 (Mass. 2002); see also *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 939 (Mass. 1998).

243. See *SINGER*, *supra* note 148 (“Where legislation is structured in the same manner as the laws of other states . . . courts may look to cases from the other states . . . which have construed such similar provisions for interpretive insight and guidance.”).

244. See *Freeman v. Swift*, 776 N.W.2d 485, 488–92 (Minn. Ct. App. 2009); *Penllyn Greene Assocs. v. Clouser*, 890 A.2d 424, 429–32 (Pa. Commw. Ct. 2005).

A. *Minnesota's Citizens Participation Act*

The Minnesota Legislature enacted the Citizens Participation Act of 1994 several months before Massachusetts enacted its anti-SLAPP statute.²⁴⁵ Although the wording of the Minnesota statute is significantly different from the wording of the Massachusetts statute, the legislative intent is the same: protecting citizen participation in government.²⁴⁶ The Minnesota statute defines public participation as “speech or lawful speech that is genuinely aimed in whole or in part at procuring favorable government action.”²⁴⁷ Substantively, the statute immunizes such speech or lawful conduct from liability—unless the conduct or speech constitutes a tort or violation of a person’s constitutional rights.²⁴⁸ Upon enactment, Professors Canan and Pring heralded the statute as “a breakthrough in effectiveness” as it promised broad and straightforward protection for public participation in government.²⁴⁹ Judicial interpretation of what constitutes public participation in Minnesota warrants similar praise.²⁵⁰ In primarily focusing on a statement’s content—rather than the subjective intent of a speaker—the Minnesota courts offer an instructive method of interpretation.

The Minnesota Court of Appeals first determined the definition and scope of public participation in *Freeman v. Swift*.²⁵¹ Three statements were at issue in the case—an email and two blog posts regarding the chief executive officer of Nexus, a juvenile sex-offender treatment facility set for relocation in Bradbury Township.²⁵² The author of the statements—defendant Janette J. Swift—vigorously opposed the relocation of the facility as a resident of Bradbury Township and the founder of Onamia Area Citizens for Responsible Growth.²⁵³ Based upon the content of the email and blog entries, the plaintiffs in the case sued Swift for defamation.

245. See 1994 Minn. Sess. Law Serv. Ch. 566 (West); see also PRING & CANAN, *supra* note 2, at 200.

246. *Freeman*, 776 N.W.2d at 488.

247. MINN. STAT. § 554.01(6) (2018); see also Lisa Blomgren Amsler & Tina Nabatchi, *Public Engagement and Decision-Making: Moving Minnesota Forward to Dialogue and Deliberation*, 42 MITCHELL HAMLINE L. REV. 1629, 1648–49 (2016) (noting that Minnesota statutes, with the exception of MINN. STAT. § 554.01, fail to expressly define the contours of public participation).

248. MINN. STAT. § 554.03 (2018).

249. PRING & CANAN, *supra* note 2, at 200–01.

250. See, e.g., *Freeman*, 776 N.W.2d at 489.

251. *Id.* at 490.

252. *Id.* at 487.

253. *Id.*

Swift moved unsuccessfully to dismiss the defamation action under Minnesota's anti-SLAPP statute.²⁵⁴

Similarly, based upon the content of the communications, the Minnesota Court of Appeals affirmed the lower court's determination that the statements were not entitled to immunity under the statute.²⁵⁵ The court held that "the determination of whether a communication is entitled to immunity under section 554.03 depends on the nature of the statement, the purpose of the statement, and the intended audience."²⁵⁶ As in *Cardno ChemRisk, LLC v. Foytlin*,²⁵⁷ the court assessed the nature of the statement by extensively recounting the defendant's activism relating to the relocation of the treatment facility.²⁵⁸ Swift attended meetings and presented petitions to government bodies involved, communicated her strong opposition to state representatives, and expressed problems associated with relocation to local government officials.²⁵⁹ Unlike the SJC, however, the Minnesota Court of Appeals reasoned that "the mere fact that discrete communications are made in the context of public participation does not confer immunity."²⁶⁰

Admittedly, the expansive breadth of the Massachusetts anti-SLAPP statute—specifically the definition of petitioning activity as any statement made in connection with an issue under consideration or review—requires courts to consider the overall context in which the statements are made.²⁶¹ Nonetheless, the exercise of distinguishing between the content of a challenged statement and a speaker's record of participation should be a necessary step in the process of determining whether an activity constitutes petitioning. This critical consideration ensures that the right to petition is exercised before the statute's procedural protections are extended, thereby ensuring the statute's language and legislative intent are simultaneously given effect.

254. *Id.*

255. *Id.* at 490.

256. *Id.*

257. *Cardno ChemRisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1184–85 (Mass. 2017).

258. *Freeman*, 776 N.W.2d at 487.

259. *Id.*

260. *Id.* at 490.

261. *N. Am. Expositions Co. v. Corcoran*, 898 N.E.2d 831, 841 (Mass. 2009).

B. *Pennsylvania's Participation in Environmental Law or Regulation Act*

Whereas Massachusetts and Minnesota extend anti-SLAPP protections to petitioning activities in all contexts, Pennsylvania's anti-SLAPP legislation limits protection to public participation in the arena of environmental law.²⁶² The Pennsylvania Legislature enacted The Participation in Environmental Law or Regulation Act on December 20, 2000.²⁶³ In the preamble of the Act, the General Assembly stated that "[i]t is contrary to the public interest to allow lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPP), to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances."²⁶⁴ Moreover, in contemplating the legislation, the General Assembly reasoned that "[i]t is in the public interest to empower citizens to bring a swift end to retaliatory lawsuits seeking to undermine their participation in the establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations."²⁶⁵ Although the scope of Pennsylvania's anti-SLAPP statute is narrower than its Massachusetts companion, the statutes share a common objective: to protect the constitutional right to petition.²⁶⁶

Section 8302 of The Participation in Environmental Law or Regulation Act identifies the communications that are eligible for protection as petitioning activity.²⁶⁷ Pursuant to the Act, the general rule is that a person who

[F]iles an action in the courts of [the] Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action.²⁶⁸

262. See 27 PA. CONS. STAT. §§ 8301–05 (2018).

263. *Id.*

264. Preamble to the Act of December 20, 2000, Pub. L. 980, No. 138.

265. *Id.*

266. *Penllyn Greene Assocs. v. Clouser*, 890 A.2d 424, 434 (Pa. Commw. Ct. 2005).

267. 27 PA. CONS. STAT. § 8302(a) (2018).

268. *Id.*

The Act enumerates three categorical definitions of statements that qualify for immunity under the Act.²⁶⁹ In addition to statements made before executive, legislative, and judicial proceedings, the Act immunizes statements made to government agencies in connection with the enforcement of environmental regulations.²⁷⁰ Finally, the Act contains an “in connection with” clause—statements made “in connection with an issue under consideration or review by a legislative, executive or judicial body or any other official proceeding authorized by law” constitute petitioning activity and are thus eligible for protection.²⁷¹

As in Massachusetts, initial application of the Act’s “in connection with” clause prompted the Pennsylvania judiciary to interpret the statutory definition of petitioning activity.²⁷² Despite the seemingly vast potential for statements to meet the standard of “in connection with,” the Pennsylvania Commonwealth Court declared that “the Act does not perfunctorily immunize all communications merely because they concern an environmental issue under consideration or review by a government body.”²⁷³ In *Penllyn Greene Associates v. Clouser*, the Commonwealth Court recognized that the legislature embedded a purposive element within the “in connection with” definition.²⁷⁴ The case involved a dispute between two residential development firms and three residents of Montgomery County, Pennsylvania.²⁷⁵ Following a two-year permitting process, the developers began constructing residential homes on property adjacent to the residents’ homes.²⁷⁶ In addition to publicly opposing the development of the land, the residents filed a series of appeals challenging the validity of the development project.²⁷⁷ After the residents withdrew their appeal three hours before the scheduled hearing, the developers brought suit against the residents for abuse of process and tortious interference.²⁷⁸ In response, the residents sought immunity under The

269. 27 PA. CONS. STAT. § 8301 (2018).

270. *Id.*

271. *Id.*

272. *See* *Penllyn Greene Assocs. v. Clouser*, 890 A.2d 424, 433 (Pa. Commw. Ct. 2005).

273. *Id.*

274. *See id.* (“The Act and the legislative intent are clear. Section 8302 of the Act, 27 Pa. C. S. § 8302(a), affords immunity only where the communication or action is ‘aimed at procuring favorable governmental action.’”).

275. *Id.* at 427.

276. *Id.*

277. *See id.* at 430 (“Residents claim that they began voicing their concerns to the local, state and federal government in the 1980’s regarding the possibility of the adverse effects of developing the Property which they asserted was contaminated.”).

278. *Id.* at 428. The developers also alleged trespass. *Id.*

Participation in Environmental Law or Regulation Act by claiming that the statements at issue were made "in connection with" a matter under review.²⁷⁹

In its evaluation of the case, the Commonwealth Court reasoned that "the Act was designed to protect those persons targeted by frivolous lawsuits based on their constitutionally protected *government petitioning* activities."²⁸⁰ The court stated: "[w]hen determining whether a communication is entitled to immunity, the court must look to the nature of the statement keeping in mind the intended audience and the purpose of the communication."²⁸¹ Whereas the residents argued that their statements "were just a 'continuation' of their longstanding and continuing governmental petitioning," the court found that the nature of the communications precluded an extension of the Act's protection.²⁸² Rather than rely on the residents' record of past petitioning—and subjectively stated motivations—the court looked to objective indicia in order to determine the nature of the statements.²⁸³ The intended audience of the statement, for instance, consisted of real estate agents and home buyers.²⁸⁴ In light of this fact, the court reasoned that "[t]he communications were not for the larger purpose of calling governmental or public attention to any alleged contamination, or to influence the government in its consideration or review of an environmental issue."²⁸⁵ The residents, therefore, were ineligible for immunity under the Act.²⁸⁶

Despite the limited contextual reach of Pennsylvania's anti-SLAPP statute, the Pennsylvania judiciary's method of statutory construction offers valuable instruction. Throughout the course of its analysis in *Penllyn Greene Associates. v. Clouser*, the Pennsylvania Commonwealth Court elevated the constitutional significance of the right to petition.²⁸⁷ As a result, the court's classification of statements as petitioning or non-

279. *Id.* at 430.

280. *Id.* at 434.

281. *Id.* at 433.

282. *Id.* at 430, 433.

283. *Compare id.* at 433 (holding courts must consider the nature of a statement, its intended audience, and its purpose), *with* discussion *supra* Part IV (analyzing the SJC's reliance on the defendants' subjectively stated intent in *Cardno ChemRisk, LLC*).

284. *Penllyn Greene Assocs.*, 890 A.2d at 434.

285. *Id.*

286. *Id.*

287. *See, e.g., id.* ("The Act was designed to protect those persons targeted by frivolous lawsuits based on their constitutionally protected government petitioning activities.").

petitioning activity depended largely on the statement's connection to governmental redress.²⁸⁸ As the court explained:

The purpose of the Act is to encourage and open the lines of communication to those government bodies clothed with the authority to correct or enforce our environmental laws and regulations.

....

Accordingly, [the court] concludes that the immunity authorized by the Act is restricted to those persons who petition the government or make any statement reasonably likely to encourage consideration or review of an environmental issue by a legislative, executive, or judicial body or in any official proceeding in an effort to effect such consideration. Immunity is triggered if, and only if, the communication is aimed at procuring favorable government action, regardless of whether the communication is made directly to the government or to third parties.²⁸⁹

As the court made clear in *Penllyn Greene Associates. v. Clouser*, determinations regarding the aim of a communication cannot be reached by evaluating a party's subjective claim. Rather, an objective assessment of the nature of the statement—which includes consideration of the statement's intended audience—is the most effective method to effectuate the Act's legislative intent.

CONCLUSION

For over twenty years, the Massachusetts judiciary has sought to interpret and apply the anti-SLAPP statute in a manner consistent with its text and legislative intent. Upon enactment, the “anti-SLAPP statute broadly defined petitioning activities, defined a qualified immunity for those activities, and crafted an objective test and an expedited procedure for enforcing that immunity.”²⁹⁰ Judicial interpretations of the statute, however, have extended the statute's protections beyond the classic SLAPP scenario.²⁹¹ Nonetheless, the SJC has consistently effectuated the

288. *Id.* at 433–34.

289. *Id.*

290. *See* Yurko, *supra* note 160, at 36.

291. *See* Baker v. Parsons, 750 N.E.2d 953, 958 (Mass. 2001) (reviewing the statute's legislative history led the court to conclude that the statute was intended to go beyond the typical case). There is mounting pressure—in Massachusetts and throughout the country—to further expand the reach of anti-SLAPP protections. *See, e.g.,* Katherleen Conti, *TripAdvisor Wants Tougher Law Protecting Online Reviewers from Suits*, BOS. GLOBE (Sept. 28, 2017), <https://www.bostonglobe.com/business/2017/09/28/tripadvisor-wants-tougher-state-law-protecting-online-reviewers-from-lawsuits/ojcWjYVjprYiR5OPwXafRM/story.html> [<https://perma.cc/M42P-PKU3>] (discussing proposed legislation to extend anti-SLAPP

statute's legislative intent by focusing its inquiry on conduct.²⁹² In focusing on conduct, rather than a given defendant's subjectively stated intent, the court ensured that the right to petition was exercised—in the constitutional sense—before extending the statute's protections.

In *Cardno ChemRisk, LLC v. Foytlin*, however, the court shifted its focus and highlighted the potential for judicial interpretation to obscure the policy rationales underlying the anti-SLAPP statute.²⁹³ The court's conclusory analysis regarding the manner in which the blog post fit the definition of the right to petition was largely based on the defendants' subjectively stated intent to increase coverage of the oil spill's environmental consequences.²⁹⁴ As a result, the anti-SLAPP statute was successfully invoked to immunize an opinionated blog—but was the right to petition exercised in the constitutional sense of the phrase? In the absence of an alternative interpretative framework—one that objectively assesses a statement's content, the manner in which it is issued, and its proximity to government action—Massachusetts courts will risk obscuring the critical importance of the connection between a statement and public participation under the anti-SLAPP statute.

Interpretive methods undertaken in other jurisdictions offer insight and instruction for future interpretation of the Massachusetts Anti-SLAPP statute.²⁹⁵ Minnesota has highlighted the importance of examining the nature of a statement, the purpose of statement, and the statement's intended audience.²⁹⁶ Similarly, the approach undertaken in Pennsylvania demonstrates the importance of examining objective indicia of a statement's eligibility for protection as petitioning activity.²⁹⁷ Ultimately, looking to the content of a statement, rather than a speaker's subjectively

protections to forms of public speech, such as online reviews). Whereas the Massachusetts anti-SLAPP statute does not address consumer reviews, other jurisdictions, such as the District of Columbia, have included language in their anti-SLAPP legislation that expressly addresses the issue. See D.C. CODE § 16-5501(3) (2018) ("Issue of public interest' means an issue related to . . . a good, product, or service in the market place."). Not surprisingly, the "public concern element" is at the crux of judicial debates surrounding anti-SLAPP statute's applicability to consumer reviews. See, e.g., *Demetriades v. Yelp, Inc.*, 175 Cal. Rptr. 3d 131, 143 (Cal. Ct. App. 2014) (finding business reviews on Yelp's website contain matters of public concern). See generally Eric Goldman, *Two More Cases Hold That Anti-SLAPP Laws Protect Consumer Reviews*, TECH. & MARKETING L. BLOG (Dec. 13, 2012), https://blog.ericgoldman.org/archives/2012/12/two_more_cases.htm [<https://perma.cc/6RJV-4MHU>].

292. See *N. Am. Expositions Co. v. Corcoran*, 898 N.E.2d 831, 841 (Mass. 2009).

293. *Cardno ChemRisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1187–88 (Mass. 2017).

294. *Id.* at 1189.

295. *Freeman v. Swift*, 776 N.W.2d 485 (Minn. Ct. App. 2009); *Penllyn Greene Assocs. v. Clouser*, 890 A.2d 424 (Pa. Commw. Ct. 2005).

296. See *Freeman*, 776 N.W.2d at 490.

297. See *Penllyn Greene Assocs.*, 890 A.2d at 434.

stated intent, ensures that protection will be afforded to parties that exercise the right to petition in the constitutional sense of the phrase. Despite differences in statutory language, the approaches developed in other jurisdictions could be adopted in Massachusetts in a manner that is consistent with Massachusetts case law. The adoption of an objective approach would provide consistent assessments of challenged statements and will eliminate the need to inquire about subjective intent for purposes of meeting the statutory definition. In the absence of such an approach, the judiciary is bound to frustrate, rather than effectuate, the statute's legislative intent.