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SLAPP-ing Back: Are Government Lawsuits Against Records Requesters Strategic Lawsuits Against Public Participation?

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Abstract

Open government advocates have expressed alarm at recent lawsuits that government agencies have filed against people requesting public records. Such suits bear a resemblance to "SLAPP" suits, the label given to "strategic lawsuits against public participation," intended to harass active citizens out of the public sphere. This article considers whether these recent lawsuits could be considered SLAPP suits in their states, and examines whether 31 anti-SLAPP laws around the country might apply to these types of circumstances. We categorize the laws based on their various definitions for public participation, finding that many laws could cover public records requests, and argue that although not all anti-SLAPP laws will offer a defense when a government entity sues a records requester, courts do not look charitably on government plaintiffs in these circumstances.

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Introduction

In the spring of 2016, James Finney and Michael Deshotels engaged in a routine part of participatory democracy: requesting government records related to a public issue. But the government's response was anything but routine. Instead of complying with the request, denying it, or even asking for more time or fees to gather and produce the records, the Louisiana Department of Education sued Finney and Deshotels.[1] According to the suit, the department sought a declaratory judgment that suppressing the data at issue was "compliant with state and federal law and not a violation Louisiana Public Records law," and requested attorney's fees and costs.[2] When the case was settled a few months later and the records were released, both sides declared victory. The education department said the lawsuit was a necessary and successful move to resolve "tension" between state and federal rules, while the defendants called it a decisive win for citizens seeking public records.[3] But Deshotels also called the suit "purely an attempt to discourage citizens from seeking to independently research the claims and conclusions" of the government and warned of the risks to transparency "if citizens are forced to face legal challenges and high legal fees for seeking public records."[4]

Lawsuits like the one against Finney and Deshotels might be more commonplace than we assume. Between June 2015 and May 2018, for example, government agencies filed at least eight such lawsuits from Michigan to Florida and Oregon to New Jersey, targeting private individuals, government accountability groups, journalists, and even student media.[5] In the suits, the

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[1] Complaint for Declaratory Relief, Louisiana Education Dep't v. Deshotels et al., No. 647953-D (19th Dist. La. 2016), https://deutsch29.files.wordpress.com/2016/05/white-vs-deshotels-et-al.pdf; *See also* Chris Nakamato, *Department of Education Sues Citizens Who File Public Records Requests*, WBRZ NEWS (June 1, 2016), http://www.wbrz.com/news/department-of-education-sues-citizens-who-file-public-records-requests/.

[2] Complaint, *supra* note 1.

[3] Joe Gyan, *Louisiana Education Activists Declare Victory in Public Records Fight*, THE ADVOCATE (Oct. 6, 2016) https://www.theadvocate.com/baton_rouge/news/courts/article_76e860ca-8bd9-11e6-9963-cf5829bedcf3.html.

[4] *Id*.

[5] *See* Barbara Clowdus, *SFWMD Plagued by Martin County's Public Records, Legal Shenanigans*, SUNSHINE STATE NEWS (Apr. 23, 2018), http://sunshinestatenews.com/story/sfwmd-plagued-martin-countys-public-records-legal-shenanigans; Matt Mencarini, *Michigan State Loses FOIA Lawsuit Against ESPN for Second Time Since 2015*, LANSING STATE JOURNAL (Sept. 18, 2017), https://www.lansingstatejournal.com/story/news/local/2017/09/18/michigan-state-espn-foia-lawsuit-sexual-assault/676752001/; Betsy Hammond, *Portland Public Schools Loses Records Secrecy Lawsuit*, THE OREGONIAN (May 12, 2018), www.oregonlive.com/education/2018/05/portland_public_schools_loses.html; Linda Blackford, *WKU Sues Student Newspapers Over Sexual Misconduct Records*, LEXINGTON HERALD LEADER (Feb. 28, 2017), https://www.kentucky.com/news/local/counties/fayette-county/article135400309.html; Jonathan Peters, *How One Paper Filed a FOIA Request in Michigan – and Got Sued by the County*, COLUM. JOURNALISM REV. (Aug. 2, 2016), www.cjr.org/united_states_project/michigan_lawsuit_daily_news_foia.php; Joe Gyan, *Louisiana Education Chief Asks Courts to Block Public Records Request, Claims Release of Data May Violate Student Privacy Rights*, THE ADVOCATE (June 4, 2016), https://www.theadvocate.com/baton_rouge/news/education/article_536e2fac-b5e2-575c-87f6-1a991bf0f455.html; Tim Cushing, *Court Tells City No You Cannot Sue Someone for Making a FOIA Request*, TECHDIRT (July 1, 2015), https://www.techdirt.com/articles/20150630/16393431506/court-tells-city-no-you-cannot-sue-someone-making-foia-request.shtml. *See also* Ryan J. Foley, *Governments Turn Tables by Suing Records Requesters*, AP NEWS (Sept. 17, 2017), https://apnews.com/7f6ed0b1bda047339f22789a10f64ac4; Jonathan Peters, *When Governments Sue Public Records Requesters*, COLUM. JOURNALISM REV. (June 30, 2015), https://www.cjr.org/united_states_project/when_governments_sue_public_record_requesters.php. Not all relevant ongoing or previous cases may be included here, because they may not be in the news.

government typically asked for a judicial declaration that the records sought could be withheld.[6] Although requesters who fought the eight suits have mostly prevailed,[7] it is unclear how many others have abandoned their requests when sued or threatened with a lawsuit, considering the burdens of litigation and uncertainty about whether they could recover costs even if they eventually won. Indeed, experts have echoed Deshotels' concerns about government agencies intimidating requesters with these suits, drawing comparisons to "SLAPP" suits: "strategic lawsuits against public participation" intended to harass or intimidate citizens out of engaging with public issues and government bodies.[8] In recognition of the "potentially grave consequences for the future of representative democracy"[9] posed by SLAPP suits, 31 states, the District of Columbia, and the territory of Guam have passed "anti-SLAPP" laws, which typically aim to discourage such suits through an expedited hearing, early dismissal, and award of attorney's fees to the target of the suit.[10]

The central question for this article is whether records requesters like Finney and Deshotels could use an anti-SLAPP law to knock down a state's lawsuit against a records request. We take two tracks of analysis to answer that question. One track looks closely at three lawsuits filed between 2015 and 2018 in which records requesters were sued in response to their requests, using the available record to consider whether state anti-SLAPP laws could have been applied, to what outcome, and other legal lessons those cases offer.[11] The second track examines the states' various

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[6] *See, e.g.*, Hammond and Gyan, *supra* note 5.

[7] *See id. See also* Mencarini, *supra* note 5; Peters, *supra* note 5; Donna Weaver, *Failed Lawsuit by Hamilton Could Cost Taxpayers $75,000*, THE PRESS OF ATLANTIC CITY (June 27, 2015), https://www.pressofatlanticcity.com/news/failed-lawsuit-by-hamilton-could-cost-taxpayers/article_18e06236-1c66-11e5-bd9a-e313fdc17f42.html.

[8] *See* Peters, *How One Paper Filed a FOIA Request in Michigan – and Got Sued by the County*, *supra* note 5 and *When Governments Sue Public Records Requesters*, *supra* note 5; *see also* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1984). It is important to note that because these suits involve the government suing requesters, they differ from "reverse-FOI" actions, in which non-governmental third parties sue to prevent the release of records. Such suits are also harmful to the public's right to know, and might be considered a form of SLAPP suit, but they are not included in this analysis.

[9] Pring & Canan, *supra* note 8, at 2.

[10] ARIZ. REV. STAT. § 12-751 (2007); ARK. CODE ANN. § 16-63-501 (Michie 2006); CAL. CODE CIV. PROC. § 425.16 (West Supp. 2004 & 2006); CONN. GEN. STAT. § 52-196a (2017); DEL. CODE. ANN. § 8136 (1999); D.C. CODE ANN. § 16-5501 (2010); FLA. STAT. ANN. § 768.295 (West 2005); GA. CODE ANN. § 9-11-11.1 (2006); 7 GUAM CODE ANN. §§17101-17109 (2006); HAW. REV. STAT. § 634F-1 (Michie 2005); 735 ILL. COMP. STAT. 110/15 (West 2007); IND. CODE ANN. § 34-7-7-1 (Michie 2006); KAN. STAT. ANN. § 60-5320 (2016); LA. REV. STAT. ANN. § 971 (West 2006); 14 ME. REV. STAT. ANN. § 556 (West 2003); MD. CODE ANN. CTS. & JUD. PROC. § 5-807 (2006); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000); MINN. STAT. § 554.01 (2015); MO. REV. STAT. § 537.528 (2006); NEB. REV. STAT. § 25-21.243 (1995); NEV. REV. STAT. ANN. § 41.635 (Michie 2002); N. M. STAT. ANN. § 38-2-9.1 (Michie 2004); N.Y. C.P.L.R. § 3211, Pt. 1/7 (McKinney Supp. 2007); OKLA. STAT. § 1430 (West 1993); OR. REV. STAT. § 31.150 (2006); 27 PA. CONS. STAT. ANN. § 7707 & 8301 (West Supp 2006); R. I. GEN. LAWS § 9-33-1 (1997); TENN. CODE. ANN. § 4-21-1001 (2005); TEX. REV. CIV. STAT. § 27.002 (West 2011); UTAH CODE ANN. § 78B-6-1401 (2002); VT. STAT. ANN. § 1041 (2005); VA. CODE ANN. § 8.01-223.2 (Michie 2017); WASH REV. CODE § 4.24.510 (2002). *See* Public Participation Project, https://anti-slapp.org/your-states-free-speech-protection/. Washington's statute was ruled unconstitutional in 2015 and Minnesota's was ruled unconstitutional in 2017, meaning 31 were still in effect spring 2019. *See* Davis v. Cox, 351 P.3d 862 (Wash. 2017); Leiendecker v. Asian Women United of Minn., 895 N.W.2d 623 (Minn. 2017). Two states, Colorado and West Virginia, have recognized a form of anti-SLAPP protection through case law. *See* Protect Our Mountain Environment, Inc. v. Dist. Court of County of Jefferson, 677 P.2d 1361 (Colo. 1984); Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993).

[11] The eight cases identified and three cases discussed here were found through news databases and trade publication reports and checked against court records available online and in legal databases Lexis Advance and Westlaw. The state anti-SLAPP laws were collected using the legal database Lexis Advance. *See supra* note 5. Although not all

anti-SLAPP laws to consider whether they might apply to similar suits in those states.[12] We categorize state anti-SLAPP laws based on their wide variety of definitions for public participation, finding that many laws could cover public records requests. We argue that although not all anti-SLAPP laws will offer a defense when a government entity sues a records requester, courts do not look charitably on government plaintiffs in these circumstances. Such suits are strategic lawsuits against public participation in form and function, if not by letter of the law. Preceding the explication of that analysis and those conclusions, however, is a brief explanation of the legal landscape surrounding government lawsuits against records requesters and strategic lawsuits against public participation.

Government Lawsuits Against Records Requesters and Anti-SLAPP Law

Government lawsuits against public records requesters may be surprisingly common, but there is little research examining them. Media law scholar Cathy Packer provided one comprehensive overview in which she examined 38 such cases between 1975 and 2006.[13] Of those, seven resulted in a court ruling that the government could not sue a records requester.[14] Packer found that most cases did not address the government's ability to sue over a records request at all, but the 14 cases where courts considered the question focused on whether the government plaintiff had standing to sue over a records request or whether the government's lawsuit impermissibly asked for an advisory opinion in a case that did not warrant one.[15] Among the findings most relevant here were that Texas's public records law explicitly denies standing to the government to sue requesters[16] and, in contrast, the Colorado and Missouri open records laws explicitly grant the government standing in such cases.[17] Courts in California and North Carolina found no standing for preemptive government lawsuits in their states' public records laws.[18] Meanwhile, courts also disagreed on the advisory opinion question.[19] Packer argues that allowing the government to sue records requesters "turns access law on its head" because it provides "a tool to punish and intimidate" contrary to the purpose of government transparency laws.[20] In spite of the clear parallel between her research subject and SLAPP suits, however, Packer's analysis only briefly mentions

relevant cases may be included here, we do not believe their omission significantly undermines our central insights or argument.

[12] The state anti-SLAPP laws were gathered and reviewed using the legal database Lexis Advance. The "Shepardize" function was used to identify and review relevant case law.

[13] Cathy Packer, *Don't Even Ask! A Two-Level Analysis of Government Lawsuits Against Citizen and Media Access Requesters*, 13 COMM. L & POL'Y 29 (2008). Packer found 38 cases in 31 years between 1975 and 2006; we found eight in three years between 2015 and 2018, suggesting the lawsuits have not slowed, and may have even accelerated.

[14] *Id*. *at* 30-31, 44-60.

[15] *Id*. at 39. Both questions are related to the doctrine of justiciability, or whether a case is suitable for adjudication by a court. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 49-50 (2006).

[16] Packer, *supra* note 13, at 40. *See also* "Texas Public Information Act," TEX. REV. CIV. STAT. ANN. § 552.001, *et seq*. (West 1993).

[17] *See* "Colorado Open Records Law," COLO. REV. STAT. § 24-72-201-206 (1968). *See also* "Sunshine Law: Missouri Open Records and Meeting Law," MO. REV. STAT. § 610.027 (1973). *See also* Packer, *supra* note 13, at 40.

[18] City of Santa Rosa v. Press Democrat, 232 Cal. Rptr. 445, 448 (Cal. Ct. App. 1987) (citing CAL GOVT. CODE § 6258) (Thomson West/Westlaw through 2007 Reg. Sess.); McCormick v. Hanson Aggregates Southeast, Inc. 596 S.E.2d 431, 463 (N.C. Ct. App. 2004) (citing N.C. GEN. STAT. § 132-9(a)). *See also* Packer, *supra* note 13, at 40-1.

[19] *See* Packer, *supra* note 13, at 44.

[20] *Id*. at 33.

SLAPPs, and does not meaningfully engage with them.[21]

Concern about SLAPPs arose in the late 1980s, as research illuminated the prevalence of lawsuits brought by powerful individuals or organizations against people for simply "talking to government, circulating a petition, writing a letter to the editor, speaking at a school board meeting, or testifying in a public hearing."[22] George Pring and Penelope Canan, pioneering scholars on the issue, defined SLAPPs in their 1996 book as civil actions aimed at nongovernmental actors or institutions who communicated with government "to influence governmental action or outcome" on an issue of "public interest or social significance."[23] Classic SLAPP suits are meritless and not intended by plaintiffs to win, but to "deter or to punish a party for exercising its political rights by forcing that party to waste time and resources defending its petitioning activity in court."[24] Although there is not a single quintessential SLAPP claim, plaintiffs commonly sue for defamation, invasion of privacy, abuse of process, malicious prosecution, conspiracy, and tortious interference with contract or business relationships.[25]

Acknowledging that SLAPP suits undermine the constitutional rights of petition and freedom of speech and risk chilling effects on important democratic processes,[26] the 31 anti-SLAPP statutes in effect across the country generally attempt to deter would-be plaintiffs by providing defendants with an expedited procedure to seek dismissal of a suit—typically through a special motion to dismiss or a motion for summary judgment—and award attorney's fees to a defendant/movant whose motion is successful.[27] The statutes have raised some confusion or controversy, however. For example, scholars have pointed out problems in how courts interpret

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[21] *Id*. at 58, citing a defendant newspaper's brief calling a city's preemptive lawsuit "a stereotypical SLAPP suit." See Defendant-Appellee's New Brief at 8–9, City of Burlington v. Boney Publishers, Inc., 611 S.E.2d 833 (N.C. 2005).

[22] Pring and Canan, s*upra* note 8, at 3.

[23] *Id*. at 8-9.

[24] Shannon Hartzler, *Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1240 (2007). *See also* Bruce Johnson and Sarah Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495 (2012). Johnson and Duran echoed the concern related to SLAPP suits noting that, "The strategy is to file weak claims with the goal of silencing speakers because they fear the expense and travails of litigation. Ordinary citizens—not to mention experts and academics—are less likely to participate in or contribute to democratic legitimation if they fear their speech will be punished or subject to expensive litigation." Johnson and Duran, at 496-7. *But see* Pring and Canan, *supra* note 8. Pring and Canan argue that not all SLAPP plaintiffs necessarily sue with ill will, even if their actions are pernicious. Similarly, this argument is applicable here, because we do not assume that every government lawsuit against a records requester is filed in bad faith.

[25] Hartzler, *supra* note 24, at 1241.

[26] U.S. CONST. AMEND. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). *See, e.g.*, CAL. CODE CIV. PROC. § 425.16 (West Supp. 2004 & 2006) ("The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."); FLA. STAT. ANN. § 768.295 (West 2005) ("It is the intent of the Legislature to protect the right in Florida to exercise the rights of free speech in connection with public issues, and the rights to peacefully assemble, instruct representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution." *See also* Pring and Canan, *supra* note 8, at 2.

[27] *See, e.g.,* ARIZ. REV. STAT. § 12-752 (2007); LA. REV. STAT. ANN. § 971(West 2006). *See also* Hartzler, *supra* note 24, 1241-42; Robert Sherwin, *Evidence: We Don't Need No Stinkin' Evidence: How Ambiguity in Some States' Anti-SLAPP Laws Threaten to De-Fang a Popular and Powerful Weapon against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431 (2017).

and apply the evidentiary standards for special motions to dismiss,[28] and inconsistency in federal courts' willingness to incorporate state anti-SLAPP laws in diversity cases.[29] Recently, supreme courts in Washington and Minnesota struck down state anti-SLAPP laws for unconstitutionally violating the right to trial by jury guaranteed by the state constitutions,[30] highlighting an overarching if not existential conflict for anti-SLAPP statutes nationwide.[31] Most significant for the purposes here, however, is the fact that the laws define protected petition and speech activity in a variety of ways, ranging from the broad inclusion of communication related to any matter of public concern to much more narrow statutes that are limited to specific circumstances—usually speaking or communicating with a government body that is considering a specific question.[32]

More fundamentally, anti-SLAPP laws' varying and context-specific definitions of petition and free speech might complicate the broader proposition that an open records request should be considered an exercise of those First Amendment-protected rights. The U.S. Supreme Court asserted in 2004 that open records laws are "a structural necessity in a real democracy" because they provide a "means for citizens to know what the Government is up to."[33] On the other hand, as noted by constitutional scholar Robert Post, the court has been reluctant to argue that the First Amendment or any other portion of the U.S. Constitution guarantees the "right to know" or requires access to government information, leaving the specifics of what information should be public and why to the legislatures.[34] Thus, whether a preemptive government lawsuit against a public records requester is ripe for an anti-SLAPP motion depends mostly on what counts as "public participation" in a given state's law and how that law is interpreted by courts.

Applying anti-SLAPP Laws to State Cases: Florida, Louisiana, Oregon

Of the eight recent preemptive government lawsuits against records requesters included in this study, only three—in Louisiana, Florida, and Oregon—occurred in states with anti-SLAPP statutes.[35] Although none of the defendant requesters filed an anti-SLAPP motion, applying the facts of those cases to the relevant state statutes allows an analysis of whether the lawsuit could have been subject to dismissal upon an anti-SLAPP motion.[36] Additionally, the cases illuminate

[28] *See* Sherwin, *supra* note 27.
[29] Aaron Smith, *SLAPP Fight*, 68 ALA. L. REV. 303 (2016). *See also* Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845 (2010).
[30] Davis v. Cox, 351 P.3d 862 (Wash. 2017); Leiendecker v. Asian Women United of Minn., 895 N.W.2d 623 (Minn. 2017). *See Washington Supreme Court Strikes Down Anti-SLAPP Law as Unconstitutional*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (May 28, 2015), https://www.rcfp.org/washington-supreme-court-strikes-down-anti-slapp-law-unconstitutiona/; Mike Mosedale, *Anti-SLAPP law perishes at Supreme Court*, MINN. LAWYER (May 30, 2017), https://minnlawyer.com/2017/05/30/anti-slapp-law-perishes-at-supreme-court/.
[31] *See* Nick Phillips and Ryan Pumpian, *A Constitutional Counterpunch to Georgia's Anti-SLAPP Statute,* 69 MERCER L. REV. 407 (2018) (also noting judicial challenges to a proposed anti-SLAPP law in New Hampshire).
[32] Hartzler, *supra* note 24, at 1248-70.
[33] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 160 (2004). *See also* Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH U. L. Q (1976); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 SUP. CT. REV. 1 (1980); Lillian BeVier, *An Informed Public, and Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980).
[34] ROBERT POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 37-38 (2012); *see also* MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW (2015).
[35] *See* Gyan, Clowdus, Hammond, and discussion accompanying *supra* note 5.
[36] The analysis here is not intended to second-guess the strategy of the defendants' attorneys, who we assume put forward the best defense for their clients that they could, accounting for the procedural or other particularities of

key questions that could arise in the other jurisdictions if requesters attempt to apply an anti-SLAPP statute to their cases.

The Louisiana lawsuit may provide the most textbook anti-SLAPP case of the three.[37] Finney and Deshotels had filed numerous public records requests for enrollment information, and the education department filed equitable causes of action against both individuals, seeking declarations from the court that it was not required to release the records and an award of attorney's fees and costs.[38] Publicly, the education department identified the "tension" between free disclosure of public records according to Louisiana law and protection of student information under federal law as justification for the suits.[39]

Deshotels had been involved in litigation with the education department over records requests on four prior occasions, and each time courts resolved the matters in his favor.[40] Along the way, he had discovered by way of records requests that the education department was falsely identifying "drop-outs" as having transferred out of state or to home-schooling, which led to inaccurate student enrollment numbers and per-pupil funding calculations.[41] The department's balking at Deshotels's records requests can fairly be described as an attempt to avoid further disclosures of that kind. Meanwhile, Finney made around 50 records requests over a seven-month period.[42] In its petition against Finney, the government asked the judge to rule that the department is not required to produce records for the requests because the requests are "unduly burdensome and … exempt from public records law,"[43] which also calls into question the justification for the suits on the basis of a conflict between state and federal law. Ultimately, the parties settled the case, with the department agreeing to acknowledge that withholding the records was "not in compliance with the Louisiana Public Records Act," and agreeing not to suppress such data going forward and to make publicly available similar data going back to 2006.[44]

On these facts, however, and in light of what is stipulated in the settlement, the Louisiana case would have been appropriate for a special motion to strike under Louisiana's anti-SLAPP law. The law allows a special motion to strike against a cause of action arising from a person's right of petition or free speech under the United States or Louisiana constitutions.[45] In addition to defining petition or free speech as written or oral statements made in government proceedings and those "made in connection with an issue under consideration or review" by a government body, the law also extends to "any other conduct in furtherance of the exercise of … the constitutional right of free speech in connection with a public issue or an issue of public interest."[46] Moreover, although

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their given jurisdiction. It is beyond the scope of the research here to investigate every possible legal angle beyond the anti-SLAPP question.

[37] Complaint, *supra* note 1.

[38] Gyan, *supra* note 5.

[39] *Id*. *See* LA. REV. STAT. ANN. § 44-1 (2011).

[40] Carol June Ostrow, *Louisiana Department of Education Sues Two Educators Over Public Data Queries*, LOUISIANA RECORD (June 15, 2016), https://louisianarecord.com/stories/510811178-louisiana-department-of-education-sues-two-educators-over-public-data-queries.

[41] *Id*.

[42] *Id*.

[43] Gyan, *supra* note 3.

[44] *Id*.; Ostrow, *supra* note 40.

[45] LA. CIV. CODE. ANN. § 971(1) (2006) ("Special motion to strike: A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.").

[46] *Id.* at § 971(F)(1).

Louisiana courts have not specifically considered whether the definition of petition or free speech extends to public records requests, the state supreme court has said the anti-SLAPP law "applies to any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, so long as it is made in connection with a public issue."[47] Given the relatively broad commonsense interpretation of the Louisiana anti-SLAPP law, and the short stretch needed to consider the defendants' records requests to be statements related to a public issue made in an "official proceeding authorized by law," the lawsuit faced by Deshotels and Finney provides a straightforward example of the type of lawsuit well-postured for the filing of a motion to strike under the relevant anti-SLAPP law.

A case in Florida, on the other hand, provides an example of a more complicated government lawsuit over a public records request, where an anti-SLAPP statute might apply, absent other factors. Here, the Everglades Law Center (ELC), an environmental law firm, sought five transcripts from the South Florida Water Management District's "shade meetings" related to ongoing litigation with an entity called Lake Point.[48] The water district withheld one transcript, which memorialized a mediation between its governing board and attorneys during which the board decided to settle the Lake Point matter.[49] The water district also filed an action for declaratory relief, asking the court for direction with respect to the request.[50]

Florida's anti-SLAPP law specifically prohibits governmental entities from suing a person or entity in response to the exercise of free speech, freedom of assembly, or for petitioning for government redress.[51] It defines "free speech in connection with public issues" as any statement "made before a governmental entity in connection with an issue under consideration or review" or "in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work."[52] Case law on the statute does not provide helpful guidance on the interpretation of those terms, though the sweeping language in the statute's preamble underlines that its protections constitute "fundamental state policy,"[53] so one could expect it to be interpreted in a defendant-friendly way, making the Florida case an excellent candidate for a motion for summary judgment under the statute.[54]

The ELC filed a motion to dismiss the case in response to the water management district's declaratory action, but the Martin County Circuit Court instead found that the Florida open meetings law did not apply, invoking the state's mediation law, which affords confidentiality to mediation participants.[55] Thus, the court ruled that the water district was not required to release the fifth transcript.[56] The ELC appealed this ruling.[57] Given the outcome, and the ruling that the

[47] Shelton v. Pavon, 236 So. 3d 1233, 1241 (La. 2017).
[48] Clowdus, *supra* note 5.
[49] *Id*.
[50] *Id*.
[51] FLA. STAT. ANN. § 768.295 (West 2005).
[52] FLA. STAT. ANN. § 768.295(2)(a) (West 2005).
[53] *Id.* at § 768.295(1).
[54] The Florida anti-SLAPP law allows defendants to move for summary judgment rather than file a special motion to dismiss. *See* FLA. STAT. ANN. § 768.295 (West 2005).
[55] Clowdus, *supra* note 5. *See* FLA. STAT. ANN. § 44.405 (2000) (stating in relevant part: "Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. … If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.").
[56] Clowdus, *supra* note 5.
[57] *Id*.

transcript is confidential, it is unclear whether a motion under the Florida anti-SLAPP law would have resulted in a more favorable outcome for the ELC.

A case in Portland, Oregon, raises at least two reasons an anti-SLAPP statute might not provide a viable response for a public records requester against a preemptive government lawsuit. Reporter Beth Slovic and parent Kim Sordyl requested records from the Portland School District seeking information about employees on leave, and were denied.[58] In Oregon, if an agency declines to release records, the process allows appeal to the local district attorney's office, which decides if the records should be released. This is what Slovic did, resulting in an order from the district attorney to provide the records.[59] Nevertheless, instead of complying with the order, the school district sued, seeking a declaratory judgment that it did not have to release the records.[60] Slovic and Sordyl prevailed on a motion for summary judgment, which dismissed the lawsuit and required the school district to release the records.[61]

Oregon's anti-SLAPP statute, like Louisiana's and Florida's, broadly applies to "any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law" and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest," among other things.[62] A defendant who is sued for those actions may file a special motion to strike under the statute.[63] In this case, the reporter and parent were arguably exercising free speech rights on a matter of public interest given they were seeking records about public school employees on leave. Considering the basis of the lawsuit was that request, an anti-SLAPP motion would have been an option in this case.

However, one key barrier could undercut many other anti-SLAPP motions responding to government lawsuits over records requests in Oregon. The Oregon anti-SLAPP law includes unique language exempting "action[s] brought by the Attorney General, a district attorney, a

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[58] *With Anti-Accountability Lawsuit Targeting Journalist, Parent, Portland Schools Get It Wrong: Editorial Agenda*, OREGONIAN (Apr. 1, 2017), https://www.oregonlive.com/opinion/2017/04/with_anti-accountability_lawsu.html.

[59] Letter from Rod Underhill, Multnomah County District Attorney, to Stephanie Harper, Portland Public Schools General Counsel (March 20, 2017), http://mcda.us/wp-content/files_mf/14900365991715Order.pdf. The district attorney found the information sought was not the type an ordinary person would find offensive to disclose, as typically employees know why other employees are on leave and for how long.

[60] Beth Slovic, *Portland Public School Will Sue Reporter and Parent to Block Release of Records*, PORTLAND TRIBUNE (Mar 28, 2017), https://pamplinmedia.com/pt/9-news/351888-231430-portland-public-schools-will-sue-reporter-and-parent-to-block-release-of-records.

[61] Hammond, *supra* note 5. Under Oregon Civ. Proc. R. 47, entitled "Summary Judgment," if there is no genuine issue of material fact the moving party is entitled to judgment in their favor. Whatever record is before the court is analyzed in the light most favorable to the non-moving party, and if no objectively reasonable juror could find for the non-movant, judgment as a matter of law is entered for the party filing the motion. This is a summary process designed to cull weak or meritless lawsuits.

[62] OR. REV. STAT. § 31.150 (2006)

[63] OR. REV. STAT. § 31.150 (2)(d) *et seq.* (2006) (stating in relevant part: "A special motion to strike may be made under this section against any claim in a civil action that arises out of: … Any … conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.")

county counsel or a city attorney acting in an official capacity."[64] Although the lawsuit in the instant case came from a school district, presumably other lawsuits over records cases would come from one of the exempted attorneys, thus holding the anti-SLAPP statute out of reach for Oregon records requesters-cum-civil defendants.

Additionally, and in contrast to the abbreviated process offered under Oregon's civil procedure rules for summary judgment, the state anti-SLAPP law involves a preliminary hearing that may result in drawn-out litigation. This may require more time for resolution, and depending on the results of the preliminary hearing, may involve depositions, interrogatories, requests for production, and requests for admission—typical discovery tools in a civil action. Compared to a motion for summary judgment, the anti-SLAPP process could result in a defendant expending significantly more resources while allowing agencies holding records to delay their release even longer. It is beyond the scope of this research to explore the procedural specifics of each state's anti-SLAPP law, but the realities illustrated in the Oregon case could certainly come to bear on whether any particular defendant might choose the anti-SLAPP route—as opposed to a regular motion for summary judgment—in responding to a government lawsuit over a records request.

The cases in Louisiana, Florida, and Oregon neatly illustrate how anti-SLAPP laws might apply to lawsuits against public records requesters, depending on how those laws define public participation, as well as other procedural particularities and exemptions. The section below examines these issues in more detail across all the states that have anti-SLAPP laws.

Applying State Anti-SLAPP Laws to Lawsuits Against Records Requesters

One key question that will determine whether a state's anti-SLAPP law can be used to knock down a preemptive government lawsuit over a public records request is whether the law's definition of public participation encompasses public records requests. A second question, somewhat more straightforward and dispositive, is whether the law exempts the government from an anti-SLAPP motion.

The definition question is unwieldy; none of the 31 state anti-SLAPP laws explicitly includes public records requests as a form of public participation. Access to information about "what the government is up to" may not be considered a clearly established constitutional right,[65] but communicating with the government about issues of public concern is surely considered an exercise of free speech under the First Amendment, and a commonsense understanding of democratic civic engagement surely includes public records requests as engaging in public participation more generally. Case law that answers questions surrounding the definition question can be helpful: Have courts provided guidance about whether public records requests would be considered "public participation" for the purposes of an anti-SLAPP law? Have they provided a broad or narrow interpretation of that definition that suggests that the law would include or exclude records requests? Using the letter of each law and the case law surrounding them, the analysis here categorizes the 31 laws into three tiers, from most likely to least likely to extend to public records requests.

The first tier includes laws with a broad definition of public participation that can apply to many circumstances inclusive of public records requests. It also includes a few special cases worth

[64] OR. REV. STAT. § 31.155(1) (2006). As discussed *infra* at text accompanying notes 102 to 103, other state statutes exempt "enforcement" actions brought by government attorneys, but this would presumably include a smaller range of actions than Oregon and be less likely to apply to public records requests.
[65] *See* discussion accompanying *supra* notes 33 and 34.

consideration. The 13 anti-SLAPP statutes in this tier are in Arkansas, California, Connecticut, Florida, Guam, Louisiana, Maryland, Massachusetts, Nevada, Oklahoma, Oregon, Rhode Island, and Texas.[66]

Most of these states' laws are either facially broad or include provisions that could logically extend to a public records request because they protect speech aimed at prompting government action on issues of public interest or concern. Guam's anti-SLAPP law might be the most facially broad, providing in full: "Acts in furtherance of the Constitutional rights to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government, shall be immune from liability, regardless of intent or purpose, except where not aimed at procuring any government or electoral action, result or outcome."[67] A records request in Guam could logically be considered an act of "participating in the processes of government"—using the open records law—with an aim of "procuring government action"—the production of the records. Maryland's law is also broad, and could be interpreted to include a records requester, as it applies to "a party who has communicated with a federal, State, or local government body or the public at large to report on, comment on, rule on, challenge, oppose, or in any other way exercise rights under the First Amendment of the U.S. Constitution or [state constitution] regarding any matter within the authority of a government body or any issue of public concern."[68] Meanwhile, Arkansas' statute "includes, *but is not limited to* … any written or oral statement" made before or in connection with a proceeding or issue under consideration by the government.[69] Neither Guam, Maryland, nor Arkansas has case law expanding on the specific speech or activities to which these broad definitions apply.

Some states specify that the protected class of speech or action must be related to an issue of public interest or concern, which would generally set a low bar for a public records request to clear. This is the case with Louisiana's law, for example, as discussed above. Connecticut's anti-SLAPP law encompasses "communicating, or conduct furthering communication, in a public forum on a matter of public concern," "communication that is reasonably likely to encourage consideration or review of a matter of public concern" by a government body, or "communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue" by a government body—all of which could be said of a public records request.[70] Oklahoma defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern" where "matter of public concern" pertains to numerous topics that would likely include a records request, such as "an executive or other proceeding before a department or agency," as well as "a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body."[71] On the other hand, a court in Massachusetts ruled that it is "not necessary that the petitioning activity [covered

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[66] *See generally*, ARK CODE ANN. § 16-63-501 (Michie 2006); CAL. CODE CIV. PROC. § 425.16 (West Supp. 2004 & 2006); CONN. GEN. STAT. § 52-196a (2017); FLA. STAT. ANN. § 768.295 (West 2005); 7 GUAM CODE ANN. §§17101-17109 (2006); LA. REV. STAT. ANN. 971 (West 2006); MD. CTS. & JUD. PROC. ANN. § 5-807 (2006); MASS. GEN. LAWS. ch. 231, § 59H (West 2000); NEV. REV. STAT. ANN. § 41.635 (Michie 2002); 12 OKLA. STAT. ANN. § 1430 (West 1993); OR. REV. STAT. § 31.150 (2006); R.I. GEN. LAWS § 9-33-1 (1997); TEX. REV. CIV. STAT. 27.002 (West 2011).

[67] 7 GUAM CODE ANN. §§17101-17109.

[68] MD. CTS. & JUD. PROC. ANN. § 5-807.

[69] ARK CODE ANN. § 16-63-501 (emphasis added).

[70] CONN. GEN. STAT. § 52-196a (2017).

[71] 12 OKLA. STAT. ANN. § 1430 (West 1993).

by the anti-SLAPP law] be motivated by a matter of public concern."[72] Some states connect public participation to asking the government to do something, like in Oklahoma, where free speech or petitioning activity is that which is "reasonably likely to encourage consideration or review,"[73] and Nevada, which protects "good faith communication in furtherance of the right to petition or the right to free speech … aimed at procuring any governmental or electoral action, result or outcome."[74] A court in those states could easily see asking the government to produce public records as encouraging consideration or review or seeking a government action.

Texas, California, and Oregon all define public participation in broad terms that would presumably cover public records requests, placing them in the first tier of anti-SLAPP laws.[75] However, additional factors bear mentioning in the context of a preemptive government lawsuit against a records requester. In Texas, for example, the public records law explicitly states "a governmental body, officer for public information, or other person or entity … may not file suit against the person requesting the information."[76]

The situation in California is more complex. In 2002, the Supreme Court of California ruled in *Filarsky v. Superior Court* that allowing a public agency to preemptively sue a records requester "frustrate[es] the legislature's purpose of furthering the fundamental right of every person in the state to have prompt access to information in the possession of public agencies" because it "circumvent[s] the established special statutory procedure," "eliminate[s] statutory protections and incentives for members of the public in seeking disclosure of public records," and "discourage[es] them from requesting records."[77] However, in a 2012 case involving a public school teacher's attempt to enjoin the release of his personnel record, *Marken v. Santa Monica-Malibu Unified School District*, a California appellate court drew a distinction between "the preemptive, agency-initiated declaratory relief action" at issue in *Filarsky*, and the teacher's third-party suit seeking judicial review of an agency decision, which it said did not "impair the important procedural protections available to a party requesting information under the CPRA."[78] Although the *Filarsky* ruling still stands as a barrier to preemptive lawsuits by public agencies against requesters in California, advocates have argued that a "proliferation" of reverse-CPRA suits subsequent to the *Marken* ruling—including by current and former government officials—"has forced requesters to engage in CPRA litigation that they did not initiate and discourages members of the public from making CPRA requests in the first place."[79]

Oregon, meanwhile, poses an almost opposite problem. The anti-SLAPP law broadly

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[72] Cadle Co. v. Schlichtmann, 448 Mass. 242, 249 (2007). The Massachusetts anti-SLAPP law covers "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding." *See* MASS. GEN. LAWS. ch. 231, § 59H (West 2000).

[73] 12 OKLA. STAT. ANN. § 1431(4)(b) (West 1993).

[74] NEV. REV. STAT. ANN. § 41.637 (Michie 2002).

[75] TEX. REV. CIV. STAT. 27.002 (West 2011); CAL. CODE CIV. PROC. § 425.16 (West Supp. 2004 & 2006); OR. REV. STAT. § 31.150 (2006).

[76] TEX. GOV'T CODE § 552.325 (a)(1995). *See also* Packer, *supra* note 13, at 40.

[77] Filarsky v. Superior Court, 28 Cal. 4th 419, 423 (Cal. 2002). *See also* City of Santa Rosa v. Press Democrat, 187 Cal. App. 3d 1315 (Cal. App. 1st Dist. 1986) (denying government's action for declaratory relief because no live controversy existed suitable for adjudication).

[78] Marken v. Santa Monica-Malibu Unified School District, 202 Cal. App. 4th 1250, 1265-1269 (2012).

[79] Brief for Reporters Committee for Freedom of the Press and 15 Media Organizations, pp. 9-10, Los Angeles v. Metropolitan Water District of Southern California, San Diego Union-Tribune, 2019 Cal. App. LEXIS 1149 (2019). *See also* Shawna Chen, Pariss Briggs and Simren Verma, *How Reverse-CPRA Lawsuits Harm the Public's Right to Know*, Reporters Committee for Freedom of the Press (May 14, 2019), https://www.rcfp.org/how-reverse-cpra-lawsuits-harm-the-publics-right-to-know/.

applies to "any … conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[80] As discussed above, however, the law also exempts actions brought by government attorneys in their official capacities. So, Oregon's broad definition of speech or activity in the interest of public participation is tempered by a clause that makes it very difficult to bring an anti-SLAPP motion in response to a government lawsuit.

The second tier of anti-SLAPP laws includes laws with narrower textual definitions of public participation, including statutory language that applies to fewer circumstances than the more inclusive first tier statutes, or case law that limits those definitions, making it more difficult to foresee a public records requester using the anti-SLAPP law in response to a preemptive government lawsuit. The 13 anti-SLAPP statutes in this tier are in Arizona, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Kansas, Maine, Nebraska, New Mexico, New York, Utah, and Vermont.[81]

The statutes in D.C., Arizona, New Mexico, and Maine are focused on more traditional acts of petitioning the government. For example, in D.C., to use the anti-SLAPP law in response to a preemptive lawsuit, a defendant would need a court to conclude that a records request qualified as an "act in furtherance of the right of advocacy on issues of public interest" including "expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest."[82] While a records request could be seen as related to such acts—i.e., gathering information to communicate it to the public—it might not be considered such an act in itself. The Arizona, New Mexico, and Maine anti-SLAPP statutes cover communication or statements related to issues currently under consideration by a government body.[83] Presumably, this could exclude lawsuits over records requests related to issues not under consideration.[84] And the Delaware, Nebraska, and New York anti-SLAPP laws extend protection only to the targets of lawsuits by people who are seeking government permits and licenses.[85] For example, in Nebraska, this means "any person who has applied for or obtained a permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from any government body."[86]

Otherwise broad laws in Georgia, Vermont, and Illinois have been interpreted narrowly by courts. Georgia's law defines public participation as "any … conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern." In *Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, the state Supreme Court ruled that although that definition was "not required to constitute a petition for redress of grievances, but instead could relate to an official proceeding instigated by someone else and

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[80] OR. REV. STAT. § 31.150 (2)(d) (2006).
[81] ARIZ. REV. STAT. § 12-751 (2007); DEL. CODE. ANN. § 8136 (1999); D.C. CODE ANN. § 16-5501 (2010); GA. CODE ANN. § 9-11-11.1 (2006); 735 ILL. COMP. STAT. 110/15 (West 2007); IND. CODE ANN. § 34-7-7-1 (Michie 2006); KAN. STAT. ANN. § 60-5320 (2016); 14 ME. REV. STAT. ANN. § 556 (West 2003); NEB. REV. STAT. § 25-21.243 (1995); N. M. STAT. ANN. § 38-2-9.1 (Michie 2004); N.Y. C.P.L.R. § 3211, Pt. 1/7 (McKinney Supp. 2007); UTAH CODE ANN. § 78B-6-1401 (2002); VT. STAT. ANN. § 1041 (2005).
[82] D.C. CODE ANN. § 16-5501(1) (2010).
[83] ARIZ. REV. STAT. § 12-751 (1)(b) (2007); N. M. STAT. ANN. § 38-2-9.1 (Michie 2004); 14 ME. REV. STAT. ANN. § 556 (West 2003).
[84] *But see* Schelling v. Lindell, 942 A.2d 1226, 1231 (Me. 2008) where the Supreme Judicial Court of Maine held, "the definition of the right to petition the government provided by the statute is unquestionably broad enough to encompass activities related to matters not currently pending before a legislative body."
[85] DEL. CODE. ANN. § 8136 (a) (1999); NEB. REV. STAT. § 25-21.242 (1) (1995); N.Y. CLS CIV R § 76-a (1993).
[86] NEB. REV. STAT. § 25-21.242 (1) (1995).

constitute an act in furtherance of the right of free speech" the law should not be read "to expand the scope … beyond its terms so as to encompass a wide range of speech and conduct which is arguably connected with any issue of public interest or concern."[87] Vermont anti-SLAPP protection extends to the "exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution."[88] But the state Supreme Court has said "the anti-SLAPP statute should be construed as limited in scope and … great caution should be exercised in its interpretation."[89] Illinois' law covers acts "in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government … when genuinely aimed at procuring favorable government action, result, or outcome."[90] In *Sandholm v. Kuecker*, however, the state Supreme Court required that anti-SLAPP motions show that suits are "directed solely at [movant's] petitioning activities" as well as that the plaintiff's claims are meritless.[91] Conceivably, a case where the government plaintiff claims its intention is to resolve a question about public records law and is thus not directed solely at defendant's petitioning activities could fall short of the standard set in *Sandholm*.

The requirement that the defendant who brings an anti-SLAPP motion bears the initial burden of proof also appears in at least four other statutes: Indiana, Utah, Kansas, and Nebraska.[92] This is arguably counter to the spirit of open records laws, which typically do not require records requesters to justify or explain their requests. For example, in Indiana, an anti-SLAPP motion must specifically identify the public issue that prompted the lawsuit and show that the plaintiff's legal action is aimed at that act.[93] In Utah, the motion must show that the SLAPP suit at issue is aimed at harassing the defendant.[94]

The third tier includes the five laws that either explicitly or implicitly exclude open records requests as the basis for an anti-SLAPP motion: Hawaii, Pennsylvania, Tennessee, Virginia, and Missouri. Hawaii's anti-SLAPP law applies to "any oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding."[95] Case law in that state has reinforced this narrow language as protecting only "testimony."[96] Pennsylvania's anti-SLAPP law applies only to "communication to a government agency relating to enforcement

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[87]Berryhill v. Ga. Cmty. Support & Solutions, Inc., 281 Ga. 439, 442 (2006).
[88] VT. STAT. ANN. § 1041 (a) (2005).
[89] Felis v. Downs Rachlin Martin PLLC, 133 A.3d 836, 851 (Vt. 2015).
[90] 735 ILL. COMP. STAT. 110/15 (West 2007).
[91] Sandholm v. Kuecker, 962 N.E.2d 418, 430 (Ill. 2012).
[92] IND. CODE ANN. § 34-7-7-1 (Michie 2006); UTAH CODE ANN. § 78B-6-1401 (2002); KAN. STAT. ANN. § 60-5320 (2016); NEB. REV. STAT. § 25-21.243 (1995).
[93] IND. CODE ANN. § 34-7-7-9 (b) (Michie 2006) ("The person who files a motion to dismiss must state with specificity the public issue or issue of public interest that prompted the act in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana"). *See also* Hartzler, *supra* note 24, at 1279, arguing that "Indiana's requirement that the party invoking anti-SLAPP protection bear the burden of proof that its actions were lawful defeats the purpose of an anti-SLAPP law because placing the burden of proof on the party invoking the law's protection weighs on the party under attack instead of putting the pressure on a party filing such a suit to reconsider its actions."
[94] UTAH CODE ANN. § 78B-6-1405(1)(b) (2002) ("A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim to recover … other compensatory damages upon an additional demonstration that the action involving public participation in the process of government was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution.").
[95] HAW. REV. STAT. § 634F-1 (Michie 2005).
[96] *See* Cabatbat v. Curtis, 2011 Haw. App. LEXIS 937 (2011); Perry v. Perez-Wendt, 129 Haw. 95 (2013).

or implementation of an environmental law or regulation."[97] Tennessee's is based on the intent to protect "good faith reports of wrongdoing to appropriate governmental bodies," and therefore only applies to the communication of "information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency."[98] Virginia anti-SLAPP law applies only to claims of tortious interference with an existing or prospective contract, or defamation—a vanishingly narrow set of circumstances for an open records request.[99] While Missouri's law applies to "conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state,"[100] defendants in the types of cases discussed here would struggle to succeed on an anti-SLAPP motion, as the state's courts have ruled that government entities have standing to sue requesters under the state's open records law.[101]

Meanwhile, records requesters sued by the government in some states might not be able to raise the question of whether their request is considered public participation under the anti-SLAPP law at all, because government litigants may be exempted from anti-SLAPP motions in the first place. Such is likely the case in Oregon, as previously discussed, where the law's provisions "do not apply to an action brought by the Attorney General, a district attorney, a county counsel or a city attorney acting in an official capacity."[102] Other states exempt an "enforcement action" brought by the state from being subject to an anti-SLAPP motion. These include Arizona, California, Connecticut, Indiana, Kansas, Louisiana, Oklahoma, Texas, and Vermont.[103]

The definition of enforcement action is not facially clear, and the statutes and courts do not parse their meaning further. Most obviously, states want to prevent a criminal defendant from using an anti-SLAPP motion to delay or interfere with a criminal prosecution, which would not apply to an open records request. But the term could also apply to civil sanctions or the enforcement of administrative regulations, which might be more likely to extend to a public records request, depending on how a state's open records law works.[104] Florida's anti-SLAPP law, on the other hand, explicitly applies in circumstances where "a person or entity [is] sued by a governmental entity or another person in violation of this section."[105]

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[97] 27 PA. CONS. STAT. ANN. § 7707 (West Supp. 2006).
[98] TENN. CODE ANN. § 4-2-1002(a) and § 4-2-1003(a) (2005).
[99] VA. CODE. ANN. § 8.01-223.2(A) (Michie 2017).
[100] MO. REV. STAT. § 537.528 (1) (2006).
[101] City of Springfield v. Events Publ'g Co., 951 S.W.2d 366, 370 (Mo. Ct. App. 1997). *See also* discussion accompanying *supra* notes 17-21.
[102] OR. REV. STAT. § 31.155(1) (2006).
[103] ARIZ. REV. STAT. § 12-7529(E)(2) (2007); CAL. CODE CIV. PRO. § 425.16(d) (West Supp. 2004 & 2006); CONN. GEN. STAT. § 52-196 (2017); IND. CODE ANN. § 34-7-7-1(b) (2006); KAN. STAT. ANN. § 60-5320(h) (2016); LA. REV. STAT. ANN. (2006); OKLA. STAT. § 12-1439(1) (West 1993); TEX. REV. CIV. STAT. § 27.010(1) (West 2011); 12 VT. STAT. ANN. § 1041(h) (2005).
[104] It is beyond the scope of this project to review all state open records laws, though subsequent research should examine this issue more closely.
[105] FLA. STAT. ANN. § 768.295(4) (West 2005). The Florida legislature has also contemplated explicitly prohibiting government entities from filing lawsuits against those seeking public records. *See* John Kennedy, *Lawsuits a New Tactic Against Those Seeking Public Records*, DAILY COMMERCIAL (May 28, 2018), https://www.dailycommercial.com/news/20180528/lawsuits-new-tactic-against-those-seeking-public-records.

Discussion, Conclusions

Anti-SLAPP laws that define public participation broadly could be used by public records requesters to defend against preemptive government agency lawsuits seeking to prevent the release of records. In some cases, the laws might work as originally intended—as a relatively fast and cost-effective way to fight back against attempts to silence and discourage critics. This appears most likely in some of the states in the first tier of anti-SLAPP laws discussed above: Arkansas, California, Connecticut, Florida, Guam, Louisiana, Maryland, Massachusetts, Nevada, Oklahoma, Rhode Island, and Texas. On the other hand, it is clear that anti-SLAPP law more generally is not a panacea for requesters sued by the government, as demonstrated by the fact that close to half of the state anti-SLAPP laws might not, or would not, apply to the type of lawsuits at the center of this research. From the history of concerns about SLAPP suits, the diverse language of the laws enacted in response, and their judicial interpretation, we can see that few if any of the laws were explicitly intended to prevent lawsuits against records requesters as a means to ensure government transparency and accountability.

However, the lukewarm findings outlined above do not mean that public records requesters are in grave jeopardy when preemptively sued by the government. Note that in Oregon, the records requesters succeeded on their motion for summary judgment in response to the Portland School District's lawsuit through a procedure that may well have taken less time and energy than an anti-SLAPP motion. This is no small consideration, as withholding records for any amount of time deprives people of information about matters of public concern[106] and can render coverage about such matters "old news," undermining the fundamental purpose of an open records law. Taking the most expeditious route for dismissal under a jurisdiction's civil procedure rules can provide a more direct and economical solution in light of these concerns. In Louisiana, similarly, the state education association settled its suit against Finney and Deshotels on terms that released the records sought and guaranteed the availability of similar data going forward.

Meanwhile, the results of five other recent cases in states without anti-SLAPP laws suggest that government entities should not expect an easy path when they preemptively sue records requesters. Suits by Michigan State University against the television network ESPN, a Michigan county government against a local newspaper, and a New Jersey township against an individual requester all resulted in rulings against the government, in which courts generally found that such suits run against the spirit and the letter of state open records laws.[107] California has strong case law and Texas a clear statutory provision to this effect. Cases are still ongoing in Kentucky, where two state universities have sued their student newspapers over requests for records related to faculty sexual harassment allegations.[108]

The fact that courts may tend to reject them notwithstanding, history seems to show us that preemptive government lawsuits against public records requesters will likely continue, especially where legislatures or courts have not clearly foreclosed that line of attack. Because they deviate from the purpose and procedure of open records laws and risk a chilling effect on public records requests, open government advocates should press lawmakers to see these lawsuits for what they are: strategic lawsuits against public participation.

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[106] *See* Hartzler, *supra* note 24, at 1237, and discussion accompanying *supra* note 24.
[107] *See* Mencarini and Peters, *supra* note 5 and Donna Weaver, *supra* note 7.
[108] *See* Blackford, *supra* note 5.