

## The Need for a Unified and Cohesive National Anti-SLAPP Law

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### INTRODUCTION

It is an all too common scenario: a blogger criticizes someone online and then is sued for his or her statements. While a number of defenses against these kinds of actions exist (the statement is true, the statement is obviously rhetorical hyperbole, etc.), defamation defenses only come into play once the lawsuit has commenced and require both time and money to assert. All too often, these lawsuits are filed solely to silence a voice of criticism and deprive individuals of their First Amendment rights. As the Internet expands and more individuals have the ability to express themselves online, the need to protect this Internet-based speech from strategic litigation against public participation—or SLAPP<sup>1</sup> suits—becomes increasingly

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important. For this reason, I believe we must adopt a national anti-SLAPP law in order to create a unified and cohesive standard to protect free speech.

As it currently stands, many states have many different laws discussing SLAPP suits. California and Oregon have some of the best-known and best-tested statutes in the nation.<sup>2</sup> These statutes stay other proceedings, preventing costly discovery, and entitle a prevailing anti-SLAPP defendant to costs and attorney's fees.<sup>3</sup> These standards discourage abusive plaintiffs from filing inappropriate lawsuits and provide defendants with the opportunity to protect their First Amendment rights and reduce their litigation exposure. Other states, like Florida and Nevada, have anemic statutes that are rarely, if ever, applicable, and limit their protections to narrow groups of people.<sup>4</sup> The disparity between existing anti-SLAPP statutes, coupled with the number of states that have no anti-SLAPP laws at all, leads to a state of injustice where some Americans have protection for their online speech and others do not. All Americans should enjoy free speech—not just those who live in civilized states.

## I

### PROBLEMS CREATED BY DISPARATE LAWS

Both Nevada and California have anti-SLAPP statutes. However, the laws of these two states are vastly different, forcing courts to reconcile those differences. *Metabolic Research, Inc. v. Ferrell* illustrates the disparity in states' provisions for anti-SLAPP protections:

On October 20, 2009, Scott J. Ferrell, an attorney practicing law in Orange County California, sent "demand letters" to Metabolic Research, Inc. ("Metabolic"), at its address in Las Vegas, Nevada, and to General Nutrition Centers, Inc. ("GNC"), at its address in Pittsburgh, Pennsylvania. The demand letters purported to notify the

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<sup>1</sup> While the acronym "SLAPP" arose from these suits' nature and purpose, they possess a number of other common characteristics including: a disparity in resources between the plaintiff and the defendant; their adjudication in a jurisdiction that is inconvenient for the defendant; and, increasingly, the assertion of frivolous rights of publicity, copyright, and trademark claims over non-infringing or nominative uses of the plaintiff's name.

<sup>2</sup> CAL. CIV. PROC. CODE § 425.16 (West 2012); OR. REV. STAT. §§ 31.150–31.155 (2011).

<sup>3</sup> While these staying provisions are applicable in state court, the application of state anti-SLAPP statutes is slightly diluted in federal court. This highlights the need for consistent, federal anti-SLAPP legislation.

<sup>4</sup> FLA. STAT. ANN. § 768.295 (West 2012); NEV. REV. STAT. ANN. §§ 41.635–41.670 (West 2011).

recipients that they had violated California Civil Code §§ 1750-1756, the California Consumer Legal Remedies Act (“CLRA”), by falsely advertising the properties and potential benefits of a product named Stemulite, which they marketed as a natural fitness supplement. Ferrell represented that he was acting on behalf of Michael Campos, Thomas Hess, and Sarah Jordan, all of whom he alleged purchased Stemulite in California, in reliance on the supposed<sup>5</sup> false advertising, and had not received the purported benefits.

Ferrell demanded that Metabolic and GNC “cease their false advertising of Stemulite,” identify purchasers of the substance, provide refunds to them all, disgorge profits from Stemulite sales, and implement a corrective advertising campaign.<sup>6</sup> A failure to do so would be met with a lawsuit.<sup>7</sup>

Metabolic did not cave. Instead, it sued Ferrell and the putative class he claimed to represent for extortion.<sup>8</sup> Metabolic’s suit also included claims for “conspiracy to engage in racketeering, civil extortion, tortious interference with contract, and tortious interference with prospective economic relations, i.e., interfering with the agreement between Metabolic and GNC. Metabolic sought declaratory relief and punitive damages.”<sup>9</sup> Ferrell sought to have the case dismissed under the Nevada anti-SLAPP statute.<sup>10</sup> However, the motion was doubly useless.

The United States District Court for the District of Nevada found that Nevada’s anti-SLAPP statute covers only communications made “directly to a governmental agency.”<sup>11</sup> The statute itself is already textually narrow, in that it could be interpreted to protect the right to *petition*,<sup>12</sup> and not the right to free speech generally (like California, Oregon, Texas, Washington, and the District of Columbia’s anti-SLAPP statutes).<sup>13</sup> However, it seems that the District of Nevada further clipped the statute’s application by reading a restriction into the statute that is just not there.

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<sup>5</sup> *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 797 (9th Cir. 2012).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 798 (citing NEV. REV. STAT. ANN. § 41.660 (West 2011)).

<sup>11</sup> *Id.*

<sup>12</sup> See NEV. REV. STAT. ANN. § 41.660.

<sup>13</sup> CAL. CIV. PRO. CODE § 425.16 (West 2012); D.C. CODE § 16-5502 (2012); OR. REV. STAT. §§ 31.150–31.155 (2012); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011 (West 2011); WASH. REV. CODE ANN. §§ 4.24.500–4.24.525 (West 2012).

The action was brought against Ferrell based upon a “good faith communication in furtherance of the right to petition.”<sup>14</sup> The statute’s plain language, however, contains nothing that says a speaker’s “right to petition” is only activated if he or she is speaking directly to a government official.<sup>15</sup> Mr. Ferrell felt the same way, so he appealed to the United States Court of Appeals for the Ninth Circuit, which showed us yet another grave weakness in Nevada’s anti-SLAPP statute: it does not provide for an interlocutory appeal.

The Ninth Circuit compared California’s anti-SLAPP statute to Oregon’s by looking at a pair of Ninth Circuit decisions.<sup>16</sup> In *Englert v. MacDonell*, the Ninth Circuit denied an appeal of an anti-SLAPP motion as a collateral order, because denials of a motion to strike under Oregon’s anti-SLAPP statute were not immediately appealable.<sup>17</sup> The Oregon statute only provided immunity from *liability*, not immunity from *suit*, in a SLAPP.<sup>18</sup> (Oregon has since repaired this glaring defect in its statute.)<sup>19</sup> On the other hand, the Ninth Circuit recognized in *Batzel v. Smith*<sup>20</sup> that denials of anti-SLAPP motions under California’s statute *are* immediately appealable:

In *Batzel*, we held that the denial of a motion to strike brought pursuant to California’s anti-SLAPP statute satisfied the collateral order doctrine because the purpose of the California law was to provide citizens with a substantive immunity from suit. In reaching this conclusion, the court relied upon the fact that California’s law provided for immediate appeal in state court and legislative history demonstrating that “lawmakers wanted to protect speakers from the trial itself rather than merely from liability.”

In contrast, *Englert* held that Oregon’s failure to provide for an immediate appeal at that time indicated its legislature’s belief that the normal appeal process was adequate to vindicate the anti-SLAPP right, which it in turn described as “a right to have the legal sufficiency of the evidence underlying the complaint reviewed by a *nisi prius* judge before a defendant is required to undergo the burden and expense of a trial.” The *Englert* court explained that “[i]t would simply be anomalous to permit an appeal from an order denying a motion to strike when Oregon was satisfied that the values underlying the remedy could be sufficiently protected by a

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<sup>14</sup> *Metabolic*, 693 F.3d at 802.

<sup>15</sup> See NEV. REV. STAT. ANN. § 41.660.

<sup>16</sup> *Metabolic*, 693 F.3d at 799–802.

<sup>17</sup> *Englert v. MacDonell*, 551 F.3d 1099, 1106–07 (9th Cir. 2009).

<sup>18</sup> *Id.* at 1107.

<sup>19</sup> OR. REV. STAT. §§ 31.150–31.155 (2012).

<sup>20</sup> *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003).

trial judge's initial review of the motion, followed by appellate review only after a final judgment in favor of the plaintiff."<sup>21</sup>

While discussing the differences between the two kinds of SLAPP statutes, the Ninth Circuit hinted that Judge Mahan's decision might have been flawed<sup>22</sup> while shoring up the position that it was improper to review the appeal before the district court reached a final judgment.<sup>23</sup>

A few years before the Ninth Circuit decided the *Metabolic* case, the Nevada Supreme Court decided a very important case for its anti-SLAPP statute: *John v. Douglas County School District*.<sup>24</sup> After facing suspension for unprofessional conduct and sexual harassment, a school security officer filed a discrimination lawsuit against the school district.<sup>25</sup> About a year later, the school district found out that the security officer had improperly obtained confidential student records and, following an investigation, terminated him.<sup>26</sup> The school district then filed a special motion to dismiss the security officer's discrimination suit under Nevada's anti-SLAPP statute. The Nevada Supreme Court upheld the district court's dismissal, finding that the school district's inquiry into the security officer's record was appropriate.<sup>27</sup>

In making its decision, the Nevada Supreme Court relied on precedent that appeared to make the state's anti-SLAPP statute more powerful. As the court wrote, "Nevada's anti-SLAPP statute was enacted in 1993, shortly after California adopted its statute, and both statutes are similar in purpose and language."<sup>28</sup> "When determining whether Nevada's anti-SLAPP statute falls within this category, [courts should] consider California case law because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute."<sup>29</sup> This lends further credence to the argument that the District of Nevada read Nevada's anti-SLAPP statute too narrowly in the *Metabolic* case. But, unfortunately for Mr. Ferrell, the

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<sup>21</sup> *Metabolic*, 693 F.3d at 800 (citations omitted).

<sup>22</sup> *Id.* at 802.

<sup>23</sup> *Id.* at 803.

<sup>24</sup> *John v. Douglas Cnty. Sch. Dist.*, 219 P.3d 1276 (Nev. 2009).

<sup>25</sup> *Id.* at 1278–79.

<sup>26</sup> *Id.* at 1279.

<sup>27</sup> *Id.* at 1287.

<sup>28</sup> *Id.* at 1281.

<sup>29</sup> *Id.* at 1283.

*Metabolic* case is not about the substance of the statutes, but how they function procedurally.

In *Metabolic*, the Ninth Circuit determined that “the right to an immediate appeal in state court” displayed a “major distinguishing feature between” the different anti-SLAPP statutes.<sup>30</sup> In Nevada, “where no statutory authority to appeal is granted, no right exists.”<sup>31</sup> Because Nevada’s anti-SLAPP statute does not expressly provide for immediate appeal, the Ninth Circuit was “unpersuaded that the statute’s generalized reference to an appeal implicitly, or otherwise, confers an immediate right to appeal. Nevada based its anti-SLAPP statute on California’s law, and the legislature could have mirrored California’s unequivocal language concerning an immediate right to appeal had it intended to furnish one.”<sup>32</sup> Instead, Nevada’s law provides that “[a] person who engages in a good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon the communication.”<sup>33</sup> Assuming that the legislatures chose specific language and utilized the words “civil liability” rather than “lawsuit” or “trial,” the Ninth Circuit ruled that the legislature did not intend to provide freedom from suit under the statute.<sup>34</sup>

The court then went on to list the ways that Ferrell, and other similarly situated defendants, might find justice. Despite the fact that Ferrell could not appeal at that point, the Ninth Circuit observed that he still had a potential award of fees and costs if he succeeded in presenting a defense to defamation later on.<sup>35</sup> While this might be true, it is a small comfort to a defamation defendant if he cannot afford to litigate the matter for that long. The appellate court then moved on to discuss Rule 11,<sup>36</sup> the laughable sanctions mechanism in the Federal Rules of Civil Procedure. Though Rule 11 sanctions against even the most outrageous filings are slightly more common than rainbow-colored unicorns, the court nevertheless attempted to placate defamation defendants:

First, a litigant in federal court may ask the district court to certify and the court of appeals to accept an interlocutory appeal pursuant

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<sup>30</sup> *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 801 (9th Cir. 2012).

<sup>31</sup> *Taylor Constr. Co. v. Hilton Hotels Corp.*, 678 P.2d 1152, 1153 (Nev. 1984).

<sup>32</sup> *Metabolic*, 693 F.3d at 801.

<sup>33</sup> NEV. REV. STAT. ANN. § 41.650 (West 2011).

<sup>34</sup> *Metabolic*, 693 F.3d at 802.

<sup>35</sup> *Id.*

<sup>36</sup> FED. R. CIV. P. 11.

to 28 U.S.C. § 1292(b) as involving controlling questions of law the resolution of which will speed the termination of the litigation. Secondly, in truly extraordinary cases, a writ of mandamus is available. We have had recourse to the writ of mandamus to protect first amendment rights where we feared that the *Mohawk* decision foreclosed collateral order appeals. Ferrell did not seek to avail himself of 28 U.S.C. § 1292(b), nor did he seek mandamus in this Court. We, therefore, express no opinion on how we might have decided such an appeal or application had one been brought. We conclude that an immediate appeal is not necessary to protect the rights in Nevada Revised Statute § 41.660.<sup>37</sup>

We should thank the Ninth Circuit for this, because it seems to be almost *inviting* federal litigants to use these alternative mechanisms to get true anti-SLAPP protection, even if the Nevada legislature neglects to fortify the statute. Of course, this is of little comfort to a Nevada SLAPP victim if the plaintiff does not provide an opportunity to remove the matter to federal court.

#### CONCLUSION

While the disparities between the Nevada, California, and ever-changing Oregon anti-SLAPP laws have made navigating the myriad of applicable federal procedures within the Ninth Circuit challenging, at least these states offer some degree of anti-SLAPP protection. Many states are completely devoid of laws that protect individuals from inappropriate lawsuits filed only to punish and censor their constitutionally protected speech. The need for a federal statute that would create a unified definition of a SLAPP suit and mechanism for disposing of them is clear and immediate.

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<sup>37</sup> *Metabolic*, 693 F.3d at 803 (citations omitted).

