

# Reviewing for the Public Interest: Affirming Access to Anti-SLAPP Protection for Consumer Reviews

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## I. INTRODUCTION

You have just had the worst meal of your life. The soup was cold and under-seasoned, your medium-rare steak came out looking like a charcoal briquette, and you are fairly certain you saw a cockroach scurry into the kitchen. Naturally, you decide to leave a review online to warn future diners. Time passes and you have forgotten about the experience, when suddenly a process server shows up at your door, informing you that the restaurant is taking you to court for defamation.

This scenario is, unfortunately, commonplace.<sup>1</sup> For most individuals, the time, cost, and emotional energy necessary to fight this legal battle just isn't worth it, and they choose to take down their review. These suits, motivated by a desire to silence critics, have been named "strategic lawsuits against public participation" or "SLAPPs."<sup>2</sup> Thirty-three states and the District of Columbia have enacted "anti-SLAPP laws"<sup>3</sup> to combat this abusive use of litigation by allowing a SLAPP target to quickly and affordably resolve a meritless claim. However, even in states that have robust anti-SLAPP protections, it is not always clear that consumer reviews are protected by their ambit.<sup>4</sup>

As this Note further explores below, anti-SLAPP statutes can be divided into several categories, as defined by the scope of the speech they protect. Statutes like California's are usually thought to fall under the broadest category of anti-SLAPP protection because their scope covers "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."<sup>5</sup> The key inquiry for consumer reviews under this type of statute is whether the review constitutes speech made in a public forum on an issue of public interest. Some states have resolved this ambiguity by explicitly including consumer reviews in their anti-

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1. See YELP, 2022 TRUST & SAFETY REPORT 16 (Feb. 1, 2023), [https://issuu.com/yelp10/docs/2022\\_yelp\\_trust\\_safety\\_report?fr=sZmZkYzU3NDM2NzY](https://issuu.com/yelp10/docs/2022_yelp_trust_safety_report?fr=sZmZkYzU3NDM2NzY) [<https://perma.cc/Z7Q2-MLYK>] (labeling 48 businesses with "Questionable Legal Threat Alerts," meaning Yelp was aware of that business' history of using legal threats to suppress negative reviews); The Transparency Company, Comment Letter on Proposed Trade Regulation Rule on the Use of Reviews and Endorsements, 1, 15 (Jan. 9, 2023), <https://regulations.gov/comment/FTC-2022-0070-0044> [<https://perma.cc/Y3CK-BMGJ>] (estimating thousands of lawyers are hired each year to use legal threats to suppress negative reviews).

2. See UNIF. PUB. EXPRESSION PROT. ACT prefatory note (UNIF. L. COMM'N 2020).

3. See Dan Greenberg et al., *Anti-SLAPP Statutes: 2023 Report Card*, INST. FOR FREE SPEECH (Nov. 2, 2023), <https://www.ifs.org/anti-slapp-report/> [<https://perma.cc/8VRZ-WFSW>]. A map is available providing more information about each state's anti-SLAPP law and a grade based on the IFS' criteria for anti-SLAPP laws. *Id.*

4. See Eric Goldman, *CA Anti-SLAPP Cases Involving Consumer Reviews as Matters of Public Concern*, TECH. & MKTG. L. BLOG (Feb. 3, 2011), [https://blog.ericgoldman.org/archives/2011/02/ca\\_antislapp\\_ca.htm](https://blog.ericgoldman.org/archives/2011/02/ca_antislapp_ca.htm) [<https://perma.cc/TH29-F5JX>] (regulating California application of anti-SLAPP laws for consumer reviews).

5. CAL. CIV. PROC. CODE § 425.16(e)(3) (Deering 2023); see Greenberg, Keating & Knowles-Gardner, *supra* note 3 (California receiving a grade A+ score for its anti-SLAPP statute).

SLAPP laws.<sup>6</sup> The issue lies in those states that have not made the line explicit in their statutes. This ambiguity could be resolved with the promulgation of the Federal Trade Commission's Trade Regulation Rule on the Use of Consumer Reviews and Testimonials.<sup>7</sup> By calling SLAPPs on consumer reviews an unfair or deceptive act, the rule would affirm these reviews as a vital part of the modern economy,<sup>8</sup> and, as a secondary effect, expand access to anti-SLAPP protection in these public interest states.

The regulation's section 465.7(a) makes it an unfair or deceptive act or practice "for anyone to use an unjustified legal threat or a physical threat, intimidation, or false accusation in an attempt to prevent a consumer review or any portion thereof from being written or created or cause a consumer review or any portion thereof to be removed."<sup>9</sup> There is no federal anti-SLAPP law, and this regulation does not substitute the need for one.<sup>10</sup> As discussed below, anti-SLAPP laws provide substantive legal benefits, in a procedural form, that allow a SLAPP target to quickly and affordably resolve the meritless claim.<sup>11</sup> Section 465.7(a) may not provide such direct benefits. This regulation expands the FTC's enforcement capacity, allowing it to "seek civil penalties against violators and obtain redress for consumers or others injured by the conduct."<sup>12</sup> While this is likely to deter some amount of

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6. WASH. REV. CODE § 4.105.010(3)(b)(ii) (2023) (excluding commercial speech from anti-SLAPP protection, but explicitly includes consumer reviews); OKLA. STAT. tit. 12, § 1431(7)(e) (2023) (defining "matters of public concern" in part to be those issues related to "a good, product or service in the marketplace").

7. Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 16 C.F.R. § 465.7(a) (2024).

8. *See The Reviews Are In: Yelp Users are Four-Star Consumers*, NIELSEN (Jun. 2013), <https://www.nielsen.com/insights/2013/the-reviews-are-in-yelp-users-are-four-star-consumers/> [<https://perma.cc/58WT-HP9Y>]. In 2013, 85% of consumers found local business information online, 51% of Yelp users made their purchasing decisions after visiting the site, and 93% of the time Yelp usage resulted in "occasionally, frequently or always making a purchase from a local business. *Id.*; *Consumer Trust in Online, Social, and Mobile Advertising Grows*, NIELSEN (Apr. 2012), <https://www.nielsen.com/insights/2012/consumer-trust-in-online-social-and-mobile-advertising-grows/> [<https://perma.cc/53SQ-ZQXR>]. In 2012, Nielsen found that 70% of global consumers trusted online reviews as their source of brand information, making it the second most trusted source behind recommendations from friends and family). *Id.*

9. 16 C.F.R. § 465.7(a).

10. *See generally* Julio Sharp-Wasserman & Evan Mascagni, *A Federal Anti-SLAPP Law Would Make Section 230(c)(1) of the Communications Decency Act More Effective*, 17 FIRST AMEND. L. REV. 367, 370 (2019) (arguing that a federal anti-SLAPP law would close current loopholes that allow for forum-shopping, abuse of favorable choice of law principles, and a circuit split over the applicability of anti-SLAPP provisions in diversity cases); Nicole J. Ligon, *Solving SLAPP Slop*, 57 U. RICH. L. REV. 459, 480–81 (2023) (arguing that a federal anti-SLAPP law is necessary to reduce forum shopping and create consistent levels of protection for SLAPP targets).

11. *See* Roni A. Elias, *Applying Anti-SLAPP Laws in Diversity Cases: How to Protect the Substantive Public Interest in State Procedural Rules*, 41 T. MARSHALL L. REV. 215, 216, 237 (2016) (arguing that the current Circuit Split over the applicability of state anti-SLAPP laws in federal court on diversity action can be resolved by understanding the laws to use a procedural mechanism to vindicate a substantive right).

12. Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. at 49378.

SLAPP-ing from happening in the first place, it does little to help an individual whose SLAPP instigator was not dissuaded by potential FTC action.

This note proceeds in three sections. Section I provides a brief history of the SLAPP and anti-SLAPP statutes, which scholars have traditionally taxonomized as narrow petitioning statutes, moderate/indirect petitioning statutes, and broad public interest statutes based on the kinds of speech protected in different jurisdictions. While this taxonomy is useful in understanding the historical limits of anti-SLAPP protection, this Note proposes a new taxonomy which centers consumer reviews and highlights how the FTC's rule would impact these statutes' applications by dividing the statutes into narrow, general public interest, and review-friendly. This new taxonomy allows, in Section II, for an examination of how anti-SLAPP laws are understood in the age of the Internet review. Finally, Section III examines how the FTC's rule can expand access to anti-SLAPP protections in general public interest jurisdictions, with particular emphasis on the established tests for "issues of public interest."

## II. SLAPPS AND ANTI-SLAPP LEGISLATION

The term SLAPP was coined by Professors Penelope Canan and George W. Pring in their seminal 1988 work *Strategic Lawsuits Against Public Participation*, which conceptualized SLAPPS as suits brought to retaliate against one party's exercise of the right to petition to the detriment of the other.<sup>13</sup> They further identified that there was usually a likely power or economic disparity between the filer and target favoring the filer, or else a battle between a public interest group and industrial interests.<sup>14</sup> They also described the way in which SLAPP filers would "recast the offending political behavior as common torts, and thereby mask the original nature of the dispute."<sup>15</sup> Finally, they identified that SLAPP filers almost always lost the

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13. See Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 508-10 (Dec. 1988) (identifying four settings for the emergence of a SLAPP: 1) "One party approached some government body or office about a matter that affected some other party"; 2) "two parties concurrently petitioned the same government body, seeking different (usually opposite) exercises of government power"; 3) "more complicated arrangements" that resulted from different parties petitioning different government bodies; and 4) boycotts).

14. *Id.* at 510-11 ("[I]ndividual and organizational lead filers had economic, occupational, or industrial interests at stake. On the other hand, first named targets were often citizens, public interest groups, or civic and social organizations."). While they acknowledge that legal documents alone are not enough to get a full picture of the relative status of litigants, in "small scale" conflicts they use a landlord/tenant conflict and the dispute between a neighbor who wanted to build a tennis court on wetlands and the neighbor who opposed him as typifying examples. *Id.* at 510. They also identify instances where there are clear power imbalances (between corporations and individuals), and even in disputes between "large organizations with plenty of resources" it was States against public interest groups, and industry groups against environmentalist organizations. *Id.* at 511.

15. *Id.*

case on a motion to dismiss or by final disposition.<sup>16</sup> As the Court of Common Pleas of Pennsylvania explained, SLAPP filers engage in these suits “as a means of intimidation and harassment, not because [they] believe in the success of their claims.”<sup>17</sup> Thus, the four essential characteristics of SLAPPs are: (1) retaliation against the exercise of a First Amendment right; (2) a power disparity between the filer and target; (3) the filer’s recasting of its motivation from silencing a critic into a cognizable legal claim; and (4) the filer’s lack of any real desire to be vindicated in a court of law. Or, as a California Appeals Court phrased it, “while SLAPP suits masquerade as ordinary lawsuits the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.”<sup>18</sup>

To aid SLAPP targets and deter SLAPP filers, states began to enact anti-SLAPP statutes.<sup>19</sup> While states’ anti-SLAPP laws vary, the Uniform Law Commission has provided a Uniform Public Expression Protection Act (“UPEPA”) which serves as a blueprint for an ideal anti-SLAPP law.<sup>20</sup> UPEPA represents an idealized form of anti-SLAPP law, and so it is used here to explain the basic mechanics of this statutory protection, while noting where particular statutes diverge from the model. Anti-SLAPP laws typically provide a SLAPP target access to a special motion to strike.<sup>21</sup> Once the special motion is filed, the proceedings are stayed until the motion is resolved.<sup>22</sup> The motion is heard on an expedited basis.<sup>23</sup> The movant (the SLAPP target) must

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16. See *id.* at 514 (finding SLAPP defendants won dismissals in 68% of cases, and 83% of final judgments—significantly, those final judgments took, on average, 32 months to reach).

17. See *O’Neill v. Rossum*, No. 2017-03836-MJ, 2017 WL 4973220, \*6 (Pa. Ct. Com. Pl. Oct. 23, 2017) (trial order). Here, a real estate developer brought suit for defamation, tortious interference with contract, and civil conspiracy against a group of local environmentalists who protested in local government hearings, press conferences, and by disseminating fliers. *Id.* Defendants succeeded in getting dismissal based on the *Noerr Pennington* Doctrine and Pennsylvania’s narrow anti-SLAPP law, but still faced another several years of appeals before the case was finally concluded. *Id.*

18. *Wilcox v. Super. Ct.*, 27 Cal. App. 4th 809, 816 (2d Dist. Ct. App. 1994) (overruled in part on other grounds).

19. See UNIF. PUB. EXPRESSION PROT. ACT prefatory note (explaining the history of anti-SLAPP laws).

20. See generally, UNIF. PUB. EXPRESSION PROT. ACT (UNIF. L. COMM’N 2020). As of January 2024, UPEPA has been adopted by six states and has been introduced in an additional seven. Uniform Law Commission, *Public Expression Protection Act*, ULC, <https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1> [<https://perma.cc/Y5AL-FA4N>] (last visited Jan. 19, 2024).

21. UNIF. PUB. EXPRESSION PROT. ACT § 3 (UNIF. L. COMM’N 2020).

22. *Id.* § 4. Not all anti-SLAPP laws feature the stay. See, e.g., N.M. STAT. ANN. § 38-2-9.1 (West 1978) (New Mexico anti-SLAPP law calls for expedited hearing but provides for no stay of proceedings).

23. UNIF. PUB. EXPRESSION PROT. ACT § 5 (UNIF. L. COMM’N 2020). The hearing must be within 60 days of the motion in UPEPA, but the length varies across jurisdictions, with some statutes not having any specific time listed. See CAL.CIV. PROC. § 425.16(f) (Deering 2023) (California’s law requires the hearing be within 30 days of the motion, “unless docket conditions of the court require a later hearing”); N.M. STAT. ANN. § 38-1-9.1(A) (West 1978) (New Mexico’s law calls for the motion to be heard “on a priority or expedited basis,” but does not include a specific timeframe).

show that this cause of action “arose from” their speech, and that their speech falls within the scope of the anti-SLAPP law’s protection.<sup>24</sup> If this burden is met, it then shifts to the non-moving party to show that either the original speech is excepted from the scope of the law, or they have established a prima facie case for each essential element of their claim.<sup>25</sup> If the SLAPP filer is successful in the latter option, the burden shifts back to the movant to show that the SLAPP filer’s cause of action fails to state a claim or that there is no genuine issue of material fact.<sup>26</sup> In addition to the expedited time to hearing, there is a time limit set on how long the judge can take before issuing a ruling on the motion.<sup>27</sup> UPEPA, and other anti-SLAPP statutes, includes a right to an immediate interlocutory appeal for a movant who has been denied.<sup>28</sup> Finally, upon a granted motion, the movant is entitled to costs and attorney’s fees, or the responding party may receive the same if the court finds the anti-SLAPP motion was frivolous.<sup>29</sup>

Access to this mechanism provides SLAPP targets with valuable protection. The honest reviewer from the hypothetical at the start of this Note is much less likely to kowtow to the restaurant if they know they have access to this protection. The stay of proceedings limits the emotional and financial burden of going through discovery, and the expedited time to hearing and

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24. UNIF. PUB. EXPRESSION PROT. ACT §§ 2(b), 7(a)(1) (UNIF. L. COMM’N 2020). Additionally, this is where the FTC’s Proposed Rule on Consumer Reviews and Testimonials would be applied. The SLAPP target should be able to show, in public interest jurisdictions, that if the FTC considers this type of suit an unfair or deceptive trade practice, that the speech itself is on a matter of public interest, and therefore within scope of the statute.

25. *Id.* §§ 2(c), 7(a)(2)-(3)(A). Section 2(c) provides for exceptions to protected speech, and Section 7(a)(2) allows the SLAPP filer to show that this speech fall under that exception, while Section 7(a)(3)(A) allows the filer to show that the cause of action is not, in fact, meritless, as they have made out a prima facie case for each essential element of their claim. *Id.*

26. *Id.* § 7(a)(3)(B). The burden shifting framework differs by jurisdiction, with some jurisdictions not even including a burden shift at all. *Compare id.*, with MO. REV. STAT. § 537.528 (2023) (Missouri’s statute requires the movant to show that the speech is in scope and that they prevail on the merits).

27. UNIF. PUB. EXPRESSION PROT. ACT § 8. UPEPA recommends 60 days, but this also varies. *Compare id.*, with Cal. CIV. PROC. § 425.16(f) (Deering 2023) (making no mention on time to ruling), and NEV. REV. STAT. § 41.660(3)(f) (2024) (requiring ruling on the motion “within 20 judicial days” of the motion being served).

28. UNIF. PUB. EXPRESSION PROT. ACT § 9. Not all statutes include this right, and some allow either party the right. *Compare id.*, with MO. REV. STAT. § 537.528(3) (2023) (Missouri allows either party the right to an interlocutory appeal), and VA. CODE ANN. § 8.01-223.2 (2023) (no interlocutory appeal in Virginia).

29. UNIF. PUB. EXPRESSION PROT. ACT § 10. UPEPA provides for mandatory award of fees and costs to a prevailing movant, and mandatory award to the respondent if the court finds the anti-SLAPP motion was frivolous or only intended to delay proceedings. *Id.* In practice, states differ on whether the award is mandatory and whether the respondent is entitled to costs and fees on a defeated motion. *See* VA. CODE ANN. § 8.01-223.2(C) (2023) (allowing that Virginia courts “may” award fees and costs to a party that successfully invokes anti-SLAPP immunity. There is no mention of fee-shifting for the benefit of the SLAPP filer); MASS. GEN. LAWS ch. 231, § 59H (2023) (providing for mandatory award of fees to the successful movant, but no sanctions for a frivolous invocation of the mechanism).

disposition reduces the time burden. Most critically, if the reviewer prevails on their motion, all financial costs are borne by the SLAPP filer.<sup>30</sup>

At this point, it is important to make two related observations: the potential constitutional issues with anti-SLAPP statutes, and the distinction between Canan and Pring's initial conception of the SLAPP and its application to consumer reviews.

The nature of anti-SLAPP laws creates tension between the target's First Amendment rights and the filer's right to redress.<sup>31</sup> Unlike a motion for summary judgment, which requires the judge to determine whether there exists a genuine issue of material fact, or a motion to dismiss for failure to state a claim, which only requires that the plaintiff plausibly *state* a claim, the anti-SLAPP motion creates a heightened burden wherein the plaintiff needs to show they have a probability of *prevailing* on their claim.<sup>32</sup> The highest courts in Washington, Minnesota, and New Hampshire found existing or proposed anti-SLAPP statutes<sup>33</sup> unconstitutional.<sup>34</sup> The District of Columbia Court of Appeals found the plain language of the District's anti-SLAPP statute would lead to a similar conclusion, but applied the canon of constitutional avoidance to supplant the pleading standard with the summary judgment standard.<sup>35</sup> One way these concerns might be ameliorated is through statutes that cover a narrow band of speech activity that gets to the core

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30. See UNIF. PUB. EXPRESSION PROT. ACT § 10 cmt. 1 (UNIF. L. COMM'N 2020) (arguing without the mandatory award of fees, the SLAPP target still bears the financial costs, and “the effect of the abusive cause of action is nevertheless achieved”).

31. See Nick Phillips & Ryan Pumpian, *A Constitutional Counterpunch to Georgia's Anti-SLAPP Statute*, 69 MERCER L. REV. 407, 408 (2018) (arguing that while anti-SLAPP laws are “well intentioned,” they overweigh the target's First Amendment rights at the expense of the filer's “right to a jury, due process, equal protection, and ironically, the right to petition”).

32. Compare FED. R. CIV. P. 56(a) (summary judgment standard), with FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining plausibility standard for a 12(b)(6) motion); and CIV. PROC. § 425.16(b)(3) (court must determine if the plaintiff has a probability that they will prevail on their claim).

33. Washington has since repealed that law and passed a new anti-SLAPP law. See WASH. REV. CODE § 4.24.525 (2020) (repealed 2021); WASH. REV. CODE § 4.105 (2023) (current law).

34. See *Davis v. Cox*, 351 P.3d 862, 874 (Wash. 2015) (overruled on other grounds) (finding Washington anti-SLAPP law “invades the jury's essential role of deciding debatable questions of fact,” violating jury trial right); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 635 (Minn. 2017) (finding Minnesota anti-SLAPP law violates right to jury where tort historically had a jury right); *Opinion of Justices*, 641 A.2d 1012, 1015 (1994) (finding proposed New Hampshire anti-SLAPP procedure requires Court to weigh the pleadings and affidavits in a way that violates right to jury).

35. See *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236-37 (D.C. 2016) (holding that to avoid unconstitutional interpretation of D.C. anti-SLAPP statute, the plain text needed to be read to impart a different standard of review than an ordinary reading would indicate).

protections of the First Amendment.<sup>36</sup> This is because, when speech strikes at the heart of the First Amendment's protection, the First Amendment serves as a defense, even when harm has been caused; the right to expression functionally trumps the right to redress.<sup>37</sup> These constitutional considerations and the original focus of Canan and Pring's work lead to the second point: how do consumer reviews fit into this scheme?

While Canan and Pring were focused on the right to petition, and some states have kept their anti-SLAPP laws narrow to avoid constitutional concerns, there has always been divergence on the scope of applicability of anti-SLAPP protection.<sup>38</sup> SLAPPs are not easily limited to a single fact pattern.<sup>39</sup> Recognizing this reality, many states have enacted anti-SLAPP legislation that protects some combination of freedom of the press, the right to petition, the right of association, and freedom of speech on matters of public concern.<sup>40</sup> These broader categories of protected activities and acceptable fora for the speech naturally led to divergences in states' anti-SLAPP laws and jurisprudence.<sup>41</sup>

Scholars have recognized a trichotomy in anti-SLAPP statutes based on the scope of protected conduct: narrow or direct petitioning statutes, moderate

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36. See, e.g., MASS. GEN. LAWS ch. 231 § 59H (2023) (applying anti-SLAPP law only to speech made before a governmental body, made in connection to an issue under consideration or review by a governmental body, or statements likely to encourage such a review or enlist public participation in an effort to consider such a review); MO. REV. STAT. § 537.528 (2023) (applying anti-SLAPP law in connection with a public hearing or meeting, or in a quasi-judicial proceeding); 27 PA. CONS. STAT. § 8302(a) (2023) (applying anti-SLAPP law only to speech made to the government related to the enforcement or implementation of an environmental law or regulation).

37. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (internal citations omitted). Discussed in more detail below, the question for the court was not whether Phelps' speech caused Snyder to suffer from intentional infliction of emotional distress, but whether the speech was on an issue of public interest. *Id.* If it was, it was "at the heart of the First Amendment's protection," and Snyder could not hold Phelps liable, whether Phelps caused Snyder's emotional distress or not. *Id.*

38. See CAL. CIV. PROC. CODE § 425.16(e) (Deering 2023) (passed in 1992, California's was one of the first anti-SLAPP statutes and included a scope of protected speech beyond just petitioning activities).

39. See UNIF. PUB. EXPRESSION PROT. ACT prefatory note ("SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues—from zoning, to the environment, to politics, to education.").

40. See, e.g., CAL. CAL. CIV. PROC. CODE § 425.16(e) (Deering 2023); COLO. REV. STAT. § 13-20-1101(2)(a); HAW. REV. STAT. § 634G-2 (2022); IND. CODE § 34-7-7-2 (2024); KY. REV. STAT. ANN. § 454.462(1) (West 2023).

41. Compare CAL. CIV. PROC. CODE § 425.16 (Deering 2023) (protecting speech made in a broad array of fora on a broad array of subject matters), with 27 PA. CONS. STAT. § 8302 (2023) (providing immunity to speech only made in court or to a government body in connection with enforcing or implementing an environmental law or regulation).



or indirect petitioning statutes, and broad or public interest statutes.<sup>42</sup> While this taxonomy historically has been a useful framework, for the purposes of this Note, I propose a modified one. I consolidate the narrow and moderate categories (i.e., those which only apply to direct and indirect petitioning activities) and divide the broad category into general public interest states and review-friendly states based on explicit statutory language and jurisprudence. Using this new taxonomy of narrow, general public interest, and review-friendly, I then analyze how the FTC's proposed Rule on the Use of Consumer Reviews and Testimonials would convert general public interest states into review-friendly states through their method of public interest analysis.

### III. ANTI-SLAPP LEGISLATION AND CONSUMER REVIEWS

As noted above, the SLAPP and anti-SLAPP were first conceptualized before the Internet became ubiquitous. As technology expanded the ability of the average person to comment on the world around them in a public forum, the importance of access to legal protection for that speech also expanded.<sup>43</sup> Critics have argued that as anti-SLAPP laws' applicability has broadened to meet those needs in the Internet era, they lose Pring and Canan's original "theoretical justification."<sup>44</sup> However, returning to the four characteristics Pring and Canan identified as common throughout SLAPPs and comparing this description to the restaurant review hypothetical at the beginning of this Note, it is clear that the review-based SLAPP and the petitioning-based SLAPP are not really so distinct. The restaurant is retaliating against the consumer's speech, utilizing its enhanced resources to convert a desire to silence the consumer into a cognizable claim for defamation that it has no real desire to win, so long as the consumer takes their review down.

If application and expansion of the anti-SLAPP beyond its original theoretical underpinnings can be justified, it now becomes necessary to see

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42. See, e.g., Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Public Concern in Anti-SLAPP Law: Shifting Boundaries in State Statutory Protection of Free Expression*, 44 HASTINGS COMM. & ENT. L. J. 133, 138-40 (2022) (slightly different, using "petition" "public concern" and "additive public-concern" to describe statutes that only relate to petitioning activity, all public concern, and public concern with some particular limitations); Sharp-Wasserman & Mascagni, *supra* note 10, at 380-82 (comparing the broad anti-SLAPP statutes of California to the narrow ones of New Mexico and Pennsylvania); Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1248 (2007) (using narrow, moderate, broad taxonomy).

43. See, Matthew D. Bunker & Emily Erickson, *#Aintturningtheothercheek: Using Anti-SLAPP Law as a Defense in Social Media*, 87 UMKC L. REV. 801, 801-02 (2019) (explaining the evolution of anti-SLAPP jurisprudence and the significance of being able to avail yourself to the mechanism "beyond the original SLAPP paradigm"); Sharp-Wasserman & Mascagni, *supra* note 10, at 367-69 (highlighting the overlapping nature of Section 230 of the Communications Decency Act and anti-SLAPP laws).

44. See Andrew L. Roth, Comment, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L. REV. 741, 742 (2016) (arguing that while anti-SLAPP legislation is well intentioned, it becomes difficult because of its "outdated empirical basis and incomplete theoretical justification").

how jurisdictions have done so, if at all. Seventeen states have no current anti-SLAPP law on the books, and therefore are not included in this taxonomy.<sup>45</sup>

Narrow anti-SLAPP jurisdictions have SLAPP statutes which apply only to speech that in some way involves petitioning the government. There are currently eleven states that fall under this branch.<sup>46</sup> While there is variation within this category, none of these statutes are likely to cover consumer reviews.<sup>47</sup>

### A. General Public Interest Anti-SLAPP

Sixteen states have what this Note calls “general public interest anti-SLAPP laws.”<sup>48</sup> These statutes protect speech on matters of public interest, without defining with particularity when speech should qualify as a matter of public interest. California’s anti-SLAPP law, for example, grants access to the anti-SLAPP procedure when a suit arises from an act “in furtherance of

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45. See Greenberg et. al, *supra* note 3 (Alabama, Alaska, Idaho, Iowa, Michigan, Minnesota, Mississippi, Montana, New Hampshire, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, West Virginia, Wisconsin, and Wyoming do not have anti-SLAPP laws).

46. Arkansas, Delaware, Florida, Illinois, Maine, Massachusetts, Missouri, Nebraska, New Mexico, Pennsylvania, and Rhode Island. *Id.*

47. See ARK. CODE ANN. § 16-63-503 (2023) (applying scope to speech that is intended to influence government action); DEL. CODE ANN. tit. 10, §§ 8136-8137 (2022) (applying scope to “actions involving public petition and participation,” where that phrase is limited to “public applicant[s] or permittee[s]”); FLA. STAT. § 768.295 (2023) (applying scope requires speech be made “before a governmental entity” about a subject under review or consideration by a governmental entity, or that the speech be made in or in connection with certain media); 735 ILL. COMP. STAT. 110/15 (2023) (covering speech “genuinely aimed at procuring favorable government action, result, or outcome”); ME. STAT. tit. 14, § 556 (2023) (covering only petitioning activity); MASS. GEN. LAWS ch. 231, § 59H (covering petitioning activity); MO. REV. STAT. § 537.528 (2023) (requiring speech to be “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”); NEB. REV. STAT. § 25-21,242 (2023) (requiring the speech to relate to “a public applicant or permittee” who brought the claim the motion seeks to dismiss); N.M. STAT. ANN. § 38-2-9.1(A) (West 1978) (applying to speech made in or in connection with public hearings and meetings); 27 PA. CONS. STAT. §§ 8301-02 (2023) (requiring the speech be related to environmental laws or regulations); 9 R.I. GEN. LAWS § 9-33-2 (2023) (using “matter of public concern” language, but also requires a showing that the exercise of free speech was not a “sham,” where that requires showing the speech was intended to effect government action).

48. See ARIZ. REV. STAT. ANN. § 12-751 (2023) (Arizona actually covers any speech at all, as long as the defendant can establish that the current action was primarily motivated by a desire to silence them); CAL. CIV. PROC. CODE § 425.16(e) (Deering 2023); COLO. REV. STAT. § 13-20-1101 (2023); CONN. GEN. STAT. § 52-196(a)(1) (2023) (defining “matter of public concern” for purposes of the anti-SLAPP motion. Although consumer reviews are not included, the analysis of a consumer review’s applicability would fall under (B) and allow for the same logic as the rest of the statutes in this category); GA. CODE ANN. § 9-11-11.1 (2023) (Georgia’s statute has received negative judicial treatment discussed *infra*); HAW. REV. STAT. § 634G-2(a)(3); § 34-7-7-1 (2022); LA. CODE CIV. PROC. ANN. art. 971(a)(1) (2023); NEV. REV. STAT. § 41.637(4) (2023); N.J. STAT. ANN. § 2A:53A-50(b)(3) (West 2023); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2020); OR. REV. STAT. § 31.150(2) (2023); TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West 2023); UTAH CODE ANN. § 78B-25-102(2)(c) (LexisNexis 2023); VT. STAT. ANN. tit. 12, § 1041(i) (2023); VA. CODE ANN. § 8.01-223.2(A) (2023).

the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue."<sup>49</sup> It then recursively defines the act as (in part) "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) 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."<sup>50</sup> In other words, the act says that a defendant should have access to anti-SLAPP protection when they are being sued for speaking about an issue of public interest, and you will know they are being sued for speaking on an issue of public interest when they were speaking on an issue of public interest. Whether a given piece of speech is on a matter of public interest then, is a question for the court, and how courts have made this determination becomes the critical inquiry.

While the Supreme Court has not had occasion to define "matter of public concern" in the context of an anti-SLAPP statute, it has confronted the phrase in several notable cases related to broader First Amendment concepts. Unfortunately, as the Court has itself acknowledged, the test it has formulated for a matter of public concern is somewhat murky.<sup>51</sup> Most recently, the Court wrestled with this test in *Snyder v. Phelps*. In this case, the Westboro Baptist Church, led by Fred Phelps, held a protest with inflammatory picket signs outside of the funeral of Matthew Snyder, a Marine Lance Corporal killed in Iraq. Matthew Snyder's father sued Phelps, his daughters, and the Church for intentional infliction of emotional distress.<sup>52</sup> The Court considered whether the picket signs addressed matters of public concern, as that type of speech is central to First Amendment protections.<sup>53</sup> If the Court answered in the affirmative, then holding Phelps liable for intentional infliction of emotional distress for that speech would be an abridgment of his First Amendment rights.<sup>54</sup> Relying on its precedent in *Connick v. Meyers*, 461 U.S. 138 (1983), the Court looked to the "content, form, and context" of the speech "as revealed by the whole record."<sup>55</sup> The Court ultimately determined that despite the vulgarity of the signs, they were broadly meant to address issues of national significance, namely the Church's views on homosexuality, the Catholic Church, and the morality of the nation, in a context that, because of its objectionable nature, would capture as much attention as possible.<sup>56</sup> This "content, form, and context" test has been criticized as circular and unclear, leading to "an unpredictable free speech environment."<sup>57</sup> The basic function,

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49. CAL. CIV. PROC. CODE § 425.16(b)(1) (Deering 2023).

50. *Id.* § 425.16(e).

51. *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) ("the boundaries of the public concern test are not well defined").

52. *See Snyder*, 562 U.S. at 448-50.

53. *See id.* at 444 ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern").

54. *See id.* at 451-52.

55. *Id.* at 453 (internal citations omitted).

56. *Id.* at 454-56.

57. *See Bunker & Erickson, supra* note 42, at 147.

as illustrated in *Snyder v. Phelps*, is to look at what issue the speech purports to address (content), and how the delivery of the speech (form) relates back to that issue (context).

At the state level, there has been more on-point jurisprudence defining “public concern” in the anti-SLAPP and consumer review contexts. In California, for instance, the historical trend had been to construe the anti-SLAPP statute as broadly as possible.<sup>58</sup> Despite the courts’ stated preference for a broad construction, there has been reluctance at times to find that online consumer reviews meet the initial burden of establishing themselves as speech on a matter of public interest.<sup>59</sup> *Wilbanks v. Wolk*, is referred to as the “leading case” for online consumer reviews and anti-SLAPP law.<sup>60</sup> Under the *Wilbanks* test, a consumer review is considered in the public interest when:

- (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; [or] (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest.<sup>61</sup>

More recently, in *FilmOn.com Inc. v. Double Verify, Inc.*, the California Supreme Court refined the public interest inquiry into a two-part analysis asking “what public interest or . . . issue of public interest the speech in question implicates” (the content of the speech) and “what functional relationship exists between the speech and the public conversation,” (the context of the speech).<sup>62</sup> Essentially, without directly citing it, California has adopted at least part of the *Snyder* test.<sup>63</sup>

The Oregon Supreme Court has similarly stated the question of whether a review is on a matter of public concern turns on the Supreme Court’s “content, form, and context,” test.<sup>64</sup> In *Lowell v. Wright*, the Oregon Supreme Court was asked to determine whether a consumer review left by Wright, an employee of a rival piano shop of Lowell’s, was a matter of public concern for First Amendment purposes.<sup>65</sup> Although Wright was availing himself of a

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58. See *Chaker v. Matteo*, 209 Cal. App. 4th 1138, 1145 (Cal. App. 4th 2012) (citations omitted) (“[C]ases which have considered the public interest requirements of the Anti-SLAPP Law have emphasized that the public interest may extend to statements about conduct between private individuals.”).

59. See *Dunne v. Lara*, No. B210779, 2009 WL 3808345, at \* 15-16 (Cal. Ct. App. Nov. 16, 2009) (holding disgruntled motorcycle repair shop customer’s online reviews not in public interest because they only concerned those who would be interested in getting motorcycle repair services in that geography); *Sandra Caron European Spa, Inc. v. Kerber*, No. A117230, 2008 WL 3976463, at \* 1 (Cal. App. Ct. August 28, 2008) (spa customer’s negative reviews not in public interest).

60. *Chaker*, 209 Cal. App. 4th at 1145 (citing *Wilbanks v. Wolk*, 121 Cal. App. 4th 883 (Cal. App. 2004)).

61. *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898 (Cal. App. 4th 2004).

62. *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1165 (Cal. 2019).

63. See *Bunker & Erickson*, *supra* note 42, at 150.

64. See *Lowell v. Wright*, 512 P.3d 403, 418-19 (Or. 2022).

65. See *id.*

First Amendment public comment defense, and not using the anti-SLAPP mechanism, the court explained that the analytical question of whether the speech was on a matter of public concern was the same “content, form, and context” test.<sup>66</sup> Although the court expressed doubt that an online consumer review should be considered *de facto* speech on a matter of public interest, it also expressed that under the right circumstances it could be.<sup>67</sup> However, because Lowell had not asked the court to overturn earlier precedent holding that a similar review was on a matter of public interest, the court allowed the entirety of Wright’s review to qualify without engaging in a full content, form, context analysis.<sup>68</sup> Given this case, it appears that for the time being in Oregon, an online consumer review will easily qualify as speech on a matter of public interest, but it will be necessary to reaffirm this qualification should the Oregon Supreme Court see a case which challenges its earlier precedent.

The Georgia Supreme Court, in analyzing its state’s most recent anti-SLAPP law noted the broad similarities between its law and California’s.<sup>69</sup> While the discussion of whether the speech at issue fell within the scope of the anti-SLAPP statute was relatively limited to a holding that it did, the court appeared to rely on the California precedent, citing *FilmOn.com Inc*, in reaching that determination.<sup>70</sup> Once again, the test for the public interest will rely on the content, context, and form of the speech.

In the context of an online review, Colorado’s recently enacted anti-SLAPP law<sup>71</sup> saw litigation in the online review context in *Tender Care Veterinary Ctr., Inc. v. Lind-Barnett*.<sup>72</sup> In *Tender Care*, a disgruntled patient of a rural veterinary clinic left negative reviews online.<sup>73</sup> The court first noted, as the Georgia court did, the similarity between the Colorado and California statutes, and explained that it would look to California case law for guidance in construing and applying the Colorado statute.<sup>74</sup> The court then applied the two-step *FilmOn.com* analysis (again, a modified *Snyder* analysis of “content

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66. *See id.* at 418.

67. *See id.* at 418.

68. *See id.* at 419.

69. *See Wilkes & McHugh, P.A. v. LTC Consulting, L.P.*, 830 S.E.2d 119, 124 (Ga. 2019) (noting that Georgia’s anti-SLAPP statute had recently been amended, effecting the court’s ability to rely on their own precedent, “thus, in interpreting our new OCGA § 9-11-11.1, we may look to California case law interpreting § 425.16 for guidance, especially decisions — such as the ones cited in this opinion — that employ the same kind of statutory analysis that we generally use”).

70. *See id.* at 128.

71. § 13-20-1101 was enacted in 2019. COLO. REV. STAT § 13-20-1101 (2023).

72. *Tender Care Veterinary Ctr., Inc. v. Lind-Barnett*, 2023 COA 114 (as of writing, this appears to be the highest court in Colorado to have addressed the new anti-SLAPP statute). The Colorado Supreme Court has granted certiorari in part to determine whether there needs to be a “nexus” in which the movant’s speech “encourages, facilitates, or contributes to a general debate,” whether the “matter of public concern” standard for defamation and invasion of privacy is the same as the “matter of public interest” standard, and whether the speaker’s motive is a consideration in evaluation of the anti-SLAPP motion. *Lind-Barnett v. Tender Care Veterinary Ctr., Inc.*, No. 24SC8, 2024 Colo. LEXIS 890 (Sept. 3, 2024).

73. *See Tender Care Veterinary Ctr., Inc.*, 544 P.3d at 695-96.

74. *See id.* at 697-98.

and context”) to determine if the defendant’s reviews qualified as speech on a matter of public interest.<sup>75</sup>

Although this review is not completely exhaustive, it is largely indicative of the approach courts take in analyzing the public interest question.<sup>76</sup> At the federal level, whether speech implicates an issue of public interest is based on a fact intensive analysis of the speech’s content, context, and form. At the state level, much the same applies, if slightly streamlined to an analysis of what the content of the speech is, and how that relates to the public interest it purports to connect to.

### B. Review-Friendly Anti-SLAPP

Six jurisdictions (five states and the District of Columbia) have enacted anti-SLAPP statutes I refer to as “review-friendly.”<sup>77</sup> Some of these jurisdictions explicitly include speech on a “good, product, or service in the marketplace” in their definition of a matter of public concern.<sup>78</sup> In other jurisdictions, such as Kentucky and Washington, one section of the statute prohibits use of the anti-SLAPP mechanism by a defendant who is in the primary business of selling goods and services when the speech at issue is related to the sale of goods or services, but includes an exception to this exception when the speech at issue is a consumer review.<sup>79</sup> In those jurisdictions, the statute makes clear that anti-SLAPP protection is not meant to apply to most categories of commercial speech (like advertising), but that consumer reviews are meant to be protected. In either type of jurisdiction, there is no question that consumer reviews fall within the scope of the public interest because the statute tells the reader it does. So long as a reviewer can satisfy the rest of the anti-SLAPP procedure’s requirements, they will likely receive its protections.

## IV. RULE ON THE USE OF CONSUMER REVIEWS AND TESTIMONIALS AS JUSTIFICATION FOR EXPANDED ANTI-SLAPP SCOPES

Having established a taxonomy for anti-SLAPP laws, categorized the existing statutes within that taxonomy, and explained how general public interest jurisdictions conceptualize speech on matters of public interest, we

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75. *See id.* at 698-700.

76. *See generally* Bunker & Erickson, *supra* note 42 (providing a more detailed overview of the evolution of the public concern analysis in anti-SLAPP context).

77. D.C., Kansas, Kentucky, Oklahoma, Tennessee, and Washington. *See Greenberg et al., supra* note 3.

78. *See* D.C. CODE § 16-5501(3) (2023); KAN. STAT. ANN. § 60-5320(7)(E) (2023); OKLA. STAT. tit. 12, § 1431(7)(e) (2023); TENN. CODE ANN. § 20-17-103(6)(E) (2023).

79. *See* KY. REV. STAT. ANN. §§ 454.462(2)(a)(3) and 454.462(2)(b)(2) (West 2023) (exempting commercial speech in 2(a)(3), then 2(b)(2) clarifies that anti-SLAPP protection applies to consumer reviews); WASH. REV. CODE §§ 4.105.010(3)(a)(iii) and 4.105.010(3)(b)(ii) (2023) (exempting commercial speech in (3)(a)(iii) then clarifying that consumer reviews are included under anti-SLAPP protections with (3)(b)(ii)).

can now turn to how an application of the FTC's Rule on the Use of Consumer Reviews and Testimonials might impact each jurisdiction.<sup>80</sup>

### A. *In Narrow and Review Friendly Jurisdictions*

The FTC's Rule on the Use of Consumer Reviews and Testimonials will not have any impact on an individual SLAPP-target's access to anti-SLAPP protection in narrow jurisdictions. To qualify for anti-SLAPP protection in these jurisdictions, the speech must take place either in the direct context of petitioning activities, or as an indirect effort to petition the government.<sup>81</sup> While there are conceivable instances where a consumer review could be recast as a form of indirect petitioning<sup>82</sup>, nothing about the Rule on the Use of Consumer Reviews and Testimonials would result in authority to transform all consumer reviews into indirect petitioning efforts. The Rule on the Use of Consumer Reviews and Testimonials' recognition of consumer reviews as speech in need of protection should make such speech implicitly a matter of public concern (as discussed below). Being speech on a matter of public concern, however, is not the same as being speech related to petitioning activities. This does not mean that SLAPP-targets in these jurisdictions are defenseless.<sup>83</sup> Ideally, the existence of an FTC regulation prohibiting these SLAPPs would prevent them from being filed in the first place. If the FTC is successful in bringing an enforcement action, they may "more readily obtain monetary redress for victims."<sup>84</sup>

In reviewer friendly jurisdictions, the FTC's Rule on the Use of Consumer Reviews and Testimonials is likely to have minimal impact. Since these jurisdictions already include consumer reviews in the scope of their anti-SLAPP statutes, a new reading isn't necessary to shore up their protection. Like narrow jurisdictions, however, there should be an overall reduction in SLAPP's filed against consumer reviews if the primary purpose of the FTC's Rule on the Use of Consumer Reviews and Testimonials is effective.

### B. *In General Public Interest Jurisdictions*

In general public interest jurisdictions, the FTC's Rule on the Use of Consumer Reviews and Testimonials would have a profound impact on a SLAPP-target's ability to access anti-SLAPP protection. As discussed above, at the federal level the applicable test for speech as a matter of public interest

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80. See 16 C.F.R. § 465.7(a).

81. *E.g.*, ch. 231, § 59H (Massachusetts statute applying only to petitioning speech).

82. For instance, a review of a dirty restaurant might call on the Board of Health to take action.

83. See, *e.g.*, *Lowell*, 512 P.3d. Wright did not avail himself of the anti-SLAPP mechanism available to him, but instead used a First Amendment public comment defense, which is available regardless of the presence of an anti-SLAPP law. *Id.* Such defendants will not benefit from the procedural gifts of the anti-SLAPP mechanism, but still receive the same substantive protection the mechanism is designed to instill.

84. Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. at 49377.

is whether, based on the “content, context, and form” of the speech, it can be said to reflect a broad public concern.<sup>85</sup> At the state level, in the anti-SLAPP context, this test has morphed through the broad application of the *FilmOn.com, Inc.* standard to simply content and context, or an investigation into what public interest the speech is argued to connect to, and how it makes that connection.<sup>86</sup> The FTC’s Rule on the Use of Consumer Reviews and Testimonials would make it an unfair or deceptive act or practice “to use an unjustified legal threat . . . to prevent a consumer review or any portion thereof from being written or created or cause a consumer review or any portion thereof to be removed.”<sup>87</sup> This makes it clear that online consumer reviews implicate a matter of public interest, because the very existence of the rule is predicated on the importance of the consumer review ecosystem to the nation’s economy.<sup>88</sup> The FTC states “the number of online reviews and aggregate ratings are extremely important for consumer purchase decisions,” and “the presence of online reviews improves consumer welfare via reductions in both search costs and the level of information asymmetry that

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85. *Snyder*, 562 U.S. at 453 (internal citations omitted).

86. See *FilmOn.com Inc.*, 439 P.3d at 1165 (step one: identify the public interest the speech purports to reflect; step two: identify how the speech interacts with that public interest); *Wilkes & McHugh, P.A.*, 830 S.E.2d at 128 (Georgia applying *FilmOn.com*); *Tender Care Veterinary Ctr., Inc.*, 544 P.3d at 697-98 (Colorado applying *FilmOn.com*).

87. 16 C.F.R. § 465.7(a).

88. See Attorneys General of D.C., Pennsylvania, & Illinois, Comment Letter on Proposed Trade Regulation Rule on the Use of Reviews and Testimonials (Sept. 29, 2023), [https://portal.ct.gov/-/media/ag/press\\_releases/2023/2023929-comment-of-23-state-ags-ftc-consumer-reviews-and-testimonials.pdf](https://portal.ct.gov/-/media/ag/press_releases/2023/2023929-comment-of-23-state-ags-ftc-consumer-reviews-and-testimonials.pdf) [<https://perma.cc/RAF7-98MX>] (state Attorneys General recognizing the significance of protecting consumer reviews as “laudable”); Consumer Reports, Comment Letter on Proposed Trade Regulation Rule on the Use of Reviews and Testimonials, (Sept. 29, 2023), <https://advocacy.consumerreports.org/wp-content/uploads/2023/10/Comments-of-Consumer-Reports-In-Response-to-the-Federal-Trade-Commission-Notice-of-Proposed-Rulemaking-on-the-Use-of-Consumer-Reviews-and-Testimonials-.pdf> [<https://perma.cc/5NY2-CTB5>] (stating unfair and deceptive practices in review space “mutated on large e-commerce platforms”); Tripadvisor, Comment Letter on Proposed Trade Regulation rule on the Use of Reviews and Testimonials (Jan. 9, 2023), <https://www.regulations.gov/comment/FTC-2022-0070-0036> [<https://perma.cc/V4KN-3ESC>] (“for travelers, cost combined with the time commitment and natural risk of traveling to parts unknown make real-time traveler reviews nearly indispensable”); Trustpilot, Comment Letter on Proposed Trade Regulation Rule on the Use of Reviews and Testimonials, (Sept. 29, 2023), [https://downloads.regulations.gov/FTC-2023-0047-0084/attachment\\_1.pdf](https://downloads.regulations.gov/FTC-2023-0047-0084/attachment_1.pdf) [<https://perma.cc/6M2Q-YPZH>]. (“[G]enuine, honest and real experiences shared online are invaluable, both to the people who write and read them, and to the businesses who can use them to understand their customers and improve their offerings.”); Yelp, Comment Letter on Proposed Trade Regulation Rule on the Use of Reviews and Testimonials, (Jan. 6, 2023) <https://www.regulations.gov/comment/FTC-2022-0070-0028> [<https://perma.cc/3DBW-FG4K>] (according to an internal Yelp survey conducted in 2022, respondents claimed they read “a median of five reviews” before making a purchase, and another study found that 90% of people on Yelp compare businesses before making a spending decision); The Transparency Company, Comment Letter on Proposed Trade Regulation Rule on the Use of Reviews and Testimonials, (Jan. 10, 2023), <https://www.regulations.gov/comment/FTC-2022-0070-0044> [<https://perma.cc/LAK8-4QFR>] (stating the review management industry is worth over an estimated \$8.8 billion, showing the value that businesses place in managing and suppressing negative reviews).



exists prior to purchase.”<sup>89</sup> In numbers, the FTC estimated, during the NPRM phase, that perfect implementation of all aspects of its proposed Rule would result in annual “welfare improvements from better informed-purchased decisions” between 5.8 and 15.85 billion dollars.<sup>90</sup> While this estimate does not address the individual impact of a reduction in review suppression, it highlights the importance of a free flow of reviews to an issue of public interest, the national economy.

The FTC’s treatment of consumer reviews as something that requires protection from the unfair or deceptive act of a SLAPP collapses the two-step analysis into a single point. A consumer review is speech on a matter of public importance because we recognize that, so long as it is a consumer review, it is of importance to the public, and it connects to that public interest by virtue of being a consumer review. Its content and context overlap.

Consider again the hypothetical at the beginning of this Note. You leave a review about your terrible restaurant experience, and the restaurant attempts to use a SLAPP to get you to take the review down. Without the FTC’s Rule on the Use of Consumer Reviews and Testimonials, you would need to argue that your review related to the public interest because 1) the content served the public’s interest in knowing which restaurants in the area were worth patronizing; and 2) the review itself adequately related to that public interest without becoming about your personal vendetta with the restaurant.<sup>91</sup> With the FTC’s Rule on the Use of Consumer Reviews and Testimonials in place, however, your argument could be: 1) the content of your post relates to a matter of public importance because the FTC has recognized the public value of consumer reviews; and 2) the review exists in context as a consumer review.

Critics would argue that this overextends the anti-SLAPP law in a way state legislatures and *Canan & Pring* had not intended.<sup>92</sup> They may claim that this steps past the balancing line between the SLAPP-target’s First Amendment rights and the filer’s right to a trial.<sup>93</sup> However, this need not be the case for two reasons.

First, as discussed above, when speech touches on a matter of public interest, it reaches the core of First Amendment protections, and the need to protect that speech is greater than the right to redress, even where the speech may have been harmful.<sup>94</sup> The Westboro Baptist Church’s signs hurt Mr. Snyder.<sup>95</sup> The speech at issue likely did inflict emotional distress upon Mr. Snyder; the jury found Phelps and the Church guilty and liable for almost

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89. Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. at 49382.

90. *Id.* at 49383-84.

91. See *Tender Care Veterinary Ctr., Inc.*, 544 P.3d at 700-02 (Lind-Barnett’s posts failed to satisfy second prong of public interest because they were ultimately, in context, about exercising her hatred for the veterinary hospital).

92. See Roth, *supra* note 44, at 743 (certainly this is a long walk from the original petitioning scope of *Canan & Pring*’s study).

93. See *Philips & Pumpian*, *supra* note 31, at 408.

94. See *Snyder*, 562 U.S. at 451-52.

95. See *id.* at 450 (describing Mr. Snyder’s thoughts of the picketing as causing him to become “tearful, angry, and physically ill”).

eleven million dollars of damages.<sup>96</sup> Likewise, negative consumer reviews can devastate a business.<sup>97</sup> The harm to the business is as real as the harm to Mr. Snyder, but the speech at issue reaches a crucial public interest, and as such requires the strongest protections the First Amendment can provide.<sup>98</sup>

Second, while this understanding of public interest broadens access to the anti-SLAPP mechanism at the first hurdle, it does not help the SLAPP defendant if the plaintiff can show that their claim is not meritless. The SLAPP target's burden is alleviated during the first step of the anti-SLAPP analysis, establishing that the Act applies, but this does not mean that the SLAPP filer (or plaintiff, if the suit is not, in fact meritless) cannot still establish a *prima facie* case during the second step.<sup>99</sup> If the review truly is defamatory, being able to establish that the review is in scope of the statute does not mean the motion will automatically be granted. If the claim was frivolous, and you sought to abuse the broadened applicability of anti-SLAPP protection, you may end up owing the attorney's costs and fees.<sup>100</sup>

Rather, this reading of the public interest standard expands access to the anti-SLAPP statute in a way that is consistent with the goals of these statutes. It speeds up time of deliberation, reduces the expenses of litigation, and ensures that meritless suits meet quick ends.

## V. CONCLUSION

Anti-SLAPP legislation provides valuable protection against frivolous lawsuits meant to quash a person's access to First Amendment rights. Currently, there is ambiguity over access to this mechanism in general public interest jurisdictions.<sup>101</sup> Through application of the FTC's Rule on the Use of Consumer Reviews and Testimonials to the "content and context" test for public interest, consumer reviews should have a much easier time clearing the first requirement of winning an anti-SLAPP motion.

By easing access to the anti-SLAPP mechanism at the first stage, consumers receive a deeper degree of protection in line with the goals of the legislation. Anti-SLAPP laws are designed to reduce the time and hassle caused by frivolous litigation, but while consumer reviews remain in a gray area in general public interest jurisdictions, their power to do so is hampered. In affirming the consumer review's status as *de facto* speech on a matter of public interest, we assure that a negative review never costs more than one bad night out.

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96. *See id.*

97. Ross Marchant, *The Impact of Online Reviews on Businesses*, BRIGHTLOCAL (Mar. 15, 2017), <https://www.brightlocal.com/blog/the-impact-of-online-reviews/> [<https://perma.cc/DW5Z-LU6S>] (one negative review could reduce customers by 22%, or about thirty customers).

98. *See Snyder*, 562 U.S. at 458.

99. *See* UNIF. PUB. EXPRESSION PROT. ACT prefatory note (explaining the flow of a motion under an anti-SLAPP law).

100. *See id.* § 10.

101. *See supra* Part III(A).