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The Jurisprudence of Public Concern in Anti-SLAPP Law: Shifting Boundaries in State Statutory Protection of Free Expression

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I. INTRODUCTION

The distinction between public and private spheres is a central theme in free expression doctrine. Most fundamentally, it separates the public realm of First Amendment state action from private contexts in which the Amendment does not operate.[1] It inhabits the law of defamation as well, when libel plaintiffs are classified as limited-purpose public figures, having "thrust themselves to the forefront of particular *public controversies* in order to influence the resolution of the issues involved."[2] And in cases that clearly fall within the First Amendment's ambit, there is sometimes *enhanced* protection for speech that addresses a matter of public — rather than private — concern. In cases concerning public-employee speech,[3] libel doctrine,[4] and infliction of emotional distress,[5] the U.S. Supreme Court has crafted an über-protected subset of speech that "is at the heart of the First Amendment's protection."[6] Indeed, one legal scholar has pointed out that "the public concern question is pivotal in at least five different areas of modern communication law."[7] In addition to defamation doctrine and public-employee speech law, it is critical in reporter privilege cases, invasion of privacy doctrine, and — the topic of this work — state anti-SLAPP law.

In the realm of anti-SLAPP statutes, the distinction between public and private matters is, in fact, the essential demarcation separating expressive activities that do or do not fall within a state's statutory protection for defendants. When scholars Penelope Canan and George W. Pring introduced the concept of Strategic Lawsuits Against Public Participation (SLAPPs) in the late 1980s, they were identifying a fairly discrete phenomenon they had recognized in their sociological research: "lawsuits filed against citizens or groups for advocating a viewpoint on a public issue in a government decisional process."[8] The line between public and private was strikingly clear, as the researchers — and early anti-SLAPP statutes — limited the scope of the phenomenon by tying it to activities associated with "petition," or speech concerning government activity.

But a funny thing happened as states rolled out anti-SLAPP statutes, courts went to work interpreting them, and the Internet became a boundless

1. *See, e.g.*, G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Government Responsibility*, 34 HOUS. L. REV. 333 (1997).

2. Gerts v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (emphasis added).

3. Connick v. Myers, 461 U.S. 138 (1983).

4. Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985).

5. Snyder v. Phelps, 562 U.S. 433 (2011).

6. *Id.* at 451-452 (quoting Dun & Bradstreet, Inc., 472 U.S. at 758-59 (1985) (internal quotation marks omitted).

7. Clay Calvert, *Defining Public Concern After* Snyder v. Phelps*: A Pliable Standard Mingles with News Media Complexity*, 19 VILL. SPORTS & ENT. L.J. 38, 40 (2012).

8. Penelope Canan and George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC. REV. 385 (1988) (citations omitted).

public forum with myriad citizens "advocating a viewpoint" on just about everything. By the late 1990s, the original understanding of SLAPPs had expanded, and when states crafted amendments to broaden their anti-SLAPP laws, "petition" was typically joined by variations of "speech regarding a matter of public concern." Now, of course, the distinction between public and private wasn't as obvious, and courts were required to take a more active role in drawing that line. Ultimately, anti-SLAPP law came to encompass vastly more litigation than Canan and Pring could have dreamt of.

Strikingly, three of the largest and most influential states have made profound alterations in their approaches to the "matter of public concern" question in the anti-SLAPP context since 2019. California, New York, and Texas are each in the midst of a fundamental shift in how their courts determine what constitutes a public matter.

This article will examine how legislatures and courts have wrestled with the public/private distinction in anti-SLAPP law in recent years. First, it will examine how state legislatures have crafted "speech regarding a matter of public concern" amendments into their anti-SLAPP statutes, suggesting a loose taxonomy of statutory approaches. Next, the article will explore the *Connick/Snyder* "public concern" concept within First Amendment law, which has been influential in some anti-SLAPP laws. It will then analyze recent legal developments in three influential states — California, New York, and Texas — to explore the concept of "public concern" in this evolving and vital area of law.

II. PUBLIC CONCERN IN ANTI-SLAPP LAWS

Just one year after Canan and Pring brought SLAPPs to the attention of the legal world, Washington state passed the nation's first anti-SLAPP law, guaranteeing civil immunity to anyone sued for reporting salient information (e.g., reports of corporate malfeasance) to a government agency.[9] The new law promised just one form of relief for prevailing SLAPP defendants: costs and reasonable attorney's fees spent in their legal defense.[10]

Since then, 31 states, as well as the District of Columbia, have passed anti-SLAPP laws,[11] and 74 percent of Americans currently live in a state with

9. WASH. REV. CODE ANN. § 4.24.500.

10. *Id.*

11. Those states include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington. (Both Washington and Minnesota's laws were ruled unconstitutional in 2015 and 2016, respectively; although Washington has since passed a new one.) Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws, Reporters Committee for Freedom of the Press*, https://www.rcfp.org/introduction-anti-slapp-guide/. In addition, West Virginia, although lacking an anti-SLAPP statute, provides some protections through court doctrine. Harris v. Atkins, 432 S.E.2d 549 (W.Va. 1993).

at least some anti-SLAPP protections.[12] The primary goal of these laws is to help qualified defendants mitigate the misery and financial stress that comes from simply being sued, even if they could ultimately prevail. Indeed, as originally conceived, anti-SLAPP statutes were intended to ensure that all citizens could be active participants in government, which meant "protect[ing] citizens from David and Goliath power differences."[13] SLAPPs might be without legal merit, but the sheer cost of defending them punishes critics and tends to intimidate others who might otherwise speak out as well.

Anti-SLAPP laws are thus designed to stop the punitive litigation in its tracks, give the defendant a chance to obtain an early dismissal before a lengthy trial process drains their resources, and force plaintiffs to pay costs and reasonable attorney's fees if the defendant prevails. To this end, many of today's statutes offer SLAPP defendants up to five common forms of relief:

(1) a vehicle by which defendants can file an expedited motion to dismiss immediately

(2) a (sometimes automatic) stay of discovery while the motion to dismiss proceeds

(3) a requirement that the plaintiff establish a prima facie case for the action

(4) costs and reasonable attorney's fees (and occasionally potential damages) if defendants prevail in their anti-SLAPP motion

(5) interlocutory appeal if the motion to dismiss is denied

In May 2021, six years after watching its modernized anti-SLAPP law[14] get struck down as unconstitutional,[15] Washington passed a new statute based on a model law produced by the Uniform Law Commission.[16] Noting the growing consensus in state legislatures that "narrow anti-SLAPP laws

12. The exact percentage is 74.18%, based on the 2020 Census population percentages of the 31 states (and District of Columbia) with operational anti-SLAPP laws.

13. Stuborn Ltd. P'ship v. Bernstein, 245 F. Supp. 2d 312, 314 (D. Mass. 2003).

14. *See* Michael Eric Johnston, *A Better Slapp Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation,"* 38 GONZ. L. REV. 263 (2002-2003) (arguing that the new statute, while still lacking two provisions, is a marked improvement over the original).

15. *See* Davis v. Cox, 183 Wash. 2d 269 (Wash. 2015) (ruling that Washington's summary judgment process violated the right of trial by jury under the state's constitution).

16. *See Public Expression Protection Act*, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1.

are ineffectual in curbing the many forms of abusive [anti-SLAPP] litigation," the ULC crafted a model that hews closely to today's most generous anti-SLAPP laws. Washington's new statute, for instance, includes all five remedies for defendants.[17] And definitionally, it permits a broad swath of expression by covering lawsuits based on the "(e)xercise of the right of freedom of speech or of the press . . . on a matter of public concern."[18]

There is, in fact, significant variation in how anti-SLAPP statutes have defined "public concern." Examining the scope of all 32 anti-SLAPP laws, a loose taxonomy emerges:

A. PETITION STATUTES

Eleven anti-SLAPP laws still limit the activity they cover to narrow categories of petitioning,[19] speaking at government proceedings[20] or applying to permits from the government.[21] Pennsylvania's, for instance, can only be used for defendants sued for petitioning related to environmental policies.[22] Nebraska[23] and Delaware[24] (and New York,[25] until last year) have laws that can only be used by individuals sued in the process of applying for permits or entitlements from the state. Not surprisingly, these anti-SLAPP statutes laws don't see much action.

B. PUBLIC CONCERN "LAUNDRY-LIST" STATUTES

Oklahoma, Connecticut, Kansas, Tennessee, the District of Columbia (and Texas,[26] until 2019) have taken the "laundry list" approach to defining what's included in "a matter of public interest." Moreover, they largely include the same five categories. "Public issue or issue of public interest" in Kansas, for instance, "includes an issue related to: (A) health or safety; (B) environmental, economic or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product or service in the marketplace."[27] The only notable variations are Tennessee and Connecticut's

17. WASH. REV. CODE ANN. § 4.105.020-90.

18. WASH. REV. CODE ANN. § 4.105.010(2)(c).

19. *See* ARIZ. REV. STAT. § 12-751 (2020); MASS. GEN. LAWS ANN. ch. 231, § 59H (2020); UTAH CODE ANN. § 78B-6-1403(1) (2019); and ME. REV. STAT. ANN. tit. 14, § 556 (2019).

20. *See* MO. REV. STAT. § 537.528(1) (2020); N.M. STAT. ANN. § 38-2-9.1(A) (2020); HAW. REV. STAT. ANN. § 634F-1 (2020).

21. *See* NEB. REV. STAT. § 25-21,242 (2020); DEL. CODE ANN. tit. 10, § 8136 (2020).

22. 27 PA. STAT. AND CONS. STAT. ANN. §§ 7707, 8301–03 (2020).

23. NEB. REV. STAT. § 25-21,242 (2020).

24. DEL. CODE ANN. tit. 10, § 8136 (2020).

25. Before November 10, 2020, New York's law only covered individuals who had "applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." N.Y. CIV. RIGHTS 76-A § 1(b).

26. TEX. CIV. PRAC. & REM. Code § 27.001 (7) (2011).

27. KAN. STAT. ANN. § 60-5320(c)(7) (2020).

inclusion of public issues related to "an audiovisual work"[28] and Tennessee's final category of "any other matter deemed by a court to involve a matter of public concern."[29] Until 2019, Texas also utilized the laundry-list approach to its anti-SLAPP statute, but as this work will explore, it has since replaced it with something of a hybrid definition.

C. ADDITIVE PUBLIC-CONCERN STATUTES

The second approach to incorporating public concern into anti-SLAPP laws has been to add it onto the petition-era lists defining the statute's scope. The California statute's wording is typical, stating that any "act in furtherance of a person's right of petition or free speech … in connection with a public issue includes:

(1) any written or oral statement or writing made before a legislative, executive or judicial proceeding;

(2) statements made in connection with an issue under consideration by a governmental body;
(3) statements made in a place open to the public or a public forum in connection with an issue of public interest;

(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.[30]

The first two items are typical in older petition statutes. The second two broaden the scope to any expression "in connection with a public issue or an issue of public interest." Twelve states[31] use some variation of this 4-part list that sets up, at least potentially, a fairly broad scope of public concern. Another two have versions that appear more limited.[32]

28. *See* TENN. CODE ANN. § 20-17-103(6)(F) (2020); CONN. GEN. STAT. § 52-196a(1)(E) (2018).

29. TENN. CODE ANN. § 20-17-104(a) (2020).

30. CAL. CIV. PROC. CODE § 425.16(e) (2019).

31. *See* CAL. CIV. PROC. CODE § 425.16(e) (2019); WASH. REV. CODE § 4.105.010(2); OR. REV. STAT. Ann. § 31.150(2) (2018); NEV. REV. STAT. § 41.637; COLO. REV. STAT. § 13-20-1101(2)(a) (2021); IND. CODE § 34-7-7-2 (2021); LA. CODE CIV. PROC. ANN. art. 971(A)(1) (2018); GA. CODE ANN. § 9-11-11.1(c) (2020); VA. CODE ANN. § 8.01-223.2(A) (2020); MD. CODE ANN., CTS. & JUD. PROC. § 5-807(c) (2019); R.I. GEN. LAWS § 9-33-2(e); VT. STAT. ANN. tit. 12, § 1041(a) (2019).

32. Arkansas has retained the first two petition categories, and added "including but not limited to" in front of them. (ARK. CODE ANN. § 16-63-503(1) (2019)). Florida's law defines "free speech in connection with public issues" as "any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made 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." FLA. STAT. ANN. § 768.295(2)(a) (2021).

Although the additive statutes are, at first blush, broader than the laundry-list statutes, the latter do at least provide definitional guidance via categories. The additive statutes, on the other hand, beg the question: what *exactly* constitutes an issue of public concern? Some statutes include additional guidance to construe the statute "broadly" or "reasonably," but ultimately the work of identifying public-concern speech is left to the courts.

III. PUBLIC CONCERN IN CONSTITUTIONAL LAW

One route for states attempting to determine whether an issue is "a matter of public concern" in anti-SLAPP law has been to draw from First Amendment cases in which the U.S. Supreme Court has examined that same question.[33] This section will examine six cases in the Court's "public concern" jurisprudence. Although they come from a variety of areas — defamation, intentional infliction of emotional distress, and the free-speech rights of public employees — all six cases have required the Court to wrestle with whether the speech in question constituted a matter of public concern. Three cases have, together, yielded a definition of public concern and an analytical framework for determining whether something is indeed a matter of public concern that, for better or worse, has found its way into state anti-SLAPP law.

A. THE PROBLEMATIC *PICKERING-CONNICK* TEST

The Court's public-concern jurisprudence was initially formulated, rather messily, in two cases examining the First Amendment rights of public employees. In the first case, Pickering v. Board of Education,[34] school teacher Marvin Pickering argued that his First Amendment rights were violated when the Board of Education fired him for sending a letter to a newspaper that was critical of a bond issue it wanted voters to pass. Justice Marshall, writing for the majority, balked at the notion that public employees would be summarily "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest," but concluded that it was still necessary to balance "the conflicting claims of First Amendment protection and the need for orderly school administration."[35] Justice Marshall's balancing analysis examined the strength of each side, and was itself an explication of private and public spheres. The state's argument was weakened, he wrote, because the School Board produced no evidence that Pickering's letter caused any workplace

33. As a *Harvard Law Review* commentary put it: "The Supreme Court has held repeatedly that the First Amendment protects an individual's ability to speak on matters of public import, even if the speech is profoundly controversial and hurtful. In contrast, speech on matters of purely private concern receives considerably less First Amendment protection." Leading Cases, 125 HARV. L. REV. 192, 192 (2011).

34. 391 U.S. 563, 564-66 (1968).

35. *Id*. at 569.

(private sphere) disorder. Indeed, the letter never alluded to any individuals that he worked with directly, and thus posed little threat of disrupting operations at his own school. Moreover, Pickering's letter, addressing the question of whether the school system required additional funds (public sphere), was precisely the type of issue on which citizens — *especially* teachers — should speak out. "On such a question," Marshall declared, "free and open debate is vital to informed decision-making by the electorate."[36]

In Connick v. Myers,[37] however, the Court, in a 5-4 decision, arrived at the opposite conclusion. Here, the Court considered the firing of a New Orleans assistant prosecutor after she resisted a job transfer, citing a conflict of interest,[38] then circulated a questionnaire to other employees about office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work on political campaigns supported by the DA's office.[39] Citing *Pickering*, Justice White, writing for the majority, reasoned that Sheila Myers' speech could only be protected under the First Amendment if it was "a matter of legitimate public concern."[40] Reversing both the District and Circuit court rulings, the Court determined that it was not.

In *Connick*, Justice White penned what would come to be used as a definition of public concern: expression that can "be fairly considered as relating to any matter of political, social, or other concern to the community."[41] He also announced a three-factor test, stating that the question of public concern "must be determined by the content, form, and context of a given statement."[42] He then proceeded to embark on a lengthy and abstruse analysis. In Myers' case, he concluded, all but one of the topics (the "content") in her questionnaire consisted of questions that did "not fall under the rubric of public concern."[43] In terms of "context," Justice White concluded that Myers' questionnaire, was not circulated "out of purely academic interest, … so as to obtain useful information"[44] and, not coincidentally, took place after she resisted her transfer, suggesting it was inspired by a private grievance.

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36. *Id*. at 571-572 (1968)

37. 461 U.S. 138, 139 (1983).

38. "Myers' opposition was at least partially attributable to her concern that a conflict of interest would have been created by the transfer because of her participation in a counseling program for convicted defendants released on probation in the section of the criminal court to which she was to be assigned." *Id.* at 140 n.1.

39. *Id.* at 141.

40. *Id.* at 145 (quoting Pickering, 391 U.S. at 571-572).

41. *Id*. at 146. The full quote is: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."

42. *Id.* at 147-148.

43. *Id.* at 148.

44. *Id*. at 153.

One problematic factor in White's trio — "form," framed here as "the manner, time, and place in which the questionnaire was distributed"[45] — was murky in both its application and significance. Here, Justice White reported that the questionnaire was prepared and distributed at the workplace, and required not only Myers "to leave her work, but for others to do the same in order that the questionnaire be completed."[46] Logically, how "form" evokes this particular detail is certainly not intuitive.[47] And Justice White's analysis was even more mystifying. The Court concluded that the time employees spent answering the questionnaires "supports Connick's fears that the functioning of his office was endangered."[48] The assertion that 14 assistant prosecutors, setting aside work for what was likely 15-30 minutes, "endangered the functioning of [the DA's] office," is dubious at best.

Justice Brennan's dissent challenged the three-factor test overall, as well as the Court's analysis of the questionnaire's content. First, Justice Brennan cited the strange disconnect between the Court's elaborate three-factor analysis and Justice White's comment, while distinguishing *Connick* from another case, that it was "clear" a school district's racially discriminatory policies were a matter of public concern — suggesting that perhaps a three-factor analysis was only *sometimes* necessary.[49] The dissenters also took issue with the majority's conclusion that efficiency and morale in an elected DA's office was not a matter of public concern. This assertion wasn't supported by the facts: Internal operations of that DA's office "often receive[d] extensive coverage in New Orleans' daily paper. In fact, as soon as the district court took up the case, the newspaper carried a seven-paragraph story describing the questionnaire and the events leading to Myers' dismissal; and it continued its coverage as the case made its way to the Supreme Court.[50]

Ultimately, if *Connick* illustrates anything, it is that White's 'content, form, context' framework has questionable utility as a meaningful or predictive analytical tool. Two lower courts, relying on *Pickering*, had arrived at a wholly different conclusion. So did four of the nine Supreme Court justices, including Justice Brennan, who wrote the dissenting opinion, and Justice Marshall, who wrote the *Pickering* opinion that *Connick* was ostensibly following.

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45. *Id*. at 152.

46. *Id*. at 153. Presumably, Justice White meant that Myers and her colleagues had to briefly stop what they were doing to fill out the questionnaire.

47. The *purpose* of the "form" inquiry is indeed mystifying. Neither *Connick* nor *Snyder* used the term itself, or subheadings, to clarify its presence in the analysis. Even experts in First Amendment jurisprudence have had to guess at a functional use of the term. *See* Calvert, *supra* note 7, at 58 (suggesting that it could be alluding to the type of media used by the speaker).

48. *Connick*, 461 U.S. at 153.

49. *Id.* at 159. The case White was distinguishing was Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979).

50. *Id.* at 160 n.2.

B. "PUBLIC CONCERN" IN DEFAMATION LAW: PLURALITY CHAOS

In New York Times Co. v. Sullivan,[51] The Supreme Court evoked public concern a number of times in its opinion, including Justice Brennan's famous declaration of the Sullivan standard's ultimate goal: that "debate *on public issues* should be uninhibited, robust, and wide-open."[52] But the *Sullivan* actual-malice standard itself focused on the identity of the plaintiff rather than the content of the alleged defamation. Initially targeting public officials, it was then expanded to include public figures, who command "sufficient continuing public interest" and have "sufficient access to the means of counterargument" that private individuals do not.[53]

Then, in 1971's Rosenbloom v. Metromedia, Inc,[54] a plurality of the Court extended the *Sullivan* standard to private-figure plaintiffs when the speech in question involved matters of public import. Here, a Philadelphia radio station, covering a city-wide crackdown on "smut merchants," reported the arrest of George Rosenbloom after police raided several properties and found "allegedly obscene books" as well as "obscene books" — failing, in short, to consistently include the qualifiers "reportedly" or "allegedly." *Sullivan's* architect, Justice Brennan, revisiting his great work, argued that limiting *Sullivan* to a class of plaintiffs had ultimately missed the mark. "It is clear," he wrote in *Rosenbloom*, that "the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest." With this insight, the Court would now extend constitutional protection "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[55]

Rosenbloom marked a dramatic expansion of free-expression rights — but it was short-lived. Just three years later, the Court rejected the doctrine in Gertz v Robert Welch, Inc.,[56] further delineating the "public" and "private" categories of libel plaintiffs and limiting — again — the actual malice requirement to the former.[57]

As a separate matter, Justice Powell, writing for the *Gertz* Court also limited the state's ability to award presumed and punitive damages unless the defamation plaintiff could prove actual malice.[58] Nine years later, in Dun

51. 376 U.S. 254, 254 (1964).

52. *Id*. at 270 (emphasis added).

53. Curtis Publishing v. Butts, 388 U.S. 130, 155 (1967).

54. 403 U.S. 29, 54 (1971).

55. *Id.* at 43-44. Interestingly, Justice Marshall dissented in *Rosenbloom* and offered an early warning of the ambiguity inherent in the public concern standard. *Id.* at 79 (Marshall, J., dissenting).

56. 418 U.S. 323 (1974).

57. *Id.* at 345-348.

58. *Id.* at 348-350.

& Bradstreet, Inc. v. Greenmoss Builders, Inc., the Court continued its defamation revisions by reaching for the public concern standard yet again — this time to adjust its *Gertz* damages rule.[59] In this case, a credit agency, Dun & Bradstreet, erroneously claimed that Greenmoss Builders had filed for bankruptcy in a report sent to five subscribers, including Greenmoss' bank. Although the credit agency issued a corrective notice a week later, Greenmoss sued for defamation, and was awarded presumptive and punitive damages even though there was no showing of actual malice.

Justice Powell, who had spent a dozen pages in the *Gertz* opinion bemoaning the lack of consensus in *Rosenbloom,* was now writing for a plurality of three as he revived the public concern factor for use in defamation damages.[60] Although *Gertz* had created a prohibition on presumptive and punitive damages *sans* a showing of actual malice, Justice Powell claimed that prohibition had been limited to cases in which the alleged defamation pertained to a matter of public concern.[61] Now the Court had to determine whether the credit report in *Dun & Bradstreet* qualified for that status.[62]

One of Justice Powell's chief objections to *Rosenbloom* was the "unpredictable results and uncertain expectations" that would accompany a case-by-case analysis of the public concern issue.[63] Supervising ad hoc resolutions across the nation's courts was indeed "not feasible."[64] It was perhaps with great reluctance, then, that he plucked the "content, form and context" inquiry from *Connick v. Snyder* to be used for this and future lower-court decisions. Indeed, Justice Powell made short work of the public concern issue, dutifully citing *Connick*'s three-factor test, then simply holding that "these factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience."[65] He further noted that Dun & Bradstreet's subscription agreement required that the information remain confidential with its subscribers, thus limiting the reach of any information contained in the reports. The Court thus concluded that the case in no way implicated the

59. 472 U.S. 749 (1985).

60. Justice Powell was joined by Justice Rehnquist and Justice O'Connor. Justice Brennan again dissented, joined by the other *Connick* dissenters: Justice Marshall, Justice Blackmun, and Justice Stevens.

61. 472 U.S. 749, 51 (1985). "In *Gertz v. Robert Welch, Inc.*," Powell wrote, "we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern."

62. *Id.*

63. Gertz v. Welch, 418 U.S. 323, 343 (1974).

64. *Id.*

65. 472 U.S. at 762. Justice Powel cited Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 561 (1980); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-772 (1976), presumably to indicate that the credit report constituted commercial speech.

Sullivan First Amendment concern for "uninhibited, robust, and wide-open" debate on public matters and thus did not require states to impose an elevated fault standard.[66]

C. THE *CONNICK-SNYDER* "SYNTHESIS"

Twenty-five years later, in Snyder v. Phelps,[67] the Court reached back to *Connick's* public-concern framework to determine whether the leader of the Westboro Baptist Church could claim First Amendment protection for organizing a protest with hate-spewing slogans near the funeral of Marine Lance Corporal Matthew Snyder, a soldier killed in the Iraq war. Armed with protest placards expressing anti-Catholic and homophobic spite ('Thank God for IEDs,' Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boy,' 'God Hates Fags,' 'You're Going to Hell' and 'God Hates You'), Fred Phelps, Sr. and his church made a regular practice of picketing military funerals. Their placards reflected the church's bizarre theology of a "militant homosexual movement" exposing America to the wrath of God and bringing the nation closer each day to the ignominious fate of Sodom and Gomorrah.[68] After the funeral, Matthew Snyder's father, Albert Snyder, sued Phelps and the church for intentional infliction of emotional distress.[69] At trial, the jury awarded Snyder $2.9 million in compensatory damages and $8 million in punitive damages. The Fourth Circuit reversed.[70]

The Supreme Court had considered the infliction of emotional distress tort once before, in Hustler Magazine, Inc. v. Falwell.[71] There, the Court had focused on the "public figure" status of televangelist Jerry Falwell, declaring that such plaintiffs should face the same actual-malice standard they did in bringing defamation claims.[72] In *Snyder*, however, the Court largely ignored this dimension, declining to either explicitly embrace or reject *Falwell*. Instead, it focused on analyzing whether or not the Westboro speech addressed a matter of public concern — which the Court, without citation, now assumed as the boundary of protected speech vis-à-vis the infliction tort.[73] In *Falwell*, the public figure finding led to a further actual malice requirement for the plaintiff; *Snyder*, on the other hand, simply declared, *ipse dixit*, that the analysis was over once public-concern speech is identified — there was no heightened fault burden for the plaintiff, no application of First

66. 376 U.S. 254, 270 (1964).

67. 562 U.S. 443 (2010).

68. *About Us*, WESTBORO BAPTIST CHURCH, http://www.godhatesfags.com/wbcinfo/aboutwbc.html.

69. 562 U.S. at 450.

70. Snyder v. Phelps, 580 F.3d. 206, 206 (4th Cir. 2009).

71. 485 U.S. 46, 46 (1988).

72. *Id.* at 56.

73. As the *Snyder* Court put it, "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest." 562 U.S. 443, 452 (2010).

Amendment scrutiny (strict or otherwise), nor any other of the standard impedimenta of the Court's free speech toolkit.

At the outset of his public concern analysis, Chief Justice Roberts, writing for the Court, candidly admitted that "the boundaries of the public concern test are not well defined."[74] Attempting to further clarify that test, he expanded *Connick*'s definition: "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social or other concern to the community,' *or when it 'is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public*.'"[75] Roberts contrasted such matters of public import with the facts of *Dun & Bradstreet*.

Next, the Chief Justice attempted to administer the three-factor *Connick* analysis: In terms of *content*, the church's signs clearly addressed a matter of public concern. Even if the messages fell short of "refined social or political commentary," Roberts wrote, "the issues they highlight — the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy — are matters of public import." For the "form," Justice Roberts, clearly caged in by *Connick*'s superfluous edifice, addressed the "context" of Westboro's expression, noting that Wesboro's protest was designed "to reach as broad a public audience as possible." Albert Snyder had attempted to persuade the Court that picketing *at his son's funeral* converted the speech from public to private, but the Court disagreed, noting that even if several signs could be interpreted as addressed specifically to the Snyder family ("You're Going to Hell"), "the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."[76]

Although eight justices were convinced the Westboro signs conveyed speech on matters of public concern and should thus be protected, Justice Samuel Alito's dissent challenged that notion. Justice Alito argued that the Westboro signs expressed a mixture of both broader societal concerns and vicious personal attacks on the Snyder family.[77] The dissent rejected the "overall thrust and dominant theme" approach of the majority, which immunized the entirety of the church's speech because parts of it were addressed to public issues. Analogizing the case to libel, Alito pointed out that "the First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Snyder and his family should be treated differently."[78] This is of course a

74. 562 U.S. at 452 (emphasis added) (quoting San Diego v. Roe, 543 U.S. 77, 83 (2004)).

75. *Id*. at 453 (quoting 543 U.S. at 84).

76. *Id.*

77. *Id.* at 471 (Alito, J., dissenting). The personal nature of the attacks was further demonstrated by an online post (the "epic") made by the church, which the Court did not consider in this case. *Id*. at 470.

78. *Id.* at 471 (Alito, J., dissenting).

valid point — where actionable speech is presented alongside nonactionable speech, the latter shouldn't necessarily immunize the former. At the very least, this juxtaposition issue may call on future courts to unpack more fully the merits of lumping versus splitting speech in the public concern analysis.

As even the *Snyder* majority acknowledged, delimiting the public concern concept is challenging. The majority's largely tautological definition of public-concern speech certainly raises questions. Moreover, its insistence on *Connick*'s fact-intensive — yet murky — three-factor framework adds significant legal uncertainty for future speakers.[79] This brand of essentially ad hoc, case-specific analysis can create an unpredictable free speech environment. As one commentator put it, "these principles do little more than restate the proposition that the First Amendment protects speech regarding a matter of public concern, and they will likely provide little guidance, especially in close cases."[80]

IV. CLASH OF THE TITANS: CALIFORNIA, NEW YORK, AND TEXAS CHART NEW PATHS

In the last three years, California, New York, and Texas — three of the largest states in population — have significantly adjusted their approaches to the public/private question in their respective anti-SLAPP laws: California by court decision, and New York and Texas through legislative amendment. This potential sea change has profound implications for the availability of anti-SLAPP relief both in these states and in other states influenced by their anti-SLAPP jurisprudence.

California, long known for its defendant-friendly interpretation of public matters, began reining in that approach in cases decided by the state's high court in 2019. Texas, on the other hand, amended its statute in 2019 in a manner that appears to have both narrowed, and in some ways, expanded the reach of its anti-SLAPP law. On the other hand, New York, long known for an extremely limited anti-SLAPP statute, produced an amended law in 2020 that dramatically expanded its coverage. This section will examine each state's approach to the public concern issue and explore its effects on the availability of anti-SLAPP relief for defendants.

A. CALIFORNIA: THE "CATCHALL PROVISION"

As discussed above, California's anti-SLAPP statute — like those of 11 other states — covers the two classic "petition" activities, then adds expression (3) "made in a place open to the public or a public forum in

79. Clay Calvert & Matthew D. Bunker, *Know Your Audience: Risky Speech at the Intersection of Meaning and Value in First Amendment Jurisprudence*, 35 LOY. L.A. ENT. L. REV. 141, 178-182 (2014/2015).

80. Andrew Meerkins, Note, *Distressing Speech After Snyder — What's Left of IIED?*, 107 NW. U. L. REV. 999, 1023 (2013).

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. [81] This final subsection has been referred to as the "catchall provision."

The "public interest" requirement was for many years interpreted with great liberality. Although there was some variation among California courts, many were willing expand the concept to its seeming limit.[82] In one well-known ruling, a dispute among cat breeders "concerned matters of public interest in the cat breeding community."[83] Also labeled a matter of public interest was a dispute between PTA members and a 4th grade basketball coach over his abrasive coaching style.[84] Other California courts, however, have employed a less relaxed approach to the public interest question. For example, in Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO,[85] a state appellate court found that criticism regarding a custodial staff's supervisor was "hardly a matter of public interest," even though it was part of a labor dispute.[86] The *Rivero* court surveyed the existing California case law and offered three indicia of matters of public concern: statements that 1) "concerned a person or entity in the public eye," 2) "conduct that could directly affect a large number of people beyond the direct participants," or 3) "a topic of widespread, public interest."[87] The *Rivero* summary, while a helpful taxonomy, hardly captured a monolithic reality in California — as noted, other appellate courts sought to construe the statute as broadly as possible. As one court put it, "the issue need not be significant to be protected by the anti-SLAPP statute." It was simply "one in which the public takes an interest."[88] Indeed, the *Rivero* court acknowledged the view that, as with Justice Potter Stewart and obscenity,[89] "some observers have said that a 'public concern' test amounts to little more than a message to judges and attorneys that no standards are necessary because they will, or

81. CAL. CODE CIV. PROC. CODE § 425.16 (e).

82. For an excellent overview of the varying standards applied by California courts, *see* Felix Shafir & Jeremey Rosen, *What is 'Public Interest' Under California Anti-SLAPP Law?*, LAW360 (Dec. 1, 2016, 5:35 PM), https://www.law360.com/articles/868201.

83. Traditional Cat Ass'n , Inc. v. Gilbreath, 13 Cal. App. 392, 397 (2004). *See also*, Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 801 (2002) (holding that discussion of plaintiff's participation in television program "Who Wants to Marry a Multimillionaire" is a matter of public interest). *But see* Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1127 (2003) (ruling that allegations of theft of token among small group of token collectors was not a matter of public concern, but rather a matter of concern to a small, specific audience).

84. Hecimovich v. Encinal School Parent Teacher Organization, 203 Cal. App. 4th 450 (2012).

85. 105 Cal. App. 4th 913 (2003).

86. Shafir & Rosen, *supra* note 82 (quoting Rivero, 105 Cal. App. 4th at 924-925).

87. Rivero, 105 Cal. App. 4th at 924.

88. Nygard, Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027, 1039-42 (2008). *See also*, other cases cited in Shafir & Rosen, *supra* note 82..

89. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

should, know a public concern when they see it."[90] It was amidst this doctrinal disarray that the California Supreme Court finally decided to act.

In 2019, the California Supreme Court, in FilmOn.Com, Inc. v. DoubleVerify, Inc.,[91] sought to bring increased clarity and rigor to the public interest question.[92] The case began when FilmOn.com ("FilmOn"), an online content distributor, sued DoubleVerify, a company providing confidential "online tracking, verification, and 'brand safety' services to Internet advertisers."[93] DoubleVerify had labeled some of FilmOn's websites as containing "Adult Content" or "Copyright Infringement," which would presumably make FilmOn's websites less attractive to advertisers.[94] DoubleVerify filed a motion to strike under California's anti-SLAPP law, asserting that its report was a matter of public interest under the catchall provision. The trial court granted the motion, and a state appellate court affirmed.[95]

In explicating the proper scope of matters of public interest under the statute, the California Supreme Court reversed and held that DoubleVerify's report was not in fact issued to further free speech about a matter of public interest.[96] As the high court put it, "we find that DoubleVerify's reports – generated for profit, exchanged confidentially without being part of any attempt to participate in a larger public discussion – do not quality for anti-SLAPP protection under the catchall provision, even where the topic discussed is, broadly speaking, one of public interest."[97] In concluding that DoubleVerify was ineligible for anti-SLAPP protection, the court outlined a two-step analysis that first examines the *content* of the speech in question and whether it sufficiently implicates a matter of public interest. Next, the analysis explored the *context* of the speech to determine "what functional relationship exists between the speech and the public conversation about

90. FilmOn.Com, Inc. v. DoubleVerify Inc., 105 Cal. App. 4th 133, 929 (2019) (citations omitted).

91. 7 Cal. 5th 133 (2019). Two other contemporaneous California Supreme Court opinions emphasize similar themes: Rand Resources, LLC v. City of Carson, 6 Cal. 5th 610 (2019) (contract dispute over exclusive representation in building of NFL stadium did not sufficiently connect to broader public issue of whether to have NFL team and build the stadium in California city) and Wilson v. Cable News Network, Inc., 7 Cal. 5th 871 (2019) (potentially defamatory statements by news organization about terminating journalist for alleged plagiarism were too tangentially related to broader public issues inherent in the news story itself or to societal concerns about journalistic ethics).

92. Although *FilmOn* explicitly addressed only the "catchall provision" of California's anti-SLAPP statute, its analysis of matters of public interest will doubtless be extended, *mutatis mutandis*, to clause 3 as well.

93. 7 Cal. 5th at 140.

94. *Id*. at 142. FilmOn's lawsuit alleged trade libel, tortious interference with contract, and related torts.

95. *Id*. at 142.

96. *Id.* at 154-55.

97. *Id.* at 140.

some matter of public interest."[98] This "content and context" approach certainly has echoes of the "content, form, and context" analysis advocated by the U.S. Supreme Court in *Snyder* and related cases, although the California high court did not cite that case (or any of the Court's opinions) on the public interest determination.

The second part of the analysis — the contextual inquiry — proved fatal to DoubleVerify's anti-SLAPP defense. The *content* of DoubleVerify's reports — dealing with adult content online and potential copyright infringement — might in the abstract ostensibly relate to matters of public, rather than private, interest, the court stated. However, it was not sufficient that the statements could be loosely linked to abstract matters of public interest. Instead, "the statement must in some manner itself contribute to the public debate."[99] DoubleVerify's statements, the court held, did not do that.

Although the court left open the precise methodology for determining whether a statement contributes to general discussion of a matter of public interest, it noted that California courts must focus on "'the specific nature of the speech' rather than on any 'generalities that might be abstracted from it.' Defendants cannot merely offer a 'synecdoche theory' of public interest, defining their narrow dispute by its slight reference to the broader public issue."[100]

FilmOn seems to be having an impact on California public interest jurisprudence.[101] For example, in *Woodhill Ventures v. Yang*,[102] decided in 2021, a California court of appeal relied in part on *FilmOn* to reject an anti-SLAPP motion by the defendant, described by the court as "self-proclaimed celebrity jeweler Ben 'the Baller' Yang."[103] Yang used his significant social media following to attack Big Sugar Bakeshop after the bakery made a birthday cake for Yang's seven-year-old son that included edible frosting designed to look like medications. The bakery claimed it did not know the cake was for a child. Yang's outraged Instagram posts in the wake of this decoration debacle included declarations like "Welp @bigsugarbakeshop you fucked up royally and now you guys are legit cancelled," and "Anyone

98. *Id.* at 149-150. As the California Supreme Court noted, "the travails of the lower courts demonstrate that virtually always, defendants succeed in drawing a line – however tenuous – connecting their speech to an abstract issue of public interest." *Id.* at 150.

99. *Id.*

100. *Id*. at 152 (quoting Commonwealth Energy Corp. v. Investor Data Exchange, Inc., 110 Cal. App. 4th 26, 34 (2003)).

101. In addition to cases discussed in the text, *see, e.g.*, Murray v. Tran, 55 Cal. App. 5th 10 (2020) (thoroughly analyzing alleged defamatory statements about dentist by another dentist using *FilmOn* analysis and citing and analyzing other post-*FilmOn* decisions, ultimately concluding that most of the statements did not qualify as matters of public concern); Bernstein v. LaBeouf, 43 Cal. App. 5th 15 (2019) (holding that the fact that the speaker, celebrity Shia LaBeouf, was himself a public figure did not convert otherwise private dispute into matter of public concern under anti-SLAPP statute).

102. Woodhill Ventures v. Yang, 68 Cal. App. 5th 624, 626 (2021).

103. *Id*. at 628.

in their even high mind would know that you should NEVER PUT DRUGS ON A 7 year old kids [sic] bday cake!"[104] Yang also attacked the bakery on Twitter and in a podcast.

When Big Sugar sued for libel and related claims, Yang moved to strike under the anti-SLAPP statute. The trial court denied the motion, finding that the statements in question did not address a matter of public interest. A state appellate court upheld that determination. Among other arguments, Yang contended that his statements implicated a matter of public interest since the CDC and American Academy of Pediatrics had warned about the dangers of "'candy confusion,' or children mistakenly eating pills they believe are candy."[105] The court of appeals was unimpressed with the conflation of Yang's posts and the candy confusion issue. As the court put it: "Agile thinkers can always create some kind of link between a statement and an issue of public concern. All you need is a fondness for abstraction and a knowledge of popular culture."[106] The court explicitly cited *FilmOn* for the proposition that such a "tangential relationship is not enough."[107]

Another recent California case relying on *FilmOn* also demonstrates the power of that decision in constraining the scope of California's statute. *Block v. Bramzon*[108] addressed a dispute between rival law firms that took the opposite sides in eviction cases in Los Angeles. Dennis P. Block, a lawyer who represented landlords, sued BASTA, a law firm that defends tenants in such cases, for defamation after BASTA created a Twitter parody account called "Not Dennis Block" that tweeted statements ostensibly *made* by Block, but which actually attacked Block and employees of his firm. Among other things, the tweets suggested Block was "a greedy thief and criminal, unethical and immoral, racist, sexist, … unfaithful and promiscuous."[109] At trial, the judge found that the tweets fell within the scope of the anti-SLAPP law since they "involved 'a consumer watchdog type of situation.'"[110]

However, the court of appeals, following *FilmOn*, reversed, in an unpublished opinion. BASTA, on appeal, had argued that Dennis Block had made himself a public issue by conceding he was "'a person in the public eye' and 'generally regarded as one of the pre-eminent attorneys handling landlord-tenant matters.'"[111] Even if that were true, the court noted, the

104. *Id.*

105. *Id*. at 632.

106. *Id*. (citation omitted).

107. *Id.*

108. Block v. Bramazon, 2021 WL 223154, at *1 (Cal. Ct. App. Jan. 22, 2021).

109. *Id*. at *2. In an appendix to its opinion, the court included 92 tweets from the Not Dennis Block account.

110. *Id.*

111. *Id*. at *4. BASTA also argued that Block had been profiled on the front page of the Los Angeles Times some ten years before. The court of appeals expressed skepticism about whether the decade-old newspaper profile or Block's other activities (which the court characterized as "marketing activities [that]

speech in question would still have to meet the public issue requirement. In its analysis, the court explicitly followed the analytical framework created in *FilmOn*. As to whether the defendant's Twitter statements about Block (the "content") implicated a public issue, the court conceded that "the public is definitely interested in critical issues related to housing, including the shortage of affordable housing, gentrification, rising rents, and rent control."[112] The court, however, found that BASTA's tweets didn't directly reference these topics. They simply attributed various outrageous statements to Block.[113] This kind of mock assertion, the court found, was too tangentially related to any genuine issue of public interest. Rather than, for example, assisting consumers in identifying trustworthy legal representation, the statements by BASTA were merely insulting. The court pointed out that "hold[ing] otherwise would turn every insult of a businessperson into a 'consumer protection' matter subject to anti-SLAPP protection."[114]

In the contextual part of the *FilmOn* analysis, the court ruled that even if the defendants had been able to identify a public issue in the first part of the analysis, the Twitter statements wouldn't have contributed to public debate about that issue. The court suggested that rather than advancing public debate of any sort, the Twitter account was solely used to "slam Block – BASTA's frequent adversary."[115] The defendants argued the account was a parody that no reasonable person would have taken literally, but the court seemed to suggest *that very fact* meant it therefore couldn't meaningfully contribute to public debate on "Block's 'trustworthiness,' the housing crisis, or any other plausible public issue."[116] Disturbingly, this analysis appears to suggest that parody and rhetorical hyperbole cannot have a serious role in galvanizing public debate, although the court's finding that there was no public issue in the "content" portion of its analysis seems to render this portion of the opinion somewhat superfluous. The court also rejected BASTA's contention that republishing negative online reviews of Block contributed to consumer information about him and his firm. As the court put it: "Sprinkling in some negative Yelp reviews cannot insulate unrelated actionable statements. This is not the purpose of the anti-SLAPP statute."[117]

The California high court's tightening of the nexus between specific statements and matters of public interest in *FilmOn* appears to be having an impact. While the statutory language has not been changed, its interpretation

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are not that uncommon among attorneys"), necessarily rendered him a person in the public eye for anti-SLAPP purposes (seemingly a synonym for the "public figure" category in defamation law). *Id.*

112. *Id.* at *5.

113. *Id.* One of the tweets, for example, stated that "Dennis Block and Associates is helping to #MAGA [Make America Great Again] by evicting one latino at a time." *Id.*

114. *Id.* at *6.

115. *Id.*

116. *Id.*

117. *Id.*

by California courts certainly appears to have been altered from the statute's free-wheeling past.

B. TEXAS: "A SUBJECT OF CONCERN TO THE PUBLIC"

While *FilmOn* and related cases clearly heralded a heightened standard for matters of public interest in California, Texas's revision of its anti-SLAPP law was a less obvious recasting. Certainly there was no question that the Texas Legislature sought in its 2019 amendments to rein in its anti-SLAPP law. Many argued that state's original statute — the Texas Citizens Participation Act (TCPA) of 2011 — had wreaked havoc in the state's courts, "clogging the dockets of trial and appellate courts with expensive, complicated, and time-consuming litigation."[118] Indeed, "at one point in 2018, roughly 40 percent of the entire docket in the Dallas Court of Appeals consisted of TCPA cases."[119] Nevertheless, the newly amended Texas statute also expanded the law by creating at least one category of cases involving the media in which there is, astonishingly, no public interest requirement at all.

Prior to the revision, the 2011 TCPA was a laundry-list statute, categorizing matters of public concern exactly as Oklahoma, Kansas, and the District of Columbia have: "(A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace."[120] Moreover, the Texas Supreme Court had held that the 2011 TCPA was to be interpreted broadly, and that even a tangential relationship between the communication and the public concern categories was enough to trigger the statute's protection.

For example, in 2015's ExxonMobil Pipeline Company v. Coleman[121] the Texas high court considered a defamation suit by Travis Coleman, a former employee of ExxonMobil, who claimed the company had fired him after falsely claiming he hadn't properly reported fluid levels in tanks that contained potentially dangerous petroleum products. The allegations against Coleman were made on several report forms shared within the business, and in statements to an internal investigator. A lower court had ruled the anti-SLAPP statute didn't apply, as the statements about Coleman "had only a tangential relationship to health, safety, environmental, and economic concerns" (all included in the 2011 statute's "laundry list") and were strictly about a personnel matter within the company.[122] The Texas Supreme Court

118. Mark C. Walker, The Essential Guide to the Texas Anti-SLAPP Law, the Texas Defamation Mitigation Act, and Rule 91A, State Bar of Texas 36th Annual Litigation Update Institute at 1 (2020).

119. *Id.*

120. TEX. CIV. PRAC. & REM. CODE § 27.001 (7) (2011).

121. 512 S.W.3d 895 (Tex. 2017).

122. ExxonMobil Pipeline Co. v. Coleman, 464 S.W.3d 841 (Tex. 2015).

rejected this interpretation, instead concluding that "the statements, although private and among EMPCo employees, related to a 'matter of public concern' because they concerned Coleman's alleged failure to gauge tank 7840, a process completed, at least in part, to reduce the potential environmental, health, safety, and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground."[123] The state high court's interpretation of the prior statute was thus a breathtakingly broad one that, as it noted, "does not require that the statements specifically 'mention' health, safety, environmental, or economic concerns, nor does it require more than a 'tangential relationship' to the same…."[124]

The 2019 Texas revision replaced the statute's laundry list with a wholly unique "matter of public concern" definition, which includes statements or activities regarding:

> (A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;
>
> (B) a matter of political, social, or other interest to the community; or
>
> (C) subject of concern to the public.[125]

The first category — speech about a public official or public figure — is the only survivor from the statute's 2011 laundry list, and has been augmented with an "other person" category, perhaps meant to broaden the scope of what constitutes a public figure beyond the *Gertz* constitutional definition. The second and third categories are borrowed from Chief Justice Roberts' *Connick/Snyder* formulation,[126] and their aim is to narrow the scope of the statute and implement what one scholarly analysis called "the most significant amendment made by the 2019 TCPA legislation."[127] However, what exactly the language means (and whether the Texas statute's standards are largely coextensive with First Amendment concepts) is unclear. One Texas commentator with significant expertise in the TCPA gave voice to the uncertainly created by the legislature's importation of *Connick/Snyder* as follows: "What on earth is 'a subject of concern to the public?'"[128]

123. 512 S.W.3d at 901.

124. *Id.* at 900. For another extremely broad decision under the prior statute, *see* Lippincott v. Whisenhunt, 462 S.W.3d 507 (Tex. 2015) (private emails sent within medical facility questioning practices and behavior of nurse anesthetist were made in connection with a matter of public concern).

125. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(A)–(C).

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

127. Amy Bresnen, Lisa Kaufman & Steve Bresnen, *Targeting the Texas Citizen Participation Act: The 2019 Texas Legislature's Amendments to a Most Consequential Law*, 52 ST. MARY'S L.J. 1, 27 (2020).

128. Walker, *supra* note 118, at 18.

There are, as yet, relatively few Texas cases applying the new statute — most appellate cases reported at this writing were filed before the amendments went into effect and thus apply the old statute. Thus far, it appears that the new "matter of public concern" definition has prompted courts to be more attuned to the public nature of the speech. For example, in Chesser v. Aucoin,[129] a Texas court of appeals considered an anti-SLAPP motion in a case involving a loan to help launch a cybersecurity business. Although the movant argued that cybersecurity was a matter of public concern, the court disagreed, saying the trial court had properly dismissed the TCPA motion. In its analysis, the appeals court specifically cited the 2019 amendments, reasoning that "the current definition of 'matter of public concern' emphasizes the term's public component…."[130] The court ultimately concluded that the cybersecurity transaction was a purely private matter.[131]

Notably, the new Texas statute departs significantly from the customary public concern requirement when it comes to the media. It contains a number of explicit exemptions —situations in which the statute is simply *not operative* — such as attorney disciplinary proceedings and common law fraud actions. Notwithstanding these exemptions, the Texas Legislature gave the media an "exemption from the exemptions" that applies not just to journalistic works, but to films, literary works and a variety of other expressive works, as well as to consumer reviews.[132] These items are protected "whether public or private," which is, of course, a dramatic departure from the anti-SLAPP canon. The media exemption allows many, if not all, media defendants to avoid the minefield of the public/private

129. 2020 WL 7391711, at *1 (Tex. Ct. App. Dec. 17, 2020).

130. *Id.* at *4.

131. *Id. See also, e.g.*, Yu v. Koo, 2021 WL 4166727 (Tex. Ct. App. Sept. 14, 2021) (in case involving defamation by ex-employee after employee reported sexual assault by employer, court found statements regarding commission of crimes is clearly within amended TCPA's public concern definition; however, statements about wrongful termination of employee, which would have been covered by previous version of TCPA, no longer are. *Id.* at *5.).

132. (b) Notwithstanding Subsections (a)(2), (7), and (12), this chapter applies to:

(1) a legal action against a person arising from any act of that person, *whether public or private*, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; and

(2) a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.132.

TEX. CIV. PRAC. & REM. CODE ANN. § 27.010 (emphasis added).

distinction — an invaluable statutory gift for such defendants.[133] As TCPA expert Mark C. Walker put it, the exemption seems to provide "the strongest, most explicit media protections in the United States."[134]

C. NEW YORK: "AN ISSUE OF PUBLIC INTEREST"

It is something of a mystery how the world's media capital[135] took so long to pass a strong anti-SLAPP law, but New York finally did so on November 10, 2020. Earlier that year, when the state legislature passed the bill, its sponsor, Senator Brad Hoylman, dropped two names that may very well have energized the push for a new law: "For decades," Hoylman tweeted, "powerful men like Donald Trump & Harvey Weinstein have abused our justice system to silence, intimidate, and impoverish their critics with frivolous lawsuits known as SLAPPs. Today New York slaps back."[136]

New York did, of course, have an anti-SLAPP law for more than 25 years, but it applied only to petitioning situations involving public permits, zoning matters, and the like. To expand its old petition-based statute, New York left alone the original "action involving public petition and participation"[137] language, but gave it a completely new two-part definition, encompassing:

> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or [138]
>
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.[139]

And to ensure that one of the most notoriously narrow anti-SLAPP laws became one of the broadest, the statute instructs courts to construe "public interest" broadly to mean "any subject other than a purely private matter."[140] Moreover, the amended statute requires that all plaintiffs whose suits fall

133. *See* Laura Lee Prather & Robert T. Sherwin, *The Changing Landscape of the Texas Citizens Participation Act*, 52 TEX. TECH. L. REV. 163, 172 (2020) ("[N]one of the claims arising out of these communications have to be related to matters of public concern.").

134. Walker, *supra* note 118, at 26.

135. Felix Richter, *New York Is The World's Media Capital*, STATISTA (Mar. 11, 2015), https://www.statista.com/chart/3299/new-york-is-the-worlds-media-capital/.

136. Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/bradhoylman/status/1285997594611724290.

137. N.Y. CIV. RIGHTS LAW § 70-a (1(a)).

138. N.Y. CIV. RIGHTS LAW § 70-a (1(a)(1)).

139. *Id.* at § 1(a)(2).

140. *Id.* at § 1(d).

under the anti-SLAPP umbrella prove actual malice in order to recover damages.[141]

Given that its passage was just a year ago, there is a surprising amount of case law applying it already. This is largely because the New York Legislature directed amendments to "take effect immediately" as a corrective measure, and the courts — starting with District Judge Jed S. Rakoff, just six weeks after it was signed into law — have read this to mean it can be applied retroactively. Thus, the first case to use the statute was Palin v. New York Times Co.,[142] a lawsuit brought by the Republican politician Sarah Palin three years earlier, with the overarching goal of challenging *Sullivan's* actual-malice standard before the Supreme Court.[143]

Palin sued the *Times* for defamation after it published a gun-control editorial suggesting a "SaraPAC" ad incited (via an electoral map dotted with gun crosshairs) the shooting that nearly took Rep. Gabby Giffords' life. The *Times* had printed a correction within 48 hours, and Judge Rakoff initially dismissed the case, ruling that the paper's actions didn't rise to the level of actual malice — but he was reversed by the 2nd Circuit, which ruled the case could move forward.[144] Now, three years later, Judge Rakoff granted the defendant's motion to apply New York's anti-SLAPP law. New York's statute — as noted earlier —does more than expedite motions to dismiss and grant stays of discovery. In addition, it requires *all* plaintiffs in cases involving an "issue of public interest" to prove actual malice. As Judge Rakoff noted in his memorandum order, this merely required Palin to prove under state law "what she had already been tasked with establishing under the federal Constitution."[145]

The *Palin* ruling turned out to be a bellwether, cited by subsequent courts that allowed for retroactive application of the new law *and* exemplifying the high-stakes, high-profile litigation that followed in 2021.[146] Some striking cases suddenly shifted gears when defendants found they

141. *Id.* at § 2.

142. Palin v. N.Y. Times Co., 510 F. Supp. 3d 21 (S.D.N.Y. 2020).

143. *Id.* at 24. ("Although plaintiff does not dispute that she is a "public figure," in a previously-filed motion for partial summary judgment, she argued that she is not required to prove actual malice, and prove it by clear and convincing evidence, on the ground that the federal constitutional rule imposing that burden in the case of public figures either is no longer good law or does not apply to this case.").

144. Palin v. N.Y. Times Co., 940 F.3d 804 (2d. Cir. 2019). The Second Circuit was displeased with, among other things, Judge Rakoff's highly irregular *sua sponte* hearing at which he took testimony from the editorial's author in order to determine if Palin's claim of actual malice was plausibly pled. *Id*. at 810-812.

145. Of course, applying the state anti-SLAPP law also effectively blocked Palin's original goal of challenging the *Sullivan* standard.

146. *See* Coleman v. Grand, 523 F. Supp. 3d 244, 258 (E.D.N.Y. 2021); Sackler v. Am. Broad. Cos., Inc., 71 Misc.3d 693, 697-698 (N.Y. Sup. Ct. 2021); Project Veritas v. N.Y. Times Co., No 63921/2020, 2021 WL 2395290, at *6 (N.Y. Sup. Ct. Mar. 18, 2021); Reus v. ETC Hous. Corp., 148 N.Y.S.3d 663, 669, n.1 (N.Y. Sup. Ct. 2021); and Lindberg v. Dow Jones, No. 20-CV-8231 (LAK), 2021 WL 3605621, at*7, n.77 (S.D.N.Y. Aug. 11, 2021).

could file anti-SLAPP motions using the amended statute. As a result, the first year of New York's anti-SLAPP law produced some dramatic rulings that also help illuminate how New York courts will likely approach the public concern analysis.

Palin was the first of five cases in which news-media defendants filed anti-SLAPP motions. As one might expect, the determination of "public concern" was fairly *pro forma* in the majority of these. In Reus v. ETC Housing Corporation,[147] for instance, a news article about structural deficiencies in an apartment complex clearly involved a matter of "public interest as it concerns the fate of the Gray Gables building which has been a matter of public concern for decades."[148] In Sackler v. American Broadcasting Companies, Inc.,[149] it was apparently so obvious that news coverage of the opioid crisis was a matter of public concern that Justice W. Franc Perry didn't do a formal analysis at all — apart from rejecting the plaintiff's argument that "anti-SLAPP protects the little guy from being put upon by the big guy for taking part in the political process."[150] This reasoning, Justice Perry wrote, "ignores the very purpose of the amendment which is to *broaden the scope of actionable cases involving the public interest,* in order to protect free speech 'in a public forum with respect to issues of public concern.'"[151]

Only one court balked at showing deference to traditional news media on the public-interest question. Justice Charles D. Wood, in Project Veritas v. New York Times Co.,[152] expressed indignation that the *New York Times* could now seek anti-SLAPP protection from the far-right activist group,[153] which he saw as merely an "upstart competitor armed with a cell phone and

147. 148 N.Y.S.3d 663 (N.Y. Sup.Ct. 2021)

148. *Id.* at 669. The court further pointed out, in a media friendly aside, that "Courts, for obvious reasons, are deferential to editors in terms of what is of interest to the public and thus what is newsworthy." *Id.*

149. 71 Misc.3d 693, 697-698 (2021). Plaintiff David Sackler — who shares a name with, but is not David Sackler of Purdue Pharma notoriety — was suing the New York Post, Reuters, Hearst Magazines and HBO for defamation after a Getty photo of him was used mistakenly in various stories about the Sackler family's role in the opioid crisis. *Id.* at. 694-95.

150. *Id.* at 698 (quoting Transcript of Record at 12, Sackler v. Am Broad. Cos., Inc. 71 Misc.3d 693 (2021) (No. 155513/2019)).

151. *Id.* (emphasis added) (quoting Sponsor Memo of Sen. Hoylman in support of S52A (July 22, 2020), https://www.nysenate.gov/legislation/bills/2019/s52).

152. Project Veritas, 2021 WL 2395290.

153. Deciding how to identify Project Veritas here presents a fascinating challenge. Wikipedia calls it "an American far-right activist group." *Project Veritas*, WIKIPEDIA, https://en.wikipedia.org/wiki/Project_Veritas. In his opinion, Justice Wood called it "a non-profit journalistic organization." 2021 WL 2395290. Most recently, U.S. District Court Judge Paul Friedman ruled that plaintiffs suing the group in his court may refer to it as a "political spying operation." *See* Eric Wemple, *Judge rules that opponents may call Project Veritas a 'political spying operation' in ongoing case*, WASH. POST (Oct. 14, 2021), https://www.washingtonpost.com/opinions/2021/10/27/james-okeefe-political-spying-project-veritas/).

a web site."[154] Justice Wood, unconvinced by Project Veritas' track record of producing misleading 'gotcha' videos, begrudgingly admitted that the *Times'* anti-SLAPP claim met the amended anti-SLAPP standard — reporting on "allegations of systemic voter fraud and potential disinformation about such voter fraud" constituted an issue of public interest — but nevertheless denied all the newspaper's motions for relief.[155] Justice Wood acknowledged that Project Veritas would eventually have to prove actual malice at trial, but only after the *Times* spent a small fortune in legal fees along the way — precisely the fate that anti-SLAPP laws are designed to avoid.

One journalistic anti-SLAPP case did require an in-depth analysis of the public interest element. In *Lindberg v. Dow Jones & Co*., Inc.,[156] plaintiff Greg Lindberg had sued the *Wall St. Journal* after it reported on how Lindberg diverted $2 billion from his financial empire for his personal use and, in a second article, hired operatives to surveil his ex-fiancé and other women he found attractive. Unlike the other cases, the question of public interest was, in *Lindberg*, a closer call. The second article in particular included assertions about Lindberg's personal life that could, certainly on their own, be cast as purely private matters. U.S. District Judge Lewis A. Kaplan, however, noted that the court's analysis could draw from New York's "robust case law," that distinguishes between "matter of 'public concern' and 'matters of purely private concern" under the state's unique fault standard in defamation — a standard that echoes *Rosenbloom*'s now defunct doctrine.[157]

In analyzing the second article, for instance, Judge Kaplan was able to consider three cases involving articles with similar inclusions of private information. One of these, Gaeta v. New York News, Inc.,[158] concerned a *New York News* piece about the state's transfer of mental-health patients to nursing homes, which clearly constituted "a matter of legitimate public concern." Within the article, though, was an account of one patient's breakdown after his son's suicide — itself precipitated, according to the article, by his mother dating other men. The mother sued, arguing that the claim was defamatory. The New York Court of Appeals, however, defended "the familiar journalistic technique of featuring the experiences of a single individual, as exemplifying in human terms the plight of many,"[159] and ruled

154. "Here, one of the largest newspapers in the world since Abraham Lincoln was engaged in the private practice of law, is claiming protections from an upstart competitor armed with a cell phone and a web site," Justice Wood wrote. Project Veritas, 2021 WL 2395290, at*6. "Not only does the amended Anti-SLAPP law grant protection to a Goliath against a David, but 16 years after the SLAPP law was enacted, a newspaper had never qualified for SLAPP protection for its written articles." *Id.*

155. *Id*.

156. 2021 WL 3605621.

157. *Id.* at. *8.

158. Gaeta v. N.Y. News Inc., 62 N.Y.2d 340 (N.Y. Ct. App. 1984).

159. Lindberg, 2021 WL 3605621, at *9 (quoting Gaeta, 62 N.Y.2d at 349-350).

that the "offending statements can only be viewed in the context of the writing as a whole."[160] After a heavily footnoted analysis, Judge Kaplan found that "the *Journal's* portrayal of Lindberg's surveillance operation is reasonably related to its report on Lindberg's use of insurance company funds," which was, in turn, "clearly of public concern under New York law."[161] Having determined this, Judge Kaplan found that Lindberg had failed to demonstrate a likelihood of proving actual malice, and thus granted the *Journal*'s motion to dismiss.[162]

Although importing the common-law libel "public concern" standard to interpret New York's amended anti-SLAPP statute could raise concerns that resulting interpretations would not be sufficiently attuned to the spirit of the new statute, such concerns seem unwarranted. It appears the body of common law consulted by the *Lindberg* court has the same animating concern as the statute, which is extending the public sphere as far as possible within reason, even in situations that have a "private" appearance to some degree. As the court put it, "the Court may not second guess the Journal's editorial judgment in employing the 'journalistic technique' of highlighting 'human-interest items' when reporting on a matter of public concern."[163]

A nonmedia case that required an analysis of the public-interest requirement was Coleman v. Grand.[164] Steven Coleman sued María Grand in 2018, after Grand published an open letter about their relationship in the context of 2017's #MeToo movement. When the two first met at a workshop Coleman gave in 2009, the "prominent saxophonist" was 52 and married.[165] Grand, an "aspiring young saxophonist" from Switzerland, was 17.[166] She asked Coleman for a lesson and, after initially saying he didn't work with beginners, Coleman agreed. Their sexual relationship began two years later, after Grand moved to New York.[167] It continued off-and-on, with non-stop drama, until 2016. In the fall of 2017, after Hollywood producer Harvey Weinstein's arrest for sex crimes, Grand sent a letter to 40 or so recipients, recounting her sexual history with "X," saying she wanted to "start a larger conversation" about "sexism in the music industry."[168]

After agreeing to give the new state anti-SLAPP law retroactive effect, the court assessed whether the statements addressed a matter of public concern. In doing so, it noted both the broad amended statutory language and the generous public concern jurisprudence of New York's common law.

160. Lindberg, 2021 WL 3605621, at *8 (quoting Gaeta, 62 N.Y.2d at 349).
161. Lindberg, 2021 WL 3605621, at *10.
162. *Id.* at *14.
163. *Id.* at *10.
164. 523. F. Supp. 3d 244 (E.D.N.Y. 2021).
165. *Id.* at 251.
166. *Id.*
167. *Id.*
168. *Id.* at 252.

Citing one 2001 defamation case, the court noted that "New York law considers a matter of public concern as 'a dispute that has in fact received public attention because its ramifications will be felt by persons who are not direct participants.'"[169] Because Grand's statements took place against the backdrop of a rising #MeToo movement, the court concluded that they addressed a matter of public concern.[170]

V. ANALYSIS AND CONCLUSION

Although it is still early in the deployment of the new approaches in California, New York, and Texas, it appears that each state has embarked upon a profound evolution in the understanding of matters of public import vis-a-vis anti-SLAPP law. This is significant not only because these states will collectively produce a large proportion of the nation's anti-SLAPP case law going forward, but also because their anti-SLAPP jurisprudence will undoubtedly have an outsized influence on other states' laws and judicial interpretations. California's influence on other states' anti-SLAPP jurisprudence was already significant prior to the *FilmOn* decision, and *FilmOn* itself has already been cited and discussed in the interpretation of anti-SLAPP laws outside of California.[171]

Texas' new approach is perhaps the most enigmatic of the three. Although it was clear the Texas Legislature wanted its statutory amendments to rein in the wide-open approach of Texas courts in cases like *ExxonMobil*, the jury is still out on whether the new public interest standard will genuinely have that effect in practice. Certainly the *Connick/Snyder* approach seems to allow a fair degree of interpretive license to courts. If a matter of public concern is defined to consist of items the public is concerned about, there is no guarantee that the category will be significantly narrower than that of the prior statute's laundry list. Of course, it may be that Texas courts will get the message the legislature intended to send, regardless of the precise text of the new statute. The Texas amendments also narrow the statute in other ways, including by altering other language that might affect the scope of the law's application[172] and by crafting additional express exemptions from the law.[173] Nonetheless, the exceedingly capacious media exemption promises some

169. *Id.* at 258 (quoting Fairley v. Peerskill Star Corp., 83 A.D.2d 294, 298 (N.Y. App. 1981)).

170. *Id.* at 259.

171. *See, e.g.*, Lane Dermatology v. Smith, 861 S.E.2d 196, 204 (Ga. App. 2021) (following *FilmOn* in interpretation of Georgia anti-SLAPP law); Saudi Am. Pub. Rels. Affs. Comm. v. Inst. for Gulf Affs., 242 A.3d 602, 611 (D.C. Ct. App. 2020) (declining to follow *FilmOn*).

172. Laurie Lee Prather & Robert T. Sherwin, *The Changing Landscape of the Texas Citizens Participation Act*, 52 TEX. TECH. L. REV. 163, 169 (2019) (discussing how "relates to" language about the scope of the TCPA was removed to narrow the law in its current iteration). For a case that limits the application of the amended TCPA based on the removal of the "relates to" language, *see* ML Dev. v. Ross Dress for Less, Inc., No. 01-20-00773-CV, 2021 WL 2096656, at*5 (Tex. Ct. App. May, 25, 2021).

173. Prather & Sherwin, *supra* note 156, at 9.

interesting definitional problems as courts attempt to delineate its outer limits.

California, on the other hand, has a relatively clear mandate via *FilmOn* that seems likely to lead to a significantly more restricted application of its anti-SLAPP statute. The early reception in lower courts seems to confirm that direction. *FilmOn's* primary legacy, of course, will almost certainly be its rigorous insistence that movants cannot simply connect general statements about which they are sued to broader public issues when that connection is in fact tenuous. The so-called synecdoche theory of public concern is thus declared dead. Moreover, litigants must more concretely demonstrate that their speech could at least potentially move the public conversation forward in some way. It must, in the words of the court, "contribute to the public debate"[174] rather than simply relate to it in some abstract and feeble way.

Comparing California's new approach to Texas' amended statute, the *FilmOn* methodology seems much more sophisticated than the simplistic *Connick/Snyder* framework of Texas. Rather than merely offering a tautological definition of speech of public concern, the California approach gets under the hood and requires that the speech actually have the potential to function in the marketplace of ideas in some substantive way. If one wished to limit anti-SLAPP motions to situations closer to those conceived by Canan and Pring (a position the authors of this work are certainly not endorsing), the California approach seems a more precise and rigorous way to achieve that.

New York's new statute (and ensuing judicial interpretations), somewhat ironically, has the sort of full-throttle daring perhaps more traditionally associated with the Golden State. Emerging from a benighted period with one of the narrowest anti-SLAPP laws in the country, New York's statute seems expressly designed to push public concern to its furthest possible borders. Notably, New York courts find themselves well equipped with the jurisprudential resources to accomplish this goal, since the state's common law of defamation law already offers caselaw with developed public concern determinations that are extremely deferential to defendants.

As this work demonstrates, legislatures and courts are still attempting to map out the contours of the public concern concept, some with greater success than others. The authors of this work suggest that, as challenging as it may be for overcrowded court dockets, courts err on the side of broadly construing what speech constitutes a matter of public concern. At the end of the day, free expression is a fragile right, and anything states can do to advance it at the margins seems a worthy goal.

174. 7 Cal. 5th at 150.