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# **SANDHOLM V. KUECKER: THE ILLINOIS SUPREME COURT “SLAPPS” AWAY A PROTECTION OF ILLINOIS CITIZENS’ FIRST AMENDMENT RIGHTS**

## INTRODUCTION

On January 20, 2012, the Illinois Supreme Court decided *Sandholm v. Kuecker*<sup>1</sup> and effectively nullified the Illinois Citizen Participation Act (CPA).<sup>2</sup> The CPA is Illinois’s anti-“strategic lawsuit against public participation” (SLAPP) statute, and like other states’ anti-SLAPP statutes, it provides a procedural mechanism to dispose of retaliatory, meritless claims and quickly shift the defendant’s legal costs to the filer.<sup>3</sup>

Anti-SLAPP statutes seek to protect citizens’ First Amendment rights to petition, speech, association, and governmental participation against those who attempt to limit those rights through litigation tactics.<sup>4</sup> The Illinois legislature drafted the CPA to address the “abuse of the judicial process . . . [that] has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.”<sup>5</sup> The United States has long “treasured” these rights;<sup>6</sup> the “alleged chilling effect on citizen involvement with government . . . is the great evil of the SLAPP.”<sup>7</sup>

This Note argues that the Illinois Supreme Court, in *Sandholm*, abused its judicial discretion by construing Illinois’s Anti-SLAPP statute so narrowly that it effectively amended the statute to provide lit-

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1. *Sandholm v. Kuecker*, 962 N.E.2d 418 (Ill. 2012).

2. 735 ILL. COMP. STAT. 110/1–99 (2012).

3. *See id.* §§ 5, 20. The CPA states:

On the filing of any motion as described in Section 15, a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent. An appellate court shall expedite any appeal or other writ, whether interlocutory or not, from a trial court order denying that motion or from a trial court’s failure to rule on that motion within 90 days after that trial court order or failure to rule.

*Id.* § 20(a). The CPA further provides instructions for awarding attorney’s fees and costs: “The court shall award a moving party who prevails in a motion under this Act reasonable attorney’s fees and costs incurred in connection with the motion.” *Id.* § 25.

4. *Id.* § 15.

5. *Id.* § 5.

6. *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting).

7. Mark J. Sobczak, Comment, *SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. ILL. U. L. REV. 559, 564 (2008).

tle, if any, protection for victims of SLAPP suits.<sup>8</sup> The plain language of the CPA provides a special motion to dismiss that disposes of meritless litigation brought against defendants when the suit “is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party’s rights of petition, speech, association, or to otherwise participate in government.”<sup>9</sup> Despite the legislature’s instruction to construe the Act liberally,<sup>10</sup> the *Sandholm* court set new precedent, under which the statute’s special motion to dismiss applies only to those claims “solely based on, relating to, or in response to” the defendant’s acts.<sup>11</sup> The addition of the word “solely” will enable nearly any plaintiff to overcome the CPA’s special motion to dismiss, amounting to a much weaker standard than intended by the legislature. Lower courts throughout Illinois have already implemented the *Sandholm* standard, and even though those suits would have traditionally been dismissed under the CPA, courts have since granted zero special motions, leaving those defendants without a remedy and the legislature with a flagrant problem.<sup>12</sup>

Prior to the *Sandholm* decision, critics of the CPA warned that the statute’s broad scope would result in a chilling effect on potential plaintiffs who might have legitimate claims, but choose not to file because of a probable dismissal under the CPA.<sup>13</sup> It is impossible to know whether such a result materialized because suits that are never filed cannot be quantified; however, the Illinois legislature presumably considered that tension because the statute’s express purpose is to “*strike a balance* between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition.”<sup>14</sup> The

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8. In *Ryan v. Fox Television Stations, Inc.*, a case that followed the *Sandholm* decision, the court stated:

The trouble with the [CPA] as written, however, is that if it is applied to the letter then the Act would mandate dismissal of *every* lawsuit that implicated a defendant’s first amendment activities regardless of whether the plaintiff’s claims were meritorious or not, essentially creating absolute immunity for torts committed while exercising first amendment rights.

*Ryan v. Fox Television Stations, Inc.*, 979 N.E.2d 954, 961 (Ill. App. Ct. 2012). The *Sandholm* holding gives lower courts the room to criticize the statute as written, even though it is not their judicial role to do so.

9. 735 ILL. COMP. STAT. 110/15.

10. *Id.* § 30.

11. *Sandholm v. Kuecker*, 962 N.E.2d 418, 434 (Ill. 2012) (emphasis added).

12. See *Cartwright v. Cooney*, No. 10-cv-1691, 2012 WL 1021816 (N.D. Ill. Mar. 26, 2012); *Chi. Reg’l Council of Carpenters v. Jursich*, 986 N.E.2d 197 (Ill. App. Ct. 2013); *August v. Hanlon*, 975 N.E.2d 1234 (Ill. App. Ct. 2012); *Ryan v. Fox Television Stations, Inc.*, 979 N.E.2d 954 (Ill. App. Ct. 2012).

13. Sobczak, *supra* note 7, at 574.

14. 735 ILL. COMP. STAT. 110/5 (emphasis added).

*Sandholm* court overstepped its authority by recalibrating the balance struck by the legislature and shifting deference in favor of plaintiffs.

The court's construction of the CPA under *Sandholm* no longer protects citizens' rights to petition without the fear of judicial retaliation. Now, any party may use a suit or the special motion as a weapon to prolong litigation and chill oppositional public speech. A plaintiff may sue a defendant for whatever meritless claims it may conceive and easily survive the CPA's special motion to dismiss. Alternatively, if a defendant is sued for her speech, she may prolong litigation by employing this extra motion, despite her knowledge that it will not succeed because her aim is to cause the other party additional legal fees.<sup>15</sup>

Part II of this Note discusses the SLAPP suit phenomena and analyzes California's, Massachusetts's, and Illinois's anti-SLAPP statutes and each state's relevant caselaw.<sup>16</sup> Part II concludes by introducing "sham" litigation, as considered by the Illinois legislature and discussed by the appellate court decision in *Sandholm*.<sup>17</sup> Part III details the Illinois Supreme Court's decision in *Sandholm*.<sup>18</sup> Part IV examines the deficiently broad language of Illinois's CPA statute, comparing it to that in the California and Massachusetts statutes and discussing how their statutes' specificity has enabled those states to achieve their particular policy aims. Part IV also expounds how the Illinois Supreme Court's decision in *Sandholm* constituted inappropriate judicial activism, which should awaken the legislature to the possibility of amending the CPA to preserve the statute's intended effect. Part V recommends that the Illinois legislature add a factual analysis that includes a "genuineness" inquiry of both sham suits and sham anti-SLAPP motions, which could counteract the abuse that will likely be caused by the *Sandholm* decision.

## II. BACKGROUND

The phrase "strategic lawsuit against public participation" was coined by University of Colorado professors George W. Pring and Penelope Canan to describe "legally meritless suits designed, from their

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15. Cf. Joshua L. Baker, *Chapter 338: Another New Law, Another SLAPP in the Face of California Business*, 35 MCGEORGE L. REV. 409, 412-14 (2004) (summarizing California's anti-SLAPP statute, CAL. CIV. PROC. CODE § 425.16 (West 2004)).

16. See *infra* notes 18-103 and accompanying text.

17. See *infra* notes 97-103 and accompanying text.

18. See *infra* notes 104-116 and accompanying text.

inception, to intimidate and harass political critics into silence.”<sup>19</sup> Pring characterized SLAPP suits by four criteria: “(1) a civil complaint or counterclaim (for monetary damages and/or injunction), (2) filed against non-governmental individuals and/or groups, (3) because of their communications to a governmental body, official, or the electorate, (4) on an issue of some public interest or concern.”<sup>20</sup> Essentially, a SLAPP is any type of lawsuit that is filed in order to “chill” the speech or petitioning activity of an individual and, as a byproduct, the community.<sup>21</sup> The plaintiff’s true motive in filing this type of suit is retaliatory; she adopts some pretense for seeking redress upon which she may prolong litigation and, in so doing, punishes the defendant for speaking out unfavorably against her by causing the defendant to incur costly legal fees.<sup>22</sup> SLAPPs have been called a “distortion of the American process of open government”<sup>23</sup> because “[i]nstitutions such as free press and a reasonably neutral government do not work if people are afraid to use them.”<sup>24</sup>

#### A. *The California and Massachusetts Statutes and Caselaw*

Twenty-eight states and the District of Columbia currently have an anti-SLAPP statute or doctrine.<sup>25</sup> Each state mechanism attempts to address the SLAPP problem in similar ways, often through stays of

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19. Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 423 (1991); see also *Sandholm v. Kuecker*, 962 N.E.2d 418, 427 (Ill. 2012).

20. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 7–8 (1989).

21. See *id.* at 4–8; see also Sobczak, *supra* note 7, at 565 (discussing the “ripple effect [that] a SLAPP produces in a given community” and noting that “[e]ven the hardiest of community activists can be deterred from voicing their opinions when they witness their neighbors face lawsuits for similar actions”). The CPA was designed to address situations like those in which “citizens oppose a developer’s plan and petition their local government to stop the developer in some way.” *Sandholm v. Kuecker*, 942 N.E.2d 544, 550 (Ill. App. Ct. 2010). Then, when “[t]he developer . . . sues the citizens for intentional interference with prospective business,” the CPA would guide the court to “throw[ ] out” the lawsuit and shift costs to the developer to remedy the financial strain it caused the citizen. *Id.*

22. See Sobczak, *supra* note 7, at 561 & n.9; see also *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970–71 (9th Cir. 1999) (“The hallmark of a SLAPP suit is that it lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party’s case will be weakened or abandoned, and of deterring future litigation.”).

23. Sobczak, *supra* note 7, at 565.

24. *Id.* (alteration in original) (quoting Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 971–72 (1999)).

25. See *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection> (last visited Mar. 30, 2014); see also Jacquelyn Kline, *Anti-SLAPP Statutes in the US by State*, LEGAL PROJECT (Jan. 14, 2009), <http://www.legal-project.org/149/anti-slapp-statutes-in-the-us-by-state>.

discovery, fee-shifting provisions, and expedited judicial processes, but the statutes vary radically in their scope.<sup>26</sup> This Note analyzes California's and Massachusetts's anti-SLAPP statutes and each state's relevant caselaw, which have been the subjects of comparison in Illinois jurisprudence.

### 1. *California's Experience*

California's anti-SLAPP statute is widely considered to be one of the broadest and, as such, provides a useful comparison for those who criticized Illinois's statute for its unjust breadth.<sup>27</sup> It provides a detailed, yet expansive and nonexclusive<sup>28</sup> list of protected petitioning activities:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (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>29</sup>

The statute requires a judge to analyze the merits of the defendant's petitioning activity and the plaintiff's suit through a two-pronged procedure. First, the defendant must establish that its conduct fits within the category of "petitioning activity" and that the cause of action "arises from" that conduct.<sup>30</sup> Petitioning activity and suits arising from it are construed broadly—even when a cause of action arises from *both* protected and unprotected activity, the suit is subject to the anti-SLAPP special motion to dismiss.<sup>31</sup> If the defendant satisfies its

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26. Sobczak, *supra* note 7, at 576.

27. See Braun, *supra* note 24, at 1040; see also Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 858–59 (2000); London Wright-Pegs, Comment, *The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant*, 16 UCLA ENT. L. REV. 323, 334 (2009).

28. Birkner v. Lam, 67 Cal. Rptr. 3d 190, 196–97 (Ct. App. 2007).

29. CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 2014).

30. Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73, 80–81 (Ct. App. 2011) ("A defendant does not establish that a cause of action 'arises from' an act in furtherance of the right of petition or free speech merely by showing that the plaintiff filed his or her lawsuit in retaliation for the defendant's petitioning or speech activities. The defendant must establish that the plaintiff's cause of action is actually *based on* conduct in exercise of those rights.").

31. South Sutter, LLC v. LJ Sutter Partners, L.P., 123 Cal. Rptr. 3d 301, 329 (Ct. App. 2011).

burden, the court moves on to the second prong of the analysis, which shifts the burden to the plaintiff to show that it will likely succeed with the claim if allowed to continue.<sup>32</sup>

California courts' extremely broad construction of the statute prompted a trend in which corporate defendants utilized the special motion to thwart individuals' suits against them for their commercial speech.<sup>33</sup> That trend led the California legislature to clarify the statute's preamble to include an instruction to courts to construe the statute broadly, much like Illinois's current purpose statement.<sup>34</sup> Also, California created additional provisions to specify the scope and applicability of the original anti-SLAPP statute in order to "fix the potential abuse."<sup>35</sup>

In *Hecimovich v. Encinal School Parent Teacher Organization*, a volunteer fourth-grade basketball coach filed a defamation claim against parents who had "rallied" to remove him as coach because they disagreed with his disciplinary methods.<sup>36</sup> As a preliminary matter, the court established that even truly defamatory speech could be protected petitioning activity under the anti-SLAPP statute.<sup>37</sup> Undertaking the statute's standard two-pronged analysis procedure, the court first determined that the defendants' activities qualified as petitioning activity because the parents' concern for children's safety con-

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32. CAL. CIV. PROC. CODE § 425.16(b)(1).

33. Baker, *supra* note 15, at 413–14.

34. CAL. CIV. PROC. CODE § 425.16(a); *see* Baker, *supra* note 15, at 413.

35. CAL. CIV. PROC. CODE § 425.16–.18. "This statute introduced a 'strict burden of proof standard' to help fix the potential abuse of California's anti-SLAPP law." Wright-Pegs, *supra* note 27, at 341 n.57. California also has a third anti-SLAPP provision, chapter 338. CAL. CIV. PROC. CODE § 425.17. It addresses the corporate abuse trend previously observed in California by prohibiting the special motion's application to commercial speech if three conditions are met:

(1) the target, as the "speaker," must be a person primarily engaged in the business of selling or leasing goods or services; (2) the "content" of the commercial speech must consist of representations of fact about the speaker's or a competitor's business operations, goods, or services; and (3) the "intended audience" of the speech must have been an actual or potential customer, or at least a person who was likely to repeat the speech to another actual or potential customer.

Baker, *supra* note 15, at 418 (footnotes omitted) (citing CAL. CIV. PROC. CODE § 425.17(c)). The extra provision enables the original anti-SLAPP statute to be applied widely in keeping with its purpose of "protect[ing] individuals from meritless, harassing lawsuits whose purpose is to chill protected expression," without opening it to abuse. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 837 n.7 (9th Cir. 2001).

36. *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 137 Cal. Rptr. 3d 455, 459 (Ct. App. 2012).

37. *Id.* at 466.

stituted an issue of “public interest.”<sup>38</sup> Then, the court determined that the plaintiff could not show a likelihood of prevailing on the merits of his defamation claim.<sup>39</sup> Thus, the court granted the defendants’ special motion to dismiss the suit.<sup>40</sup>

## 2. *Massachusetts’s Experience*

The Massachusetts anti-SLAPP statute also has a two-pronged analysis procedure, broad application, and a deferential description of “a party’s exercise of its right of petition.”<sup>41</sup> Massachusetts’s common law places an initial burden upon the defendant to demonstrate, through the pleadings and affidavits, that the plaintiff’s claims are “based on the defendant’s petitioning activities alone and have no substantial basis other than or in addition to its petitioning activities.”<sup>42</sup> The state’s statute provides the second prong:

The court shall grant such special motion, unless the [plaintiff] shows that: (1) the [defendant]’s exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the [defendant]’s acts caused actual injury to the [plaintiff].<sup>43</sup>

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38. *Id.* at 466–67 (noting that “public interest should be something of concern to a substantial number of people. . . . Nevertheless, it may encompass activity between private people.” (quoting *Rivera v. First DataBank, Inc.*, 115 Cal. Rptr. 3d 1, 6 (Ct. App. 2010))).

39. *Id.* at 469–70. The court noted that “[w]hile plaintiff’s burden may not be ‘high,’ he must demonstrate that his claim is legally sufficient.” *Id.* at 470. The plaintiff’s claim was insufficient because he did not produce admissible evidence of the essential elements of defamation and because, even had he produced adequate evidence, the defendant’s statements were protected under the doctrine of “privileged publication.” *Id.* at 471–73.

40. *Id.* at 469, 477. The court recognized that the “plaintiff needs to show only a ‘minimum level of legal sufficiency and triability.’” *Id.* at 470 (quoting *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 33 n.5 (Cal. 2000)).

41. See MASS. GEN. LAWS ch. 231, § 59H (2010); see also Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1256–59 (2007). The statute states:

[T]he words “a party’s exercise of its right of petition” shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

MASS. GEN. LAWS ch. 231, § 59H.

42. *Marabello v. Bos. Bark Corp.*, 974 N.E.2d 636, 640–41 (Mass. 2012) (quoting *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998)) (internal quotation marks omitted); *accord Fustolo v. Hollander*, 920 N.E.2d 837, 840 (Mass. 2010).

43. MASS. GEN. LAWS ch. 231, § 59H.



The Massachusetts anti-SLAPP statute differs from that of other states in two significant ways: (1) it applies to petitioning activities that do not pertain to the public interest and (2) the statute imposes unique procedural burdens.<sup>44</sup>

In the landmark decision *Duracraft Corp. v. Holmes Products Corp.*, upon which the Illinois Supreme Court's *Sandholm* reasoning is based,<sup>45</sup> the two parties were corporate competitors.<sup>46</sup> The plaintiff corporation, Duracraft, filed suit against Holmes Products and a former Duracraft executive who had since been hired by Holmes Products.<sup>47</sup> Duracraft claimed that the executive disclosed confidential information in a deposition during the two companies' adjudicatory proceedings before the Trademark Trial and Appeal Board in violation of a valid nondisclosure agreement.<sup>48</sup> The defendants argued that the deposition testimony was "petitioning activity" protected under Massachusetts's anti-SLAPP statute, and that any claim by Duracraft based on that testimony should be dismissed.<sup>49</sup> The Massachusetts Supreme Judicial Court denied the defendant's special motion to dismiss because the plaintiff had a separate "substantial basis other than [the executive's] petitioning activity" upon which it brought suit, namely the nondisclosure agreement that the executive signed.<sup>50</sup>

Though the statute's legislative history demonstrated that it was "intended to enact very broad protection for petitioning activities,"<sup>51</sup> the court found that legislative history unhelpful because it failed to address situations in which a court suspects that the special motion is being "deployed not to limit 'strategic litigation,' but as an *additional* litigation tactic."<sup>52</sup> Thus, the court focused on the first prong of the statutory test, whereby the defendant must show that the plaintiff's claims were "based on" the defendant's petitioning activities.<sup>53</sup> The court explained that the statutory test could only yield a just result when the plaintiff's claim was "*solely* based on" the petitioning activity. In the court's opinion, focusing on the defendant's petitioning activity—rather than the plaintiff's claim—would ignore other poten-

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44. Rebecca Ariel Hoffberg, Note, *The Special Motion Requirements of the Massachusetts Anti-SLAPP Statute: A Real Slap in the Face for Traditional Civil Practice and Procedure*, 16 B.U. PUB. INT. L.J. 97, 99 (2006).

45. See *Sandholm v. Kuecker*, 962 N.E.2d 418, 430–31 (Ill. 2012).

46. *Duracraft Corp.*, 691 N.E.2d at 937.

47. *Id.* at 937–38.

48. *Id.* at 938.

49. *Id.* at 939.

50. *Id.* at 943–44.

51. *Id.* at 940.

52. *Duracraft Corp.*, 691 N.E.2d at 941 (emphasis added).

53. *Id.* at 942.

tially legitimate legal claims that were unrelated to the petitioning activity.<sup>54</sup>

The court interpreted the statute to apply to claims that are “solely ‘based on’ the petitioning activity” and admitted that some analysis of the plaintiff’s claims was necessary in order to allow claims that are not based on the petitioning activity to survive.<sup>55</sup> The court’s determination that the plaintiff had a separate basis (the valid contract) that was unrelated to the defendant’s petitioning activity (his deposition), meant that it would not grant the anti-SLAPP motion to dismiss, even without having considered the second prong.<sup>56</sup> The court also provided an example for future courts: “a defamation claim . . . can be tested by showing that the defendant’s petitioning activity was devoid of factual or legal support and thus can overcome a presumption of qualified immunity.”<sup>57</sup>

In a subsequent Massachusetts Supreme Court decision, *Baker v. Parsons*, the court was forced to expand upon its analysis of parties’ burdens because the defendant in that case, unlike in *Duracraft*, satisfied its burden to prove that the plaintiff’s action was based solely on its petitioning activities.<sup>58</sup> The court identified the lawsuit as one “based on petitioning activity” because the allegedly defamatory “smear campaign” was contained in a letter to a government official.<sup>59</sup> After the court determined that the defendant satisfied its burden, the court analyzed whether the plaintiff could prove that the underlying petition (1) “was devoid of any reasonable factual support or any arguable basis in law” and (2) has “caused actual injury to the [plain-

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54. *See id.* The court stated, “In this case, however, focusing on the defendants’ petitioning activity and ignoring Duracraft’s claims—that a contractual obligation precludes [the employee’s] exercise of otherwise protected petitioning activity—fails to test fully whether Duracraft’s claim lacks merit.” *Id.*

55. *Id.*

56. *Id.* at 942–44. The court specified that “[t]he Massachusetts statute makes no provision for the plaintiff to show that its own claims are not frivolous.” *Id.* at 942.

57. *Id.* at 942.

58. *Baker v. Parsons*, 750 N.E.2d 953, 959–60 (Mass. 2001).

59. *See id.* at 955–56, 960; *see also* Hoffberg, *supra* note 44, at 107–10. The case concerned an island property owner who applied for licenses to construct a pier on his property. *Baker*, 750 N.E.2d at 955. A scientist wrote a letter to public officials expressing concern that the pier construction would have a detrimental impact on the biodiversity of that habitat, specifically with regard to the island’s aquatic birds. *See id.* at 955–56. The property owner took issue with the portion of the scientist’s letter that stated, “It is my fervent hope that the state and federal agencies charged with protecting the region’s natural resources will act to halt the continued degradation of this important site and restore Clark’s Island to the prominence it held only recently in providing nesting habitat to aquatic birds.” *Id.* at 956 (emphasis omitted). The property owner brought defamation claims against the scientist, which were subsequently dismissed pursuant to the special motion because the nonmovant property owner did not satisfy his burden of proof. *See id.* 955–57.

tiff].”<sup>60</sup> The court referenced *Duracraft* when interpreting “devoid of any reasonable factual support” as requiring the plaintiff to show “by a preponderance of evidence” that the defendant’s petitioning activity lacked *any* reasonable factual support, and was essentially “sham” petitioning.<sup>61</sup> The court clarified that the special motion presumes a dismissal of the plaintiff’s claim because the anti-SLAPP motion must be granted if the petitioner’s activity had *some* factual basis.<sup>62</sup> Given that presumption and the high standard, the court granted the special motion to dismiss.<sup>63</sup>

*B. The Illinois Statute and the Procedural History of  
Sandholm v. Kuecker*

In August of 2007, Illinois became the twenty-sixth state to enact an anti-SLAPP statute when it created the CPA.<sup>64</sup> The CPA was the result of five years of work by a handful of Illinois legislators<sup>65</sup> who were determined to pass what they considered to be “‘common-sense’ legislation.”<sup>66</sup>

The CPA states:

[I]t is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. . . . The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.

. . . .

It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government . . . .<sup>67</sup>

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60. *Baker*, 750 N.E.2d at 960 (quoting MASS. GEN. LAWS ch. 231, § 59H (2010)).

61. *Id.* at 961–62; *see also Duracraft Corp.*, 691 N.E.2d at 943.

62. *See Baker*, 750 N.E.2d at 961; *see also Hoffberg*, *supra* note 44, at 110–11 (noting that the presumption in favor of the special motion is unlike a Rule 12(b)(6) motion to dismiss, for which the court presumes a denial).

63. *Baker*, 750 N.E.2d at 961–62.

64. Citizen Participation Act, Pub. Act. No. 95-506, 2007 Ill. Laws 1434 (codified at 735 ILL. COMP. STAT. 110/1–99 (2012)); *see also* Debbie L. Berman & Wade A. Thomson, *Illinois’ Anti-SLAPP Statute: A Potentially Powerful New Weapon for Media Defendants*, COMM. LAW., Mar. 2009, at 13, 13.

65. Eric M. Madiar & Terrence J. Sheahan, *Illinois’ New Anti-SLAPP Statute*, 96 ILL. B.J. 620, 621 (2008). Senators John Cullerton and Dan Cronin and Representative Sara Feigenholtz, each sponsored failing bills before Cullerton, Feigenholtz, and Senator Jack Franks successfully passed the CPA as Senate Bill 1434 in 2007. *Id.*

66. Sobczak, *supra* note 7, at 570.

67. 735 ILL. COMP. STAT. 110/5.

The Illinois Supreme Court recognized this public policy foundation for the statute, in addition to its goals to “establish an efficient process for identification and adjudication of SLAPPs” and “provide for attorney’s fees and costs to prevailing movants.”<sup>68</sup>

Commentators consider the CPA to be facially broader than other states’ anti-SLAPP statutes. One reason is section 15, which immunizes “any act or acts” made “in furtherance of the constitutional right to petition, speech, association, and participation in government . . . regardless of intent or purpose.”<sup>69</sup> Also, the CPA defines “government,” “person,” and “claim” broadly, in addition to the CPA’s explicit instruction that it be “construed liberally to effectuate its purpose and intent fully.”<sup>70</sup>

The CPA’s plain language mandates a two-pronged analysis that first requires a defendant show that the plaintiff’s complaint was “based on” his petitioning activity in furtherance of his constitutional rights.<sup>71</sup> Then, under section 20(c), the burden shifts to the plaintiff to produce “clear and convincing evidence” demonstrating that the defendant’s acts are not immunized by the CPA.<sup>72</sup> In the second prong, the court examines the genuineness of the defendant’s petitioning to determine whether it was all a “sham” and “not genuinely aimed at procuring a favorable government action.”<sup>73</sup>

### 1. Wright Development Group LLC v. Walsh

In *Wright Development Grp.*, the Illinois Supreme Court established that the CPA could protect defamatory statements made to the media.<sup>74</sup> In that case, a developer sued a condominium association

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68. *Wright Dev. Grp., LLC v. Walsh*, 939 N.E.2d 389, 397 (Ill. 2010) (quoting 735 ILL. COMP. STAT. 110/5).

69. *Madiar & Sheahan*, *supra* note 65, at 621 (quoting 735 ILL. COMP. STAT. 110/15). The *Sandholm* appellate court itself argued that “[t]he [CPA] exceeds [traditional] definition[s] by including the rights to speak, assemble, or otherwise participate in government, and it is not limited to matters of social or civic concern.” *Sandholm v. Kuecker*, 942 N.E.2d 544, 550 (Ill. App. Ct. 2010).

70. 735 ILL. COMP. STAT. 110/10, 30(b). The Act defines “government” as “a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, a subdivision of a state, or another public authority including the electorate.” *Id.* § 10. “‘Person’ includes any individual, corporation, association, organization, partnership, 2 or more persons having a joint or common interest, or other legal entity.” *Id.* Further, a “[j]udicial claim’ or ‘claim’ include[s] any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury.” *Id.* These definitions encompass the widest breadth that one can imagine the words allowing.

71. *Id.* § 15.

72. *Id.* § 20(c).

73. *See Wright Dev. Grp.*, 939 N.E.2d at 398.

74. *Id.* at 400.

president claiming that the president made defamatory statements to a newspaper directly following an alderman-sponsored public meeting.<sup>75</sup> The trial court had denied the defendant's special motion because the statements were made to a reporter, rather than addressed to the government.<sup>76</sup> However, the trial court ultimately dismissed the suit pursuant to Illinois's innocent construction rule,<sup>77</sup> which requires courts to construe statements innocently if it is reasonable to do so considering their context.<sup>78</sup> The appellate court then dismissed the defendant's appeal as moot because "[he] got exactly the relief he sought (i.e., dismissal of the complaint), albeit on a different basis."<sup>79</sup> The Illinois Supreme Court agreed with the circuit court that the suit should be dismissed.<sup>80</sup> Nonetheless, the appeal was not moot because an express public policy ground of the CPA is to provide "attorney's fees and costs to prevailing movants,"<sup>81</sup> and because the plaintiff's suit did generally arise out of defendant's "petitioning" activities, the lawsuit was a SLAPP and the defendant should receive the protection and financial benefits of the CPA.<sup>82</sup>

## 2. Shoreline Towers Condominium Association v. Gassman<sup>83</sup>

In *Shoreline*, a resident sued her condominium association regarding its rule prohibiting her from displaying a religious object in her doorway.<sup>84</sup> The association and its president counterclaimed for harassment, intimidation, and defamation, alleging that she provided in-

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75. *Id.* at 390–91. The condominium association president believed that answering the reporter's follow-up questions after the meeting was "continuing to further participate in what the purpose of the meeting was" because he was discussing the same topics as those in the alderman's meeting. *Id.* at 391–92 (internal quotation marks omitted).

76. *Id.* at 389.

77. *See id.* at 394–95.

78. *Bryson v. News Am. Publications, Inc.*, 672 N.E.2d 1207, 1215 (Ill. 1996); *see also Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 206–08 (Ill. 1992); *Chapski v. Copley Press*, 442 N.E.2d 195, 196–97 (Ill. 1982).

79. *Wright Dev. Grp.*, 939 N.E.2d at 394–95.

80. *Id.* at 389. The trial court denied the defendant's special motion because the statements were made to a reporter, rather than addressed to the government. *See id.* However, the trial court ultimately dismissed the suit pursuant to Illinois's innocent construction rule. *See id.* at 394–95. The appellate court then dismissed the defendant's appeal as moot because "[he] got exactly the relief he sought (i.e., dismissal of the complaint), albeit on a different basis." *Id.*

81. *Id.* at 397 (citing 735 ILL. COMP. STAT. 110/5 (2012)).

82. The court found that the defendant's statements to the reporter were constitutionally protected as being "in furtherance" of his rights because the CPA expressly includes "the electorate" in its definition of "government." *Id.* at 397–400 (quoting 735 ILL. COMP. STAT. 110/10, 15).

83. *Shoreline Towers Condo. Ass'n v. Gassman*, 936 N.E.2d 1198 (Ill. App. Ct. 2010).

84. *Id.* at 1201. The resident filed several lawsuits alleging religious discrimination. Her suits were dismissed for lack of substantial evidence and closed pursuant to the condominium association's voluntary revision of its rules. *Id.* at 1201–02.

accurate information to a local newspaper, ripped down flyers, and accused the association president of being a drug dealer, among other things.<sup>85</sup> The resident filed a motion to dismiss and argued that the whole suit should be dismissed pursuant to the CPA because she was acting in furtherance of her constitutional rights while attempting to protect herself from religious discrimination.<sup>86</sup> The trial court partially dismissed the association's complaint pursuant to the CPA, but did not dismiss the defamation claims relating to the president because, the court reasoned, "Anti-SLAPP legislation is not intended to protect those who actually commit torts but to protect those who are in danger of being sued solely because of their valid attempts to petition the government."<sup>87</sup> The appellate court distinguished the resident's defamatory actions against the president as an individual from those against the condominium association for its rules restricting her religious freedom.<sup>88</sup> In affirming the trial court, the appellate court clarified that the condominium association's defamation claims were clearly brought against the resident in response to her acts in furtherance of her constitutional rights and, thus, were protected by the statute's broad scope, noting that "the [CPA] . . . protects from liability all constitutional forms of expression and participation in pursuit of favorable government action."<sup>89</sup>

### 3. Sandholm: *The Appellate Decision*

In *Sandholm*,<sup>90</sup> a former high school basketball coach brought an action for defamation per se<sup>91</sup> against a group of defendants com-

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85. *Id.* at 1203–04. The defendant also told the building desk clerk that she had friends on the police force who would be monitoring [the condominium president] and his guests for suspicious behavior. . . . Later, [she] told the desk clerk that [the condominium president] had a homosexual lover. She also told the desk clerk that [the condominium president] was involved in litigation regarding alleged misconduct with one of his patients.

*Id.* at 1203.

86. *Id.* at 1204.

87. *Id.* at 1204–05 (internal quotation marks omitted).

88. *Id.* at 1204–07.

89. *Shoreline Towers Condo. Ass'n*, 936 N.E.2d at 1207.

90. The appellate court considered this a case of first impression regarding the scope of the CPA because it did not involve a "typical SLAPP case." *See Sandholm v. Kuecker*, 942 N.E.2d 544, 550 (Ill. App. Ct. 2010).

91. A statement is defamatory if it "tends to harm a person's reputation to the extent that it lowers that person in the eyes of the community or deters others from associating with that person." *Id.* (citing *Tuite v. Corbitt*, 866 N.E.2d 114, 121 (Ill. 2006)). A statement is defamatory per se if "its defamatory character is obvious and apparent on its face and injury to the plaintiff's reputation may be presumed." *Id.* at 558. Exceptions apply in certain circumstances, including when the statement is substantially true, when the statement is subject to a qualified privilege—like the fair report privilege—or absolute privilege, and when the statement is made during

prised primarily of parents of student-athletes who were dissatisfied with the coach's methods and had campaigned to have him removed from the school's staff.<sup>92</sup> The parents sought the coach's removal by approaching the school principal, superintendent, and members of the school district board.<sup>93</sup> When that was ineffective, they made allegedly defamatory statements about the coach online and on the radio, including that the plaintiff "adversely performed his job, that his coaching philosophy was to verbally abuse, bully, discourage, and desecrate players, and that plaintiff needed to be fired."<sup>94</sup> The appellate court affirmed the trial court's grant of the parents' CPA special motion to dismiss, including attorney fees,<sup>95</sup> agreeing that the CPA was "written broadly enough that it applies to [the parents'] statements made outside the petition and the school board meeting."<sup>96</sup>

The appellate court agreed with the trial court's determination that the parents had genuinely<sup>97</sup> "acted in furtherance of their desire that

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legislative proceedings. *Id.* at 558–59 (citing *J. Maki Constr. Co. v. Chi. Reg'l Council of Carpenters*, 882 N.E.2d 1173, 1186 (Ill. App. Ct. 2008); *Solaia Tech., LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825, 842 (Ill. 2006)). The *Sandholm* court declared:

[T]he [CPA] alters existing defamation law by providing a new, qualified privilege for any defamatory statements communicated in furtherance of one's right to petition, speak, assemble, or otherwise participate in government. The privilege is qualified because it may be exceeded if the statements are not made with the genuine aim at procuring a favorable government action.

*Id.* at 559–60.

92. *Id.* at 551. On April 23, 2008, the school board removed the plaintiff from his coaching job, but allowed him to retain his position as the school's athletic director. *Id.* at 553.

93. *Id.* at 551.

94. *Id.*

95. *Id.* at 576.

96. *Sandholm*, 942 N.E.2d at 563.

97. An analysis of genuineness is based on the *Noerr-Pennington* doctrine. See Sobczak, *supra* note 7, at 568–70. The appellate court in *Sandholm* found that, based on the legislative history of the CPA, the legislature intended to adopt the *Noerr-Pennington* doctrine, which provides a limit on antitrust liability by protecting companies' lobbying efforts subject to a "sham exception." See *Sandholm*, 942 N.E.2d at 566–67 (citing *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)). Under *City of Columbia v. Omni Outdoor Advertising, Inc.*,—which elaborated on the doctrine and was referenced by the CPA's sponsors during legislative hearings—a person's petitioning activities are immunized from suit unless the other party can show that those activities are a "sham." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991). When a defendant's activities are "not genuinely aimed at procuring favorable government action at all" then it is a "sham." *Id.* at 380 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 496, 500 n.4 (1988)) (internal quotation marks omitted). The Supreme Court later created a two-part test to identify "sham" lawsuits: (1) the court must determine whether the petitioning activity was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and (2) if the court finds that the petitioner's activity was objectively baseless, the court must analyze "whether the baseless lawsuit conceals 'an attempt to interfere directly with the business relationships of a competitor.'" *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60–61 (1993) (emphasis omitted) (quoting

the school board remove plaintiff as coach and athletic director” and held that the Act barred plaintiff’s complaint in its entirety.<sup>98</sup> The court analyzed the parents’ genuineness through the “sham exception,” which it explained as “encompass[ing] situations in which ‘persons use the governmental *process*—as opposed to the *outcome* of the process—as an anticompetitive weapon.’”<sup>99</sup> The court determined that the parents’ petitioning was genuine because, objectively, the parents could have reasonably expected to remove the plaintiff from his coaching position, which was supported by the fact that their actions led to their “desired outcome that the school board remove plaintiff as coach of the basketball team.”<sup>100</sup>

The court also considered the plaintiff’s argument that the trial court failed to “strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government.”<sup>101</sup> The appellate court concluded that “[t]he legislature presumably struck the balance by passing the Act itself, and it [was] not the court’s role to rewrite a statute that appears to lead to unjust results when interpreted as written.”<sup>102</sup> Thus, the appellate court affirmed the dismissal of the plaintiff’s action.<sup>103</sup>

### III. THE ILLINOIS SUPREME COURT’S DECISION IN *SANDHOLM*

The Illinois Supreme Court overturned the appellate court and held that the CPA did not bar the plaintiff from bringing a defamation action against the parents who campaigned for his removal.<sup>104</sup> The court’s decision limited the scope of the CPA by establishing that “the

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*Noerr*, 365 U.S. at 144). An Illinois appellate court defined the sham standard as “when a defendant petitions the government with no realistic expectation of a favorable result, but merely to force expense and delay on the other party.” *Stahelin v. Forest Pres. Dist.*, 877 N.E.2d 1121, 1132 (Ill. App. Ct. 2007).

98. *Sandholm*, 942 N.E.2d at 554, 556. The court acknowledged that section 15 . . . appeared ambiguous in that it both excluded inquiry as to the subjective intent or purpose of the acts in furtherance of the moving party’s rights and then included inquiry as to the genuine aim of those acts. . . . The gist . . . is that even if a speaker was motivated by an illegal purpose in petitioning the government, as long as the actions constituted a genuine effort at petitioning for government action, they were immune from liability.

*Id.* at 554.

99. *Id.* at 567 (quoting *Omni Outdoor Adver., Inc.*, 499 U.S. at 380).

100. *Id.* at 568–69.

101. *Id.* at 557, 563 (quoting 735 ILL. COMP. STAT. 110/5 (2012)).

102. *Id.* at 570–71. The appellate court emphasized that “[t]he courts . . . are bound to interpret statutes as written and not to strike balances that the legislature already struck.” *Id.* at 571.

103. *Id.* at 576.

104. *Sandholm v. Kuecker*, 962 N.E.2d 418, 434 (Ill. 2012).



legislature intended to target only meritless, retaliatory SLAPPs and did not intend to establish a new absolute or qualified privilege for defamation.”<sup>105</sup> The court began with an analysis of the traditional SLAPP paradigm, which it asserted involves claims that are, “by definition, meritless.”<sup>106</sup> The court further contended that legislators had that scenario in mind when they drafted the CPA, specifically section 5, which mentions the chilling effect that SLAPP suits have upon citizens’ petitioning activity.<sup>107</sup> After an overview of the statutory language, the court stated that its “primary objective is to ascertain and give effect to the intent of the legislature.”<sup>108</sup>

The court agreed with the plaintiff’s argument “that the Act is intended to apply only to actions based *solely* on the defendants’ petitioning activities and does not immunize defamation or other intentional torts.”<sup>109</sup> The *Sandholm* court looked to the *Duracraft* court’s construction of the Massachusetts anti-SLAPP statute’s “based on” language, which “exclud[es] motions brought against meritorious claims with a substantial basis other than or in addition to the petitioning activities implicated.”<sup>110</sup> The *Sandholm* court explained that its interpretive addition of the word “solely” would rebalance the right of defendants to petition with the right of plaintiffs to seek redress for injuries,<sup>111</sup> which was necessary because “where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not *solely* based on defendant’s rights of petition, speech, association, or participation in government.”<sup>112</sup> The court also discussed the CPA’s

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105. *Id.* at 431.

106. *Id.* at 427 (citing John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 396 (1993)).

107. *See id.* at 428 (citing 735 ILL. COMP. STAT. 110/5 (2012) (“The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.”)).

108. *Id.* at 429. The court went on to describe its statutory construction approach: “The most reliable indicator of the legislative intent is the language of the statute, which should be given its plain and ordinary meaning.” *Id.*

109. *Id.* at 429–31 (citing *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998)).

110. *Sandholm*, 962 N.E.2d at 431 (quoting *Duracraft Corp.*, 691 N.E.2d at 943).

111. *See id.* at 431. The court saw a “danger inherent in anti-SLAPP statutes . . . that when constructed or construed too broadly in protecting the rights of defendants, they may impose a counteractive chilling effect on prospective plaintiffs’ own rights to seek redress from the courts for injuries suffered.” *Id.* (alteration in original) (quoting Sobczak, *supra* note 7, at 575).

112. *Id.* at 430 (emphasis added).

legislative history, which it believed supported its interpretation that the Act “was aimed solely at traditional, meritless SLAPPs.”<sup>113</sup>

The court rejected the defendants’ proposition that the “sham exception” could sufficiently distinguish SLAPPs from meritorious suits, finding instead that “[t]he sham exception tests the genuineness of the *defendants’* acts; it says nothing about the merits of the plaintiff’s lawsuit.”<sup>114</sup> Thus, the court determined that the defendants did not satisfy their burden of proving that the plaintiff’s complaint was “based on” their petitioning activity, and it did not need to move on to the plaintiff’s burden.<sup>115</sup> The court found it clear that the plaintiff’s “true goal” was to seek damages for personal and reputational harm, and he should survive the special motion to dismiss; however, the Illinois Supreme Court was careful to disclaim any opinion as to the merits of the plaintiff’s claim at that early stage of the litigation.<sup>116</sup>

#### IV. ANALYSIS

The broad language in the CPA enabled the *Sandholm* court to effectively nullify the purpose of Illinois’s anti-SLAPP statute. The California and Massachusetts statutes’ analysis procedures have led those states to apply their respective anti-SLAPP statutes within the scope their legislatures intended. Though Illinois’s anti-SLAPP statute, as written, calls only for analysis of the genuineness of defendants’ petitioning, the problems with the court’s new “solely” standard create a need for analysis of the genuineness of plaintiffs’ claims as well in order to achieve the legislature’s goal of protecting individuals’ right to speak freely without the threat of litigation. Such a procedure would restore some degree of pro-defendant deference to the court’s application of the CPA, as the Illinois legislature intended. A two-sided genuineness analysis would enable courts to identify both sham petitioning activity and sham suits, which would address the Illinois Supreme Court’s concern for preserving the balance between parties’

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113. *Id.* at 432. The court included statements from bill sponsors Senator Cullerton and Representative Franks, in which the legislators provided examples of scenarios that the eventual law would target. *Id.*

114. *Id.* at 432–33. The court emphasized, “If a plaintiff’s complaint genuinely seeks redress for damages from defamation or other intentional torts and, thus, does not constitute a SLAPP, it is irrelevant whether the defendants’ actions were genuinely aimed at procuring favorable government action, result, or outcome.” *Id.* at 433 (internal quotation marks omitted). It is notable that the court failed to address plaintiff’s emphasis of the portion of the statute that provides, “*regardless of intent or purpose.*” See *id.* at 432–33 (quoting 735 ILL. COMP. STAT. 110/15 (2012)).

115. *Id.* at 434.

116. *Sandholm*, 962 N.E.2d at 434. As of September 2013, the court had yet to rule on the merits of the plaintiff’s claims.

rights and achieving fairness in the litigation process. The Illinois legislature should add a factual-evaluation process to the CPA, which will address the abuse that may well follow as a result of the *Sandholm* decision.

In holding that defamation or intentional tort claims that genuinely seek relief cannot be *solely* based on a defendant's speech and, thus, are not subject to CPA special dismissal,<sup>117</sup> the court opened a floodgate through which future plaintiffs may easily bypass a defendant's CPA special motion to dismiss. Despite the legislature's instruction to courts to interpret the CPA "liberally" and to give it its full and intended effect,<sup>118</sup> the Illinois Supreme Court read an additional word into the CPA—"solely"—which greatly restricts the applicability of the CPA's special motion to dismiss.<sup>119</sup>

Similar to the appellate court in *Shoreline*,<sup>120</sup> the Illinois Supreme Court in *Sandholm* relied heavily on section 5 of the CPA, which instructs courts to "strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition."<sup>121</sup> In *Shoreline*, the court found that only four of ten claims could survive the special motion to dismiss because those four claims focused on the defendant's statements that were personally directed at the association president.<sup>122</sup> The other six claims focused on the defendant's speech regarding the condominium association's discriminatory policies and were clearly protected petitioning activity because the defendant's objective was the alteration of the policies.<sup>123</sup> In contrast, the Illinois Supreme Court in *Sandholm* allowed the plaintiff's defamation claim to survive even though the defendants' allegedly defamatory speech was the petitioning activity—the reasons they felt the plaintiff should be removed from his coaching position—as opposed to a peripheral attack.<sup>124</sup> *Shoreline* is one example of the judiciary's ability to discern between petitioning activity that merits the protection of the CPA and activity that does not. *Sandholm* unnecessarily narrowed the statute. The Illinois Supreme Court believed that it was ridding the system of a pro-defendant construction, which constituted

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117. *Id.* at 430 (emphasis added).

118. 735 ILL. COMP. STAT. 110/30(b).

119. *See Sandholm*, 962 N.E.2d at 429–31.

120. *See Shoreline Towers Condo. Ass'n v. Gassman*, 936 N.E.2d 1198, 1206 (Ill. App. Ct. 2010).

121. *Sandholm*, 962 N.E.2d at 431 (quoting 735 ILL. COMP. STAT. 110/5).

122. *See Shoreline Towers Condo. Ass'n*, 936 N.E.2d at 1204–05.

123. *Id.* at 1204–07; *see also supra* notes 83–89 and accompanying text.

124. *See Sandholm*, 962 N.E.2d at 434.

a “danger inherent in anti-SLAPP statutes,”<sup>125</sup> by instituting a new standard whereby a plaintiff’s suit may survive the CPA special motion if it has been brought with any grounds besides chilling the defendant’s speech.<sup>126</sup> However, that goal is contrary to the CPA’s plain language, which limits courts’ analysis to the defendant’s petitioning activity and mandates dismissal if the court finds that activity to be in furtherance of her constitutional rights, regardless of the merits of plaintiff’s claims against her for that speech.<sup>127</sup>

When drafting the CPA, legislators intended for the court to reject a defendant’s motion only if the plaintiff met her high burden.<sup>128</sup> That interpretation heavily favored defendants because when a court determined there was “petitioning activity,” which was fairly easy because the statute defines it broadly,<sup>129</sup> the court would conclude that the claim was “based on” the petitioning activity when it was generally the subject of the plaintiff’s complaint.<sup>130</sup> That deference to the defendant was consistent with the CPA’s overall purpose: “[a] broad grant of conditional immunity for First Amendment activity.”<sup>131</sup>

The Illinois Supreme Court, in effect, switched the presumption in favor of the plaintiff by re-weighting the procedural burdens of the parties. Because the court determined that the defendants had not met their burden to prove that the plaintiff’s suit was “solely” based on their petitioning activity,<sup>132</sup> the burden never shifted to the plaintiff to provide “clear and convincing evidence” that the CPA immunity did not apply to the defendants’ actions.<sup>133</sup> Under the prior standard that followed the plain language of the CPA, the defendants would have had to prove only that the plaintiff’s defamation claim was

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125. *Id.* at 431.

126. *See id.* at 430; *see also* Ryan v. Fox Television Stations, Inc., 979 N.E.2d 954, 962 (Ill. App. Ct. 2012); August v. Hanlon, 975 N.E.2d 1234, 1244 (Ill. App. Ct. 2012).

127. *See* 735 ILL. COMP. STAT. 110/15 (2012).

128. *See id.* § 20; *see also* Sobczak, *supra* note 7, at 572.

129. The statute defines “petitioning activity” broadly by immunizing that action “regardless of intent or purpose” and by broadly defining “government” for the purposes of determining whether those acts were “genuinely aimed at procuring favorable government action, result, or outcome,” to include even the “electorate.” 735 ILL. COMP. STAT. 110/10–15; *see also* Sandholm v. Kuecker, 942 N.E.2d 544, 569–70 (Ill. App. Ct. 2010); Madiar & Sheahan, *supra* note 65, at 621–22.

130. 735 ILL. COMP. STAT. 110/20(c). “The court *shall* grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not the furtherance of acts immunized from, liability by this Act.” *Id.* (emphasis added); *see also* Hytel Grp., Inc. v. Butler, 938 N.E.2d 542, 554–55 (Ill. App. Ct. 2010).

131. Sobczak, *supra* note 7, at 571.

132. Sandholm v. Kuecker, 962 N.E.2d 418, 434 (Ill. 2012).

133. 735 ILL. COMP. STAT. 110/20(c).

“based on” their petitioning activity to have him removed from his public school coaching position, “regardless of [their] intent or purpose,” so long as it was in furtherance of their constitutional rights.<sup>134</sup>

A. *Enabling Broad Statutory Protection Through Merits Analysis*

The Illinois Supreme Court’s decision in *Sandholm* seemed to be a reaction to criticism that the Illinois anti-SLAPP statute was overly broad and “impose[d] a counteractive chilling effect on prospective plaintiffs’ own rights to seek redress.”<sup>135</sup> Specifically, the court cited the CPA’s lack of “an explicit statement of . . . intent” to “establish a new, qualified privilege” as its justification for reeling in the scope of the CPA’s applicability.<sup>136</sup>

1. *The Illinois Supreme Court’s Arbitrary Reliance on and Misapplication of Massachusetts Caselaw in Sandholm*

When the Illinois Supreme Court heightened the defendant’s burden in the first prong of the CPA analysis by including the “solely based on” test, it relied on an unusual source: Massachusetts caselaw. The *Sandholm* court cited the “solely” language in *Duracraft*,<sup>137</sup> which involved two corporate competitors that the Massachusetts court suspected of utilizing the special motion as “an additional litigation tactic.”<sup>138</sup> The corporate setting and other facts specific to the case were crucial to the Massachusetts court’s decision to deny the special motion to dismiss.<sup>139</sup> Nonetheless, the Massachusetts court acknowledged that other fact scenarios might clearly meet the “solely based on” test and require the court to move on to the second prong of the analysis. The court hypothesized that a “defamation claim, for example, can be tested by showing that the defendant’s petitioning activity

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134. *Id.* § 15.

135. *Sandholm*, 962 N.E.2d at 431 (quoting Sobczak, *supra* note 7, at 575); *cf.*

James J. Sipchen et al., *Thinking of Filing A Defamation Lawsuit? The Citizens Participation Act May Make You Think Twice*, CBA REC., May 25, 2011, at 52 (“[T]he Illinois courts have taken an extremely broad view of the Act, and thus, provided defense practitioners with a powerful weapon to combat lawsuits designed to curtail a defendant’s public activities.”); Madiar & Sheahan, *supra* note 65, at 623 (“The plain language of the [CPA] appears, however, to fundamentally alter existing defamation law by affording a new, absolute privilege for any defamatory statements communicated—maliciously or otherwise—while genuinely aiming to procure favorable government action, even from the electorate.”).

136. *Sandholm*, 962 N.E.2d at 432.

137. *See id.* at 430–31.

138. *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940–41 (Mass. 1998).

139. *See id.* at 940–43.

was devoid of factual or legal support and thus can overcome a presumption of qualified immunity.”<sup>140</sup>

The *Duracraft* court explained that the statute’s “construction of ‘based on’ . . . exclude[s] motions brought against meritorious claims with a substantial basis other than or in addition to the petitioning activities implicated.”<sup>141</sup> In *Duracraft*, the other substantial basis was a nondisclosure agreement, which constituted an entirely separate ground for the plaintiff’s claim that was unrelated to the employee’s petitioning rights.<sup>142</sup> Whereas in *Sandholm*, the coach asserted a defamation claim, which the *Duracraft* court plainly suggested survives the first prong’s “based on” test and requires an analysis under the second prong.<sup>143</sup> The *Duracraft* court presumably used defamation as an example because it is an obvious situation in which the plaintiff’s claim stems directly from the defendant’s speech; thus, if that speech is made in the exercise of her constitutional rights, it should be immunized, regardless of any defamatory content.

The *Duracraft* court’s defamation hypothetical makes plain its opinion that in a defamation action, a defendant would overcome her initial burden of demonstrating that the plaintiff’s complaint was solely based on her petitioning activity. Confusingly, when the Illinois Supreme Court adopted the Massachusetts “solely” standard, relying on *Duracraft*, it seemingly ignored that court’s defamation example by finding that the *Sandholm* defendants failed to satisfy their burden. The Illinois Supreme Court’s reliance on *Duracraft* was inappropriate not only because Massachusetts’s caselaw is based on a different statutory standard, but also because the *Sandholm* court misinterpreted *Duracraft*’s guidance for defamation cases.

## 2. A Lesson from California

Given the facial similarity between the Illinois and California anti-SLAPP statutes, including instructions for liberal construction, California’s experience should provide guidance for both the Illinois judiciary and legislature.<sup>144</sup> Widely considered one of the most expansive anti-SLAPP statutes in the country,<sup>145</sup> the language of the California

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140. *Id.* at 942.

141. *Id.* at 943.

142. *Id.*

143. *Id.* at 942.

144. Compare 735 ILL. COMP. STAT. 110/30(b) (2012) (“This Act shall be construed liberally . . . .”); with CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2014) (“[T]his section shall be construed broadly.”). But see Sobczak, *supra* note 7, at 584 (contending that California’s sweeping statute and experience should be viewed as a “cautionary tale”).

145. Sobczak, *supra* note 7, at 581.

statute is strikingly similar to that of the CPA. Both statutes define “petitioning activity” as including all statements that generally relate to an issue of concern to the government, which includes the electorate.<sup>146</sup> The statutes also call for a similar two-pronged analysis procedure. The first prong of each requires analysis of whether the defendant is immunized because the suit is based on her petitioning activity (and, under the California statute, whether that activity concerned an issue of public interest).<sup>147</sup> Both procedures then allow the plaintiff a rebuttal opportunity: Illinois courts require the plaintiff to provide “clear and convincing evidence” that the immunity does not apply,<sup>148</sup> and California courts assess whether the plaintiff can show a likelihood of prevailing on the merits of the claim.<sup>149</sup>

*Hecimovich*, decided by a California appeals court only a month after the Illinois Supreme Court’s *Sandholm* decision, offers a valuable comparison of the application of the two state statutes.<sup>150</sup> Both cases involved parents who petitioned to have coaches removed from their positions because of the parents’ disagreement with the coaches’ disciplinary methods.<sup>151</sup> Unlike *Sandholm*, the California court granted the defendants’ special motion to dismiss because it determined that the facts easily satisfied both prongs of the California test.<sup>152</sup> First, the California court determined that the defendants’ activity was immunizable because the “principal thrust” of the plaintiff’s cause of action was conduct that fell under the statute’s definition of protected activity.<sup>153</sup> Second, the court determined that the plaintiff could not show a likelihood of prevailing on the merits of the claim

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146. 735 ILL. COMP. STAT. 110/10–15; CAL. CIV. PROC. CODE § 425.16(e).

147. 735 ILL. COMP. STAT. 110/15; CAL. CIV. PROC. CODE § 425.16(b)(1), (e).

148. 735 ILL. COMP. STAT. 110/20(c).

149. CAL. CIV. PROC. CODE § 425.16(b)(1).

150. See *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 137 Cal. Rptr. 3d 455 (Ct. App. 2012); see also *supra* notes 36–40, 90–94 and accompanying text. Specifically, the plaintiff in *Sandholm* alleged, “defendants defamed him by making statements that [he] abused children, did not get along with colleagues, and performed poorly at his job.” *Sandholm v. Kuecker*, 962 N.E.2d 418, 433 (Ill. 2012). In *Hecimovich*, the specific statements were disputed, but the coach’s complaint alleged that the parents charged him with “immoral qualities including a disregard for the safety of children that by natural consequence would and have in fact injured [plaintiff’s] reputation in the community and his ability to engage in the avocation of his choice.” *Hecimovich*, 137 Cal. Rptr. 3d at 471.

151. Compare *Sandholm*, 962 N.E.2d at 422–25, with *Hecimovich*, 137 Cal. Rptr. 3d at 459.

152. See *Hecimovich*, 137 Cal. Rptr. 3d at 469, 476.

153. *Id.* at 466–67. The statute protects “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.” CAL. CIV. PROC. CODE § 425.16(e)(4).

because he had insufficiently pleaded the essential elements of defamation.<sup>154</sup>

The Illinois appellate court's analysis in *Sandholm* was very similar to *Hecimovich* because it determined that the defendants' statements were petitioning activity protected by the CPA.<sup>155</sup> Both the California and Illinois appellate court read their respective anti-SLAPP statutes to provide that even truly defamatory speech could be protected petitioning activity. Although both courts determined that the defendants survived genuineness analysis and that the plaintiffs failed to satisfy their rebuttal burdens,<sup>156</sup> the Illinois Supreme Court in *Sandholm* overturned the appellate court's decision and erroneously determined that the CPA did not apply because the plaintiff "genuinely" sought damages, making it "irrelevant" whether the defendants genuinely acted in furtherance of their constitutional rights.<sup>157</sup>

The Illinois Supreme Court's focus on the plaintiff's genuineness is a clear departure from the CPA's plain language, which does not call for the court's analysis of that matter. Ironically, even though the *Hecimovich* court granted the special motion and the *Sandholm* court eventually denied it, the plain language of the Illinois anti-SLAPP statute could be viewed as more deferential to defendants than the California statute. While the California statute offers plaintiffs the opportunity to show that their claim could be successful if it were allowed to survive and proceed to trial,<sup>158</sup> the Illinois statute requires plaintiffs to meet the very high standard of "clear and convincing evidence" that the defendants' actions are not protected by the statute.<sup>159</sup>

#### B. *Balancing Parties' Burdens under the Sandholm Standard*

The Illinois appellate court in *Sandholm* complied with the pro-defendant standards codified by the legislature by disposing of the suit once the requirements of the CPA were met and found a way to harmonize section 5's warning to "balance" parties' rights.<sup>160</sup> In response to the plaintiff's argument that statements made outside the school board did not qualify as petitioning activity, the appellate court focused its analysis on whether the defendants' acts were petitioning activity "genuinely aimed at procuring government action."<sup>161</sup> The

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154. *Hecimovich*, 137 Cal. Rptr. 3d at 469–71.

155. *Sandholm v. Kuecker*, 942 N.E.2d 544, 570 (Ill. App. Ct. 2010).

156. *See id.*; *Hecimovich*, 137 Cal. Rptr. 3d at 467, 469–71.

157. *Sandholm v. Kuecker*, 962 N.E.2d 418, 433 (Ill. 2012).

158. CAL. CIV. PROC. CODE § 425.16(b)(1).

159. 735 ILL. COMP. STAT. 110/20(c) (2012).

160. *See Sandholm*, 942 N.E.2d at 570.

161. *Id.* at 563–64.



appellate court determined that the legislature intended Illinois courts to analyze defendants' "genuineness,"<sup>162</sup> which calls for consideration of both the objective and subjective intent of the defendants' petitioning.<sup>163</sup> It found that the *Sandholm* defendants proved that their petitioning activity was genuine because they objectively achieved their goal of removing the coach from his position at the school.<sup>164</sup> However, the parents need not have even achieved that result because a court need only ask whether a defendant could have expected to achieve a favorable government outcome; only if the answer is negative must the court proceed to an analysis of whether the defendants subjectively thought they could achieve that result.<sup>165</sup>

Under the current CPA, a court need only analyze the genuineness of the defendant's conduct.<sup>166</sup> Illinois courts have recognized that the genuineness inquiry originates from established doctrines related to "sham" litigation.<sup>167</sup> Traditionally, "sham" analysis involves a determination of whether "a reasonable litigant could realistically expect success on the merits."<sup>168</sup> If a court determines that the litigation is objectively meritless, it may then examine the plaintiff's subjective motive, which is determined by assessing whether the litigant is "indifferent to the outcome on the merits of the suit, brought the suit notwithstanding that the litigation costs would exceed any potential recovery, or sued primarily to inflict collateral injuries."<sup>169</sup> Currently, Illinois courts' analysis of the plaintiff's motives in bringing a suit is much more limited: they assess "(1) the proximity in time between the protected activity and the filing of the complaint, and (2) whether the damages requested are reasonably related to the facts alleged in the complaint and are a 'good-faith estimate of the extent of the injury sustained.'"<sup>170</sup>

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162. *See id.* at 566–67.

163. *Id.* at 568–69.

164. *Id.* at 569.

165. *Id.* at 568–69.

166. *See* 735 ILL. COMP. STAT. 110/15 (2012).

167. *See* *Stahelin v. Forest Pres. Dist.*, 877 N.E.2d 1121, 1131–32 (Ill. App. Ct. 2007) (discussing *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)); *cf.* *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993).

168. *See* James B. Perrine, Commentary, *Defining the "Sham Litigation" Exception to the Noerr–Pennington Antitrust Immunity Doctrine: An Analysis of the Professional Real Estate Investors v. Columbia Pictures Industries Decision*, 46 ALA. L. REV. 815, 829–30 (1995) (citing *Prof'l Real Estate Investors*, 508 U.S. at 55–56).

169. *Id.* at 830.

170. *Ryan v. Fox Television Stations, Inc.*, 979 N.E.2d 954, 962–63 (Ill. App. Ct. 2012) (quoting *Hytel Grp., Inc. v. Butler*, 938 N.E.2d 542, 556 (Ill. App. Ct. 2010)).

The Illinois Supreme Court, however, did not mention any such procedure and seemingly felt justified in its unsupported determination that the plaintiff's "genuine" pursuit of damages warranted survival of the CPA special motion.<sup>171</sup> The court accurately stated, "The sham exception [of the CPA] tests the genuineness of the *defendants'* acts; it says nothing about the merits of the plaintiff's lawsuit."<sup>172</sup> The CPA's limited application of the sham exception, whereby only the defendant's petitioning activity is analyzed, was appropriate under the prior pro-defendant "based on" standard because courts erred in favor of protecting those defendants' First Amendment rights. However, given the Illinois Supreme Court's judicial activism undermining the CPA's language, the Illinois legislature must react.

An amendment to the CPA adding a provision to the second-prong, similar to California's scrutiny of the merits of the plaintiff's suit, would restore some protection for defendants. Not only would such an amendment demonstrate the legislature's intention through the overt exclusion of the word "solely" in the first prong, but it would also assist the CPA's goal of disposing of SLAPP litigation when petitioning defendants are sued for defamation—one of the most common forms of SLAPP suits<sup>173</sup>—because Illinois applies a unique doctrine called the innocent construction rule.<sup>174</sup> Illinois is the only state with the innocent construction rule, which is a "rigorous standard" that favors defendants accused of defamation.<sup>175</sup> Thus, its implementation at the motion to dismiss phase, as opposed to later in litigation when the defendant has already incurred plenty of attorney's fees, could recapture some defendant deference.

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171. See *Sandholm v. Kuecker*, 962 N.E.2d 418, 433 (Ill. 2012).

172. *Id.* ("It is entirely possible that defendants could spread malicious lies about an individual while in the course of genuinely petitioning the government for a favorable result. For instance, in the case at bar, plaintiff alleges that defendants defamed him by making statements that plaintiff abused children, did not get along with colleagues, and performed poorly at his job. Assuming these statements constitute actionable defamation, it does not follow that defendants were not *genuinely* attempting to achieve a favorable governmental result by pressuring the school board into firing the plaintiff. If a plaintiff's complaint genuinely seeks redress for damages from defamation or other intentional torts and, thus, does not constitute a SLAPP, it is irrelevant whether the defendants' actions were 'genuinely aimed at procuring favorable government action, result, or outcome.'" (footnote omitted)).

173. Tate, *supra* note 27, at 804–05; see also Sharon J. Arkin, *Bringing California's Anti-SLAPP Statute Full Circle: To Commercial Speech and Back Again*, 31 W. ST. U. L. REV. 1, 3 (2003) (citing *Wilcox v. Super. Ct.*, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994)).

174. See Siphchen et al., *supra* note 135, at 54 ("The rule requires courts to give statements a non-defamatory interpretation if that interpretation is reasonable.").

175. *Anderson v. Vanden Dorpel*, 667 N.E.2d 1296, 1302 (Ill. 1996); see also 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 4:22 (2d ed. 2013). See generally *infra* text accompanying notes 208–213.

An amendment clarifying the absence of “solely” in the first prong and requiring plaintiffs to show a likelihood that they could prevail at trial in the second prong would rectify the court’s error in *Sandholm*. It would restore the motion’s application to defamation claims that are clearly based on a defendant’s speech in furtherance of her constitutional rights. It would also add a deeper analysis of whether the plaintiff’s suit would inevitably fail because of the pro-defendant innocent construction rule—or for other reasons such as inadequacy of pleadings.<sup>176</sup> The revised plaintiff’s burden would be to provide clear and convincing evidence (1) that the defendant’s activity was either not genuine or not petitioning activity, and (2) that the plaintiff can prevail at trial.

The amendment would provide a safeguard against the currently drastic “solely” language only if the Illinois Supreme Court first recognizes that the statute calls for immunization of genuine petitioning activity. If that were established, only when a court determined that a defendant’s petitioning activity was genuine would it move on to the analysis of the plaintiff’s suit. This would create a standard that supports the overarching policy aims of the statute because it would thwart plaintiffs from pursuing retaliatory litigation when a court can recognize that their claims stand little chance to succeed, even if their suit is not “solely” based on a defendant’s genuine petitioning activity. Without an amendment that provides such a balancing, it is inevitable that where prior courts’ analysis focused primarily on defendants’ conduct, future courts will merely focus on the plaintiff’s stated grounds for bringing the suit. This is a strange turn of events because the original purpose of the CPA was to provide a semi-automatic motion to dismiss that safeguards defendants’ petitioning activity.<sup>177</sup> Under the current *Sandholm* test, courts need only analyze whether the plaintiff has brought her suit for any reason other than chilling the defendant’s speech,<sup>178</sup> which is a vague, shallow, and easily met standard.

## V. IMPACT

Sophisticated litigants will abuse the *Sandholm* standard by using their financial prowess to prolong litigation and chill others’ speech. An amendment to the second prong that adds a merits analysis would combat that abuse and potentially restore some pro-defendant deference, as the legislature intended.

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176. See *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 137 Cal. Rptr. 3d 455, 471–73 (Ct. App. 2012).

177. 735 ILL. COMP. STAT. 110/5 (2012).

178. See *Sandholm v. Kuecker*, 962 N.E.2d 418, 430 (Ill. 2012).

A. *The New “Solely” Burden Will Chill Speech*

The Illinois Supreme Court subverted the legislature’s intention to provide a presumption in favor of the defendant by heightening the defendant’s initial burden. Plaintiffs will presumably always claim that they are bringing suit with some other basis besides “chilling” the defendant’s speech. This is especially true when the suits are true SLAPP suits because those plaintiffs’ motive is to give their suit the appearance of validity in order to prolong litigation.<sup>179</sup> Historically, SLAPP suits have been brought in many forms and under multiple bases, “including libel, slander, tortious interference with a contract or a business interest, abuse of process, malicious prosecution, and, less often, . . . violations of the prospective plaintiff’s constitutional rights, such as due process or equal protection.”<sup>180</sup>

Thus, although the CPA’s plain language purpose is to protect private citizens from expensive litigation, any sophisticated plaintiff may survive the motion to dismiss by seemingly having more than one basis for her claim. The standard may be even easier than having multiple bases because the plaintiff in *Sandholm* claimed only defamation per se, presumably based on the defendants’ speech, which was found to be sufficient to survive the special motion because his “true goal . . . [was] to seek damages for the personal harm to his reputation.”<sup>181</sup> The court found that his claim should survive the special motion because it did not fall into the traditional SLAPP paradigm,<sup>182</sup> which the court asserted is driven by claims that are “by definition, meritless.”<sup>183</sup> However, the court’s analysis was misguided because the language of the CPA only required the defendant’s petitioning activity to be genuine, which the court expressly disavowed.<sup>184</sup> Thus, the CPA has gone from a stalwart protection for citizens’ petitioning rights to a flimsy precaution, and it is now difficult to imagine what kind of claim a court would discern as having only the purpose of chilling a defendant’s speech.

*Sandholm* has likely left Illinois citizens in an even worse position than they were in prior to the CPA’s enactment because defendants who attempt to bring the special motion and lose will be accountable

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179. See *supra* notes 20–22 and accompanying text.

180. Sobczak, *supra* note 7, at 561 (citing Pring, *supra* note 20, at 8–9 & nn.11–15).

181. *Sandholm*, 962 N.E.2d at 434.

182. *Id.* at 434.

183. *Id.* at 427 (citing Barker, *supra* note 106, at 396).

184. See *id.* at 433 (“If a plaintiff’s complaint genuinely seeks redress for damages from defamation or other intentional torts and, thus, does not constitute a SLAPP, it is irrelevant whether the defendants’ actions were genuinely aimed at procuring favorable government action, result, or outcome.” (internal quotation marks omitted)).

for those additional attorney's fees.<sup>185</sup> Alternatively, the failure to bring the motion for fear of additional attorneys fees will strong-arm defendants into the expensive discovery process, which the Act intended to avoid.<sup>186</sup> These financial pressures will likely result in a settlement for most litigants. Such legal feuds and their costly settlements will serve as cautionary tales that chill the speech of other possible petitioners who would voice their opinions against wealthy corporate or private entities if not for the financial burden. Thus, the only defendants that will likely bring this motion will be those with deep pockets who seek to prolong litigation against less sophisticated plaintiffs.

That exact trend was observed in California when the broad language of California's anti-SLAPP statute led some California corporations to employ the special motion when sued for their commercial speech.<sup>187</sup> The Practising Law Institute, a nonprofit continuing legal education organization, amongst others, even held legal seminars advising corporations "to employ the anti-SLAPP motion as a new litigation weapon by filing it in otherwise ordinary personal injury and products liability cases."<sup>188</sup> That trend led the California legislature to clarify the statute's scope and "fix the abuse."<sup>189</sup> California courts found that corporate petitioning activities are not chilled in the same way that individuals' are and should not receive the benefit that the anti-SLAPP motion bestows.<sup>190</sup> Though a different phenomenon than that which Illinois will likely experience as a result of *Sandholm*, it is a valuable policy lesson. Both states' anti-SLAPP statutes seek to protect common individual citizens, who are by nature of their economic status vulnerable to judicial manipulation by those who have greater resources with which to instigate and defend lawsuits.<sup>191</sup> When that pattern was observed in California, before it adopted a new statutory provision that directly addressed that abuse,<sup>192</sup> commentators lamented that "[t]he cure ha[d] become the disease—SLAPP motions [were] . . . just the latest form of abusive litigation."<sup>193</sup>

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185. 735 ILL. COMP. STAT. 110/25 (2012).

186. *Id.* § 5.

187. Baker, *supra* note 15, at 413.

188. *Id.* at 413 n.38.

189. *See supra* note 35 and accompanying text.

190. *See Baker, supra* note 15, at 419.

191. *See S. COMM. ON THE JUDICIARY, 2004–2005 GEN. ASSEMB., COMM. ANALYSIS OF S.B. 515*, at 6 (Cal. 2003); *see also Sobczak, supra* note 7, at 564 (citing Braun, *supra* note 24, at 969 n.13 ("The costs of litigation are tax-deductible for the filers but not for the legal targets.")).

192. *See CAL. CIV. PROC. CODE* § 425.17 (West Supp. 2014).

193. *Navellier v. Sletten*, 52 P.3d 703, 714 (Cal. 2002) (Brown, J., dissenting).

*B. Merits Analysis Can Restore Balance*

It is unclear why the Illinois Supreme Court looked specifically to Massachusetts's law when construing the CPA's new standard in *Sandholm*.<sup>194</sup> The *Sandholm* defendants' activity should have passed *Duracraft*'s solely test because it was clearly directed at the "government," under the CPA's wide definition.<sup>195</sup> Regardless, had the court applied *Duracraft* correctly, it would have found that the plaintiff's claim satisfied the first prong because it was based solely on the defendants' petitioning activity, and then moved on to a second-prong analysis.<sup>196</sup> Under the second prong of the Massachusetts statute, the plaintiff must demonstrate that, "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party."<sup>197</sup>

Because the Illinois Supreme Court borrowed its new language from *Duracraft*, it should have read that case in conjunction with *Duracraft*'s companion case *Baker v. Parsons*.<sup>198</sup> *Baker* details how to proceed with the plaintiff's burden when the defendant's "solely" burden is met.<sup>199</sup> The *Baker* court, recalling *Duracraft*'s similar analysis, proceeded by weighing the competing interests of each party's right to petition in light of the Massachusetts statute's clear presumption for dismissal.<sup>200</sup> It determined that the plaintiff's burden requires a showing "by a preponderance of the evidence" that the defendant's petitioning activity "lacked any reasonable factual support or any arguable basis in law," which properly "place[d] the burden on the

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194. *Sandholm v. Kuecker*, 962 N.E.2d 418, 431–32 (Ill. 2012).

195. *See Sandholm v. Kuecker*, 942 N.E.2d 544, 551–53 (Ill. App. Ct. 2010) (summarizing the plaintiff's claims against various defendants for their allegedly defamatory statements, which were all directed at the electorate, seemingly in an effort to have the coach removed). In *Shoreline*, the court distinguished the defendant's actions from those protected by the statute's broad scope by noting that the CPA "protects from liability all constitutional forms of expression and participation in pursuit of favorable government action." *Shoreline Towers Condo. Ass'n v. Gassman*, 936 N.E.2d 1198, 1207 (Ill. App. Ct. 2010). Thus, even though the defendant's activities were flagrant, the statute provided protection so long as they were related to her goal of rectifying the religious discrimination she experienced at the hands of the plaintiffs. *See id.* Similarly, the *Sandholm* defendants may have gone too far in their campaign against the plaintiff, but they were seemingly always acting in pursuit of having him removed from his position by the school board. *See Sandholm*, 942 N.E.2d at 551–53. Under the prior standard, like that utilized in *Shoreline*, the *Sandholm* defendants would presumably be immunized because they were still pursuing government action; however, under the current standard, their actions are never even analyzed because the court does not get to the second prong.

196. *See Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 942 (Mass. 1998).

197. MASS. GEN. LAWS. ch. 231 § 59H (2010).

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

199. *See id.* at 960–62.

200. *Id.* at 961.

nonmoving party, as the Legislature intended, but without creating an insurmountable barrier to relief.”<sup>201</sup>

The Massachusetts court, though aware of the tension that an anti-SLAPP statute causes by putting two parties’ constitutional rights in conflict, prioritized the legislature’s intent over its own discretion and retained the statute’s defendant deference, which the Illinois Supreme Court failed to preserve. The Massachusetts second prong provides a valuable guide for Illinois, considering the *Sandholm* court’s valid concern for balancing parties’ rights. Both California and Massachusetts seek to preserve fairness and justice through a second-prong underlying fact analysis: California courts assess the merits of the claim and Massachusetts courts evaluate the “factual and legal support” for the defendant’s petitioning.<sup>202</sup>

Because the Illinois Supreme Court determined that a departure from the statute was necessary, the aforementioned amendment adding a factual analysis would also satisfy courts’ concern for fairness and balance, while allowing the statute to effectively dispose of SLAPP suits at this early stage. The current standard under *Sandholm* leaves the CPA seemingly defunct and useless for defendants who genuinely require its assistance in eradicating retaliatory suits. Granted, installing a factual analysis into the burden shifting procedure seems contradictory to the CPA’s goal of expediency and cost saving.<sup>203</sup> Despite the additional time and resources that factual analysis will require, it will inevitably result in a more accurate initial evaluation of the parties’ actions and, as discussed earlier in *Wright*,<sup>204</sup> such determinations are crucial to make at the special motion stage because of the CPA’s express public policy to provide attorney’s fees and costs to prevailing movants.<sup>205</sup> Thus, some additional measure is necessary in order to put petitioners back in their rightful place as the object of the court’s deferential protection and “to protect and encourage public participation in government to the maximum extent permitted by law.”<sup>206</sup>

Unlike *Baker*, though, the *Sandholm* court ignored the legislature’s express public policy purpose of protecting individuals’ First Amend-

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201. *Id.*

202. Compare CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2014), with MASS. GEN. LAWS. ch. 231 § 59H.

203. See 735 ILL. COMP. STAT. 110/5 (2012) (“It is in the public interest and it is the purpose of this Act to . . . establish an efficient process for identification and adjudication of SLAPPs . . .”).

204. See generally *supra* notes 73–82 and accompanying text.

205. See *Wright Dev. Grp., LLC v. Walsh*, 939 N.E.2d 389, 395–97 (Ill. 2010) (citing 735 ILL. COMP. STAT. 110/5).

206. 735 ILL. COMP. STAT. 110/5.

ment rights and, instead, caused the defendants to incur legal fees, defeating yet another major purpose of the CPA.<sup>207</sup> If the court had also engaged in a factual analysis component, it would likely have recognized the impact that the imminent application of the innocent construction rule will have on the outcome of the litigation when it eventually proceeds to the trial phase. In California, the court assesses whether the plaintiff has satisfied her rebuttal burden to “establish[] that there is a probability that [she] will prevail on the claim.”<sup>208</sup> The addition of a factual inquiry procedure into the court’s special motion analysis, which would include an innocent construction rule evaluation in defamation cases, is appropriate because it could achieve a purpose very similar to that of the CPA by supporting “the constitutional interests of free speech and free press and encourag[ing] the robust discussion of daily affairs.”<sup>209</sup>

One post-*Sandholm* court demonstrated the problem detailed in this Note by admitting, “[t]he fact that the defendants’ activities are the kind the Act is intended to protect does not mean that [the plaintiff’s] lawsuit is subject to dismissal as a SLAPP lawsuit.”<sup>210</sup> Rather than abiding by the CPA’s plain language, post-*Sandholm* courts have interpreted the CPA standard as requiring defendants to present evidence that the plaintiff’s claim is solely based on their activity by proving that the plaintiff’s claim lacks any merit and has a retaliatory intent, in addition to their burden to show that their petitioning was genuine.<sup>211</sup> The *Sandholm* standard has been insurmountable since its enactment.<sup>212</sup> In another recent case, the court rejected the special motion brought by investigative reporter defendants, who, by nature of their profession, were likely even better equipped than the average defendant to find evidence demonstrating that their activity was aimed at important governmental action and that their reportage was based on verifiable evidence.<sup>213</sup>

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207. *Id.*

208. CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2014).

209. *Chapski v. Copley Press*, 442 N.E.2d 195, 198 (Ill. 1982) (West Supp. 2014).

210. *Chi. Reg’l Council of Carpenters v. Jursich*, 986 N.E.2d 197, 201 (Ill. App. Ct. 2013).

211. *See, e.g., id.*; *Ryan v. Fox Television Stations, Inc.*, 979 N.E.2d 954, 963 (Ill. App. Ct. 2012). In *Ryan*, the defendants’ special motion was denied despite evidence of the plaintiff’s retaliatory intent because “that alone does not make the lawsuit a SLAPP because a SLAPP is also ‘by definition, meritless.’” *Id.* (quoting *Sandholm v. Kuecker*, 962 N.E.2d 418, 427 (Ill. 2012)).

212. *See Capeheart v. Terrell*, 996 N.E.2d 257, 261 (Ill. App. Ct. 2013); *Garrido v. Arena*, 993 N.E.2d 488, 496, 501 (Ill. App. Ct. 2013); *Kresta v. Zajewski*, 2013 IL App (1st) 110772-U, ¶ 18; *Jursich*, 986 N.E.2d at 201, 203–04; *Ryan*, 979 N.E.2d at 962–65; *August v. Hanlon*, 975 N.E.2d 1234, 1245 (Ill. App. Ct. 2012).

213. *See Ryan*, 979 N.E.2d at 956–57, 965.



If future courts undertake a factual analysis to determine if a defendant's statements are even actionable, defendants would be equipped with another tool for receiving expedited judicial review and their attorney's fees and expenses. This could provide the relief that defendants "who have been victimized by meritless, retaliatory SLAPP lawsuits" deserve.<sup>214</sup>

## VI. CONCLUSION

The Illinois appellate court in *Sandholm* was correct when it stated, "[t]he legislature presumably struck the balance by passing the Act itself, and it is not the court's role to rewrite a statute that appears to lead to unjust results when interpreted as written."<sup>215</sup> The Illinois Supreme Court in *Sandholm* disregarded the appellate court's reasoning and threw off the delicate balance established by legislators. The court should have recognized that the legislature had done its job when it wrote the CPA and prioritized defendants' First Amendment rights over those of the plaintiff to bring a suit, in order to address the "disturbing" SLAPP trend.<sup>216</sup> Perhaps the legislature made it the statute's primary procedure to assess the defendant's genuineness precisely because SLAPPs are so difficult to identify.<sup>217</sup>

The Illinois Supreme Court overstepped its bounds by effectively amending the statute because it determined that that preferential treatment was somehow unfair, but it is not the court's role to alter legislation. The result is a confusing standard that can only be fixed by, either (1) an entire reversal of the *Sandholm* decision which restores the CPA standards back to the written language of the statute, or (2) an amendment to the CPA clarifying whether a suit need be "solely based on" the defendants' speech, in addition to a factual evaluation of the merits of the suit, as detailed in this Note. Before the Illinois Supreme Court's decision in *Sandholm*, critics warned that courts would have to fashion creative solutions to the statute's overly broad and vague language;<sup>218</sup> however, a solution that disenfranchises

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214. *Wright Dev. Grp., LLC v. Walsh*, 939 N.E.2d 389, 396 (Ill. 2010).

215. *Sandholm v. Kuecker*, 942 N.E.2d 544, 570–71 (Ill. App. Ct. 2010).

216. 735 ILL. COMP. STAT. 110/5 (2012).

217. *See Ryan*, 979 N.E.2d at 960 (remarking on "the most intractable problem associated with SLAPPs: they are very hard to distinguish from normal lawsuits").

218. *See, e.g., Sobczak, supra* note 7, at 591–92.

an entire class of individuals because they cannot afford to defend their First Amendment rights is not a solution, it is a gag order.

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