Testimony Before the House China Select Committee

Diego A. Zambrano[1]

Introduction

Thank you for the opportunity to provide views on the influence of the Chinese government on U.S. courts. The main point of my testimony today is that foreign authoritarian governments, including China, have relatively easy access to our courts and, in some instances, have abused that access to go after political dissidents or newspapers in the U.S. But there is no need to allow this—Congress can adopt a straightforward fix that would help defendants beat back these political harassment claims.

Stepping back, I am a scholar of civil procedure and transnational litigation. My research focuses on the legal rules governing cases in U.S. federal courts. The transnational part of my research studies cases in U.S. courts involving foreign parties, foreign laws, and foreign nations.[2] My focus today is on U.S. courts and not foreign policy: what is happening in U.S. court cases involving foreign governments? How do the rules of civil procedure interact with cases involving the Chinese government or proxies?

Much of my testimony will address the problem of foreign authoritarian governments filing civil cases in U.S. courts in order to pursue political ends. There is evidence that authoritarian regimes from Russia, Venezuela, Turkey, and China, are filing frivolous civil cases in our courts with the goal of imposing legal costs on their targets, be it political opponents, dissidents, or newspapers. This means that if a political opponent or newspaper runs afoul of the Chinese or Russian governments, those regimes are exporting their oppression to our courts by imposing potentially crippling legal costs. One surprising aspect of all of this is that you might expect these authoritarian countries to mostly be present in U.S. courts as defendants in human rights or expropriation cases. But, it turns out, these countries are surprisingly filing claims *as plaintiffs* either directly or through proxies.

The Chinese government has been one of the worst offenders. An investigation by the Wall Street Journal, relying on sources in the FBI and State Department, found that China has used legal claims to go after Chinese dissidents who fled to the U.S. And we have solid evidence that this is part of a plan orchestrated by the CCP's—in the words of a Chinese official—multidimensional "legal war" against Chinese emigres. In this war, Chinese companies file tort and breach of contract claims against dissidents who have recently fled to the United States to pressure them to return to China. While the use of proxies conceals the involvement of the CCP in political harassment lawsuits, some Chinese officials have acknowledged using U.S. litigation to intimidate Chinese dissidents. Some Chinese officials have even admitted that the lawsuits are manufactured and seek only to drain defendants' financial resources.[3]

The Chinese government can do this because U.S. procedural rules are permissive: they make it very easy for foreign parties to file claims in our courts.

---

[1] Professor of Law, Stanford Law School. Most of the content in this written testimony comes directly from my article, Diego Zambrano, *Foreign Dictators in U.S. Court*, 88 U. CHI. L. REV. 157 (2022).

[2] *See e.g.*, Diego A. Zambrano, *How Litigation Imports Foreign Regulation*, 107 VA. L. REV. 1165 (2021).

[3] Aruna Viswanatha & Kate O'Keeffe, *China's New Tool to Chase Down Fugitives: American Courts*, WALL ST. J. (July 29, 2020).

But our procedural system does not have to work this way and we need not lend our courts to Chinese oppression. The final part of my testimony offers a series of recommendations for actions that Congress ought to consider. In short, Congress should adopt a statutory fix that would increase the burden on foreign government plaintiffs, or their proxies, to demonstrate that their case has some merit before they can impose crippling legal costs on a defendant. There would be nothing innovative or out of the norm in this statute because it would resemble what more than thirty states already do in their Anti-SLAPP statutes. I call it a Foreign Sovereign Anti-SLAPP law.

Here's how the law would work. A defendant can use the statute to move to dismiss a lawsuit by showing that it was brought by a proxy of a foreign government and is based on the defendant's exercise of free speech or political rights. The plaintiff who brought the suit must then produce some evidence on each element of their claim, demonstrating that it has some merit and is not a frivolous suit meant to intimidate political opponents. In other words, the Foreign Sovereign Anti-SLAPP statute would function like a modified motion for summary judgment. It would also carry some procedural protections like expedited consideration, a stay on discovery, and would allow the court to impose attorneys' fees and other sanctions. Finally, the statute would carve out important exceptions so that it can't be used to dismiss legitimate, non-political lawsuits, like personal injury suits or suits based on a commercial transaction.

My testimony today will divide into three parts. First, I will explain the legal rules that govern the presence of foreign governments in U.S. courts, either as defendants or as plaintiffs. I'll explain the role of the Foreign Sovereign Immunities Act and the so-called foreign privilege of bringing suit. Second, I will discuss how China seems to be taking advantage of the U.S. legal system to pursue political goals and suppress dissidents. Finally, I will lay out my proposal for a Congressional fix: a Foreign Sovereign Anti SLAPP statute.

I. Foreign Governments in U.S. Civil Cases

Let me begin with the basic legal framework that governs the relationship between foreign countries and U.S. courts: the Foreign Sovereign Immunities Act. I will then explain why foreign sovereigns can file cases in U.S. courts. But, in basic terms, I will lay out two findings. First, foreign sovereigns enjoy immunity from suit in U.S. courts. That means that it is very difficult to file claims against any foreign government in U.S. court. Second, foreign sovereigns enjoy the privilege of access to U.S. courts as plaintiffs, either directly or indirectly through state-owned companies or proxies. This, in contrast to their role as defendants, means that it is very easy for foreign governments to access our courts. The combination of these two findings creates an asymmetry: foreign dictators and their proxies can exploit access to our courts as plaintiffs to harass their opponents, but their regimes are, in turn, immune from lawsuits here.

A. Foreign Sovereign Immunities Act

Congress adopted the Foreign Sovereign Immunities Act in 1976, codifying the doctrine that foreign sovereigns are immune from suit in U.S. court. In basic terms, the FSIA grants all foreign sovereigns a baseline immunity from suit. Unless it fits into an exception, an American company or individual cannot sue a foreign sovereign like China. If you tried to sue China, a U.S. court would immediately dismiss your claim as barred by the FSIA.

The FSIA is rooted in principles of reciprocity and international comity. The idea is that the U.S. government grants respect and dignity to foreign sovereigns in U.S. courts by shielding them from legal claims and, in return, expects that foreign governments will similarly give the U.S. immunity in their courts.

But the FSIA embraces only a restrictive version of immunity, providing that while foreign sovereigns enjoy a baseline of immunity there are also important exceptions. These include cases where the foreign sovereign contractually waives immunity, participates in commercial activity in the United States, takes property in violation of international law, sponsors terrorism, or causes tortious acts in the U.S.[4] Other than the state-sponsored terrorism exception, the FSIA does not draw distinctions among regime types, be it democracy or dictatorship.

The FSIA is in line with international practice and also with other U.S. doctrines that shield foreign sovereigns when they are defendants in U.S. courts. For example, under the act of state doctrine, U.S. courts refuse to judge the validity of a foreign government's official act "done within [their country's] own territory."[5] In other words, if a plaintiff sues a foreign government in U.S. court over an act performed in a foreign country, U.S. courts refuse to inquire into the validity of the foreign sovereign's act. The Supreme Court has justified this doctrine as avoiding threats to "the amicable relations between governments and vex[ing] the peace of nations."[6] Courts have stuck to this doctrine regardless of the government in power. In addition to these foreign or external considerations, there are also concerns with separation of powers built into the doctrine.

Before moving on, notice that the FSIA mostly addresses the relationship between U.S. courts and foreign governments as *defendants*. It has very little to say about foreign governments as plaintiffs. U.S. courts have long recognized that foreign countries can also file cases as plaintiffs in U.S. courts. Under the so-called "privilege of bringing suit," the Supreme Court long ago recognized that "sovereign states are allowed to sue in the courts of the United States."[7] Foreign companies can also access U.S. courts. To file a lawsuit in U.S. federal courts, a foreign company just needs to satisfy basic subject matter jurisdiction requirements—mostly that it is suing under federal law or diversity jurisdiction. This means that foreign governments can enter U.S. courts through state owned companies or even proxy companies or individual lawsuits that they indirectly control.

B. Foreign Authoritarian Governments in U.S. Courts

With the basic legal framework established, let's now move on to the case of foreign authoritarian governments in U.S. courts. As I mentioned before, both the FSIA and the privilege of bringing suit apply equally to democracies and dictatorships. The Supreme Court has implied that courts should not draw distinctions between government types when it comes to immunity and access to courts. I call this an "equal treatment" principle. Lower courts have repeatedly declined to distinguish between foreign government types, instead embracing regime-neutral doctrines. This principle traces back to

[4] DAVID P. STEWART, FEDERAL JUDICIAL CENTER, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 41 (2013), https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf. The FSIA draws on a long common law tradition of immunity that goes back to a case called The *Schooner Exchange*. That case first established the basic rule that foreign sovereigns enjoy blanket immunity from process in U.S. courts.

[5] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).

[6] *Id.* at 418.

[7] *Id.* at 408–09 (citing The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870)).

The Sapphire, where the Court refused to distinguish between "[t]he reigning Emperor, or National Assembly, or other actual person or party in power."[8]

Because of the equal treatment principle, courts have long accepted foreign authoritarian governments in our courts. Indeed, the first landmark case involving a foreign autocrat was filed in 1811, when two boat owners sought to reclaim a ship that, allegedly, was "violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon." So began two hundred years of interactions between our courts and foreign authoritarian governments.

It is quite easy for foreign dictators or their proxies to access our courts. Foreign governments can thus exploit this access, benefiting from the privilege of bringing suit for any purpose, legitimate or illegitimate.

Looking specifically at post-1945 cases, dictators have been common litigants in U.S. courts. In a previous study focusing on just twenty dictators in the past few decades, I found more than one hundred cases across U.S. district courts. These include names like Mao Zedong, Fidel Castro, Augusto Pinochet, Ferdinand Marcos, and Saddam Hussein. Usually, the official party named in the suit was the country's government or an instrumentality like a central bank. Many claims against foreign dictators were based on the Alien Tort Statute and Torture Victim Protection Act; some involved torts, extradition, and criminal prosecutions; others were about disputes over sovereign funds; and, of course, a few involved expropriations disputes.[9]

More recently, official parties tend to be proxies, lower-level officials, or cronies. As I will discuss in a moment, the Chinese Communist Party has filed civil cases in U.S. courts through proxy companies or agents, potentially to conceal its involvement in harassment lawsuits. Other cases included countries like Venezuela, Cuba, Iran, the Philippines, Russia, Turkey, and China. Sometimes, however, the dictator was named in his individual capacity, including cases against Ferdinand Marcos, Jiang Zemin, and Radovan Karadžić.

That foreign governments can indirectly file claims through proxies means that it is difficult to quantify their true involvement in our courts. Consider that the CCP can simply ask a state-owned company to file a claim against a political target in the U.S. As I mentioned before, foreign companies have easy access to U.S. courts through diversity or federal question jurisdiction. Absent specific intelligence, we would never know if this was a legitimate claim or government harassment. This means that the CCP, Putin, or Maduro can engage in harassment campaigns against opponents, using U.S. discovery and other procedures to their advantage.

Even if the number of claims was small, litigation can have an outsized chilling effect on opponents. Even a single case is enough to cause concern. At the same time, victims have a difficult time suing foreign dictators. Even just in theory, these rules and statutory provisions provide cover for the most egregious acts.

---

[8] *Id.*

[9] Some of these claims involve the application of foreign authoritarian law in our courts. Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1691 (2020).

C. Foreign Authoritarian Governments as Plaintiffs

Setting aside cases in which foreign authoritarian governments are defendants, there do appear to be a sizable number of cases involving dictators as plaintiffs in the past few decades. From Mao Zedong's fight with the Kuomintang in a 1952 Northern District of California case to Fidel Castro's 1964 attempt to enforce expropriations in the Southern District of New York, dictators have become a recognizable presence in U.S. courts. Notably, in a 1960s case, *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court firmly established the principle that foreign authoritarian governments can file cases in U.S. courts. The Court allowed Fidel Castro's government to file suit in U.S. court and to benefit from U.S. comity doctrines. The Court explicitly rejected the argument that Cuba "should be denied access to American courts because Cuba is an unfriendly power and does not permit nationals of this country to obtain relief in its courts."[10] *Sabbatino* rested on two pillars: the potential harm to the nation's foreign relations and the difficulty of assessing which foreign regimes deserve different treatment. By treating Cuba's dictatorial regime like any other sovereign, *Sabbatino* reinforced the equal treatment principle I mentioned before.

Foreign dictators litigate a variety of cases in U.S. courts as plaintiffs. Sometimes there are disputes over sovereign funds deposited in U.S. banks. Typically, foreign countries deposit funds in U.S. financial institutions to conduct sovereign transactions. These funds become a source of litigation when democratic opponents contest a dictatorial regime's power, both claiming to represent the country. These cases are, at bottom, about executive recognition of foreign regimes. To name a few, Venezuela, China, Iran, Chile, Nicaragua, and Panama have all had dictators litigate against competing leaders over funds that nominally belong to their respective countries. For example, in 1988, Panamanian President Eric Arturo Delvalle dismissed the then-reigning dictator Manuel Noriega from his military post in Panama. But Noriega refused to step down, setting up a parallel administration to govern the country. This turmoil pushed Delvalle to file a case in U.S. court, seeking to freeze all Panamanian funds deposited in several bank accounts. This, in turn, prompted Noriega's regime to file motions to intervene in the case. Ultimately, the court deferred to the U.S. president's recognition of Delvalle as the representative of "the only lawful government of the Republic of Panama," freezing the funds and putting them at the order of the Delvalle administration. The Panama cases closely resemble cases involving the Shah of Iran, Augusto Pinochet, and Tachito Somoza.

Foreign dictators have also filed cases in the United States to enforce property expropriations. Although expropriations typically take place in a foreign country, they can often have ramifications for U.S. individuals, companies, and funds. Notably, communist regimes—including those in Cuba, Nicaragua, Venezuela, and the Soviet Union—initiated prominent expropriation cases in U.S. courts. And, on closer inspection, many of these cases resulted from dictators' attempts to consolidate power. For instance, when Fidel Castro gained power in 1959, he selectively expropriated strategic businesses to neutralize potential opposition. As I mentioned above, this led to a legal dispute between Cuba and a U.S. company.

D. The Asymmetry of Foreign Authoritarian Governments

The doctrines I have laid out above—the FSIA, the privilege of bringing suit, and courts' refusal to distinguish between democracies and dictatorships—create a problematic asymmetry: foreign

[10] *Sabbatino*, 376 U.S. at 408.

dictators and their proxies can access our courts as plaintiffs to harass their opponents, but their regimes are, in turn, usually immune from lawsuits here. For example, in 2016, a top-ranking Venezuelan official sued the *Wall Street Journal* for defamation over an article linking him with drug trafficking. But if the *Wall Street Journal* had tried to sue a Venezuelan official for harassment of its journalists, the case would likely have been dismissed under common-law immunities.[11]

Our legal system, then, seems to insulate dictators from the downsides of U.S. law while allowing them to reap the benefits of access to court. This asymmetry makes foreign sovereigns—and specifically foreign dictators who are willing to exploit access to U.S. courts—a unique kind of litigant, worthy of special attention.

The most worrisome cases involve efforts by foreign dictators to exploit the U.S. judiciary to their advantage. Regimes dress up these cases as run-of-the-mill claims: defamation, contract claims, enforcement of foreign awards, 1782 discovery requests, or bankruptcy disputes. Sometimes state-affiliated companies—like China's Huawei or Russia's Kapersky Lab—sue in U.S. courts to pursue seemingly commercial interests that are, on closer look, aligned with an authoritarian regime's goals. Notable cases involve dictatorships in China, Venezuela, Russia, and Turkey. While many cases have been successful, some of these claims have been dismissed at early stages.

To be sure, this asymmetry applies to all foreign states, regardless of regime type. But the asymmetry has particularly worrisome consequences in dictator-related cases because foreign authoritarians go on the offense against democratic opponents, newspapers, and dissidents in the United States. There appear to be no cases of democracies taking advantage of our courts this way. And, importantly, democracies usually give Americans access to foreign court systems. Dictatorships, by contrast, generally block any cases that have political implications. This lack of reciprocal access and willingness to exploit our courts is what makes foreign dictators unique kinds of litigants. Setting aside the FSIA and other immunities, doctrines that benefit dictators, like act of state and the privilege of bringing suit, are based on shaky premises that open them up to abuse or manipulation.

II. China's Use and Abuse of U.S. Courts

China has been one of the most prolific foreign authoritarian governments to take advantage of U.S. courts. In 2014, a Chinese anti-corruption program announced a "multidimensional legal war" against corruption suspects around the world.[12] As part of this plan, the Chinese government decided to "sue fugitives in American courts" with the goal of harassing defendants, draining their financial resources, and forcing them to return to China.[13] But instead of filing those cases in China's sovereign capacity, the program recruited state-owned businesses to do its bidding. This has resulted in several civil cases in state and federal courts, on claims ranging from breach of fiduciary duty to fraud.[14] Surprisingly, Chinese officials have called "the lawsuit strategy a success, publicly citing one of the suits as helping

---

[11] *See* Sam Kleiner & Lee Wolosky, *Time for a Cyber-Attack Exception to the Foreign Sovereign Immunities Act*, JUST SECURITY (Aug. 14, 2019), https://www.justsecurity.org/65809/time-for-a-cyber-attack-exception-to-the-foreign-sovereign-immunities-act/.

[12] Aruna Viswanatha & Kate O'Keeffe, China's New Tool to Chase Down Fugitives: American Courts, WALL ST. J. (July 29, 2020, 10:29 AM), https://www.wsj.com/articles/china-corruption-president-xi-communist-party-fugitives-california-lawsuits-us-courts-11596032112.

[13] *Id.*

[14] *Id.*; *see, e.g.*, Xinba Constr. Grp. Co. v. Jin Xu, No. ESX-L-2889-18, 2019 BL 383407, (N.J. Super. Ct. Law Div. Sept. 20, 2019); Changsha Metro Grp. Co. v. Peng Xueng, No. E072596, 2020 BL 187229 (Cal. App. 4th Dist. May 19, 2020).

to force one of their most-wanted home."[15] U.S. officials, however, have called the lawsuits an "effort to pursue political targets rather than just criminal ones."[16] The Chinese suits have apparently been paired with physical harassment, stalking—including by Chinese agents dressed as "fake FBI officials"—and outright threats.[17] All of this appears to be an organized attempt by a foreign dictatorship to use U.S. civil lawsuits for political ends. The most galling aspect of this is that Chinese officials have admitted that the lawsuits are manufactured and seek only to drain defendants' financial resources.

Take the case of Peng Xufeng, who claims he fled China after he refused to testify against enemies of the Chinese Premier, Xi Jinping. In response, Chinese officials allegedly harassed him in California, smashed his windows, arrested his family in China, moved his child to an orphanage, and, finally, used a state-owned company to sue him in U.S. court.

Or consider Xiao Jianming, a Chinese businessman who fled to the United States. In 2019, a Chinese state-owned company sued Xiao and his daughter in U.S. courts, alleging that Xiao diverted to his daughter hundreds of thousands of dollars in company funds. Facing this costly lawsuit, Xiao returned to China. Immediately thereafter, the company dismissed its U.S. claim and, simultaneously, a Chinese anticorruption entity called the Central Commission for Discipline Inspection celebrated the success of the litigation pressure.

To be sure, China claims that these defendants violated criminal law in China and were not prosecuted because they were dissidents or refugees. But this is irrelevant. China is violating basic norms of diplomacy when it uses bogus U.S. civil lawsuits to pressure these defendants, rather than rely on traditional negotiations with the State Department or the Department of Justice.

Let me say a few words about the potential success of these lawsuits. It is hard to overstate how difficult it can be for a political dissident to deal with these claims. To begin, of course, a simple case has the potential to impose high legal costs. When a Chinese dissident faces a lawsuit in U.S. court, they must retain legal counsel, a task that may be routine for sophisticated entities but can be difficult for individuals and especially recent immigrants. If there are language barriers, the defendant has to determine a way to communicate with their lawyer. The target must then prepare legal documents and stay on top of a developing case in a legal system that may be totally foreign. And if the case continues, the defendant must comply with discovery requests that can seek a wealth of documents or can force the defendant to sit down for a deposition.[18] The litigation process can pile on more burdens, court dates, traveling to distant fora, communicating with and supervising an attorney, and costly motion practice. These difficulties will be even heavier for a recent immigrant with few connections, piling on anxiety and legal and psychological costs. If you then combine this with explicit threats from China against family members who are still abroad, no wonder, then, that some dissidents have returned to China.

Even American citizens and organizations are vulnerable to these lawsuits. In 2021, Chinese electric vehicle giant BYD sued the non-profit advocacy group Alliance for American Manufacturing and several of its employees in a U.S. district court for defamation. The Alliance for American

[15] Viswanatha & O'Keeffe, *supra* note 12.
[16] *Id.*
[17] *Id.*
[18] For a broader discussion of discovery, *see e.g.*, Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020).

Manufacturing had spoken out against Chinese state-owned and subsidized enterprises profiting from forced labor and receiving U.S. taxpayer-supported contracts. It took two years for the district court, the D.C. Circuit, and finally the U.S. Supreme Court, to conclusively dismiss BYD's suit for failure to state a claim.[19] In the meantime, BYD succeeded in intimidating the small advocacy group and diverting 10% of its annual budget to legal fees.[20] The Alliance for American Manufacturing had also sought dismissal and attorney's fees under D.C.'s anti-SLAPP statute, but the district court could not enforce the D.C. statute in federal court.

The complete scale of harm to political dissidents and democracy is also hard to measure. Although we can identify dozens of claims across U.S. courts, most cases likely remain hidden because authoritarian governments use proxies to file them. Moreover, these claims may be most significant because of litigation's chilling effect on other dissidents and journalists. Even a single claim sends a powerful message to would-be critics: if you are in the United States, we can bring our harassment to U.S. courts. Comply with the CCP's demands or else.

As if this were not difficult enough, consider that pesky asymmetry I mentioned earlier: when the Chinese government is a defendant in U.S. courts, they can take advantage of the FSIA and other doctrines like head-of-state immunity and act of state to avoid liability and quickly dismiss cases. For example, in 2004, a group of unidentified plaintiffs belonging to the Chinese group Falun Gong filed a claim against China's former premier, Jiang Zemin, while he traveled through the United States.[21] Plaintiffs' alleged that Jiang "organize[d] and direct[ed] the suppression of Falun Gong throughout China," leading to a series of human rights violations, rape, execution, disappearances, and torture.[22] The U.S. government, however, filed an amicus brief suggesting that Jiang was "immune from the jurisdiction of the Court because he is China's former head of state."[23] The court accepted the executive's suggestion and dismissed the claim.[24]

To be sure, China's aggressive use of our courts is not unique—it is part of a pattern of abuse also perpetrated by Turkey, Venezuela, and Russia:

- Turkey's dictator, Erdogan, used government lawyers to go after his main opponent, Muhammed Fethullah Gülen, a cleric who lives in Pennsylvania. But instead of filing the case in the name of Turkey, it appears that Erdogan's regime recruited regular citizens as proxies to file a seemingly private case. The complaint alleged that Gulen engaged in religious persecution against plaintiffs within Turkey. But, in fact, the litigation coincided with a broader effort by Erdogan to purge the Turkish opposition and weaken Gulen's status as his most important political opponent. Moreover, the fact that Turkish government lawyers represented these supposed individual plaintiffs suggests a broader government plan. Not only did the Turkish government hire the law firm, the main plaintiffs' lawyer admitted that the lawsuit

[19] *See* BYD Co. Ltd. v. All. for Am. Mfg., 554 F. Supp. 3d 1, 12 (D.D.C. 2021), *aff'd*, No. 21-7099, 2022 WL 1463866 (D.C. Cir. May 10, 2022), *cert. denied*, 143 S. Ct. 306 (2022).
[20] Bethany Allen, *Libel Lawfare: Is There a Legal Risk to Criticizing Chinese Companies?*, THE WIRE CHINA (July 28, 2024), https://www.thewirechina.com/2024/07/28/libel-lawfare-chinese-companies-defamation-suit-anti-slapp/.
[21] Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F. Supp. 2d 875, 879 (N.D. Ill. 2003), *aff'd* but criticized sub nom. Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004).
[22] *Id.* at 878.
[23] *Id.* at 879.
[24] Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 917 (2011).

"represents a legal battle as well as a political battle and an investigation targeting the Gülen Movement" that would show Gulen is "not untouchable in the United States."[25] Even though the district court dismissed the case early on, it appears that Erdogan decided to use the U.S. legal system to harass Gulen in his home state of Pennsylvania. And Turkey seems to be using other types of claims to pursue its interests.[26]

- Or take, for example, claims by Venezuela in U.S. court. In 2016, the second most powerful official in Venezuela's dictatorship, Diosdado Cabello, sued the *Wall Street Journal* over an article that suggested he was linked to narcotrafficking. Although the district court dismissed the claim, Cabello appealed to the Second Circuit and pursued his claim for nearly two years.[27] This case involved Cabello's individual interests in his reputation but, importantly, also the broader dictatorship's political goals to push back against U.S. pressure. Another notorious regime crony also sued the U.S. network Univision for defamation on similar grounds.[28] In 2019, disputes between dictator Nicolas Maduro and his opponent, Juan Guaido, triggered another series of cases. Guaido, as opposition leader and President of the Venezuelan legislature, assumed the Venezuelan Presidency in 2019 after Maduro refused to hold free and fair elections.[29] The United States recognized Guaido, leading to two separate regimes both claiming to represent Venezuela in many contexts. This situation resulted in legal disputes over Venezuelan property in the U.S., including ownership over oil-distributor CITGO, which is based in the United States. And cases have proliferated, with nearly half a dozen claims filed in Delaware, Texas, and Louisiana. These cases have put U.S. courts in the difficult position of deciding whether Guaido or Maduro has standing to sue. But despite U.S. action to recognize Guaido and even to issue indictments against Maduro, Venezuela's dictatorial regime continues to litigate across the country and in other foreign courts.

- Importantly, Russia has been one of the most prolific foreign authoritarian governments to take advantage of U.S. courts.[30] Since around 2004, Russian proxies have filed several cases against dissidents and Putin critics. Some of these cases involve enforcement of foreign awards against dissident politicians, bankruptcy disputes, and discovery requests for foreign proceedings that "[w]ere part of a coordinated effort to use the US courts to harass and further extort assets" from opponents.[31] In one case, Putin's attempt to expropriate a Russian alcohol manufacturer included "fabricated criminal charges" against the owner, extradition requests, and trademark infringement cases filed in U.S. court.[32] The Atlantic Council called some of these cases an orchestrated Russian effort to "exploit[] US courts by pursuing superficially legitimate lawsuits with a two-part purpose: perpetrating global harassment campaigns against the Kremlin's enemies, while seeking to enrich themselves through bad faith claims made

---

[25] Defendant Muhammed Fethullah Gülen's Memorandum of Law in Support of His Motion for Rule 11 Sanctions Against Plaintiffs & Their Counsel at 3, 13, Ateş v. Gülen, 2016 WL 3568190 (M.D. Pa. Dec. 7, 2015) (No. 15-cv-2354).

[26] *See e.g.*, Ex parte Republic of Turkey, No. 2:19-CV-20107-ES-SCM, 2020 BL 186291 (D.N.J. May 18, 2020) (§ 1782 discovery request).

[27] Cabello-Rondon v. Dow Jones & Co., Inc., 2017 WL 3531551 (S.D.N.Y. Aug. 16, 2017).

[28] Saab v. Univision Communications Inc. et al, No. 2018-031253-CA-01 (Fla. Cir. Ct. Sep 14, 2018).

[29] *See* Diego Zambrano, *Guaido, Not Maduro, Is the De Jure President of Venezuela*, LAWFARE (Feb. 1, 2019, 12:27 PM), https://www.lawfareblog.com/guaido-not-maduro-de-jure-president-venezuela.

[30] *See* ANDERS ÅSLUND, ATL. COUNCIL, RUSSIA'S INTERFERENCE IN THE US JUDICIARY 24 (2018), https://perma.cc/9RVS-32UZ.

[31] *Id.* at 18.

[32] *Id.* at 17.

possible by the Russian state's abuse."[33] Some of these cases have led to protracted struggles in both federal and state court, including extensive discovery and claims by a state judge that there was a "blatant misuse of the federal forum."[34] Two cases involved defamation claims by three Russian oligarchs against BuzzFeed News and Christopher Steele over the Steele Dossier.[35]

Again, it's difficult to measure the importance of these cases but their potential impact cannot be overstated. The fact that there are dozens of such claims likely hides their impact on defendants and other related parties. These claims may be most significant not because of each case's outcome on the merits, but because of litigation's chilling effect on dissidents and journalists. Even a single defamation claim against the *Wall Street Journal* or a tort suit against a dissident in U.S. court sends a powerful message to all would-be dissidents or journalists: even if you flee to the United States we can continue to harass you or sue you there. And that is why it also does not matter whether these foreign dictators are winning these claims on the merits or not. The fact that they have easy access to court is itself a victory for their regimes and a defeat for their opponents.

III. A Related Phenomenon: SLAPP Suits

Claims by foreign dictatorships against dissidents and newspapers in the United States have a common core: use of the legal system to punish political opponents. States have dealt with a related phenomenon called "strategic lawsuits against public participation," or "SLAPP" suits.

A. State Anti-SLAPP Statutes

In the 1990s, scholars and legislators noticed a worrying trend of lawsuits against private individuals "for speaking out politically."[36] In the most worrisome cases, large organizations sued individuals for exercising their freedom of speech in contexts like "testifying against real estate development at a zoning hearing, complaining to a school board about unfit teachers, or demonstrating peacefully for or against government actions."[37] These strategic lawsuits against public participation are fundamentally about intimidating and imposing costs on defendants. Superficially, the claims vary in their substance. They're often dressed up as defamation or business tort suits. But the proliferation of SLAPP claims presents a significant challenge to the First Amendment and political speech. This is true even if plaintiffs lose most cases, as they are able to impose significant litigation costs and mental and emotional anguish.

The potential for SLAPP suits to chill constitutionally protected speech has forced state legislatures into action. States like California, Washington, Oregon, Texas, and Nevada were the first to adopt

---

[33] *Id.* at 23–24.

[34] Avilon Auto. Grp. v. Leontiev, No. 656007/16, 2017 WL 4422593, at *4 (N.Y. Sup. Ct. Oct. 05, 2017), *rev'd*, 91 N.Y.S.3d 379 (N.Y. App. Div. 2019).

[35] *See e.g.*, Fridman v. Bean LLC, No. 17-2041 (RJL), 2019 BL 15051, 2019 WL 231751 (D.D.C. Jan. 14, 2019); *see also* Tatintsyan v. Barr, 799 F. App'x 965, 966 (9th Cir. 2020).

[36] *See generally* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385 (1988); George W. Pring, *Intimidation Suits Against Citizens: A Risk for Public Policy Advocates*, 7 NAT'L L. J. 16 (1985).

[37] Laura Long, *SLAPPing Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right to Petition*, 60 OKLA. L. REV. 421 (2007).

anti-SLAPP statutes, which help dismiss SLAPP suits before protracted litigation sets in.[38] Anti-SLAPP statutes usually allow defendants to demonstrate that they are being sued for exercising constitutional rights, usually freedom of speech, political association, or petitioning.[39] If defendants meet this standard, they trigger an array of procedural protections and shift the burden onto plaintiffs to prove that their claims have some merit. The statutes expedite judicial consideration of the motion to dismiss, stay discovery, provide attorney's fees, and allow for immediate appeals[40] And these statutes are widely used, including in at least 300 to 450 filings per year in the state of California alone.[41]

33 states and the District of Columbia have adopted anti-SLAPP statutes.[42] Additionally, in 2020 the Uniform Law Commission drafted and recommended for enactment in all states a uniform anti-SLAPP statute called the Uniform Public Expression Protection Act. Many states have adopted that model, and our proposed bill provides many of the same procedural protections.[43]

B. Federal Anti-SLAPP Bills

But while numerous states have adopted anti-SLAPP statutes, Congress has not. This presents a few problems. First, many courts have held that state anti-SLAPP statutes do not apply in federal court.[44] This means that filing in federal court allows plaintiffs to avoid state anti-SLAPP laws. Second, even in circuits that do apply state anti-SLAPP statutes in federal courts, shrewd plaintiffs—especially a foreign government with numerous proxies—can often forum shop away from the states that already provide protections against SLAPP suits.

A federal anti-SLAPP law could address some of these problems. But there has been limited political appetite, at least for a broad anti-SLAPP statute. Since the early 2000s, many commentators have called for federal anti-SLAPP legislation.[45] And in 2009, Representative Steve Cohen (D-TN) introduced the first federal anti-SLAPP bill, the Citizen Participation Act of 2009.[46] In 2015, Representative Blake Farenthold (R-TX) introduced the SPEAK FREE Act, obtaining thirty co-

---

[38] Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 735 (2003).
[39] *Id.*
[40] Tom Wyrwich, *A Cure for A "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 674 (2011).
[41] See Thomas R. Burke, *The Annual Roundup of California Anti-SLAPP Appellate Decisions*, DAVIS WRIGHT TREMAINE LLP (Feb. 28, 2020), https://www.dwt.com/blogs/media-law-monitor/2020/02/the-annual-roundup-ofcalifornia-antislapp-appella.
[42] These states include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington. *Anti-SLAPP Legal Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Sept. 2023), https://www.rcfp.org/anti-slapp-legal-guide/.
[43] As of February 2024, the UPEPA has been enacted in substantially similar form in six states (Hawaii, Kentucky, New Jersey, Oregon, Utah, and Washington) and introduced in eight others (Idaho, Iowa, Minnesota, Missouri, Nebraska, Pennsylvania, South Carolina, and West Virginia). *Public Expression Protection Act*, Unif. L. Comm'n (Feb. 19, 2024, 2:01 AM (UTC)), https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1.
[44] Lauren Bergelson, *The Need for a Federal Anti-SLAPP Law in Today's Digital Media Climate*, 42 COLUM. J.L. & ARTS 213, 232-33 (2019).
[45] Scholars like Nicole Ligon have argued in favor of a federal anti-SLAPP statute, noting that SLAPP suits undermine our democracy by intimidating defendants who exercise their First Amendment rights, imposing the immense financial and emotional burdens of years-long litigation. Nicole J. Ligon, *Solving SLAPP Slop*, 57 U. RICH. L. REV. 459, 466-67, 486 (2023). Ligon additionally observes that frivolous, dilatory SLAPP suits drain courts' resources, but that a federal anti-SLAPP law should carefully tailor its scope to preserve meritorious claims.
[46] Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009).

sponsors and the support of fifty organizations.[47] More recently, in 2022, Representative Jamie Raskin (D-MD) introduced the SLAPP Protection Act.[48]

While each of these bills died in committee, a narrower anti-SLAPP statute that applies only to foreign sovereign plaintiffs could potentially garner broad bipartisan support as a national security measure. And a narrower statute may better target the problem of foreign dictators in our courts. Indeed, though Congress has yet to pass federal anti-SLAPP legislation, it has already acknowledged a pressing need to prevent foreign parties from using U.S. courts to silence speech. In 2010 Congress adopted the SPEECH Act, which prevents courts in the United States from recognizing judgments obtained in a foreign court if that court provided less protection for free-speech rights than the U.S. Constitution.[49] Still, the SPEECH Act falls short of protecting free-speech rights from abusive litigation by foreign parties in U.S. courts. The Act does nothing to address foreign plaintiffs directly filing suit in U.S. courts before obtaining a foreign judgment. And as anti-SLAPP statutes around the country demonstrate, the mere threat of protracted litigation has the power to chill the speech of political dissidents or media outlets.

IV. Foreign Dictators as Plaintiffs and Solutions that Would not Work

There are currently no straightforward legal tools for defendants to quickly defeat claims by foreign dictators. First, the Foreign Sovereign Immunities Act does not address the context of foreign governments as plaintiffs. It provides only for a counterclaim exception so that defendants can file claims against a foreign country. But it otherwise provides no help at all for defendants.

Second, current tools in the judicial arsenal are insufficient and often inapplicable to these cases. The main instrument to deter and punish frivolous suits comes from Federal Rule of Civil Procedure 11, which allows a federal judge to sanction attorneys that bring harassment claims. But the standard for Rule 11 violations is too high and the rule is not fit for a situation when a foreign country is involved because judges may not want to punish foreign sovereigns or proxies without explicit Congressional authorization.[50] Moreover, these sanction requests often come at too late a stage in litigation, they force defendants to incur substantial legal costs, and they do not sufficiently penalize plaintiffs.[51] Because these tools are part of the judicial arsenal, they also lack the Congressional and executive imprimatur necessary for a situation in which foreign parties are involved.

Third, courts cannot easily discriminate against dictatorships because of judicial administrability and separation of powers pressures. Courts may need to decide on a case-by-case basis whether a dictatorship deserves equal treatment or not, bumping heads against the State Department. Courts may also be forced to evaluate foreign policy consequences of dictator-related decisions, weakening

---

[47] Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015, H.R. 2304, 114th Cong. (2015).

[48] Strategic Lawsuits Against Public Participation Protection Act of 2022, H.R. 8864, 117th Cong. (2022).

[49] *See* 28 U.S.C. § 4102.

[50] There is also a strong norm in the judiciary against Rule 11 sanctions. *See* Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, 118 NW. U. L. REV. 853, 904-06 (2024).

[51] *See* Ates v. Gulen, No. 3:15-cv-02354-RDM (M.D. Pa. June 29, 2016) (denying a motion for Rule 11 sanctions); Xinba Constr. Grp. Co. v. Jin Xu, No. ESX-L-2889-18 (N.J. Super. Ct. Law Div. Sept. 20, 2019) (denying abuse of process counterclaim). Although state anti-SLAPP statutes already cover defamation claims, courts have previously refused to apply them in federal court. *See e.g.*, Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328 (D.C. Cir. 2015); Fridman v. Bean LLC, 2019 WL 231751 (D.D.C. Jan. 14, 2019).

deference to the executive.[52] There is simply no easy way for courts to administer a categorical anti-dictatorship standard. Even setting aside fundamental concerns with separation of powers, dictatorships may not be the right category to target. The problem with dictatorial acts is that they fundamentally challenge basic human rights and liberties. But democratic governments can do that too. That is why U.S. courts have previously refused to enforce libel awards from the United Kingdom. Judging all dictatorships as different from democratic governments for purposes of all claims would also be substantively overinclusive. There is no need to prevent dictatorships from litigating nonpolitical claims like contract disputes or embassy hit-and-run accidents. Lastly, forcing U.S. courts to distinguish between friendly and unfriendly dictatorships, as well as among the different shades of authoritarian governments (e.g., hybrid, semiauthoritarian, or competitive authoritarian), would be unfeasible.

These and other functionalist problems discussed below make one conclusion clear: it would be infeasible to categorically discriminate against foreign dictatorships. We should instead judge dictatorships by the types of cases they file and related doctrines.

V. A Proposed Fix: Foreign Sovereign Anti-SLAPP Statute

Congress should draw on the experience of the states and enact a Foreign Sovereign Anti-SLAPP statute. A Foreign Sovereign Anti-SLAPP statute would prevent many of the most egregious cases filed by foreign authoritarian governments. It would have stopped Castro's case against the sugar company in *Sabbatino*, China's array of cases against corruption suspects, Turkey's claim against Gulen, Russia and Venezuela's many claims against dissidents, and Noriega's claims. Such a statute would be a boon for democracy around the world. Here's how it would work.

A. Motion to Dismiss with Burden Shifting and Procedural Consequences

The key feature of an anti-SLAPP statute is that it gives the defendant a special motion to dismiss the case. Anti-SLAPP laws typically establish a two-step process. The defendant first files a special motion to dismiss, which must show that the plaintiff's suit is based on the defendant's exercise of his freedom of speech, association, or petition. The burden then shifts to the plaintiff to demonstrate a likelihood of success on the merits. At this step, the motions often incorporate the summary judgment standard. Courts are well familiar with that standard, which comes from Federal Rule of Civil Procedure 56, and similar rules in the state courts. While a court considers the anti-SLAPP motion, procedural protections kick in, including a stay on discovery and expedited consideration of the motion.

My proposal's key provisions would similarly operate in two steps. First, if a defendant is a victim of a political harassment lawsuit by a foreign government, then the defendant can file a special motion to dismiss the claim. The defendant must allege that a foreign government or its proxy has sued them for political purposes or for exercising rights protected by the U.S. Constitution, either at home or abroad.

Second, if a defendant meets this initial threshold, the burden shifts to the foreign plaintiff to survive a modified summary judgment standard. Procedural protections attach to this special motion to dismiss, as I'll later explain. Under Rule 56 of the Federal Rules of Civil Procedure, a defendant can successfully move for summary judgment on any claim or defense if they can demonstrate there is

[52] *See* Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 954 (2017).

"no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law."[53] Summary judgment operates through a burden shifting mechanism: the movant must first meet her burden of production and then the non-movant must generally show that a jury could find for her because there is a genuine dispute of material fact. My proposal incorporates the Rule 56 summary judgment standard and burden-shifting, but with some important modifications. In addition to the regular method of negating the plaintiff's claim or pointing out its deficiencies, the statute allows the defendant to move for summary judgment by showing that plaintiff is a foreign state or proxy and the claim is based on the defendant's speech or political activity. If met, the burden shifts to the plaintiff to show that defendant is not entitled to summary judgment. They can, for instance, present at least some evidence on each essential element of the claim. Crucially, a plaintiff cannot defeat the motion by claiming that discovery is needed. And the defendant need not point out the deficiency of the plaintiff's evidence.

As discussed above, the FSAS should apply narrowly to political claims by foreign governments or proxies. Therefore, the trickiest and most novel provisions of the bill are the definitions of those two key concepts: a "political" lawsuit and a "proxy" of a foreign government.

B. Defining Political Lawsuits

The goal of the statute is to protect political dissidents or opponents, newspapers, and others who exercise their freedom of expression rights. In addition to covering a party's lawful exercise of First Amendment rights within the United States, the statute should also cover conduct that took place abroad. In order to do that, we rely on existing protections under the political-asylum standard, which applies to political conduct by dissidents in their home countries.

Specifically, the political asylum standard obligates an applicant to "demonstrate that he faces persecution 'on account of . . . political opinion.'"[54] Applicants satisfy this by showing that a foreign government harmed them for holding a political opinion, including by participating in "act[s] against the government" or protests.[55] And applicants only have to show that holding a political opinion was "one central reason" for the mistreatment or persecution.[56] There are thousands of asylum decisions expounding on this standard, showing that courts are comfortable defining the existence of "political" acts and subsequent persecution. Protected political opinions must be publicly known, not privately held, but can be either overt or imputed.[57] Examples of overt protected political opinions include: public speaking,[58] whistle-blowing,[59] refusal to comply with military orders,[60] threats to inform human rights organizations about the military's conduct,[61] and participation in a political organization.[62] And because the political asylum standard also covers opinions that a foreign government, correctly or

---

[53] FED. R. CIV. P. 56(A).
[54] 8 U.S.C. § 1101(a)(42)(A) (as interpreted in 8 U.S.C.A. § 1158(b)(1)(B)(i)).
[55] Zhiqiang Hu v. Holder, 652 F.3d 1011, 1017 (9th Cir. 2011).
[56] *Id.*
[57] *See* Mayorga-Vidal v. Holder, 675 F.3d 9, 18 (1st Cir. 2012).
[58] *See* Haxhiu v. Mukasey, 519 F.3d 685 (7th Cir. 2008) (public speaking against government corruption); *Samimi v. I.N.S.*, 714 F.2d 992 (9th Cir. 1983) (public speaking in opposition to the regime).
[59] *See* Baghdasaryan v. Holder, 592 F.3d 1018 (9th Cir. 2010).
[60] *See* Barraza Rivera v. I.N.S., 913 F.2d 1443, 1451 (9th Cir. 1990) (refusal to comply with military orders on the basis that they violate standards of human decency).
[61] *See* Lopez Ordonez v. Barr, 956 F.3d 238 (4th Cir. 2020).
[62] *See* Garcia-Ramos v. I.N.S., 775 F.2d 1370 (9th Cir. 1985) (participation in a political organization through demonstrations, distributing propaganda, or painting slogans).

incorrectly, attributes to the party,[63] it also covers situations like: an accusation of spying for another country,[64] refusal to comply with extortion demands,[65] refusal to join a guerrilla group,[66] and conscientious objection to military service.[67]

Crucially, in the asylum law context, persecution need not be solely "on account of" a party's political opinion. Rather, the political opinion need only be "one central reason" for the persecution.[68] This standard would resolve the problem of proxy plaintiffs filing facially legitimate complaints that are also partially motivated by political persecution abroad. Our proposed bill therefore incorporates the political asylum standard wholesale.

C. Defining Foreign Proxies

The statute should also be sufficiently broad to deter not only actions brought by the foreign state itself or by its officials or agents, but also actions brought by agents or proxies of the foreign state. For example, the definition should cover Chinese state-owned companies, Russia's recruitment of oligarchs as plaintiffs, and Turkey's recruitment of ordinary citizens represented by government lawyers.

The bill therefore incorporates two key definitions from other statutes. First, the bill refers to "foreign states" as defined in the Foreign Sovereign Immunities Act. Second, the bill also relies on the definition of "agent of a foreign principal" in the Foreign Agents' Registration Act.[69] But, in addition, we expanded the scope of the bill by creating the concept of a "proxy of a foreign state." To supplement a simple definition, the statute could draw on the old doctrine of virtual representation in the preclusion context. Under this definition, plaintiffs would be considered proxies if they shared both a "substantial identity of interests" and a "close relationship"[70] with the foreign state or the head of a foreign state. The idea is to capture non-governmental actors who are so closely tied to the regime, such as Russian oligarchs, that they effectively represent the government's interests.

The statute could also import the test under corporate law for determining whether a director has become "so beholden" to an interested party that they can no longer be considered independent when determining the validity of a transaction.[71] This definition would cover plaintiffs who share a sufficiently personal or financial relationship with the head of the foreign state. For example, such relationships can be demonstrated through, intertwined personal lives[72] or sharing "a mutually

---

[63] *See* Alvarez Lagos v. Barr, 927 F.3d 236, 254 (4th Cir. 2019) ("[T]he relevant inquiry is not the political views sincerely held or expressed by the victim, but rather the persecutor's subjective perception of the victim's views.").
[64] *See* Hamdan v. Mukasey, 528 F.3d 986 (7th Cir. 2008).
[65] *See* Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988).
[66] *See* Borja v. I.N.S., 175 F.3d 732 (9th Cir. 1999).
[67] Opinion of the INS General Counsel, 70 Interp. Releases 498–509 (Apr. 12, 1993).
[68] 8 U.S.C.A. § 1158(b)(1)(B)(i); *see also Osorio v. I.N.S.*, 18 F.3d 1017, 1028 (2d Cir. 1994) ("The plain meaning of the phrase 'persecution on account of the victim's political opinion' does not mean persecution *solely* on account of the victim's political opinion.") (emphasis in original).
[69] 22 U.S.C. § 611; *see also* 18 U.S.C. § 951; 18 U.S.C. § 2339B; 18 U.S.C. § 175b.
[70] *Taylor v. Sturgell*, 553 U.S. 880, 888 (2008); *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996).
[71] *Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *5 (Del. Ch. Mar. 17, 2006).
[72] *See, e.g.*, *Tornetta v. Musk*, 2024 WL 343699, at *51 (Del. Ch. Jan. 30, 2024) (joint family vacations and attending family birthday parties); *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015) (50-year friendship); *Sandys v. Pincus*, 152 A.3d 124, 134 (Del. 2016) (co-owning a private plane).

beneficial network of ongoing business relations."[73] Finally, to maximize the statute's reach, I also propose that Congress cover two additional kinds of plaintiffs: first, plaintiffs who receive funding for their anti-SLAPP suits from a foreign state, and second, plaintiffs sanctioned by the Treasury Department's Office of Foreign Assets Control due to their ties to an authoritarian regime.

Erring on the side of an over- rather than under-inclusive definition of foreign proxies is justifiable. The statute only applies to a narrow slice of political lawsuits. And evenif successfully invoked, the statute merely shifts the burden to the plaintiff to meet a heightened pleading standard. Plaintiffs with meritorious claims should survive this burden-shifting, especially because the motion merely raises pleading standards closer to the global norm. In other words, the statute puts foreign plaintiffs in the same procedural position they would occupy in most foreign courts.

D. Other Considerations and Complications

I acknowledge that this proposal is not without its complications. After all, it aims to remedy the complex problem of foreign proxies bringing political lawsuits in U.S. courts. Briefly, if Congress were to implement this proposal, it should consider the following issues as well:

- First*, interlocutory appeal*. My proposal does not expressly provide for interlocutory appeal if the anti-SLAPP motion is denied. However, most of the circuit courts to address this issue have held a denial is appealable under the collateral order doctrine.[74] Scholars have argued that a right to interlocutory appeal of a denial of an anti-SLAPP motion is needed to preserve immunity from litigation that would burden a defendant's First Amendment rights.[75] Still, some limits on interlocutory appeal may be desirable to reduce delay. Courts' ability to levy sanctions for frivolous appeals, such as under Federal Rule of Appellate Procedure 38, may suffice to prevent delaying the resolution of meritorious claims.[76] Congress should allow the federal courts to determine the availability of interlocutory appeal by applying the collateral order doctrine and the policy interests it embodies.

- Second*, abuse of Anti-SLAPP motions*. Critics of anti-SLAPP provisions argue that they chill meritorious claims, and even harm federalism by interfering with state courts. It's true that a poorly drafted anti-SLAPP statute runs the risk of chilling meritorious claims against tortfeasors. What is more, some critics have argued against allowing removal of anti-SLAPP motions to federal court. They argue that it might incentivize reverse forum-shopping and end the states' experimentation with state court procedural protections against SLAPP suits.[77] Given these critiques, a Foreign Sovereign Anti-SLAPP Statute must take care to define its scope and lay out exceptions, such as employment discrimination or civil rights cases, to limit abuse by defendants whose conduct does not constitute protected speech or political activity on a matter of public concern. Finally, anti-SLAPP proposals must take care to avoid burdening legitimate plaintiffs' constitutional rights to petition and to a jury trial while

[73] *Sandys v. Pincus*, 152 A.3d 124, 134 (Del. 2016).
[74] Franchini v. Investor's Bus. Daily, Inc., 981 F.3d 1, 8 n.6 (1st Cir. 2020) (collecting cases and agreeing with the majority rule that the denial is appealable).
[75] *See* Ligon, *supra* note 16, at 485.
[76] E.g., Workman v. Colichman, 33 Cal. App. 5th 1039, 1056 (2019) (imposing sanctions for frivolous appeal of denial).
[77] Aaron Smith, Note, *SLAPP Fight*, 68 Ala. L. Rev. 303, 332 (2016).

protecting defendants' freedom of speech.[78] To achieve this, the statute should set a standard no stricter than the summary judgment standard and not empower judges to make factual determinations or weigh evidence in violation of the Seventh Amendment right to a jury trial.[79]

- Third*, increasing the federal courts' workload.* There is always a potential for abuse and frivolous filings of anti-SLAPP motions. But it is unlikely that this proposal would pose a problem for the federal courts' workload. Unlike typical anti-SLAPP laws, the FSAS applies narrowly to political claims by foreign sovereigns or proxies. Further, parties filing frivolous anti-SLAPP motions remain subject to sanctions.

Conclusion

Ultimately, the problem I highlight is a pragmatic one: the manipulation or abuse of our legal system. Dictators are using their privileges—as recognized by our democratic institutions—to advance their authoritarian agendas. It is self-evident that U.S. courts should not serve the interests of foreign dictatorships if they can avoid it. Liberal theorists from Karl Popper to John Rawls have defended a democracy's right to resist having its institutions employed for illiberal purposes.[80] Indeed, under a Kantian view of international law, democracies are not obligated to extend comity to tyrannical states because dictators do not represent their people so "they cannot create obligations for their subjects."[81] Without necessarily embracing that view, the problem is that the foreign relations doctrines mentioned above—the privilege of bringing suit, act of state, FSIA, and related immunities—benefit all sovereigns equally, including those governed by dictatorships. So then the question becomes whether domestic law requires extending wide access to court to foreign dictators. If it does not, courts can and should discard it.

Suffice it to say, for now, that foreign dictators challenge the goals and foundations of both a democratic polity (and its courts), and the underlying justifications for international comity. In the United States, our courts have defended international comity to foreign sovereigns because it strengthens a community of nations that wish to promote cooperation, free commerce, and reciprocal treatment.[82] But even if most modern autocracies are not autarkic, authoritarian governments are not reliable promoters of reciprocal judicial access. Dictators often bar our citizens from their court systems and treat U.S. companies unfairly vis-à-vis their domestic companies.

While foreign dictators (or monarchs) have been litigants in our courts since the beginning of the Republic, there is no need to grant them the current level of access. Foreign dictators have no right to

---

[78] *See* Shannon Jankowski & Charles Hogle, *SLAPP-ing Back: Recent Challenges to the Application of Anti-SLAPP Laws*, AM. BAR ASS'N (Mar. 16, 2022), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws.

[79] Bergelson, *supra* note 12, at 237.

[80] JOHN RAWLS, A THEORY OF JUSTICE 217 (1971); Karl Popper, THE OPEN SOCIETY AND ITS ENEMIES (Ed. 1995); Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI. REV. 417, 638 (1937); Samuel Issacharoff, *Fragile Democracie*s, 120 HARV. L. REV. 1405 (2007).

[81] Fernando Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 89 (1992); Anne Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch*, *in* PERPETUAL PEACE AND OTHER ESSAYS 107 (Ted Humphrey trans., 1983); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992). *But see* BRAD ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER (2011) (rejecting this view).

[82] *See e.g.*, Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

benefit from access to U.S. courts in order to pursue political goals. Doctrines like act of state, the privilege of bringing suit, or official immunity can adapt to a modern world under threat from democratic regression. U.S. courts and Congress should take up the baton and, in a careful and targeted way, recalibrate international comity in these cases.