ARTICLE

THE "ENGLISH" RULE—IT AIN'T ENGLISH, AND OUGHT NOT BE AMERICAN

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"*Broad prophylactic rules in the area of [First Amendment rights] are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.*"[1]

Despite the stirring words above, courts in almost one-third of the states in the United States[2] follow the so-called "English" rule, i.e., a rule that

1. NAACP v. Button, 371 U.S. 415, 438 (1963) (citations omitted).

2. States that follow the English rule are Delaware, Illinois, Iowa, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Rhode Island, Texas, Virginia, Washington, and Wisconsin, as well as the District of Columbia. *See* Nix v. Sawyer, 466 A.2d 407, 413 (Del. Super. Ct.1983) (recognizing a claim for malicious prosecution was precluded in the context of an alleged defamation case because the plaintiff fell far short in proving probable cause and malice); Joeckel v. D.A.V., 793 A.2d 1279, 1281 (D.C. 2002) (holding the harm done to the employee's reputation fell short of reaching the "special injury" standard required to support a malicious prosecution cause of action); Howard v. Firmand, 880 N.E.2d 1139, 1145 (Ill. App. 1st Dist. 2007) (affirming the plaintiff "failed to show he suffered a special injury"); Whalen v. Connelly, 621 N.W.2d 681, 688 (Iowa 2000) (en banc) (determining "our precedent requires a showing of special injury" for a malicious prosecution suit); One Thousand Fleet Ltd. P'ship v. Guerriero, 694 A.2d 952, 958 (Md. 1997) ("[T]he plaintiff must establish that damages were inflicted upon the plaintiff by arrest or imprisonment, by seizure of property, or other special injury which would not necessarily result in all suits prosecuted to recover for a like cause of action." (citations omitted)); Friedman v. Dozorc, 312 N.W.2d 585, 596 (Mich. 1981) (concluding the physician neglected to plead special injury required under the English rule to prevail in the malicious prosecution claim); Ackerman v. Lagano, 412 A.2d 1054, 1058 (N.J. Super Ct. Law Div. 1979) (providing special injury was required for a malicious prosecution claim, but a claimed damage to a physician's professional reputation did not constitute a special injury); Belsky v. Loventhal, 392 N.E.2d 560, 560 (N.Y. 1979) (mem.) (affirming the dismissal of a malicious prosecution claim because the complaint did not "contain[] any allegation of interference with plaintiff's person or property" (citations omitted)); Stanback v. Stanback, 254 S.E.2d 611, 626 (N.C. 1979) (informing the wife's complaint against her husband failed to state a claim for malicious prosecution because there was no allegation of "a substantial interference with either the plaintiff's person or her property as contemplated by the special damage requirement"); Savoy v. Univ. of Akron, 2014-Ohio-3043, 15 N.E.3d 430, at ¶ 27 (recognizing the "seizure of plaintiff's person or property in the prior proceedings" is an element of malicious civil prosecution (citations omitted)); Palazzo v. Alves, 944 A.2d 144, 154 (R.I. 2008) (explaining "this [c]ourt has adopted the so-called 'English rule'" that requires special injury to be shown for a malicious prosecution cause of action if the person was not arrested or subject to having property seized); Airgas Sw. v. IWS Gas & Supply, 390 S.W.3d 472, 484 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("[A]s a matter of law, the TRO granted in favor of Airgas did not cause a special injury to IWS or its employees so as to support a claim for malicious prosecution."); Ely v Whitlock, 385 S.E.2d 893, 896 (Va. 1989) ("[T]he risk of damage to a lawyer's livelihood is a natural consequence of any disciplinary proceeding against him."); Clark v. Banes, 84 P.3d 245, 248–49 (Wash. 2004) (en banc) (recognizing arrest or seizure of property and special injury are essential elements of "a malicious prosecution claim arising from a civil action" (citations omitted)); Johnson v. Calado, 464 N.W.2d 647, 654 (Wis. 1991) ("Because the plaintiff failed to allege such a

prohibits victims of civil litigation abuse from filing a malicious use of process suit unless a claimant has been arrested or imprisoned, his property seized, or other special injury.[3]

The English rule's arbitrary damage requirements arguably makes the tort of malicious use of process almost useless.[4] The rule has the anomalous effect of opening the courthouse doors to meritless claims while slamming the doors shut on possibly meritorious claims by victims of litigation abuse.

This Article posits that these holdings resulted from a distortion of English common law. Further, the English rule violates the Petition Clause of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[5]

seizure of either person or property and that such a seizure had caused her damages, the plaintiff's cause of action is fatally defective and was properly dismissed.").

3. *See* Buck v. Gale, 530 P.2d 1248, 1249 (Or. 1975) ("[A] civil action, although commenced with malice and without probable cause, does not give rise to cause of action for malicious prosecution unless there has been arrest of person, seizure of property, or other special injury to defendant in that action which would not ordinarily result in all similar causes seeking recovery of damages." (quoting Balsiger v. Am. Steel & Supply Co., 451 P.2d 868, 869 (Or. 1969) (en banc))); *see also Calado*, 464 N.W.2d at 651 ("[O]nly in exceptional cases of special damages stemming from certain kinds of restraints of person or property caused by the malicious action would a cause of action lie.").

4. *See* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1218 (1979) [hereinafter Note, *Groundless Litigation*] ("In about one-third of American jurisdictions, plaintiffs who have brought actions for malicious prosecution have found the remedy all but useless, because of the restrictions of the English Rule. . . . .").

5. An argument also could be made that the English rule violates the remedy clause contained in a number of states' constitutions. For instance, looking at the Maryland Constitution, Article 19 of the Maryland Declaration of Rights (commonly referred to as "the Remedy Clause") states, anyone, "for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the [l]aw of the land." MD. CONST. art. 19. Remedy guarantees are unique to state constitutions and have no federal counterpart. *See* David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197, 1198 (1992) ("State constitutional 'remedy guarantees' provide concrete proof. These guarantees, requiring that the law furnish a remedy for specified types of injuries, have no federal counterpart.").

Similarly, it could be argued the "English" rule violates the right to a jury trial embodied in most states' constitutions. For example, in 2015, the State of Washington (an English rule state) struck down that state's anti-SLAPP (Strategic Lawsuit Against Public Participation) law (formerly WASH. REV. CODE § 4.24.525 (2010)) holding that the "clear and convincing evidence" standard contained in the anti-SLAPP statute violated the Washington Constitution's right to a jury trial. *See* Davis v. Cox, 351 P.3d 862 873–74 (Wash. 2015) (en banc) ("[Wash. Rev. Code § 4.24.525 (2010)] requires the trial judge to make a factual determination of whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim. This [] no frivolousness standard. . . . creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial. Such a procedure invades the jury's essential role of deciding debatable questions of fact. In this way, [Wash. Rev. Code § 4.24.525 (2010)] violates the right of trial by jury under article I, section 21 of the Washington Constitution.").

This Article, however, focuses on the English rule *vis-à-vis* the U.S. Constitution, which can

The Article also examines the statistical evidence from states that have abolished the English rule and finds no support for the underlying public policy suppositions courts employ in adopting the English rule.[6]

I. BACKGROUND OF THE ENGLISH RULE

The misleadingly labeled "English" rule[7] is not really English as applied to American law. The rule, as it developed in England, was based on the fact that a prevailing party received full costs and attorney's fees.[8] Only in

preempt and displace state law either expressly or implicitly pursuant to the Supremacy Clause. U.S. CONST. art. VI, cl 2.

6. This Article focuses on abusive litigation in a civil context, not a criminal process. Ironically, in some English rule states (e.g., Maryland) "arrest is not an essential element of the tort of 'criminal' malicious prosecution." Krashes v. White, 341 A.2d 798, 801 (Md. 1975). Nor does a criminal malicious prosecution plaintiff need to prove any special damages. *See id.* at 801–02 ("Unlike a plaintiff in a malicious use of civil process suit, the plaintiff in a criminal malicious prosecution action need not prove any special damages, such as arrest or seizure of property.").

7. The English rule at issue in this Article is not to be confused with at least two other so-called "English" rules. The first is the rule that the successful party in a lawsuit may recover his costs, including attorney's fees. Sande L. Buhai, *Everyone Makes Mistakes: Attorney's Fee Recovery in Legal Malpractice Suits*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 32, 48 (2016). This English rule is followed by courts in Great Britain and most other legal systems in the Western world. *Id.* Contrast the "American" rule—followed in nearly all states in the U.S.—which holds that each side bears their own costs, including attorney's fees, regardless of the outcome. *Id.*; *see, e.g.*, Haliw v. City of Sterling Heights, 691 N.W.2d 753, 756 (Mich. 2005) ("We note that Michigan follows the 'American rule' with respect to the payment of attorney fees and costs. Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." (citing Dessart v. Burak, 678 N.W.2d 615 (Mich. 2004))); *see also* Toland v. Davis, 657–58, 693 N.E.2d 1196, 1200 (Ill. 1998) ("More than two centuries ago the United States Supreme Court rejected application of the English rule in the United States. The rule in this country is that attorney fees are not ordinarily recoverable in the absence of such a provision in a statute or enforceable contract." (citing Arcambel v. Wiseman, 3 U.S. (Dall.) 306 (1796))); Ocean City, Md., Chamber of Commerce, Inc. v. Barufaldi, 75 A.3d 952, 953 (Md. 2013) ("The vast majority of states, including Maryland, follow what is known as the 'American Rule' on the allocation of the costs of litigation—that is, each party bears its own costs, including attorneys' fees, regardless of the outcome." (first citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975), and then citing Empire Realty Co. v. Fleisher, 305 A.2d 144 (Md. 1973))).

The second English rule provides that witnesses, parties, and judges enjoy absolute immunity from civil liability for defamation regarding statements made in a judicial proceeding, even if the statement is wholly unrelated to the underlying proceeding. *See, e.g.*, Hawkins v. Harris, 661 A.2d 284, 288 (N.J. 1995) ("The English rule differs slightly from the American rule in that England affords a true, absolute privilege without regard to the relevancy of the statements to the subject matter of the proceedings." (citing Fenning v. S. G. Holding Corp., 135 A.2d 346 (N.J. 1957))); *see also* Norman v. Borison, 17 A.3d 697, 708 (Md. 2011) ("For witnesses, parties, and judges, we employ the 'English' rule, which provides that the putative tortfeasor enjoys absolute immunity from civil liability, even if the statement is wholly unrelated to the underlying proceeding." (first citing Keys v. Chrysler Credit Corp., 494 A.2d 200, 203 (Md. 1985), and then citing Adams v. Peck, 403 A.2d 840, 843 (Md. 1979))).

8. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award

"special" cases could an English prevailing party seek additional compensation.[9] In America, however, a prevailing party rarely receives his attorney's fees.[10] As a result, "[t]he 'English' rule is, in fact, not English."[11] When applied to American law it is a fiction. As the Wisconsin Supreme Court explained:

> The rule requiring special damages has been called the "English" rule. This is based upon the supposition that English jurisprudence ordinarily did not permit a cause of action for malicious prosecution because it was assumed that the prevailing party in the underlying action had received full costs and substantially full compensation for the expenses and attorney's fees that were incurred as the result of being maliciously sued without probable cause. Hence, only in exceptional cases of special damages stemming from certain kinds of restraints of person or property caused by the malicious action would a cause of action lie. Whatever the true situation might have been in England, it is obvious that statutory costs and statutory attorney's fees as provided in the various jurisdictions of the United States do not provide amounts that are either fully compensatory to the recipient or are a meaningful deterrent to the party who pays. Hence, to the extent a rule disallowing or limiting the right to bring an action for civil malicious prosecution is based on the theory that

costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party."); *see also Calado*, 464 N.W.2d at 651 ("English jurisprudence ordinarily did not permit a cause of action for malicious prosecution because it was assumed that the prevailing party in the underlying action had received full costs and substantially full compensation for the expenses and attorney's fees that were incurred as the result of being maliciously sued without probable cause.").

9. For a further discussion of the history of the "English" rule, see Note, *Groundless Litigation, supra* note 4, at 1219 (analyzing "the history of Anglo-American attempts to discourage malicious civil suits" and noting the jurisdictional difference of whether a showing of special damage is required for a remedy). *See also* John Raymond Jones, Jr., Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743, 745–46 (1980) (providing a detailed history of how the English rule has developed over the centuries).

10. In the absence of the specific language in a contract or a statute, courts in America generally deny the allowance of attorney's fees. Buhai, *supra* note 7, at 52. Statutory attorney's fees may be awarded only when "expressly," "explicitly," or "specifically" authorized by statute, and statutes allowing an award of attorney's fees are usually strictly construed. *See* Andrews v. Blue, 489 F.2d 367, 377 (10th Cir. 1973) (noting the award of attorney's fees under the Colorado Securities Act is permissive not mandatory); *see also* Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 389 F. Supp. 486, 487–88 (N.D. Cal. 1975) (holding absent overriding considerations, a landowner who recovered against the city in an inverse condemnation action brought under the Fifth Amendment was not entitled to recover attorney's fees), *aff'd* 561 F.2d 1327 (9th Cir. 1977).

11. *See* HARPER ET AL., HARPER, JAMES & GRAY ON TORTS § 4.8, at 536 (3d ed. 2006) ("It accordingly appears that, whatever justification there may be for the American 'English rule' position, it is a position that bars a remedy for unjustified civil litigation when an English court would not necessarily do so on the same facts. The 'English rule' is, in fact, not English.").

the winner has already been compensated, it is *based upon sheer fiction.*[12]

Nonetheless, almost one-third of American jurisdictions (including Wisconsin) have adopted this English rule even though it renders "the remedy [of malicious use of process] all but useless."[13]

Most states that follow the English rule first adopted it in the nineteenth or early twentieth century.[14] None of these states, however, considered its

12. *Calado*, 464 N.W.2d at 650–51 (emphasis added) (footnotes omitted). Nonetheless, the *Calado* court reasoned that dropping it would "would discourage persons from having access to the courts." The court, however, cited no evidence to substantiate this conclusion. *Id.* at 653.

13. *See* Note, *Groundless Litigation*, *supra* note 4, at 1218 (stating plaintiffs in a third of the jurisdictions across the United States have been unsuccessful in their attempts to bring suit for malicious prosecution because the English Rule requires plaintiffs to show special damage). While most states statutorily award attorneys' fees in cases of vexatious litigation, fees rarely are awarded. *See* F.T.C. v. Kuykendall, 466 F.3d 1149, 1152 (10th Cir. 2006) (recognizing that the awarding of attorneys' fees to the prevailing party for a suit brought in bad faith is a rare occasion). Furthermore, attorneys' fees do not provide full compensation to a victim of litigation abuse and deny the victim the right to a jury trial. *See* Note, *Groundless Litigation*, *supra* note 4, at 1220 (noting compensatory damages under either the American Rule or English Rule allow expenses and damage incurred by way of wrongful litigation and allow for punitive damages, which would not otherwise be recoverable absent either of these rules or a statutory enactment).

14. *See* Peckham v. Union Fin. Co., 48 F.2d 1016, 1017 (D.C. Cir. 1931) (invalidating actions brought in the District of Columbia for malicious suit, absent arrest, seizure of property, or special injury); Smith v. Michigan Buggy Co., 51 N.E. 569, 571 (Ill. 1898) (adopting the English Rule in Illinois); Wetmore v. Mellinger, 18 N.W. 870, 871 (Iowa 1884) (rejecting actions in Iowa by Defendants in malicious suits filed without probable cause, unless defendant wrongly suffered from arrest, property seizure, or special injury); McNamee v. Minke, 49 Md. 122, 134–35 (Md. 1878) (restricting a Maryland defendants' recovery to groundless actions wrongly brought, which results in arrests, seizure of property, bankruptcy, and the like); Powers v. Houghton, 123 N.W. 1108, 1109 (Mich. 1909) (precluding defendants in Michigan from recovery in malicious prosecution suits, where property was seized to which the plaintiff did not have an ownership interest); Potts v. Imlay, 4 N.J.L. 330, 334 (N.J. Sup. Ct. 1816) (denying actions in New Jersey to recover ordinary defense costs in civil suits, where no arrest or special grievance manifests); Paul v. Fargo, 82 N.Y.S. 369, 377 (N.Y. App. Div. 1903) (espousing that Defendants of New York are not entitled to maintain action for recovery of costs resulting from malicious prosecution against a plaintiff); Ely v. Davis, 15 S.E. 878, 878 (N.C. 1892) (dismissing an action brought in North Carolina against a plaintiff for malicious prosecution, which lacked probable cause); Cincinnati Daily Tribune v. Bruck, 56 N.E. 198, 199 (Ohio 1900) (refusing to sustain an action in Ohio brought for malicious prosecution where no special damages result other than interference of person or property belonging to the defendant); Haldeman v. Chambers, 19 Tex. 1, 53–54 (1857) (rebuffing legal redress to Defendants in Texas seeking recovery for costs incurred in defense of a malicious action brought without probable cause); Abbott v. Thorne, 76 P. 302, 305 (Wash. 1904) (disallowing civil actions in Washington for malicious prosecution, except where such prosecution interferes with person or property of the defendant); Luby v. Bennet, 87 N.W. 804, 808 (Wis. 1901) (dictum) (stating civil actions brought in Wisconsin against maliciously prosecuted actions will not sustain, where neither the defendants' person nor the property thereof experience interference via special damages to him). Though the contention was obiter dictum in *Luby*, it was later expressly adopted in *Myhre v. Hessey*. Myhre v. Hessey, 9 N.W.2d 106, 110 (Wis. 1943) (endorsing the English Rule as sounder public policy than the American Rule).

A few courts did not adopt the "English" rule until later in the twentieth century. *See* Kaye v.

application *vis-à-vis* the United States Constitution, nor have they cited any evidence to support the public policy suppositions for its application.

II. ELEMENTS OF THE TORT

A malicious use of civil process suit[15] generally requires four elements: (1) a prior civil proceeding instituted by the defendant; (2) the proceeding was instituted without probable cause; (3) the prior proceeding was instituted with malice; (4) the proceeding terminated in favor of the plaintiff.[16]

English rule states add a fifth element: (5) damages were inflicted upon the plaintiff by arrest or imprisonment, by seizure of property, or other special injury,[17] which would not result in suits prosecuted for a like cause

Pantone, Inc., 395 A.2d 369, 372 (Del. 1978) (instituting the rule in Delaware that, to sustain a cause of action for malicious prosecution, a civil proceeding must be instituted, absent probable cause, with malice, which terminates in favor of the aggrieved party, and injured the aggrieved party by seizure of property or other special injury); Ring v. Ring, 228 A.2d 582, 583–84 (R.I. 1967) (rejecting action for malicious prosecution); Ayyildiz v. Kidd, 266 S.E.2d 108, 111 (Va. 1980) (requiring parties suffering from malicious criminal prosecution to allege and prove that such prosecution was set forth by the defendant and unfavorably for the aggrieved party, that the case was instituted by cooperation of defendant, the grievance lacked probable cause, and was malicious, and noting that such requirements are more stringent in criminal prosecutions than those in tort actions).

15. This type of suit is also known as "malicious prosecution of a civil suit." Penwag Prop. Co. v. Landau, 388 A.2d 1265, 1266 (N.J. 1978). It is also sometimes referred to as "wrongful use of a civil proceeding." Rosen v. Am. Bank of Rolla, 627 A.2d 190, 191 (Pa. Super Ct. 1993). Additionally, it can be referred to as "wrongful civil proceedings" or other phrases. James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982).

16. *See* Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203, 207 (Tex. 1996) (discussing the elements necessary for a malicious civil suit, including the necessity of showing special damages to prove malicious prosecution in Texas); Howard v Firmand, 880 N.E.2d 1139, 1142 (Ill. App. Ct. 2007) (compelling the demonstration of several factors and requiring a special injury suffered by the plaintiff beyond the ordinary expense, time, or annoyance involved in defense of the action to prove malicious prosecution in Illinois); Ackerman v. Lagano, 412 A.2d 1054, 1056–57 (N.J. Super Ct. 1979) (illustrating that to prove malicious prosecution in New Jersey, Plaintiff must show the initial suit was filed without probable cause and was actuated by malice, the suit was terminated in favor of the plaintiff, and plaintiff suffered a "special grievance"); One Thousand Fleet Ltd. Pship. v. Guerriero, 694 A.2d 952, 956 (Md. 1997) (holding the plaintiff in malicious prosecution in Maryland must prove the defendant brought a prior civil suit absent probable cause, with malice, which terminated in the plaintiff's favor, and resulted in special injury). *But see* Frey v. Stoneman, 722 P.2d 274, 277 (Ariz. 1986) (requiring a plaintiff in an Arizona malicious prosecution case to establish only the following: a prior prosecution terminated in the plaintiff's favor, the defendant brought action, the action was brought with malice without probable cause, and the plaintiff incurred damage to prove); Wilkinson v. Shoney's, Inc., 4 P.3d 1149, 1157 (Kan. 2000) (providing that in to maintain a malicious prosecution civil action in Kansas, one must show that the defendant in such action initiated civil action against the plaintiff, without probable cause, with malice, which terminated in the plaintiff's favor, and thus, employed damages against the plaintiff (citing RESTATEMENT (SECOND) OF TORTS § 674(e) (AM. LAW INST. 1977)).

17. Case law from various jurisdictions is inconsistent as to what constitutes "special injury." For

of action.[18]

III. RATIONALE FOR ENGLISH RULE NOT SUPPORTED BY COMMENTATORS, MOST STATES OR THE SUPREME COURT

The presumptions most often cited by courts for adopting the English rule are: "Public policy requires that citizens be free to resort to the courts to resolve grievances without fear that their opponent will retaliate. . . ."[19] and, without the English rule, "a large proportion of unsuccessful civil actions would be followed by suits for malicious prosecution, and so there would be a piling of litigation on litigation without end."[20] No court has

example, New Jersey considers meritless defamation suits (also known as "SLAPP" suits) "special injury" due to the infringement on the First Amendment right to free speech, while Illinois does not. *Compare Baglini*, 768 A.2d at 836 (upholding a special injury claim—in the context of malicious prosecution in New Jersey—which derived from a strategic lawsuit against public participation because it restrained First Amendment "bundle of freedoms" granted under the Constitution), *with Thomas*, 775 N.E. 2d at 235 (distinguishing "ordinary" injury from "special" injury in the context of malicious prosecution, and holding that designation of either turns on the peculiar effect caused by the litigation and the remedy sought as opposed to the subjective impact the litigation may have imposed on the maliciously prosecuted claimant).

18. When the malicious use of civil process suit elements are satisfied, arrest or imprisonment, property seizure, or special injury is not required when applying the American Rule. The English rule prevents defense costs to defendants to be recovered in a spectrum of cases that do not show imprisonment, seizure of property, or special injury. *Compare Kaye*, 395 A.2d at 372 (refusing malicious prosecution damages to party who did not show, *inter alia*, seizure of property), *with Frey*, 722 P.2d at 277 (granting malicious prosecution claim upon meeting the requisite elements in Arizona, which does not include a showing of imprisonment, seizure of property, or special injury).

19. *One Thousand Fleet Ltd. P'ship*. 694 A.2d at 955; *see also Ackerman*, 412 A.2d at 1059 (providing the "overriding public policy of free and unfettered access to the courts," as rationale for imposing a strict burden of proof in malicious prosecution cases); Palazzo v. Alves, 944 A.2d 144, 153 (R.I. 2008) (disfavoring the tort of malicious prosecution because it chills unencumbered access to the courts); Franklin v. Grossinger Motor Sales, 259 N.E.2d 307, 309 (Ill. App. Ct. 1970) (criticizing malicious prosecution claims for chilling litigation to determine rights, and imposing fear of prosecution engaging the courts to adjudicate such rights); Perry v. Arsham, 136 N.E.2d 141, 143 (Ohio Ct. App. 1956) (enforcing the "strict" rule when handling malicious prosecution claims, and citing the adequacy of the importance of free and open access to courts unencumbered by fear of retaliatory prosecution); *Ring*, 228 A.2d at 584 (adhering to the strict rule because the "dictates of sound public policy" demand that civil actions must be not be unreasonably limited by the threat retaliatory malicious prosecution); *Tex. Beef Cattle Co.*, 921 S.W.2d at 209 (contending that the special damage requirement imposed by the stricter rule ensures good faith litigants free access to the courts and quells the intimidation posed by potential countersuits for malicious prosecution); *Calado*, 464 N.W.2d at 653–54 (finding justification for disfavoring malicious prosecution in freer access to courts where prospective litigants are not easily exposed to malicious prosecution suits when they do not prevail).

20. Owens v. Graetzel, 132 A. 265, 267 (Md. 1926); *see also* Friedman v. Dozorc, 312 N.W.2d 585, 602 (Mich. 1981) (arguing that opening the door to malicious prosecution, absent the requirement for special injury, would encourage retaliatory and punitive frivolous actions, without consideration for the probability of success); *Perry*, 136 N.E.2d at 143 (rationalizing the potential for interminable litigation as justification for disfavoring malicious prosecution); *Tex. Beef Cattle Co.*, 921 S.W.2d at 207–

cited any evidence to support its public policy hypothesis.[21] Additionally, such reasoning ignores the fact that—as the U.S. Supreme Court has noted—some *initial* suits are retaliatory in nature.[22] The English rule is not supported by the American Law Institute,[23] was roundly criticized by Dean William L. Prosser,[24] and has been either refuted or never adopted by courts in the majority of United States jurisdictions.[25] Nonetheless, the English

08 (rejecting a lenient stance on malicious prosecution because it promotes repetitive and frivolous litigation); *Calado*, 464 N.W.2d at 653–54; Abbott v. Thorne, 76 P. 302, 305 (Wash. 1904) (reasoning that sound judicial policy justifies the stricter rule, which limits frivolous malicious prosecution claims).

21. *See, e.g.*, *Owens*, 132 A. at 267 (discussing how the action for malicious prosecution of a civil suit was effectively superseded by statute except in cases involving special injury, such as wrongful arrest or seizure of property).

22. *See* Bill Johnson's Rest. Inc. v. Nat'l Lab. Rel. Bd., 461 U.S. 731, 740 (1983) ("A lawsuit no doubt may be used . . . as a powerful instrument of coercion or retaliation."). One example of pervasive, retaliatory-type suits are SLAPP suits, i.e., meritless suits (often, but not always, defamation-type suits) brought to silence critics. *See* George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar & Bystanders*, 12 BRIDGEPORT L. REV. 937, 941 (1992) (citing a study that found "SLAPPs are filed by one side of a public, political dispute, to punish or prevent opposing points of view.") (footnotes omitted). SLAPP suits are so common that twenty-eight states, the District of Columbia, and Guam have enacted anti-SLAPP laws. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (showing presence of anti-SLAPP laws by state). Note, however, Washington's anti-SLAPP statute was struck down as a violation of that state's constitution in 2015. *See* Davis v. Cox, 351 P.3d 862, 875 (Wash. 2015) (en banc) (holding the anti-SLAPP law violated the right to trial by jury by requiring the trial judge to "invade the jury's province of resolving disputed facts and dismiss—and punish—nonfrivolous claims without a trial.").

23. *See* RESTATEMENT (SECOND) OF TORTS §§ 674–77 (AM. LAW INST. 1977) (providing liability for those who act without probable cause in the "initiation, continuation or procurement of civil proceedings").

24. In the last edition of Dean Prosser's hornbook before his death in 1972, Prosser provides criticism of the three main arguments advanced by courts supporting the English rule. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 850–51 (4th ed. 1971).

Per Prosser, the first justification is the idea "that the successful party to a civil litigation is awarded costs, which are intended as full compensation[.]" As Prosser noted, while this may have been true in earlier times in England where costs included attorney's fees, it is not true in the U.S. where costs do not include attorney's fees or any other damages that often flow from civil litigation. *See id.* (discussing the extension of a malicious prosecution action to wrongfully-initiated civil proceedings).

Second is the reason most often cited by most courts, i.e., "[p]ublic policy requires that citizens be free to resort to the courts to resolve grievances without fear that their opponent will retaliate[.]" *See, e.g.*, *One Thousand Fleet Ltd.*, 694 A.2d at 955 (noting the court's general disfavor of malicious prosecution suits). Prosser noted, however, that states have *no* interest in allowing meritless suits to proceed as "there is no [public] policy in favor of vexatious suits known to be groundless, which are a real and often a serious injury." Prosser, *supra* note 24, at 851.

The third reason in support of the English rule is the idea that litigation must end somewhere. As Prosser points out, however, this goal is met more narrowly by "the heavy burden of proof upon the [malicious use of process] plaintiff, to establish both a lack of probable cause and an improper purpose[.]" *Id.*

25. *See* HARPER ET AL, *supra* note 11, § 4.8, at 537–38 ("[T]he prevailing American decision, supported by the American Law Institute and by a majority of the courts that have considered the

rule effectively immunizes sham lawsuits and vexatious litigation.[26] The United States Supreme Court, however, has specifically rejected any notion that plaintiffs are free to resort to the courts to bring baseless claims. In *Bill Johnson's Restaurants, Inc. v. Nat'l Lab. Rel. Bd.*,[27] the Court held: "Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition."[28] In other words, the immunity the English rule gives to baseless litigation has no constitutional support.[29]

IV. THE UNITED STATES CONSTITUTION AND THE RIGHT TO COURT ACCESS

A. *The Petition Clause Includes the Right to Petition Courts*

Although English rule jurisdictions deny court access to most victims of litigation abuse, the Supreme Court has found a right of access to courts via several constitutional routes. Among them is the Petition Clause of the First Amendment,[30] wherein the Supreme Court "recognize[s] that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."[31]

issue[,] . . . [provides that] the same injury that will support an action based on unjustified criminal proceedings will support one based on wrongful civil litigation." (footnotes omitted)).

26. Except in cases of arrest, seizure of property or other special injury. *See, e.g.*, Krashes v. White, 341 A.2d 798, 801 (Md. Ct. App. 1975) (contrasting criminal malicious prosecution actions with malicious use of civil process suits which, unlike the former, do not require a showing of special damages, such as arrest or seizure of property).

27. Bill Johnson's Rests., Inc., 461 U.S. 731 (1983).

28. *Id.* at 743 (citations omitted). The court held retaliatory prosecution of an unmeritorious lawsuit is not an enjoinable offense unless the suit lacks a factual or legal basis. *Id.* at 749.

29. *See, e.g.*, Mine Workers of Am. v. Ill. Bar Ass'n, 389 U.S. 217, 222 (1967) ("We have therefore repeatedly held that laws which actually affect the exercise of these vital [First Amendment] rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the [s]tate's legislative competence[] or even because the laws do in fact provide a helpful means of dealing with such an evil." (citations omitted)). *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact.").

30. The Petition Clause is the last of the five rights guaranteed by the First Amendment. The Petition Clause provides: "Congress shall make no law . . . abridging the freedom . . . to petition the government for a redress of grievances." U.S. CONST. amend. I. It is binding on the states pursuant to the Fourteenth Amendment. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963) ("It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States." (citations omitted)).

31. *See Bill Johnson's Rests. Inc.*, 461 U.S. at 741 (holding a suit must lack a reasonable legal or factual basis before the National Labor Relations Board can halt state-court proceedings (citations omitted)); *see also* Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."); BE & K Constr. Co. v. Nat'l Lab.

For a victim of litigation abuse, a court is the only acceptable avenue for redress in a civil society.[32] As the Supreme Court noted over a century ago: "The right to sue and defend in the courts is the alternative of force. In an organized society[,] it is the right conservative of all other rights[] and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . ."[33] The English rule violates these principles. In denying most litigation abuse victims access to court, the rule violates their First Amendment right to petition the government.[34]

B. *Access to Judicial Process Reflects Both Equal Protection and Due Process Concerns*

1. Due Process

In addition to the Petition Clause, the Supreme Court has found that issues "concerning access to judicial processes . . . reflect both equal

Rel. Bd., 536 U.S. 516, 525 (2002) ("'[T]he right to petition extends to all departments of the Government,' and . . . 'is . . . but one aspect of the right of petition.'" (quoting Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972))); McDonald v. Smith, 472 U.S. 479, 484 (1985) ("[F]iling a complaint in court is a form of petitioning activity . . . ." (citations omitted)); Sure-Tan, Inc. v. Nat'l Lab. Rel. Bd., 467 U.S. 883, 896–97 (1984) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government . . . ."); R.R.. Trainmen v. Va. Bar, 377 U.S. 1, 7 (1964) (recognizing "[t]he right to petition the courts").

Of course, access to court is not without limitation. The Supreme Court has held that the right to petition is subject to the same limitations as the other rights under the First Amendment. *See McDonald*, 472 U.S. at 484 (holding the right to petition is limited in the same way as the rights to speech and the press are, as previously decided in New York Times Co. v. Sullivan, 376 U.S. 254 (1964)). In addition, governments may place nominal monetary restrictions on access to courts for activities that are not deemed fundamental, such as fees for filing bankruptcy petition or appealing a welfare eligibility determination. *See* Ortwein v. Schwab, 410 U.S. 656, 660–61 (1973) (per curiam) (upholding a $25 fee to appeal a decision regarding welfare benefits); United States v. Kras, 409 U.S. 434, 446 (1973) (upholding a $50 filing fee requirement to file a bankruptcy petition). In the public employment context, a government employee does not have constitutional protection for a petition based solely on matters of private concern. *See Borough of Duryea*, 564 U.S. at 392 (reasoning that application of the Petition Clause to matters not involving public concern would be "unnecessary, or even disruptive, when there is already protection for the public employees' right to file grievances and to litigate"). Additionally, a state may terminate a claim for failure to comply with a statute of limitations or reasonable evidentiary or procedural rules. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (clarifying that the Court's decision did not entitle a chance to be heard on the merits in every case for every civil litigant) (dictum). These restrictions, however, are a far cry from closing the courthouse doors completely as English rule states do to most victims of litigation abuse.

32. *See* Note, *The Nature and Limitations of the Remedy Available to the Victim of a Misuse of the Legal Process: The Tort of Abuse of Process*, 2 VAL. U. L. REV. 129, 140 (1967) (concluding the sole remedy for victims injured by litigation is bringing a suit for abuse of process).

33. Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907).

34. *See* Cal. Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (finding the right of access to the courts is protected by the First Amendment).

protection and due process concerns."[35] The Due Process Clause of the Fourteenth Amendment[36] provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"[37] In discussing due process, the Supreme Court said: "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated."[38] After opening its courts to sham suits, English rule states cannot argue they are being fair when closing their courts to possibly meritorious suits for remuneration based on the arbitrary damage requirements of the English rule. Further, the Supreme Court has held in several cases that a cause of action is a property right protected by the Due Process Clause of the Fourteenth Amendment.[39] Accordingly, the English rule violates the Due Process Clause of the Fourteenth Amendment.

2. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[40] This guarantees that similarly situated individuals

35. M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996). In addition, multiple courts have found a right to access to courts via the Privileges and Immunities Clause of the Fourth Amendment. *See, e.g.*, Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983) ("It is clear that the Court [in *Chambers*] viewed the right of access to the courts as one of the privileges and immunities accorded citizens under [A]rticle 4 of the Constitution and the [F]ourteenth [A]mendment."); *accord* Nordgren v. Milliken, 762 F.2d 851, 853 (10th Cir. 1985) (recognizing the Constitution protects a citizen's right to a fair hearing in a court).

36. The Fourteenth Amendment only applies to actions of governmental entities, referred to as "state action," but, "[t]he actions of, and processes used by, state and federal courts constitute 'state action.'" 2 NOWAK & ROTUNDA, TREATISE ON CONSTITUTIONAL LAW § 16.1, at 995 n.1 (4th ed. 2007). Hence, the decisions of English rule courts denying court access to some victims of litigation abuse must comply with the Fourteenth Amendment. Further, a private party's use of court process also can be state action. Georgia v. McCollum, 505 U.S. 42, 52 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991); Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982).

37. U.S. CONST. amend. XIV, § 1.

38. Ross v. Moffitt, 417 U.S. 600, 609 (1974); *see also* Boddie v. Connecticut, 401 U.S. 371, 379 (1971) ("[A] State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.").

39. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428–29 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."); *see also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S., 306, 313 (1950) ("In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests [*i.e.*, bring a lawsuit]."); Martinez v. California, 444 U.S. 277, 281–82 (1980) ("Arguably . . . [a state tort claim] . . . is a species of 'property' protected by the Due Process Clause.").

40. U.S. CONST. amend. XIV, § 1.

will be treated in a similar manner by the government.[41]

For example, an Oregon law requiring tenants appealing the loss of a trial court decision in a landlord-tenant dispute to post twice the amount of bond necessary as for appellants in other civil cases, violated equal protection principals.[42] The Supreme Court said:

> This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review . . . . When an appeal is afforded, however, it *cannot be granted to some litigants and capriciously or arbitrarily denied to others* without violating the Equal Protection Clause.[43]

Similarly, the English rule's restrictions, which provide court access to some victims of litigation abuse—but not others—based on an arbitrary level of damages, violate the Equal Protection Clause.[44] The arbitrary nature of the damage requirement is demonstrated as follows: A multimillionaire whose bank account is levied in the amount of $100 to satisfy a debt he did not owe can bring a malicious use of process suit,[45] while a freelance journalist sued into bankruptcy by a sham defamation suit, brought by a homeopathic drug company whose product was injuring thousands of its customers, cannot—even though the journalist's reporting is later proven correct when the Food and Drug Administration advised consumers to stop using the product.[46]

41. 3 NOWAK & ROTUNDA, TREATISE ON CONSTITUTIONAL LAW § 18.2(a), at 298 (4th ed. 2008).

42. Lindsey v. Normet, 405 U.S. 56, 74 (1972).

43. *Id.* at 77 (emphasis added); see *also* M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996) ("Although the Federal Constitution guarantees no right to appellate review . . . once a State affords that right, *Griffin* held, the State may not 'bolt the door to equal justice,' . . . in judgement" (quoting Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring))); Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.").

44. *See* U.S. CONST. amend. XIV, § 1 (providing no person shall be deprived of "equal protection of the laws").

45. *See, e.g.*, Keys v. Chrysler Credit Corp., 494 A.2d 200, 205 (Md. App. Ct. 1985) (applying the elements required for malicious use of process under Maryland law).

46. *See* Gretchen Morgenson, *The Eyeshade Smelled Trouble*, N.Y. TIMES (June 27, 2009), http://www.nytimes.com/2009/06/28/business/28gret.html?_r=0 (describing a similar event that actually occurred in Maryland (an English rule state) several years ago to an independent journalist (i.e., this author)); *see also* Press Release, U.S. Food & Drug Admin., FDA Advises Consumers Not to Use Certain Zicam Cold Remedies (June 16, 2009), http://www.fda.gov/Newsevents/Newsroom/PressAnnouncements/ucm167065.htm (stating the FDA had issued warnings to the drug company at issue). The homeopathic drug company, Matrixx Initiatives, Inc., admitted in a filing with the U.S. Securities and Exchange Commission that it had received almost two thousand complaints of injury

Per the English rule, the victim who suffered a much greater loss (i.e., the reporter—and, arguably, the public at large) is locked out of the courthouse, while the millionaire strolls in. Thus, the rule's distinctions are arbitrary. Hence, no equal protection.[47]

from customers using its Zicam products. *See* MTXX, Current Report (Form 8-K) (Nov. 19, 2009) (providing exhibits which show 1569 complaints through May 2009 and a letter from Nancy L. Buc stating Matrixx received an additional "approximately 400 complaints" from June 16, 2009 to July 7, 2009).

47. In examining whether a law complies with the Fourteenth Amendment, the Supreme Court has developed a tiered system of review. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–41 (1985) (differentiating the standard of review based on the classification of the right at issue). Laws that burden a fundamental right or target a suspect class are subject to strict scrutiny and will be sustained only if they have been narrowly tailored to serve a compelling state interest. *Id.* at 440–41 ("[F]actors [such as race, alienage, or national origin] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such consideration are deemed to reflect prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others."). Laws that target a quasi-suspect class will be subject to intermediate scrutiny. *Id.* (noting gender-based restrictions are subjected to intermediate scrutiny). Laws that neither target a suspect or quasi-suspect class nor burden a fundamental right will be upheld so long as they are rationally related to a legitimate state interest. *Id.* ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." (citations omitted)). Since the "English" rule restricts the fundamental First Amendment right to petition the government, it would be reviewed with strict scrutiny. It would fail this test for the reasons explained above. As the Supreme Court held:

> [A]ny attempt to restrict [First Amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . . It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.

Thomas v. Collins, 323 U.S. 516, 530 (1945).

The "English" rule may even fail rational basis scrutiny since it gives protection to sham lawsuits, but there is no legitimate governmental interest in encouraging baseless litigation. *See, e.g.*, Durham v. Guest, 204 P.3d 19, 27 (N.M. 2009) ("When the judicial process is used for an illegitimate purpose such as harassment, extortion, or delay, the party that is subject to the abuse suffers harm, as does the judicial system in general."). Note, however, one unreported, intermediate appellate court in Ohio considered the "English" rule in light of Ohio's due process and equal protection laws. Moss v. Blake, No. 43799, 1982 WL 5198 at *4 (Ohio Ct. App. Mar. 4, 1982) (framing the plaintiff's argument as "Ohio's rule for malicious prosecution denies him a remedy for wrongful injury to his property" and "denies him substantive due process and equal protection of the laws"). The court found no fundamental rights were involved (though it failed to consider the Petition Clause). *Id.* at *4 n.9. The court applied a rational basis test and concluded the English rule was rationally related to the state's desire to limit malicious use of process cases to "extreme situations[.]" *Id.* at *5. However, as demonstrated in the example above with the multimillionaire and the $100 levy, the English rule does not limit cases to extreme situations.

V. LESSONS FROM STATES THAT HAVE ABOLISHED THE ENGLISH RULE

A. *No Change in Number of Civil Cases Filed With or Without the English Rule*

No court that has adopted the English rule has cited any evidence to support the English rule's presumptions: failure to follow the English rule will chill litigants from court access or will "pile on" litigation from people seeking retribution. Indeed, several federal courts have found to the contrary.[48] Nonetheless, if the English rule's public policy suppositions are correct, we would expect to see a material decline or increase in civil cases (depending on which assumption one buys, i.e., it will "chill" litigation or "pile it on"). Particularly in states that have abandoned the English rule. Statistics, however, do not bear this out.

Four states that formerly followed the English rule have abolished it. Two by statute (Pennsylvania in 1980[49] and Oregon in 1987[50]) and two by case law (Georgia in 1986—codified in 1989[51]—and New Mexico in December 1997[52]).

48. Washington follows the English rule, reasoning, *inter alia*, that it is necessary to encourage access to its courts. *See, e.g.*, Gem Trading Co. v. Cudahy Corp., 603 P.2d 828, 833 (Wash. 1979) ("[W]e chose in *Petrich* to retain the requirement of arrest or seizure of property and special injury which was established in this state in 1904 and has been followed ever since, in order 'not to hamper the litigant or intimidate him from fully and fearlessly presenting his case.'" (citations omitted)). However, Washington has a statutory exception for malicious use of process suits brought by judicial, prosecutorial, or law enforcement authorities, i.e., it "drops" the English rule for those potential governmental plaintiffs. *See* WASH. REV. CODE § 4.24.350(2) (2016) ("In any action, claim, or counterclaim brought by a judicial officer, prosecuting authority, or law enforcement officer for malicious prosecution arising out of the performance or purported performance of the public duty of such officer, an arrest or seizure of property need not be an element of the claim, nor do special damages need to be proved."). Several non-governmental parties have challenged this exception, alleging that the lack of the English rule chilled them from suing government employees—thereby chilling their First Amendment right to petition. All these challenges, however, have been rejected by Washington courts. *See* Laws v. City of Seattle, No. C09-033JLR, 2009 WL 3836122, at *3–4 (W.D. Wash. Nov. 12, 2009) ("The constitutionality of RCW 4.4.350(2) has been reviewed by five district court judges sitting in Washington. The courts in *Bakay*, *Gibson*, *Pruitt*, and *Wender* rejected constitutional challenges to [this statute] while the court in *De La O* concluded that the statute constituted impermissible content discrimination." (citations omitted)).

49. 42 PA. CONS. STAT. §§ 8351–8354 (1980).

50. OR. REV. STAT. § 31.230 (2015) (formerly cited as § 30.895).

51. *See* Yost v. Torok, 344 S.E.2d 414, 417 (Ga. 1986) (redefining the elements of a common law abuse of process claim). Prior to *Yost*, Georgia followed the English rule. *See, e.g.*, Se. Ceramics, Inc. v. Klem, 271 S.E.2d 199, 201 (Ga. 1980) (affirming Georgia's use of the English rule); *see also* GA. CODE ANN. § 51-7-80 to -85 (2016) (codifying the tort of abusive litigation adopted in *Yost*).

52. *See* DeVaney v. Thriftway Mktg. Corp., 953 P.2d 277, 289–90 (N.M. 1997) (concluding the English rule "no longer serves the purposes of the tort itself"), *overruled by* Durham v. Guest, 204 P.3d 19 (N.M. 2009); *see also* Fleetwood Retail Corp. v. LeDoux, 164 P.3d 31, 39 (N.M. 2007) (building upon

1. Pennsylvania

Pennsylvania did not begin keeping state-wide civil case filing statistics until 1981, the year after it abolished the English rule, so we cannot compare its civil filing rates before and after the abrogation of the English rule.[53] Pennsylvania, however, does keep statistics[54] for the number of malicious prosecution cases filed. While they are statistically insignificant[55] (i.e., 6/100 of 1% in 2015), they are very significant in disproving the English rule courts' public policy assumptions. This should not be surprising considering the time, expense, difficulty, and uncertainty involved in bringing a malicious use of process suit.

Pennsylvania Statistics

Year	Malicious Prosecution Cases Filed	Total Civil Cases Filed	Mal. Pros. % Total Civil	PA Population	Total New Civil Case/ PA Population
2011	97	160127	0.06%	12742806	1.26%
2012	73	157948	0.05%	12763536	1.24%
2013	103	149939	0.07%	12773801	1.17%
2014	68	139980	0.05%	12787209	1.09%
2015	88	136512	0.06%	12802503	1.07%

2. Maryland

By way of comparison, the neighboring English rule state of Maryland (which does not keep abusive litigation filing statistics) has a similar level of new civil case filings per capita as Pennsylvania.[56] These statistics debunk

the finding in *DeVaney*); *Durham*, 204 P.3d at 28 (further defining the new tort of malicious abuse of process enacted in *DeVaney*).

53. *See* 42 PA. CONS. STAT. §§ 8351–8354 (1980) (replacing the English rule in 1980).

54. *See Civil Cases*, UNIFIED JUD. SYS. PA., http://www.pacourts.us/news-and-statistics/research-and-statistics/statewide-civil-cases (last visited Mar. 26, 2017) (providing statistics on a variety of civil cases, including malicious prosecution, brought in Pennsylvania from 2011–2015); *see also Pennsylvania Facts*, PA. ST. DATA CTR., https://pasdc.hbg.psu.edu/sdc/pasdc_files/pastats/PaFacts_2016.pdf (last visited Mar. 26, 2017) (presenting general facts related to Pennsylvania).

55. The Administrative Office of Pennsylvania Courts confirmed via email that the "malicious prosecution" category on its website includes both malicious prosecution of criminal cases and malicious use of civil process complaints. Thus, the actual number of malicious use of process complaints (i.e., the type restricted by the English rule) is probably *even smaller* than in the table.

56. Although Pennsylvania's new case filings per capita declined somewhat in 2014 and 2015 (for reasons unknown to this author), the percentage of new case filings to population for the years 2011–2013 were very similar to Maryland's for the years 2011–2015. *Compare* 2015 MD. JUDICIARY ANN.

both sides of the English rule's public policy assumption. The number of malicious prosecution suits in Pennsylvania is insignificant (thereby debunking the "endless litigation" argument) and the level of civil litigation per capita is approximately the same with or without the English rule (debunking the "potential plaintiffs will be chilled from filing suit" argument).[57]

Maryland Statistics

Year	Malicious Prosecution Cases Filed	Total Civil Cases Filed	Mal. Pros. % Total Civil	MD Population	Total New Civil Case/ MD Population
2011	N/A	65402	N/A	5828289	1.12%
2012	N/A	67967	N/A	5839572	1.16%
2013	N/A	74407	N/A	5884563	1.26%
2014	N/A	78893	N/A	5976407	1.32%
2015	N/A	74227	N/A	6006401	1.24%

STAT. ABSTRACT CC-5, http://mdcourts.gov/publications/annualreport/reports/2015/fy2015statisticalabstract.pdf (listing civil case filing statistics from 2013–2015 in the "Total Civil-General" category, *and* 2012 MD. JUDICIARY ANN. STAT. ABSTRACT CC-5, http://mdcourts.gov/publications/annualreport/reports/2012/annualreport2012.pdf (listing civil case filing statistics from 2011–2012 in the "Total Civil-General" category), *with Civil Cases*, UNIFIED JUD. SYS. PA., http://www.pacourts.us/news-and-statistics/research-and-statistics/statewide-civil-cases (last visited Jan. 25, 2016) (providing statistics on a variety of civil cases, including malicious prosecution, brought in Pennsylvania from 2011–2015).

57. In an example of how to compound an error, in 1997, Maryland's highest court became the *only* one in the country to extend the English rule to another tort designed to combat litigation abuse, i.e., abuse of process. *See* One Thousand Fleet Ltd. P'ship. v. Guerriero, 694 A.2d 952, 959–61 (Md. 1997) (refusing to limit the requirements for an abuse of process claim); *see also* Jeffrey J. Utermohle, *Look What They Done to My Tort, Ma: The Unfortunate Demise of "Abuse of Process" in Maryland*, 32 U. BALT. L. REV. 1, 26–30 (2002). This extension, however, fails constitutional scrutiny for all the reasons discussed above regarding malicious use of process suits. The extension is even more nonsensical when one realizes the public policy supposition cited by the *One Thousand Fleet* court for the English rule—i.e., that citizens be free to *file* complaints without fear of retaliation—does not apply in abuse of process suits because abuse of process suits concern activity that occurs *after* the complaint is filed. *See One Thousand Fleet Ltd. P'ship.*, 694 A.2d at 955–57. Further, there is no issue of "endless litigation" because abuse of process claims may be resolved in the same litigation the abuse allegedly occurred. *See id.* at 956–57 (omitting the "proceedings must have been terminated" requirement from the abuse of process elements); *see also* Utermohle, *supra*, at 32–33. But the senselessness doesn't stop there. The *One Thousand Fleet* court cited only one Maryland case from 1888 to support its position. *One Thousand Fleet Ltd. P'ship.*, 694 A.2d at 960 (citing Bartlett v. Christhilf, 14 A. 518, 522 (Md. 1888)). The problem is that the 1888 case was not an abuse of process suit, but a malicious use of process suit. *See* Utermohle, *supra*, at 32–33. As if that were not enough, the *One Thousand Fleet* court then cited case law from five other sister states which it claimed supported its extension of the English rule to abuse of process suits. *One Thousand Fleet Ltd. P'ship.*, 694 A.2d at 959. None of those five jurisdictions, however, extend the English rule to abuse of process suits. *See* Utermohle, *supra*, at 32–33 ("[N]one of the five . . . 'sister states' cited in *One Thousand Fleet* currently follow Maryland's rigid approach.").

3. Oregon

Oregon does not keep records regarding the number of abusive litigation civil complaints filed each year.[58] Oregon, however, has civil case filing statistics for periods before and after the repeal of the English rule.[59] Oregon's circuit court civil filings began declining in 1983 (before the revocation of the English rule in 1987) and that decline continued until 1988, reversing in 1989 and rising from there.[60] So, it cannot be said potential plaintiffs failed to file a claim due to fear of retaliation since civil filings increased year-over-year (except 1988 in the circuit courts) in every year following the repeal of the English rule. Nor can it be said case filing became excessive since the number of circuit court filings in 1992 was below the level in 1982.

Oregon Civil Filings

Year	Circuit Court
1982	32945
1983	30030
1984	27351
1985	28719
1986	28640
1987	25726
1988	23611
1989	25157
1990	27300
1991	29142
1992	29250

4. New Mexico

New Mexico does not keep records regarding the number of abusive litigation civil complaints filed each year. New Mexico, however, has civil case filing statistics for periods before and after the repeal of the English

58. Oregon court statistics for 1982–1992 were obtained via email from the Oregon Judicial Department as those years are not available online. The circuit court civil statistics in the table exclude domestic relations, offense, probate, and mental health cases as those categories of cases are unlikely to be malicious use of process cases.

59. *See Statistics and Other Reports*, OREGON COURTS: OREGON JUDICIAL DEPARTMENT, http://courts.oregon.gov/OJD/OSCA/pages/statistics.aspx (providing access to annual reports of Oregon circuit court statistics) (last visited Jan. 30, 2017).

60. *See id.* (providing access to annual reports of Oregon circuit court statistics).

rule beginning in July 1996 (for fiscal year July–June).[61] The New Mexico Supreme Court decision abrogating the English rule was issued on December 22, 1997—half-way through the 1998 fiscal year.[62] "Other tort" new case filings (the category most likely to describe a malicious use of process suit) were relatively level before and after the Supreme Court ruling with the exception of an increase in fiscal year 1998. No information could be found for the 1998[63] increase in that category, but the levels dropped back in 1999 and remained stable for years thereafter.

New Mexico District Court Filings

Fiscal Yr	Other Tort	Misc. Civil	Total Civil
1997	1220	4065	53259
1998	1391	3595	55370
1999	1275	3608	57092
2000	1269	3751	58214
2001	1259	3669	56390
2002	1253	3456	58089

5. Georgia

Georgia does not keep records regarding the number of abusive litigation civil complaints filed each year. Georgia, however, has civil case filing statistics for periods before and after the repeal of the English rule.[64] Georgia experienced a slight decline in overall civil case filings in 1987 (the year after its abolition of the English rule in 1986).[65] The filings, however,

61. *See Reports & Policies*, JUDICIAL BRANCH OF NEW MEXICO, https://www.nmcourts.gov/reports-and-policies.aspx (providing access to annual statistics for every year since 1996) (last visited Jan. 30, 2017). New Mexico's "total civil" cases are from its districts courts, the trial courts of general jurisdiction. The "other tort" and "misc. civil" category were included on the theory those categories may be the most likely to include an abusive litigation complaint.

62. *See* DeVaney v. Thriftway, 953 P.2d 277, 283 (N.M. 1997) (deciding to follow the "American Rule").

63. The 1998 "other tort" figure includes both "personal injury" and "other" torts as those two categories were separated only in that year. *See Reports & Policies*, JUD. BRANCH N.M., https://www.nmcourts.gov/reports-and-policies.aspx (providing access to annual statistics for every year since 1996) (last visited Jan. 30, 2017). In other years, it appears they were combined under the "other tort" category. *Id.* (providing access to annual statistics for every year since 1996).

64. *See Archives—Court Journal, Annual Report & AOC on Balance*, JUD. COUNCIL GA., http://www.georgiacourts.org/content/archives-court-journal-annual-report-aoc-balance (providing annual statistics for each year from 1975 to 2013) (last visited Jan. 30, 2017).

65. Georgia Superior Court General Civil trial statistics can be found in the archived annual reports of the Georgia Administrative Office of the Courts. *See id.*; *Fourteenth Annual Report on the Work of the Georgia Courts*, JUD. COUNCIL GA. (Feb. 1988) http://www.georgiacourts.org/

increased in 1988 to slightly more than the 1986 level, so there is no evidence potential plaintiffs were "chilled" from seeking redress in court.

Georgia Superior Court

Year	General Civil
1983	133695
1984	132703
1985	136138
1986	140803
1987	135570
1988	144081
1989	156312
1990	167730

Georgia civil trial case filings materially increased in 1989 and 1990.[66] Without any statistics on abusive litigation claims, it is not possible to know what percentage, if any, of the increase was due to that type of claim. Based upon the statistics from Pennsylvania, however, it seems unlikely that abusive litigation suits were a material portion of the increase in civil case filings.

VI. CONCLUSION

The English rule gives protection to abusive sham litigation, but the Supreme Court has found that such suits are not entitled to protection.[67] At the same time, the English rule denies most victims of litigation abuse access to court, while the Supreme Court has found there is a constitutional right of access to court.[68] In this manner, the English rule both violates the Constitution and encourages the perversion of the judicial process. Further, statistical evidence from the states that have abolished the English rule

sites/default/files/Annual%20Reports/Annual%20Report%201987.pdf (providing the 1987 report).

66. *Sixteenth Annual Report on the Work of the Georgia Courts*, JUD. COUNCIL GA. (Apr. 1990), http://www.georgiacourts.org/sites/default/files/Annual%20Reports/Annual%20Report%201989.pdf; *Seventeenth Annual Report on the Work of the Georgia Courts*, JUD. COUNCIL GA. (June 1990), http://www.georgiacourts.org/sites/default/files/Annual%20Reports/Annual%20Report%201990.pdf.

67. *See, e.g.*, Bill Johnson's Rests., Inc. v. Nat'l Lab. Rel. Bd., 461 U.S. 731, 732 (1983) (holding retaliatory suits which lack a reasonable basis are not protected by the First Amendment).

68. *See, e.g.*, *id.* at 741 (explaining access to court is "an aspect of the First Amendment right to petition the Government for redress of grievances").

demonstrate the "public policy" assumptions for the rule are a canard.[69]

The judicial systems in the majority of U.S. jurisdictions manage to survive without the English rule. English rule states can as well. As the Georgia Supreme Court noted: "The tort system can (and should) provide within its own structure the means for preventing its abuse."[70] Instead, "English rule" courts say malicious use of process suits should be viewed "with disfavor."[71] This view may partially explain why litigation abuse is such an issue in the United States. It is sham lawsuits that should be viewed "with disfavor," not meritorious malicious use of process suits.[72]

69. Some of the concerns regarding malicious use of process and abuse of process suits can be alleviated with a few changes. For example, numerous courts confuse the torts of malicious use of process and abuse of process. Utermohle, *supra* at 57, at 19 n.91. In light of this, it seems prudent to combine the two torts into one abusive litigation tort—as at least two states have done (New Mexico and Georgia). *See* DeVaney v. Thriftway Mktg. Corp., 953 P.2d 277, 289–90 (N.M. 1997) (concluding the English rule "no longer serves the purposes of the tort itself"); Yost v. Torok, 344 S.E.2d 414, 417 (Ga. 1986) (redefining the elements of a common law abuse of process claim). The elements determined in *Yost* were later codified. GA. CODE ANN. § 51-7-80 to -85 (2016).

Second, instead of requiring the first lawsuit to terminate before an abusive litigation suit may be filed—which wastes judicial resources and raises the (unlikely) possibility of never-ending litigation—the abusive litigation claim may be raised as a counterclaim in the initial proceeding. Defer hearing the abusive litigation claim until after the disposition of the underlying action; then it should be heard immediately by the *same* fact finder. No reference, however, should be made to the jury of the existence of any such abusive litigation claim during the trial of the underlying claim. *Yost*, 344 S.E.2d at 415.

Third, a "safe harbor" provision should be enacted whereby an allegedly offending party has a certain period of time (e.g., 30 days) to withdraw an offending pleading after notice before an abusive litigation claim is filed. *See, e.g.*, GA. CODE ANN. § 51-7-82.

70. *Yost*, 344 S.E.2d at 415.

71. One Thousand Fleet Ltd. P'ship. v. Guerriero, 694 A.2d 952, 955 (Md. 1997); Penwag Prop. Co. v. Landau, 388 A.2d 1265, 1266 (N.J. 1978); Luce v. Interstate Adjusters, Inc., 26 S.W.3d 561, 565 (Tex. App.—Dallas 2000).

72. Perhaps the simplest and least controversial statute would be a two-paragraph statement that defines the English rule in the first paragraph and provides for its abolition in the second. More ambitious legislators may consider some of the points discussed in *supra* note 69.