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The SLAPP Happy State: Now Is the Time for Ohio to Pass Anti-SLAPP Legislation

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— Comment —

THE SLAPP HAPPY STATE:
NOW IS THE TIME FOR OHIO TO PASS
ANTI-SLAPP LEGISLATION

CONTENTS

INTRODUCTION 560

I. WHAT ARE ANTI-SLAPP LAWS? 563

 A. *Procedural Structure of Anti-SLAPP Laws* 568

 B. *The Uniform Public Expression Protection Act (UPEPA)*..... 571

 C. *Circuit Split Regarding Applicability of Anti-SLAPP Laws in Federal Court*..... 573

II. A CLOSER LOOK—NEVADA AND TEXAS 577

 A. *Nevada*..... 578

 B. *Texas* 583

III. OHIO 587

 A. *Ohio’s 2017 Anti-SLAPP Bill*..... 587

 1. *Structure of the OCPA* 589

 2. *Protection of Anonymous Online Posters*..... 592

 B. *Ohio’s 2019 Anti-SLAPP Bill*..... 594

 C. *Ohio’s 2024 Anti-SLAPP Bill*..... 595

IV. WHAT SHOULD AN ANTI-SLAPP LAW LOOK LIKE IN OHIO? 597

 A. *Adopt a Three-Step Rather than a Two-Step Framework* 597

 B. *The Plaintiff’s Burden Should Be, at Most, “Clear and Specific Evidence,” Not “Clear and Convincing Evidence”* 599

 C. *Include a Provision that Immunizes SLAPPED Defendants from Civil Action* 600

 D. *Incorporate Three Key Provisions from Previous Ohio Anti-SLAPP Bills*..... 605

 1. *Mandatory and Discretionary Fee-Shifting* 606

 2. *Discovery Stay* 608

 3. *Right to Appeal*..... 608

 E. *Keep S.B. 206 and S.B. 215’s Definition of “Protected Communication”*..... 609

 F. *Do Not Expand the Number of Exemptions*..... 610

 G. *Expand Scope of Availability of Anti-SLAPP Motion to Include Claims Brought Against a Person Based upon “or in Response to” a Protected Communication*..... 611

 H. *Include Protections for Anonymous Speakers*..... 611

CONCLUSION 612

INTRODUCTION

On the evening of August 11, 2012, Steubenville High School students sexually assaulted a sixteen-year-old girl and documented the assault on social media.¹ One student, Cody Saltsman—who happened to be the victim’s ex-boyfriend—posted a picture of the victim on Instagram, depicting two students carrying her unresponsive body by her wrists and ankles.² Shortly thereafter, Alexandria Goddard and various anonymous posters discussed Saltsman and the other students on Goddard’s blog.³ In response, Saltsman and his family sued Goddard and the other anonymous posters for defamation.⁴ When the case settled on December 27, 2012, Saltsman, not Goddard, was required to apologize.⁵ Goddard shared Saltsman’s statement on her blog:

I deeply regret my actions on the night of August 11, 2012. While I wasn’t at the home where the alleged assault took place, there is no doubt that I was wrong to post that picture from an earlier party and tweet those awful comments. Not a moment goes by that I don’t wish I would have never posted that picture or tweeted those comments. I want to sincerely apologize to the victim and her family for these actions. *I also want to acknowledge the work of several bloggers, especially Ms. Goddard at Prinniefied.com*, in their efforts to make sure the full truth about that terrible night eventually comes out. At no time did my family mean to stop anyone from expressing themselves online—we only wanted to correct what we believed were misstatements that appeared on Ms. Goddard’s blog. I am glad that we have

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1. Richard A. Oppel Jr., *Ohio Teenagers Guilty in Rape That Social Media Brought to Light*, N.Y. TIMES (Mar. 17, 2013), <https://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html> [<https://perma.cc/MNB8-FUMJ>].
 2. Kashmir Hill, *Lessons from Steubenville*, FORBES (Jan. 9, 2013, 7:21 PM), <https://www.forbes.com/sites/kashmirhill/2013/01/09/lessons-from-steubenville> [<https://perma.cc/5H6M-R2EL>]; Ariel Levy, *Trial by Twitter*, NEW YORKER (July 29, 2013), <https://www.newyorker.com/magazine/2013/08/05/trial-by-twitter>.
 3. Complaint in Defamation and for Injunctive Relief and for Monetary Judgment ¶¶ 12–18, *Saltsman v. Goddard*, No. 2012-CV-00544 (Jefferson Cnty. Ct. Com. Pl. filed Oct. 25, 2012).
 4. *See id.* ¶¶ 19–28.
 5. *Saltsman v. Goddard*, DIGIT. MEDIA L. PROJECT (Jan. 17, 2013, 1:00 PM), <https://www.dmlp.org/threats/saltsman-v-goddard> [<https://perma.cc/CZ6L-9A6V>]; *Settlement Reached in Case Protecting Anonymous Speech of Online Commenters*, ACLU OHIO (Dec. 27, 2012), <https://www.acluohio.org/en/press-releases/settlement-reached-case-protecting-anonymous-speech-online-commenters> [<https://perma.cc/PT2F-J8CY>].

resolved our differences with Ms. Goddard and that she and her contributors can continue their work.⁶

The ACLU of Ohio categorized *Saltsman v. Goddard*⁷ as a classic Strategic Lawsuit Against Public Participation (SLAPP) suit, where the Saltsmans did not have a meritorious defamation claim but instead wanted to silence both Goddard's and the anonymous posters' protected speech.⁸ The very purpose of SLAPP suits is to intimidate and silence speakers:

Because SLAPPs inherently have, in theory, no chance of prevailing in court, filers bring them not to remedy a wrong but to interfere with the First Amendment rights of targeted individuals. Their goal is to force targets into costly litigation that reduces or prevents their current and future involvement in public discourse.⁹

It's true that the Saltsmans' case against Goddard was dismissed and settled in Goddard's favor.¹⁰ But if Ohio had passed either the 2017, 2019, or 2024 version of its anti-SLAPP bill¹¹ at the time, the court would have required the Saltsmans to pay Goddard's reasonable

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6. *Status of Defamation Lawsuit* (Dec. 27, 2012), PRINNIIFIED.COM, <https://web.archive.org/web/20130101035724/https://prinnified.com/wp/case-dismissed/> (emphasis added).
 7. *See* Docket, *Saltsman v. Goddard*, No. 12-CV-00544 (Jefferson Cnty. Ct. Com. Pl. dismissed Dec. 27, 2012), https://eservices.jeffersoncountyoh.com/eservices/searchresults.page?x=FDvC6z5j7*I5i9WfMHFr0kGS2NUrev6S-s8xSe4dLkjYm47A2MfNtgaoVMCndYhRhCPG4zEtOZfKRwPZ9fpkkg (last visited Feb 12, 2024).
 8. *ACLU of Ohio Offers to Represent Anonymous Defendants in Jefferson County Defamation Case*, ACLU OHIO (Dec. 14, 2012), <https://www.acluohio.org/en/press-releases/aclu-ohio-offers-represent-anonymous-defendants-jefferson-county-defamation-case> [https://perma.cc/39FS-VEBM] (“We believe the real goal of this lawsuit is to discover the identity of anonymous online commenters so that they, and future commenters will be intimidated and discouraged from voicing their opinions,” said ACLU Volunteer Attorney Scott Greenwood. “This is just an updated form of a classic Strategic Lawsuit Against Public Participation (SLAPP) which is typically used to silence speech that is protected under the First Amendment.”).
 9. Aaron Smith, Note, *SLAPP Fight*, 68 ALA. L. REV. 303, 307–08 (2016).
 10. *Settlement Reached in Case Protecting Anonymous Speech of Online Commenters*, *supra* note 5.
 11. *See* S.B. 206, 132d Gen. Assemb., Reg. Sess. (Ohio 2017); S.B. 215, 133d Gen. Assemb., Reg. Sess. (Ohio 2019); S.B. 237, 135th Gen. Assemb., Reg. Sess. (Ohio 2024).

attorney's fees and court costs.¹² Additionally, under the 2017 and 2019 Ohio anti-SLAPP bills, the court could have further required the Saltsmans to pay Goddard "such punitive or exemplary monetary sanctions as the court finds sufficient to deter the filing of similar actions in the future."¹³ Without an anti-SLAPP law, wrongfully sued defendants must request attorney's fees from the court and are entitled to recover them only if they meet certain requirements.¹⁴ Plus, because courts have tremendous discretion in awarding sanctions, it is difficult to determine if the court will award sanctions should the wrongfully sued move for them.¹⁵

SLAPP suits, which either force defendants to (1) spend an exorbitant amount of money to defend themselves, or, if they can't afford the costs of litigation, (2) settle, which creates a chilling effect on speech,¹⁶ have led the majority of states to enact anti-SLAPP laws that provide wrongfully sued parties a means to escape SLAPP suits early.¹⁷ In both 2017 and 2019, two separate versions of Ohio anti-

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12. See Ohio S.B. 206 § 2305.64(A)(1); Ohio S.B. 215 § 2305.64(A)(1); Ohio S.B. 237 § 2747.05(A).
 13. See Ohio S.B. 206 § 2305.64(A)(2); Ohio S.B. 215 § 2305.64(A)(2).
 14. See, e.g., *Metron Nutraceuticals, LLC v. Thomas*, 2022-Ohio-79, at ¶ 36 (noting that a party requesting attorney fees must prove that the attorney fees are reasonable).
 15. See, e.g., *Cogent Sols. Grp., LLC v. Brown*, No. 2:12-CV-665, 2013 WL 6116052, at *15 (S.D. Ohio Nov. 20, 2013). There, the court recognized that plaintiff Cogent's defamation claim was "weak" and nearly frivolous because the statements upon which it based its defamation claim did not even "remotely seem to refer to Cogent or the product it seeks to protect with this lawsuit (Baxyl)." *Id.* Although noting that "[t]his makes the question of sanctions a close one," the court reasoned that "Cogent's saving grace is that Ohio law does allow for a defamation claim based on implication, or 'innuendo.'" *Id.* (quoting *N.E. Ohio Elite Gymnastics Training Ctr., Inc. v. Osborne*, 183 Ohio App. 3d 104, 2009-Ohio-2612, 916 N.E.2d 484, at ¶ 7).
 16. *Smith*, *supra* note 9, at 308 (quoting *Metabolic Rsch., Inc. v. Ferrell*, 693 F.3d 795, 799–800 (9th Cir. 2012)) ("The Ninth Circuit, which has adjudicated cases involving anti-SLAPP statutes since the late 1990s, has identified two principal risks of SLAPPs. First, 'there is a danger that men and women will be chilled from exercising their [First Amendment] rights . . . by fear of the costs and burdens of resulting litigation'; and second, 'that unscrupulous lawyers and litigants will be encouraged to use meritless lawsuits to discourage the exercise of [F]irst [A]mendment rights.'").
 17. *Anti-SLAPP Legal Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/anti-slapp-legal-guide/> [<https://perma.cc/N7WR-UF28>] ("As of September 2023, 33 states and the District of Columbia have anti-SLAPP laws, including Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana,

SLAPP legislation did not succeed.¹⁸ But on March 26, 2024, a third version of Ohio anti-SLAPP legislation was introduced in the Ohio Senate as Senate Bill 237.¹⁹ Although Senate Bill 237 is flawed, this third attempt of anti-SLAPP legislation suggests that Ohio might finally be ready to join the majority of the country and pass an anti-SLAPP law.

This Comment, therefore, proposes that Ohio finally adopt an anti-SLAPP law. Part I of this Comment examines anti-SLAPP laws generally and the Uniform Public Expression Act (UPEPA),²⁰ which is a uniform act that provides a model anti-SLAPP statute that states can pass as part of their anti-SLAPP legislation. Part II of this Comment explores two jurisdictions' anti-SLAPP legislation—Nevada and Texas—because the previous drafts of Ohio's anti-SLAPP bill were partly modeled on their provisions. Part III explores the history of Ohio's anti-SLAPP efforts. Finally, Part IV provides recommendations about what Ohio's anti-SLAPP law should include.

I. WHAT ARE ANTI-SLAPP LAWS?

In 1988, Professors Penelope Canan and George Pring recognized that “every year in the United States, hundreds, perhaps thousands, of civil lawsuits are filed that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.”²¹ Canan and Pring labeled such lawsuits as SLAPPs—“strategic lawsuits against public participation.”²²

The filers of SLAPP lawsuits do not bring any meritorious claims—rather, they file the SLAPP suit with an objective to silence or intimidate someone whose exercise of their First Amendment rights has negatively affected the filer.²³ And SLAPP suits are not exclusive to defamation—a SLAPP suit might involve claims of defamation, invasion of privacy, nuisance, conspiracy, or other claims that really

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. Minnesota previously passed an anti-SLAPP law, but it was struck down as unconstitutional.”).

18. See *infra* Parts III.A & III.B.

19. See *infra* Part III.C.

20. UNIF. PUB. EXPRESSION PROT. ACT (Unif. L. Comm'n 2020).

21. Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988).

22. *Id.*

23. Smith, *supra* note 9, at 307–08.

seek to prohibit the defendant from engaging in constitutionally protected activities.²⁴

SLAPP suits like this have been recognized since the early 1980s.²⁵ Oftentimes, they occur when an aggrieved politician or public figure reacts to a negative story that someone has publicized about him or her and files a frivolous lawsuit—usually for defamation—in retaliation. Generally, the filer of the suit knows that she doesn't have a claim but seeks to silence the speaker. In response, the wrongfully sued will either (1) expend exorbitant costs on litigation in an effort to defend themselves or (2) settle the case, which has a chilling effect on speech.

Take, for example, *Trump v. O'Brien*,²⁶ where Donald Trump sued a book author and publishers for \$6 billion because the book alleged that Trump was “‘only’ worth between \$150 to \$250 million.”²⁷ The court granted the defendants' motion for summary judgment because Trump could not meet the required standard of proof that the defendants had spoken with knowledge of falsehood or reckless disregard for the truth.²⁸ But if New Jersey had an anti-SLAPP law in effect at the time the case was filed, the defendants could have filed a special motion to dismiss the case, stay discovery, and recover their attorneys' fees—all of which would have saved time and money.²⁹ But here, the defendants had to proceed through expensive dispositive motions and lengthy discovery.³⁰ The majority of wrongfully sued defendants do not have the financial means to defend themselves against frivolous suits and will instead settle the case.³¹

24. Canan & Pring, *supra* note 21, at 512 tbl.2.

25. *Id.* at 510–11 (discussing late 1970s and early 1980s SLAPP suits).

26. 29 A.3d 1090, 1092 (N.J. Super. Ct. App. Div. 2011); *see also* Smith, *supra* note 9, at 308–09 (discussing the *Trump v. O'Brien* case).

27. *Former President Trump and the First Amendment: What You Need to Know*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/trump-and-the-first-amendment> [<https://perma.cc/76Q3-SK7V>].

28. *Id.*

29. *Id.*

30. *Trump*, 29 A.3d at 1094–95.

31. Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (June 15, 2020), <https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law/> [<https://perma.cc/GWV9-4N3W>] (“Civil litigation is prohibitively expensive for the vast majority of Americans As a consequence, abusive litigants can frequently intimidate critics into silence by threatening or filing baseless SLAPP suits Understandably, when faced with the prospect of having to spend tens—if not hundreds—of thousands of dollars in legal fees to defend one's right to speak freely, for many people, agreeing to self-censor

In filing the suit, Trump stated, “I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable, which I’m happy about.”³² This is a prime example of when “a SLAPP-filing party ‘expects to lose and is willing to write off litigation expenses’ as ‘merely a cost of doing business.’”³³

*Murray v. Chagrin Valley Publishing Co.*³⁴ is another example from Ohio. After Robert Murray, an Ohio business mogul, fired 156 employees the day after the 2012 presidential election, Patriots for Change held an organized protest outside of Murray Energy, and a reporter for the Chagrin Valley Times interviewed protestors.³⁵ In January 2013, the newspaper published an editorial about Murray, and included a cartoon that “unfavorably depict[ed]” him.³⁶ Murray sued the newspaper for defamation, and the trial court granted summary judgment in favor of the defendants.³⁷ Murray appealed to the Eighth District Court of Appeals of Ohio, which affirmed the trial court’s holding.³⁸

The court recognized that Murray’s defamation suit accomplished the chilling effect that SLAPP suits strive for, since the newspaper completely removed all mention of Murray and the protest.³⁹ The court called for Ohio’s adoption of an anti-SLAPP statute.⁴⁰

in exchange for avoiding or securing the dismissal of a SLAPP suit is an attractive proposition.”).

32. Paul Farhi, *What Really Gets Under Trump’s Skin? A Reporter Questioning His Net Worth*, WASH. POST (Mar. 8, 2016, 6:14 PM), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html [<https://perma.cc/CUD8-YGYB>].
33. Smith, *supra* note 9, at 308 (first quoting Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 805 (2000) and then quoting *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 500 (Cal. Ct. App. 2004)).
34. 2014-Ohio-5442, 25 N.E.3d 1111.
35. *Id.* at ¶ 2.
36. *Id.*
37. *Id.* at ¶¶ 3–4.
38. *Id.* at ¶ 1.
39. *Id.* at ¶ 40.
40. *Id.* (“This case illustrates the need for Ohio to join the majority of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech. These suits, referred to as strategic lawsuits against public participation (‘SLAPP’), can be devastating to individual defendants or small news organizations and act to chill criticism and debate.”).

Nearly six years after *Murray* was decided, Lisa Ciocia, one of the Patriots for Change protestors, testified before the Ohio Judiciary Committee and urged them to pass Ohio's anti-SLAPP bill. Ciocia explained how Robert Murray also sued her and her husband for \$22 million for defamation, invasion of privacy, and trespassing for their roles in the protest.⁴¹ Although she and her husband won their case in the lower court, except for a \$1 award for trespassing, Robert Murray appealed and then dropped the case "before the district court heard oral arguments."⁴² Ciocia testified about the suit's financial ruin on the newspaper as well as her and her husband:

I cannot speak for how this case affected the newspaper, except to say that financially they took a big hit. . . . As for us, I believe the owner of this company wanted to destroy us financially. Emotionally, his bevy of lawyers tried to intimidate us in every way possible, delaying our attorney's requests for information, demanding access to our computers etc. It was a very stressful time for us. Not to mention the colossal waste of the court's time. And this man did succeed in one way. While we will continue our activism, we will never speak out against him or his activities again.⁴³

Those opposed to SLAPP legislation could argue that the judicial system is already sufficient to weed out meritless claims, either through motions to dismiss or motions for summary judgment. But as Canan and Pring point out, SLAPPs "invoke a judicial forum in which the defendant's resources may be depleted (e.g., in a lawsuit over libel) and in a manner in which the original social issues that prompted the petitioning (e.g., zoning) cannot be adjudicated."⁴⁴

41. *Ohio Citizen Participation Act: Hearing on S.B. 215 Before the S. Judiciary Comm.*, 133d Gen. Assemb., Reg. Sess. (Ohio 2020) (statement of Lisa Ciocia) ("On December 12, 2012, my husband, Jim Ciocia . . . myself . . . and our group, 'Patriots for Change,' held a roughly hourlong protest outside of a coal company headquarters. We were protesting the environmental and safety record of this company and the efforts by its owner to deny the health and environmental costs of his product and his disinformation about market realities. . . . In February of 2013 we were served with a summons to appear in court. My husband and I were being sued for defamation of character, invasion of privacy and trespassing for 22 million dollars. Separately 'Patriots for Change' was also being sued as was one of the two local newspapers who had covered our demonstration. Since this newspaper had followed up with an editorial and a cartoon, they also sued the editorial writer and a cartoonist.").

42. *Id.*

43. *Id.*

44. Canan & Pring, *supra* note 21, at 516.

Indeed, one of the primary purposes of anti-SLAPP legislation is to allow the expeditious dismissal of frivolous lawsuits so that defendants do not have to spend exorbitant amounts of money to defend themselves.⁴⁵ Plus, anti-SLAPP laws help declutter courts' dockets.⁴⁶ And with an anti-SLAPP statute's mandatory fee-shifting provision, if a defendant prevails on an anti-SLAPP motion, then the court *must* award the defendant court costs and attorney's fees and oftentimes has discretion to award additional sanctions.⁴⁷

For jurisdictions without anti-SLAPP laws, defendants are theoretically able to seek sanctions against those who file frivolous SLAPP suits. But a discretionary award of sanctions is not enough. Indeed, Ohio courts have held that "even in instances where frivolous conduct exists, a trial court may, in its considerable discretion, deny attorney fees."⁴⁸

Anti-SLAPP statutes are successful. For example, in 2013, Sheldon Adelson sued the National Jewish Democratic Council for libel based on the Council's publication that accused him of "personally appro[ving] of prostitution at his Macao casino."⁴⁹ The district court dismissed the complaint under Nevada's anti-SLAPP statute, and the Second Circuit affirmed.⁵⁰ In 2018, after the defendants renewed their application for attorneys' fees under Nevada's anti-SLAPP statute, the district court awarded the defendants \$1,909,476.50 in fees and

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45. *Murray*, 2014-Ohio-5442 at ¶ 40 (noting that many states with anti-SLAPP statutes "provide that plaintiffs pay the attorney fees of successful defendants and for abbreviated disposition of cases").
 46. *Canan & Pring*, *supra* note 21, at 516 ("SLAPPs further tax already overburdened courts.").
 47. *See infra* Part II.
 48. *Int'l Union of Operating Eng'rs, Loc. 18 v. Laborers' Int'l Union of N. Am*, Loc. 310, 2017-Ohio-1055, at ¶ 10 ("Neither Civ.R. 11 nor R.C. 2323.51 mandate an award of attorney fees; rather, the ultimate decision whether to deny or grant attorney fees under Civ.R. 11 and R.C. 2323.51 rests within the sound discretion of the trial court."). *See also* *Lansky v. Brownlee*, 2018-Ohio-3952, 111 N.E.3d 135, at ¶¶ 45-47, 49. When a court is determining whether to award sanctions under Ohio law, "a trial court is not required, even where frivolous conduct exists, to award attorney fees." *Id.* at ¶ 45. Moreover, even if the court does award attorney fees, the court has tremendous discretion and is "[not] bound to award that which is requested . . . [and may] award that which the court thinks is reasonable." *Id.* at ¶ 46 (alteration in original) (citation omitted).
 49. Josh Nathan-Kazis, *Sheldon's \$60M Waste of Time*, FORWARD (Aug. 9, 2012), <https://forward.com/opinion/160879/sheldons-60m-waste-of-time/> [<https://perma.cc/RR6J-EBAZ>].
 50. *Adelson v. Harris*, 973 F. Supp. 2d 467, 493, 504 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413 (2d Cir. 2017).

\$55,716.64 in costs, totaling \$1,965,193.14.⁵¹ Nevada’s mandatory-fee shifting provision provides that “[i]f the court grants a special motion to dismiss . . . [t]he court *shall* award reasonable costs and attorney’s fees to the person against whom the action was brought.”⁵²

The following Subpart describes the general procedural structure of anti-SLAPP laws.

A. Procedural Structure of Anti-SLAPP Laws

Anti-SLAPP statutes allow defendants to terminate SLAPP suits by filing an anti-SLAPP motion immediately after being sued.⁵³ Anti-SLAPP laws generally protect individuals and entities.⁵⁴ Although such statutes vary by state, many states employ similar procedures.⁵⁵

Procedurally, after a party (typically a plaintiff) files an anti-SLAPP suit, the target (typically the defendant) can file a special motion to dismiss the plaintiff’s claim on the basis that its conduct is protected by the state’s anti-SLAPP statute.⁵⁶ After the defendant files this motion, discovery is often stayed.⁵⁷

The defendant has the initial burden to prove that its communication or conduct is protected by the anti-SLAPP statute.⁵⁸

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51. Adelson v. Harris, No. 12 Civ. 6052, 2018 U.S. Dist. LEXIS 53416, at *1–2, *17–18 (S.D.N.Y. Mar. 29, 2018).
 52. NEV. REV. STAT. § 41.670(1)(a) (2021) (emphasis added).
 53. Smith, *supra* note 9, at 309–10.
 54. For example, although California’s anti-SLAPP statute protects “a person,” CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2016), entities are also protected. *See* Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 694 (Cal. 2002) (affirming grant of consumer group’s anti-SLAPP motion). Ohio’s most recent anti-SLAPP legislation defines a person as “an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.” S.B. 237, 135 Gen. Assemb., Reg. Sess., § 2747.01(A)(3) (Ohio 2024).
 55. The Unified Public Expression Protection Act (UPEPA) drafters noted that jurisdictions with anti-SLAPP statutes “achieve their goals by generally employing at least five mechanisms: 1. [c]reating specific vehicles for filing motions to dismiss or strike early in the litigation process; 2. [r]equiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they’re heard; 3. [r]equiring the plaintiff to demonstrate the case has some degree of merit; 4. [i]mposing cost-shifting sanctions that award attorney’s fees and other costs when the plaintiff is unable to carry its burden; and 5. [a]llowing for an interlocutory appeal of a decision to deny the defendant’s motion.” UNIF. PUB. EXPRESSION PROT. ACT prefatory note at 2–3 (UNIF. L. COMM’N 2020).
 56. Smith, *supra* note 9, at 309–10.
 57. *Id.* at 310.
 58. *Id.* at 309–10.

For example, in California, a defendant must prove that a lawsuit targets its acts made “in furtherance of” its “right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue.”⁵⁹

But in some jurisdictions, anti-SLAPP statutes contain explicit causes of action that are *exempt* from the statute’s protections.⁶⁰ For example, if a plaintiff in Texas brings “a legal action seeking recovery for bodily injury, wrongful death, or . . . [challenging] statements made regarding that legal action,” the party against whom the action is brought cannot utilize Texas’s anti-SLAPP statute to have the case dismissed.⁶¹ In these jurisdictions, if the defendant files an anti-SLAPP motion and meets its burden of proof, the burden then flips to the plaintiff to prove that its legal claims are exempt.⁶²

But if the defendant establishes that its speech or conduct is protected, and the plaintiff is unable to prove that a specific exemption applies, the plaintiff must then prove that its “claim is meritorious rather than one designed to harass the other party.”⁶³ In so doing, the plaintiff often must prove a *prima facie* case of each element of its claim. Some jurisdictions impose an even higher burden.⁶⁴ If the plaintiff fails to meet its requisite burden, the anti-SLAPP motion is granted, the claim(s) are dismissed, and the defendant is awarded attorney’s fees and costs.⁶⁵

59. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2016). The Code includes four kinds of communications/conduct that constitute “acts in furtherance of” protected rights. *Id.* § 425.16(e). The defendant must therefore prove that it engaged in one of the four acts that the anti-SLAPP statute protects.

60. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a) (West 2020).

61. *Id.* § 27.010(a)(3).

62. *See, e.g.*, Superior HealthPlan, Inc. v. Badawo, No. 03-18-00691-CV, 2019 WL 3721327, at *2–3 (Tex. App. Aug. 8, 2019) (noting that under Texas’s anti-SLAPP statute, the defendant (or anti-SLAPP movant) has the initial burden to prove that the plaintiff’s legal action is based on a good-faith communication that the anti-SLAPP statute protects, but the burden then flips to the plaintiff (or nonmovant) to prove that its claim falls within a “statutory exemption”). *See also infra* Part II.B for a further discussion of Texas’s anti-SLAPP law.

63. Smith, *supra* note 9, at 309–10.

64. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West 2020) (plaintiff must establish with “clear and specific evidence a *prima facie* case for each essential element of the claim”); NEV. REV. STAT. § 41.660(3)(b) (2021) (plaintiff’s burden is demonstrating a “*prima facie* . . . probability of prevailing on the claim”).

65. Smith, *supra* note 9, at 310.

Even if the plaintiff *does* meet its burden, many jurisdictions afford the defendant one last chance to get the case dismissed by asserting some other affirmative defense or by establishing that the plaintiff's claim(s) otherwise fail as a matter of law.⁶⁶ "Interlocutory appeals are [also] generally available" to defendants whose motions have been denied.⁶⁷

For example, California's anti-SLAPP law provides that any lawsuit "against a person arising from any act of that person in furtherance of the person's [protected rights] . . . shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."⁶⁸ If a defendant believes that it is the target of a SLAPP suit, the defendant must file a special motion within sixty days of being served.⁶⁹ As soon as the defendant files its motion, all discovery in the case is stayed.⁷⁰

California courts evaluate anti-SLAPP motions in two steps.⁷¹ In its motion, the defendant must prove that the activity giving rise to the plaintiff's suit arises from one of the four protected categories under subsection 425.16(e).⁷² If the defendant meets this burden, then the burden shifts to the plaintiff to prove that "there is a probability that the plaintiff will prevail on the claim."⁷³ Importantly, if the defendant

66. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d) (West 2020); UNIF. PUB. EXPRESSION PROT. ACT prefatory note at 4, § 7(a)(3)(B)(i)–(ii) (UNIF. L. COMM'N 2020).

67. Smith, *supra* note 9, at 310.

68. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2016).

69. *Id.* § 425.16(f).

70. *Id.* § 425.16(g).

71. "A court evaluates an anti-SLAPP motion in two steps. 'Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims "aris[e] from" protected activity in which the defendant has engaged. If the defendant carries its burden, the plaintiff must then demonstrate its claim have at least "minimal merit."' " Wilson v. Cable News Network, Inc., 444 P.3d 706, 713 (Cal. 2019) (citations omitted) (quoting Park v. Bd. of Trs. of Cal. State Univ., 393 P.3d 905, 907 (Cal. 2017)). "If the plaintiff fails to meet that burden, the court will strike the claim." *Id.*

72. CAL. CIV. PROC. CODE § 425.16(e) (West 2016). "The defendant's first-step burden is to identify the activity each challenged claim rests on and demonstrate that that activity is protected by the anti-SLAPP statute." Wilson, 444 P.3d at 713.

73. Laker v. Bd. of Trs. of Cal. State Univ., 244 Cal. Rptr. 3d 238, 251, 258 (Cal. Ct. App. 2019) ("In the second step of the anti-SLAPP analysis, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually

prevails on its special motion, the defendant is generally entitled to recover attorney's fees.⁷⁴ But if the court finds that the defendant has filed a frivolous anti-SLAPP motion, then the plaintiff is entitled to costs and attorney's fees.⁷⁵

B. The Uniform Public Expression Protection Act (UPEPA)

As noted above, anti-SLAPP statutes vary. But in 2020, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Public Expression Protection Act (UPEPA) and approved and recommended its enactment in all U.S. states.⁷⁶

Prior to UPEPA, the Washington Supreme Court in 2015 held that Washington's then-existing anti-SLAPP law was unconstitutional.⁷⁷ But in 2020, Washington became the first state to adopt a version of UPEPA.⁷⁸ In September 2023, New Jersey became the most recent state to adopt a version of UPEPA as of the publication of this Comment.⁷⁹ The most recent version Ohio anti-SLAPP bill is modeled on UPEPA.

substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken.”) (quoting *Baral v. Schnitt*, 376 P.3d 604, 617 (Cal. 2016)). Note that courts have construed a plaintiff's burden of legal sufficiency as one of “minimal merit.” See *Navellier v. Sletten*, 52 P.3d 703, 708, 713 (Cal. 2002) (noting that “[o]nly a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP” and that “plaintiffs may defeat the anti-SLAPP motion by establishing a probability of prevailing on their claim” where “the plaintiff need only have ‘stated and substantiated a legally sufficient claim’”) (emphasis in original) (quoting *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 575 (Cal. 1999)); *Monster Energy Co. v. Schechter*, 444 P.3d 97, 102, 107 (Cal. 2019) (noting that the court's inquiry into whether the plaintiff has met their burden “is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. . . . [C]laims with the *requisite minimal merit* may proceed”) (emphasis added) (citations omitted).

74. Smith, *supra* note 9, at 310.

75. CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2016).

76. UNIF. PUB. EXPRESSION PROT. ACT (UNIF. L. COMM'N 2020).

77. *Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015), *abrogated by* *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 423 P.3d 223 (Wash. 2018).

78. Sarah Matthews & Maya Gandhi, *Washington*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/anti-slapp-guide/washington/> [<https://perma.cc/X6HC-AV4F>].

79. Afiyfa H. Ellington, *The Uniform Public Expression Protection Act: New Jersey's Recently Enacted Anti-SLAPP Legislation*, N.J. ENV'T L.

UPEPA's goals are clear: "protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries."⁸⁰ Importantly, UPEPA notes that "[a]lthough the Act operates in a procedural manner—specifically, by altering the typical procedure parties follow at the outset of litigation—the *rights* the [A]ct protects are most certainly *substantive* in nature."⁸¹

UPEPA proposes a three-step process for the adjudication of an anti-SLAPP motion.⁸² In the first phase, the court must determine whether UPEPA applies to the cause of action.⁸³ If the moving party meets its burden that the Act applies, then the burden shifts to the plaintiff to show that its claim falls into one of the Act's exemptions.⁸⁴ If the plaintiff fails to do so, then the court proceeds to the second phase, where the plaintiff must prove it "has a viable cause of action from a prima-facie perspective."⁸⁵ If the plaintiff fails to prove that an exception applies or that it has a prima facie case, then the anti-SLAPP motion is approved, the plaintiff's case is dismissed, and the defendant is entitled to costs, attorney's fees, and "reasonable litigation expenses."⁸⁶

(Sept. 15, 2023), <https://njournalism.com/2023/09/15/the-uniform-public-expression-protection-act-new-jerseys-recently-enacted-anti-slapp-legislation/> [https://perma.cc/3LXC-RZK5]; *Public Expression Protection Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1> (click on "enactment history") (last visited Feb. 12, 2024).

80. UNIF. PUB. EXPRESSION PROT. ACT prefatory note at 3 (UNIF. L. COMM'N 2020). UPEPA seeks to discourage forum shopping among states with different degrees of anti-SLAPP protection. By making anti-SLAPP laws more uniform, plaintiffs will be discouraged from filing in forums that have narrow anti-SLAPP laws that do not afford defendants much protection. *Id.*
81. *Id.* § 2 cmt. 2.
82. "The general flow of a[n] [anti-SLAPP] motion under the Act employs a three-phase analysis seen in *many states' statutes*." *Id.* prefatory note at 3–4 (emphasis added).
83. "In the first phase, the court effectively decides whether the Act applies. It does so by first determining if the responding party's (typically the plaintiff's) cause of action implicates the moving party's (typically the defendant's) right to free speech, petition, or association. The burden is on the moving party to make the initial showing that the Act applies." *Id.* prefatory note at 3.
84. *Id.*
85. *Id.*
86. *Id.* § 10(1)–(2).

But if the plaintiff meets its burden, then the burden shifts in the third and final phase, back to the defendant to show that the claim should be dismissed under the traditional motion to dismiss or summary judgment standard. If the defendant prevails, the court will dismiss the action.⁸⁷

*C. Circuit Split Regarding Applicability of
Anti-SLAPP Laws in Federal Court*

Circuits are split as to whether state anti-SLAPP statutes apply in federal court. Understanding the split is crucial in determining if a future Ohio anti-SLAPP law would apply in federal court.⁸⁸

Following *Erie Railroad Co. v. Tompkins*,⁸⁹ a federal court must apply state substantive law and federal procedural law.⁹⁰ But because circuits have difficulty determining whether states' anti-SLAPP laws are procedural or substantive, circuits differ in how they conduct their *Erie* analysis.⁹¹

The Second, Fifth, Tenth, Eleventh, and D.C. Circuits have held that states' anti-SLAPP statutes do not apply in federal court.⁹² All of these circuits except the Tenth have conducted a complex *Erie* inquiry and found that, because the Federal Rules of Civil Procedure answer the same question or are "sufficiently broad to control the [same] issue" as the state's anti-SLAPP statute, the federal rules, rather than the state's anti-SLAPP rules, apply in federal court.⁹³

In reaching their holdings, these circuits followed the framework from *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance*

87. *Id.* prefatory note at 3–4.

88. *See infra* Part IV.C.

89. 304 U.S. 64 (1938).

90. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) ("The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law.").

91. Because federal circuits must consider "the relationship between the Federal Rules of Civil Procedure and a state [anti-SLAPP] statute that governs both procedure and substance in the state courts[,] . . . [t]his is not the classic *Erie* question." *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010).

92. *La Liberte v. Reid*, 966 F.3d 79, 87–88 (2d Cir. 2020); *Klocke v. Watson*, 936 F.3d 240, 245–46 (5th Cir. 2019); *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 668–69 (10th Cir. 2018); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018); *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015).

93. *Carbone*, 910 F.3d at 1349–50 (citation omitted); *Klocke*, 936 F.3d at 245–47 (citation omitted); *La Liberte*, 966 F.3d at 87; *Abbas*, 783 F.3d at 1333–34.

*Co.*⁹⁴ Under *Shady Grove*, when determining whether a state law that is seemingly both procedural and substantive applies in federal court, the court must first ask if a federal rule answers the same question as the state law.⁹⁵ If it does answer the same question, the federal law will apply so long as it does not violate the Rules Enabling Act.⁹⁶ But if a federal rule does *not* apply, the court must “make the ‘relatively unguided *Erie* choice’ to determine whether the state law is the ‘rule of decision.’”⁹⁷ In making the “relatively unguided *Erie* choice” when faced with “a substantive state law, courts must consider whether countervailing federal interests require displacement of that law.”⁹⁸

The Tenth Circuit reached its conclusion on a simpler analysis—because New Mexico’s anti-SLAPP statute is “nothing more than a *procedural* mechanism,” it cannot apply in federal court in a diversity action under *Erie*.⁹⁹

These circuits, in holding that state anti-SLAPP statutes do not apply in federal court, have also determined that the statutes do not create any substantive rights.¹⁰⁰

94. 559 U.S. 393 (2010).

95. *Id.* at 421 (Stevens, J., concurring).

96. *Id.* at 422; 28 U.S.C. §§ 2071–2077.

97. 559 U.S. at 417 (Stevens, J., concurring) (citations omitted) (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)). In making this determination, “courts must consider the twin aims of *Erie*: ‘discouragement of forum-shopping and avoidance of inequitable administration of the laws.’” Matthew L. Schafer & Tanvi Valsangikar, *The Application of the New York Anti-SLAPP Scheme in Federal Court*, 2 J. FREE SPEECH L. 573, 592 (2023) (quoting *Shady Grove*, 559 U.S. at 417 n.2 (Stevens, J., concurring)).

98. *Shady Grove*, 559 U.S. at 417 (Stevens, J., concurring); Schafer & Valsangikar, *supra* note 97, at 592.

99. *Los Robos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 668–69 (10th Cir. 2018) (emphasis in original).

100. *Klocke v. Watson*, 936 F.3d 240, 247 (5th Cir. 2019) (determining that the Texas Citizenship Participation Act does not create any substantive rights and instead “provides a procedural mechanism for vindicating existing rights”) (citations omitted); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) (“The D.C. Anti-SLAPP Act, to use the words of the D.C. Court of Appeals, establishes a new ‘procedural mechanism’ for dismissing certain cases before trial.”) (citations omitted); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1355 (11th Cir. 2018) (holding that Georgia’s anti-SLAPP statute does not create substantive rights and only provides “a special *procedural* device—a ‘motion to strike’—that applies a heightened burden to the claims that fall within its ambit”) (emphasis in original); *Los Robos*, 885 F.3d at 670 (“[O]ne cannot reasonably read the language of the New Mexico anti-SLAPP statute as providing a defendant with a substantive defense to

But the First, Second, and Ninth Circuits have held that state anti-SLAPP statutes *do* apply. Only the First Circuit has applied the *Shady Grove* analysis and reached a different conclusion. In *Godin v. Schencks*,¹⁰¹ the First Circuit held that Federal Rules 12(b)(6) and 56 *do not* answer the same question as Maine’s anti-SLAPP statute and, therefore, resolved the question under the “relatively unguided *Erie*” analysis.¹⁰²

On the other hand, the Second and Ninth Circuits have employed a different framework altogether to conclude that California’s and Nevada’s anti-SLAPP statutes apply in federal court. In *Adelson v. Harris*,¹⁰³ the district court succinctly concluded that provisions of Nevada’s anti-SLAPP statute apply in federal court because its immunity and fee-shifting provisions are substantive.¹⁰⁴ The Second

SLAPP liability. To be sure, the statute seeks to spare those who exercise their free speech rights . . . from unwarranted and harassing litigation that threatens to chill the exercise of such rights. . . . [H]owever, the statute as written pursues this policy through purely *procedural* means.”); *La Liberte v. Reid*, 966 F.3d 79, 86 n.3 (2d Cir. 2020) (differentiating California’s procedural statute from Nevada’s substantive one).

101. 629 F.3d 79 (1st Cir. 2010).

102. *Id.* at 88 (“Federal Rules 12(b)(6) and 56 are addressed to different (but related) subject-matters. Section 556 [(Maine’s anti-SLAPP statute)] on its face is not addressed to either of these procedures, which are general federal procedures governing all categories of cases. Section 556 is only addressed to special procedures for state claims based on a defendant’s petitioning activity. In contrast to the state statute in *Shady Grove*, Section 556 does not seek to displace the federal rules or have Rules 12(b)(6) and 56 cease to function. In addition, Rules 12(b)(6) and 56 do not purport to apply only to suits challenging the defendants’ exercise of their constitutional petitioning rights. Maine itself has general procedural rules which are the equivalents of . . . 12(b)(6) and 56. That fact further supports the view that Maine has not created a substitute to the federal rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities.”) (citations omitted).

103. 973 F. Supp. 2d 467 (S.D.N.Y. 2013), *certifying questions to Nevada Supreme Court*, 774 F.3d 803 (2d Cir. 2014), *answering certified questions*, 402 P.3d 665 (Nev. 2017), *aff’d*, 876 F.3d 413 (2d Cir. 2017).

104. *Id.* at 494 n.21 (“[T]he Nevada statute immunizes ‘good faith communication[s]’—defined as communications that are ‘truthful or . . . made without knowledge . . . of falsity’—thereby effectively raising the *substantive* standard that applies to a defamation claim. Thus, even if the *procedural* elements of certain Anti-SLAPP statutes present problems under *Erie*, those problems are not presented in this case, where the effects of the Anti-SLAPP law (fee-shifting and a heightened substantive legal standard) are substantive.”) (emphasis in original) (citation omitted).

Circuit affirmed the district court’s application of Nevada’s anti-SLAPP statute.¹⁰⁵

In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*,¹⁰⁶ the Ninth Circuit established that certain provisions of California’s anti-SLAPP statute—namely the special motion to strike and fee-shifting provisions—are applicable in federal court because they do not directly collide with the federal rules.¹⁰⁷ The court later held in *Metabolife International, Inc. v. Wornick*¹⁰⁸ that other provisions of California’s anti-SLAPP law—the sixty-day deadline for filing an anti-SLAPP motion and an automatic stay of discovery—are not applicable because they directly conflict.¹⁰⁹

In 2018, the Ninth Circuit adopted a new rule for applying California’s anti-SLAPP statutes in its jurisdiction to avoid a “stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure” that would render the anti-SLAPP statute invalid in federal courts:

[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated. And, on the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply.¹¹⁰

105. *Adelson*, 876 F.3d at 415.

106. 190 F.3d 963 (9th Cir. 1999).

107. *Id.* at 971–73. But note that, at the time *Lockheed* was decided, the relevant inquiry was whether there was a “direct collision” between state law and federal rules. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980). Now, under *Shady Grove*, the relevant inquiry has expanded to whether the federal rules answer the same question as the state law. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). But according to the Ninth Circuit, *Shady Grove* “did not discard the ‘direct collision’ test; it merely repackaged it” and the Ninth Circuit has “continued to use the ‘direct collision’ language interchangeably with the ‘same question’ language.” *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1142 (9th Cir. 2022).

108. 264 F.3d 832 (9th Cir. 2001).

109. *Id.* at 846.

110. *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018) (noting, though, that if a federal court evaluates an anti-SLAPP motion under a Rule 56 standard, it must allow discovery “with opportunities to supplement evidence based on the factual challenges”).

The Ninth Circuit reaffirmed, in *CoreCivic, Inc. v. Candido Group, LLC*,¹¹¹ the applicability of California’s anti-SLAPP statute in 2022, noting that *Shady Grove* is not intervening authority since it did not involve an anti-SLAPP statute.¹¹² Looking at the other circuits’ decisions that found that federal rules answered the same question as their respective states’ anti-SLAPP statutes, *CoreCivic* determined that California’s anti-SLAPP statute applies because it does not directly collide with the federal rules.¹¹³ Plus, the court recognized that other “circuits have not *uniformly* decided that anti-SLAPP statutes cannot apply in federal court following *Shady Grove*,” and cited to a First Circuit case that held that Maine’s anti-SLAPP statute *does* apply under a *Shady Grove* analysis.¹¹⁴

Finally, in *Clifford v. Trump*,¹¹⁵ the Ninth Circuit applied Texas’s anti-SLAPP law in federal court.¹¹⁶ While the court noted that the law’s sixty-day deadline to file an anti-SLAPP motion conflicts with the Federal Rule 56 under *Erie*, it declined to address the deadline’s applicability because there is “good cause” to permit it to proceed.¹¹⁷

This circuit split makes it clear that the Ohio Legislature must carefully draft Ohio’s future anti-SLAPP law to protect substantive rights.¹¹⁸

II. A CLOSER LOOK—NEVADA AND TEXAS

This Part examines Nevada’s and Texas’s anti-SLAPP laws. First, because portions of Ohio’s anti-SLAPP bills are modeled on the laws of those states.¹¹⁹ Also, Nevada’s and Texas’s anti-SLAPP laws are

111. 46 F.4th 1136.

112. *Id.* at 1141.

113. *Id.* at 1142–43 (noting that the other circuits have not explicitly cast aside the ‘direct collision’ test and that the Ninth Circuit uses the ‘direct collision’ test interchangeably with the ‘same question’ language).

114. *Id.* at 1143 (citing *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010)).

115. 339 F. Supp. 3d 915 (C.D. Cal. 2018), *aff’d*, 818 F. App’x 746 (9th Cir. 2020).

116. *Id.* at 924.

117. *Id.* at 923.

118. *See infra* Part IV.C.

119. *See Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S. Comm. on Gov’t Oversight & Reform*, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2018) (statement of Dennis Hetzel, President and Executive Director, Ohio News Media Association) (stating that “SB 206 is most directly based on a Texas statute hailed as one of the nation’s best”); *see also Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S.*

regarded as some of the best in the country. The Public Participation Project surveyed all fifty states to determine the strength of their anti-SLAPP laws and classified each state into one of five grades: A for Excellent; B for Good; C for Adequate; D for Weak; and F for no anti-SLAPP law.¹²⁰ Nevada is an “A,” Texas is a “B,” and Ohio is, obviously, an “F.”¹²¹

A. Nevada

Nevada passed its anti-SLAPP law in 1993,¹²² and amended portions of it in 1997, 2013, and 2015.¹²³ A person can file a special motion to dismiss a party’s action against them, within sixty days of being served, if the action is “based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.”¹²⁴ Though the statute provides that a *person* may file an anti-SLAPP motion,¹²⁵ it applies to both individuals and entities.¹²⁶ The statute further defines

Comm. on Gov’t Oversight & Reform, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2018) (statement of Jeffrey Nye) (“We also looked closely at Nevada, and at California, where there is a large volume of case law because of their entertainment industry.”).

120. *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/your-states-free-speech-protection> [<https://perma.cc/6746-SC8P>].

121. *Id.*

122. Act of July 13, 1993, ch. 653, 1993 Nev. Stat. 2848 (current version at NEV. REV. STAT. §§ 41.635–41.670 (2021)).

123. Act of July 11, 1997, ch. 387, 1997 Nev. Stat. 1363; Act of May 27, 2013, ch. 176, 2013 Nev. Stat. 622; Act of June 8, 2015, ch. 428, 2015 Nev. Stat. 2454.

124. NEV. REV. STAT. § 41.660(2)–3(a). Prior to 2013, the statute’s protections were limited: only “[a] person who engages in a good faith communication in furtherance of the right to petition is immune from any civil action for claims based upon the communication.” 1997 Nev. Stat. at 1365 (effective 1997 to 2013). But in 2013, Nevada expanded the scope of its protected communications to include “[a] person who engages in a good faith communication in furtherance of the right to petition *or the right to free speech in direct connection with an issue of public concern.*” 2013 Nev. Stat. at 623 (effective 2013 to present) (codified at NEV. REV. STAT. § 41.650 (2021)) (emphasis added).

125. NEV. REV. STAT. § 41.660 (2021).

126. *See Clark Cnty. v. 6635 W. Oquendo LLC*, No. 85185, 2024 WL 1106453 (Nev. 2024) (political subdivision filed an anti-SLAPP motion against a limited liability company).

the sorts of “good faith communication” that its anti-SLAPP statute protects.¹²⁷

127. Prior to 2013, the statute confined the meaning of “[g]ood faith communication in furtherance of the right to petition” to three narrow definitions:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome; 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; or 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law. 1997 Nev. Stat. at 1364 (effective 1997 to 2013).

In 2013, section 41.637 added a fourth—and much broader—definition of a qualifying good faith communication: “[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum.” 2013 Nev. Stat. at 623 (effective 2013 to present) (codified at NEV. REV. STAT. § 41.637 (2021)). *See also* Jeff Hermes, *Congratulations to Nevada on Its New and Improved Anti-SLAPP Law!*, DIGIT. MEDIA L. PROJECT (June 28, 2013, 10:28), <https://www.dmlp.org/blog/2013/congratulations-nevada-its-new-and-improved-anti-slapp-law> [<https://perma.cc/BUG2-3YXJ>].

Like many jurisdictions, Nevada has a burden-shifting anti-SLAPP statute.¹²⁸ But where UPEPA proposes a three-step framework, Nevada courts adjudicate anti-SLAPP motions in two steps.¹²⁹

First, the court must determine if the anti-SLAPP movant (typically the defendant) has met its requisite burden of proof, i.e., whether the defendant has proven “by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or right to free speech in direct connection with an issue of public concern.”¹³⁰ The court will look at the statute’s definition of “good faith communication” to determine if the defendant’s communication falls into one of four protected categories.¹³¹ Once the

128. But Nevada has not always had a burden-shifting statute, and the changes have caused some controversy in Nevada’s courts. From 1997 to September 30, 2013, the statute required the court to treat an anti-SLAPP motion as a motion for summary judgment, stating that “[i]f a special motion to dismiss is filed . . . the court shall: (a) Treat the motion as a motion for summary judgment.” 1997 Nev. Stat. at 1365 (effective 1997 to 2013).

In 2013, Nevada scrapped section 41.660’s motion for summary judgment standard and introduced the burden-shifting requirements that first require a court to examine whether a defendant “has established, by a preponderance of the evidence” that its claim falls under the protection of the statute. If the defendant met this burden, then the court was required to examine whether the plaintiff “has established, by clear and convincing evidence, a probability of prevailing on the claim.” 2013 Nev. Stat. at 623–24 (effective 2013 to 2015). In *Delucchi v. Songer*, the Nevada Supreme Court noted that “[t]he 2013 amendment completely changed the standard of review for a special motion to dismiss by placing a significantly different burden of proof on the parties.” 396 P.3d 826, 831 (Nev. 2017).

But in 2015, “NRS 41.660’s burden-shifting framework evolved . . . when the Legislature *decreased* the plaintiff’s burden of proof from ‘clear and convincing’ to ‘prima facie’ evidence.” *Coker v. Sassone*, 432 P.3d 746, 748 (Nev. 2019) (emphasis in original); 2015 Nev. Stat. at 2455 (effective June 8, 2015 to present) (codified at NEV. REV. STAT. § 41.660(3)(a) (2021)). The Nevada Supreme Court held that the 2015 amendments that have changed the plaintiff’s burden mean that an anti-SLAPP motion “again functions like a summary judgment motion procedurally.” *Coker*, 432 P.3d at 748.

129. *Stark v. Lackey*, 458 P.3d 342, 345 (Nev. 2020) (“Our anti-SLAPP statutes posit a two-prong analysis to determine the viability of a special motion to dismiss.”).

130. NEV. REV. STAT. § 41.660(2)–(3)(a) (2021).

131. *Id.* § 41.637. But note that because the statute does not define “issue of public concern,” there has been significant litigation as to what qualifies under the statute. *See Pope v. Fellhauer*, No. 74428, 2019 WL 1313365,

defendant files the motion, discovery is generally stayed except in limited circumstances,¹³² and the court must rule on the motion within twenty judicial days after service.¹³³ If the court denies the motion, the defendant can file an interlocutory appeal.¹³⁴

If the defendant has met its burden, the burden then shifts to the plaintiff to “demonstrat[e] with prima facie evidence a probability of prevailing on the claim.”¹³⁵ If the plaintiff has not met its burden, then

at *2 (Mar. 21, 2019) (noting that Nevada has looked to California law to determine what constitutes an issue of public concern).

132. NEV. REV. STAT. § 41.660(3)(e) (2021). However, a plaintiff may be permitted to take limited discovery “[u]pon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery.” *Id.* § 41.660(4); see also Marc J. Randazza, Esq., *Back Story: Nevada’s Anti-SLAPP Law Update*, NEV. LAW., Sept. 2016, at 50.

133. NEV. REV. STAT. § 41.660(3)(f) (2021). Interestingly, in 2013, Nevada drastically decreased the number of days in which a court has to rule on an anti-SLAPP motion, changing it from thirty days to seven days. *Compare* 1997 Nev. Stat. at 1365 (effective 1997 to 2013), *with* 2013 Nev. Stat. at 624 (effective 2013 to 2015). But just two years later, Nevada increased the number from seven days to twenty days. 2015 Nev. Stat. at 2456 (effective 2015 to present) (codified at NEV. REV. STAT. § 41.660(3)(f)).

134. NEV. REV. STAT. § 41.670(4) (2021).

135. *Id.* § 41.660(3)(b). In 2015, the Nevada Legislature amended section 41.660(3)(b) to change the plaintiff’s burden from “clear and convincing evidence” to “prima facie evidence.” *Compare* 2013 Nev. Stat. at 624 (effective 2013 to 2015), *with* 2015 Nev. Stat. at 2455 (effective 2015 to present). This helped distance Nevada’s anti-SLAPP law from that of Washington, where the Washington Supreme Court held that the plaintiff’s “clear and convincing” burden was unconstitutional. *Randazza, supra* note 132, at 50 (citing *Davis v. Cox*, 351 P.3d 862, 873–74 (Wash. 2015), *abrogated by* *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 423 P.3d 223 (Wash. 2018)). See also Mitch Langberg, *Anti-SLAPP—A Constitutional Tug-Of-War*, LAW360 (June 25, 2015), <https://www.bhfs.com/Templates/media/files/Anti-SLAPP%20%E2%80%94%20A%20Constitutional%20Tug-Of-War.pdf> [<https://perma.cc/W3DX-YRLY>].

To further clarify the plaintiff’s burden, the Nevada legislature also passed section 41.665, which states that “the Legislature intends that in determining whether the plaintiff ‘has demonstrated with prima facie evidence a probability of prevailing on the claim’ the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California’s anti-[SLAPP] law as of June 8, 2015.” 2015 Nev. Stat. at 2455 (effective 2015 to present) (codified at NEV. REV. STAT. § 41.665(2) (2021)). Because the section 41.665 does not articulate what California’s anti-SLAPP law specifically requires of plaintiffs, a 2023 proposed amendment to section 41.665 removed mention to California’s anti-SLAPP law and instead required the plaintiff to prove that the

the court will grant the motion and dismiss the case as “an adjudication upon the merits.”¹³⁶

One of the most important features of an anti-SLAPP statute is its award of costs and attorney’s fees to the movant. But in Nevada, not only *must* the court award the anti-SLAPP movant “reasonable costs and attorney’s fees,”¹³⁷ but it also has the discretion to award up to an additional \$10,000 to the movant.¹³⁸

The wrongfully SLAPPED in Nevada receive more than just attorney’s fees, costs, and maybe an additional \$10,000. Nevada’s anti-SLAPP bill also permits the wrongfully sued defendant to bring its own action against the plaintiff who brought the initial SLAPP suit, and can seek compensatory and punitive damages, as well as attorney’s fees and costs for the separate action.¹³⁹

Additionally, the 2013 amendments established that anti-SLAPP movants can immediately appeal a court’s denial of their motion.¹⁴⁰ Prior to 2013, the statute provided movants immunity from liability, rather than immunity from suit.¹⁴¹ This meant that if movants’ anti-SLAPP motions were denied, they “had to wait until the end of trial to appeal the denial of an anti-SLAPP motion.”¹⁴² Now, the statute states that an anti-SLAPP movant “is immune from any civil *action* for claims based upon the [qualifying good faith] communication.”¹⁴³ This is important because if a trial court denies a movant’s anti-SLAPP

complaint is “legally sufficient,” which is what California courts require, but this amendment did not pass. Assemb. B. 375, 82d Leg., Reg. Sess. (Nev. 2023).

136. NEV. REV. STAT. § 41.660(5) (2021).

137. *Id.* § 41.670(1)(a).

138. *Id.* § 41.670(1)(b).

139. *Id.* § 41.670(1)(c).

140. “A person who engages in a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is immune from any civil action for claims based upon the communication.” 2013 Nev. Stat. at 623 (effective 2013 to present) (codified at NEV. REV. STAT. § 41.650 (2021)); *see also* Marc J. Randazza, Esq., *Nevada’s New Anti-SLAPP Law: The Silver State Sets the Gold Standard*, NEV. LAW., Oct. 2013, at 7, 10.

141. “A person who engages in a good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon the communication.” Act of July 11, 1997, ch. 387, § 5, 1997 Nev. Stat. 1363, 1365 (effective 1997 to 2013) (current version at NEV. REV. STAT. § 41.650 (2021)); Randazza, *supra* note 140, at 10.

142. Randazza, *supra* note 140, at 10.

143. NEV. REV. STAT. § 41.650 (2021) (emphasis added).

motion, a movant can now immediately appeal the denial of its anti-SLAPP motion.¹⁴⁴

If, on the other hand, the plaintiff prevails in meeting its burden, then the anti-SLAPP motion will be denied, and the legal action will resume. If the court finds that the defendant's anti-SLAPP motion was "frivolous or vexatious," then the court will award the plaintiff "reasonable costs and attorney's fees incurred in responding to the motion."¹⁴⁵

B. Texas

Texas enacted the Texas Citizens Participation Act (TCPA)¹⁴⁶ in 2011 and significantly amended it in 2019.¹⁴⁷ The purpose of the statute, which has remained unchanged, is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."¹⁴⁸

Unlike Nevada, Texas's anti-SLAPP law does not establish that a successful anti-SLAPP movant will obtain substantive immunity from suit or even from liability.¹⁴⁹ But like Nevada, Texas allows a target of a SLAPP suit to file a motion to dismiss. A defendant has sixty days to file the motion after being served with a SLAPP suit.¹⁵⁰ Legal discovery is generally stayed,¹⁵¹ but there are a few exceptions.¹⁵² Texas

144. Randazza, *supra* note 140, at 10; *see also* Wynn v. Bloom, 852 F. App'x. 262, 262 n.1 (9th Cir. 2021) ("[I]n 2012, we held that we did not have jurisdiction over an appeal from the denial of an anti-SLAPP motion brought under Nevada law because Nevada's anti-SLAPP statute did not expressly provide for an immediate right to appeal or establish immunity from suit. In 2013, Nevada amended its anti-SLAPP statute to provide for those rights.") (citations omitted).

145. NEV. REV. STAT. § 41.670(2) (2021).

146. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011 (West 2020).

147. Citizens Participation Act, ch. 341, 2011 Tex. Gen. Laws 961; Act of June 2, 2019, ch. 378, 2019 Tex. Gen. Laws 684; *Texas*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/texas> [<https://perma.cc/CD7S-BQV4>].

148. TEX. CIV. PRAC. & REM. § 27.002 (West 2020).

149. *See id.* §§ 27.001–27.011.

150. *Id.* § 27.003(b) (allowing an extension of time by court order or the parties' mutual agreement).

151. *Id.* § 27.003(c).

152. *Id.* § 27.006(b) ("On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion."). Note that while Texas allows limited discovery upon *either* party's showing of good cause, Nevada allows

requires a court to hold a hearing on an anti-SLAPP motion.¹⁵³ After the hearing, the court has thirty days to rule on the anti-SLAPP motion.¹⁵⁴ If a defendant's anti-SLAPP motion is denied, the defendant may appeal.¹⁵⁵ Appellate courts are required to expedite appeals from a trial court's denial of an anti-SLAPP motion or failure to timely rule on the motion.¹⁵⁶

While Nevada's anti-SLAPP statute provides a two-step framework for adjudicating anti-SLAPP motions,¹⁵⁷ both the UPEPA and TCPA establish a three-step analysis.¹⁵⁸ The first step requires the movant to prove that their speech is protected by the anti-SLAPP statute:

If a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by [Texas Code of Civil

discovery only if a party shows that information "necessary to meet or oppose" the *plaintiff's* burden "is in the possession of another party or third party and is not reasonably available without discovery." NEV. REV. STAT. § 41.660(4) (2021).

153. TEX. CIV. PRAC. & REM. § 27.004 (West 2020). This is an important feature of Texas's anti-SLAPP statute, as it allows judges to become more familiar with and understand anti-SLAPP motions. This is especially true because, prior to the anti-SLAPP law, Texas's procedural rules did not allow for any pre-trial dispositive motions. *See* Craig Penfold Props., Inc. v. Travelers Cas. Ins., No. 3:14-CV-326-L, 2015 WL 356885, at *3 (N.D. Tex. Jan. 28, 2015) (noting that the newly enacted Texas Rule of Civil Procedure 91a "now allows a state court to do what a federal court is allowed to do under Federal Rule of Civil Procedure 12(b)(6)").

154. TEX. CIV. PRAC. & REM. § 27.005(a) (West 2020).

155. *Id.* § 27.008(a).

156. *Id.* § 27.008(b).

157. *Coker v. Sassone*, 432 P.3d 746, 749 n. 3 (Nev. 2019).

158. "Reviewing a TCPA motion to dismiss requires a three-step analysis. As a threshold matter, the moving party must show by a preponderance of the evidence that the TCPA properly applies to the legal action against it. If the moving party meets that burden, the nonmoving party must establish by clear and specific evidence a prima facie case for each essential element of its claim. If the nonmoving party satisfies that requirement, the burden finally shifts back to the moving party to prove each essential element of any valid defenses by a preponderance of the evidence." *Youngkin v. Hines*, 546 S.W.3d 675, 679–80 (Tex. 2018) (citations omitted). *See also supra* Part I.B.

Practice and Remedies] Section 27.010(b), that party may file a motion to dismiss the legal action.¹⁵⁹

If the defendant meets this burden, the burden flips to the plaintiff to establish that its legal action is exempt from the statute.¹⁶⁰

The TCPA enumerates the legal actions that are exempt from its protections,¹⁶¹ and further provides exceptions to the exemptions, i.e., lists what the TCPA covers *even if* one of the exemptions in subsection (a) is met.¹⁶² Unlike Nevada, which does not include any exemptions,¹⁶³ the TCPA lists thirteen exempt causes of action, with the most recent addition being “a legal malpractice claim brought by a client or former client.”¹⁶⁴ One of the most litigated exemptions is the commercial-speech exemption, which exempts:

159. TEX. CIV. PRAC. & REM. § 27.003 (West 2020). Prior to 2019, the scope of a party’s ability to file a motion to dismiss was broader—a party could file a motion to dismiss “[i]f a legal action is based on, *relates to*, or is in response to a party’s exercise of the right to free speech.” Citizens Participation Act, ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (emphasis added). The 2019 amendment removed “relates to” from the statute to curb the overly broad and unintended reach of the TCPA. Act of June 2, 2019, ch. 378, § 2, 2019 Tex. Gen. Laws 684, 685 (effective Sept. 30, 2019).

160. *See, e.g.*, Superior HealthPlan, Inc. v. Badawo, No. 03-18-00691-CV, 2019 WL 3721327, at *3 (Tex. Ct. App. Aug. 8, 2019) (citations omitted) (“If the movant carried its initial burden to show the TCPA applies, the trial court then considers whether the nonmovant’s claims fall within any exception raised by the movant. The nonmovant bears the burden to demonstrate that her claims fall within a statutory exemption.”); Hieber v. Percheron Holdings, LLC, 591 S.W.3d 208, 210–11 (Tex. Ct. App. 2019) (“Regardless of any [defenses a defendant has], a nonmovant can avoid a dismissal altogether by establishing that its legal action is exempt from the TCPA under a specific statutory exemption.”).

161. TEX. CIV. PRAC. & REM. § 27.010(a) (West 2020). *See, e.g.*, Hieber, 591 S.W.3d at 210–11.

162. TEX. CIV. PRAC. & REM. § 27.010(b) (West 2020). *See, e.g.*, VSMSQ Structural Eng’rs, LLC v. Structural Consultants Assocs., Inc., 679 S.W.3d 767, 776 (Tex. Ct. App. 2023) (noting that “when the TCPA applies to a legal action pursuant to subsection 27.010(b)(1), the commercial-speech exemption does not exempt the legal action from the TCPA’s application. In other words, subsection 27.010(b)(1) provides an exception—the artistic-work exception—to the commercial-speech exemption for ‘dramatic, literary, musical, political, journalistic, or otherwise artistic work’ when the other elements of subsection 27.010(b)(1) are met”) (internal citation omitted).

163. *See generally* NEV. REV. STAT. § 41.660 (2021).

164. TEX. CIV. PRAC. & REM. § 27.010(a)(13) (West 2020). In 2011, the initial TCPA had only three enumerated exemptions: (1) state enforcement actions; (2) commercial speech; and (3) bodily injury or wrongful death claims. Citizens Participation Act, ch. 341, § 2, 2011 Tex.

[A] legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.¹⁶⁵

If no exemption applies, then the plaintiff must establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.”¹⁶⁶ If the plaintiff fails to meet this burden, then the defendant’s anti-SLAPP motion will be granted.¹⁶⁷ The court *must* award the defendant reasonable attorney’s fees and court costs, and has discretion to award an uncapped amount of “sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.”¹⁶⁸

If the plaintiff meets its burden, then the burden flips back to the defendant in the third and final step to prove “an affirmative defense or other grounds on which the moving party is entitled to judgment as

Gen. Laws 961, 963–64. In 2013, the legislature added a fourth exemption: legal actions brought under the Insurance Code or arising out of an insurance contract. Act of June 14, 2013, ch. 1042, § 3, 2013 Tex. Gen. Laws 2499, 2499. The 2019 amendments to section 27.010 were the most significant, as they established eight new exemptions from the TCPA as well as section 27.010(b) to clarify that three of those subsections were still covered by the TCPA so long as the criteria in either section 27.010(b)(1) or 27.010(b)(2) is met. The 2019 amendment also established that the TCPA *does* apply to actions against victims/alleged victims of dating or domestic violence. Act of June 2, 2019, ch. 378, § 9, 2019 Tex. Gen. Laws 684, 686–87 (effective 2019 to present).

165. TEX. CIV. PRAC. & REM. § 27.010(a)(2) (West 2020). This is referred to as the commercial-speech exemption. UPEPA includes it in its statute as well. UNIF. PUB. EXPRESSION PROT. ACT § 2(c)(3) (UNIF. L. COMM’N 2020).

166. *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015). A “prima facie case” “refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.” *Id.* at 590. “It is the ‘minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.’” *Id.* (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004)). In addition, the TCPA limits the type of evidence from which a prima facie case may be made to that evidence which is “clear and specific”—“clear” meaning “unambiguous,” “sure or free from doubt”; and “specific” meaning “explicit or relating to a particular named thing.” *Id.* (citing *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. Ct. App. 2013)).

167. TEX. CIV. PRAC. & REM. § 27.005(b)–(c) (West 2020).

168. *Id.* § 27.009(a).

a matter of law.”¹⁶⁹ If the defendant cannot meet this burden, then the court will deny the anti-SLAPP motion.¹⁷⁰ If the court finds that the defendant filed a frivolous anti-SLAPP motion, then the plaintiff is entitled to reasonable costs and attorney’s fees.¹⁷¹

III. OHIO

As discussed in Part I, in 2014, the Eighth District Court of Appeals of Ohio called for Ohio to pass an anti-SLAPP statute: “Given Ohio’s particularly strong desire to protect individual speech, as embodied in its Constitution, Ohio should adopt an anti-SLAPP statute to discourage punitive litigation designed to chill constitutionally protected speech.”¹⁷²

After defending Alexandria Goddard and the anonymous blog posters in *Saltsman*, attorneys Jeffrey Nye and Thomas Haren began working on Ohio’s first attempt at an anti-SLAPP bill.¹⁷³ The bill draft was marked up by then-Senate Minority Leader Eric Kearney but was never introduced in the Ohio Senate.¹⁷⁴ Then, in 2017 and 2019, two separate anti-SLAPP bills—both called the Ohio Citizens Participation Act (OCPA)—were introduced in the Ohio Senate, but were ultimately unsuccessful. But on March 26, 2024, a third version of anti-SLAPP legislation—built on the model UPEPA and confusingly named the Uniform Public Expression Protection Act—was introduced in the Ohio Senate. Perhaps the third time really *is* the charm.

A. Ohio’s 2017 Anti-SLAPP Bill

Senate Bill 206 (S.B. 206) was introduced in the Ohio Senate on October 3, 2017, and referred to the Government Oversight and Reform

169. *Id.* § 27.005(d).

170. *Id.* § 27.005(c).

171. *Id.* § 27.009(b).

172. *Murray v. Chagrin Valley Publ’g Co.*, 2014-Ohio-5442, 25 N.E.3d 1111, at ¶ 40.

173. Legis. Serv. Comm’n No. 130 2510, 130th Gen. Assemb., Reg. Sess. (Ohio 2013–2014) (provided by Jeffrey Nye and on file with the Case Western Reserve Law Review).

174. *See id.*; email from Jeffrey M. Nye to author (Oct. 25, 2023, 9:54 AM) (on file with author).

Committee on October 18, 2017.¹⁷⁵ The committee conducted two hearings on the bill.¹⁷⁶

At the first hearing on October 25, 2017, Senator Matt Huffman, the bill's sponsor, testified before the Committee stating, "S.B. 206 would provide protection for individuals exercising their constitutional right to free speech against frivolous lawsuits designed to stifle opposition."¹⁷⁷

On June 6, 2018, numerous proponents of the bill submitted verbal or written testimony before the Committee, including the Ohio News Media Association, the Ohio Domestic Violence Network, Ohio Alliance to End Sexual Violence, ACLU of Ohio, and Yelp.¹⁷⁸ On behalf of the Ohio Alliance to End Sexual Violence (OAESV), Camille Crary, J.D., M.Ed., testified that Ohio needs an anti-SLAPP bill to protect survivors of domestic violence:

Ultimately, SLAPP suits discourage survivors from speaking about their abuse in any form—whether that be reporting to police, reporting to campus officials, or seeking medical care. . . . OAESV does not want to see an Ohio where survivors of sex crimes are silenced and offenders are free to continue abuse. SB 206 is critical to achieving that, and we fully and enthusiastically support its passage.¹⁷⁹

Individuals Geoff Mitchell, M.D., J.D., Julie Boak, and attorney Jeffrey Nye also testified on their own behalf.¹⁸⁰ Dr. Mitchell testified that he was SLAPPED for attempting to fight health-care fraud in Ohio.¹⁸¹ Julie Boak testified that after speaking publicly about enduring her father's sexual, emotional, and verbal abuse as a child, her father

175. *Senate Bill 206 Status*, OHIO LEG., <https://www.legislature.ohio.gov/legislation/132/sb206/status> (last visited Feb. 13, 2024).

176. *Senate Bill 206 Committee Activity*, OHIO LEG., <https://www.legislature.ohio.gov/legislation/132/sb206/committee> (last visited Feb. 13, 2024).

177. *Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S. Comm. on Gov't Oversight & Reform*, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017) (statement of Sen. Matt Huffman, 12th Dist.).

178. *Senate Bill 206 Committee Activity*, *supra* note 176.

179. *Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S. Comm. on Gov't Oversight & Reform*, 132d Gen. Assemb., Reg. Sess. 3 (Ohio 2018) (statement of Camille Crary, Director of Legal Services & Policy, Ohio Alliance to End Sexual Violence).

180. *Senate Bill 206 Committee Activity*, *supra* note 176.

181. *Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S. Comm. on Gov't Oversight & Reform*, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2018) (statement of Geoff Mitchell, M.D., J.D.).

(and his business) hit her with a SLAPP suit for defamation.¹⁸² Boak stated that “[t]he lawsuit created never-ending thoughts in my head of the times he molested me,” and concluded that “[i]f Ohio had an Anti SLAPP law, I would have been protected from this latest torment by my abuser. Please support SB 206 so my nightmare doesn’t happen to anyone else.”¹⁸³ Jeffrey Nye, who represented Alexandria Goddard in *Saltsman* and helped draft S.B. 206, stated:

The Ohio Supreme Court has repeatedly explained in case law that the Ohio Constitution gives broader protection to speech than does the First Amendment to the US Constitution. But without a good anti-SLAPP bill, it’s difficult or impossible for people to take advantage of those protections that they already have under the Ohio Constitution.¹⁸⁴

Despite numerous proponents of S.B. 206, the Committee did not refer it for a full-chamber vote, and it ultimately died during that legislative session.¹⁸⁵ Despite S.B. 206’s failure, it is important to discuss since many of its provisions should be included in a future Ohio anti-SLAPP law.

1. Structure of the OCPA

S.B. 206 states that “[a]ny person who engages in a protected communication is immune from suit in any civil action for a claim based on that communication.”¹⁸⁶ A “protected communication” is defined as “any written or oral statement or communication” that is protected under the U.S. Constitution, Ohio Constitution, or the state’s constitution where the statement was made,¹⁸⁷ and includes:

(1) A written or oral statement or communication that is aimed at procuring any governmental or electoral action, result, or outcome;

(2) Any written or oral statement or communication of information or a complaint made to a member of the general assembly or to any officer or employee of the government of the

182. *Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S. Comm. on Gov’t Oversight & Reform*, 132d Gen. Assemb., Reg. Sess. 1, 3 (Ohio 2018) (statement of Julie Boak).

183. *Id.* at 3.

184. *Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S. Comm. on Gov’t Oversight & Reform*, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2018) (statement of Jeffrey Nye).

185. *Senate Bill 206*, OHIO LEG., <https://www.legislature.ohio.gov/legislation/132/sb206> (last visited Feb. 13, 2024).

186. S.B. 206, 132d Gen. Assemb., Reg. Sess., § 2305.62(B)(1) (Ohio 2017).

187. *Id.* § 2305.61(D).

United States, this state, or a political subdivision of this state, regarding a matter reasonably of concern to the governmental entity involved;

(3) Any written or oral statement or communication made in direct connection with an issue under consideration by an executive, legislative, or judicial body of the United States, this state, or a political subdivision of this state, or any other official proceeding authorized by law;

(4) Any written or oral statement or communication made in direct connection with an issue of public interest;

(5) Any written or oral statement or communication between individuals who join together to collectively express, promote, pursue, or defend common interests.¹⁸⁸

S.B. 206 and Nevada's enumerated definitions of protected communications are very similar, but S.B. 206 would have added broader protections for communications for individuals who join together to collectively express, promote, pursue, or defend common interests.¹⁸⁹

Unlike Nevada, but like Texas and UPEPA, S.B. 206 would have provided exemptions from its anti-SLAPP law, including a commercial-speech exemption.¹⁹⁰

S.B. 206 would have afforded wrongfully sued defendants the same procedural tool as other anti-SLAPP jurisdictions: "If a claim is brought against a person based upon a protected communication, the defendant may file a special motion to strike the action."¹⁹¹ Movants must file within sixty days of being served.¹⁹²

Had S.B. 206 become law, its provisions concerning the adjudication of anti-SLAPP motions and burden-shifting requirements would have been nearly identical to Nevada's, except that the burden

188. *Id.*

189. Compare NEV. REV. STAT. § 41.637 (2021), with Ohio S.B. 206 § 2305.61(D).

190. Ohio S.B. 206 § 2305.62(C); UNIF. PUB. EXPRESSION PROT. ACT § 2(c)(3) (UNIF. L. COMM'N 2020); TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(2) (West 2020).

191. Ohio S.B. 206 § 2305.63(A). As seen above, both Nevada and Texas provide the same procedural tool. However, while Nevada's statute, just like Ohio's, mentions the availability of the procedural tool *and* the defendant's immunity from suit (if their communication is protected by the anti-SLAPP statute), Texas does *not* provide for a defendant's immunity from suit. See TEX. CIV. PRAC. & REM. § 27.003(a) (West 2020).

192. Ohio S.B. 206 § 2305.63(B).

of proof imposed on the plaintiff would have been higher in Ohio (“clear and specific”) rather than Nevada’s requirement that a plaintiff demonstrate “with prima facie evidence a probability of prevailing on the claim.”¹⁹³ Like Nevada, S.B. 206 would have generally stayed discovery in the action except in limited circumstances.¹⁹⁴

S.B. 206 would have required the court to issue a briefing schedule after a defendant filed an anti-SLAPP motion. The schedule would have (1) allowed plaintiffs to file a memorandum in opposition to the motion; (2) allowed defendants to file a reply in support of their motion; and (3) provided for either the court or party to request a hearing.¹⁹⁵ The court would have been required to rule on the defendant’s motion within thirty days of either the hearing (if requested), defendant’s reply in support of the motion (if filed), or the defendant’s waiver of the right to file a reply brief (if no hearing was requested).¹⁹⁶ In adjudicating the motion, the court would have been required to consider “the pleadings and admissible evidence in any supporting or opposing affidavits,” and the defendant could have chosen to “present the defendant’s evidence through testimony, subject to cross-examination by the plaintiff.”¹⁹⁷ Like Nevada, if the court dismissed the action, the dismissal would have served as an adjudication upon the merits.¹⁹⁸

193. Compare *id.* § 2305.63(C)(2), with NEV. REV. STAT. § 41.660(3)(b) (2021). The “clear and specific” burden is the same one that Texas imposes on the party bringing the legal action (generally the plaintiff). TEX. CIV. PRAC. & REM. CODE § 27.005(c). As of 2023, the “clear and specific” language has not been declared unconstitutional in Texas.

194. Compare Ohio S.B. 206 § 2305.63(C)(4)(b) (“The court may allow specified and limited discovery relevant to the special motion to strike upon the court’s own motion, or upon the motion of a party to the special motion to strike, if the party seeking discovery shows by affidavit good cause why the discovery is necessary and why the party’s burden under division (C)(1) [(the movant/defendant’s burden)] or (2) [(the plaintiff’s burden)] of this section cannot be discharged without the specified and limited discovery.”), with NEV. REV. STAT. § 41.660(4) (2021) (“Upon a showing by a party that information necessary to meet or oppose the [plaintiff’s] burden pursuant to paragraph (b) of subsection 3 is in possession of another party or a third party and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information.”). Ohio would allow for limited discovery to satisfy either the defendant’s or plaintiff’s burden (in limited circumstances), while Nevada allows for limited discovery to meet or oppose the plaintiff’s burden.

195. Ohio S.B. 206 § 2305.63(C)(5).

196. *Id.* § 2305.63(C)(6).

197. *Id.* § 2305.63(D).

198. *Id.* § 2305.63(E); NEV. REV. STAT. § 41.660(5) (2021).

If the court granted the defendant's motion, S.B. 206's mandatory fee-shifting provision would have required the court to award the defendant its reasonable attorney's fees and costs.¹⁹⁹ But while Nevada limits any additional monetary award to \$10,000,²⁰⁰ S.B. 206 would have permitted courts to additionally award "such punitive or exemplary monetary sanctions as the court finds sufficient to deter the filing of similar actions in the future."²⁰¹ Like Nevada, S.B. 206 would have afforded defendants a separate cause of action that they can bring against the filer of the SLAPP suit to seek compensatory and punitive damages, reasonable attorney's fees, and court costs.²⁰²

2. Protection of Anonymous Online Posters

S.B. 206 went above and beyond usual anti-SLAPP statutes by codifying protections for anonymous speakers engaging in protected online speech.²⁰³ Indeed, S.B. 206 aimed "to protect the identity of persons who *anonymously* engage in online communications under certain circumstances."²⁰⁴

As an initial matter, the bill stated that "[n]o party to an action involving an online communication shall seek to discover . . . the identity of an anonymous user without first obtaining leave from court."²⁰⁵ Under the bill, before a court could grant leave to discover an

199. Ohio S.B. 206 § 2305.64(A)(1). Further, "[t]he court shall not fail to award, or reduce an award of, attorney's fees and court costs under this division on the grounds that the defense of the claim was undertaken on a pro bono or contingent basis." *Id.*

200. NEV. REV. STAT. § 41.670(1)(b) (2021).

201. Ohio S.B. 206 § 2305.64(A)(2).

202. *Id.* § 2305.64(A)(3).

203. See John Samples, *Some Promising Anti-SLAPP Legislation*, CATO INST.: CATO AT LIBERTY (Oct. 10, 2017, 3:22 PM), <https://www.cato.org/blog/some-promising-anti-slapp-legislation> [<https://perma.cc/K9AG-YDGF>] ("Unlike other anti-SLAPP bills, [the OCPA] protects the privacy of anonymous and pseudonymous speakers by requiring ISPs to notify their customers of any unmasking requests, and allowing speakers to contest attempts to piece [sic] their veil of anonymity. Furthermore, when anonymous internet speakers are sued for alleged defamation or libel, they make take advantage of the expedited dismissal process without revealing their identities.").

204. Ohio S.B. 206 (emphasis added). An anonymous user includes "a person or entity who has engaged in an online communication without publicly revealing the person's or entity's identity, including a person or entity communicating only through a pseudonym." *Id.* at § 2305.66(A).

205. *Id.* § 2305.67(A) (emphasis added).

anonymous user's identity, numerous criteria would have needed to be satisfied.²⁰⁶

Namely, an anonymous user would have needed to receive sufficient notice that a party was seeking to discover its identity,²⁰⁷ and the anonymous user would need to be given time to respond.²⁰⁸ Importantly, the party seeking to discover the anonymous user's identity must have proven, by clear and specific evidence, that (1) the party gave the anonymous user sufficient notice; (2) the party has quoted the allegedly actionable online communication; (3) the party "has sufficiently alleged each element of the cause of action, such that the party would survive a special motion to strike under section 2305.63"; (4) the party has "presented admissible evidence supporting the allegations"; (5) the online communication is not a protected communication as defined in the bill; and (6) the right to identify the user outweighs the user's right to "speak anonymously" under the U.S. or Ohio Constitution.²⁰⁹

Importantly, an anonymous user would have been able to defend against an attempt to discover its identity without having to reveal its identity, and would have been also able to file an anti-SLAPP motion against a party without having to reveal its identity.²¹⁰

These sections demonstrate the significant hurdles that a party must overcome to unmask an anonymous online user. In effect, S.B. 206 sought to codify the *Dendrite International, Inc. v. Doe No. 3*²¹¹ test, where the Superior Court of New Jersey outlined what a trial court must do when a party seeks to discover an anonymous user's identity.²¹² The Court of Appeals of Maryland (Maryland's highest court) compiled the *Dendrite* factors into a five-part test that a trial court must take when "confronted with a defamation action in which anonymous speakers or pseudonyms are involved."²¹³ The court should do the following:

(1) require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, including posting a message

206. *Id.* § 2305.67(B).

207. *Id.* § 2305.67(B)(4)(a). The notice must contain the exact language as provided in § 2305.67(C).

208. *Id.* § 2305.67(B)(3).

209. *Id.* § 2305.67(B)(4).

210. *Id.* § 2305.68(B)–(C).

211. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

212. *Id.* at 760–61.

213. *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456–57 (Md. 2009).

of notification of the identity discovery request on the message board; (2) withhold action to afford the anonymous posters a reasonable opportunity to file and serve opposition to the application; (3) require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech; (4) determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters; and (5), if all else is satisfied, balance the anonymous poster's First Amendment right of free speech against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity, prior to ordering disclosure.²¹⁴

B. Ohio's 2019 Anti-SLAPP Bill

Senator Huffman reintroduced the Ohio Citizenship Participation Act on October 10, 2019, as Senate Bill 215 (S.B. 215).²¹⁵ For the most part, S.B. 215 remained the same as the 2017 version, but it also included some significant changes:

- S.B. 215 changed the plaintiff's burden of proof from one of "clear and *specific admissible* evidence" to one of "clear and *convincing*" evidence.²¹⁶
- S.B. 215 removed any mention or protection for anonymous speakers.²¹⁷

On October 23, 2019, the bill was referred to the Judiciary Committee.²¹⁸ The Committee conducted the first hearing on November 13, 2019, and a second hearing on January 22, 2020.²¹⁹

At the first hearing, Senator Huffman testified that the organizations who had supported S.B. 206 also support S.B. 215: the

214. *Id.* at 457 (citing *Dendrite Int'l, Inc.*, 775 A.2d at 760–61).

215. *Senate Bill 215 Status*, OHIO LEG., <https://www.legislature.ohio.gov/legislation/133/sb215/status> (last visited Feb. 13, 2024).

216. *Compare* S.B. 206, 132d Gen. Assemb., Reg. Sess. § 2305.63(C)(2) (Ohio 2017) (emphasis added), *with* S.B. 215, 133d Gen. Assemb., Reg. Sess. § 2305.63(C)(2) (Ohio 2019) (emphasis added).

217. *See* Ohio S.B. 215.

218. *Senate Bill 215 Committee Activity*, OHIO LEG., <https://www.legislature.ohio.gov/legislation/133/sb215/committee> (last visited Feb. 13, 2024).

219. *Id.*

ACLU, ALEC, the Ohio News Media Association, and the Ohio Domestic Violence Network.²²⁰

The January hearing introduced new proponents of the bill, while the Ohio News Media Association, the Ohio Domestic Violence Network, and Julie Boak—who had all testified in support of S.B. 206—testified again in support of S.B. 215.²²¹ The new proponents included Lisa Coicia, Frantz Ward LLP, the Cincinnati Enquirer, and Americans for Prosperity–Ohio.²²² Despite the continued support for an Ohio anti-SLAPP law, the Judiciary Committee did not refer the bill for a full-chamber vote, and it died.²²³

C. Ohio's 2024 Anti-SLAPP Bill

On March 26, 2024, Senators Theresa Gavarone and Nathan Manning introduced a third anti-SLAPP bill—Senate Bill 237 (S.B. 237).²²⁴ Unlike its predecessors, S.B. 237 is based on the model UPEPA and is confusingly also called the Uniform Public Expression Protection Act.²²⁵

Unlike S.B. 206 and S.B. 215, S.B. 237 does not adequately define the speech or communication it protects. While all three anti-SLAPP bills protect speech guaranteed under both the U.S. and Ohio Constitutions,²²⁶ S.B. 206 and S.B. 215's definition of "protected communication" and its specific enumerations provide greater protection.²²⁷

More specifically, S.B. 237 copies the model UPEPA verbatim, and merely protects a person's (1) communications made during specific governmental proceedings, (2) communications regarding an issue under governmental consideration or review, or (3) exercise of her freedoms guaranteed by the U.S. and Ohio Constitutions, regarding a

220. *Ohio Citizen Participation Act: Hearing on S.B. 215 Before the S. Judiciary Comm.*, 133d Gen. Assemb., Reg. Sess. 1 (Ohio 2019) (statement of Sen. Matt Huffman, 12th Dist.).

221. *Senate Bill 215 Committee Activity*, *supra* note 218.

222. *Id.*; *see also supra* notes 41–43 and accompanying text.

223. *Senate Bill 215 Committee Activity*, *supra* note 218.

224. *Senate Bill 237 Status*, OHIO LEG., <https://www.legislature.ohio.gov/legislation/135/sb237/status> (last visited Apr. 8, 2024).

225. S.B. 237, 135th Gen. Assemb., Reg. Sess. (Ohio 2024).

226. *See* S.B. 206, 132d Gen. Assemb., Reg. Sess. § 2305.61(D) (Ohio 2017); S.B. 215, 133d Gen. Assemb., Reg. Sess. § 2305.61(D) (Ohio 2019); Ohio S.B. 237 § 2747.01(B)(3).

227. *See infra* Part IV.E.

matter of public concern.²²⁸ S.B. 237 does not define “communication,” nor does it specify whether such communications need be oral or written.²²⁹ But S.B. 237 does provide some beneficial clarity, which S.B. 206 and S.B. 215 lack, by defining a person as an “individual, estate, trust, partnership, business or nonprofit entity, government unit, or other legal entity.”²³⁰

Facially, S.B. 237 is much shorter than its predecessors: S.B. 206 includes 501 lines of proposed legislation, S.B. 215 includes 368, and S.B. 237 includes only 233. Consequentially, S.B. 237’s brevity renders it much more ineffective, as it lacks necessary and key provisions.

Unlike S.B. 206 and S.B. 215, S.B. 237 does not clarify whether a plaintiff must present “clear and specific admissible evidence” or “clear and convincing evidence” when responding to an anti-SLAPP motion.²³¹ Instead, S.B. 237 states that if the party responding to an anti-SLAPP motion (usually the plaintiff) does not “establish a prima-facie case for each essential element of the cause of action,” then the court must dismiss the plaintiff’s claim, provided that all of the other criteria of section 2747.04(C) are also met.²³²

Unlike S.B. 206 and S.B. 215, S.B. 237 does not establish the defendant’s requisite burden to prove that its communication is protected under the law.²³³

Unlike S.B. 206 and S.B. 215, S.B. 237 does not provide that those who engage in a protected communication are immune from suit in any civil action for a claim based on that communication.²³⁴

228. Ohio S.B. 237 § 2747.01(B)(1)–(3); UNIF. PUB. EXPRESSION PROT. ACT § 2(b)(1)–(3) (UNIF. L. COMM’N 2020).

229. Compare Ohio S.B. 237, with TEX. CIV. PRAC. & REM. CODE ANN. § 27.001 (West 2020) (“‘Communication’ includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, and electronic.”).

230. Compare Ohio S.B. 237 § 2474.01(A)(3), with Ohio S.B. 206 § 2305.61, and Ohio S.B. 215 § 2305.61.

231. Compare Ohio S.B. 237 § 2474.01(C)(3), with Ohio S.B. 206 § 2305.63(C)(2), and Ohio S.B. 215 § 2305.63(C)(2).

232. Ohio S.B. 237 § 2747.04(C)(3).

233. Both S.B. 206 and S.B. 215 provided that the defendant’s anti-SLAPP motion must prove “by a preponderance of the evidence, that the claim in the civil action is based upon a protected communication.” Ohio S.B. 215 § 2305.63(C)(1); Ohio S.B. 206 § 2305.63(C)(1). S.B. 237 would require that “[t]he moving party establish[] that the cause of action is based on a communication or action” protected by the statute. Ohio S.B. 237 § 2747.04(C)(1).

234. See *infra* Part IV.C. Because the Sixth Circuit has construed “immunity from suit” as language creating a substantive right, including this language in a future Ohio anti-SLAPP law could render it substantive for

Unlike S.B. 206 and S.B. 215, S.B. 237 does not allow the court to award “punitive or exemplary monetary sanctions” to the prevailing SLAPPED defendant “to deter the filing of similar [SLAPP] actions in the future.”²³⁵

Unlike S.B. 206 and S.B. 215, S.B. 237 does not afford a wrongfully SLAPPED defendant the option to bring a separate claim or counterclaim against the original plaintiff for compensatory and punitive damages, reasonable attorney’s fees, and court costs.²³⁶ Finally, S.B. 237 removes any protection for anonymous speakers.²³⁷

As discussed in Part IV, many provisions that S.B. 237 lacks should be included in a future Ohio anti-SLAPP law. But Part IV also highlights one of S.B. 237’s key differences from S.B. 206 and S.B. 215—its three-step framework—that a future anti-SLAPP law should include.

IV. WHAT SHOULD AN ANTI-SLAPP LAW LOOK LIKE IN OHIO?

Ohio’s most recently introduced anti-SLAPP bill is the weakest. The Ohio Legislature should, therefore, not pass S.B. 237 as it is currently drafted. While none of the three anti-SLAPP bills is perfect, all versions contain important provisions. Therefore, whenever Ohio passes an anti-SLAPP law, it should incorporate provisions of the three previous bills *and* other jurisdictions’ anti-SLAPP statutes.

A. Adopt a Three-Step Rather than a Two-Step Framework

There is a more favorable approach included in S.B. 237 that S.B. 206 and S.B. 215 lack—its three-step approach to adjudicating an anti-SLAPP motion. In fact, S.B. 237, the TCPA, and the model UPEPA incorporate this three-step framework.

purposes of *Erie* in federal court. S.B. 237 fatally lacks this language. Though it defines “substantial right,” it is unclear for what purpose. Ohio S.B. 237 § 2505.02(A)(1). Aside from defining “substantial right,” S.B. 237 only mentions it twice more to establish that denials of anti-SLAPP motions are final orders, and final orders include “[a]n order that affects a substantial right.” *Id.* §§ 2747.05(C), 2505.02(B)(1)–(2). Since S.B. 237 is based on the model UPEPA, perhaps its incorporation of “substantial right” attempts to adopt the model UPEPA’s protection of “*substantive rights*.” See UNIF. PUB. EXPRESSION PROT. ACT prefatory note at 1 (UNIF. L. COMM’N 2020); see also *id.* at § 2 cmt. 2.

235. Compare Ohio S.B. 237, with S.B. 206 § 2305.64(A)(2), and Ohio S.B. 215 § 2305.64(A)(2).

236. Compare Ohio S.B. 237, with Ohio S.B. 206 § 2305.64(A)(3), and Ohio S.B. 215 § 2305.64(A)(3).

237. See Ohio S.B. 237.

Under both S.B. 237 and UPEPA, a court must grant a defendant's anti-SLAPP motion if (1) the defendant establishes the Act applies; (2) the plaintiff fails to establish that its cause of action is exempt; and (3) *either* the plaintiff fails to establish a prima facie case, or the defendant establishes that the plaintiff either failed to state a claim upon which relief can be granted or that the defendant is entitled to judgment as a matter of law.²³⁸ In other words, even if a plaintiff establishes a prima facie case, the court still gives the defendant an opportunity to have the case dismissed based on a traditional motion to dismiss or summary judgment standard.²³⁹

Texas's law is similar: if the plaintiff satisfies its burden of proof, "the burden finally shifts back to the moving party to prove each essential element of any valid defenses by a preponderance of the evidence."²⁴⁰ This third step is written into the TCPA itself, which provides that, even if the plaintiff establishes "by clear and convincing evidence a prima facie case for each essential element" of their claim, then the court must still dismiss the plaintiff's case if the moving party "establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as law."²⁴¹

Ohio's future anti-SLAPP law should reject S.B. 206 and S.B. 215's two-step framework,²⁴² and instead incorporate S.B. 237's approach:

238. UNIF. PUB. EXPRESSION PROT. ACT § 7(a) (UNIF. L. COMM'N 2020); Ohio S.B. 237 § 2747.04(C)(1)–(3).

239. "Section 7(a)(3)(B) establishes 'Phase Three' of the motion's procedure—legal viability. Even if a responding party makes a prima-facie showing under Section 7(a)(3)(A), the moving party may still prevail if it shows that the responding party failed to state a cause of action upon which relief can be granted *or* that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law—in other words, that the cause of action is not *legally* sound. In this phase, the burden shifts back to the moving party. If the moving party makes a showing under Section 7(a)(3)(B), then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed. If the moving party does not make such a showing—and the responding party successfully established a prima-facie case in 'Phase Two'—then the motion must be denied." *Id.* § 7 cmt. 5 (emphasis in original).

240. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018).

241. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c)–(d) (West 2020) (emphasis added).

242. Under the two-step approach, the court first determines whether the defendant has proven that their speech is protected by the statute. If the defendant has met its burden, the court then determines whether the plaintiff has established a probability of prevailing on the claim. *See* Ohio S.B. 206 § 2305.63(C)(1)–(2); S.B. 215 § 2305.63(C)(1)–(2). Unlike S.B. 237 and UPEPA, S.B. 206 and S.B. 215's approach did not explicitly provide

that defendants can prevail on their anti-SLAPP motions even if a plaintiff meets its prima facie burden *so long as* the defendant defeats the plaintiff's claim (1) by an affirmative defense or (2) under Ohio's motion to dismiss or summary judgment standard.

B. The Plaintiff's Burden Should Be, at Most, "Clear and Specific Evidence," Not "Clear and Convincing Evidence"

Ohio's 2024 proposed anti-SLAPP legislation fatally fails to specify the plaintiff's requisite burden when responding to an anti-SLAPP motion. And the 2019 version of the proposed OCPA regrettably changed the plaintiff's burden from "clear and *specific* admissible evidence of a prima facie case for each essential element of the plaintiff's claim" to "clear and *convincing* evidence."²⁴³ If this standard is ever incorporated in a future Ohio anti-SLAPP law, the law would be at risk of being ruled unconstitutional.

In 2015, in *Davis v. Cox*,²⁴⁴ the Supreme Court of Washington invalidated its anti-SLAPP statute that required a "clear and convincing" burden of proof upon plaintiffs because it violated the Washington Constitution.²⁴⁵ Under Washington's burden-shifting framework, if the defendant met its burden beyond a preponderance of the evidence, then the burden shifted to the plaintiff to provide "clear and convincing evidence a probability of prevailing on the claim."²⁴⁶ The *Davis* court held that this standard violates the Washington Constitution's right to a trial by jury because it "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."²⁴⁷

Like Washington, Nevada's anti-SLAPP statute imposed the same "clear and convincing" standard on plaintiffs until 2015.²⁴⁸ Then,

that the defendant can then attack the plaintiff's case by means of asserting an affirmative defense. Instead, both bills provided that "[n]othing . . . shall be construed as limiting or abrogating any other defense, remedy, immunity or privilege available . . . relating to claims based on protected communications." S.B. 206 § 2305.67(D); S.B. 215 § 2739.021.

243. Compare Ohio S.B. 206 § 2305.63(C)(2) (emphasis added), with Ohio S.B. 215 § 2305.63(C)(2) (emphasis added).

244. 351 P.3d 862 (Wash. 2015).

245. *Id.* at 873–74.

246. WASH. REV. CODE ANN. § 4.24.525(4)(b) (West 2017) (*declared unconstitutional by Davis v. Cox*, 351 P.3d 862 (Wash. 2015)).

247. *Davis*, 351 P.3d at 874.

248. "If the court determines that the moving party has met the burden pursuant to paragraph (a), [the court shall] determine whether the

following Washington's lead, it changed the plaintiff's burden to "demonstrate[] with prima facie evidence a probability of prevailing on a claim."²⁴⁹

At a minimum, to avoid invalidation concerns, Ohio's future anti-SLAPP law should avoid S.B. 215's burden of "clear and convincing" evidence in favor of S.B. 206's "clear and specific" evidence. This is the same burden that Texas courts require of plaintiffs in its anti-SLAPP burden-shifting framework.²⁵⁰

*C. Include a Provision that Immunizes
SLAPPED Defendants from Civil Action*

One way to aim for the applicability of a future Ohio anti-SLAPP law in federal courts is by ensuring that the law establishes not only a right to move to dismiss, but also a substantive right of immunity from suit for future claims based on the communications at issue. S.B. 237 fails to include a crucial provision from S.B. 206 and S.B. 215: "Any person who engages in a protected communication *is immune from suit in any civil action* for a claim based on that communication."²⁵¹ This provision is crucial because the Sixth Circuit has held that immunity from suit is a substantive right.²⁵² Providing a substantive right is

plaintiff has established by *clear and convincing evidence a probability of prevailing on the claim.*" Act of May 27, 2013, ch. 176, § 3, 2013 Nev. Stat. 622, 624 (effective Oct. 1, 2013) (emphasis added) (current version at NEV. REV. STAT. § 41.660(3)(b) (2021)).

249. Act of June 8, 2015, ch. 428, § 13, 2015 Nev. Stat. 2454, 2455 (effective 2015 to present) (current version at NEV. REV. STAT. § 41.660(3)(b) (2021)).

250. "The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West 2020).

251. S.B. 206, 132nd Gen. Assemb., Reg. Sess. § 2305.62(B)(1) (Ohio 2017) (emphasis added); S.B. 215, 133d Gen. Assemb., Reg. Sess. § 2305.62(B)(1) (Ohio 2019) (emphasis added).

252. "[T]he right to an interlocutory appeal from the denial of a claim of absolute or qualified immunity under state law can only exist where the state has extended *an underlying substantive right* to the defendant official to be free from the burdens of litigation . . ." *Walton v. City of Southfield*, 995 F.2d 1331, 1343 (6th Cir. 1993) (emphasis added) (quoting *Marrical v. Detroit News, Inc.*, 805 F.2d 169, 172 (6th Cir. 1986)). Also note that when someone has a substantive right to immunity from suit, the Supreme Court has emphasized "the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). This further supports the adoption of an anti-SLAPP statute since an anti-SLAPP motion seeks to have a SLAPP suit dismissed as early as possible.

important not only because of the free-speech value of the right itself, but also because the presence of a substantive right in the statute would make the statute substantive, as opposed to merely procedural, for purposes of an *Erie* analysis and, thus, would be more likely to allow Ohio defendants to rely on anti-SLAPP provisions in federal as well as state court.

For example, in *Adelson v. Harris*, a federal district court held that Nevada's anti-SLAPP immunity and fee-shifting provisions are substantive and, therefore, apply in federal court under *Erie*.²⁵³ The court reasoned that, where California's anti-SLAPP law establishes a "reasonable probability of success"²⁵⁴ standard that plaintiffs must meet without discovery, Nevada's immunization of "good faith communication[s]," which includes communications that are "truthful or . . . made without knowledge of [their] fals[e]hood,"²⁵⁵ effectively raised the substantive standard of defamation claims.²⁵⁶ *Adelson* further reasoned that "even if the *procedural* elements of certain Anti-SLAPP statutes present problems under *Erie*, those problems are not presented in this case, where the effects of the Anti-SLAPP law (fee-shifting and heightened substantive legal standard) are substantive."²⁵⁷ The Second Circuit agreed, stating:

[T]here is the question of whether Nevada's anti-SLAPP provisions apply in federal proceedings under *Erie*. . . . While our Circuit has not previously examined the issue, the specific state anti-SLAPP provisions applied by the district court—immunity from civil liability and mandatory fee shifting—seem to us unproblematic. Each of these rules (1) would apply in state court

253. *Adelson v. Harris*, 973 F. Supp. 2d 467, 493 n.21 (S.D.N.Y. 2013). Note that at the time *Adelson* was originally filed in the district court, Nevada's anti-SLAPP statute provided for immunity from civil liability. See Act of July 11, 1997, ch. 387, § 5, 1997 Nev. Stat. 1363, 1365 (effective 1997 to 2013) (current version at NEV. REV. STAT. § 41.650 (2021)); see also *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014). In 2013, the statute was amended to provide for immunity from any civil action. Act of May 27, 2013, ch. 176, § 2, 2013 Nev. Stat. 622, 623 (effective 2013 to present) (current version at NEV. REV. STAT. § 41.650 (2021)). This change does not affect the court's holding.

254. *Adelson*, 973 F. Supp. 2d at 494 n.21. See also CAL. CIV. CODE. § 425.16(b)(1) (West 2016). When the burden shifts to the plaintiff, the plaintiff must establish "that there is a probability that the plaintiff will prevail on the claim." *Id.*

255. *Adelson*, 973 F. Supp. 2d at 494 n.21, 498. See also NEV. REV. STAT. § 41.637(4) (2021).

256. *Adelson*, 973 F. Supp. 2d at 494 n.21.

257. *Id.* (citation omitted).

had suit been filed there; (2) *is substantive within the meaning of Erie*, since it is consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity; and (3) does not squarely conflict with a valid federal rule.²⁵⁸

Because S.B. 206 and S.B. 215 similarly immunize defendants who engage in protected communications from any civil action and provide a fee-shifting structure, the Sixth Circuit could apply the Second Circuit's construction of Nevada's anti-SLAPP law and apply these provisions from the OCPA in federal court.

That said, even if Ohio's future anti-SLAPP law provides for a substantive right, this does not automatically guarantee that the law will apply in federal court. The fact that Ohio's anti-SLAPP law would need to be enforced through a procedural mechanism makes the federal application of the law more complicated. As discussed in Part I, while the main takeaway from *Erie* is that federal courts must apply state substantive law and federal procedural law, anti-SLAPP statutes have both seemingly substantive and procedural elements.²⁵⁹ Courts faced with such statutes must engage in a more complex *Erie* analysis.²⁶⁰ And many circuits follow the analysis from *Shady Grove* in determining whether an anti-SLAPP statute applies in federal court.²⁶¹

As previously explained, the *Shady Grove* analysis is as follows: as a threshold matter, courts must determine whether a federal rule answers the same question as, is broad enough to cover the same material as, or directly conflicts with the state law.²⁶² If the answer to those questions is yes, then the federal rule applies so long as it does not violate the Rules Enabling Act. Specifically, application of the federal rule cannot abridge, enlarge, or modify a substantive right.²⁶³

258. *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (emphasis added) (citations omitted).

259. *See supra* Part I.C.

260. "Courts deciding whether these anti-SLAPP statutes apply in federal court agree that the issue falls into the 'special category concerning the relationship between the Federal Rules of Civil Procedure and a state statute that governs both procedure and substance in the state courts,' which is not the 'classic *Erie* question.'" *Caranchini v. Peck*, 355 F. Supp. 3d 1052, 1058 (D. Kan. 2018) (quoting *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010)).

261. *See supra* text accompanying notes 92–98.

262. *See supra* text accompanying notes 94–95.

263. "When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can be reasonably interpreted the avoid that impermissible result." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 422–23 (2010) (Stevens,

But if the federal rule does not answer the same question, then the state law applies so long as it does not violate the Rules of Decision Act²⁶⁴ and satisfies the “twin aims of *Erie*.”²⁶⁵

Circuits following the framework of *Shady Grove* have refused to apply state anti-SLAPP statutes in federal court on the basis that Federal Rules 12(b)(6) and 56 answer the same question or are sufficiently broad enough to cover the same issues as the state anti-SLAPP statutes.²⁶⁶ And these circuits have found that the application of Rules 12(b)(6) and 56 does not violate the Rules Enabling Act.²⁶⁷ The circuits agree, either explicitly or implicitly, that the respective anti-SLAPP statutes do not provide any substantive rights.²⁶⁸ It follows

J., concurring). But note that the Tenth Circuit in *Los Lobos Renewable Power v. Americulture, Inc.* declined to engage in this “complex *Erie* analysis . . . because, assuming one is able to read, drawing the line between procedure and substance in this case is hardly a ‘challenging endeavor.’ The plain language of the New Mexico anti-SLAPP statute reveals the law is nothing more than a *procedural* mechanism designed to expedite the disposal of frivolous lawsuits aimed at threatening free speech rights.” 885 F.3d 659, 668–69 (10th Cir. 2018) (emphasis in original).

264. 28 U.S.C. § 1652.

265. Schafer & Valsangikar, *supra* note 97, at 592.

266. *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1333–36 (D.C. Cir. 2015); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1352, 1356–57 (11th Cir. 2018); *Klocke v. Watson*, 936 F.3d 240, 244–45 (5th Cir. 2019); *La Liberte v. Reid*, 966 F.3d 79, 87–88 (2d Cir. 2020)

267. *Abbas*, 783 F.3d at 1336 (“We need not take a long time here to explain that Federal Rules 12 and 56 are valid under the Rules Enabling Act.”); *Carbone*, 910 F.3d at 1357 (“We have little difficulty concluding that Rules 8, 12, and 56 comply with the Rules Enabling Act and the Constitution.”); *Klocke*, 936 F.3d at 247–48 (noting that “there is really no doubt” that Rules 12 and 56 are “a valid exercise of Congress’s rulemaking authority” under the Rules Enabling Act”); *La Liberte*, 966 F.3d at 88.

268. *Abbas*, 783 F.3d at 1335 (quoting *Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014) (rejecting the defendant’s argument that D.C.’s special motion to dismiss provision embodies a substantive D.C. right not found in the federal rules, and instead holding that “[t]he D.C. Anti-SLAPP Act . . . establishes a new ‘procedural mechanism’ for dismissing certain cases before trial”); *Carbone*, 910 F.3d at 1355 (“The Georgia statute does not purport to alter a defendant’s rights to petition and freedom of speech under the Federal and Georgia Constitutions. Nor could it. The only change effectuated by the Georgia statute is to make it easier for a defendant to avoid liability for conduct associated with the exercise of those rights by providing a special *procedural* device—a “motion to strike”—that applies a heightened burden to the claims that fall within its ambit.”); *Klocke*, 936 F.3d at 247 (determining that the Texas Citizenship Participation Act does not create any substantive rights and instead “provides a procedural mechanism for vindicating existing rights”)

that the application of the federal rules could not possibly abridge, enlarge, or modify any substantive right.²⁶⁹

That's where Ohio's future anti-SLAPP law would differ. If it is determined that such a law provides a substantive right, Justice Stevens's concurrence from *Shady Grove* supports its application in federal court. Justice Stevens noted, "I . . . agree with Justice Ginsburg that there are some state procedural rules that federal courts *must* apply in diversity cases because they function as part of the State's definition of substantive rights and remedies."²⁷⁰ Stevens also stated that "[w]hen a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice."²⁷¹

Even without the support of Justice Stevens's concurrence, there is an argument that Ohio's future anti-SLAPP law must be enforced in federal court because Rules 12(b)(6) and 56 cannot answer the same question as the anti-SLAPP law, *and* even if they did, application of the rules would abridge or modify the anti-SLAPP law's substantive right.²⁷²

(quoting *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring)); *La Liberte*, 966 F.3d at 86 n.3.

269. But the above-cited cases did not make the necessary and explicit connection that the *application* of the federal rules to the anti-SLAPP statute does not violate the Enabling Act since the statutes do not provide substantive rights. In his *Shady Grove* concurrence, Justice Stevens noted that "an *application* of a federal rule that effectively abridges, enlarges, or modifies a state-created right" cannot govern. 599 U.S. at 422 (emphasis added). But the circuits analyzed whether Federal Rules 12 and 56 facially—not as applied—violate the Enabling Act. *See supra* note 267 and accompanying text.

270. *Shady Grove*, 559 U.S. at 416–17 (Stevens, J., concurring) (emphasis added). "A 'state procedural rule, though undeniably 'procedural' in the ordinary sense of the term,' may exist 'to influence substantive outcomes,' and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Id.* at 419–20 (quoting *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995)).

271. *Id.* at 420.

272. In *Abbas*, then-Judge Kavanaugh held that anti-SLAPP statute with a probability requirement "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial," and that Rules 12 and 56 answer the same question about when a court must dismiss a case before trial. 783 F.3d at 1333–34. But *Abbas* determined that the D.C. anti-SLAPP statute does not establish any substantive rights. *Id.* at 1335. Alternatively, Ohio's future anti-SLAPP law should establish a substantive right, and its procedural mechanism should attempt to answer a totally different question than D.C.'s anti-SLAPP statute. Under the law, the relevant inquiry should be whether the defendant has met their

More specifically, under Ohio's future anti-SLAPP law, a person who engages in protected communication is immune from any civil action. The purpose of the law is to allow wrongfully sued defendants to escape the exorbitant costs of litigation (e.g., back-and-forth motions and discovery). Applying Rules 12(b)(6) and 56 in lieu of an Ohio anti-SLAPP law's procedural mechanisms would not safeguard the law's substantive right—immunity from suit.²⁷³ This is the conclusion that the court came to in *Godin v. Schencks* to support the application of Maine's anti-SLAPP statute in federal court.²⁷⁴ *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, though decided prior to *Shady Grove*, also supports this conclusion.²⁷⁵

*D. Incorporate Three Key Provisions from
Previous Ohio Anti-SLAPP Bills*

There are three central provisions in Ohio's previous anti-SLAPP bills: (1) the discovery stay; (2) the availability of appeal; and (3) the fee-shifting provision. Without these features, any future Ohio anti-SLAPP law would fail to achieve the purpose of anti-SLAPP statutes generally: allowing for the expeditious dismissal of frivolous lawsuits

requisite burden to avoid suit entirely, not the circumstances under which the case is to be dismissed. Therefore, Rules 12(b)(6) and 56 could not answer the same question. But if the Sixth Circuit decides that Rules 12 and 56 *do* answer the same question, it might prove difficult to argue that they violate the Rules Enabling Act. "So far, the Supreme Court has rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act." *Id.* at 1336. *But see supra* note 269 (explaining how circuits have not determined whether the *application* of the federal rules would modify the state's substantive right).

273. "I also agree with Justice Ginsburg that there are some state procedural rules that federal courts must apply in diversity cases because they function as part of the State's definition of substantive rights and remedies." *Shady Grove*, 559 U.S. at 416–17 (Stevens, J., concurring). *But cf.* 3M Co. v. Boulter, 842 F. Supp. 2d 85, 108 (D.D.C. 2012) ("[E]ven assuming a substantive right is created, the Anti-SLAPP Act cannot apply in this Court because the D.C. Council has clearly mandated the *procedure* for enforcing any such substantive right that preempts Federal Rules 12 and 56.") (emphasis in original).

274. 629 F.3d 79, 88–90 (1st Cir. 2010).

275. *Id.* at 972–73. But in *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1356 (11th Cir. 2018), the court noted that *Newsham* "fails to appreciate that a special purpose distinct from that of the relevant Federal Rules is insufficient to eliminate a conflict between the Federal Rules and a state statute."

without subjecting the wrongfully sued to lengthy and expensive litigation.²⁷⁶

1. Mandatory and Discretionary Fee-Shifting

Under all versions of Ohio's proposed anti-SLAPP legislation, if a court grants the anti-SLAPP motion, the court *must* award the defendant reasonable attorney's fees and costs. This provides a lot more protection to wrongfully sued defendants than the discretionary award of sanctions under Federal Rule 11 or Ohio Revised Code section 2323.51. It should be a nonnegotiable provision of a future Ohio anti-SLAPP law.²⁷⁷

In addition to attorney's fees and court costs, S.B. 206 and S.B. 215 would have afforded the court discretion to award the defendant "such punitive or exemplary monetary sanctions as the court finds sufficient to deter the filing of similar actions in the future."²⁷⁸ This discretionary award is similar to the TCPA.²⁷⁹ While the TCPA and Ohio S.B. 206

276. *Anti-SLAPP Legal Guide*, *supra* note 17 (noting that anti-SLAPP laws "typically provide critical protections to the news media—allowing defendants to secure a quick dismissal before the costly discovery process begins, permitting defendants who win their anti-SLAPP motions to recover attorney's fees and costs, automatically staying discovery once the defendant has filed an anti-SLAPP motion, and allowing defendants to immediately appeal a trial court's denial of an anti-SLAPP motion").

277. The drafters of UPEPA recognized the importance of anti-SLAPP mandatory fee-shifting provisions: "States that do not impose a mandatory award upon dismissal of a cause of action will become safe havens for abusive litigants. Without the prospect of having to financially reimburse a successful moving party, SLAPP plaintiffs will be able to file their frivolous suits in such states with impunity, knowing that, at worst, their claims will only be dismissed. But because moving parties would be financially responsible for the expense of obtaining that dismissal, the effect of the abusive cause of action is nevertheless achieved." UNIF. PUB. EXPRESSION PROT. ACT § 10 cmt. 1 (UNIF. L. COMM'N 2020).

278. S.B. 215, 133d Gen. Assemb., Reg. Sess. § 2305.64(A)(2) (Ohio 2019). But note, however, that if the court denies the anti-SLAPP motion and finds that the motion was frivolous, the court has discretion to award the plaintiff "reasonable attorney's fees, court costs, and other reasonable expenses incurred in responding to the special motion to strike." *Id.* § 2305.64(B). In other words, while the court *must* award a *defendant* reasonable attorney's fees and court costs and has discretion to award additional sanctions if it grants the anti-SLAPP motion, the court has discretion to award any fees, costs, or expenses to the *plaintiff* if the anti-SLAPP motion is denied. And courts do not have discretion to award sanctions to a plaintiff even if the anti-SLAPP motion was frivolous. *See id.* § 2305.64.

279. The court "may award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions

and S.B. 215 afford the court discretion in awarding the defendant monetary sanctions, both Ohio S.B. 237 and UPEPA do not provide for this. Rather, if the defendant prevails on its anti-SLAPP motion, UPEPA only requires the court to “award court costs, reasonable attorney’s fees, and reasonable litigation expenses related to the motion.”²⁸⁰ “Reasonable litigation expenses” is defined as “the hard costs an attorney incurs in the . . . defense of the motion” such as “copies and faxes, postage, couriers, expert witnesses, consultants, private court reports, and travel.”²⁸¹ S.B. 237 also requires the court to award “reasonable attorney’s fees, court costs, and other reasonable litigation expenses to the moving party,” but does not define the latter.²⁸²

To deter the filing of future frivolous lawsuits, Ohio’s future anti-SLAPP law should incorporate S.B. 206 and S.B. 215’s provisions regarding mandatory *and* discretionary fees.

Finally, S.B. 206’s and S.B. 215’s sections governing the award of attorney’s fees and court costs provide that in addition to such recovery, the defendant may bring a separate claim or action against the plaintiff who filed the SLAPP suit to recover compensatory damages (capped at \$500), punitive damages, and the reasonable attorney’s fees and costs associated with bringing the separate cause of action.²⁸³ This provision provides an additional deterrent against frivolous lawsuits, and Ohio’s future anti-SLAPP law should include it.²⁸⁴

described in this chapter.” TEX. CIV. PRAC. & REM. CODE. ANN. § 27.009(a)(2) (West 2020). But note that while the previous Ohio bills intended to deter filing of similar actions *generally*, the TCPA seeks to deter that *specific party* from bringing similar actions. Ohio’s future anti-SLAPP law should keep its broader language to deter all people—not just the party bringing the frivolous action—from bringing SLAPP suits.

280. UNIF. PUB. EXPRESSION PROT. ACT § 10 (UNIF. L. COMM’N 2020). But note that if the anti-SLAPP motion is denied and the court finds that the anti-SLAPP motion was “frivolous or filed solely with intent to delay the proceeding,” then the party who filed the lawsuit is entitled to these costs, fees, and expenses. *Id.*

281. *Id.* § 10 cmt. 5.

282. S.B. 237, 135th Gen. Assemb., Reg. Sess. § 2747.05(A) (Ohio 2024).

283. S.B. 206, 132d Gen. Assemb., Reg. Sess. § 2305.64 (Ohio 2017); Ohio S.B. 215 § 2305.64.

284. Nevada similarly includes a separate cause of action. NEV. REV. STAT. § 41.670(c) (2021). The UPEPA and TCPA do not.

2. Discovery Stay

All three Ohio anti-SLAPP bills provide that discovery in the case must be stayed after a defendant files an anti-SLAPP motion.²⁸⁵ However, the court has discretion to allow a party “limited discovery” of specific information.²⁸⁶

The discovery-stay provision is important to protect the filer of the anti-SLAPP motion “from the burdens of litigation,” which include discovery.²⁸⁷ In its written testimony to the Government Oversight and Reform Committee, which urged the Senate to pass S.B. 206, the Ohio News Media Association recognized the OCPA’s limitation on discovery as a “key element” because it “insulate[s] defendants against ruinous discovery costs if the suit is meritless.”²⁸⁸

3. Right to Appeal

Ohio’s anti-SLAPP bills expressly provide an interlocutory right of appeal to a party whose anti-SLAPP motion is denied.²⁸⁹ This is a key provision because “[w]ithout it, a defendant who loses an anti-SLAPP motion would be forced to continue to litigate the entire trial before the finding on the motion could ever be appealed.”²⁹⁰

For a future Ohio anti-SLAPP law to function as one of the nation’s strongest, it must include the right to interlocutory appeal. Indeed, not all anti-SLAPP statutes provide for interlocutory appeals, but the

285. Ohio S.B. 206 § 2305.63(C)(4)(a); Ohio S.B. 215 § 2305.63(C)(4)(a); Ohio S.B. 237 § 2747.03(A)(1).

286. Ohio S.B. 206 § 2305.63(C)(4)(b); Ohio S.B. 215 § 2305.63(C)(4)(b); Ohio S.B. 237 § 2747.03(C). While S.B. 206 and S.B. 215 provide for limited discovery *only if* the party seeking discovery “shows by affidavit good cause why the discovery is necessary . . . and why the party’s burden . . . cannot be discharged without the discovery,” S.B. 237 does not include the good-cause requirement. *Compare* Ohio S.B. 215 § 2305.63(C)(4)(b), *and* Ohio S.B. 206 § 2305.63(C)(4)(b), *with* Ohio S.B. 237 § 2747.03(C).

287. UNIF. PUB. EXPRESSION PROT. ACT § 4 cmt. 1 (UNIF. L. COMM’N 2020).

288. *Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S. Comm. on Gov’t Oversight & Reform*, 132d Gen. Assemb., Reg. Sess. 4 (Ohio 2017) (statement of Dennis Hetzel, President and Executive Director, Ohio News Media Association).

289. “If the court denies a special motion to strike filed under section 2305.63 of the Revised Code, the denial is a final order under section 2505.02 of the Revised Code and the defendant has an interlocutory right of appeal under section 2505.02 of the Revised Code.” Ohio S.B. 206 § 2305.64(C). *See also* Ohio S.B. 215 § 2305.64(C); Ohio S.B. 237 § 2747.05(C).

290. Dan Greenberg, David Keating & Helen Knowles-Gardner, *Anti-SLAPP Statutes: 2023 Report Card*, INST. FOR FREE SPEECH (Nov. 2, 2023), <https://www.ifs.org/anti-slapp-report/> [<https://perma.cc/F6Y9-59UM>].

Institute for Free Speech, which annually grades states' anti-SLAPP statutes, considers an immediate right of appeal to be *so* important that it assigns the most points to anti-SLAPP statutes that have that right.²⁹¹

*E. Keep S.B. 206 and S.B. 215's Definition
of "Protected Communication"*

One of S.B. 237's most fatal flaws is its failure to define "communication." Consequently, it does not establish adequate protections for SLAPPED defendants. Rather, S.B. 237 applies to a "cause of action . . . against a person" based on (1) "the person's communication" either in a governmental proceeding or regarding an issue under consideration or review in a governmental proceeding; or (2) the person's exercise of their rights guaranteed by the United States and Ohio Constitution.²⁹² Based on this vague definition, the bill's protections are inadequate.

A future Ohio anti-SLAPP law should instead adopt S.B. 206 and S.B. 215's definitions.²⁹³ Unlike S.B. 237, S.B. 206 and S.B. 215 meticulously define "protected communication":

Any written or oral statement or communication for which a speaker may not be subject to liability in a civil action under the First Amendment to the United States Constitution, Section 11 of Article 1 of the Ohio Constitution, or a similar provision in the applicable constitution of the jurisprudence in which the statement or communication was made.²⁹⁴

For clarity, S.B. 206 further defines "written or oral statement or communication":

291. *Id.* In 2023, the Institute increased the grades for Connecticut, Maine, New York, and Oregon based on their respective statutes' rights to interlocutory appeal. *Id.* The Institute for Free Speech describes itself as "the nation's largest organization dedicated solely to protecting First Amendment political speech rights." *About Us*, INST. FOR FREE SPEECH, <https://www.ifs.org/about-us/> [<https://perma.cc/CM3Q-CGML>].

292. Ohio S.B. 237 § 2747.01(B)(1)–(3).

293. The definitions are the same in both bills. *See* Ohio S.B. 215 § 2305.61(D)–(E); Ohio S.B. 206 § 2305.61(D)–(E).

294. Ohio S.B. 206 § 2305.61(D). *Compare id.*, with Ohio S.B. 237 § 2747.01(B)(3) ("The person's exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the United States Constitution or Ohio Constitution, on a matter of public concern.").

[T]he making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, and electronic. An electronic statement or communication includes a statement or communication made on an internet web site.²⁹⁵

If a court can easily discern whether a defendant's speech is protected by the applicable anti-SLAPP statute, then the statute serves its purpose—disposing of the case without lengthy litigation. But when an anti-SLAPP statute is overly broad or vague, litigants are at risk of a costly and time-consuming statutory interpretation battle. This is where S.B. 206 is especially strong—it enumerates protected communications. Of these enumerations, the two most important protected communications for a future Ohio anti-SLAPP law are (1) “[a]ny written or oral statement or communication made in direct connection with an issue of public interest” and (2) “[a]ny written or oral statement or communication between individuals who join together to collectively express, promote, pursue, or defend common interests.”²⁹⁶

F. Do Not Expand the Number of Exemptions

Assuming that a future Ohio anti-SLAPP law will incorporate the definitions of protected communications from S.B. 206 and S.B. 215, it should also incorporate the same exemptions. S.B. 206 lists four exemptions, including the commercial-speech exemption (and an exception to the commercial-speech exemption).²⁹⁷ The exemptions are nearly identical to the exemptions in Texas's anti-SLAPP law prior to the 2019 amendments.²⁹⁸ As of 2019, the TCPA includes thirteen exemptions from the TCPA.²⁹⁹ Because the 2019 amendments to the TCPA, which include the numerous additional exemptions, have been construed to narrow the TCPA's protections,³⁰⁰ Ohio should be cautious in expanding the number of exemptions in a future draft of the bill.

295. Ohio S.B. 206 § 2305.61(E).

296. *Id.* § 2305.61(D)(4)–(5).

297. Ohio S.B. 206 § 2305.62(C).

298. Citizens Participation Act, ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962–63 (effective June 17, 2011 to Sept. 1, 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West 2020)).

299. Act of June 2, 2019, ch. 378, § 9, 2019 Tex. Gen. Laws 684, 686–87 (effective 2019 to present) (codified at TEX. CIV. PRAC. & REM. CODE § 27.010 (West 2020)).

300. Amy Leila Saberian Prueger & Zackery L. Horton, *The Narrowed Texas Citizenship Participation Act: A Look at What It Means for SLAPP Suits*, 85 TEX. BAR J. 124, 124 (2022).

*G. Expand Scope of Availability of Anti-SLAPP Motion
to Include Claims Brought Against a Person Based upon
“or in Response to” a Protected Communication*

S.B. 215 provides that “[i]f a claim is brought against a person *based upon* a protected communication, the defendant may file a special motion to strike.”³⁰¹ To expand the scope of future anti-SLAPP protections in Ohio, the anti-SLAPP law should include S.B. 215’s language with a minor tweak: protected communications should include claims brought against a person based upon *or in response to* a protected communication.³⁰²

H. Include Protections for Anonymous Speakers

Finally, Ohio’s future anti-SLAPP law should include protections for anonymous speakers. The Ohio News Media Association, in urging the Ohio Senate to pass S.B. 206, highlighted the Bill’s protection for anonymous speakers as a “key element,” stating, “[t]here are also protections to alert anonymous digital commenters who face litigation. This important change would make Ohio a national trend-setter.”³⁰³

Indeed, in the *Saltsman* case, the ACLU believed that “the real goal of this lawsuit [was] to discover the identity of anonymous online commenters so that they, and future commenters will be intimidated and discouraged from voicing their opinions.”³⁰⁴ Codifying protections

301. S.B. 215, 133d Gen. Assemb., Reg. Sess. § 2305.63(A) (Ohio 2019) (emphasis added).

302. Jurisdictions differ in how their anti-SLAPP statutes apply to protected communications. In Nevada, a person who “engages” in a protected communication is immune from suit. NEV. REV. STAT. § 41.650 (2021). In 2019, Texas amended a party’s ability to file an anti-SLAPP motion. Prior to 2019, a party could file an anti-SLAPP motion “[i]f a legal action is based on, *relates to*, or is in response to a party’s exercise of” protected acts. Citizens Participation Act, ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (emphasis added) (effective 2011 to 2019) (current version at TEX. CIV. PRAC. & REM. CODE. ANN. § 27.003(a) (West 2020)). The 2019 amendment removed “relates to” from this section. See 2019 Tex. Gen. Laws at 685 (effective 2019 to present) (codified at TEX. CIV. PRAC. & REM. CODE. ANN. § 27.003(a)(2) (West 2020)). Finally, Section 2(b) of UPEPA states that it “applies to a [cause of action] asserted in a civil action against a person based on the person’s” protected communications. UNIF. PUB. EXPRESSION PROT. ACT § 2(b) (UNIF. L. COMM’N 2020).

303. *Ohio Citizen Participation Act: Hearing on S.B. 206 Before the S. Comm. on Gov’t Oversight & Reform*, 132d Gen. Assemb., Reg. Sess. 4 (Ohio 2017) (statement of Dennis Hetzel, President and Executive Director, Ohio News Media Association).

304. *ACLU of Ohio Offers to Represent Anonymous Defendants in Jefferson County Defamation Case*, *supra* note 8.

for anonymous speakers would further safeguard the anonymous speech that the Supreme Court has held to be protected under the First Amendment.³⁰⁵

To protect anonymous speakers in the exercise of their First Amendment rights, the future draft of the OCPA should include the *Dendrite* standard³⁰⁶ and also allow anonymous speakers to file anti-SLAPP motions without having to reveal their identities.

CONCLUSION

The various proponents who have testified in support of S.B. 206 and S.B. 215 have demonstrated that an Ohio anti-SLAPP law could benefit many people and organizations—newspapers, journalists, advocates, protestors, domestic and sexual violence survivors, and doctors, just to name a few.³⁰⁷ When Senator Huffman testified before the Senate Judiciary Committee in November 2019, he stated that Ohio could “join more than twenty-eight states that have already adopted similar laws.”³⁰⁸ Now, thirty-three states and D.C. have adopted anti-SLAPP laws.³⁰⁹ It is time for Ohio to join the majority and adopt an anti-SLAPP bill that adequately protects those exercising their rights protected under the U.S. and Ohio Constitutions.

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305. See Allison Hayward, *Anonymous Speech*, FREE SPEECH CENTER, <https://firstamendment.mtsu.edu/article/anonymous-speech> [<https://perma.cc/HM8B-2BBN>] (Sept. 19, 2023).

306. See *supra* notes 211-14 and accompanying text.

307. *Senate Bill 206 Committee Activity*, *supra* note 176; *Senate Bill 215 Committee Activity*, *supra* note 218.

308. *Ohio Citizen Participation Act: Hearing on S.B. 215 Before the S. Judiciary Comm.*, 133d Gen. Assemb., Reg. Sess. 1 (Ohio 2019) (statement of Sen. Matt Huffman, 12th Dist.).

309. See *supra* note 17 and accompanying text.

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