Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation

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ABSTRACT

For nearly thirty years, states have been adopting laws that attempt to stop rich, sophisticated parties from using costly litigation as a weapon to punish and silence their less-affluent critics. Known as "anti-SLAPP" statutes, these measures have been incredibly effective in forcing certain plaintiffs to bring forth evidence at an early stage of litigation to show their claims have merit.

Unfortunately, a troubling trend has emerged. Some states' courts are interpreting particular language within their anti-SLAPP laws to allow plaintiffs to survive early dismissal by merely pointing to unproven and unsworn-to allegations in their pleadings. This movement is on the rise as Congress recently considered a federal anti-SLAPP bill that just so happens to feature this same ambiguous language.

This Article explores how state courts are arriving at entirely opposite holdings despite sharing statutory language that is identical in form and purpose. Ultimately, I offer specific suggestions about how Congress and state legislatures can fix their laws to avoid uncertainty and fully effectuate the purpose of anti-SLAPP legislation.

I. INTRODUCTION

We've all read them: scathing Internet reviews of businesses, products, and services, all accessible at the swipe of a finger on a phone or with a few mouse clicks on a computer.[1] They've come to play an important role in how people decide to spend their money in an economy that relies more on technology with each passing day.[2]

But there can be a cost.[3] Consider these three separate stories from users of the website Yelp:

- A Texas couple posted a review about a pet-sitting company they used, complaining about cloudy water in the fish bowl and the company's $5 extra fee for dog walking. They gave the business a one-star review. The pet-sitting company sued for up to $1 million when the couple refused to take the post down.[4]
- A Virginia woman took her dog to obedience school, and when the training wasn't what she expected, she requested a pro-rated refund and wrote a negative review: "In a nutshell, the services delivered were not as advertised and the owner refused a refund." The owner of the obedience school sued the woman for $65,000.[5]
- A Colorado couple wrote about a flooring company: "Absolutely horrible experience . . . . I have 4,000 square feet of sandpaper on the floor and [the company] believes there is nothing wrong. I have shoe prints in the stain, dust, debris and filler trapped under my stain . . . . The quality of the work is absolutely deplorable." The couple paid $15,000

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1. Clay Calvert, *Businesses can actually sue you for posting negative reviews – and now Congress is fighting back*, THE CONVERSATION (Nov. 10, 2015, 5:47 AM), https://perma.cc/A7N6-76KJ.

2. Myles Anderson, *88% Of Consumers Trust Online Reviews As Much As Personal Recommendations*, SEARCH ENGINE LAND (July 7, 2014, 10:22 AM), https://perma.cc/Z3ZF-DBWC.

3. *See People are getting sued for doing this one thing online*, THE KIM KOMANDO SHOW (Aug. 19, 2014), https://perma.cc/AWF4-978B.

4. Cristin Severance, *Couple Fights Off $1 Million Lawsuit Over Bad Yelp Review*, CBS DFW (May 4, 2016, 9:40 PM), https://perma.cc/S57N-YPDV.

5. Justin Jouvenal, *Negative Yelp, Angie's List reviews prompt dog obedience business to sue*, THE WASH. POST (Mar. 25, 2015), https://perma.cc/4SQJ-R7T5.

> to settle a business disparagement suit brought by the company because they knew settlement would be cheaper than fighting the case in court.[6]

The use of litigation, or even the threat of a lawsuit, as an intimidation tool to silence and punish one's critics is hardly a new tactic.[7] But it seems to have risen to a new degree in an Internet age where every consumer is a potential reviewer and untapped customers rely heavily on the web to find products and services.[8] Consequently, frivolous lawsuits aimed at muzzling criticism—not just from online reviews, but from a wide panoply of expressive activities—are on the rise.[9]

When someone files this kind of suit, it's known as a "SLAPP"—an acronym for "strategic lawsuit against public participation."[10] And such "strategery"[11] can have very real chilling effects on important public discourse.[12] As a result, since 1989, twenty-eight states, as well as the District of Columbia and the territory of Guam, have passed what are known as "anti-SLAPP" statutes—laws that attempt to deter individuals and companies from using the court system as a weapon instead of a forum for legitimate relief.[13] These statutes generally work in the same way: they provide defendants a special, expedited procedure to seek a quick dismissal of the case, and they install cost-shifting provisions that attempt to economically disincentivize the filing of a frivolous suit.[14]

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6. Rob Low, *Yelp review gets couple sued*, FOX 31 DENVER (May 18, 2015, 9:16 PM), https://perma.cc/7RS4-3RDN.

7. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3, 5-6 (1989).

8. Megan Totka, *How to Handle Bad Online Reviews for Your Small Business*, SMALL BUS. TRENDS (Aug. 21, 2013), https://perma.cc/D482-YVHB.

9. Tim Evans, *Sued for posting a negative online business review? It can happen*, INDIANAPOLIS STAR (Nov. 15, 2014, 8:21 PM), https://perma.cc/6WZX-PX6Q; *Examining H.R. 2304, the SPEAK FREE Act Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 70 (2016) (statement of Laura Lee Prather, Partner, Haynes and Boone, LLP, Austin, Texas) [hereinafter "*Examining H.R. 2304*"], http://perma.cc/9MTK-6WEC.

10. Pring, *supra* note 7, at 4.

11. "The word 'strategery' (/strəˈtiːdʒəri/ strə-TEE-jər-ee) was coined for a *Saturday Night Live* sketch . . . airing October 7, 2000, which satirized the performances of George W. Bush and Al Gore, two candidates for President of the United States, during the first presidential debate for election year 2000. Comedian Will Ferrell played Bush and used the word 'strategery' (a mock-Bushism playing on the word 'strategy'), when asked by a mock debate moderator to summarize 'the best argument for his campaign[,]' thus satirizing Bush's reputation for mispronouncing words . . . . After the 2000 presidential election, people inside the Bush White House reportedly began using the term as a joke, and it later grew to become a term of art among them meaning oversight of any activity by Bush's political consultants . . . . The term is now widely used in comic and popular discourse across the political spectrum." *Strategery*, WIKIPEDIA, https://perma.cc/79FQ-L3GV (last visited Apr. 17, 2017) (citations omitted).

12. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 30 (1989).

13. Robert T. Sherwin, *Clones, Thugs, 'N (Eventual?) Harmony: Using the Federal Rules of Civil Procedure to Simulate a Statutory Defamation Defense and Make the World Safe From Copyright Bullies*, 64 DEPAUL L. REV. 823, 846-50 (2015); *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, https://perma.cc/S78U-8QVM (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Washington).

14. Dwight H. Merriam & Jeffrey A. Benson, *Identifying and Beating a Strategic Lawsuit Against Public Participation*, 3 DUKE ENVTL. L. & POL'Y F. 17, 34-35 (1993).

But as many of these statutes begin to be interpreted by their own state courts, a problem has begun to emerge.[15] It's a problem endemic to nearly half of the thirty existing statutes,[16] which have a peculiar tendency to borrow exact language from each other.[17] In particular, courts are coming to markedly different conclusions about what the term "evidence" means when considering special motions to dismiss.[18] The reason has to do with the wording of these statutes, many of which instruct trial courts to "consider the pleadings and supporting and opposing affidavits" of the parties.[19] On the surface, that seems rather innocuous, and given the purpose of these laws—to provide a quick and cost-effective way of weeding out frivolous litigation—it makes sense.[20] But when the statutes are put to work, some key questions arise: does a party *have to* produce affidavits?[21] Or can it rely solely on its pleadings?[22] If so, do those pleadings need to be verified?[23] Or are even unsworn-to pleadings "evidence" for the purpose of the motion to dismiss?[24]

That these are questions without easy answers is perfectly illustrated by the case law coming out of the various states.[25] The best illustration of this conundrum is California versus Texas.[26] Both have statutes that use nearly identical language about what kinds of evidence the court must consider, and yet they've come to exactly opposite results: California courts say that pleadings—even if verified—

15. *See infra* Part III.

16. Actually, there are only twenty-nine "existing" statutes, as Washington's was struck down by its Supreme Court in 2015. Davis v. Cox, 351 P.3d 862, 875 (Wash. 2015) (en banc). Nevertheless, I include Washington's law in the count of thirty enacted statutes.

17. *Compare* LA. CODE CIV. PROC. ANN. art. 971(A)(2) (2012) ("In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.") *with* ME. REV. STAT. ANN. tit. 14, § 556 (2012) ("In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based.").

18. *See infra* Part III.

19. *See, e.g.*, OR. REV. STAT. § 31.150(4) (2010) ("In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.").

20. *See* Jonathan Segal, *Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America:* Borat, Reality Bites, *and the Construction of an Anti-SLAPP Fence Around the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 639, 642-43 (2009).

21. *See* Serafine v. Blunt, 466 S.W.3d 352, 360 (Tex. App. 2015) (considering a party's argument that an anti-SLAPP movant had to provide an affidavit or live testimony to show that the claims at issue were filed in response to one's exercise of free speech).

22. *See* Cuba v. Pylant, 814 F.3d 701, 711 (5th Cir. 2016) (holding that the Texas anti-SLAPP statute allows parties to rely on their pleadings in lieu of affidavit testimony).

23. *See* Salma v. Capon, 74 Cal. Rptr. 3d 873, 885 (Cal. Ct. App. 2008) (holding that unverified allegations in the pleadings or averments made on information and belief are insufficient); Evans v. Unkow, 45 Cal. Rptr. 2d 624, 628-29 (Cal. Ct. App. 1995) (same).

24. *See* Fawcett v. Grosu, 498 S.W.3d 650, 662-63 (Tex. App. 2016) (holding that a plaintiff is permitted to rely on his unsworn pleadings (including exhibits) in response to an anti-SLAPP motion to dismiss).

25. *See infra* Part III.

26. *See infra* Part III.

aren't sufficient evidence to establish a plaintiff's burden under the statute.[27] Texas courts, meanwhile, are holding that plaintiffs can defeat anti-SLAPP motions to dismiss by merely pointing to facts in their live pleadings.[28]

In short, many states have on their hands a ticking time bomb of ambiguity that threatens to compromise the safeguards anti-SLAPP statutes provide.[29] If, indeed, more courts follow the lead of states like Texas, then what has been regarded as a strong and growing shield against vexatious litigation will be watered down to little more than a heightened-pleading standard, easily reachable by even the most opportunistic of bullying plaintiffs.[30] This issue takes on particular importance given that Congress has recently considered a federal anti-SLAPP statute being pushed by Yelp that—surprise, surprise—contains the exact statutory language giving rise to all this uncertainty.[31]

Part II of this Article will discuss anti-SLAPP statutes in general, and how they operate—or rather, are intended to operate—to deter frivolous litigation.[32] Part III will more fully expose the problem at hand: specifically, how ambiguously drafted language is causing some states to arrive at different answers about what kind of evidence plaintiffs need to offer to overcome their burdens in anti-SLAPP motions to dismiss.[33] In Part IV, this Article demonstrates why these differing approaches threaten to destabilize what has become a useful tool in combating frivolous litigation, with special focus on the recent federal anti-SLAPP proposal in Congress.[34]

II. UPSIDE THE HEAD: HOW ANTI-SLAPP STATUTES SEEK TO DISRUPT FRIVOLOUS LITIGATION

"Strategic lawsuit against public participation," or SLAPP, is a term used to describe a specific kind of lawsuit brought by plaintiffs with the intention of "silencing [their] opponents, or at least diverting their resources."[35] The credit for

27. *See, e.g.*, Finton Constr., Inc. v. Bidna & Keys APLC, 190 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2015) ("[The court] must rely on admissible evidence, not merely allegations in the complaint or conclusory statements by counsel.").

28. *See, e.g.*, *Fawcett*, 498 S.W.3d at 660 ("Based on section 27.006(a)'s directive ('the court shall consider the pleading and supporting and opposing affidavits . . .') and the Texas Supreme Court's interpretation that 'pleadings and evidence' setting forth the factual basis for a claim are sufficient to resist a TCPA motion to dismiss, [Plaintiff] was permitted to rely on his pleadings (including exhibits) in response to [Defendants'] motion to dismiss.") (citations omitted).

29. *See infra* Parts III and IV.

30. *See infra* Part IV.

31. Josh Harkinson, *Yelp Is Pushing a Law to Shield Its Reviewers From Defamation Suits*, MOTHER JONES (July 20, 2015, 6:05 AM), https://perma.cc/G9CV-K2FS; SPEAK FREE Act of 2015, H.R. 2034, 114th Cong. (2015), https://perma.cc/N73Z-FYTF.

32. *See infra* Part II.

33. *See infra* Part III.

34. *See infra* Part IV.

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

coining the label goes to Professors George Pring and Penelope Canan, who in 1989 penned companion law review articles.[36] Pring wrote:

> Americans are being sued for speaking out politically. The targets are not typically extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[37]

Pring observed that the types of activities that were getting citizens in legal hot water were things like circulating petitions, calling consumer protection offices, reporting police misconduct, and speaking out at school board meetings—all expression that we should consider to be at the core of the First Amendment.[38] But when plaintiffs with lots of money and experience with the legal system elect to use the courts as a means of punishing their detractors, their lawsuits, which can come in the form of defamation, tortious interference, conspiracy, nuisance, and intentional infliction of emotional distress claims, will effectively silence important speech.[39] That's true even though their cases typically have no merit; their suits achieve success because defendants can't afford to defend them, and thus either retract their statements or agree to censor themselves in the future.[40] Ultimately, those who abuse the system for the purpose of silencing their critics hope that others will learn about the perils of opposition.[41] That, in turn, causes everyone to check their speech on controversial matters, and in the end, public discourse is stifled.[42]

In 1989—the same year Pring and Canan published their seminal articles—Washington became the first state to pass what is known as an "anti-SLAPP" statute.[43] Since then, twenty-seven other states, as well as the District of Columbia and the territory of Guam, have joined the fight by enacting various forms of legislation to address SLAPP cases.[44]

36. Pring, *supra* note 7, at 4; Canan, *supra* note 12, at 23.

37. Pring, *supra* note 7, at 3.

38. *Id.* at 5; Sherwin, *supra* note 13, at 844-46.

39. Barker, *supra* note 35, at 402-03.

40. Lauren McBrayer, Note, *The DirecTV Cases: Applying Anti-SLAPP Laws to Copyright Protection Cease-and-Desist Letters*, 20 BERKELEY TECH. L.J. 603, 609 (2005).

41. Barker, *supra* note 35, at 403-04.

42. Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 113-14 (1988).

43. *See* WASH. REV. CODE §§ 4.24.500-.520 (2010). Interestingly, in 2015, Washington also became the first state to have its anti-SLAPP law struck down by its own Supreme Court. Davis v. Cox, 351 P.3d 862, 875 (Wash. 2015) (holding that Washington's law infringed on the "right of trial by jury under article I, section 21 of the Washington Constitution because it require[d] a trial judge to invade the jury's province of resolving disputed facts and dismiss—and punish—nonfrivolous claims without a trial."). Technically, the New Hampshire Supreme Court was the first state high court to write that an anti-SLAPP law *could* violate the right to a trial by jury. *See* Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1015 (N.H. 1994). But in that instance, the court had been asked by its state senate to opine about the constitutionality of pending anti-SLAPP legislation. *Id.* at 1012.

44. *State Anti-SLAPP Laws*, *supra* note 13.

To be sure, most of the thirty statutory efforts differ from each other in some respect.[45] Some are broad in scope, while others are narrow.[46] Some impose high burdens on plaintiffs, while others feature low hurdles.[47] But it's safe to say that the typical anti-SLAPP law seeks to root out and end frivolous cases—those brought only to harass or punish one's critics—before the costs of litigation escalate and prevent a defendant from fighting.[48] They typically accomplish this goal by: (1) granting defendants specific avenues for filing motions to dismiss or strike early in the litigation process; (2) requiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they're heard; (3) requiring the plaintiff to produce evidence that shows the case has merit; and (4) imposing cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry his burden.[49] What follows is a brief discussion of the various types of anti-SLAPP measures and how they attempt to accomplish their goals.

A. WHEN DO ANTI-SLAPP STATUTES APPLY?

The first inquiry into any anti-SLAPP law should be to ask what kind of "public participation" it covers.[50] Some statutes are narrow, only applying to speech in front of or aimed at governmental bodies.[51] Others are quite broad, applying to any speech that touches any matter of public concern.[52]

Take, for example, Delaware's statute.[53] It only affects a claim "for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission."[54] A public applicant or permittee is anyone "who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body . . . ."[55] In other words, it only applies when a plaintiff, who has applied for some sort of governmental permission, sues a person who has voiced opposition to that application.[56]

45. *See Examining H.R. 2304*, *supra* note 9, at 51 n.1 (statement of Alexander A. Reinert, Professor of Law, Benjamin N. Cardozo School of Law).

46. *See id*.

47. *See id*.

48. *See* McBrayer, *supra* note 40, at 610.

49. *See* Noah P. Peeters, Note, *Don't Raise That Hand: Why, Under Georgia's Anti-SLAPP Statute, Whistleblowers Should Find Protection from Reprisals for Reporting Employer Misconduct*, 38 GA. L. REV. 769, 782 (2004); Laura Lee Prather & Justice Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH. L. REV. 725, 735-36 (2015).

50. *See* Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1248-70 (2007).

51. *Id.* at 1248-53.

52. *Id.* at 1260-70.

53. *See* DEL. CODE ANN. tit. 10, §§ 8136-38 (1992).

54. *Id.* at § 8136(a)(1).

55. *Id.* at § 8136(a)(4).

56. *See id.* at § 8136; Nichols v. Lewis, C.A. No. 1758-VCS, 2008 WL 2253192, at *1 (Del. Ch. May 29, 2008).

This type of narrow anti-SLAPP statute stands in contrast to other states that have chosen to give their laws a broader scope.[57] The District of Columbia, for example, provides that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest."[58] An "'issue of public interest' means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place."[59] So, in places like the District of Columbia, a defendant would have protection even if her speech didn't target a governmental body, so long as that speech was on some issue of concern to the public.[60]

Perhaps the broadest statute is Florida's, which prevents anyone from filing suit against another "without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue."[61] "Free speech in connection with public issues" is defined expansively to include statements "made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work."[62] Indeed, with the applicability standard in Florida apparently extending to *anything* that appears in print or an audiovisual work, it's hard to imagine a suit to which the statute *wouldn't* apply.[63]

B. HOW DO COURTS DECIDE WHAT LIVES AND WHAT DIES?

Many states follow a two-step approach when ruling on an anti-SLAPP motion to dismiss.[64] The first step focuses on the defendant, and whether he has carried his burden of establishing the statute's applicability.[65] That seems only fair; if the defendant is seeking to have a claim against him dismissed under a special mechanism, he ought to prove that mechanism applies before availing himself of the

57. *See* Hartzler, *supra* note 50, at 1260-70.

58. D.C. CODE § 16-5502(a) (2012).

59. *Id.* at §16-5501(3).

60. *See* Abbas v. Foreign Pol'y Grp., LLC, 975 F. Supp. 2d 1, 12 (D.D.C. 2013) (holding that any statements about a public figure would automatically qualify as an issue of public interest).

61. FLA. STAT. § 768.295(3) (2015).

62. *Id.* at § 768.295(2)(a).

63. *See id.*

64. Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 865-66 (2010).

65. *Id.* at 866. *See also, e.g.*, IND. CODE § 34-7-7-9(b) (1998) ("The person who files a motion to dismiss must state with specificity the public issue or issue of public interest that prompted the act in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana."); NEB. REV. STAT. § 25-21,245 (1994) ("A motion to dismiss based on a failure to state a cause of action shall be granted when the moving party demonstrates that the action, claim, cross-claim, or counterclaim subject to the motion is an action involving public petition and participation unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law.").

benefits.[66] Exactly what that level of proof amounts to will vary from jurisdiction to jurisdiction. Indiana, for example, requires that the movant "state with specificity" why his speech falls under the law.[67] Nebraska merely demands that the "moving party demonstrate[]" that the claim "is an action involving public petition and participation."[68] Nevada, like Texas, is a bit more specific, requiring that the court "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim 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."[69]

Assuming the defendant can satisfy his prescribed burden, courts then turn to the second step in the process: asking the plaintiff to show why the case should not be dismissed.[70] And, not surprisingly, the exact degree of the plaintiff's burden depends on what state he's in. Arizona's law, for instance, requires that the court grant the motion unless the plaintiff shows two things: (1) "that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law;" and (2) "that the moving party's acts caused actual compensable injury to the responding party."[71] Oklahoma's statute, on the other hand, requires dismissal unless "the party filing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question."[72]

Whatever the burden might be, this particular step is necessarily the stickiest in any anti-SLAPP analysis.[73] It's sticky for state legislatures, because they have to craft a bill that will accomplish the primary goal of anti-SLAPP legislation—"unmasking and dismissing" frivolous lawsuits—while being careful not to violate defendants' due process rights, rights to jury trials, and any state-created open courts guarantees.[74] It's equally sticky for plaintiffs, who have to marshal enough

66. Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 452 (Cal. Ct. App. 1994), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002) ("Traditionally, a party seeking to benefit from a statute bears the burden of making a prima facie showing the statute applies to her. We see no reason why that rule should not apply to a party seeking a special motion to strike under section 425.16. It is not only logical to put this burden on the party seeking the benefit of section 425.16, it is fundamentally fair that before putting the plaintiff to the burden of establishing probability of success on the merits the defendant be required to show imposing that burden is justified by the nature of the plaintiff's complaint.").

67. IND. CODE § 34-7-7-9.

68. NEB. REV. STAT. § 25-21,245.

69. NEV. REV. STAT. § 41.660(3)(a) (2015). *See also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2013) ("[A] court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.").

70. Barylak, *supra* note 64, at 866.

71. ARIZ. REV. STAT. ANN. § 12-752.B (2006).

72. OKLA. STAT. tit. 12, § 1434.C (2014).

73. *See* Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 452 (Cal. Ct. App. 1994), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).

74. *Id.* at 452, 454. *See also* Davis v. Cox, 351 P.3d 862, 874-75 (Wash. 2015) (holding that Washington's anti-SLAPP statute infringed on the Washington Constitution's right to jury trial).

"evidence"—whatever that term might mean—to satisfy new and oftentimes vague proof standards without the benefit of discovery.[75] Parts III and IV of this Article will zoom in on those issues.[76]

III. AN EVIDENTIARY CONUNDRUM AND TICKING TIME BOMB OF AMBIGUITY

The preceding section discussed how anti-SLAPP legislation typically works to achieve its goals of exposing and punishing litigious bullies.[77] Because the legislation itself usually establishes a detailed, specific framework for handling frivolous cases, a trial court's heavy lifting is generally confined to the "two-pronged" analysis explained above.[78] Again, once an anti-SLAPP dismissal motion is filed, the trial judge must first determine whether the defendant/movant has carried his burden of proving that the lawsuit relates to his public participation.[79] If the judge believes the defendant carried that burden, then the plaintiff/non-movant must establish that the case has whatever degree of merit the statute prescribes.[80]

So, to succeed in their respective endeavors, the parties must necessarily offer *something* to the court—some sort of evidence to persuade the judge on those two questions.[81] What *form* that evidence must take is the focus of the remainder of this Article. More to the point, what does the "evidence" need to look like? Affidavits?[82] Live witness testimony?[83] Facts alleged in the parties' pleadings?[84]

The majority of states' laws are silent on this precise question, so it would obviously fall to those states' courts to answer it.[85] To be clear, this Article is *not*

75. *See Wilcox*, 33 Cal. Rptr. 2d at 454-56.
76. *See infra* Parts III and IV.
77. *See supra* Part II.
78. *See supra* Part II(B).
79. Barylak, *supra* note 64, at 866.
80. *Id.*
81. *See id.*
82. *See, e.g.*, UTAH CODE ANN. § 78B-6-1403 (2008) ("A defendant in an action . . . may file: (a) an answer supported by an affidavit of the defendant detailing his belief that the action is designed to prevent, interfere with, or chill public participation in the process of government, and specifying in detail the conduct asserted to be the participation in the process of government believed to give rise to the complaint" and "[a]ffidavits detailing activity not adequately detailed in the answer may be filed with the motion.").
83. *See, e.g.*, NEV. REV. STAT. § 41.660.3(d) (2015) ("If a special motion to dismiss is filed pursuant to subsection 2, the court shall . . . [c]onsider such evidence, written *or oral, by witnesses* or affidavits, as may be material in making a determination . . . .") (emphasis added).
84. *See, e.g.*, HAW. REV. STAT. § 634F-2(5) (2002) ("The court shall make its determination based upon the allegations contained in the pleadings.").
85. *See, e.g.*, MO. ANN. STAT. § 537.528 (2012) (authorizing "a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation" but offering no guidance on what courts should consider or how to weigh the evidence).

concerned with those silent statutes; the apparent deference those legislatures have afforded to their courts renders this a rather uninteresting question in those states.[86]

But the twelve states that *have* statutorily answered the question all share something in common.[87] Remarkably, all of them use the same, or nearly the same, language in directing their courts to the "evidence" they must examine.[88] That language often reads:

> *In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.*[89]

In two instances—Texas and Oklahoma—this statutory directive lives in its own numbered section titled "Evidence" (Texas)[90] or "Evidence to consider by court" (Oklahoma).[91] In the remaining ten statutes, the provision exists as part of a longer string of text that sets out the procedure the court is to follow.[92] But regardless, for all the states that employ this wording, there's hardly any difference from jurisdiction to jurisdiction.[93]

And that's what makes this issue so remarkable: despite effectively identical language, states are adopting entirely contradictory approaches in application.[94] Part IV will explain *why* these competing approaches threaten to water down existing state laws (and proposed federal legislation) while injecting uncertainty into what should be a clear-cut statutory scheme.[95] But first, this Article scrutinizes these opposite constructions and offer several explanations for why they're occurring.[96] That discussion will examine the statutes and case law of the two states that have most clearly planted flags at opposite ends of the issue: California and Texas.[97]

86. Although, to the extent those states' courts are construing their laws to allow for parties to satisfy their burdens through pleadings alone, I would contend that such holdings do not fully effectuate the purpose of unmasking and disposing of frivolous litigation. *See infra* Part IV(A).

87. *But see* ARIZ. REV. STAT. ANN. § 12-752(B) (2006); CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2009); 7 GUAM CODE ANN. tit. 7, § 17106(d) (1998); IND. CODE § 34-7-7-9(c) (1998); LA. CODE CIV. PROC. ANN. art. 971(A)(2) (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012); MASS. GEN. LAWS ch. 231, § 59H (1996); OKLA. STAT. tit. 12, § 1435(A) (2014); OR. REV. STAT. § 31.150(4) (2010); TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013); VT. STAT. ANN. tit. 12, § 1041(e)(2) (2005); WASH. REV. CODE § 4.24.525(4)(c) (2010).

88. *Supra* note 87.

89. MASS. GEN. LAWS ch. 231, § 59H (1996) (emphasis added).

90. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).

91. OKLA. STAT. tit. 12, § 1435(A) (2014).

92. ARIZ. REV. STAT. ANN. § 12-752(B); CAL. CIV. PROC. CODE § 425.16(b)(2); GUAM CODE ANN. tit. 7, § 17106(d); IND. CODE § 34-7-7-9(c); LA. CODE CIV. PROC. ANN. art. 971(A)(2); ME. REV. STAT. ANN. tit. 14, § 556; MASS. GEN. LAWS ch. 231, § 59H; OR. REV. STAT. § 31.150(4); VT. STAT. ANN. tit. 12, § 1041(e)(2); WASH. REV. CODE § 4.24.525(4)(c).

93. *See supra* notes 90, 91, and 92. The only exceptions are Guam and Indiana, both of which substantively read, "[t]he court shall make its determination based on the facts contained in the pleadings and affidavits filed." 7 GUAM CODE ANN. tit. 7, § 17106(d) (1998); IND. CODE § 34-7-7-9(c) (1998); *see also* IND. CODE § 34-7-7-9(c) (1998) ("The court shall make its determination based on the facts contained in the pleadings and affidavits filed.").

94. *See infra* Parts III(A), (B).

95. *See infra* Part IV(A).

96. *See infra* Parts III(A)-(C).

97. *See infra* Parts III(A), (B).

A. THE GOLDEN STATE

In California, the issue of what kind of evidence courts must consider in an anti-SLAPP analysis is clear-cut, and has been for more than twenty years.[98] Its statute reads:

> *In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.*[99]

And uniformly, California courts have held that a plaintiff's pleadings alone—even when verified or sworn to—are insufficient evidence to overcome an anti-SLAPP motion to dismiss.[100,101]

There's a decent reason California's courts have had such an easy time concluding that plaintiffs must do more than merely point to a well-drafted complaint: the

98. *See* Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620, 637 (Cal. Ct. App. 1996), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).

99. CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2009) (emphasis added).

100. *See, e.g.*, Finton Constr., Inc. v. Bidna & Keys APLC, 190 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2015) ("[The court] must rely on admissible evidence, not merely allegations in the complaint or conclusory statements by counsel."); Thayer v. Kabateck Brown Kellner LLP, 143 Cal. Rptr. 3d 17, 32 (Cal. Ct. App. 2012) ("To begin with, [Plaintiff] cannot rely on her complaint, even if verified, to demonstrate a probability of success on the merits."); Hailstone v. Martinez, 87 Cal. Rptr. 3d 347, 351 (Cal. Ct. App. 2008) ("Nevertheless, a plaintiff cannot simply rely on his or her pleadings, even if verified. Rather, the plaintiff must adduce competent, admissible evidence."); Paulus v. Bob Lynch Ford, Inc., 43 Cal. Rptr. 3d 148, 158 (Cal. Ct. App. 2006) ("The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence."); Roberts v. L.A. Cty. Bar Ass'n, 129 Cal. Rptr. 2d 546, 552 (Cal. Ct. App. 2003) ("In assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence.").

101. There is one lone exception to this near-universal holding: Salma v. Capon, 74 Cal. Rptr. 3d 873, 885 (Cal. Ct. App. 2008). Although *Salma* confirmed that a SLAPP plaintiff could not rely on his own unverified pleadings to overcome a motion to dismiss, it disagreed with those courts that hold a plaintiff cannot rely on his own *verified* pleadings. *Id.* Specifically, the court held: "Those holdings appear to be based on an inapt analogy to summary judgment proceedings. Verified pleadings may not be used to support or oppose summary judgment motions because the statute expressly restricts the types of evidence that can be used and does not include verified allegations. Unlike the summary judgment statute, section 425.16 expressly permits the court to consider the parties' pleadings as well as their declarations." *Id.* (citations omitted). Nevertheless, the *Salma* court's holding has been categorically rejected by every court that has considered it. *See, e.g.*, Barker v. Fox & Assocs., 192 Cal. Rptr. 3d 511, 524-25 n.7 (Cal. Ct. App. 2015) ("We note that *Salma* has not been followed by any other published decision, and that every other case holds to the contrary. We disagree with *Salma*, as apparently does the leading practical treatise . . . ."). Personally, I agree with *Salma*: so long as a petition is verified—i.e., sworn-to—it is the functional equivalent of an affidavit. *See* Sweetwater Union Sch. Dist. v. Gilbane Bldg. Co., 199 Cal. Rptr. 3d 659, 676-77 (Cal. Ct. App. 2016) (holding that when statements are based on a declarant's personal knowledge and the declarant has attested to the truth of the statements under penalty of perjury the court may consider those statements in the same way that it could consider declarations and affidavits). But I recognize that the contrary holding is simpler, cleaner, and easier to apply.

standard for dismissal set forth by the statute itself.[102] With respect to the second step in the anti-SLAPP analysis, California's statute declares:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue 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*.[103]

The California Legislature gave no guidance as to what it meant by "a probability that the plaintiff will prevail on the claim," but that's where the case of *Wilcox v. Superior Court* came to the rescue.[104] Decided in 1994 (just one year after the statute went into effect)[105] by the Seventh Division of California's Second District Court of Appeal, *Wilcox* likened the new law to other statutes that provided early dismissal mechanisms, like a motion for nonsuit or directed verdict.[106] It noted that the case law interpreting those statutes, which also used the language "probability of success," only required that "the plaintiff must demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."[107]

As California's Third Division of the Second District Court of Appeal noted, within two years, *Wilcox* had become the standard with respect to how courts should treat anti-SLAPP motions and the evidence required to defeat them:[108]

> It is recognized, with the requirement that the court consider the pleadings and affidavits of the parties, the test is similar to the standard applied to evidentiary showings in summary judgment motions pursuant to section 437(c) and requires that the showing be made by *competent admissible evidence* within the personal knowledge of the declarant.[109]

That meant that "[a]verments on information and belief are insufficient."[110] The reason, as pointed out by the Fifth Division of California's First District Court of Appeal, is that when the standard is "a probability that the plaintiff will prevail on

102. *See* Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 454-55 (Cal. Ct. App. 1994), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).

103. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2009) (emphasis added).

104. *Wilcox*, 33 Cal. Rptr. 2d at 446.

105. *Id.* at 451.

106. *Id.* at 454-55.

107. *Id.* at 454.

108. *See, e.g.*, Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620, 635 (Cal. Ct. App. 1996) (citing Evans v. Unkow, 45 Cal. Rptr. 2d 624 (Cal. Ct. App. 1995); Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 44 Cal. Rptr. 2d 46, 53 (Cal. Ct. App. 1995); Ludwig v. Superior Court, 43 Cal. Rptr. 2d 350, 355 (Cal. Ct. App. 1995); Robertson v. Rodriguez, 42 Cal. Rptr. 2d 464, 468 (Cal. Ct. App. 1995); Dixon v. Superior Court, 36 Cal. Rptr. 2d 687, 694 (Cal. Ct. App. 1994)), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).

109. *Wollersheim*, 49 Cal. Rptr. 2d at 635-36 (emphasis added) (citing *Ludwig*, 43 Cal. Rptr. 2d at 356).

110. *Id.* at 636 (citing *Evans*, 45 Cal. Rptr. 2d at 629; Coll. Hosp., Inc. v. Superior Court, 882 P.2d 894, 903-04 (Cal. 1994)).

the claim," averments alone can't get the plaintiff across the finish line.[111] And that's because "[a]n assessment of the probability of prevailing on the claim looks to *trial*, and the evidence that will be presented at that time."[112] Naturally, that evidence must be admissible.[113]

As the court in *Wilcox* explained, the plaintiff's burden of establishing "facts to sustain a favorable decision if the evidence submitted is credited" implies a requirement of admissibility, because "otherwise there would be nothing for the trier of fact to credit." At trial, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." An averment on information and belief is inadmissible at trial, and thus cannot show a probability of prevailing on the claim.[114]

The remaining question, then, would be: if a party can't rely *solely* on its pleadings to satisfy its burden, then what role do the pleadings play in the analysis?[115] Certainly, the pleadings *have* to play *a* role.[116] Under the "Surplusage Canon" of statutory construction, every word and every provision of a law must be given effect, and we can't ignore the dictate that pleadings be considered.[117]

But California courts have answered that question rather simply.[118] In equating the anti-SLAPP ruling to deciding a motion for summary judgment, the courts say that "the pleadings merely frame the issues to be decided."[119] And that's sound reasoning; without considering the pleadings, it would be impossible (or close to it) to fully understand the allegations being advanced.[120] Perhaps more importantly, requiring the court to "consider" the pleadings ensures that the court only rely on the offered evidence that supports the plaintiff's claim.[121] A different approach—either excluding the pleadings from consideration or at least not mandating their examination—might result in the court giving weight to irrelevant evidence that has no relation to the claim defendant is asking to be dismissed.[122]

111. *Evans*, 45 Cal. Rptr. 2d at 628-29.

112. *Id.* at 628 (citing *Wilcox*, 33 Cal. Rptr. 2d at 454-55 (must be prima facie showing of facts which "if accepted by the trier of fact" would negate constitutional defenses)).

113. *Wilcox*, 33 Cal. Rptr. 2d at 459.

114. *Evans*, 45 Cal. Rptr. 2d at 628-29 (quoting Hung v. Wang, 11 Cal. Rptr. 2d 113, 127 (Cal. Ct. App. 1992); *Wilcox*, 33 Cal. Rptr. 2d at 459; CAL. EVID. CODE § 702(a) (West 1967)).

115. *See* CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2009).

116. *See* United States v. Butler, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

117. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). This canon of construction is also known by its Latin name, *verba cum effectu sunt accipienda*. *Id.*

118. *See* Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620, 636 (Cal. Ct. App. 1996), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).

119. Schoendorf v. U.D. Registry, Inc., 118 Cal. Rptr. 2d 313, 319 (Cal. Ct. App. 2002).

120. *See id.*

121. *See id.*

122. *See id.*

B. THE LONE STAR STATE

So, it's clear that California law is well settled, and parties need to do more to meet their burden under the state's anti-SLAPP statute than merely invoke their own pleadings.[123] But the opposite is true—not only as to the well-settled nature of the law, but also as to result—in the Lone Star State.[124]

Texas's law, dubbed the Texas Citizens Participation Act (TCPA),[125] contains a separate provision titled "Evidence," and it reads:

> *In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.*[126]

That language precisely mirrors California's statute, with two exceptions: (1) Texas's starts by saying, "[i]n determining whether a legal action should be dismissed under this chapter" instead of "[i]n making its determination," as California's reads; and (2) Texas (like all other states) excises the comma in between "pleadings" and "and supporting and opposing affidavits" that we see in the California version.[127] The first difference is necessary (or at least helpful), but doesn't do anything to substantively distinguish the two; because Texas's evidentiary provision exists as its own statutory section, it needs a bit more contextual language than California's statute.[128] As for the second difference—the mid-sentence comma—that's harder to say.[129] This Article can count at least three reasons—one of which may be substantive—that would explain why it was omitted, but that discussion is saved for later.[130]

Now, to be sure, Texas's Supreme Court has never addressed the precise issue of what this statutory provision means, and because the law is still relatively young (it went into effect in 2011),[131] the state's high court may come to a different conclusion than its underlings. But those lower courts have, fairly consistently, held that plaintiffs don't need to produce evidence in response to an anti-SLAPP motion, so long as their petitions are well-drafted.[132]

The genesis of this rule seems to have originated with the San Antonio Court of Appeals in 2014, which was considering the issue of whether the *defendant* had to

123. *See supra* Part III(A).
124. Cuba v. Pylant, 814 F.3d 701 (5th Cir. 2016); Fawcett v. Grosu, 498 S.W.3d 650 (Tex. App. 2016).
125. H.J. of Tex., 82d Leg., R.S. 4916, 4624 (2011), http://perma.cc/4GFH-HKA2.
126. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006 (West 2013) (emphasis added).
127. *Compare* § 27.006 *with* CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2009).
128. *See* § 27.006; § 425.16(b)(2).
129. *See infra* Part III(C)(4).
130. *See infra* Part III(C)(4).
131. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001.
132. Cuba v. Pylant, 814 F.3d 701, 711 (5th Cir. 2016); Fawcett v. Grosu, 498 S.W.3d 650 (Tex. App. 2016); Watson v. Hardman, 497 S.W.3d 601, 608, 610 (Tex. App. 2016).

produce evidence to trigger the protections of the statute.[133] The Texas law requires, as the first step in the "two-step process," that the moving party "show [] by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association."[134] If the defendant is successful in that regard, the burden shifts to the plaintiff-nonmovant to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question."[135] If the plaintiff fails, the case must be dismissed.[136]

In *Rio Grande H_20 Guardian v. Robert Muller Family Partnership Ltd*., the plaintiff had argued that because the defendant presented no evidence, it failed to meet its initial burden of proving that the lawsuit related to the defendant's exercise of its right to petition.[137] But the San Antonio Court of Appeals rejected that contention, writing:

> Unlike other types of cases where pleadings are not considered evidence, section 27.006 of the Act, which is entitled "Evidence," expressly provides, "In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Because we may consider the pleadings as evidence in this case*, [Defendant's] petition established that the appellants were exercising their right to petition in filing the lawsuit.[138]

After the San Antonio court decided *Rio Grande H_20 Guardian*, the Texas Supreme Court heard a case to decide a different, albeit related, issue: what the statute meant by "clear and specific evidence," which is the standard the plaintiff needs to meet in the "second step" of the anti-SLAPP process.[139] There had been a circuit split within Texas on that topic, with some courts holding that "clear and specific evidence"—an undefined term—meant that only "direct evidence" could be considered, and others holding that relevant circumstantial evidence could suffice.[140] In *In re Lipsky*, the defendant—who had moved to dismiss the plaintiff's defamation, business disparagement, and civil conspiracy claims—argued that the phrase "clear and specific evidence" elevated the statute's evidentiary standard, requiring the plaintiff to produce direct evidence as to each element of its claim.[141] Predictably, the plaintiff argued that circumstantial evidence and rational inferences could be considered, and that the TCPA's prima-facie-case requirement did not impose a higher or unique evidentiary standard.[142]

133. Rio Grande H_20 Guardian v. Robert Muller Family P'Ship Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *2 (Tex. App. Jan. 29, 2014), *abrogated on other grounds by* In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).

134. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b).

135. *Id.* at § 27.005(c).

136. *Id.* at §§ 27.005(b), (c).

137. *Rio Grande H_20 Guardian*, 2014 WL 309776 at *3.

138. *Id.* (emphasis added) (citation omitted).

139. In re Lipsky, 460 S.W.3d 579, 584, 587 (Tex. 2015).

140. *Id.*

141. *Id.*

142. *Id*. at 586.

The Texas Supreme Court firmly resolved that question by siding with the plaintiff:

> All evidentiary standards, including clear and convincing evidence, recognize the relevance of circumstantial evidence. In fact, we have acknowledged that the determination of certain facts in particular cases may exclusively depend on such evidence. Circumstantial evidence may be used to prove one's case-in-chief or to defeat a motion for directed verdict, and so it would be odd to deny its use here to defeat a preliminary motion to dismiss under the TCPA. That the statute should create a greater obstacle for the plaintiff to get into the courthouse than to win its case seems nonsensical.[143]

So, *Lipsky* clearly answered the "boxers or briefs," "circumstantial or direct" question.[144] But for all the clarity it provided on that issue, it undoubtedly muddied the waters on a question it never considered: what kind of vehicle does the direct or circumstantial evidence need to arrive in?[145] The court dropped competing clues.[146] For example, it warned that the statute's "purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits," and that "[t]o accomplish its purpose, the Act endorses a summary process, requiring judicial review of the pleadings and limited evidence . . . ."[147] It went on: "Courts are further directed to make that determination early in the proceedings, typically on the basis of the pleadings and affidavits. But *pleadings* that might suffice in a case that does not implicate the TCPA *may not* be sufficient to satisfy the TCPA's 'clear and specific evidence' requirement."[148]

That use of the phrase "may not" is interesting.[149] Undoubtedly, the court was acknowledging that the anti-SLAPP law imposes a higher pleading standard than the normal case.[150] What is less clear is whether the court was saying that pleadings alone could meet the "clear and specific evidence" requirement.[151] When it said typically sufficient pleadings "may not be sufficient" in the TCPA realm, might that suggest the opposite could be equally true—that in some instances pleadings may be sufficient, especially if they went beyond providing mere "notice" of a claim?[152] The court continued:

> Because the Act requires more, mere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, a plaintiff must provide enough detail to show the factual basis for its claim. In a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of when,

143. *Id.* at 589 (citations omitted).
144. *Id.* at 591.
145. In re Lipsky, 460 S.W.3d 579, 584, 586-97 (Tex. 2015).
146. *See id.*
147. *Id.* at 589.
148. *Id.* at 590 (emphasis added).
149. *See id.*
150. *See id.*
151. In re Lipsky, 460 S.W.3d 579, 584, 590 (Tex. 2015).
152. *See id.*

> where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss.[153]

So, the court seemed to focus heavily on the issue of pleadings, which suggests that they might make a difference in the dismissal analysis.[154] On the other hand, the court repeatedly used the term "pleadings *and evidence*."[155] That's not necessarily surprising, as it's similar to the phrasing employed by the statute.[156] But it might suggest at least two things, either separately or in combination: (1) the court considers the two to be functionally distinct; and/or (2) the court believes both are necessary to meet the burden.[157] Looking to the facts of *Lipsky* doesn't help answer whether that's true, as the plaintiff *did* produce evidence (which the court characterized as "voluminous")[158] in support of its anti-SLAPP response.[159]

Still, there are other hints that suggest the court may believe pleadings alone could suffice. Earlier in the decision, when it laid out the "two-step process," the court wrote, "[i]n determining whether the plaintiff's claim should be dismissed, the court is to consider the pleadings and any supporting and opposing affidavits."[160] At first glance, that sentence is unremarkable, as it seemingly tracks the language of the statute.[161] But look carefully: the TCPA doesn't use the word "any" before the term "supporting and opposing affidavits."[162] Was the court's insertion of that word in characterizing the statute an inadvertent oversight?[163] Or does it imply that the court foresees some cases in which affidavits may not exist and pleadings alone could suffice?[164] Arguably, had the statute been worded that way, the "pleadings alone can suffice" camp would have a pretty strong plain-language argument.[165]

Ultimately, the Texas Supreme Court's detailed discussion of the pleading requirements in *non*-SLAPP cases—as if to set them in contrast to the pleading

153. *See id.* at 590-91.

154. *See id.*

155. *Id.* at 591 (emphasis added).

156. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).

157. *See Lipsky*, 460 S.W.3d at 590-91.

158. *Id.* at 597.

159. *Id.* at 592 ("The court of appeals . . . concluded that an affidavit from [Plaintiff's] senior vice president was sufficient proof of [the Plaintiff's] damages, at this stage, to defeat [Defendant's] motion to dismiss. *See* 411 S.W.3d at 547 (noting that the affidavit 'provided the trial court with minimum but sufficient facts, at this stage in the litigation, to raise a rational inference, and therefore serve as prima facie proof' of [Plaintiff's] losses).").

160. *Id.* at 587 (citation omitted).

161. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a).

162. *Compare* § 27.006(a), *with Lipsky*, 460 S.W.3d at 587.

163. *Lipsky*, 460 S.W.3d at 587.

164. *See id.*

165. Or perhaps not; case law is chockfull of instances of the word "any" creating ambiguity in statutes. *See, e.g.*, U.S. v. Coiro, 922 F.2d 1008, 1014 (2d Cir. 1991) ("In cases in this and other circuits, the word 'any' has 'typically been found ambiguous in connection with the allowable unit of prosecution,' for it contemplates the plural, rather than specifying the singular.") (citations omitted); U.S. v. Long, 787 F.2d 538, 539 (10th Cir. 1986) ("The use of the word 'any' under these circumstances creates an ambiguity.") (citations omitted); Brumley v. Lee, 963 P.2d 1224, 1227 (Kan. 1998) ("The words 'an' and 'any' are inherently indefinite and ambiguous.").

requirements in a SLAPP case—may give us the best evidence (no pun intended) of the court's leanings:

> Our procedural rules merely require that the pleadings provide fair notice of the claim and the relief sought such that the opposing party can prepare a defense. *See* TEX. R. CIV. P. 45 & 47. Even the omission of an element is not fatal if the cause of action "may be reasonably inferred from what is specifically stated." *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993). Moreover, under notice pleading, a plaintiff is not required to "set out in his pleadings the evidence upon which he relies to establish his asserted cause of action." *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494-95 (Tex. 1988). But the TCPA requires that on motion the plaintiff present "clear and specific evidence" of "each essential element."[166]

Does that language—suggesting that a pleading can "set out evidence"—carry the day?[167] It's impossible to say; in the end, the *Lipsky* holding is limited to the precise question of whether "clear and specific evidence" includes circumstantial evidence.[168] To that, the court answered "yes": "In short, [the statute] does not impose a higher burden of proof than that required of the plaintiff at trial. We accordingly disapprove those cases that interpret the TCPA to require direct evidence of each essential element of the underlying claim to avoid dismissal."[169]

But whatever it intended to say about *how* that evidence may be presented—and perhaps we'll find out down the road—the Texas Supreme Court's *Lipsky* opinion, along with the San Antonio Court of Appeals's decision in *Rio Grande H_20 Guardian*, begat a string of lower court holdings that say pleadings, by themselves, could be sufficient to overcome an anti-SLAPP motion.[170]

In early 2016, the federal Fifth Circuit Court of Appeals decided *Cuba v. Pylant*, in which it opined that the plaintiff's clear-and-specific-evidence burden, "as interpreted by Texas courts, is more like a pleading requirement than a summary-judgment standard."[171] The court wrote that "the Texas cases inform that a litigant's evidentiary burden in a TCPA motion may be satisfied by either detailed pleading or supporting affidavits: a party need not provide 'evidence' in the traditional sense if the pleadings are sufficiently clear."[172] For this assertion, the court cited to only two cases: an Austin Court of Appeals case captioned *Serafine v. Blunt*, and under a "*see also*" signal, *Lipsky*.[173] Of course, this Article already discussed *Lipsky* at length,

166. *See Lipsky*, 460 S.W.3d at 590.
167. *See id.*
168. *See id.* at 591.
169. *Id.*
170. Cuba v. Pylant, 814 F.3d 701, 711 (5th Cir. 2016); Fawcett v. Grosu, 498 S.W.3d 650, 660 (Tex. App. 2016); Deaver v. Desai, 483 S.W.3d 668, 673 (Tex. App. 2015).
171. *Cuba*, 814 F.3d at 711.
172. *Id.* (citing Serafine v. Blunt, 466 S.W.3d 352, 360 (Tex. App. 2015) and *Lipsky*, 460 S.W.3d at 590-91).
173. *Id.*

and whether it supports the *Cuba* court's specific assertion is less than clear.[174] But what about *Serafine*?[175]

Serafine v. Blunt, decided in 2015, did indeed hold that one of the parties was under no statutory obligation to present evidence.[176] But, like its sister court in San Antonio, the party the Austin Court of Appeals was concerned with wasn't the alleged-SLAPP plaintiff.[177] Rather, it was *the defendant*, or movant.[178] The issue in *Serafine* was whether the defendant met *her burden* to prove the first step of the anti-SLAPP process—that the claims against her were "based on, relate to, or are in response to her exercise of the right to petition."[179] To do that, she pointed to the plaintiffs' pleadings.[180] On appeal, the plaintiffs argued the defendant "did not meet her burden because she failed to provide an affidavit or live testimony to show that their [claims] were filed in response to her exercise of her right to petition."[181] The court disagreed, holding that "[u]nder Section 27.006 of the Act, the trial court may consider pleadings as evidence" and "[t]he Act does not require [the movant] to present testimony or other evidence to satisfy her evidentiary burden."[182]

The court said nothing about whether that same rule would apply to the non-movant in the second step of the dismissal analysis (i.e., establishing a prima facie case), because that wasn't at issue—the plaintiffs did produce evidence, in the form of affidavit testimony.[183] But had it been before the court, it's certainly possible (and perhaps even likely) that's how the court would have ruled.[184]

In any event, *Cuba* isn't the only case to construe *Lipsky* and *Serafine* that way. The Fourteenth District Court of Appeals in Houston, in mid-2016, decided *Fawcett v. Grosu*.[185] After the defendant filed an anti-SLAPP motion to dismiss, the plaintiff

174. *See Lipsky*, 460 S.W.3d at 590. The "*see also*" signal in legal citation is a "[s]ignal[] that indicate[s] support" insofar as the "[c]ited authority constitutes additional source material that supports the proposition." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 58-59 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

175. *Serafine*, 466 S.W.3d at 352.

176. *Id.* at 360.

177. *Id.*

178. *Id.* To be precise, she was the counterdefendant. *Id.* at 355-56. Mary Louise Serafine brought suit against her next-door neighbors, Alexander and Ashley Blunt. *Id.* at 355-56. Serafine claimed that the Blunts built a new wooden fence that encroached on Serafine's property, and that they dug a trench to install a drainage system that would destroy the lateral support of her land. *Id.* at 356. She sued for trespass to try title, trespass, nuisance, negligence, and fraud by nondisclosure. *Id.* The Blunts counterclaimed, alleging that Serafine tortiously interfered with their contract with the drainage and foundation company and that she fraudulently filed a lis pendens in the county property records. *Id.* Serafine filed her anti-SLAPP motion to dismiss those counterclaims. *Id.* So, for the purpose of this discussion and for ease of understanding, I refer to the Blunts as the plaintiffs and Serafine as the defendant.

179. *Id.* at 359.

180. *Id.*

181. *Id*. at 359-60.

182. *Id.* at 360 (citing Rio Grande H_20 Guardian v. Robert Muller Family P'Ship Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *3 (Tex. App. Jan. 29, 2014), *abrogated on other grounds by* In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015)).

183. *See Serafine*, 466 S.W.3d at 361.

184. *See id.* at 360.

185. Fawcett v. Grosu, 498 S.W.3d 650 (Tex. App. 2016).

failed to file a formal response, and at the hearing on the motion, argued that the statute did not require that he brief the matter and that he was entitled to stand on his Petition (including the exhibits attached to it).[186] The court agreed:

> Based on section 27.006(a)'s directive ("the court shall consider the pleading and supporting and opposing affidavits . . . .") and the Texas Supreme Court's interpretation that "pleadings and evidence" setting forth the factual basis for a claim are sufficient to resist a TCPA motion to dismiss, [Plaintiff] was permitted to rely on his pleadings (including exhibits) in response to [Defendants'] motion to dismiss.[187]

The same court decided another case in 2015, where, like in *Fawcett*, the plaintiffs attempted to rely only on their pleadings to defeat a motion to dismiss.[188] Although the court concluded the plaintiffs' petition was "insufficient by itself," it seemed to suggest that had the petition been better pleaded, it would have sufficed.[189] In particular, the court determined the plaintiffs didn't establish a prima facie case of emotional distress because "the only evidence in [their] pleading regarding their emotional distress is a single allegation that they endured 'shame, embarrassment, humiliation, and mental anguish.'"[190] The court said that without an explanation of *how or why* they suffered, those bare pleadings, devoid of any facts, were conclusory and not "clear and specific" evidence.[191]

Also, in mid-2016, the Dallas Court of Appeals decided *Watson v. Hardman*, where it addressed questions of whether either party needed to produce evidence apart from their pleadings to satisfy their respective burdens.[192] The court answered "no" as to each.[193]

And in 2014, Houston's other court of appeals (the First District of Texas) wrote:

> We first note that, in making a determination on a motion to dismiss, the trial court is not limited to considering only supporting and opposing affidavits, but the court "shall consider the pleadings" as well. Thus, even if [Defendant's] affidavits do not constitute competent and admissible evidence, his motion to dismiss does not necessarily fail.[194]

Granted, like the San Antonio court in *Rio Grande H_20 Guardian* and the Austin court in *Serafine*, the First District Court of Appeals in *Schimmel v. McGregor* was talking about the *movant's* burden to prove the statute applied.[195] But the sweeping language used seems to leave little doubt about how the court would have ruled if it were considering whether the *non-movant* had satisfied its burden.[196]

186. *Id.* at 658, n.4.
187. *Id.* at 660 (citing *Lipsky*, 460 S.W.3d at 591).
188. Deaver v. Desai, 483 S.W.3d 668, 677 (Tex. App. 2015).
189. *See id.*
190. *Id.*
191. *Id.*
192. Watson v. Hardman, 497 S.W.3d 601, 608-10 (Tex. App. 2016).
193. *Id.*
194. Schimmel v. McGregor, 438 S.W.3d 847, 859 (Tex. App. 2014) (citations omitted).
195. *Id.*
196. *Id.*

C. EXPLAINING THE DIFFERENT APPROACHES

Although this Article focuses heavily on California and Texas, they're not the only jurisdictions to reach conflicting results on this issue. States like Washington and Oregon seem to follow the California approach, while states like Louisiana and Maine seem to follow Texas.[197]

But California and Texas are the two *best* examples of the spectrum's ends.[198] For one, their respective statutory language dealing with evidence is nearly identical, and yet the judicial interpretation of that language is anything but.[199] Second, they also represent a stark distinction in time. California's law has been on the books since 1993, and most agree it has served as a model for other states.[200] Texas's, meanwhile, is just celebrating its fifth birthday, and the state's courts are still struggling with the statute's meaning and effect.[201]

So why are the two states at such opposite ends on this issue? There are at least four *potential* explanations, but ultimately, the fourth is the most likely: ambiguously worded statutory language.[202]

1. Are Texas Courts Just Plain Wrong?

Perhaps the easiest explanation for Texas's divergence from well-settled California law is that the Lone Star State's mid-level appellate courts have simply been incorrect, and that when the issue squarely falls before the Texas Supreme Court at some point in the future, it will right the ship.[203] That's not an entirely unreasonable notion; the high court in Texas has only heard five cases involving its Citizens Participation Act, and in none of those cases has it had the opportunity to weigh in on the section of the statute that directs courts to consider the pleadings and affidavits.[204]

There are at least three reasons the Texas Supreme Court could disagree with the holdings of the state's lower appellate courts. First, most of the cases that have held a party can stand on his own pleadings have relied on the Supreme Court's 2015

197. *Compare* Spratt v. Toft, 324 P.3d 707, 712 (Wash. Ct. App. 2014); Staten v. Steel, 191 P.3d 778, 788 (Or. Ct. App. 2008), *with* Hebert v. La. Licensed Prof'l Vocational Rehab. Counselors, 4 So. 3d 1002, 1008-09 (La. Ct. App. 2009); Nader v. Me. Democratic Party (Nader I), 41 A.3d 551, 563 (Me. 2012).

198. *Compare* Hailstone v. Martinez, 87 Cal. Rptr. 3d 347, 351 (Cal. Ct. App. 2008) ("Nevertheless, a plaintiff cannot simply rely on his or her pleadings, even if verified. Rather, the plaintiff must adduce competent, admissible evidence."), *with* Serafine v. Blunt, 466 S.W.3d 352, 360 (Tex. App. 2015) ("The Act does not require [the movant] to present testimony or other evidence to satisfy her evidentiary burden.").

199. CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013). *Compare Hailstone*, 87 Cal. Rptr. 3d at 351, *with Serafine*, 466 S.W.3d at 360.

200. *See* CAL. CIV. PROC. CODE § 425.16; Prather & Bland, *supra* note 49, at 735.

201. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001.

202. *See infra* Part III(C)(4).

203. *See* In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).

204. KBMT Operating Co., LLC v. Toledo, 492 S.W.3d 710 (Tex. 2016); Greer v. Abraham, 489 S.W.3d 440 (Tex. 2016); Sullivan v. Abraham, 488 S.W.3d 294 (Tex. 2016); Lippincott v. Whisenhunt, 462 S.W.3d 507 (Tex. 2015); *Lipsky*, 460 S.W.3d at 579.

decision, *In re Lipsky*.[205] But as already discussed at length, *Lipsky* never reached that issue, and although it dropped several hints concerning a party's evidentiary obligations, those intimations don't clearly point in one direction over another.[206] In short, relying on *Lipsky* is an unreliable approach at best, and a dangerous one at worst.[207]

Second, it becomes apparent upon careful reading that, *Lipsky* aside, Texas courts are violating a well-known canon of statutory construction and, in doing so, are ignoring the state's own Government Code.[208] It all started with *Rio Grande H_20 Guardian*, which opined that "we may consider the pleadings as evidence in this case":

> Unlike other types of cases where pleadings are not considered evidence, section 27.006 of the Act, which is entitled "Evidence," expressly provides, "[i]n determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."[209]

Serafine v. Blunt, the Austin Court of Appeals decision from 2015, held in a similar fashion: "Under Section 27.006 of the Act, the trial court may consider pleadings as evidence."[210] The problem, of course, is that the statute never actually says that.[211] Sure, it dictates the court "shall *consider* the pleadings," and that provision lives in a section titled "Evidence."[212] But if we exclude the heading, Section 27.006 never uses the word "evidence," and it certainly does not say "pleadings are evidence" that could, by themselves, carry a party's burden.[213] The only way to arrive at the "pleadings are evidence" mantra is to violate the "Title-and-Headings" canon of statutory construction.[214] As the United States Supreme Court has said:

> [The] heading is but a short-hand reference to the general subject matter involved . . . [H]eadings and titles are not meant to take the place of the detailed provisions of text. . . . For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.[215]

205. Cuba v. Pylant, 814 F.3d 701, 711 n.13 (5th Cir. 2016); Fawcett v. Grosu, 498 S.W.3d 650, 655 (Tex. App. 2016); Deaver v. Desai, 483 S.W.3d 668, 677 (Tex. App. 2015).

206. *Lipsky*, 460 S.W.3d at 579.

207. *See id.*

208. *See* SCALIA & GARNER, *supra* note 117, at 221-24; TEX. GOVT. CODE ANN. § 311.024 (West 1985).

209. Rio Grande H_20 Guardian v. Robert Muller Family P'Ship Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *3 (Tex. App. Jan. 29, 2014), *abrogated on other grounds in Lipsky*, 460 S.W.3d at 591.

210. Serafine v. Blunt, 466 S.W.3d 352, 360 (Tex. App. 2015) ("The Act does not require [Defendant] to present testimony or other evidence to satisfy her evidentiary burden.").

211. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).

212. *Id.*

213. *See id.*

214. *See* SCALIA & GARNER, *supra* note 117, at 221-24.

215. Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528-29 (1947).

Texas's Government Code says essentially the same thing: "The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute."[216] But that's exactly what Texas courts are doing by saying "pleadings are evidence."[217] Merely "considering" the pleadings—as California courts do, to "frame the issues"—is quite different from treating them as *actual evidence*.[218] The only way to get to that point—to engage in the legal fiction that pleadings are evidence when it comes to anti-SLAPP motions—is to read the section's heading into the language of the statute itself.[219]

Now, to be sure, courts *can* interpretively lean on a statute's heading, but only if they're trying to relieve an ambiguity and determine legislative intent.[220] The problem in Texas is that no court has opined that the evidentiary language is ambiguous in the first place.[221] Rather, they're jumping into the pool head first without taking off their clothes: unless they want to declare the statute has more than one reasonable interpretation, they can't say "pleadings are evidence" when the statute only implies that through its title.[222]

The third reason Texas's appellate courts could eventually be overruled by the Texas Supreme Court boils down to a misunderstanding of which parties are relying on which pleadings.[223] Again, several of the Texas cases that have held "pleadings are evidence" have done so in the context of the *defendant* relying on the *plaintiff's* pleadings to prove the anti-SLAPP law applies.[224] And that should be no problem at all, because there is a very real difference between relying on one's *own* pleadings, and relying on the other side's.[225] Typically—with Texas being no exception—an *opposing party's* assertions of fact in its pleadings *are* admissible evidence at trial as judicial admissions.[226] So, to allow a party to rely on the opposing party's pleadings presents no admissibility issue.[227] The same can't be said, however, about a party's *own* pleadings.[228] And that's where courts like the Fifth Circuit in *Cuba v. Pylant* go too far; they're right that some Texas courts have allowed defendants to rely solely

216. TEX. GOVT. CODE ANN. § 311.024 (West 1985).

217. *See* Serafine v. Blunt, 466 S.W.3d 352, 360 (Tex. App. 2015).

218. *See* Schoendorf v. U.D. Registry, Inc., 118 Cal. Rptr. 2d 313, 319 (Cal. Ct. App. 2002).

219. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2011).

220. *See* SCALIA & GARNER, *supra* note 117, at 222.

221. *Serafine*, 466 S.W.3d at 360; Rio Grande H_20 Guardian v. Robert Muller Family P'Ship Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *3 (Tex. App. Jan. 29, 2014), *abrogated on other grounds*,In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).

222. *See* SCALIA & GARNER, *supra* note 117, at 222; TEX. GOVT. CODE ANN. § 311.024 (West 1985).

223. *See* Cuba v. Pylant, 814 F.3d 701, 711 n.13 (2016) (citing *Serafine*, 466 S.W.3d at 360).

224. *Serafine*, 466 S.W.3d at 360; *Rio Grande H_20 Guardian*, 2014 WL 309776, at *3.

225. *See id*.

226. Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 568 (Tex. 2001) (quoting Houston First Am. Sav. v. Musick, 650 S.W.2d 764, 767 (Tex. 1980)). Not only are opposing pleadings evidence, but "[a]ny fact admitted is conclusively established in the case without the introduction of the pleadings or presentation of other evidence." *Musick*, 650 S.W.2d at 767 (citing Kirk v. Head, 152 S.W.2d 726 (1941); 1A ROY ROBERT RAY, TEXAS LAW OF EVIDENCE, § 1144 (Texas Practice 3d ed. 1980)).

227. *Id.*

228. *See* THPD, Inc. v. Cont'l Imports, Inc., 260 S.W.3d 593, 610 (Tex. App. 2008) (". . . neither pleadings nor attachments to pleadings are competent evidence.").

on the plaintiffs' pleadings to prove the statute applies.[229] But by no means should that mean the plaintiff can carry his evidentiary burden by producing zero *admissible* evidence in response.[230]

2. Semantic Differences in Burdens of Proof

In discussing the state of California law, this Article observed that California's courts have, from the start, had an easy time concluding that pleadings alone were insufficient to meet the statute's "two-step" evidentiary burdens.[231] In large part, that's because California's second step asks plaintiffs to "establish[] that there is a probability that the plaintiff will prevail on the claim."[232] Because "[a]n assessment of the probability of prevailing on the claim looks to *trial*, and the evidence that will be presented at that time," mere pleading averments could not possibly be enough.[233]

On one hand, it's certainly true that California's standard—that plaintiffs prove they will probably prevail—sets its law apart from some other states that use arguably softer language.[234] For example, Arizona's anti-SLAPP law requires the trial court to grant a defendant's motion to dismiss "unless the party against whom the motion is made shows that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual compensable injury to the responding party."[235] Perhaps more to the point, Texas's statute requires plaintiffs to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question."[236] That certainly *sounds* easier than California's law—it's not a probability of success, but rather a mere prima facie case.[237]

But remember, California's courts have not interpreted the "probably prevail" language as strictly as it sounds.[238] Instead, its case law has made clear that the plaintiff must only "demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."[239] Texas interprets its "prima facie" requirement in a similar fashion: "It refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted."[240] In short, although the

229. *Serafine*, 466 S.W.3d at 360; *Rio Grande H_20 Guardian*, 2014 WL 309776 at *3.

230. Finton Constr., Inc. v. Bidna & Keys APLC, 190 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2015) ("[The court] must rely on admissible evidence, not merely allegations in the complaint or conclusory statements by counsel.").

231. *See supra* Part III(A).

232. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015).

233. Evans v. Unkow, 45 Cal. Rptr. 2d 624, 628 (Cal. Ct. App. 1995).

234. § 425.16(b)(1).

235. ARIZ. REV. STAT. ANN. § 12-752(B) (2006).

236. TEX. CIV. PRAC. & REM. CODE § 27.005(c) (West 2013).

237. *Compare* § 425.16(b)(1), *with* § 27.005(c).

238. *See* Wilcox v. Superior Court, 33 Cal. Rptr. 446, 454-55 (Cal. Ct. App. 1994), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).

239. *Id.* at 454.

240. *See* In re Lipsky, 460 S.W.3d 579, 590 (Tex. 2015).

statutory language differs ("probably prevail" versus "prima facie case"), California's interpretation of its statute puts it on all fours with Texas's law.[241] In both states, it's merely a matter of bringing forth the minimum amount of evidence that would prove an allegation if that evidence were uncontroverted. [242] Consequently, that semantic difference shouldn't explain the divergent approaches.[243]

3. Legislative Intent

To be sure, the notion of "legislative intent" is a sticky one.[244] Typically, courts opine about their duty being to "determine the legislative intent and give it effect."[245] Law students are routinely taught that legislative intent "is the intent of the legislature as a whole when it enacted the statute."[246] But many commentators rightly point out that legislative intent—or at least the idea that a legislature has one collective state of mind when voting a bill into law—is fiction.[247] And some, such as Bryan Garner and Justice Antonin Scalia, have argued that the notion of legislative intent be banished into oblivion: "As many respected authorities agree, it is high time that further uses of *intent* in questions of legal interpretation be abandoned."[248]

Still, until Garner and Justice Scalia's viewpoint wins out, it would be irresponsible not to explore legislative intent here.[249] Earlier, this Article discussed the fact that Texas's statute (like Oklahoma's) has a separate section, titled "Evidence," in which the "shall consider the pleadings and affidavits" provision resides.[250] It was suggested that the "Evidence" heading might be one reason Texas courts are mistakenly holding that pleadings are to be treated as evidence in ruling on an anti-SLAPP motion to dismiss.[251]

But again, assuming one believes the provision to be ambiguous, it *would* be appropriate to consider the heading in deciphering the statute's meaning.[252] Even Garner and Justice Scalia agree: "If there is any uncertainty in the body of an act,

241. *Compare Wilcox*, 33 Cal. Rptr. at 454, *with Lipsky*, 460 S.W.3d at 590.

242. *Id.* It's true that California's courts have equated its anti-SLAPP procedure and the required quantum of evidence to a summary judgment proceeding, and that no Texas court (at least to my knowledge) has made a similar comparison. *See* Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620, 635-36 (Cal. Ct. App. 1996), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002). But I'm not sure that matters; the statutes of both states seem to align with respect to what the parties need to "establish" in order to prevail. *Compare Wilcox*, 33 Cal. Rptr. at 454, *with Lipsky*, 460 S.W.3d at 590.

243. *Compare Wilcox*, 33 Cal. Rptr. at 454, *with Lipsky*, 460 S.W.3d at 590.

244. *See* RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 11-13 (2002).

245. *Id.* at 11.

246. *Id.* at 12.

247. *Id.*

248. SCALIA & GARNER, *supra* note 117, at 396 (citations omitted).

249. *See* ROBERT A. KATZMANN, JUDGING STATUTES 3-4 (2014).

250. *See supra* Part III(C)(1).

251. *See supra* Part III(C)(1).

252. SCALIA & GARNER, *supra* note 117, at 221.

the title may be resorted to for the purpose of ascertaining legislative intent and of relieving the ambiguity."[253]

So, let's assume for the sake of argument that the "pleadings and affidavits" provision is ambiguous (indeed, this Article argues as much in the next section).[254] Does Texas's statute, which includes the titled section "Evidence," indicate an intent absent from California's, which lacks such a title?[255] Frankly, it's impossible to say. The legislative history surrounding the Texas law's passage is scant.[256] On the day the Texas House of Representatives heard testimony regarding its passage, it considered thirty-one other pieces of legislation, and devoted just thirty-three minutes of the day's schedule to the bill's discussion.[257] After that hearing, it was never discussed in session again until it was passed a little more than a month later.[258] The Senate history is even more brief: it was discussed for just three minutes before it was passed a week later.[259]

In short, it's hard to know why the legislature agreed to name the section "Evidence," or whether the heading indeed means that "pleadings are evidence."[260] As Garner and Justice Scalia point out, sometimes legislatures do contradict themselves with poorly worded titles.[261] Their example even happens to be from the Texas Legislature, which once labeled a venue statute "Permissive Venue," even though the law's language used the term "shall."[262]

4. Ambiguities Abound

Ultimately, the most likely explanation for courts coming to different conclusions about the "pleadings and affidavits" provision comes down to a simple and inescapable reason—the language is ambiguous.[263] This is true for three reasons.

First, what does the term "consider" mean?[264] Black's Law Dictionary doesn't define the word, but Merriam-Webster provides at least two definitions that might lead to conflicting results.[265] The first: "to think about carefully: such as to think of especially with regard to taking some action."[266] The second: "to come to judge or classify."[267] Applying the first definition steers us toward California's accepted

253. *Id.* at 222 (quoting Bellew v. Dedeaux, 126 So.2d 249, 250 (Miss. 1961)) (citation omitted).
254. In fact, I believe it *is* ambiguous and argue as much in Part III(C)(4).
255. *Compare* CAL. CIV. PROC. CODE § 425.16 (West 2009), *with* TEX. CIV. PRAC. & REM. CODE § 27.006 (West 2013).
256. Mark C. Walker & David M. Mirazo, *The Texas AntiSLAPP Statute: Issues for Business Tort Litigation*, STATE BAR OF TEXAS PARALEGAL DIVISION, https://perma.cc/7AN4-5ZTY.
257. *Id.*
258. *Id.*
259. *Id.*
260. *See* TEX. CIV. PRAC. & REM. CODE § 27.006 (2013).
261. SCALIA & GARNER, *supra* note 117, at 223.
262. *Id.* (citing and quoting Burlington N. R.R. v. Harvey, 717 S.W.2d 371, 375-77 (Tex. App. 1986').
263. *See* TEX. CIV. PRAC. & REM. CODE § 27.006(a) (2013).
264. *See id.*
265. *Consider*, MERRIAM-WEBSTER, https://perma.cc/ENN6-C8LG.
266. *Id.*
267. *Id.*

meaning—that a court "considers" the pleadings by using them to frame the issues, and then "considers" the evidence to see what it establishes.[268] The second definition implies more of a judgmental action, and tends to support the Texas approach.[269] In the end, it's unclear what the word means when we ask what role the pleadings should play versus affidavits and other evidence.[270]

Second, it's unclear what the last clause—"stating the facts upon which the liability or defense is based"—refers to.[271] Does it only modify the words "supporting and opposing affidavits"?[272] Or does it modify that term in addition to the word "pleadings?"[273] This is hardly an unimportant question. If the "stating the facts" clause only refers to affidavits, then it supports California's conclusion that the sole role of the pleadings are to frame the issues.[274] If, on the other hand, the "facts" clause also refers to the pleadings, then it's more likely a party can rely on *either* the pleadings *or* affidavits to satisfy his evidentiary burden.[275]

Interestingly, California's statute answers this question for us.[276] In part III(B), this Article compared the precise wording of the Texas and California laws.[277] California's, unlike any of the other similarly worded statutes, includes a mid-sentence comma:

> *In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.*[278]

If one examined this language without thinking carefully about the topic of this Article, he or she might come to the conclusion that the comma in between "pleadings" and "and supporting and opposing affidavits" was inappropriate or ungrammatical.[279] Why? Well, although what precedes the comma is an independent clause, what comes after it is not, thereby disqualifying at least one reason for using a mid-sentence comma.[280] Moreover, we're not dealing with a series of three or more items, so it's not as if an "Oxford" or "serial" comma would be appropriate either.[281]

But given the issue we're struggling with, consider what this comma does do: it makes clear, even if ungrammatical in form, that the "stating the facts" clause only applies to the affidavits.[282] By inserting a hard pause after "pleadings," the sentence

268. *See* Schoendorf v. U.D. Registry, Inc., 118 Cal. Rptr. 2d 313, 319 (Cal. Ct. App. 2002).
269. *See* Deaver v. Desai, 483 S.W.3d 668, 677 (Tex. App. 2015).
270. *See* TEX. CIV. PRAC. & REM. CODE § 27.006(a) (West 2013).
271. *See id.*
272. *See id.*
273. *See id.*
274. *See* Schoendorf, 118 Cal. Rptr. 2d at 319.
275. Cuba v. Pylant, 814 F.3d 701, 711 (2016).
276. *See* CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2009).
277. *See supra* Part III(B).
278. CAL. CIV. PROC. CODE § 425.16(b)(2) (emphasis added).
279. *See id.*
280. *See* Christina Sterbenz, *13 Rules For Using Commas Without Looking Like An Idiot*, BUS. INSIDER (Sept. 17, 2013, 11:39 AM), https://perma.cc/K2E8-DB6Z.
281. *Id.*
282. *See* CAL. CIV. PROC. CODE § 425.16(b)(2) (2009).

clearly reads that the court shall separately consider: (1) the pleadings; and (2) supporting and opposing affidavits that state the facts upon which the liability or defense is based.[283]

Now, again, Texas (as well as nine other states) dropped the mid-sentence comma when it passed its anti-SLAPP law.[284] There are at least three explanations for the excision. First, it might signify the drafters' intent that the "stating the facts" clause should apply to *both* the pleadings and affidavits.[285] Second, it might have been the result of the drafter believing the comma to be odd, unnecessary, or misplaced.[286] But third—and most likely—it might not indicate anything at all.[287] Of the ten states that have adopted this exact language, only the first—California—uses the mid-sentence comma.[288] Every state that has since adopted the language has done so without the comma, starting in 1994 with Massachusetts.[289] And between then and Texas's passage in 2011, seven other states employed the provision without the comma.[290] So, it's likely, particularly given that the Texas legislative history is lacking, that there was no conscious thought behind the mark's deletion.[291] Instead, it was most likely the result of healthy borrowing from the seven other states that had already used the language.[292]

Setting the comma aside, might there be a canon of statutory construction that would assist us in applying the "stating the facts" clause?[293] Perhaps, but it doesn't necessarily provide a clear answer either.[294] Justice Scalia and Garner write of the "Series-Qualifier Canon," which states, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive

283. *See id.*

284. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (2013); ARIZ. REV. STAT. ANN. § 12-752(B) (2006); LA. CODE CIV. PROC. ANN. art. 971(A)(2) (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012); MASS. GEN. LAWS ch. 231, § 59H (1996); OKLA. STAT. tit. 12, § 1435(A) (2014); OR. REV. STAT. § 31.150(4) (2010); VT. STAT. ANN. tit. 12, § 1041(e)(2) (2005); WASH. REV. CODE § 4.24.525(4)(c) (2010).

285. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (2013).

286. *See* Sterbenz, *supra* note .

287. SCALIA & GARNER, *supra* note 117, at 397 (arguing that "[t]he false notion that the plain language of a statute is the 'best evidence' of legislative intent" is one of the "thirteen falsities" of statutory interpretation).

288. *Compare* CAL. CIV. PROC. CODE § 425.16(b)(2), *with* ARIZ. REV. STAT. ANN. § 12-752(B) (2006); LA. CODE CIV. PROC. ANN. art. 971(A)(2) (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012); MASS. GEN. LAWS ch. 231, § 59H (1996); OKLA. STAT. tit. 12, § 1435(A) (2014); OR. REV. STAT. § 31.150(4) (2010); TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (2009); VT. STAT. ANN. tit. 12, § 1041(e)(2) (2005); and WASH. REV. CODE § 4.24.525(4)(c) (2010).

289. MASS. GEN. LAWS ch. 231, § 59H (1996).

290. ARIZ. REV. STAT. ANN. § 12-752(B) (2006); LA. CODE CIV. PROC. ANN. art. 971(A)(2) (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012); MASS. GEN. LAWS ch. 231, § 59H (1996); OR. REV. STAT. § 31.150(4) (2010); VT. STAT. ANN. tit. 12, § 1041(e)(2) (2005); WASH. REV. CODE § 4.24.525(4)(c) (2010).

291. *See* Walker & Mirazo, *supra* note 256.

292. *See* ARIZ. REV. STAT. ANN. § 12-752(B) (2006); LA. CODE CIV. PROC. ANN. art. 971(A)(2) (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012); MASS. GEN. LAWS ch. 231, § 59H (1996); OR. REV. STAT. § 31.150(4) (2010); VT. STAT. ANN. tit. 12, § 1041(e)(2) (2005); WASH. REV. CODE § 4.24.525(4)(c) (2010).

293. *See* SCALIA & GARNER, *supra* note 117, at 147.

294. *Id.*

modifier normally applies to the entire series."[295] In our instance, the "stating the facts" clause is a postpositive modifier.[296] But is "pleadings and supporting and opposing affidavits" a series?[297] It's hard to say, and even Justice Scalia and Garner acknowledge that syntax can make this canon particularly tricky: "[p]erhaps more than most of the other canons, this one is highly sensitive to context. Often, the sense of the matter prevails: *He went forth and wept bitterly* does not suggest that he went forth bitterly."[298]

Ultimately, even if a court were to decide that the "stating the facts" clause should apply to both the pleadings and the affidavits, it may not answer the ultimate question of whether a plaintiff could overcome his evidentiary burden by standing on his own pleadings.[299] In other words, it's entirely possible a court could hold that the clause modifies both, but still say, as California has done, that the statute's prima facie evidentiary burden requires *admissible* evidence.[300] But it's an important question nonetheless, and one that adds to the provision's ambiguity.[301]

The third way in which the "pleadings and affidavits" verbiage is ambiguous may be surprising, because ideally, the use of conjunctive language should make the law clearer.[302] Instead, in this case, it raises more questions than it answers.[303] Specifically, consider the word "and" in between "pleadings" and "supporting and opposing affidavits."[304] Joined with the mandatory word "shall," a normal interpretation would be that the court *must* consider *both* the pleadings and affidavits.[305] Certainly, there will always be pleadings—a case can't start (or continue) without a live Complaint, and without an Answer, the Plaintiff is entitled to a default judgment.[306] But what if there are no affidavits to consider?[307]

Does the use of the conjunctive "and" mean that the parties *must* attach affidavits?[308] That hardly seems right, especially given that the defendant may be able to satisfy his burden by doing nothing more than invoking the plaintiff's pleadings.[309] But then again, the word "and" is conjunctive, and the language could easily read "***any*** supporting and opposing affidavits" (which would clearly imply it's possible they may not exist).[310] Given the uncertainty, that's where Texas and

295. *Id.* at 147.
296. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).
297. *See id.*; SCALIA & GARNER, *supra* note 117, at 147.
298. SCALIA & GARNER, *supra* note 117, at 150.
299. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).
300. *See* Evans v. Unkow, 45 Cal. Rptr. 2d 624, 629 (Cal. Ct. App. 1995).
301. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013). *Cf.* GUAM CODE ANN. tit. 7, § 17106(d) (1998); IND. CODE § 34-7-7-9(c) (1998) (both of which read, "[t]he court shall make its determination based on the facts contained in the pleadings and affidavits filed.").
302. *See* SCALIA & GARNER, *supra* note 117, at 116.
303. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).
304. *Id.*
305. *See id.*; SCALIA & GARNER, *supra* note 117, at 112-14, 116.
306. FED. R. CIV. P. 3, 55.
307. Cuba v. Pylant, 814 F.3d 701, 711 (5th Cir. 2016).
308. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).
309. *See* Serafine v. Blunt, 466 S.W.3d 352, 360 (Tex. App. 2015)
310. *See* In re Lipsky, 460 S.W.3d 579, 584, 587 (Tex. 2015).

Oklahoma's "Evidence" section headings might be relevant: to nudge us toward the notion that pleadings should be treated as evidence in an anti-SLAPP proceeding.[311]

One other thing pertaining to the "and" between pleadings and affidavits: where does that leave live witness testimony or other types of evidence?[312] It seems many courts allow witnesses to testify live at the motion's hearing and present non-affidavit evidence, even though their statutes don't seem to contemplate it.[313] But not all courts agree.[314] Certainly, the language could be clearer.[315]

In sum, California and Texas are the standard bearers for the two competing trains of thought: on one hand, anti-SLAPP statutes create evidentiary motions that force plaintiffs to bring forward admissible proof that would support a claim;[316] and on the other hand, anti-SLAPP statutes simply create enhanced pleading standards that plaintiffs can meet in a variety of ways.[317] There are a number of explanations for the different states having arrived at these opposite conclusions, but none is more apparent than the ambiguities present in at least one-third of the anti-SLAPP statutes that have been enacted.[318] The next section explains why these ambiguities threaten to erode the foundation of anti-SLAPP protection, and how something needs to be done before the United States Congress passes a federal anti-SLAPP law with that same language.[319]

IV. ANTI-SLAPP AT A CROSSROADS: THE FUTURE OF THE DEFENSE

At this point, perhaps you're asking, "so what? Why should it matter if some states are allowing SLAPP plaintiffs to overcome motions to dismiss with well-drafted pleadings? What if that's how those states want to do things?" To be clear, this Article isn't targeting any jurisdiction that has gone that direction knowingly and intentionally. For instance, Hawaii's law makes very apparent that it's a pleading statute, and actually instructs the court to ignore any extrinsic evidence:

> [U]pon the filing of any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or involves public participation and is a SLAPP lawsuit: (1) The motion shall be treated as a motion for judgment on the

311. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013); OKLA. STAT. tit. 12, § 1435(A) (2014).

312. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).

313. *See, e.g.*, Williams v. Cordillera Commc'ns, Inc., 2014 WL 2611746, at *2-3 (S.D. Tex. June 11, 2014) ("Under TCPA § 27.006(b), the Court may allow targeted discovery relevant to the motion, which would produce other types of evidence such as deposition testimony, admissions, and documents produced through requests for production or subpoenas *duces tecum.* The statute does not preclude the use of such evidence.").

314. *See, e.g.*, Pena v. Perel, 417 S.W.3d 552, 556 (Tex. App. 2013) ("By statute, the trial court's decision on a motion to dismiss under Section 27.003 is not based on live testimony or the argument presented at the hearing but instead must be based on the pleadings and the supporting and opposing affidavits.").

315. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013).

316. *See* Finton Constr., Inc. v. Bidna & Keys APLC, 190 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2015).

317. *See* Cuba v. Pylant, 814 F.3d 701, 711 (5th Cir. 2016).

318. *See supra* Part III(C)(4).

319. *See infra* Part III.

> pleadings, matters outside the pleadings shall be excluded by the court, and the court shall expedite the hearing of the motion; . . . [and] (5) The court shall make its determination based upon the allegations contained in the pleadings.[320]

To that, one could say, "good for Hawaii." That may not be the best way to expose and dispose of "a lawsuit that lacks substantial justification or is interposed for delay or harassment and that is solely based on the party's public participation before a governmental body,"[321] but that's Hawaii's business, and the fact that it has passed a statute at all makes it better than the twenty-two states that haven't.[322]

No, the target of this Article are those states with anti-SLAPP laws that are ambiguous with respect to what kind of evidence the parties need to offer.[323] There are two reasons the ambiguities pose a threat. The first is that if courts choose to adopt a "pleadings are evidence" approach, the law effectively becomes a pleading statute, which allows any vexatious plaintiff to easily survive dismissal—and thereby drag the defendant through costly discovery—by pointing to unsworn-to and unproven facts.[324] Again, that can't fully effectuate the purpose of the statute if the idea is to unmask frivolous lawsuits at an early stage.[325] The second problem is that it provides almost no guidance for legitimate plaintiffs in states with courts that haven't clearly ruled on this issue.[326]

These problems unquestionably destabilize what has come to be known as a strong and effective tool against judicial harassment.[327] But they take on even greater importance when we see that this ambiguous language exists in the federal anti-SLAPP bill currently being considered by Congress.[328]

A. WHY AMBIGUITY MATTERS

Consider the effect of an interpretation like the one Texas courts have prescribed: if a plaintiff can offer his *own* pleadings—and nothing more—to establish a prima facie claim, then the anti-SLAPP law is reduced to a pleading statute.[329] And again, if that's the way a particular state legislature wants it, then fine.[330] But I'd argue that does very little to advance the purpose of anti-SLAPP legislation, which is to combat *baseless* lawsuits. The California Court of Appeals explained why in its *Wilcox v. Superior Court* opinion:

320. HAW. REV. STAT. §§ 634F-2(1), (5) (2002).

321. *Id.* at § 634F-1.

322. *State Anti-SLAPP Laws*, *supra* note 13 (identifying the scope of anti-SLAPP laws in all fifty states).

323. *See supra* Part III(C)(4).

324. *See* Barker v. Fox & Assocs., 192 Cal. Rptr. 3d 511, 524-25 n.7 (Cal. Ct. App. 2015).

325. *See* Roberts v. L.A. Cty. Bar Ass'n, 129 Cal. Rptr. 2d 546, 552 (Cal. Ct. App. 2003).

326. *See* Serafine v. Blunt, 466 S.W.3d 352, 360 (Tex. App. 2015).

327. *See Examining H.R. 2304, the SPEAK FREE Act: Hearing Before the Subcomm. on* the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114th Cong. 2 n.1 (2016) (testimony of Bruce D. Brown, Executive Director, The Reporters Committee for Freedom of the Press).

328. SPEAK FREE Act of 2015, H.R. 2034, 114th Cong. (2015).

329. *See* Fawcett v. Grosu, 498 S.W.3d 650 (Tex. App. 2016).

330. *See* HAW. REV. STAT. §§ 634F-2(1), (5) (2002).

> This argument points up *why traditional pleading-based motions* such as demurrers and motions to strike are ineffective in combating SLAPP's and why the Legislature believed there was a need for a "special motion to strike" as authorized by section 425.16. In a SLAPP complaint the defendant's act of petitioning the government is *made to appear* as defamation, interference with business relations, restraint of trade and the like.[331]

And there's the real problem: without having to offer actual, admissible evidence that goes to the heart of the claim, how do we know that anything the plaintiff has alleged is true? Well-funded SLAPP plaintiffs with good lawyers can make nearly anything look like a valid lawsuit if they're not burdened with an oath of truth and the possibility of a perjury charge. That's why California's "leading practical treatise"[332] rejects the "pleading statute" approach:

> The anti-SLAPP statute should be interpreted to allow the court to consider the "pleadings" in determining the nature of the "cause of action"—i.e., whether the anti-SLAPP statute applies. But affidavits stating evidentiary facts should be required to oppose the motion (because pleadings are supposed to allege ultimate facts, not evidentiary facts).[333]

In effect, treating the pleadings as if they are evidence dilutes the anti-SLAPP mechanism into something close to what has already been accomplished by the United States Supreme Court's "Twiqbal" caselaw.[334] As I've written in another article:

> "Twiqbal" is the colloquial portmanteau given to the duo of earth-shaking federal civil procedure cases decided by the Supreme Court in 2007 and 2009. First in *Bell Atlantic Corp. v. Twombly*, and then in *Ashcroft v. Iqbal*, the Court overhauled the standard for pleading civil cases in federal courts, replacing "notice pleading" (as announced in *Conley v. Gibson*) with a more demanding rule that requires a plaintiff to show not only a legally cognizable claim for relief, but also a factually "plausible" one.[335]

To be sure, Twiqbal can be a difficult burden to overcome, particularly in complex claims against multiple defendants, or with allegations such as antitrust or employment discrimination where the facts the plaintiff needs to plead are only available through discovery.[336] But most SLAPP claims are relatively simple defamation or business disparagement cases, and it shouldn't be difficult for a plaintiff to offer testamentary proof to establish a prima facie claim, *assuming the*

331. Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 453 (Cal. Ct. App. 1994) (emphasis added).

332. Barker v. Fox & Assocs., 192 Cal. Rptr. 3d 511, 524-25 n.7 (Cal. Ct. App. 2015).

333. ROBERT I. WEIL, ET AL., CIVIL PROCEDURE BEFORE TRIAL (THE RUTTER GROUP CALIFORNIA PRACTICE GUIDE) ¶ 7.1021.1 (2011) (emphasis omitted).

334. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

335. Robert T. Sherwin, *#havewereallythoughtthisthrough: Why Granting Trademark Protection to Hashtags is Unnecessary, Duplicative, and Downright Dangerous*, 29 HARV. J.L. & TECH. 455, 490-91 (2016) (citations omitted).

336. *See* Tamayo v. Bagojevich, 526 F.3d 1074, 1084-85 (7th Cir. 2008); Robbins v. Oklahoma, 519 F.3d 1242, 1246 (10th Cir. 2008).

claim has merit.[337] In the end, requiring a plaintiff to put forth *admissible* evidence—as opposed to just pointing to unsworn-to "facts" in his pleadings—is the only appropriate way to test that merit.[338]

The other significant problem with an ambiguous statute is that it operates unfairly to legitimate plaintiffs. Although offering affidavit testimony to support one's claim shouldn't be difficult, it may be more costly.[339] Thus, it's understandable why a plaintiff would choose to rest on his pleadings, if indeed that's a viable option.[340] But if it's not clear whether a state's anti-SLAPP law is a pleading statute or evidentiary statute, what's a plaintiff to do? Shouldn't a prudent lawyer "play it safe" and offer affidavits, even if doing so is unnecessary and therefore not worth the cost? The ambiguity, at least in jurisdictions that haven't settled the issue, works to a legitimate plaintiff's disadvantage.

Both of these problems weaken anti-SLAPP measures. As Texas itself pointed out in its own statute, the purpose of the legislation 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."[341] How can citizens "speak freely" when they know a litigation bully can skirt the purpose of the statute by cleverly crafting a Complaint? And how is a legitimate plaintiff protected when he doesn't know what kind of evidence will be sufficient to satisfy his prima facie burden?

B. YELP TO THE RESCUE!: THE FEDERAL SPEAK FREE ACT

This Article's introduction detailed three different stories of litigation bullying suffered by users of the review website Yelp.[342] That wasn't an accident. In 2014, the $3 billion San Francisco company set up a Washington, D.C. political office for the purpose of assembling a coalition to push for a federal anti-SLAPP law.[343] The result was H.R. 2034—the SPEAK FREE Act—which was introduced in May of 2015 with the support of thirty-three organizations, including the Electronic Frontier Foundation.[344] In June of 2016, the House Judiciary Committee heard testimony on the bill.[345]

337. *See* In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).

338. *See* Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 628, 637 (Cal. Ct. App. 1996), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).

339. *See* JD Hull, *Motions: Using "Declarations" rather than Affidavits*, WHAT ABOUT PARIS? (July 8, 2009, 12:16 AM), https://perma.cc/Y3FL-96B5.

340. *See* Cuba v. Pylant, 814 F.3d 701, 711 (5th Cir. 2016).

341. *See* TEX. CIV. PRAC. & REM. CODE § 27.002 (2013).

342. *See supra* Part I.

343. Harkinson, *supra* note 31.

344. *Id.*; Sophia Cope, *Federal Anti-SLAPP Bill Introduced in the House*, ELEC. FRONTIER FOUND. (May 21, 2015), https://perma.cc/Y5YT-ZJDL .

345. *Examining H.R. 2304, the SPEAK FREE Act*, House of Representatives Judiciary Committee (June 22, 2016, 1:00 PM), https://perma.cc/K7N3-CEB2.

Unsurprisingly, the SPEAK FREE Act looked extraordinarily similar to many state anti-SLAPP laws.[346] It was broad in scope, applying to any claim that arises from a written or oral statement about a matter of public concern.[347] "Public concern" is likewise defined broadly to mean an issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace.[348]

Moreover, in fairly standard terms, if a defendant makes a "prima facie showing" that the statute applies, the burden shifts to the plaintiff to show "that the claim is likely to succeed on the merits."[349]

And then, we get this:

> (g) Evidence.—
>
> (1) IN GENERAL.—In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and affidavits stating the facts on which the liability or defense is based.[350]

Not only do we have the same exact ambiguous language shared by ten states, we also have it living under an "Evidence" heading, identical to Texas's law.[351]

Although it held hearings on the bill, the 114th Congress never passed the SPEAK FREE Act.[352] And, because the legislative slate was wiped clean when the 114th Congress adjourned in January 2017, the bill would have to be reintroduced to be considered.[353] It's impossible to say whether future proposals would retain the 2015 form. But if Congress is inclined to pass such legislation, it needs to make some changes that won't invite the kind of interpretive chaos that is likely to follow if the bill skates through unchanged.

C. SOLUTIONS

Congress, as well those states that have already adopted this defective language, can do a couple of things to clarify the bill's evidentiary directive. Assuming Congress follows the California model of a statute that demands admissible evidence, here's what it should do:

- Insert a new, numbered section, titled "(1) Moving Party's Evidence" immediately under subsection (g). That section should read: "The moving party may, but is not required to, submit one or more affidavits stating the facts on which the defense is based. In lieu of or in addition

346. *Compare* SPEAK FREE Act of 2015, H.R. 2034, 114th Cong. (2015), *with* CAL. CIV. PROC. CODE § 425.16 (2009) *and* TEX. CIV. PRAC. & REM. CODE § 27.001-.011 (2013).

347. SPEAK FREE Act of 2015, H.R.2304, 114th Cong. § 4202(a) (2015).

348. *Id.* at § 4208(1).

349. *Id.* at § 4202(a).

350. *Id.* at § 4202(g).

351. *See* TEX. CIV. PRAC. & REM. CODE § 27.006 (2013).

352. *Actions Overview*, CONGRESS, https://perma.cc/8FTV-3AWF.

353. *What happens to bills after Congress adjourns?*, POPVOX (Dec. 4, 2016, 3:18 AM), https://perma.cc/3Z69-9CPJ; *114th United States Congress*, WIKIPEDIA, https://perma.cc/88X4-V868.

to the affidavit(s), the moving party may, at the motion's hearing, call one or more witnesses to testify to the facts on which the defense is based."[354]

- Insert a new numbered section, titled "(2) Responding Party's Evidence" immediately after paragraph (1). That section should read: "The responding party shall submit one or more affidavits stating the facts on which liability is based. In lieu of or in addition to the affidavit(s), the responding party may, at the motion's hearing, call one or more witnesses to testify to the facts on which liability is based."[355]
- Insert a new numbered section, titled "(3) Determination" immediately after paragraph (2). That section should read: "In determining whether the moving party has made a prima facie showing that the claim at issue arises from speech made in connection with an official proceeding or about a matter of public concern, the court shall review the Complaint along with any affidavit(s) or witness testimony offered by the moving party. In determining whether the responding party has demonstrated the claim is likely to succeed on the merits, the court shall review the affidavit(s) or witness testimony offered by the responding party, while taking into account the nature of the cause(s) of action as pleaded in the Complaint.[356]

This language, while admittedly a bit longer than what currently exists, would accomplish a number of things. First, it makes clear what the parties *must* do, and what the parties *may* do. The defendant may, if he wishes, offer testamentary evidence. Or, if he wants to rely on the judicial admissions in his opponent's Complaint to establish the statute applies, he's free to do that as well. Meanwhile, the plaintiff is required to offer *some* actual evidence, whether that be in the form of affidavits, live witness testimony, or both.

Second, the language tells the court in well-defined terms what it should take into account when faced with two very different questions: (1) does the statute apply; and (2) does the plaintiff's claim have merit?[357] As to the first question, it should rely primarily on the Complaint, because that will best frame the issues at stake.[358] As to the second question, the court should rely primarily on the evidence, because that's what tells us whether the claim is legitimate.[359]

Third, the language replaces the amorphous term "consider" with "review."[360] Perhaps this change is not necessary given the increased clarity overall, but it makes the bill stronger nonetheless.

Of course, there are other changes Congress could consider. It could do away with an "Evidence" section entirely, following the approach of seventeen

354. *See* SPEAK FREE Act of 2015, H.R.2304, 114th Cong. § 4202(g).
355. *See id.*
356. *Id.*
357. *See* WEIL, *supra* note 333, at ¶ 7.1021.1, p. 7(II)–48.
358. *See id.*
359. *Id.*
360. *See supra* Part III(C)(4).

jurisdictions that don't dictate what a court should look at.[361] But that would be unwise for a statute that has to operate uniformly in all fifty states. Likewise, if Congress decides its law should be a pleading statute in the model of Texas's, it should alter its "Evidence" language to read like Guam's and Indiana's: "The court shall make its determination based on the facts contained in the pleadings and affidavits filed."[362] But given that this is a bill being pushed by a consortium of groups who obviously want it to provide the strongest protection possible, it's doubtful that this is what Congress will ultimately "intend."[363] As a result, it—along with the ten states that have already acted—should adopt the language suggested above, and abolish this evidentiary ambiguity to the hinterlands.

V. CONCLUSION

Given the purpose of anti-SLAPP legislation—to expose baseless, vexatious litigation and expel it from the civil court docket—it's important to have statutes that clearly define what type of evidence the parties need to bring forth to satisfy their respective burdens.[364] Unfortunately, more than half of existing state anti-SLAPP measures contain no such directives.[365] But even more disturbing, of the twelve states that *have* included language purporting to define the form of acceptable evidence, ten contain ambiguous verbiage that has some courts accepting plaintiffs' pleadings as conclusive evidence of allegedly meritorious claims.[366] To make matters worse, Congress has recently considered a federal anti-SLAPP bill that used this same, unclear language.[367]

Ultimately, the problem with this ambiguity is that it invites chaos by allowing courts to construe anti-SLAPP statutes in a manner that frustrates their purpose.[368] If courts decide that plaintiffs can survive a special motion to dismiss by standing on their own pleadings—however "factual" they may be—then what has come to be regarded as a strong protective mechanism for First Amendment activity will be

361. *See* ARK. CODE ANN. § 16-63-506 (2005); DEL. CODE ANN. tit. 10, §§ 8136-38 (1992); D.C. CODE § 16-5502 (2012); FLA. STAT. § 768.295 (2015); GA. CODE ANN. § 9-11-11.1 (2016); 735 ILL. COMP. STAT 110/1-99 (2007); MD. CODE ANN., CTS. & JUD. PROC. §5-807 (West 2010); MINN. STAT. §§ 554.01-.05 (2015); MO. ANN. STAT. § 537.528 (2012); NEB. REV. STAT. § 25-21,245 (1994); NEV. REV. STAT. § 41.660 (2015); N.M. STAT. § 38-2-9.1 (2001); N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2008); N.Y. C.P.L.R. 3212 (McKinney 2015); 27 PA. CONS. STAT. §§ 7707, 8301-05 (2001); R.I. GEN. LAWS §§ 9-33-1 – 9-33-4 (1993); TENN. CODE ANN. §§ 4-21-1001 – 4-21-1004 (1997); UTAH CODE ANN. § 78B-6-1403 (2008).

362. GUAM CODE ANN. tit. 7, § 17106(d) (1998); IND. CODE § 34-7-7-9(c) (1998).

363. *See* Cope, *supra* note 344.

364. *See* Brecher, *supra* note 42, at 113.

365. *See* WEIL, *supra* note 333.

366. ARIZ. REV. STAT. ANN. § 12-752(B) (2006); CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2009); GUAM CODE ANN. tit. 7, § 17106(d) (1998); IND. CODE § 34-7-7-9(c) (1998); LA. CODE CIV. PROC. ANN. ART. 971(A)(2) (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012); MASS. GEN. LAWS ch. 231, § 59H (1996); OKLA. STAT. tit. 12, § 1435(A) (2014); OR. REV. STAT. § 31.150(4) (2010); TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2013); VT. STAT. ANN. tit. 12, § 1041(e)(2) (2005); WASH. REV. CODE § 4.24.525(4)(c) (2010).

367. SPEAK FREE Act of 2015, H.R. 2034, 114th Cong. (2015), https://perma.cc/5MAH-E3XN.

368. *See supra* Part IV(A).

diluted into nothing more than a heightened pleading standard.[369] Instead, states and Congress should redraft this ambiguous language to mirror the stance of courts in California: that plaintiffs seeking to overcome anti-SLAPP motions to dismiss need to bring forth competent, admissible evidence that would establish a right to relief.[370]

369. *Id.*

370. *See supra* Part IV(C); Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620, 637 (Cal. Ct. App. 1996), *abrogated on other grounds in* Equilon Enters. v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).