To: North Carolina General Statutes Commission
From: Duke First Amendment Clinic
Duke Law Professors Nicole Ligon and Sarah Ludington
Re: Responses to AOC Comments
Date: May 5, 2022

These comments are intended to address the comments from the AOC received on Tuesday, May 3, 2022 raising additional concerns about UPEPA.

Most significantly, anti-SLAPP laws are not a new creation and UPEPA merely creates a standard anti-SLAPP law that models many such laws already in existence. Thirty-two states have anti-SLAPP laws – Washington and Kentucky enacted this uniform version but they are certainly not the first to adopt these provisions. We can look at neighboring states – like Tennessee and Georgia, for example – for additional guidance on how to successfully implement these laws, as well as to demonstrate that they do not disrupt civil procedure. Both TN and GA[1] have broad anti-SLAPP laws that: (1) create specific vehicles for filing motions to dismiss or strike early in the litigation process; (2) require the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they are heard; (3) require the plaintiff to demonstrate the case has some degree of merit; (4) impose cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry that burden; and (5) allow for an interlocutory appeal of a decision to deny the defendant's motion. The success of these statutes and ability for courts to implement them in the majority of states in the U.S. is indicative that it can be done smoothly and well. While most states already have established anti-SLAPP statutes, North Carolina is in the minority without one. UPEPA merely spells out (in a uniform way) the process for challenging SLAPP suits – abusive lawsuits aimed to entangle their targets in expensive litigation that chills the defendant from engaging in constitutionally protected activity, such as freely speaking and petitioning the government. North Carolina needs an anti-SLAPP statute – we've previously provided examples of cases that have unnecessarily burdened our citizens (see attached memo). Without one, North Carolina citizens will continue to be on the receiving end of frivolous lawsuits that burden their constitutional right to speech; citizens who succeed against frivolous defamation claims often still have to spend significant time and resources defending them which results in silencing both the defendant party (sometimes through scaring them into a retraction and settlement despite that they have committed no wrong) as well as other citizens fearful of becoming the next target of a SLAPP suit.

To address the other specific concerns laid out by the AOC, an anti-SLAPP statute actually decreases the load for courts – it does not create additional burden. When cases can be easily disposed of by an anti-SLAPP motion, it can avoid years of time and financial costs for not just

[1] These are not the only such states with similar statutes. The following are just some states that have enacted broad and similarly structured anti-SLAPP statutes (in alphabetical order): California, Connecticut, Georgia, Indiana, Kansas, Kentucky, Louisiana, Nevada, New York, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, and Washington. It is also worth noting that the majority of states—almost every one with an anti-SLAPP statute—mandates attorney's fees be paid to a successful anti-SLAPP movant.

the parties but the courts as well. As attorneys who regularly litigate these types cases, it has been our experience that although our clients have all successfully defended or favorably settled their matters, the courts have had to endure significant motion practice, time, and expense in seeing these frivolous actions through. Regarding the calendaring concerns expressed by the AOC, those concerns only arise if a defendant moves for an anti-SLAPP hearing, which means that the timeline, etc., will be triggered by the motion and the deadlines set by the statute. This will not be a common occurrence or something that is likely to burden judicial resources. To the extent that it does, it is offset by the savings in judicial resources by the early resolution of frivolous lawsuits.[2]

We previously discussed discovery in our written responses, but are happy to provide our comments again here for convenience:

> The statute is designed to address *meritless* lawsuits that are only filed to entangle a person in costly litigation because the person exercised their First Amendment rights. A large part of the harm we're trying to address is to prevent the person who got "SLAPP'd" from racking up legal fees and getting stuck in ongoing discovery for a claim that is baseless. As the comment mentions, the court may permit very limited discovery under § 1-674(d) if the party needs the specific information to establish whether the party has satisfied/failed to satisfy a burden under § 1-677(a). This ensures fairness for all. All of the plaintiff's facts still have to be taken as true. Therefore, if the underlying claim is meritorious, discovery should not be required to determine if there is a *legal* cause of action. It may be that the issue implicates no factual issues at all and is a matter of determining the legal sufficiency of the claim: whether the facts alleged give rise to recovery. If a court determines that the claim has some merit, and is not merely frivolous based on the facts, or determines there are significant factual disputes, then a court can simply deny the anti-SLAPP motion and the parties may proceed with discovery.
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> To break this down in further detail, it may be helpful to note that GSC UPEPA § 1-677 lays out the procedure for assessing a motion for expedited relief brought under § 1-673. The procedure can be broken down into three distinct "phases."[3] In "Phase One," which is covered by § 1-677(a)(1) and (2), the court evaluates whether the moving party has proved that the Act applies to all or part of the cause of action, and whether the responding party has proved that the Act does *not* apply to the same. In "Phase Two," covered by § 1-677(a)(3)(a), the court assesses whether the responding party has failed to establish a prima facie case as to each essential element of the cause of action. If it has, then the court moves

[2] There is nothing novel or burdensome to the courts in the expedited hearing procedure. North Carolina already has statutes that explicitly provide for expedited hearings in civil matters (for example, N.C.G.S. § 50A-371: expedited hearings for custody determination prior to military deployment of a parent; N.C.G.S § 42-68: expedited hearings for eviction of drug traffickers and other criminals). Also, there is nothing in the North Carolina rules of civil procedure that conflicts with the notion of an expedited hearing; a motion for an expedited hearing would be made by request of the party seeking the hearing, pursuant to UPEPA and following Rule 7(b)(1). Calendaring the hearing would be made according to local calendaring rules (typically, a calendaring request sent to the clerk of court).

[3] *See* UNIF. PUB. EXPRESSION PROT. ACT § 7 cmt. 2–4 (UNIF. L. COMM'N 2020).

to "Phase Three" (§1-677(a)(3)(b)), where it considers whether the moving party has established that the responding party failed to state a cause of action, or that it is entitled to a judgment as a matter of law. This Reply will discuss the evidentiary burdens on the parties in Phases Two and Three of the motion procedure.

To avoid dismissal under § 1-677, the party against whom the motion is filed has the burden to show that its case has merit by establishing a prima-facie case as to *each* essential element of the cause of action being challenged by the motion. However, under most circumstances, discovery is not required to establish a prima-facie case if the underlying claim is meritorious. In the context of an anti-SLAPP motion, prima-facie evidence is "the *minimum* quantum of evidence necessary to support a rational inference that the allegation is true."[4] Courts have "repeatedly described the anti-SLAPP procedure as operating like an early summary judgment motion,"[5] which is designed precisely to dispose of a case "expeditiously," prior to a significant course of discovery.[6] In addition, in assessing the evidence put forward by the responding party, the Uniform Law Commission advises courts to afford them a "certain degree of leeway" due to the limited opportunity to conduct discovery.[7] Most importantly, courts may not weigh the responding party's evidence, but must take it as true and determine whether it meets the elements of the moved-upon cause of action.[8] In this sense, the burden to establish a prima-facie case is legal, not factual.

Even if the responding party makes a prima-facie showing under § 1-677(a)(3)(a), the movant may still prevail if it shows that the responding party failed to state a cause of action upon which relief can be granted *or* that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. The court assesses the first showing using the same standard as a motion to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6).[9] Accordingly, the showing may implicate no factual issues at all if it goes solely to the *legal sufficiency* of the complaint: whether the facts alleged by the plaintiff, if true and liberally construed, would give rise to a basis for recovery.[10] Alternatively, the first showing may require the court to assess the *pleading sufficiency* of the complaint: whether the plaintiff's complaint includes sufficient factual matter to satisfying the pleading requirements of G.S. § 1A-1, r. 8.[11] But again, in this inquiry the court must accept all of the plaintiff's factual allegations as true; moreover, significant discovery is not required to satisfy the pleading requirements. The second showing is the

[4] Dallas Morning News, Inc. v. Hall, 579 S.W.3d 370, 376–77 (Tex. 2019) (emphasis added) (quoting KBMT Operating Co. v. Toledo, 492 S.W.3d 710, 721 (Tex. 2016)).
[5] THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 5.2 (2019).
[6] N.C. GEN STAT. ANN. § 1A-1 (West 2022).
[7] UNIF. PUB. EXPRESSION PROT. ACT § 7 cmt. 4 (UNIF. L. COMM'N 2020) (quoting Integrated Healthcare Holdings, Inc. v. Fitzgibbons, 44 Cal.Rptr.3d 517, 529 (Cal. Ct. App. 2006)).
[8] *Id*. at cmt. 4 (citing *Sweetwater Union High Sch. Dist. v. Giblane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019)).
[9] *Id.* at cmt. 5.
[10] Steven S. Gensler & Lumen Mulligan, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY ch. 3 (2022).
[11] *Id.*

> same as the test for summary judgment motions,[12] which, as noted above, are frequently filed prior to a significant course of discovery.
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> Neither Phase Two nor Phase Three of the motion procedure outlined in § 1-677 require discovery in most cases—although how the parties carry their modest evidentiary burdens will vary from case to case, depending on the nature of the complaint and the thrust of the motion. Thus, particularly in light of the Act's allowance of limited discovery under § 1-674(d) if the court finds it reasonably necessary, § 1-677 raises no serious evidentiary concerns.

Furthermore, UPEPA provides sufficient guidance for a judge ruling on an expedited motion to dismiss because it enables existing case law to be considered. For instance, the existing law of libel – including the rules for testing whether a plaintiff has established a prima facie case – would apply to a libel case being considered by an anti-SLAPP motion brought under the statute. All that UPEPA does is provide an expedited hearing schedule on this question. The elements for the claim remain the same as always. Indeed, Comment 4 to Section 7 of UPEPA explains: "Accordingly, all a responding party must do to satisfy its burden under Phase Two is produce evidence that, if believed, would satisfy each element of the challenged cause of action. A court may not weigh that evidence, but rather must take it as true and determine whether it meets the elements of the moved-upon cause of action. *Sweetwater Union High Sch. Dist.*, 434 P.3d at 1157. If the responding party cannot establish a prima-facie case, then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed." This does not create any new burden for the court – it merely expedites the timeframe during which this threat to constitutional rights is reviewed. This is necessary because the strategic use of the civil litigation system to prevent citizens from exercising their free speech and petition rights by subjecting them to costly litigation has been w growing problem that imposes tremendous time and strain on everyday citizens. And, as demonstrated by the listing of example SLAPP suits in North Carolina, current remedies have been ineffective at protecting our citizenry from being forced into silence or to endure a costly litigation suit even when they have rightly engaged in freedom of speech.

[12] UNIF. PUB. EXPRESSION PROT. ACT § 7 cmt. 5 (UNIF. L. COMM'N 2020).