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A CONSTITUTIONAL COUNTERPUNCH TO GEORGIA'S ANTI-SLAPP STATUTE

A "Strategic Lawsuit Against Public Participation"--commonly referred to as a "SLAPP"--is a lawsuit intended to chill free speech and healthy public debate and to otherwise intimidate people from speaking out on issues of public concern.[1] True SLAPP suits strike at the heart of the United States and Georgia Constitutions, specifically the rights to free speech and to petition the government enshrined therein.[2] In recent years, state legislatures, including the Georgia General Assembly, have attempted to ward off SLAPP suits through legislation--commonly referred to as "anti-SLAPP" statutes--aimed at the early dismissal of SLAPPs and the award of attorney's fees and costs to the SLAPP target.[3]

***408** Anti-SLAPP statutes are, arguably, well-intended. The expressed aim of anti-SLAPP statutes is to promote the right to free speech and to petition--and some would argue, democracy as we know it--by attempting to prevent or discourage SLAPP suits and provide for their quick dismissal if filed.[4] Yet, in attempting to promote the SLAPP target's constitutional rights to free speech and to petition the government, anti-SLAPP statutes often infringe on the plaintiff's constitutional rights, including the right to a jury, due process, equal protection, and ironically, the right to petition.[5] Georgia's anti-SLAPP statute is no exception.

This Article explores the constitutionality of section 9-11-11.1[6] of the Official Code of Georgia Annotated (O.C.G.A.), Georgia's anti-SLAPP statute. Part I offers a brief historical perspective on SLAPP suits and the different judicial and legislative remedies to SLAPPs used or suggested by commentators. Part II discusses the framework, procedure, and applicability of Georgia's anti-SLAPP statute. Part III discusses the constitutional infirmities of Georgia's anti-SLAPP statute, concluding that the statute is likely unconstitutional. Finally, Part IV proposes alternatives to Georgia's anti-SLAPP statute that both better promote the aims of the statute and do not run afoul of the United States or Georgia Constitutions.

*409 I. HISTORICAL PERSPECTIVE

A. An Overview of SLAPP Suits

In the classic SLAPP case, a well-funded corporation alleges defamation or other tortious conduct against detractors and critics who speak out against the company or a particular project or policy of the company.[7] SLAPP suits commonly arise in connection with real estate development. For example, if disgruntled neighboring landowners protest the development (or redevelopment) of property, the developer might sue the protestors for defamation or tortious interference with contract or business relations.[8] Through intimidation and the threat of mounting legal expenses, the real estate developer seeks to muzzle its critics by stopping them from speaking out or punishing them for doing so.[9] A New York court summarized the classic SLAPP suit as follows:

> SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. T[he] ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the ***410** head, a greater threat to First Amendment expression can scarcely be imagined.[10]

In short, "SLAPPs send a clear message: that there is a 'price' for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings."[11]

Since SLAPP suits were first recognized as a growing trend in the late 1980s,[12] the question has been how to prevent them.[13]

> Solutions suggested by academic and professional observers fall generally into four categories: (1) those which aim at deterring SLAPP suits from being filed at all; (2) those which aim at early identification of targets and dismissal of SLAPP suits already filed; (3) those which aim at indemnification, such as awards of attorney fees and counterclaims for compensatory or punitive damages; and (4) those which aim at helping targets in the conduct of their defense.
>
> Within each of these four categories remedies fall into two groups: (1) *judicial solutions*, which proceed from existing actions and procedures, and (2) *statutory solutions*, which involve a legislative response designed specifically to meet the SLAPP problem.[14]

B. Judicial Remedies to SLAPP Suits

George Pring, who coined the term "SLAPP,"[15] suggested early on that the best solution to SLAPPs is judicial rather than legislative: "The best of these solutions lie with our courts--the very institution designed to protect individual liberties and political rights, yet, ironically, the very institution being manipulated to produce the 'chilling effect' of SLAPPs."[16] There are two basic judicial approaches: (1) judicially-crafted procedures providing for early dismissal of SLAPPs, and (2) counterclaims filed by SLAPP targets seeking damages and attorney's ***411** fees for the wrongful lawsuit, sometimes called

"SLAPP-Backs."[17] Both are discussed below.

1. Judicially-Crafted Procedures for Early Dismissal

Several states rely on rules and procedures created by the courts for the early identification and dismissal of SLAPPs.[18]

a. The Noerr-Pennington Doctrine

Relying on the First Amendment right to petition, the Supreme Court of the United States has long protected citizens against SLAPPs--well before the term SLAPP was coined. This protection, commonly known as the *Noerr-Pennington* doctrine, arose from two Supreme Court opinions issued in the 1960s in the antitrust context, *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc*.[19] and *United Mine Workers of America v. Pennington*.[20] The result of those two cases was an express recognition that conduct intended to influence government action was absolutely privileged, and therefore, could not be the basis for liability under the antitrust laws, even if it negatively affected the plaintiff or competition generally.[21] That protection was subsequently extended to judicial activity[22] and to areas of the law beyond antitrust.[23] The *Noerr-Pennington* doctrine has been used for decades to enable targets of SLAPPs to end the case at the motion to dismiss stage.

b. Application of the Noerr-Pennington Doctrine to Address SLAPPs at the Motion to Dismiss Stage

In *Webb v. Fury*,[24] the Supreme Court of West Virginia applied the *Noerr-Pennington* doctrine and reversed the trial court's refusal to ***412** dismiss a lawsuit based on privileged petitioning activity.[25] In *Webb*, an individual and his non-profit corporation (the defendants) filed an administrative complaint with the Office of Surface Mining (OSM) and requested an evidentiary hearing with the Environmental Protection Agency (EPA), asserting that DLM Coal Corporation (DLM) violated the Surface Mining Control and Reclamation Act of 1977 and the Clean Water Act.[26] The nonprofit defendant also issued a newsletter suggesting that DLM was not responsibly mining coal.[27] DLM responded by filing a lawsuit against the defendants alleging that the defendants defamed DLM through their communications with the EPA and OSM, as well as through the newsletter published by the nonprofit.[28] DLM claimed that the defendants' legal actions and newsletter were false and defamatory.[29]

The defendants moved to dismiss DLM's lawsuit because their communications were constitutionally privileged.[30] They argued that "these activities are absolutely privileged petitioning activities under the *First Amendment to the Constitution of the United States* and, for that reason, [DLM] may not maintain an action for damages against them."[31] The Circuit Court of Upshur County denied the motion to dismiss.[32]

On appeal, the Supreme Court of West Virginia, relying on the *Noerr-Pennington* doctrine, explained that "[t]he right to petition for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights."[33] Accordingly, "[i]f it appears that [defendants'] conduct falls within the class of absolutely privileged petitioning activity, the mere pendency of the action will threaten the [defendants'] free exercise of their right to petition the government and the denial of the motion to dismiss by the circuit court will constitute error."[34] The court held that the defendants' communications to the EPA and OSM were "classic examples of absolutely privileged petitioning activity."[35] Likewise, the newsletter published by the non-profit defendant was also protected petitioning activity because "the right to petition includes, among other things, activity designed to influence public sentiment concerning the ***413** passage and enforcement of laws as well as appeals for redress made directly to the government."[36] The court concluded that "[A] publicity campaign

to influence governmental action falls clearly into the category of political activity."[37]

In holding that DLM's lawsuit should have been dismissed, the court reasoned:

> [W]e shudder to think of the chill our ruling would have on the exercise of the freedom of speech and the right to petition were we to allow this lawsuit to proceed. The cost to society in terms of the threat to our liberty and freedom is beyond calculation. This cost would be especially high were we to prohibit the free exchange of ideas on such pressing social matters as surface mining. Surface mining, and energy development generally, are matters of great public concern. Competing social and economic interests are at stake. To prohibit robust debate on these questions would deprive society of the benefit of its collective thinking and, in the process, destroy the free exchange of ideas which is the adhesive of our democracy. Our democratic system is designed to do the will of the people, and when the people cannot express their will, the system fails. It is exactly this type of debate which our federal and state constitutions protect; debate intended to increase our knowledge, to illustrate our differences, and to harmonize those differences in order to form a more perfect union. We see this dispute between the parties as a vigorous exchange of ideas which is more properly within the political arena than in the courthouse. To hold otherwise would be to isolate ourselves in ignorance and to deprive society of the collective genius upon which our civilization depends. This we must never allow.[38]

Similarly, in *Protect Our Mountain Environment, Inc. v. District Court of Jefferson County* (*POME*),[39] the Supreme Court of Colorado relied on the *Noerr-Pennington* doctrine to dismiss a SLAPP suit.[40] Going a step further than the Supreme Court of West Virginia in *Webb*, the Colorado high court set forth a standard for trial courts for analyzing (and dismissing) SLAPP suits at the motion to dismiss stage.[41]

In *POME*, a developer sought to rezone 507 acres of land in Jefferson County, Colorado, for the purpose of constructing 465 residential units, retail and office space, a conference center, recreational facilities, an ***414** early education center, and 1700 parking spaces. The Jefferson County Board of County Commissioners (the Board) approved the application. Thereafter, an environmental protection group, Protect Our Mountain Environment, Inc., and several individuals (collectively referred to as POME) sued the Board and the developer seeking to overturn the Board's decision. The Jefferson County District Court and Colorado Court of Appeals ruled against POME.[42]

Following POME's unsuccessful lawsuit, the developer sued POME and its legal counsel, alleging that POME abused the legal process by filing and pursuing a lawsuit against the Board and the developer that POME knew was without legal justification. The developer also alleged that POME's legal counsel engaged in a civil conspiracy to bring groundless claims against the developer. The developer asserted that the actions of POME and its legal counsel caused the developer economic harm to the tune of $10 million in compensatory damages and $30 million in exemplary damages.[43]

POME filed a motion to dismiss the developer's lawsuit on the grounds that POME's initial action was protected petitioning activity under the First Amendment of the United States Constitution.[44] Relying on the *Noerr-Pennington* doctrine, the Supreme Court of Colorado set forth a standard by which motions to dismiss based on the First Amendment right to petition should be assessed:

> That standard requires that when, as here, a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual

> support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.[45]

The court remanded the case to the trial court for consideration of POME's motion to dismiss in light of the appropriate standard.[46]

***415** The decisions in *Webb* and *POME* demonstrate how courts can provide judicial protection to SLAPP targets by dismissing SLAPP suits early in the litigation. In addition to this judicial protection, the SLAPP target can also file counterclaims against a SLAPP to recover damages, fees, and costs arising from the SLAPP suit: namely, "SLAPP-Back."

2. The "SLAPP-Back" Lawsuit

"The most effective long-range tool for discouraging filings at the outset appears to be the 'SLAPP-Back,' a subsequent counterclaim or countersuit for damages by the target against the filer."[47] "The clearest resort for a party aggrieved by a groundless lawsuit is an action for malicious prosecution. This is a long-established remedy available in every state."[48]

In Georgia, for example,

> [a]ny person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if such person acts:
>
> (1) With malice; and
>
> (2) Without substantial justification.[49]
>
> 'Malice' means acting with ill will or for a wrongful purpose ... or us[ing] process for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based.[50]
>
> 'Without substantial justification' ... means ...
>
> (A) Frivolous;
>
> (B) Groundless in fact or in law; or
>
> ***416** (C) Vexatious.[51]

Georgia's abusive litigation statute has been used successfully by SLAPP targets in fighting back against the SLAPP filer.[52]

In addition to Georgia's abusive litigation statute, Georgia has two statutes under which a party subject to frivolous litigation may seek attorney's fees and costs. Under O.C.G.A. § 9-15-14,[53] a party is entitled to attorney's fees and litigation expenses when another party asserts a claim "with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position." [54] SLAPP targets have also used this statute successfully.[55]

Section 13-6-11[56] of the O.C.G.A. also provides for an award of attorney's fees and expenses against a defendant who has acted in bad faith, been stubbornly litigious, or caused unnecessary trouble and expense.[57] However, only plaintiffs can assert this statute, so the value to a SLAPP target may be limited.[58]

All of these statutory provisions are potential tools that may be used by a SLAPP target to SLAPP-back against a SLAPP suit.[59]

C. Legislative Remedies to SLAPP Suits

One of the most common approaches to remedy SLAPP suits is the enactment of anti-SLAPP statutes. "These statutes provide features that are intended to protect public participants and activists from claims based on their petitioning activities, in order to at least minimize the cost of defending against abusive discovery and other legal process during such frivolous suits."[60] Anti-SLAPP statutes vary from state to state but generally provide for prompt dismissal of the SLAPP suit and the award of attorney's fees and costs to the successful defendant seeking ***417** dismissal.[61] Some states have enacted narrow anti-SLAPP statutes only applicable in certain circumstances, and other states have enacted sweeping legislation that protects First Amendment activities related to issues of public concern.[62] As of the publication of this Article, twenty-nine states and the District of Columbia have enacted anti-SLAPP statutes.[63]

The problem with many anti-SLAPP statutes, however, is that they directly infringe on the rights of the plaintiff in attempting to protect the rights of the defendant.[64] As one commentator noted, "[t]he main challenge state legislatures face in drafting an anti-SLAPP statute is that in protecting one party's right to petition, an anti-SLAPP law can directly infringe on the petitioning rights of the opposing party."[65]

II. GEORGIA'S ANTI-SLAPP STATUTE-O.C.G.A. § 9-11-11.1

Like other states, Georgia's legislature has attempted to fend off SLAPP suits through legislation.[66] Georgia first enacted its anti-SLAPP ***418** statute in 1996.[67] The original statute protected only such speech made "in connection with an issue *under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law*."[68] "In essence, the statute narrowed protected speech to statements made in connection with official government proceedings. When a person spoke on an issue not currently under consideration or review through an official proceeding, no anti-SLAPP protections applied."[69]

In 2016, the Georgia legislature expanded the scope of Georgia's statutory anti-SLAPP protections to *all* speech about an issue of public concern, notwithstanding the existence of an official government proceeding.[70]

A. Statutory Framework

1. Elements of an Anti-SLAPP Motion to Strike

If a defendant believes she is the subject of a SLAPP, she can immediately file a motion to dismiss pursuant to Georgia's anti-SLAPP statute. Georgia's anti-SLAPP statute states the following:

> A claim for relief against a person or entity *arising from any act* of such person or entity which could reasonably be construed as an act *in furtherance of the person's or entity's right of petition or free speech* under the Constitution of the United States or the Constitution of the State of Georgia *in connection with an issue of public interest or concern* shall be subject to a motion to strike *unless* the court determines that *the nonmoving party has established that there is a probability that the nonmoving party will prevail on the claim*.[71]

***419** Thus, there are two basic elements to Georgia's anti-SLAPP statute: First, the filer's claims must "*aris[e] from*" the defendant exercising his constitutional right of free speech or to petition the government.[72] Second, the purported exercise of free speech or to petition the government must be "*in connection with an issue of public interest or concern*."[73] If these elements are met, the burden shifts to the nonmoving party (the alleged SLAPP filer) to establish a *probability* of success on the merits of its claim.[74]

2. Procedure After Anti-SLAPP Motion to Strike is Filed

When a defendant files a motion to strike under O.C.G.A. § 9-11-11.1, the entire case is *immediately* stayed: "All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section until a final decision on the motion."[75] The court must then rule on the motion to strike "not more than 30 days after service unless the emergency matters before the court require a later hearing."[76] In ruling on the motion, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[77] However, "on noticed motion and for good cause shown, [the court] may order that specified discovery or other hearings or motions be conducted notwithstanding [the automatic stay]."[78] Thus, the court has discretion to permit discovery, but it is not obligated to do so.

3. Prevailing Party's Right to Attorney's Fees

The cost-shifting provision in Georgia's anti-SLAPP statute strongly favors defendants. "[A] prevailing *moving* party on a motion to strike ***420** [under O.C.G.A. § 9-11-11.1(b)(1)] *shall be* granted the recovery of attorney's fees and expenses of litigation related to the action."[79] On the other hand, a prevailing *nonmoving* party is only entitled to fees if it shows that the motion to strike "is frivolous or is solely intended to cause unnecessary delay."[80]

4. Summary of Georgia's Anti-SLAPP Statute

In sum, Georgia's anti-SLAPP statute operates as follows:

• The plaintiff files a claim against a defendant;

• If the defendant believes the plaintiff's claims arise out of the defendant's rights to free speech or petition about an issue of public concern, the defendant may move to strike the plaintiff's complaint;[81]

• Once the defendant files its motion to strike, the entire case is stayed;[82]

• The burden then shifts to the *plaintiff* to prove either (i) the plaintiff's claims do not implicate the anti-SLAPP statute, or (ii) a probability of success on the merits of the plaintiff's claims;[83]

• The court must rule on the motion to strike within thirty days, considering the pleadings and opposing affidavits (that is, weighing disputed facts, without providing the plaintiff the benefit of any discovery or a jury trial);[84]

• If the plaintiff cannot prove a probability of success, its claims are dismissed and it must pay the defendant's attorney's fees.[85]

B. Application of Georgia's Anti-SLAPP Statute in Federal Court

One issue several federal courts around the country have faced is whether state anti-SLAPP statutes apply in federal court.[86] The issue boils down to whether a federal court that has jurisdiction based on diversity should apply state law or federal law. "More specifically, can a federal court invoke the state-level anti-SLAPP special motion to dismiss (special motion), or is the special motion trumped by a ***421** Federal Rule of Civil Procedure (FRCP) 12(b)(6) motion to dismiss for failure to state a claim?"[87]

In a recent decision, the United States District Court for the Northern District of Georgia ruled that Georgia's anti-SLAPP statute does *not* apply because it is a procedural rule conflicting with the pleading standard set forth in Rule 12 of the FRCP.[88] In her order, Judge Orinda Evans acknowledged the circuit split on the issue, noting that the United States Courts of Appeals for the First, Fifth, and Ninth Circuits have held that anti-SLAPP statutes do apply in federal court, while the District of Columbia Circuit concluded otherwise.[89] The United States Court of Appeals for the Eleventh Circuit will likely weigh in soon, as the defendant appealed Judge Evan's ruling.[90] The Eleventh Circuit's impending ruling has significant implications. If state anti-SLAPP statutes do not apply in federal court in the Eleventh Circuit, then plaintiffs are free to file SLAPP suits in such federal courts (assuming they can obtain jurisdiction) without facing the consequences imposed by a state's anti-SLAPP statute.

III. CONSTITUTIONAL INFIRMITIES OF GEORGIA'S ANTI-SLAPP STATUTE

While Georgia lawmakers may have passed O.C.G.A. § 9-11-11.1 with a good-faith intent to protect the rights of citizens who wish to speak out on matters of public concern,[91] the legislature may have gone too far. Although the statute promotes the constitutional rights of one group of people (the right to free speech and petition of people speaking out on public issues), it does so by infringing on the constitutional rights of another group (those who wish to file a lawsuit and exercise their own constitutional rights to petition and to have a jury decide the merits of their claims). The Supreme Court of Washington summed up this constitutional infirmity well, stating that anti-SLAPP statutes "seek[] to protect one group of citizens' constitutional rights of expression and ***422** petition by cutting off another group's constitutional rights of petition and jury trial. This the legislature cannot do."[92]

Georgia's anti-SLAPP statute establishes a unique procedure[93] requiring the trial court, when presented with a motion to strike a complaint, to consider the pleadings, weigh the evidence, and decide whether the plaintiff has established (that is, proven) a probability that it will prevail on its claim.[94] The plaintiff is not entitled to discovery when opposing the motion to strike.[95] The plaintiff also is not allowed to have a jury decide the merits of its claim.[96] This procedure is distinct from the procedure for addressing a motion to dismiss, which requires the court to assume the facts pled in the complaint are true and then determine whether those facts plausibly state a cause of action.[97] The procedure in O.C.G.A. § 9-11-11.1 is also unlike the procedure for addressing motions for summary judgment, which allows the nonmoving party to take discovery and requires the case to proceed unless the moving party can prove that no genuine issue of material fact exists for a jury to consider.[98] Under O.C.G.A. § 9-11-11.1, even if there is a disputed issue of fact, the case will not proceed if the judge concludes that the nonmoving party did not satisfy the heightened probability showing.[99]

In short, a plaintiff may have its case dismissed under the anti-SLAPP statute despite (i) complying with well-established rules of pleading that require only a short and plain statement of the claims showing the plaintiff is entitled to relief, (ii) taking no discovery, and (iii) establishing ***423** a disputed issue of fact on the face of the pleadings and any affidavits submitted in connection with the motion to strike.[100] This very real scenario raises serious constitutional concerns.

A. Georgia's Anti-SLAPP Statute Infringes on a Plaintiff's Right to a Jury Trial Guaranteed by the Georgia Constitution[101]

1. O.C.G.A. § 9-11-11.1 Undermines the Jury's Fact-Finding Function

The Georgia Constitution protects the right to a jury trial for civil litigants in Georgia courts.[102] Any statute undermining the jury's basic function to resolve factual disputes violates this right.[103] Georgia's anti-SLAPP statute is likely unconstitutional for this reason.

The Georgia statute usurps the jury's role by tasking the trial court judge with weighing evidence and making a factual determination about whether the nonmoving party has proven a probability that it will prevail.[104] Moreover, the statute requires the trial judge make this factual determination without ensuring that the nonmoving party has an opportunity to take discovery.[105] Courts in three states--two of which are the highest court in their respective states--have ruled that anti-SLAPP ***424** statutes similar to Georgia's statute are unconstitutional on these grounds.[106]

Most recently, in *Mobile Diagnostic Imaging v. Hooten*,[107] the Minnesota Court of Appeals held that "[t]he procedural provisions of [Minnesota's anti-SLAPP statute] deprive the non-moving party of the right to a jury trial by requiring a court to make pretrial factual findings to determine whether the moving party is immune from liability. The statute, therefore, is unconstitutional."[108]

Similarly, in 2015, the Washington Supreme Court also held in *Davis v. Cox*[109] that Washington's anti-SLAPP statute "violate[d] the right of trial by jury under [Washington's state constitution] because it requires a trial judge to invade the jury's province of resolving disputed facts and dismiss-- and punish--nonfrivolous claims without a trial."[110]

Although *Davis* and *Mobile Diagnostic Imaging* are relatively recent decisions, protecting the right to jury trial against encroachment by well-intended anti-SLAPP legislation is not new. The New Hampshire Supreme Court recognized the problem in 1994, holding in *Opinion of the Justices*[111] that a proposed anti-SLAPP statute--identical in all material respects to O.C.G.A. § 9-11-11.1--was unconstitutional.[112] The proposed New Hampshire statute provided that a plaintiff's complaint was

subject to a 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."[113] Like the Georgia statute, the New Hampshire legislation did not elaborate on the meaning of "probability," but the court interpreted it to mean that a plaintiff capable of showing only a possibility of prevailing would be subject to a motion to strike.[114] Also like O.C.G.A. § 9-11-11.1, the New Hampshire legislation required the court to consider and weigh disputed evidence when determining whether a plaintiff met its burden of establishing a "probability that [the plaintiff] ***425** will prevail on the claim."[115] Holding the proposed statute unconstitutional, the court explained that "[a] solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group."[116]

The procedural requirements of Georgia's anti-SLAPP statute similarly infringe on a plaintiff's constitutional right to a jury trial. The Georgia statute requires the trial court to weigh disputed evidence, make factual determinations, and ultimately dismiss claims unless "the nonmoving party has established that there is a probability that the nonmoving party will prevail on the claim."[117] This places an unconstitutional burden on a plaintiff to prove a "probability" of prevailing without their claims ever being presented to a jury. Like Washington's invalidated statute, O.C.G.A. § 9-11-11.1 "creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial. Such a procedure invades the jury's essential role of deciding debatable questions of fact."[118]

2. Georgia's Legislature Expressly Rejected a Summary Judgment Standard for O.C.G.A. § 9-11-11.1

The grant of summary judgment--when a court decides that there are no genuine issues of material fact and a party is entitled to judgment as a matter of law[119]--provides a constitutionally valid exception to a party's right to have a jury decide its case. Accordingly, some courts faced with constitutional challenges to their state's anti-SLAPP statute have creatively "interpreted" their state's anti-SLAPP statute as imposing a summary judgment standard.[120]

For example, the District of Columbia adopted an anti-SLAPP statute substantially similar to Georgia's statute.[121] That statute requires that a party opposing an anti-SLAPP motion to strike must demonstrate that its claim is "likely to succeed on the merits."[122] The District of Columbia ***426** Court of Appeals stated that this statutory language literally mandated evidentiary proof of success and did not permit mere reliance on allegations in the complaint.[123] The court also equated the term "likely" with "probable," meaning that the nonmovant had to show that it would probably prevail.[124]

In light of the statute's evidentiary burden, the court ruled on the constitutional conflict: "An interpretation that puts the court in the position of making credibility determinations and weighing the evidence to determine whether a case should proceed to trial raises serious constitutional concerns because it encroaches on the role of the jury."[125] Rather than calling it how it saw it, however, the court decided to invoke the doctrine of constitutional avoidance and interpret the statute as if it imposed a summary judgment standard.[126] In effect, the court ruled that the District of Columbia legislature did not mean what it said.[127] The court plainly recognized that it was walking (or crossing) the line demarcating its role in our system of government to interpret and apply statutes, not rewrite them, explaining "[w]e acknowledge that our functional interpretation of the statutory language is not evident from the face of the statute alone. As we have explained, the interpretation we adopt is made possible by the ambiguity of the statutory language and rendered necessary to avoid doubt about the constitutionality of § 16-5502(b)."[128]

Whether it is prudent for courts to "interpret," or rewrite, statutes in order to avoid a constitutional conflict is up for debate.[129] Notwithstanding such a debate, however, it would be wrong for any court to graft a summary judgment standard onto Georgia's anti-SLAPP statute because the Georgia legislature expressly rejected a summary judgment standard during the

enactment process.

A version of the anti-SLAPP statute proposed in the Georgia House provided that a complaint "shall be subject to a motion to strike [under the anti-SLAPP statute] unless the court determines that the nonmoving party has established that he or she would be *likely to prevail on a motion* ***427** *for summary judgment brought by the moving party*."[130] That version, however, was rejected in favor of the "probability of prevailing" standard in the current law.[131] Thus, the Georgia legislature intended to impose a heightened standard different than that of summary judgment. It would be especially surprising, then, for a court to interpret Georgia's statute as providing a summary judgment standard when both the statutory language and legislative history make clear that summary judgment was not the standard the legislature intended.

B. Georgia's Anti-SLAPP Statute Infringes on a Plaintiff's Right to Petition the Courts

In addition to the right to a jury trial, Georgia's anti-SLAPP statute also runs afoul of other constitutional protections. Ironically, although attempting to protect the right to petition, the Georgia statute may in fact violate that same constitutional protection.

As noted earlier,[132] the First Amendment guarantees the right to "petition the Government for a redress of grievances."[133] The Supreme Court of the United States has held that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."[134] Under the First Amendment, a lawsuit may not be prohibited, notwithstanding the intent or purpose of the lawsuit, unless it is a "mere sham."[135] Moreover, the Supreme Court explained that "if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined."[136] The Supreme Court of Washington in *Davis* relied on this application of the First Amendment right to petition when invalidating Washington's anti-SLAPP statute.[137]

By establishing a high burden of proof in a purported SLAPP suit while simultaneously requiring a court to dismiss a case turning on ***428** genuine issues of disputed fact and competing witnesses, Georgia's anti-SLAPP statute impedes a party's right to petition and access the court under the United States and Georgia Constitutions. Georgia's anti-SLAPP statute is thus subject to constitutional attack on this ground as well.

C. Georgia's Anti-SLAPP Statute May Also Violate a Plaintiff's Rights to Due Process and Equal Protection under the Georgia and United States Constitutions

1. Due Process

Although less blatant than the constitutional problems noted above, Georgia's anti-SLAPP statute may also run afoul of the Due Process and Equal Protection Clause provisions of the Georgia and United States Constitutions. Plaintiffs are guaranteed the right to due process under both the Georgia and United States Constitutions.[138] "The constitutionally-guaranteed right to due process of law is, at its core, the right to notice and the *opportunity to be heard*."[139] Due process is satisfied "if a party has reasonable notice and *opportunity to be heard*, and *to present its claim* or defense, *due regard being had to the nature of the proceeding* and the character of the rights which may be affected by it."[140] The truncated adjudication of a plaintiff's claims provided for by Georgia's anti-SLAPP statute pushes the limit of due process requirements.

Under the statute, a plaintiff's claims are subject to final adjudication in a short--not more than 30 days--period, and the party is not guaranteed a right to discover evidence to present in support of its claims, which the party must prove by a "probability" standard that is higher than the burden of proof at trial.[141] The statute's failure to provide for discovery is especially problematic because the trial judge is required to ***429** assess whether a party meets the heightened probability standard even when there are disputed issues of material fact. At best, the Georgia statute allows a party the opportunity to argue that it meets the heightened probability standard without the benefit of full discovery provided for under the Georgia Civil Practice Act. At worst, the statute's procedures are an "empty ritual."[142] A Georgia court could easily conclude that this is not the type of proceeding and opportunity to be heard contemplated by the due process clauses in the Georgia and United States Constitutions.[143]

2. Equal Protection

Both the Georgia and United States Constitutions guarantee the right to equal protection under the law.[144] The Equal Protection Clause "requires that all persons shall be treated alike under like circumstances and conditions."[145] It can be argued that Georgia's anti-SLAPP statute affords higher protection of the defendant's constitutional rights than it does the plaintiff's constitutional rights under like circumstances and conditions, namely, in the same case before the same court. The statute limits plaintiffs' rights to petition the court, while at the same time preserving (and strengthening) the defendants' right to petition.[146] This disparity is highlighted by the treatment that movants (defendants) and nonmovants (plaintiffs) receive under the statute with regard to (i) decisions on the merits and (ii) the right to attorneys' fees and costs--(i) if the trial court grants a motion to strike, the decision is case dispositive, but a decision in favor of a nonmovant is inadmissible for any purpose; (ii) if the movant prevails, she is entitled to attorneys' fees and costs, but ***430** if the nonmovant prevails it is entitled to fees and costs only under certain conditions.[147]

Despite such disparity, Georgia's anti-SLAPP statute should be upheld on equal protection grounds if it is rationally related to promoting some legitimate government interest.[148] There are certainly legitimate government interests at stake, specifically, the exercise of free speech and right to petition the government. Less clear, however, is whether the anti-SLAPP statute is rationally related to those interests. California courts have ruled a rational relationship exists;[149] Georgia courts have not yet weighed in on the matter.

IV. CONCLUSION AND SUGGESTED APPROACH

Georgia's current anti-SLAPP statute creates as many constitutional problems as the legislature sought to protect when enacting the statute. If the constitutionality of the statute is ever considered, there are strong grounds to invalidate it. It remains to be seen whether the Georgia legislature will take a proactive approach and amend the statute to cure the constitutional infirmities.

The best long-term solution to SLAPP suits, however, may not be through legislative action but rather through a combination of judicial remedies.[150] Under the *Noerr-Pennington* doctrine, courts are empowered to dismiss lawsuits that are based on constitutionally protected activity. The *Noerr-Pennington* doctrine has been used for decades to end suits based on constitutionally protected conduct (including SLAPPs) at the motion to dismiss stage, just like Georgia's anti-SLAPP statute attempts to do. In addition, there are statutory provisions in Georgia's code that SLAPP targets can use to fight back, specifically O.C.G.A. § 51-7-8 (abusive litigation claim for damages) and O.C.G.A. §§ 9-15-14, 13-6-11 (providing for attorney's fees and expenses of litigation). Each of these statutory provisions provides an effective mechanism to combat the costs of a SLAPP suit, as well as seek damages for abusive litigation--and they have been used successfully in Georgia by

SLAPP targets.

***431** In sum, Georgia's abusive litigation and attorney's fees statutes, coupled with a properly filed motion to dismiss by the target of the SLAPP, provide an adequate and constitutional method to fend off SLAPP suits while at the same time providing the target of the SLAPP with damages, attorney's fees, and costs of litigation resulting from the SLAPP suit. In cases in which courts believe that the plaintiff has filed a true SLAPP suit, the court should apply the *Noerr-Pennington* doctrine at the motion to dismiss stage and also liberally apply the abusive litigation and fee shifting statutes in the Georgia code.

Footnotes

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[1] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989) ("We call the suits 'SLAPPs,' for Strategic Lawsuits Against Public Participation. We have found that this accurately captures both their causation and their consequences.").

[2] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); GA. CONST. art. I, § 1, para. 5 ("Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty."); GA. CONST. art. I, § 1, para. 9 ("The people have the right to assemble peaceably for their common good and to apply by petition or remonstrance to those vested with the powers of government for redress of grievances.").

[3] *See State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection/ (last visited Jan 23, 2018) (noting various state anti-SLAPP statutes); *see, e.g.*, O.C.G.A. § 9-11-11.1 (2017) (Georgia's anti-SLAPP statute).

[4] For example, the Georgia statute states:
The General Assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process. To accomplish the declarations provided for under this subsection, this Code section shall be construed broadly.
O.C.G.A. § 9-11-11.1(a) (2017).

[5] *See, e.g.*, Davis v. Cox, 351 P.3d 862, 875 (Wash. 2015) (holding Washington's anti-SLAPP statute violated state constitutional right to jury trial and right to petition); Op. of the Justices, 641 A.2d 1012, 1014-15 (N.H. 1994) (holding New Hampshire's proposed anti-SLAPP statute would violate state constitutional right to jury trial); Mobile Diagnostic Imaging, Inc. v. Hooten, 889

N.W.2d 27, 33 (Minn. App. 2016) (holding Minnesota's anti-SLAPP statute violated state constitutional right to jury trial).

[6] O.C.G.A. § 9-11-11.1 (2017).

[7] *See* Pring, *supra* note 1, at 5-9.

[8] *See id*. at 13-14 (noting examples of real estate development-related SLAPPs); Jessica Block, *Civil Procedure--Special Motion to Dismiss--Anti-SLAPP Statute*, 91 MASS. L. REV. 97, 98 (2008) (explaining that the "typical mischief" in SLAPP cases historically has been in the real estate development context); Frederick M. Rowe & Leo M. Romero, *Resolving Land-Use Disputes by Intimidation: SLAPP Suits in New Mexico*, 32 N.M. L. REV. 217, 218 (2002) ("The typical SLAPP suit involves citizens opposed to a particular real estate development.") (quoting Dixon v. Superior Ct., 36 Cal. Rptr. 2d 687, 693 (Cal. Ct. App. 1994)); *see, e.g.*, Metzler v. Rowell, 248 Ga. App. 596, 596, 547 S.E. 2d 311, 312 (2001) (regarding "a dispute between a landowner seeking to rezone a parcel of land for development and concerned residents of the affected neighborhood"); Providence Constr. Co. v. Bauer, 229 Ga. App. 679, 679, 494 S.E.2d 527, 528 (1997) ("The developer sought to enjoin the residents from actively opposing its efforts to rezone a parcel of property adjoining the subdivision.").

[9] Pring, *supra* note 1, at 5-6.

[10] Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992).

[11] Pring, *supra* note 1, at 6.

[12] *Id*. at 3-4 ("What is this new (and, we believe, growing) litigation phenomenon? The civil lawsuits we are studying at the University of Denver's Political Litigation Project are all filed against non-governmental individuals and groups for having communicated their views to a government body or official on an issue of some public interest.").

[13] *See id*. at 15-21.

[14] Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 984 (1999) (emphasis added) (noting various solutions to SLAPP suits); Pring, *supra* note 1, at 15-21.

[15] *See* Pring, *supra* note 1, at 4; *see also* Block, *supra* note 8, at 97 n.5 ("The phrase was coined by George W. Pring and Penelope Canan.").

[16] Pring, *supra* note 1, at 21.

[17] Braun, *supra* note 14, at 985-94; Pring, *supra* note 1, at 17-21.

[18] *See* PUB. PARTICIPATION PROJECT, *supra* note 3; *see also* Kourtney Harrison & Scott Ellis Ferrin, *Strategic Lawsuits Against*

Public Participation in Educational Settings: Are Anti-SLAPP's Provisions Protecting the Right Parties, 306 ED. L. REP. 1, 8 (2014) (discussing states without anti-SLAPP statutes).

[19] 365 U.S. 127 (1961).

[20] 381 U.S. 657 (1965).

[21] Webb v. Fury, 282 S.E.2d 28, 36 (W. Va. 1981), *overruled on other grounds*, Harris v. Adkins, 432 S.E.2d 549, 552 (W. Va. 1993).

[22] *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973).

[23] *See* Rowe & Romero, *supra* note 8, at 224-25 (discussing the broad application of the *Noerr-Pennington* doctrine outside of antitrust cases); *see, e.g.*, Zeller v. Consolini, 758 A.2d 376, 382 (Conn. App. Ct. 2000) (applying the *Noerr-Pennington* doctrine to zoning case); *Webb*, 282 S.E.2d at 36-37 (discussing the application of the *Noerr-Pennington* doctrine in various contexts).

[24] 282 S.E.2d 28 (W. Va. 1981).

[25] *Id*. at 43.

[26] *Id*. at 31; *see also* Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (2017); Clean Water Act, 33 U.S.C. §§ 1251-1376 (2017).

[27] *Webb*, 282 S.E.2d at 32-33.

[28] *Id*. at 31.

[29] *Id*. at 31-33.

[30] *Id*. at 31.

[31] *Id*. at 33.

[32] *Id*.

[33] *Id*. at 34 (quoting Stern v. U.S. Gypsum Inc., 547 F.2d 1329, 1342 (7th Cir. 1977)).

[34] *Id*.

[35] *Id*. at 37.

[36] *Id*. at 42.

[37] *Id*. (quoting *Noerr*, 365 U.S. at 140-41).

[38] *Id*. at 43-44.

[39] 677 P.2d 1361 (Colo. 1984).

[40] *Id*. at 1369.

[41] *See id*.

[42] *Id*. at 1362-64.

[43] *Id*. at 1364.

[44] *Id*.

[45] *Id*. at 1369.

[46] *Id*. at 1370.

[47] Pring, *supra* note 1, at 4 n.2, 19 n.56 (collecting articles discussing "SLAPP-Back" counterclaims).

[48] Braun, *supra* note 14, at 990 (discussing SLAPP-backs and their drawbacks as a remedy to SLAPP suits).

[49] O.C.G.A. § 51-7-81 (2017); Westinghouse Credit Corp. v. Hall, 144 B.R. 568, 578 (S.D. Ga. 1992) ("Today, both the actions for malicious use and abuse of process have been merged into Georgia's abusive litigation tort"); *see also* O.C.G.A. § 51-7-85 (2017) ("On and after April 3, 1989, no claim other than as provided in this article or in Code Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claims filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation.").

[50] O.C.G.A. § 51-7-80(5) (2017).

[51] O.C.G.A. § 51-7-80(7) (2017).

[52] *See* Nairon v. Land, 242 Ga. App. 259, 260, 529 S.E.2d 390, 392 (2000) (noting that SLAPP target sued real estate developer under O.C.G.A. § 51-7-80 for abusive litigation as a result of SLAPP suit filed by the developer; developer settled claims made by SLAPP target under O.C.G.A. § 51-7-81).

[53] O.C.G.A. § 9-15-14 (2017).

[54] O.C.G.A. § 9-15-14(a) (2017).

[55] *See Nairon*, 242 Ga. App. at 260, 529 S.E.2d at 391-92.

[56] O.C.G.A. § 13-6-11 (2017).

[57] *Id*.

[58] *Id*.

[59] *Compare* Braun, *supra* note 14, at 991-92 (discussing similar SLAPP-back claim mechanisms under California law).

[60] Harrison & Ferrin, *supra* note 18, at 5.

[61] *Id.*; *see also* Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1242 (2007) ("Common features of anti-SLAPP laws include a mechanism for early procedural review and a mandatory award of attorney's fees for a party whose motion to dismiss under the statute is successful.").

[62] *See* Hartzler, *supra* note 61, at 1243 ("Some states have decided to draft broad anti-SLAPP laws and have left it to the courts to limit their reach through narrow interpretations of the statutes, while others have chosen to word their anti-SLAPP provisions narrowly to apply only to select situations."); *see also* Braun, *supra* note 14, at 1036-45 (comparing different states' anti-SLAPP laws); Harrison & Ferrin, *supra* note 18, at 5-7 (providing specific examples of states with narrow statutes and states with broad statutes); Michael Eric Johnston, *A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation"*, 38 GONZ. L. REV. 263, 276-80 (2002-2003) (comparing different states' anti-SLAPP laws); Jeremy Rosen & Felix Shafir, *Helping Americans To Speak Freely*, 18 FEDERALIST SOC'Y REV. 22, 28-30 (2017) (comparing California's broad anti-SLAPP statute to New York's more narrow statute).

[63] Those states are: Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania,

Rhode Island, Tennessee, Texas, Utah, Vermont, and Washington. PUB. PARTICIPATION PROJECT, *supra* note 3.
The following states have *not* enacted anti-SLAPP legislation: Alabama, Alaska, Colorado, Connecticut, Idaho, Iowa, Kentucky, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Virginia, West Virginia, Wisconsin, and Wyoming. *Id*.

64 *See* discussion *infra* Part III.

65 Hartzler, *supra* note 61, at 1243.

66 *See* O.C.G.A. § 9-11-11.1.

67 Ga. S. Bill 3, Reg. Sess., 1996 Ga. Laws 260.

68 Former O.C.G.A. § 9-11-11.1(c) (2016) (emphasis added), *amended by* Ga. H.R. Bill 513, Reg. Sess., 2016 Ga. Laws 341.

69 Pierre-Joseph Noebes & Rachael Reed, *Civil Practice: Pleadings and Motions*, 33 GA. ST. U. L. REV. 109, 112 (2016). *See, e.g.*, Ga. Cmty. Support & Solutions, Inc. v. Berryhill, 275 Ga. App. 189, 192, 620 S.E.2d 178, 181 (2005).

70 Ga. H.R. Bill 513. *See also* Noebes & Reed, *supra* note 69, at 119 ("These additions effectively extend anti-SLAPP protection to any speech or conduct connected to issues of public concern, regardless of whether those issues are the subject of a government proceeding.").

71 O.C.G.A. § 9-11-11.1(b)(1) (2017) (emphasis added). The Georgia legislature amended Georgia's anti-SLAPP statute, effective July 1, 2016. The amendments also removed a condition in the old statute that required the plaintiff to sign and file a verification with its complaint stating that the complaint was not a SLAPP suit. *See* Ga. H.R. Bill 513; *see also* Noebes & Reed, *supra* note 69, at 109 (discussing 2016 amendments to O.C.G.A. § 9-11-11.1).

72 O.C.G.A. § 9-11-11.1(b)(1).

73 *Id*. (emphasis added).

74 *Id*. Notably, if the nonmoving party successfully shows a probability of success and defeats a motion to strike made pursuant to O.C.G.A. § 9-11-11.1(b)(1), "neither that determination nor the fact of such determination shall be admissible in evidence at any later stage of the case or in any subsequent action and no burden of proof or degree of proof otherwise applicable shall be affected by such determination in any later stage of the case or in any subsequent proceeding." O.C.G.A. § 9-11-11.1(b)(3) (2017).

75 O.C.G.A. § 9-11-11.1(d) (2017).

76 *Id*.

[77] O.C.G.A. § 9-11-11.1(b)(2) (2017). However, if the nonmoving party is a public figure plaintiff, "then the nonmoving party shall be entitled to discovery on the sole issue of actual malice whenever actual malice is relevant to the court's determination under [O.C.G.A. § 9-11-11.1(b)(1)]." *Id.*

[78] O.C.G.A. § 9-11-11.1(d).

[79] O.C.G.A. § 9-11-11.1(b.1) (2017) (emphasis added).

[80] *Id.*

[81] O.C.G.A. § 9-11-11.1(b)(1).

[82] O.C.G.A. § 9-11-11.1(d).

[83] O.C.G.A. § 9-11-11.1(b)(1).

[84] O.C.G.A. § 9-11-11.1(b)(2).

[85] O.C.G.A. §§ 9-11-11.1(b)(1), (b.1).

[86] Many scholars and practitioners have argued for a federal anti-SLAPP law. Such a topic presents an article in and of itself. *See* Rosen & Shafir, *supra* note 62, at 28-30.

[87] Katelyn E. Saner, *Getting SLAPP-ED in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 DUKE L.J. 781, 783 (2013) (analyzing the issue in detail and arguing that state anti-SLAPP procedures should apply in federal court).

[88] Carbone v. Cable News Network, Inc., Case No. 1:16-cv-01720-ODE (N.D. Ga. Feb. 15, 2017) (order denying defendant's motion to strike).

[89] *Compare* Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010); Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164 (5th Cir. 2009); Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999), *with* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328 (D.C. Cir. 2015).

[90] Notice of Appeal, *Carbone*, Case No. 1:16-cv-01720-ODE (N.D. Ga. Feb. 21, 2017).

[91] *See* Noebes & Reed, *supra* note 69 (quoting legislative findings and intent of O.C.G.A. § 9-11-11.1).

[92] *Davis*, 351 P.3d at 875.

[93] *See supra* Part II.

[94] O.C.G.A. §§ 9-11-11.1(b), (d).

[95] *See* O.C.G.A. § 9-11-11.1(d) (giving the trial court the power to permit discovery, but not requiring that discovery be allowed).

[96] *See* O.C.G.A. § 9-11-11.1(b).

[97] *See* O.C.G.A. § 9-11-12(b)(6) (2017); Blockbuster Inv'rs LP v. Cox Enters., Inc., 314 Ga. App. 506, 506, 724 S.E.2d 813, 814 (2012) (citations and internal quotation marks omitted) ("A motion to dismiss should be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim. We thus construe all the allegations in the complaint in a light most favorable to the complaining party and resolve all doubts in his favor."). The complaint need only set forth a short and plain statement of the claims showing the plaintiff is entitled to relief. *See* O.C.G.A. § 9-11-8(a)(2)(A) (2017).

[98] O.C.G.A. § 9-11-56(f) (2017) (emphasis added); Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474, 475 (1991).

[99] *Probability* is the "quality, state, or condition of being more likely ... to have happened than not; the character of a proposition or supposition that is more likely true than false." BLACK'S LAW DICTIONARY (10th ed. 2014). Notably, this "probability" standard is a *higher* burden than the preponderance of the evidence standard that plaintiff would face at trial.

[100] *See, e.g.*, Hindu Temple & Cmty. Ctr. v. Raghunathan, 311 Ga. App. 109, 109, 714 S.E.2d 628, 629 (2011) (striking well-pled complaint under anti-SLAPP statute).

[101] In suits for which a jury trial was available at common law, the Seventh Amendment to the United States Constitution preserves that right for civil actions in which the amount in controversy exceeds $20. U.S. CONST. amend. VII. But the Seventh Amendment has never been applied to the states, so state courts are not bound by the United States Constitution to offer jury trials in civil cases. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 719 (1999) (holding the Seventh Amendment does not apply to the states); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996) (holding the Seventh Amendment does not apply to the states). This Article leaves for another day discussion of the possibility that the Seventh Amendment would be violated if a motion to strike a claim under the anti-SLAPP statute was granted in *federal* court. In short, there are strong arguments that Georgia's anti-SLAPP statute would infringe on the Seventh Amendment for the reasons argued herein.

[102] GA. CONST. art. I, § 1, para. 11 ("The right to trial by jury shall remain inviolate").

[103] *See, e.g.*, Atlanta Oculoplastic Surg., P.C. v. Nestlehutt, 286 Ga. 731, 735, 691 S.E.2d 218, 223 (2010) (holding statute capping

noneconomic damages was unconstitutional because it "nullifie[d] the jury's findings of fact regarding damages and thereby undermine[d] the jury's basic function").

104 *See* O.C.G.A. § 9-11-11.1(b).

105 *See* O.C.G.A. § 9-11-11.1(d). In fact, discovery is automatically stayed upon the filing of a motion to strike, though the trial court has discretion to permit specified discovery. *Id*.

106 *See, e.g.*, *Davis*, 351 P.3d at 873 (holding Washington's anti-SLAPP statute, which required a plaintiff to prove "by clear and convincing evidence a probability of prevailing [on the claim]," violated state constitutional right to jury trial); *Op. of the Justices*, 641 A.2d at 1015 (holding New Hampshire's proposed anti-SLAPP statute would violate state constitutional right to jury trial); *Mobile Diagnostic Imaging*, 889 N.W.2d at 35 (holding Minnesota's anti-SLAPP statute violated state right to jury trial).

107 889 N.W.2d 27 (Minn. App. 2016).

108 *Id*. at 35.

109 351 P.3d at 862 (Wash. 2015).

110 *Id*. at 875.

111 641 A.2d 1012 (N.H. 1994).

112 *Id*. at 1015.

113 *Id*. at 1013.

114 *Id*. at 1014-15.

115 *Id*. (explaining that "the trial court that hears the special motion to strike is required to weigh the pleadings and affidavits on both sides and adjudicate a factual dispute").

116 *Id*. at 1015.

117 O.C.G.A. § 9-11-11.1(b).

118 *Davis*, 351 P.3d at 874; *see also Mobile Diagnostic Imaging*, 889 N.W.2d at 33 (invalidating Minnesota anti-SLAPP statute

because "a court is required to ignore genuine issues of material fact and to step into the jury's role of deciding disputed facts and weighing evidence").

[119] O.C.G.A. § 9-11-56(f); *Lau's Corp.*, 261 Ga. at 491.

[120] *See* Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1237 (D.C. App. 2016).

[121] *See* D.C. CODE § 16-5502 (2017).

[122] *See* D.C. CODE § 16-5502(b) (2017).

[123] *Competitive Enter. Inst.*, 150 A.3d at 1233.

[124] *Id*. at 1233-34; *see also Abbas*, 783 F.3d at 1333-34 (recognizing that the District of Columbia's anti-SLAPP statute imposed a burden beyond that necessary to overcome summary judgment but ruling that the statute did not apply in federal court).

[125] *Competitive Enter. Inst.*, 150 A.3d at 1235.

[126] *Id*. at 1236.

[127] *Id*.

[128] *Id*. at 1237.

[129] *See Davis*, 351 P.3d at 867 (stating that the doctrine of constitutional avoidance should be applied to save a statute when it is "genuinely susceptible to two constructions," but noting that was not the case with Washington's anti-SLAPP statute).

[130] Ga. H. Bill 513, Reg. Sess. (2015) (as introduced).

[131] *Compare id. with* O.C.G.A. § 9-11-11.1(b)(1).

[132] *See supra* Part III.

[133] U.S. CONST. amend I.; *see also* GA. CONST. art. I, § 1, para. 9 ("The people have the right to assemble peaceably for their common good and to apply by petition or remonstrance to those vested with the powers of government for redress of grievances.").

[134] Bill Johnson's Rests., Inc. v. N.L.R.B., 461 U.S. 731, 741 (1983) (emphasis omitted).

[135] *Id*. at 741 ("The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.").

[136] *Id*. at 745.

[137] *See Davis*, 351 P.3d at 872.

[138] *See* U.S. CONST. amend XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law"); GA. CONST. art. 1, § 1, para. 1 ("No person shall be deprived of life, liberty, or property except by due process of law."); *see also* Cherokee Cty. v. Greater Atlanta Homebuilders Ass'n, 255 Ga. App. 764, 767 n.1, 566 S.E.2d 470, 473 n.1 (2002) (explaining that the state and federal due process guarantees are substantively identical).

[139] Cobb Cty. Sch. Dist. v. Baker, 271 Ga. 35, 37, 518 S.E.2d 126, 129 (1999) (emphasis added).

[140] *Id*. (emphasis added) (citations and internal quotation marks omitted); *see also, e.g.*, State v. Johnson, 261 Ga. 363, 363, 404 S.E.2d 563, 564 (1991) (holding that Georgia's surety remission statutes violated the right to due process under state and federal constitutions "to the extent they require[d] the surety to pay the judgment in full before being permitted to present arguments in support of remission").

[141] *See* O.C.G.A. §§ 9-11-11.1(b), (d).

[142] Nagel v. State, 262 Ga. 888, 890, 427 S.E.2d 490, 492 (1993) (explaining that a presumption that cannot be rebutted is inconsistent with due process).

[143] Such a decision may turn on the trial court's application of the statute in individual cases, such as the extent to which discovery is permitted and evidence is allowed to be presented and heard at the hearing.

[144] *See* U.S. CONST. amend. XIV, § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws."); GA. CONST. art. I, § 1, para. 2 ("No person shall be denied the equal protection of the laws."); *see also* Lewis v. Chatham Cty. Bd. of Comm'rs, 298 Ga. 73, 74 n.1, 779 S.E.2d 371, 372 n.1 (2015) ("The Georgia clause is generally coextensive with and substantially equivalent to the federal equal protection clause, and we apply them as one.") (internal quotation marks and citations omitted).

[145] Dorsey v. City of Atlanta, 216 Ga. 778, 781, 119 S.E.2d 553, 555 (1961).

[146] *Cf*. Tolbert v. Murrell, 253 Ga. 566, 571, 322 S.E.2d 487, 492 (1984).
Because the rights of children whose mothers have been wrongfully killed are protected by O.C.G.A. § 51-4-3 in ways in which

the right of children whose fathers have been wrongfully killed are not protected, we find that O.C.G.A. § 51-4-2 deprives children of deceased fathers who leave widows of equal protection of law in violation of Art. I, Sec. I, Par. II of our Constitution. *Id*.

147 *See* O.C.G.A. §§ 9-11-11.1(b)(3), (b.1).

148 Henry v. State, 263 Ga. 417, 418, 434 S.E.2d 469, 471 (1993) ("[S]tatutory classifications are presumed valid and will survive an equal protection challenge if the classification bears a rational relationship to a legitimate government interest.").

149 *See* Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061 (Cal. 1996); Bernardo v. Planned Parenthood Fed'n, 9 Cal. Rptr. 3d 197 (Cal. Ct. App. 2004); Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 44 Cal. Rptr. 2d 46 (Cal. Ct. App. 1995).

150 *See* discussion at *supra* Part I.

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