

**UNITED STATES
HOUSE OF REPRESENTATIVES**

**COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
CONSTITUTION AND CIVIL RIGHTS**

**EXAMINING H.R. 2304,
the SPEAK FREE Act**

**Statement of
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**On Behalf of
The Public Participation Project**

June 22, 2016

TESTIMONY OF LAURA LEE PRATHER

Mr. Chairman Franks, Ranking Member Cohen, and Distinguished Members of the Subcommittee, good afternoon. My name is Laura Prather. I am a partner at the law firm of Haynes and Boone LLP in Austin, Texas. Thank you for the invitation to testify on H.R. 2304, the SPEAK FREE Act. My practice focuses on First Amendment and intellectual property litigation, counseling and legislative efforts. I have been handling speech related and content protection claims in state and federal court for 25 years. I have also been involved in several legislative efforts to encourage free speech and increase government transparency. This includes being instrumental in the passage of the Texas Citizens Participation Act, commonly known as Texas' Anti-SLAPP statute, including drafting, negotiating, and forming the coalition that supported passage of the legislation.

Today I am here to discuss the need for a federal Anti-SLAPP statute in the form of the SPEAK FREE Act.

I currently serve on the Board of Directors for the Public Participation Project (or PPP). I am pleased and honored to testify today on behalf of the PPP. Founded in 2008, the Public Participation Project was formed for the purpose of educating the public about SLAPPs, or Strategic Lawsuits Against Public Participation, and the consequences of these types of destructive lawsuits. Our mission is to obtain passage of federal Anti-SLAPP legislation in Congress and to assist individuals and organizations working to pass state Anti-SLAPP laws. Members of our Board of Directors and PPP staff regularly defend SLAPP targets and have worked with numerous State legislatures, including those in Texas, California, New York, Florida and others to pass and strengthen their Anti-SLAPP laws. PPP and our coalition of supporters, which includes organizations, businesses and individuals from both sides of the aisle, strongly support the passage of H.R. 2304, the SPEAK FREE Act. A list of supporters is attached as Appendix A.

Identifying The Problem

Let me say at the outset that SLAPP suits differ from ordinary lawsuits in that they seek to dissuade one from exercising a lawful right, such as testifying at a City Council meeting, complaining to a medical board about an unfit doctor, investigating fraud in our education system, or participating in a political campaign. When meritless lawsuits target truthful speech, lawful petitioning, and legal association, they have been dubbed “Strategic Lawsuits Against Public Participation” (SLAPP suits).¹ SLAPP suits chill First Amendment activities by subjecting citizens who exercise their constitutional rights to the intimidation and expense of litigation. While legitimate litigation serves to right a wrong, the primary motivation behind a SLAPP suit is to extinguish lawful speech. SLAPP filers harness the judicial process as a weapon in a strategy to win a political, social, or economic battle.

A significant portion of my practice involves defending SLAPP targets in litigation arising out of traditional media and online content. The SLAPP victims I have defended include: individual homeowners sued by their HOA for disclosure of fraud; politicians sued by their opponents for campaign literature; the Better Business Bureau sued for the protected opinions expressed in its reliability reports; and countless media organizations sued for their investigative reporting exposing things like millions of dollars in Medicaid fraud or predatory teachers who have moved from one school district to another after inappropriate behavior with their students. In short, SLAPP suits are a problem.²

¹ Professors Pring and Canan of the University of Denver are two of the primary scholars who analyzed this legal phenomenon and coined the term “SLAPP.” George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press 1996).

² This is not an infrequent problem either; it is one that exists on a daily basis and threatens the core values of our democracy. Case in point: Lance Armstrong. He is an admitted perjurer who lied about years of rampant drug use while winning the Tour de France. Despite the knowledge of dozens (or more) about Armstrong’s drug use, his vehement

Further, with the rise of the internet, lawsuits aimed at silencing those civically engaged citizens are becoming more common, and are a threat to the growth of our society. The Internet age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism and other forms of speech. Unfortunately, with the rise of the internet, there has also been an increase in meritless lawsuits aimed at silencing critics, brought for the purpose of harassing and intimidating those who urge a government result or speak out on an issue of public interest. The rise of this sort of litigation is directly related to the rise of the popularity of the internet. The main difference is that pre-Internet comments on and criticisms about service and experiences with corporate America or the government were received by a limited audience – those within earshot or to whom a letter was mailed. Now, in real-time, one’s statements can go global instantaneously with the click of a button on the internet. In either situation, if the statements are false, defamation laws exist to protect and hold people accountable for what they say. That is where the line belongs – not with the bully being able to silence speech before words are spoken. In response to these “bullies,” twenty-nine states, as well as the District of Columbia and the territory of Guam, have adopted Anti-SLAPP legislation.

It is important to note, SLAPP claims do not merely come in the form of defamation complaints or any other particular cause of action. The defining characteristic of a SLAPP suit is its intention to deter one from exercising one’s constitutional rights. Because of the insidious nature of a SLAPP claim, there is neither a prototypical SLAPP filer nor a prototypical SLAPP claim – the limits are solely confined by the fertile minds of the lawyers or their clients. SLAPP suit filers often camouflage their grievances against the target’s constitutional activities by filing varying types of

denials continued to survive because each time a truth-teller challenged his statements, they were SLAPPED with a lawsuit and retaliated against until they submitted to relinquishing their First Amendment rights. A system that allows such rampant abuse of our judicial branch is not what our forefathers had envisioned when they adopted the constitutional protections for free speech and a fair trial.

claims, including: defamation, business torts, copyright and/or trademark infringement, process violations, conspiracy, and constitutional and civil rights violations. Other less common causes of action may include claims for nuisance, trespass, and emotional harms. A nationwide study of SLAPP suit litigation identified defamation in the form of libel, slander and business libel as the most common cause of action that houses a SLAPP purpose.³ Business torts was the second most common cause of action, including interference with contract or business, antitrust, restraint of trade, and unfair competition.⁴ Furthermore, SLAPP victims are not just individuals sued by those with more resources, but can also be corporations being targeted by disgruntled former employees or the media being used as a scapegoat for uncovering corporate malfeasance.

Until now, if one got sued for what one said, that individual or entity had three choices for how to respond — none of which were terribly attractive options. They could retract what they said — even if they believed it to be true — in an effort to appease their accuser. They could choose not to fight the lawsuit and allow a default judgment to be entered against them and then have their property seized and liens placed against their assets. Or, they could spend a significant amount of money hiring a lawyer to represent them in the case, which generally took years to defend and immeasurable time in discovery until a motion for summary judgment was filed and, hopefully won.

H.R. 2304 recognizes that SLAPP cases come in all shapes and sizes and aims to stop the bullies, facilitate judicial economy⁵ and foster First Amendment rights by providing an expedited

³ Professors Pring and Canan of the University of Denver are two of the primary scholars who analyzed this legal phenomenon and coined the term “SLAPP.” George W. Pring & Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (Temple University Press 1996) at 27.

⁴ *Id.*

⁵ The California Judicial Council maintains data on Anti-SLAPP court filings, which is available upon request. This data demonstrates that Anti-SLAPP motions are little more than a tiny fraction of trial courts’ civil dockets. Between fiscal years 2010 and 2014, parties filed a total of 2,051 Anti-SLAPP motions in trial courts, or roughly 410 Anti-SLAPP motions per year on average. Given the 5,006,580 total civil filings over that same period, these 2,051 motions constitute only about 0.041% of total civil filings. (*See* Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2015) Superior Courts Data for Figures 3-16, p. 70). During that same time period, California appellate courts issued opinions in 585 Anti-SLAPP appeals out of a total of 48,403 total appeals during that same time period. Thus,

motion to dismiss procedure when one is simply sued for what one says without there being a valid basis for the claim. When this happens, the fees are shifted so that the party who brought the case ends up paying the fees that were spent fighting the meritless claim. This means a lot when you are the consumer who has been sued for speaking out and you have no insurance to protect you against a baseless lawsuit.⁶ One would assume the consumer would ultimately prevail in a lawsuit without the Anti-SLAPP statute being passed; the practical reality, though, is that the consumer could be bankrupted by the cost of defending himself in the process. The fee shifting provision can also help to serve as a deterrent to those who would otherwise fund their own lawyers cost to file a baseless suit but might think twice about filing such a claim when they risk paying the other side's fees.⁷

Passage of State Anti-SLAPP Laws is on the Rise

Long before the internet became popular as a forum for public speech, California recognized the problem when well-funded companies were suing citizens who were holding the companies accountable. The solution California came up with in 1992 was the adoption of an Anti-SLAPP law that made it easier for defendants to seek early dismissal of these suits at no cost to them. Since that time, similar measures have been adopted in 29 other states, the District of Columbia, and the territory of Guam. In the last year we have seen Kansas⁸ pass an Anti-SLAPP

roughly 1.209% of the total appellate opinions issued by California courts were Anti-SLAPP opinions. (*Id.*, Courts of Appeal Data for Figures 22-27, p. 67). The data clearly shows that no systematic abuse of the Anti-SLAPP statute is occurring. The information is also significant because it shows that while the number of cases involving Anti-SLAPP motions is very small in comparison to the overall number of civil cases, it is still significant enough to show that SLAPP suits are a problem.

⁶ Even if one has insurance to protect against such a claim, they are still forced to pay a deductible (which may be beyond their means) and/or see a sharp increase in their insurance rates going forward.

⁷ California's Anti-SLAPP law has been on the books for over twenty years. It is difficult to accurately quantify how many SLAPPs have not been filed thanks to this law, but it is substantial. Marty Singer, a prominent Los Angeles entertainment litigator, was once quoted in a 2002 California Law Business article as saying that the California Anti-SLAPP Law is "sort of like a deterrent" to filing defamation lawsuits on behalf of celebrities. "Instead of filing three to five suits a year, I think I would file 50 a year, if I didn't tell the clients how expensive it would be."

⁸ See http://kslegislature.org/li/b2015_16/measures/sb319/.

law and Florida⁹ and Georgia¹⁰ strengthen their Anti-SLAPP statutes by broadening the scope of their protection.

Five years ago, the Texas Legislature passed its Anti-SLAPP statute (The Texas Citizens' Participation Act) unanimously out of both chambers. In getting the law passed, we saw resounding support for the bill with droves of public testimony from those who had been SLAPPED with meritless lawsuits, including individuals like author Carla Main, who spoke about her experience being sued by an influential developer after writing a book about eminent domain. A number of homeowners came forward and testified about their experience getting sued by their homebuilder under civil R.I.C.O. for putting signs in their yard expressing their opinion about their construction – lawsuits some had been defending for a decade. Media groups testified about the impact on their newsrooms in having to defend against lawsuits where they were sued for merely reporting on public records or for providing a conduit for a whistleblower. We also saw countless groups including some strange bedfellows come together and put in cards in support of the bill – Texas Municipal League and the Freedom of Information Foundation of Texas, the Texas Trial Lawyers Association and the Texans for Lawsuit Reform, and the ACLU and the Texas League of Conservative Voters, to name a few. This experience, and others, proves the issue is not “red” or “blue” nor is it individual verses business. It transcends all parties and groups because of its universal purpose to promote free speech.

The Need for Federal Legislation

There are three primary reasons that we need federal legislation: first, there is a patch-work of state laws in the area creating an invitation for forum shopping and inconsistent application of laws; second, there is a split of authority as to whether state Anti-SLAPP laws apply in federal court;

⁹ See <http://m.flsenate.gov/session/bill/2015/1312>. Florida previously had two narrow Anti-SLAPP statutes, one of which protected only parcel owners from suits brought by home owners associations on the basis of speech.

¹⁰ See <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/513>.

and, third, even in those States that have Anti-SLAPP statutes, they generally do not apply to federal claims.

The SPEAK FREE Act would prevent forum shopping

The Legislatures in twenty-nine states, the District of Columbia, and the territory of Guam have all seen the merit in passing Anti-SLAPP legislation to curtail the ability of bullies from using the court system to squelch the First Amendment rights of others. The breadth of these statutes vary significantly, though, with a majority only covering statements made in governmental proceedings.¹¹ This has left a patchwork of protection that savvy plaintiffs have been known to work around by filing actions in jurisdictions that have not enacted SLAPP statutes.

This patchwork of state laws have led to two loopholes that SLAPP-happy plaintiffs have discovered and used as a tool to avoid state Anti-SLAPP laws: 1) “forum shopping” by plaintiffs, who file their SLAPPs in jurisdictions where Anti-SLAPP protections are absent or weak, and 2) filing a federal claim in federal court (or in some jurisdictions such as D.C., any claim in federal court).

As an example, in November 2010, the *Washington City Paper* published a story critical of Washington Redskins owner Daniel Snyder. The article noted, along with many other issues fans had with Snyder, the fees the Redskins charged for fans to attend preseason practices, lawsuits against season ticket holders for failing to pay for their tickets during the difficult economy, and his multiple firings of the team’s head coaches. The article also detailed Snyder’s management and ownership practices outside of professional football.

Snyder’s attorney responded by sending a letter to the hedge fund that owns the weekly paper, threatening to sue in response to the article. In a stunning acknowledgment as to the true

¹¹ See Reporters Committee for Free Press Chart on Anti-SLAPP laws from 2012 attached hereto as Appendix B. Since the time this chart was prepared, Oklahoma and Kansas have both passed broad Anti-SLAPP statutes, and Florida and Georgia have expanded the breadth of their Anti-SLAPP statutes.

motive in filing this frivolous lawsuit, the attorney wrote, “Mr. Snyder has more than sufficient means to protect his reputation and defend himself and his wife against your paper’s concerted attempt at character assassination. We presume defending such litigation would not be a rational strategy for an investment fund such as yours. Indeed, the cost of litigation would presumably quickly outstrip the value of the *Washington City Paper*.”

Floyd Abrams, an eminent First Amendment attorney, and counsel for the paper, told *The New York Times*, “This litigation is so self-evidently lacking in merit and so ludicrous on its face that it is difficult to imagine that it was commenced for any reason but to seek to intimidate.”

In an article published by the Citizen Media Law Project, Marc Randazaa, First Amendment attorney and editor of the blog *Legal Satyricon*, described the lawsuit as “frivolous” and as “a classic SLAPP suit – not filed because it has a chance of success – but filed because the cost of defending it will be punitive.”

In a classic example of blatant forum shopping, Snyder originally filed the lawsuit in New York, where the hedge fund is located, despite the fact that the Washington DC region is home to the paper, the Redskins, and Snyder. Two months before Snyder’s attorneys filed the suit in New York, the Council of the District of Columbia passed a strong Anti-SLAPP law, which would probably cover Snyder’s lawsuit because he is a public figure. New York State’s Anti-SLAPP law, by contrast, is notoriously weak. Snyder was forced to re-file his SLAPP in Washington, D.C. naming the author of the article as an additional defendant and dropping the hedge fund as a defendant after his attorneys claimed that they had determined that the hedge fund had not been involved in the publication of the article. Snyder eventually dropped the lawsuit, leaving D.C.’s new Anti-SLAPP law untested at the time. One of the most significant ironies in the entire case, and one that

establishes without a doubt that this was a SLAPP suit, is the fact that Snyder himself has admitted he never read the article at issue prior to filing suit.¹²

A circuit split exists on whether state Anti-SLAPP laws apply in federal diversity cases

Another quandary presented by this primarily state-born protection is whether it applies in federal court. For more than fifteen years, federal courts have applied State Anti-SLAPP statutes to federal cases when sitting in diversity jurisdiction because they have viewed SLAPP statutes as being designed to prevent substantive consequences – the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law.¹³ In 2014, however, the D.C. Circuit found the *Erie* doctrine barred the application of the D.C. Anti-SLAPP statute in federal court.¹⁴ The conflict now results in a circuit split. On March 21, 2016, the U.S. Supreme Court declined to address this problem when it denied the petition for certification in the *Mebo International v. Yamanaka*, 607 Fed. Appx. 768 (9th Cir. 2015), *cert. denied* 136 S. Ct. 1449 (March 21, 2016), further highlighting the need for the passage of H.R. 2304.

State Anti-SLAPP Laws Do Not Reach Federal Question Claims

Different federal courts have agreed that state Anti-SLAPP laws do not apply to federal claims in federal court.¹⁵ For example, in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*¹⁶, and later, *Restaino v. Bah (In re Bah)*¹⁷, the Ninth Circuit held that federal claims in federal courts are not subject to California's Anti-SLAPP law. Essentially what this means is that even in

¹² See <http://dc.sbnation.com/washington-redskins/2011/9/8/2413469/dan-snyder-washington-city-paper-lawsuit/in/1734593>; see also <http://www.nytimes.com/2011/09/11/magazine/redskins-owner-dan-snyder-on-being-a-marked-man.html>.

¹³ See *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999).

¹⁴ See *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

¹⁵ See *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999); *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010).

¹⁶ *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F.Supp.2d 1127 (N.D. Cal. 1999).

¹⁷ *Restaino v. Bah (In re Bah)*, 321 B.R. 41 (B.A.P. 9th Cir. 2005).

states with broad Anti-SLAPP statutes, a plaintiff can avoid a state's Anti-SLAPP law by filing a federal claim in federal court. The passage of the SPEAK FREE Act would solve this problem.

Legal Organizations in Favor of Anti-SLAPP

In addition to the wide-ranging support of individuals, businesses and organizations listed in Appendix A, it is also noteworthy that the American Bar Association has weighed in in favor of Anti-SLAPP legislation.

On August 7, 2012, the American Bar Association adopted a resolution encouraging legislatures, including Congress, to enact and strengthen Anti-SLAPP laws. The House of Delegates resolution makes Anti-SLAPP legislation the official policy of the organized Bar in the United States. It reads:

RESOLVED, That the American Bar Association encourages federal, state and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).

The Resolution was drafted by a committee of the ABA Forum on Communications Law and co-sponsored by three powerful ABA components: the Section of Litigation, the Section on Individual Rights and Responsibilities, and the Torts and Insurance Practice Section. A copy of the Resolution and accompanying Report are attached to this testimony as Appendix C.

Two years later, on July 1, 2014, the American Legal Exchange Council (ALEC) also adopted a Model Anti-SLAPP Policy entitled the Public Participation Protection Act, a copy of which is attached as Appendix D.

CONCLUSION

Citizen participation is at the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, the involvement of

citizens in the exchange of ideas benefits our society. When the legal system can be so manipulated that one can use it to intimidate and silence people that are telling the truth, we have a problem.

Without federal legislation, plaintiffs are able to “forum shop” so they can choose a state where Anti-SLAPP legislation has not passed yet or has a very narrow focus and tie a speaker up in court for years – effectively silencing them (and others) in the process. Think about the intimidation factor the bully has on all those observing the fight. Because the claims at issue arise under the First Amendment right to free speech and right to petition, the federal legislation would permit the removal of a SLAPP case to federal court so a federal judge could apply the law and the forum shopping would cease. A consistent approach to the application of Anti-SLAPP laws in federal court is critical to serve the purpose of protecting one’s exercise of their First Amendment rights from meritless claims, and nothing would satisfy that need more efficiently than passage of the SPEAK FREE Act.

In sum, this bill is a “win-win” and good government because (1) it promotes the constitutional rights of our citizens and encourages their continued participation in public debate, (2) it creates a mechanism to get rid of meritless lawsuits at the outset of the proceeding, and (3) it provides for a means to help alleviate some of the burden on our court system. Without laws like these in place, the bullies prevail, and the public stands to lose a tremendous tool for information and discourse.

Thank you for this opportunity to express our views regarding this very important legislation. I look forward to answering any questions you or other members of the subcommittee may have. I have several attachments to my statement, and I would respectfully request that these materials be included in the record.

APPENDIX “A”

Organizations and Businesses: The following organizations and businesses support H.R.

2304, the SPEAK FREE Act of 2015:

- American Booksellers for Free Expression
- American Consumer Institute
- Association of Alternative Newsmedia
- Association of American Publishers
- American Society of News Editors
- Avvo
- California Anti-SLAPP Project
- California Newspaper Publishers Association
- Center for Democracy & Technology
- Center for Individual Liberty
- Competitive Enterprise Institute
- Copia Institute
- Competitive Enterprise Institute
- Computer and Communications Industry Association
- Consumer Electronics Association
- Engine
- Electronic Frontier Foundation
- Demand Progress
- Fight for the Future
- FreedomWorks
- Glassdoor
- Government Accountability Project
- Hoosier State Press Association
- Horvitz & Levy LLP
- Institute for Liberty
- Internet Association
- Information Technology & Innovation Foundation
- Media Alliance
- Media Law Resource Center
- National Association of Broadcasters
- Newspaper Association of America
- Niskanen Center
- Online News Association
- Public Employees for Environmental Responsibility
- Public Participation Project
- Public Knowledge
- R Street Institute
- Radio Television Digital News Association
- Real Self
- Reporters Committee for Freedom of the Press
- Survivors Network of Those Abused by Priests
- Taxpayers Protection Alliance

- TechFreedom
- Trip Advisor
- Yelp
- Zenefits

APPENDIX “B”

SLAPP Stick: Fighting frivolous lawsuits against journalists

[Introduction](#)

[A statutory solution](#)

[A SLAPPED blogger's push for reform in Maryland](#)

[Chart: Anti-SLAPP laws and journalists](#)

[State-by-state guide](#) ►

Chart: Anti-SLAPP laws and journalists

Anti-SLAPP laws and journalists The Reporters Committee rated on a scale of 1 to 4 stars each jurisdiction with a statute or cases addressing meritless lawsuits brought to silence speech about a public issue. The evaluation is based on the scope of protection for speech by journalists — defined broadly as those who gather and disseminate information to the public — and was calculated as follows:

- The addition of one star for the existence of an anti-SLAPP statute or case law addressing the causes of actions;
- The addition of one star for protection for speech made in any forum in connection with an issue of public concern or interest, not just speech made before a governmental body;
- The addition of one star for protection for speech made in connection with any issue of public concern or interest, not just speech made in connection with an issue under consideration by a governmental body or speech designed to procure favorable government action (those statutes that broadly define issues of public concern or interest to include topics ranging from the government to economic well-being are awarded a star under this criterion);
- The addition of one star for the mandatory, not just the permissive, award of costs and attorney fees to a prevailing SLAPP defendant; and
- The subtraction of one star for the inclusion of additional burdens, such as a requirement that the SLAPP suit be brought in "bad faith" or that the statements be made without knowledge of or reckless disregard for their falsity.

[View the PDF](#)

Rating	State	Statute/ case law?	Any forum?	Any public issue?	Mandatory attorney fees/costs?	Additional burden?
★★★	Arizona	✓	✓		✓	
★★	Arkansas	✓	✓		✓	-✓
★★★★	California	✓	✓	✓	✓	
★★	Colorado	✓	✓			
★★	Connecticut	✓				
★★	Delaware	✓	✓			
★★★	District of Columbia	✓	✓	✓		

★★Florida	✓			✓	
★★★Georgia	✓	✓		✓	
★★Hawaii	✓			✓	
★★★★Illinois*	✓	✓	✓	✓	
★★★Indiana	✓	✓	✓	✓	-✓
★★★★Louisiana	✓	✓	✓	✓	
★★★Maine	✓	✓	✓		
★★Maryland	✓	✓	✓		-✓
★★★Massachusetts	✓	✓		✓	
★★★Minnesota	✓	✓		✓	
★★Missouri	✓			✓	
★★Nebraska	✓	✓			
★★Nevada	✓	✓		✓	-✓
★★New Mexico	✓			✓	
★★New York	✓	✓			
★Oklahoma	✓				
★★★★Oregon	✓	✓	✓	✓	
★★Pennsylvania	✓	✓		✓	-✓
★★★★Rhode Island	✓	✓	✓	✓	
★Tennessee	✓			✓	-✓
★★★★Texas	✓	✓	✓	✓	
★★Utah	✓	✓			
★★★★Vermont	✓	✓	✓	✓	
★★★★Washington	✓	✓	✓	✓	
★West Virginia	✓				
★★★Guam	✓	✓		✓	

* However, the language is vague and has not been tested in court.

APPENDIX “C”

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

RESOLVED, That the American Bar Association encourages federal, state and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).

REPORT

Strategic Lawsuits Against Public Participation, or SLAPPs, are brought not to vindicate legal rights, but to harass and intimidate, and to divert attention and resources from the underlying civic issue. Such lawsuits turn the justice system into a weapon, and have a serious chilling effect on the free speech that is so vital to the public interest. Even a meritless suit can drag on for months – sometimes even years – and tactics such as aggressive discovery can pile on the costs.

The best protection against SLAPPs is a method to quickly dismiss suits that arise from protected speech – and the ability to recover the fees, costs and damages incurred in defending the meritless suit. Twenty-eight states, the District of Columbia and the territory of Guam have enacted legislation to protect against SLAPPs, but these vary in their strength and breadth. Moreover, there is no federal anti-SLAPP protection. Anti-SLAPP legislation is needed at a federal level to consistently protect the citizens of all states. Further, those states that have not adopted such legislation to protect the First Amendment rights of their citizens need to adopt similar legislation in order to preserve our democracy.

Generally, state anti-SLAPP laws share four basic goals: (1) to provide as a matter of substantive law a statutory immunity for statements (and expressive conduct) on matters of public concern, where the plaintiff is unable to establish a *prima facie* case supporting his or her cause of action; (2) to furnish a suggested procedural framework that encourages and facilitates prompt and inexpensive resolution of such SLAPP claims; (3) to provide a right of immediate appeal of a trial court ruling on an anti-SLAPP motion; and (4) to require appropriate reimbursement for the targets of SLAPP lawsuits. Anti-SLAPP laws also provide a mechanism for meritorious claims to survive this stage of the litigation.

Federal Action

Federal Anti-SLAPP efforts have received bi-partisan support from sponsors on both sides of the aisle. The latest version of the federal bill has many of the attractive provisions of the state statutes, including a mandatory award of attorney's fees to the prevailing defendant, a stay of discovery, and the right to an immediate interlocutory appeal.¹ In addition, it has some unique provisions, including permitting federal removal jurisdiction.² This provides relief for those sued in states with limited or no anti-SLAPP statute. The proposed federal statute also provides for a “special motion to quash,” protecting anonymous speakers from having their identities revealed through discovery or subpoena, unless a plaintiff can show that the underlying case has merit.³ Finally, the bill

¹*The Petition Act: Summary of Proposed Federal Anti-SLAPP Legislation*, PUBLIC PARTICIPATION PROJECT, <http://www.anti-slapp.org/the-citizen-participation-act-h-r-4364/>. HR 4364, called The Citizen Participation Act of 2009, was introduced in the House of Representatives in 2009.

²*Id.*

³*Id.*

makes fees awarded under an anti-SLAPP statute (either state or federal) non-dischargeable in bankruptcy.⁴

State Action

With anti-SLAPP laws becoming a fierce tool in the fight for First Amendment rights, Texas and the District of Columbia are the most recent jurisdictions to enact such statutes with laws going into effect in 2011 in both places. A dozen other states have added anti-SLAPP laws since the turn of the century, including Arizona (passed in 2006),⁵ Arkansas (2005),⁶ Florida (2000),⁷ Hawaii (2002),⁸ Illinois (2007),⁹ Maryland (2004),¹⁰ Missouri (2004),¹¹ New Mexico (2001),¹² Oregon (2001),¹³ Pennsylvania (2000),¹⁴ Utah (2001),¹⁵ and Vermont (2006).¹⁶ The statutes adopted by Florida and some of the other jurisdictions listed are very narrowly drawn, provide limited protections, and do not apply to private claims, allow for a right to an interlocutory appeal, or provide attorney's fees to a prevailing defendant. Thus, some states, like Washington in 2010 have been working to expand their narrowly written anti-SLAPP statutes. The ABA would urge those states

⁴*Id.*

⁵ Ariz. Rev. Stat. Ann. §§ 12-751–12-752 (2011); *see also*, 2006 Ariz. Legis. Serv. Ch. 234 (H.B. 2440) (West); *Tennenbaum v. Arizona City Sanitary Dist.*, 799 F. Supp. 2d 1083, 1090 (D. Ariz. 2011).

⁶ Ark. Code Ann. §§ 16-63-501–16-63-508 (West 2010); *see also*, 2005 Ark. Laws Act 1843 (H.B. 1569); Jacquelyn Kline, *Anti-SLAPP Statutes in the US by State*, THE LEGAL PROJECT (January 14, 2009), <http://www.legal-project.org/149/anti-slapp-statutes-in-the-us-by-state>.

⁷ Fla. Stat. Ann. §§ 720.304(4), 768.295 (West 2011); *see also*, 2000 Fla. Sess. Law Serv. Ch. 2000-174 (H.B. 135) (West); *Three States Introduce Anti-SLAPP Bills*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, February 8, 2001, <http://www.rcfp.org/browse-media-law-resources/news/three-states-introduce-anti-slapp-bills>.

⁸ Haw. Rev. Stat. §§ 634F-1–634F-4 (West 2011); *see also*, 2002 Hawaii Session Laws 187 (H.B. 741) (West).

⁹ 735 Ill. Comp. Stat. Ann. 110/15–110/25 (West 2011); *see also*, 2007 Ill. Legis. Serv. P.A. 95-506 (S.B. 1434) (West); Eric M. Madiar and Terrence J. Sheahan, *Illinois' New Anti-SLAPP Statute*, 96 ILL. B. J. 620 (Dec. 2008).

¹⁰ Md. Code Ann., Cts. & Jud. Proc. § 5-807 (West 2011); *see also*, 2004 Md. Laws Ch. 279 (S.B. 464) (West).

¹¹ Mo. Ann. Stat. § 537.528 (West 2011); *see also*, 2004 Mo. Legis. Serv. S.B. 807 (West); Stephen L. Kling, *Missouri's New Anti-SLAPP Law*, 61 J.MO.B. 124 (2005).

¹² N.M. Stat. Ann. § 38-2-9.1 (West 2011); *see also*, 2001 N.M. Laws Ch. 218 (H.B. 241) (West); Jacquelyn Kline, *Anti-SLAPP Statutes in the US by State*, THE LEGAL PROJECT (January 14, 2009), <http://www.legal-project.org/149/anti-slapp-statutes-in-the-us-by-state>.

¹³ Or. Rev. Stat. Ann. §§ 31.150–31.155 (West 2011); *see also*, 2001 Or. Laws Ch. 616 (H.B. 2460); Steve Berman, *Businesses Use Oregon's Anti-SLAPP Law*, PORTLAND BUS. J., Friday, September 16, 2011, 3:00 AM, <http://www.bizjournals.com/portland/print-edition/2011/09/16/businesses-use-oregons-anti-slapp-law.html?page=all>.

¹⁴ 27 Pa. Cons. Stat. Ann. §§ 7707, 8301–8305 (West 2011); *see also*, 2000 Pa. Legis. Serv. Act 138 (H.B. 393) (Purdon's); Joel Burcat, *Pennsylvania Enacts "Anti-SLAPP Law" and Changes Attorneys' Fees Provisions of Coal Mining Laws*, K&L Alert, January 2001. The Pennsylvania statute was enacted in late 2000, but became effective in 2001.

¹⁵ Utah Code Ann. §§ 78B-6-1401–78B-6-1405 (West 2011); *see also*, *Anderson Development Co. v. Tobias*, 116 P.3d 323, 330 (Utah 2005). Utah's anti-SLAPP statute of was recodified in 2008, but no substantial changes were made. *See Jacob v. Bezzant* 212 P.3d 535, 538 n1 (Utah, 2009).

¹⁶ Vt. Stat. Ann. tit. 12, § 1041 (West 2011); *see also*, 2006 Vt. Laws P.A. 134 (S. 103). The complete legislative history of Vt. Stat. Ann. 12, § 1041 is available at: <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S%2E0103&Session=2006>.

with such limited statutes to consider expanding their laws to provide the needed protections to citizens outlined herein.¹⁷

ABA Commitment to First Amendment

The American Bar Association has a long history of protecting First Amendment rights through its support of passage of a federal reporter's privilege, its express continued protection of the First Amendment free speech rights of students in the recent cyber-bullying resolution, and its promotion of the Section of Litigation First Amendment & Media Litigation Committee, the Forum on Communications Law, and the Torts & Insurance Practice Section Media, Privacy and Defamation Law Committee, as well as, other membership opportunities dedicated to First Amendment rights. The Section of Litigation First Amendment and Media Litigation Committee also supports this resolution.

This resolution is consistent with ABA policy and objectives to foster the protection of First Amendment Rights of United States citizens.

Respectfully Submitted,

Charles D. Tobin, Chair of the Forum on Communications Law

Ashley Kissinger and Jonathan Donellan, Co-Chairs of the First Amendment & Media Litigation Committee

August 2012

¹⁷ Wash Rev. Code. Ann. §4.24.510-4.24.525 (West 2011). *See also*, Bruce E.H. Johnson, et.al., *Advisories: Washington Enacts New Anti-SLAPP Law*, Davis Wright Tremaine, March 18, 2010, http://www.dwt.com/advisories/Washington_Enacts_New_AntiSLAPP_Law_03_18_2010/.

GENERAL INFORMATION FORM

Submitting Entity: ABA Forum on Communications Law

Submitted By: Charles D. Tobin, Chair

1. Summary of Resolution(s). Urges the American Bar Association to adopt a policy position which may be used to encourage federal, state and territorial legislatures to enact legislation to provide for the protections to individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).
2. Approval by Submitting Entity. April 15, 2012
3. Has this or a similar resolution been submitted to the House or Board previously? This Resolution has not been submitted to the House previously. We are unaware of any similar resolutions being submitted previously.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are no current Association policies relevant to this Resolution.
5. What urgency exists which requires action at this meeting of the House? We anticipate legislation being introduced in the next Congress to address this issue and the adoption of this policy would allow the ABA to participate in shaping the legislation.
6. Status of Legislation. (If applicable) None pending.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Forum, in conjunction with the GAO, will work with other organizations to urge Congress to enact relevant legislation at the federal level.
8. Cost to the Association. (Both direct and indirect costs) None, other than time spent by GAO and Forum staff to coordinate efforts to urge adoption.
9. Disclosure of Interest. (If applicable) No know conflicts.

10. Referrals. This resolution was referred to the Section of Litigation and the Torts Trial and Insurance Section in April 2012.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address):

Laura Lee Prather, Haynes and Boone LLP, 600 Congress Ave., Suite 1300, Austin, Texas 78701-3285, (512) 867-8476, laura.prather@haynesboone.com

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.):

On site contact is: Charles D. Tobin – cell number (703) 304-0951.
Full contact information; Charles D. Tobin, Holland & Knight, 2099 Pennsylvania Ave., N.W., Suite 100, Washington, DC 20006, 202-419-2539, charles.tobin@hklaw.com.

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges the American Bar Association to adopt a policy position which may be used to encourage federal, state and territorial legislatures to enact legislation to provide for the protections to individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).

2. Summary of the Issue that the Resolution Addresses

The resolution addresses attempts to address the use of litigation to chill speech on matters of public concern.

3. Please Explain How the Proposed Policy Position will address the issue

If adopted, the policy position advanced by the resolution may be used to encourage federal, state and territorial legislatures to enact legislation to provide for protections to individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech.

4. Summary of Minority Views

No minority views are known as of the date of this submission.

APPENDIX “D”



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PUBLIC PARTICIPATION PROTECTION ACT

Policy Status

Date Amended: **July 1, 2014**

Issues

- Lawsuit Reform

Task Forces

- Civil Justice

PUBLIC PARTICIPATION PROTECTION ACT

Public Participation Protection Act

Summary

The ALEC Public Participation Protection Act is intended to encourage and safeguard public participation in civic society. Some have abused the civil justice system by filing, or threatening to file, lawsuits against those who express their views on matters of public concern. The goal of such lawsuits is not to win on the merits. Rather, the purpose of the lawsuit is to discourage, intimidate, retaliate against and, ultimately, silence critics by forcing them to spend time and money to defend themselves in litigation.

The model act protects individuals and organizations that speak, petition the government, and associate with others on matters of public concern from lengthy, expensive litigation, while preserving the ability of people and businesses to file meritorious lawsuits. Under the model act, a person who is hit with a lawsuit that impedes his or her First Amendment rights can request an expedited hearing, and, if the court finds the claim lacks merit, is entitled to recover attorney's fees and costs. A plaintiff can recover such expenses if a defendant abuses the expedited process.

Approximately 29 states and the District of Columbia have enacted legislation along these lines, which are often called "anti-SLAPP laws" (Strategic Lawsuits Against Public Participation). The model act draws from several such laws, including those enacted in California, Oregon, Texas, and Washington.

Model Policy

Section 1. {Title.}

This Act shall be known and may be cited as the Public Participation Protection Act.

Section 2. {Time for Filing Special Motion to Dismiss; Discovery.}

(A) A party may file a special motion to dismiss a claim under this Act if the claim is based on, or in response to, an act of the party in furtherance of the right of petition, free speech, or association under the United States Constitution or the [State] Constitution in connection with a public issue, which includes:

(1) the right of free speech by communicating, or conduct furthering communication, in a public forum on a matter of public concern related to (a) health or safety; (b) environmental, economic, or community well-being; (c) the government; (d) a public official or public figure; or (e) a good, product, or service in the marketplace;

(2) the right to petition the government through (a) a communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial, or other official body; (b) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, administrative, judicial, or other official body; or (c) a communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, administrative, judicial, or other official body; or

(3) the right of association, meaning a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(C) A special motion to dismiss under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section for good cause.

(D) All discovery in the proceeding shall be stayed upon the filing of a special motion to dismiss under this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion and any interlocutory appeal thereof. Notwithstanding the stay imposed by this section, the court, on motion by a party or the court's own motion and for good cause shown, may order specified and limited discovery relevant to the motion.

Section 3. {Expedited Hearing on Special Motion to Dismiss; Determination; Appeal.}

(A) The court shall conduct an expedited hearing on the motion. A hearing on the motion shall be held not later than [30] days after service of the motion, or [30] days of ordering discovery under paragraph (D), unless docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties.

(B) Consideration of the Special Motion to Dismiss.

(1) If the moving party makes an initial showing by a preponderance of the evidence that the legal action is based on, or is in response to, that party's exercise of the right to free speech, right to petition, or right of association as defined in Section 2(A), the court shall grant the motion to dismiss unless the party bringing the action states with particularity the circumstances giving rise to the claim and shows by a preponderance of the evidence a probability of prevailing on the merits.

(2) Notwithstanding paragraph (B)(1), the court shall grant the motion to dismiss if the moving party establishes each element of a valid defense to the claim.

(3) In its determination, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(4) The court shall rule on a special motion to dismiss as soon as possible, [but no later than [30] days after hearing the motion. If the court does not rule on a motion to dismiss within this period, the motion is considered to have been denied by operation of law.]

(C) An order granting or denying a special motion to dismiss shall be appealable under [insert reference to state statute or court rule providing grounds for interlocutory appeals].

Section 4. {Recovery of Attorneys' Fees and Costs; Sanctions.}

(A) If the court orders dismissal of a legal action under this Act, the court shall award to the moving party costs and reasonable attorney's fees, including those incurred on the motion.

(B) If the court finds that a special motion to dismiss is frivolous and solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to the party opposing the motion.

Section 5. {Exemptions / Rules of Construction.}

This Act does not:

(A) Apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, or a county attorney;

(B) Result in findings or determinations that are admissible into evidence at any later stage of the case or in any subsequent action;

(C) Affect or limit the authority of a court to award sanctions, costs, attorneys' fees or any other relief available under any statute, court rule, or other authority;

(D) Affect, limit, or preclude the right of the moving party to any defense, remedy, immunity, or privilege otherwise authorized by law;

(E) Affect the substantive law governing any asserted claim; or

(F) Create a private right of action.

Section 6. {Severability Clause.}

Section 7. {Repealer Clause.}

Section 8. {Effective Date.}

This Act shall be effective as to any civil action commenced on or after the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

Approved by the ALEC Board of Directors July 1, 2014.