

As Introduced

132nd General Assembly

Regular Session

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S. B. No. 206

Senator Huffman

Cosponsors: Senators Uecker, Lehner, Terhar, Jordan

A BILL

To amend section 2505.02 and to enact sections 1
2305.61, 2305.62, 2305.63, 2305.64, 2305.65, 2
2305.66, 2305.67, 2305.68, and 2739.021 of the 3
Revised Code to enact the Ohio Citizen 4
Participation Act to provide protections to 5
persons who engage in certain specified 6
protected communications and to protect the 7
identity of persons who anonymously engage in 8
online communications under certain 9
circumstances. 10

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 2505.02 be amended and sections 11
2305.61, 2305.62, 2305.63, 2305.64, 2305.65, 2305.66, 2305.67, 12
2305.68, and 2739.021 of the Revised Code be enacted to read as 13
follows: 14

Sec. 2305.61. As used in sections 2305.61 to 2305.64 of 15
the Revised Code: 16

(A) "Defendant" means the person against whom a claim 17
based on a protected communication is made, regardless of 18

whether that claim appears in a complaint, counterclaim, cross-claim, or third-party complaint. 19
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(B) "Issue of public interest" means any issue of interest to the public, including any issue related to the following: 21
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(1) Health and safety; 23

(2) Environmental, economic, or community well-being; 24

(3) The government; 25

(4) A public official or public figure; 26

(5) Goods, products, or services in the marketplace. 27

(C) "Plaintiff" means the person making a claim based on a protected communication, regardless of whether that claim appears in a complaint, counterclaim, cross-claim, or third-party complaint. 28
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(D) "Protected communication" means any written or oral statement or communication for which a speaker may not be subject to liability in a civil action under the First Amendment to the United States Constitution, Section 11 of Article 1 of the Ohio Constitution, or a similar provision in the applicable constitution of the jurisprudence in which the statement or communication was made. "Protected communication" includes the following: 32
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(1) A written or oral statement or communication that is aimed at procuring any governmental or electoral action, result, or outcome; 40
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(2) Any written or oral statement or communication of information or a complaint made to a member of the general assembly or to any officer or employee of the government of the 43
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United States, this state, or a political subdivision of this 46
state, regarding a matter reasonably of concern to the 47
governmental entity involved; 48

(3) Any written or oral statement or communication made in 49
direct connection with an issue under consideration by an 50
executive, legislative, or judicial body of the United States, 51
this state, or a political subdivision of this state, or any 52
other official proceeding authorized by law; 53

(4) Any written or oral statement or communication made in 54
direct connection with an issue of public interest; 55

(5) Any written or oral statement or communication between 56
individuals who join together to collectively express, promote, 57
pursue, or defend common interests. 58

(E) "Written or oral statement or communication" includes 59
the making or submitting of a statement or document in any form 60
or medium, including oral, visual, written, audiovisual, and 61
electronic. An electronic statement or communication includes a 62
statement or communication made on an internet web site. 63

Sec. 2305.62. (A) Sections 2305.61 to 2305.68 of the 64
Revised Code shall be known as the "Ohio Citizen Participation 65
Act." 66

(B) (1) Any person who engages in a protected communication 67
is immune from suit in any civil action for a claim based on 68
that communication. 69

(2) Nothing in sections 2305.61 to 2305.68 of the Revised 70
Code shall be construed as limiting or abrogating any other 71
defense, remedy, immunity, or privilege available under other 72
constitutional, statutory, common law, or administrative 73
provisions or rules relating to claims based on protected 74

communications. 75

(C) Sections 2305.61 to 2305.68 of the Revised Code do not 76
apply to any of the following: 77

(1) An enforcement action that is brought in the name of 78
this state or a political subdivision of this state by the 79
attorney general or the chief legal officer of a political 80
subdivision of this state; 81

(2) (a) Except as provided in division (C) (2) (b) of this 82
section, a legal action brought against a person primarily 83
engaged in the business of selling or leasing goods or services, 84
if the action arises out of a statement or conduct made in 85
relation to the sale or lease of goods, services, or an 86
insurance product, insurance services, or a commercial 87
transaction in which the intended audience is an actual or 88
potential buyer or customer; 89

(b) Division (C) (2) (a) of this section does not apply to 90
any action against any person or entity based upon the creation, 91
dissemination, exhibition, or advertisement, or a similar 92
promotion, of any dramatic, literary, musical, political, or 93
artistic work, including, but not limited to, a motion picture 94
or television program, an art show or exhibit, or an article 95
published in a newspaper or magazine of general circulation. 96

(3) A legal action seeking recovery for bodily injury, 97
wrongful death, or survival, or to statements made regarding 98
that legal action; 99

(4) A legal action brought under Chapters 3901-1 to 3901- 100
11 of the Ohio Administrative Code or arising out of an 101
insurance contract. 102

Sec. 2305.63. (A) If a claim is brought against a person 103

based upon a protected communication, the defendant may file a 104
special motion to strike the action. 105

(B) The special motion to strike the action shall be filed 106
not later than sixty days after the service of the complaint on 107
the moving defendant. The court may extend the sixty-day period 108
for good cause shown. 109

(C) If a special motion to strike is filed under this 110
section, the court shall do all of the following: 111

(1) Determine whether the defendant has established, by a 112
preponderance of the evidence, that the claim in the civil 113
action is based upon a protected communication; 114

(2) If the court determines that the defendant has met the 115
burden set by division (C)(1) of this section, determine whether 116
the plaintiff in the action has presented clear and specific 117
admissible evidence of a prima facie case for each essential 118
element of the plaintiff's claim; 119

(3) If the court determines that the plaintiff has 120
established a probability of prevailing on the claim pursuant to 121
division (C)(2) of this section, ensure all of the following: 122

(a) That the determination shall not be admitted into 123
evidence at any later stage of the underlying action or any 124
subsequent proceeding; 125

(b) That the determination will not affect the burden of 126
proof that is applied in the underlying action or any subsequent 127
proceeding; 128

(c) That filing a special motion to strike shall not 129
operate as a waiver of any defense based upon personal 130
jurisdiction. 131

<u>(4) (a) Subject to division (C) (4) (b) of this section, stay</u>	132
<u>any discovery in the action until after both of the following:</u>	133
<u>(i) A ruling by the court on the special motion to strike;</u>	134
<u>(ii) The disposition of any appeal from the court's ruling</u>	135
<u>on the special motion to strike.</u>	136
<u>(b) The court may allow specified and limited discovery</u>	137
<u>relevant to the special motion to strike upon the court's own</u>	138
<u>motion, or upon the motion of a party to the special motion to</u>	139
<u>strike, if the party seeking discovery shows by affidavit good</u>	140
<u>cause why the discovery is necessary and why the party's burden</u>	141
<u>under division (C) (1) or (2) of this section cannot be</u>	142
<u>discharged without the specified and limited discovery.</u>	143
<u>(5) Issue a briefing schedule to the parties to the action</u>	144
<u>for the special motion to strike that does the following:</u>	145
<u>(a) Permits the plaintiff to file and serve a memorandum</u>	146
<u>in opposition to the defendant's special motion to strike:</u>	147
<u>(i) Within fourteen days after the motion is served on the</u>	148
<u>plaintiff;</u>	149
<u>(ii) Upon a showing of exceptional circumstances, within a</u>	150
<u>period of up to twenty-eight days as allowed by the court after</u>	151
<u>the motion is served on the plaintiff;</u>	152
<u>(iii) Within a period approved by the court to which the</u>	153
<u>plaintiff and defendant agree.</u>	154
<u>(b) Permits the defendant to file and serve a reply in</u>	155
<u>support of the defendant's special motion to strike, if any:</u>	156
<u>(i) Within fourteen days after the plaintiff's memorandum</u>	157
<u>in opposition is served on the defendant;</u>	158

(ii) Upon a showing of good cause, within a period of up to twenty-eight days as allowed by the court after the plaintiff's memorandum in opposition is served on the defendant; 159
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(iii) Within a period approved by the court to which the plaintiff and defendant agree. 162
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(c) If requested by any party or the court, provides for a hearing on the special motion to strike not later than thirty days after the defendant either files and serves the defendant's reply in support of the defendant's special motion to strike or notifies the court and the plaintiff that the defendant waives the defendant's right to file a reply brief. 164
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(6) Rule on the special motion to strike within thirty days after any of the following: 170
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(a) The hearing on the special motion to strike, if a hearing is requested by any party or the court; 172
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(b) The defendant's reply in support of the motion is filed, served on the plaintiff, and provided to the court, or the defendant notifies the plaintiff and the court that the defendant waives the defendant's right to file a reply brief, if no hearing is requested by any party or the court. 174
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(7) Dismiss the action, if the plaintiff fails to timely file a memorandum in opposition to the special motion to strike. 179
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(D) In making its determinations under divisions (C) (1) and (2) of this section, the court shall consider the pleadings and admissible evidence in any supporting or opposing affidavits stating the facts on which the claim or defense is based. At the defendant's option, the defendant may present the defendant's evidence through testimony, subject to cross-examination by the plaintiff. 181
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(E) If the court dismisses the claim pursuant to a special motion to strike filed under this section, the dismissal acts as an adjudication upon the merits. 188
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Sec. 2305.64. (A) If the court grants a special motion to strike pursuant to section 2305.63 of the Revised Code, the following apply: 191
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(1) The court shall award reasonable attorney's fees and court costs to the defendant. The court shall not fail to award, or reduce an award of, attorney's fees and court costs under this division on the grounds that the defense of the claim was undertaken on a pro bono or contingent basis. 194
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(2) The court may award, in addition to reasonable attorney's fees and court costs awarded under division (A) (1) of this section, such punitive or exemplary monetary sanctions as the court finds sufficient to deter the filing of similar actions in the future. 199
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(3) The defendant may bring a separate claim or action, or with leave of the court may bring a counterclaim, to recover the following: 204
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(a) Actual compensatory damages proximately caused by the claim, or five hundred dollars, whichever is greater; 207
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(b) Punitive damages as provided by section 2315.21 of the Revised Code; 209
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(c) Reasonable attorney's fees and court costs of bringing the separate claim, action, or counterclaim. 211
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(4) If all or any portion of any award made by the court pursuant to division (A) (1) or (2) of this section remains unpaid ninety days after being made, the court, upon motion of 213
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the defendant, may in its discretion impose joint and several 216
liability for any unpaid amount of the award against the 217
attorney or attorneys who signed the pleading in which the claim 218
was raised, if the court finds that the attorney or attorneys 219
knew or should have known that the claim was based on a 220
protected communication. 221

(B) If the court denies a special motion to strike filed 222
under section 2305.63 of the Revised Code, and finds that the 223
motion was frivolous conduct as defined in section 2323.51 of 224
the Revised Code, the court, after the disposition of any appeal 225
from the court's ruling on the special motion, may award to the 226
plaintiff reasonable attorney's fees, court costs, and other 227
reasonable expenses incurred in responding to the special motion 228
to strike. The court shall follow the procedures set forth in 229
section 2323.51 of the Revised Code in making that award. 230

(C) If the court denies a special motion to strike filed 231
under section 2305.63 of the Revised Code, the denial is a final 232
order under section 2505.02 of the Revised Code and the 233
defendant has an interlocutory right of appeal under section 234
2505.02 of the Revised Code. 235

Sec. 2305.65. (A) As used in this section: 236

(1) "Foreign claim based on a protected communication" 237
means any claim in a civil action brought against a person based 238
on a protected communication, if such action was commenced in 239
any court outside of Ohio against a person who was a resident of 240
Ohio at one or more of the following times: 241

(a) The time the person made the protected communication; 242

(b) The time the action was commenced against the person; 243

(c) The time the person was served in the action. 244

(2) "Protected communication" has the same meaning as in 245
section 2305.61 of the Revised Code. 246

(B) Any person subject to a foreign claim based on a 247
protected communication may bring a claim in a civil action in 248
the courts of this state against the person filing the foreign 249
claim based on a protected communication against the person 250
filing the foreign claim. Such claim may be filed at any time, 251
but not later than one year after the dismissal or final 252
judgment of the foreign claim based on a protected 253
communication. 254

(C) If the court establishes by a preponderance of the 255
evidence in the action brought under division (B) of this 256
section that the person subject to the foreign claim based on a 257
protected communication would have prevailed on a special motion 258
to strike under section 2305.63 of the Revised Code if the 259
foreign claim based on a protected communication had been filed 260
in Ohio, the court: 261

(1) Shall award to the person reasonable attorney's fees 262
and costs for the defense of the foreign claim based on a 263
protected communication in the same manner provided for the 264
award of attorney's fees and court costs under division (A) (1) 265
of section 2305.64 of the Revised Code; 266

(2) Shall award to the person reasonable attorney's fees 267
and costs incurred in connection with the claim provided for by 268
this section; 269

(3) Shall award to the person either actual compensatory 270
damages proximately caused by the filing of the foreign claim 271
based on a protected communication or statutory damages of five 272
hundred dollars, whichever is greater; 273

<u>(4) May award such punitive or exemplary monetary</u>	274
<u>sanctions as the court finds sufficient to deter the filing of</u>	275
<u>similar actions against Ohio residents.</u>	276
<u>(D) For purposes of section 2307.382 of the Revised Code</u>	277
<u>and Civil Rule 4.3:</u>	278
<u>(1) The filing of a foreign claim based on a protected</u>	279
<u>communication constitutes an act outside this state which causes</u>	280
<u>tortious injury in this state and which is committed with the</u>	281
<u>purpose of injuring persons.</u>	282
<u>(2) A person filing a foreign claim based on a protected</u>	283
<u>communication may reasonably expect that injury would incur in</u>	284
<u>this state to a person against whom a foreign claim based on a</u>	285
<u>protected communication is filed.</u>	286
<u>Sec. 2305.66. As used in sections 2305.66 to 2305.68 of</u>	287
<u>the Revised Code:</u>	288
<u>(A) "Anonymous user" means a person or entity who has</u>	289
<u>engaged in an online communication without publicly revealing</u>	290
<u>the person's or entity's identity, including a person or entity</u>	291
<u>communicating only through a pseudonym.</u>	292
<u>(B) "Online communication" means any communication made</u>	293
<u>through a computer, computer system, computer network,</u>	294
<u>telecommunication, telecommunications device, telecommunications</u>	295
<u>service, information service, or other digital or electronic</u>	296
<u>method of communication.</u>	297
<u>(C) "Protected communication" has the same meaning as in</u>	298
<u>section 2305.61 of the Revised Code.</u>	299
<u>(D) "Web site operator" means the person or entity</u>	300
<u>responsible for the maintenance, content, or operation of an</u>	301

internet web site. 302

Sec. 2305.67. (A) No party to an action involving an 303
online communication shall seek to discover, by subpoena or 304
otherwise, the identity of an anonymous user without first 305
obtaining leave from the court in which the action was filed. 306

(B) A court shall not grant leave to discover the identity 307
of an anonymous user under division (A) of this section unless 308
all of the following have occurred: 309

(1) The court considers any written or oral evidence 310
offered by any party or witness or any affidavit that may be 311
material in making a determination under this section. 312

(2) At least fourteen days have passed from the date that 313
the anonymous user has received notice under division (B)(4)(a) 314
of this section, unless that time period has been enlarged by 315
order of the court or an agreement between the parties. 316

(3) The anonymous user has had an opportunity to respond 317
to the movant's motion within the time period specified in 318
division (B)(2) of this section. 319

(4) The party seeking to discover the anonymous user's 320
identity has established, by clear and specific admissible 321
evidence, each of the following elements: 322

(a) That the party has provided sufficient notice to the 323
anonymous user that the anonymous user's identity is being 324
sought, including a notice with the language required under 325
division (C) of this section and a copy of the party's motion 326
for leave to seek the identity of the anonymous user; 327

(b) That the party has quoted verbatim to the court and 328
the anonymous user the communication alleged to be actionable; 329

(c) That the party has sufficiently alleged each element of the cause of action, such that the party would survive a special motion to strike under section 2305.63 of the Revised Code or a motion to dismiss under Civil Rule 41; 330
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(d) That the party has presented admissible evidence supporting the allegations contained in the action; 334
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(e) That the online communication is not a protected communication; 336
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(f) That the right to identify the anonymous user outweighs the right of an anonymous user to speak anonymously pursuant to the First Amendment to the United States Constitution and Section 11 of Article I of the Ohio Constitution. 338
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(C) The notice provided under division (B) (4) (a) of this section must contain the following language, the first paragraph being set in all capital letters: 343
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"A LAWSUIT HAS BEEN FILED RELATING TO YOUR SPEECH. A PARTY TO THAT LAWSUIT IS TRYING TO UNCOVER YOUR IDENTITY. YOU MUST ACT QUICKLY TO PROTECT YOUR RIGHT TO REMAIN ANONYMOUS. 346
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A party to the lawsuit of [insert case caption] in the [insert name and jurisdiction of the court in which the action is pending] has alleged that the anonymous user [insert anonymous user pseudonym] has made comments for which he/she/it is or may be subject to civil liability, which may include damages and possibly attorney's fees and court costs. 349
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The party making those allegations does not yet know your actual identity, but has asked the [insert name and jurisdiction of the court in which the action is pending] to require your internet service provider ("ISP"), the web site on which the 355
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communication was made, or a similar entity to force the ISP, 359
web site, or entity to reveal your identity. 360

You should contact an attorney who is licensed to practice 361
law in Ohio so that he or she can appear on your behalf in this 362
matter. You also have the right to represent yourself if you 363
were not communicating as a corporation or other business 364
entity. 365

You or your attorney can contest the party's ability to 366
discover your identity without revealing your identity pursuant 367
to divisions (B) and (C) of section 2305.68 of the Revised Code. 368
The operator of the web site on which the party alleges you made 369
the actionable communication may also seek to intervene on your 370
behalf under division (A) of section 2305.68 of the Revised 371
Code. 372

Upon receipt of this notice, you will have fourteen days 373
to respond to the party's motion to subpoena your ISP for your 374
identity." 375

(D) Nothing in this section precludes an internet service 376
provider or other recipient of a subpoena or discovery request 377
from moving to quash the subpoena or objecting to the discovery 378
request under Civil Rule 45, or under any other applicable rule 379
of procedure, statute, common law rule, or constitutional 380
principle. 381

Sec. 2305.68. (A) (1) A web site operator, internet service 382
provider, or other similar entity shall have an unconditional 383
right to intervene in any action in which a party seeks to 384
identify an anonymous user of the web site, internet service 385
provider, or other similar entity. 386

(2) Regardless of whether intervention is sought under 387

division (A) (1) of this section, a web site operator, internet 388
service provider, or other similar entity shall have standing to 389
contest and defend against an attempt by a party to identify an 390
anonymous user of its web site or service pursuant to section 391
2305.67 of the Revised Code. 392

(B) An anonymous user may contest and defend against an 393
attempt by a party to identify an anonymous user of the 394
anonymous user's web site pursuant to section 2305.67 of the 395
Revised Code, without first having to reveal the anonymous 396
user's identity. 397

(C) In addition to proceeding under division (B) of this 398
section, an anonymous user may file a special motion to strike 399
pursuant to section 2305.63 of the Revised Code without having 400
to reveal the anonymous user's identity. 401

(D) For purposes of any action under this section, it is 402
sufficient that the anonymous user be identified and referred to 403
by the parties and the court by means of a pseudonym. 404

(E) If an anonymous user or web site operator appears in 405
an action for the purpose of filing a special motion to strike 406
pursuant to section 2305.63 of the Revised Code, or to contest a 407
party's subpoena or discovery request, the anonymous user's 408
appearance shall not operate as a waiver of any defense based on 409
personal jurisdiction. 410

Sec. 2505.02. (A) As used in this section: 411

(1) "Substantial right" means a right that the United 412
States Constitution, the Ohio Constitution, a statute, the 413
common law, or a rule of procedure entitles a person to enforce 414
or protect. 415

(2) "Special proceeding" means an action or proceeding 416

that is specially created by statute and that prior to 1853 was 417
not denoted as an action at law or a suit in equity. 418

(3) "Provisional remedy" means a proceeding ancillary to 419
an action, including, but not limited to, a proceeding for a 420
preliminary injunction, attachment, discovery of privileged 421
matter, suppression of evidence, a prima-facie showing pursuant 422
to section 2307.85 or 2307.86 of the Revised Code, a prima-facie 423
showing pursuant to section 2307.92 of the Revised Code, or a 424
finding made pursuant to division (A) (3) of section 2307.93 of 425
the Revised Code. 426

(B) An order is a final order that may be reviewed, 427
affirmed, modified, or reversed, with or without retrial, when 428
it is one of the following: 429

(1) An order that affects a substantial right in an action 430
that in effect determines the action and prevents a judgment; 431

(2) An order that affects a substantial right made in a 432
special proceeding or upon a summary application in an action 433
after judgment; 434

(3) An order that vacates or sets aside a judgment or 435
grants a new trial; 436

(4) An order that grants or denies a provisional remedy 437
and to which both of the following apply: 438

(a) The order in effect determines the action with respect 439
to the provisional remedy and prevents a judgment in the action 440
in favor of the appealing party with respect to the provisional 441
remedy. 442

(b) The appealing party would not be afforded a meaningful 443
or effective remedy by an appeal following final judgment as to 444

all proceedings, issues, claims, and parties in the action.	445
(5) An order that determines that an action may or may not be maintained as a class action;	446 447
(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;	448 449 450 451 452 453 454 455 456 457 458 459
(7) An order in an appropriation proceeding that may be appealed pursuant to division (B) (3) of section 163.09 of the Revised Code;	460 461 462
<u>(8) An order that denies a special motion to strike pursuant to section 2305.63 of the Revised Code;</u>	463 464
<u>(9) An order that grants leave under section 2305.67 of the Revised Code to discover the identity of an anonymous user who has made an online communication.</u>	465 466 467
(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.	468 469 470 471 472
(D) This section applies to and governs any action,	473

including an appeal, that is pending in any court on July 22, 474
1998, and all claims filed or actions commenced on or after July 475
22, 1998, notwithstanding any provision of any prior statute or 476
rule of law of this state. 477

Sec. 2739.021. Nothing in sections 2739.01 and 2739.02 of 478
the Revised Code shall be construed as limiting or abrogating 479
any other defense, remedy, immunity, or privilege available 480
under other constitutional, statutory, common law, or 481
administrative provisions or rules relating to claims based on 482
protected communications brought under sections 2305.61 to 483
2305.64 of the Revised Code. 484

Section 2. That existing section 2505.02 of the Revised 485
Code is hereby repealed. 486

Section 3. The General Assembly hereby declares that its 487
purposes in enacting sections 2305.61 to 2305.68 and section 488
2739.021 of the Revised Code and amending section 2505.02 of the 489
Revised Code are: (1) to encourage and safeguard the 490
constitutional rights of persons to petition, speak freely, and 491
associate freely, (2) to encourage and safeguard the rights of 492
persons to participate in government to the maximum extent 493
permitted by law, (3) to protect the rights of persons to speak 494
and act with respect to issues of public concern, and, at the 495
same time, (4) to protect the rights of persons to file 496
meritorious lawsuits for demonstrable injury. The General 497
Assembly declares that sections 2305.61 to 2305.68, section 498
2739.021, and section 2505.02 of the Revised Code shall be 499
construed liberally to effectuate their purpose and intent 500
fully. 501