As Introduced

132nd General Assembly
Regular Session
2017-2018

S. B. No. 206

Senator Huffman

Cosponsors: Senators Uecker, Lehner, Terhar, Jordan

A BILL

To amend section 2505.02 and to enact section 2305.61, 2305.62, 2305.63, 2305.64, 2305.65, 2305.66, 2305.67, 2305.68, and 2739.021 of the Revised Code to enact the Ohio Citizen Participation Act to provide protections to persons who engage in certain specified protected communications and to protect the identity of persons who anonymously engage in online communications under certain circumstances.

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

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

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

(A) "Defendant" means the person against whom a claim based on a protected communication is made, regardless of
whether that claim appears in a complaint, counterclaim, cross-claim, or third-party complaint.

(B) "Issue of public interest" means any issue of interest to the public, including any issue related to the following:

(1) Health and safety;

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

(3) The government;

(4) A public official or public figure;

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

(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.

(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:

(1) A written or oral statement or communication that is aimed at procuring any governmental or electoral action, result, or outcome;

(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
United States, this state, or a political subdivision of this state, regarding a matter reasonably of concern to the governmental entity involved;

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 2305.63. (A) If a claim is brought against a person...
based upon a protected communication, the defendant may file a special motion to strike the action.

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

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

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

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

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

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

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

(c) That filing a special motion to strike shall not operate as a waiver of any defense based upon personal jurisdiction.
(4)(a) Subject to division (C)(4)(b) of this section, stay any discovery in the action until after both of the following:

(i) A ruling by the court on the special motion to strike;

(ii) The disposition of any appeal from the court's ruling on the special motion to strike.

(b) The court may allow specified and limited discovery relevant to the special motion to strike upon the court's own motion, or upon the motion of a party to the special motion to strike, if the party seeking discovery shows by affidavit good cause why the discovery is necessary and why the party's burden under division (C)(1) or (2) of this section cannot be discharged without the specified and limited discovery.

(5) Issue a briefing schedule to the parties to the action for the special motion to strike that does the following:

(a) Permits the plaintiff to file and serve a memorandum in opposition to the defendant's special motion to strike:

(i) Within fourteen days after the motion is served on the plaintiff;

(ii) Upon a showing of exceptional circumstances, within a period of up to twenty-eight days as allowed by the court after the motion is served on the plaintiff;

(iii) Within a period approved by the court to which the plaintiff and defendant agree.

(b) Permits the defendant to file and serve a reply in support of the defendant's special motion to strike, if any:

(i) Within fourteen days after the plaintiff's memorandum in opposition is served on the defendant;
(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;

(iii) Within a period approved by the court to which the plaintiff and defendant agree.

(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.

(6) Rule on the special motion to strike within thirty days after any of the following:

(a) The hearing on the special motion to strike, if a hearing is requested by any party or the court;

(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.

(7) Dismiss the action, if the plaintiff fails to timely file a memorandum in opposition to the special motion to strike.

(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.
(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.

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:

(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.

(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.

(3) The defendant may bring a separate claim or action, or with leave of the court may bring a counterclaim, to recover the following:

(a) Actual compensatory damages proximately caused by the claim, or five hundred dollars, whichever is greater;

(b) Punitive damages as provided by section 2315.21 of the Revised Code;

(c) Reasonable attorney's fees and court costs of bringing the separate claim, action, or counterclaim.

(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
the defendant, may in its discretion impose joint and several liability for any unpaid amount of the award against the attorney or attorneys who signed the pleading in which the claim was raised, if the court finds that the attorney or attorneys knew or should have known that the claim was based on a protected communication.

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

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

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

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

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

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

(c) The time the person was served in the action.
(2) "Protected communication" has the same meaning as in section 2305.61 of the Revised Code.

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

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

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

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

(3) Shall award to the person either actual compensatory damages proximately caused by the filing of the foreign claim based on a protected communication or statutory damages of five hundred dollars, whichever is greater;
(4) May award such punitive or exemplary monetary sanctions as the court finds sufficient to deter the filing of similar actions against Ohio residents.

(D) For purposes of section 2307.382 of the Revised Code and Civil Rule 4.3:

(1) The filing of a foreign claim based on a protected communication constitutes an act outside this state which causes tortious injury in this state and which is committed with the purpose of injuring persons.

(2) A person filing a foreign claim based on a protected communication may reasonably expect that injury would incur in this state to a person against whom a foreign claim based on a protected communication is filed.

Sec. 2305.66. As used in sections 2305.66 to 2305.68 of the Revised Code:

(A) "Anonymous user" means a person or entity who has engaged in an online communication without publicly revealing the person's or entity's identity, including a person or entity communicating only through a pseudonym.

(B) "Online communication" means any communication made through a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, information service, or other digital or electronic method of communication.

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

(D) "Web site operator" means the person or entity responsible for the maintenance, content, or operation of an
internet web site.

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

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

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

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

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

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

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

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

(d) That the party has presented admissible evidence supporting the allegations contained in the action;

(e) That the online communication is not a protected communication;

(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.

(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:

"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.

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.

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
communication was made, or a similar entity to force the ISP, 361
web site, or entity to reveal your identity.

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

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.

Upon receipt of this notice, you will have fourteen days 372
to respond to the party's motion to subpoena your ISP for your 373
identity."

(D) Nothing in this section precludes an internet service 374
provider or other recipient of a subpoena or discovery request 375
from moving to quash the subpoena or objecting to the discovery 376
request under Civil Rule 45, or under any other applicable rule 377
of procedure, statute, common law rule, or constitutional 378
principle.

Sec. 2305.68. (A)(1) A web site operator, internet service 379
provider, or other similar entity shall have an unconditional 380
right to intervene in any action in which a party seeks to 381
identify an anonymous user of the web site, internet service 382
provider, or other similar entity.

(2) Regardless of whether intervention is sought under 383

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

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

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

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

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

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

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

(2) "Special proceeding" means an action or proceeding
that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

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

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

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

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

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

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

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

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to
all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(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;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code;

(8) An order that denies a special motion to strike pursuant to section 2305.63 of the Revised Code;

(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.

(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.

(D) This section applies to and governs any action,
including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

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

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

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