



Ohio Senate Government Oversight and Reform Committee
Testimony of Dennis Hetzel, President and Executive Director, Ohio News Media Association
June 6, 2018
Senate Bill 206 | Ohio Citizen Participation Act

Chairman Coley, Vice-Chair Uecker, Ranking Minority Member Schiavoni and committee members, thank you for this opportunity to testify in support of Senate Bill 206, the Ohio Citizen Participation Act. We particularly thank Sen. Huffman for introducing this measure to protect Ohio citizens when they are sued for simply sharing their perspectives on matters of public interest – a right clearly protected by both the U.S. and Ohio constitutions.

The bill will help citizens defend themselves against litigation filed with the primary motivation to silence critics and discourage others. These often are lawsuits motivated less by a desire for ultimate victory than to “send a message” to others who might speak, publish or post views that are unwanted by the plaintiff. The Ohio Citizen Participation Act prevents the weaponizing of the court system to quash the legitimate expression of a profoundly important and fundamental constitutional right.

The Act builds on the work done and lessons learned in about two dozen states. SB 206 is most directly based on a Texas statute hailed as one of the nation’s best. SB 206 also was carefully written to conform to Ohio statutes and court procedures. The bill has been praised by groups on different sides of the political spectrum, including the conservative [Cato Institute, which recently analyzed the bill and said](#), “If approved by the legislature, it will stand as a new gold standard for anti-SLAPP laws.”

As the Cato Institute noted, SLAPP is the euphemism for “Strategic Lawsuits against Public Participation” and refers to the type of litigation addressed by Sen. Huffman’s bill: vexatious defamation actions designed to chill unwanted free speech by subjecting the defendants to long, costly legal battles.

Across the country and in Ohio, these measures have attracted support from groups that would take opposite sides on many other issues, and you will hear testimony from several groups today. That’s because constitutional rights don’t know political boundaries. At different periods in American history, free speech battles have come from left and right. Other controversies have no political agenda at all—just a goal of “shutting you up.” Media organizations of all types, from Ohio news organizations to documentary filmmakers, have an obvious interest. So do everyday citizens. For example, today you will hear from domestic violence victims who have been sued for speaking out. Even public officials have found themselves in lawsuits for stating their opinions on matters before them, which happened in Grove City not long ago.



It's also important to underscore what the Ohio Citizen Participation Act is not. It is not an expansion of defamation law. There is no change to definitions. Deserving claims of libel and slander will continue to go forward. In simple terms, this bill does not grant anyone a free-speech license to shout "fire" in a crowded theater, but it would allow a citizen to better defend himself if he gets sued for commenting on whether the movie theater is doing a good job with its evacuation procedures.

Attached to our testimony is a detailed discussion paper on the Ohio Citizen Participation Act that includes examples such as tenants sued for complaining about landlords, commenters who spoke out in a controversy involving a high school football coach and bloggers who criticized a suburban Cleveland mayor.

The attachment also describes the specific process and definitions in the act in more detail. Here is a quick summary: The Act creates an expedited court process to dispose of cases that target constitutionally protected speech. "Protected communication" is broadly defined in relation to matters of public interest. The defendant initiates the process by asking the court to grant what is called a "special motion to strike." Key elements of the process include limitations on broad discovery and a "preponderance of evidence" standard for the defendant to show that the complaint was based on protected communication. The plaintiff can defeat the motion by showing clear, specific evidence of prevailing on each allegation. Both sides have full appeal rights. The defendant receives reasonable fees if the motion succeeds; the plaintiff can seek fees if the motion is frivolous; for example, used as a stalling tactic. Many cases brought under the Act will resolve in a few months instead of the years and expense it can take to achieve even a basic summary judgment.

This bill also adds new protections for anonymous commenters in the digital realm. Again, it does not expand the definitions of defamation but allows an anonymous commenter the opportunity to contest a subpoena or other legal efforts to require a website or Internet service provider to reveal their identities. This is done through required notification if the digital outlet is asked to expose the identity. We believe this aspect of the bill would make Ohio a national leader in applying the time-tested, important right to comment anonymously – think about Benjamin Franklin and the Federalist Papers -- to our digital age.

Thank you for your consideration. We welcome your questions and comments and look forward to working with all interested parties as the Legislature considers Sen. Huffman's bill.



THE OHIO CITIZEN PARTICIPATION ACT

Ohio should join 28 other states in protecting constitutional rights

THE OHIO CONSTITUTION

1.11 Freedom of speech; of the press; of libels (1851)

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

A so-called “Strategic Lawsuit Against Public Participation,” or SLAPP suit, is a meritless lawsuit against someone for exercising his or her First Amendment rights – rights that also are guaranteed to Ohio citizens under our state’s constitution.

Often the real objective of these suits isn’t to win. “How,” you might ask, “does that make sense?” That’s because the primary goal often is to quash criticism, discourage opposition and limit citizen participation. The lawsuit sends a message to others who might speak out by imposing the stress, time commitments and large legal bills that defendants often endure over months and even years.

This happens today to Ohio citizens exercising some of America’s most fundamental and important rights.

Twenty-eight states have adopted laws to help protect these rights – with full appeal rights preserved for those cases that deserve to go forward.

The “Ohio Citizen Participation Act” is primarily modeled after the Texas Citizen Participation Act. Experts in the field generally acknowledge the Texas and California laws as the nation’s best. Georgia is one of several other states to pass or improve statutes in recent years. The Ohio proposal also includes digital-age protections for anonymous free speech – an American tradition back to the times of Thomas Paine and Benjamin Franklin. The legislation is consistent with Ohio law and the accepted practices of Ohio’s courts.

The Ohio Citizen Participation Act outlines a process to manage such cases in a far-more expeditious manner. The bottom line is that in situations in which the Act is properly invoked, cases will be resolved in about 9 months at the most; far less in many actions.

It also is important to note what this legislation is not.



It does not change defamation standards. Legitimate cases continue to go forward. Appeal rights are fully protected. The Ohio Citizen Participation Act helps dispose of cases that unreasonably attack First Amendment protections – which often are expressions of opinion.

It is not just a “media bill.” These cases most often involve average citizens who “dare” to exercise their rights to do such things as speak out at public meetings or post reviews of products or services on the Internet. Even public officials have been sued for their comments.

What are the key elements in the Ohio Citizen Participation Act?

1. The statute allows a judge to dismiss meritless lawsuits filed against one who engages in a “protected communication” in an expedited manner through a special motion to strike. “Protected communication” is defined explicitly to encompass First Amendment-protected speech on matters of public interest and concern.
2. When the special motion to strike is filed, the defendant must establish by a preponderance of evidence that the complaint is based upon “protected communication.” The plaintiff defeats the motion by showing clear and specific evidence of prevailing on each, specific allegation.
3. The statute limits discovery that is not necessary for the court to decide the motion in order to insulate defendants against ruinous discovery costs if the suit is meritless.
4. Both parties have full appeal rights from the ruling on the special motion. Some extensions are allowed if discovery is ordered.
5. If the defendant prevails in the motion, fees, including reasonable attorney’s fees, are awarded. The court may award fees to the plaintiff upon a showing of frivolous conduct by the defendant, such as a finding that filing the motion to strike was a delaying tactic.
6. There also are protections to alert anonymous digital commenters who face litigation. This important change would make Ohio a national trend-setter.

(See the last 2 pages of this document for “protected speech” definitions and process timelines.)

How do the anonymous speech protections work?

Anonymous commenters will have an opportunity to contest efforts to expose their identities, protecting their legitimate expression of First Amendment and Ohio Constitutional rights in the digital realm. As is the case with other provisions, this is not a change to libel and defamation standards. Cincinnati attorney Jeffrey Nye, a member of our coalition who has represented multiple defendants in these actions, offered this explanation of support:

“James Madison, Alexander Hamilton, and John Jay wrote The Federalist Papers under the pseudonym “Publius.” Ben Franklin wrote as “Silence Dogood.” Jonathan Swift published “A Modest Proposal” anonymously at first, as did Thomas Paine with “Common Sense.” You know Eric Blair as “George Orwell.”



Before Bob Gates was the Secretary of Defense he was the president of Texas A&M, and he used a pseudonym to engage with students on a school message board.

“The Supreme Court has repeatedly held that anonymous and pseudonymous speech is not just protected, but hugely important (including in a prominent case involving the Ohio Elections Commission) ... It encourages candor and allows whistle blowers some protection.”

Under the Citizen Participation Act, if an Internet Service Provider is presented with a subpoena or other order to disclose the identity or IP address of a commenter, the anonymous commenter must be notified and has an opportunity to contest the disclosure. The statute has specific language that must be provided to the commenter about his/her rights.

Does this interfere with the powers of the courts?

We have prepared a detailed document that cites precedent in Ohio law and details the process to demonstrate that the Ohio Citizen Participation Act will not conflict with the Supreme Court’s rulemaking authority or the Modern Courts Amendment. Under the Act, Ohio’s courts maintain discretion to exercise authority; nor does the special motion require judges to weigh evidence per se. They simply consider the quality or type of evidence. The language is very similar to language that has been upheld elsewhere, such as in Texas and California

The Act also can relieve pressure on the courts by faster disposition of cases in which the plaintiff should not prevail. Even in the best of circumstances, such as the granting of summary judgment, defamation and similar cases can drag on for months and years, often with voluminous, costly discovery and deposition requirements.

We believe these First Amendment and Ohio Constitutional rights are so important that the need is clear. Twenty-eight other states already have agreed.

Who supports the Ohio Citizen Participation Act?

These laws bring together groups that often wouldn’t be in the same room. Support cuts across party and technological lines, from citizen groups to media firms and giant Internet companies. Groups as diverse as the [ACLU](#) and [ALEC](#) support such legislation. Insurance providers also are positively impacted by expedited court processes to dismiss cases that would ultimately fail. Major Web content providers such as Google and Yelp have united in support of anti-SLAPP provisions to protect First Amendment rights in the digital age.

Our coalition includes direct participation from these groups:

- Ohio News Media Association
- Ohio Association of Broadcasters
- Ohio Domestic Violence Network



- Ohio Alliance to End Sexual Violence
- Common Cause Ohio
- ACLU of Ohio
- Motion Picture Association of America
- Yelp Inc.
- Numerous Ohio attorneys who represent defamation defendants

EXAMPLES AND CASE STUDIES

The need for Ohio's Citizen Participation Act can be illustrated by recent examples from the Buckeye State and around the country.

A domestic violence victim speaks out; gets sued

[Bridget Mahoney's story](#) is one reason why advocates for domestic violence victims support the Ohio Citizen Participation Act. Mahoney has spoken publicly about abuse she and her children endured in a violent home. Her ex-husband sued the group Citizens against Domestic Violence, Bridget Mahoney and her daughter for defamation in January of 2015, claiming their public statements damaged him and his business. Mahoney, a former television anchor in Youngstown, spent thousands of dollars in legal fees. Some of her comments:

“... It is costly and emotionally draining. It has added more layers of trauma to be healed. (The discovery process) dredged up all the emotion from the past... it's a process that in many ways re-victimized us.”

The case was settled in December after two years of litigation in Mahoning County Common Pleas Court. Bridget Mahoney continues to speak out.

Chagrin Falls case causes huge legal fees before dismissal

The Chagrin Valley Times outside Cleveland was sued for coverage and editorials around protests by a citizen group against an energy company. The newspaper, citizens and their insurance companies spent roughly \$200,000 in legal fees as the plaintiff appealed to the Ohio Supreme Court, which refused to hear the case after it was dismissed at every level.

The case prompted Ohio's 8th District Court of Appeals to make this extraordinary comment [in a written opinion in late 2014](#):

This case illustrates the need for Ohio to join the majority of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech. These suits ... can be devastating to individual defendants or small news organizations and act to chill criticism and debate.



The fact that the Chagrin Valley Times website has been scrubbed of all mention of Murray or this protest is an example of the chilling effects this has.

...In this era of decentralized journalism where the internet has empowered individuals with broad reach, society must balance competing privacy interests with freedom of speech. Given Ohio's particularly strong desire to protect individual speech, as embodied in its Constitution, Ohio should adopt an anti-SLAPP statute to discourage punitive litigation designed to chill constitutionally protected speech.

Pet-store chain sues elected officials

During a vigorous dispute over whether Grove City's city council could regulate the breeders that Petland might use to obtain puppies for sale, [the company sued Councilman Ted Berry for defamation](#) over emails sent to constituents, saying his publicly stated opinions about the chain vilified and defamed them. Petland also sued the city and three other Council members.

[Petland later said it planned to drop the lawsuits](#) after the Ohio Legislature ultimately blocked Grove City's efforts to regulate its practices.

1851 Center fights for couple who criticized mayor

The non-profit 1851 Center for Constitutional Law supported the husband and wife team of Bill and Lynde Brownlee. [According to the 1851 Center](#), the Brownlees wrote a short Web article on their blog in the summer of 2014 questioning whether Mayor Jeffrey Lansky of Maple Heights had kept campaign promises. They also questioned tax and spending policies. The article addressed the policies and did not use insulting or harsh language. Lansky sued for defamation.

Judge Jose Villanueva of the Cuyahoga County Court of Common Pleas held in a 27-page ruling that Ohio public officials cannot prevail in lawsuits merely in response to political speech and that these were obvious expression of opinion. However, the suit took nearly a year to litigate.

Florida case shows importance to motion picture industry

Ohio is actively trying to grow participation by the film industry in the state. The Motion Picture Association of America strongly supports the Ohio Citizen Participation Act. Attorney Ben Sheffner of the MPAA provided [this example from Florida](#), which improved its anti-SLAPP law in 2016, but did not have such a law when this litigation was filed:

"You may remember the 2000 Warner Bros. movie *The Perfect Storm*, a harrowing tale of fishing boat called the *Andrea Gail* that sank in a storm, killing its entire crew. Unfortunately, like many successful movies, *The Perfect Storm* was hit with a meritless lawsuit – filed in Florida under Florida law – by those who disagreed with the way that the film portrayed certain people and events.



“While MPAA’s member Warner Bros. ultimately prevailed on its First Amendment defenses, it took five years and several millions of dollars in attorneys’ fees for the defendants to vindicate their free speech rights. But had Florida had a robust anti-SLAPP statute in place at the time of that suit, it likely could have been resolved in mere months, at a small fraction of the cost.”

Dayton-area landlord sued former tenant over negative opinions

In 2013, reportedly angered over online negative postings, the Dayton-area Connor Group filed a lawsuit seeking more than \$1 million from a tenant of the Meridian housing complex it owned at the time in Northwest Columbus. It took three years of litigation before the lawsuit was settled. [According to coverage in The Dispatch](#), the tenant, James Raney, admitted no liability and merely agreed to no longer disparage the company. His attorney argued that all of Raney’s postings were protected opinions about the apartment complex.

There are many more examples

The classic SLAPP actions involve citizens who get sued for “daring” to speak out. Citizens have been sued by wealthy neighbors for opposing zoning regulations and sued over opinions expressed at public forums and public meetings. There is a pending case in Cleveland in which a local builder is suing its customers and their attorney to prevent them from commenting on business practices. In Dublin, a case was recently settled in which a doctor sued a competitor for allegedly making false statements at a dinner party and elsewhere. The plaintiff doctor later paid \$210,000 in restitution to insurance providers over licensing issues, and Medicaid fraud charges against him were dropped. In a well-publicized Nevada case, a casino operator sued over a banker’s opinion at a symposium on the confidence he had in the operator’s investments.

The digital world has opened up new areas of litigation:

- An Ohio man operated an eBay sales business. He filed a defamation action in Medina County against customers in South Carolina and Pennsylvania for negative transaction reviews on the website. The buyers had no idea the seller even lived in Ohio.
- The Steubenville community was rocked by allegations involving rape and the high school football team. The plaintiff attempted to unmask not only the blogger who discussed the allegation but commenters. The anonymous commenters were mostly members of the Steubenville community, and the threat to unmask discouraged others from speaking out because of the pushback against those critical of the football team, the coach and others.

(Source of these digital examples: [Cincinnati attorney Jeffrey Nye](#), who has represented many defendants in cases that would fit the Ohio Citizen Participation Act.)



For further information

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Additional material & links

The Texas Citizens Participation Act (Primary basis for the Ohio Act)

<http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.27.htm>
<http://slappedintexas.com/citizen-participation-act/>

Explanation of how the Texas law works:

<http://www.dmlp.org/legal-guide/anti-slapp-law-texas>

How TX law was strengthened in 2013 as signed by Gov. Perry with bipartisan support:

http://foift.org/files/2013/08/Texas_Citizen_Participation_Act_Gets_Stronger.pdf

[Commentary on the Texas law](#) by Jeffrey Elkin, of the law firm Porter Hedges LLP:

“The Legislature made the determination that democracy only works if people are involved, meaning sharing information, exchanging ideas, writing about public issues, commenting on the quality of a business or assembling to support or oppose a cause. The TCPA is meant to protect citizen participation.”

California law (1 of 2 “best of breed” laws):

<http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-16/print/>

An explanation by a California lawyer in common-sense terms on “what SLAPP motions are, and how they work, and why they are important:”

<http://popehat.com/2012/06/07/why-yes-i-am-into-slapping/>

Public Participation Project state-by-state review of anti-SLAPP laws

<http://www.anti-slapp.org/your-states-free-speech-protection/>

2011 overview (with story & chart) of anti-SLAPP laws

<http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf>

ALEC’s model legislation

<http://www.alec.org/model-policy/public-participation-protection-act/>

1. Definition of protected communication in Ohio Citizen Participation Act

“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 I of the Ohio Constitution, or a similar provision in the applicable constitution of the jurisprudence in which the state 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.

2. Exemptions from ‘protected communication’ language

(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.

Timeline of the special motion process

