STAGNARO, SABA & PATTERSON

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Senator Nathan H. Manning, Chair
Senator Michele Reynolds, Vice Chair
Senator Paula Hicks-Hudson, Ranking Member
Senate Judiciary Committee
Ohio Statehouse
1 Capitol Square
Columbus, OH 43215

Re: Support for SB 237, the Uniform Public Expression Protection Act

Dear members of the Senate Judiciary Committee:

I write in support of SB 237, which would adopt the anti-SLAPP statute known as the Unform Public Expression Protection Act (or "UPEPA").

I am an attorney in private practice in Cincinnati, and while I've represented defamation plaintiffs on occasion, my relevant experience is mainly in representing non-institutional *defendants* in defamation cases, often pro bono, since about 2012. I have been working on anti-SLAPP issues for nearly as long. I speak or present periodically on these issues at meetings and conferences, and I first started working with Ohio legislators on anti-SLAPP bills in 2014. I helped draft two prior anti-SLAPP bills that were introduced in this chamber: SB 206 in the 132nd General Assembly (2017) and SB 215 in the 133rd General Assembly (2019), both of which were introduced by Senator Matt Huffman.

Ohio desperately needs an anti-SLAPP statute.

A "SLAPP"—a strategic lawsuit against public participation—is a meritless lawsuit that is designed to suppress speech, by forcing the speaker to endure litigation that is expensive, lengthy, invasive, and often embarrassing. The most common cause of action in a SLAPP is defamation, but a SLAPP is defined by its substance, not its form; the goals of SLAPPs are to punish speakers for their constitutionally protected speech, and to intimidate or chill other people from engaging in similar conduct in the future.

The purpose of an anti-SLAPP bill like UPEPA is to give people tools to fight those meritless and abusive lawsuits.

Here is a sampling of things that people have been sued for in Ohio in recent years: asserting that someone "should be ashamed of" themselves; leaving a "neutral" rating on eBay, together with a review that said only "Order retracted"; reposting the plaintiff's tweets on a blog; calling someone "greedy"; leaving a review online that said, accurately, that an item purchased had arrived with $1.40 postage due; a college student reporting sexual harassment by a guest speaker; and more.

None of these were meritorious claims, but each case involved at least dozens, (and often hundreds) of hours of attorney defense time, and took months or years to reach a conclusion. None of the defendants in these cases could have afforded to mount full-blown defenses if they had to pay for them. All of them were fortunate to have found counsel willing to represent them on a pro bono or low-bono basis. (I represented some of these defendants on that basis, and while I'm fortunate to have been in position to do so, the defendants' ability to vindicate their constitutional rights should not turn on whether they can find that kind of representation.) All these defendants would have benefitted tremendously from an anti-SLAPP statute in Ohio.

Since the first anti-SLAPP statute was adopted in the 1990s, some two thirds of American jurisdictions have enacted one. Seven of those jurisdictions have enacted UPEPA. That includes our neighbor to the south, Kentucky, which enacted UPEPA in 2022, and Maine, which enacted it earlier this month. Ohio is lagging behind its sister states. It's time for us to catch up and join the twenty-first century.

One of the great ironies of Ohio's lack of an anti-SLAPP statute is that the Ohio Constitution contains some of the best speech protections in the country. The Ohio Supreme Court has made it clear time and again that our Constitution offers protection beyond even that of the First Amendment. But without a good anti-SLAPP law, it's difficult or impossible for Ohioans to take advantage of the protections they already have under the Ohio Constitution. I can tell you from personal experience as counsel for defendants in these cases that SLAPP plaintiffs will seek out reasons to file their case in Ohio, even when it has no real connection the state, because the absence of an anti-SLAPP statute makes it a favorable forum for their frivolous litigation.

The problem is that current law and current practice are structured such that the question of whether a statement is constitutionally protected generally will come only at the end of the litigation, after months or years of fighting. Some (not all!) professional

media companies have can endure that kind of litigation, but few other companies, and even fewer individuals, have that level of resources. The result very often is that the speaker will retract (or, these days, delete) their statement instead of asserting and protecting their rights. When that happens, everyone loses. Not only has the speaker who was sued been silenced, but other people also don't get to hear what they had to say; and everyone is dissuaded from issuing commentary or leveling criticism in the future—even when it's factually true, and even when it's a matter of opinion about important issues of public concern—because they do not want to be sued.

A good anti-SLAPP statute has four essential components. First, it must put the legal question of whether a statement is constitutionally protected at the beginning of the case, rather than the end of the case. Second, it must stay the litigation while the court considers that question, so the defendant is not put to the expense and harassment of the lawsuit. Third, if the court determines that the statement is constitutionally protected, the defendant must receive a mandatory award of attorney's fees and costs. And fourth, the statute must provide an immediate right of appeal.

UPEPA does all those things. It permits the defendant, by motion, to raise the constitutional question within sixty days of being served with the claim (see lines 111-117), and requires the court to decide the motion quickly (see lines 152-160 and 184-185). It stays discovery while that motion is being considered (see lines 118-123), subject to limited exceptions based on necessity (see lines 134-139). It provides for a mandatory award of attorney's fees and costs if a defendant prevails on the motion (see lines 199-202). And it provides for an immediate right of appeal if the motion is denied (see lines 211-216).

One thing UPEPA does *not* do is change defamation law. The First Amendment and the Ohio Constitution provide the determinative principles in these cases; claims that are meritorious today will still be meritorious after the adoption of UPEPA. What UPEPA does is give litigants the right to have constitutional questions decided swiftly .

UPEPA would not be unique in this regard. Other constitutional rights are protected by statutes that require prompt action. For instance, Ohioans have a constitutional right to just compensation if their property is taken through eminent domain. That right is statutorily protected by R.C. 163.09, which requires a jury to assess compensation within twenty days. Ohioans have a constitutional right to speedy criminal trial. That right is statutorily protected by R.C. 2945.71, which requires trial within 270 days. Ohioans have a constitutional right to raise and parent their children,

and if the State tries to take them away based on allegations of abuse, they are statutorily entitled by R.C. 2151.35 to have that claim determined within ninety days.

UPEPA would be no different—it is a statutory mechanism for the enforcement of a constitutional right.

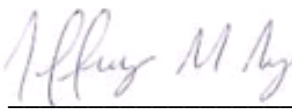
UPEPA is not perfect, and I would recommend five improvements in particular. First, and most importantly, an amendment that clarifies that the act creates a "substantive immunity from suit" under Ohio law, rather than merely immunity from liability, would increase the likelihood that the law applies to cases in federal courts in Ohio. (Federal courts apply state substantive laws, but disregard state laws that they consider to be "procedural"; some federal courts have concluded that some anti-SLAPP laws are procedural, so unscrupulous plaintiffs try to avoid the law by filing their case in federal court.) Second, the bill would benefit from a requirement that allegedly defamatory statements be quoted verbatim in the complaint. SLAPP plaintiffs frequently try to obscure the weakness of their claims by being cagey about the basis for them; I have sometimes litigated these cases for months before learning what the case is even about. Third, the attorney's fees provision could be strengthened by clarifying that a court must not fail to award fees on the ground that a lawyer defended the claim on a contingent or pro bono basis. Fourth, the 2017 anti-SLAPP bill—SB 206 in the 132nd General Assembly; see lines 287-410—contained a provision that would have codified the emerging standard for when a plaintiff may unmask an anonymous speaker online. (The goal of SLAPPs frequently is to identify the source of anonymous but constitutionally protected criticism, often for the sole purpose of humiliating the critic.) And fifth, the 2017 bill would have permitted any Ohioan who was subjected to a SLAPP in a different state to sue their tormenter for damages in Ohio (see lines 236-286); this would help combat "libel tourism," in which plaintiffs find a friendly jurisdiction and try to hale Ohioans into court there.

There are other things that could be improved, too—and I would be happy to discuss them with you—but adding these four provisions would allow Ohio not just to catch up with its fellow states, but would put it at the vanguard of protecting speech. Ohio's anti-SLAPP statute would be the new gold standard.

Thank you for your time and interest in this important issue. I look forward to seeing this bill adopted.

Sincerely,

STAGNARO, SABA
& PATTERSON CO., L.P.A.



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