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HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE
PUBLIC HEARING

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MONDAY, DECEMBER 16, 2019
9:32 A.M.

PRESENTATION ON
HB 95 (DIAMOND) AND SB 95 (FARNESE)
ANTI-SLAPP

BEFORE:

HONORABLE ROB W. KAUFFMAN, MAJORITY CHAIRMAN
HONORABLE SHERYL M. DELOZIER
HONORABLE MATTHEW D. DOWLING
HONORABLE TORREN C. ECKER
HONORABLE JOHNATHAN D. HERSHEY
HONORABLE BARRY J. JOZWIAK
HONORABLE JERRY KNOWLES
HONORABLE PAUL SCHEMEL
HONORABLE TARAH TOOHIL
HONORABLE JESSE TOPPER
HONORABLE TIM BRIGGS, DEMOCRATIC CHAIRMAN
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P R O C E E D I N G S

* * *

MAJORITY CHAIRMAN KAUFFMAN: Good morning.

I don't know if the sound system is on, but my mic is on, so I guess we'll go without a sound system.

But it's good to have you all this morning. Thanks for coming out and braving the weather. It was snowing in Franklin County this morning at 4:30 when I got up, so I don't know where you all came from.

I want to call this hearing of the House Judiciary Committee to order.

And first, if we could rise for the Pledge of Allegiance.

(The Pledge of Allegiance was recited.)

MAJORITY CHAIRMAN KAUFFMAN: And we are here today for an anti-SLAPP hearing on HB 95/SB 95 issue, and at the request of my colleague, Representative Russ Diamond, and -- Chairman Briggs, do you have anything you would like to say? No.

Okay. So I'm going to invite Representative Diamond to come forward and address the Committee first. And actually, Senator Farnese, if you would like to come forward as well. You can tag team and address the

1 Committee however you would like.

2 REPRESENTATIVE DIAMOND: Well, good morning,
3 Chairman Kauffman, Chairman Briggs, Members of the
4 Committee.

5 Thank you for holding this informational hearing
6 on House Bill 95 and Senate Bill 95. In the House, we have
7 called it the Free Speech Protection Act, and it's aimed at
8 preventing our court system from being abused by powerful
9 actors who seek to bully Pennsylvanians into refraining
10 from exercising their First Amendment rights.

11 Specifically, House Bill 95 would add a provision
12 to Title 42 to allow for a swift motion to dismiss a SLAPP
13 suit. SLAPPs, or Strategic Lawsuits Against Public
14 Participation, are lawsuits filed against a person or
15 organization for statements made or positions taken in
16 connection with a matter of public interest or regulation.

17 Some of the legal theories cited in SLAPP
18 lawsuits are defamation, invasion of privacy, nuisance,
19 malicious prosecution or abuse of process, conspiracy,
20 intentional infliction of emotional distress, and
21 interference with contract or economic advantage.

22 While all of those serve as valid reasons for
23 legitimate litigation, in practice, the true purpose of a
24 SLAPP is to chill free speech and to deter or silence
25 critics by burdening them with mounting a legal defense

1 requiring the significant expenditure of time and financial
2 resources, when the plaintiff knows they cannot prevail on
3 the merits.

4 The Free Speech Protection Act creates a process
5 to quickly dismiss SLAPPs against constitutionally
6 protected speech through a special motion to dismiss. If
7 successful, the moving party may recover attorney fees,
8 costs, and damages related to the SLAPP.

9 The legislation is balanced in that it also
10 includes a "SLAPP back" provision. In other words, if a
11 defendant is found to have filed a SLAPP motion frivolously
12 or merely as a delay tactic, the court can award attorney's
13 fees and costs to the plaintiff. As such, this legislation
14 will not deter sincere plaintiffs with genuine grievances
15 from petitioning our courts.

16 Anti-SLAPP legislation has a wide appeal and does
17 not break down along political or ideological lines.
18 Several other States, including right-leaning Texas and
19 left-leaning California, have brought anti-SLAPP statutes.
20 The list of House Bill 95's cosponsors underscores its
21 nonpartisan appeal.

22 Similar legislation passed the Senate, and it was
23 sponsored by Senator Farnese, in 2015 and '16 by a 48-to-1
24 vote, and again in 2017-18 by a 42-to-8 vote. Now, we have
25 updated the legislation with a minor tweak to account for a

1 recent IRS rule change regarding the deductibility of legal
2 fees under miscellaneous itemized deductions.

3 Finally, it should be noted that in 2000,
4 Pennsylvania established limited protections from SLAPPs,
5 but only in the very narrow area of environmental law. It
6 is my belief that every Pennsylvanian, regardless of the
7 issue or the cause they support, should enjoy similar
8 protection of their First Amendment rights.

9 I want to thank you again for holding this
10 hearing, and I look forward to the Committee's support of
11 this legislation in the near future.

12 SENATOR FARNESE: Thank you.

13 Thank you again, Chairman Kauffman and Chairman
14 Briggs, for having me here today and for holding this very
15 important hearing.

16 We have been working on this, my office,
17 probably close to a decade now, and I think as the
18 Representative said, SLAPPs were originally identified,
19 interestingly, by two University of Denver professors in a
20 study about 20 years ago. They identified that SLAPP suits
21 tend to fall into predictable categories, including
22 defamation, invasion of privacy, interference with
23 prospective economic advantage, and conspiracy. As the
24 Representative said, they generally include actions against
25 defendants who have been involved in speaking publicly

1 either for or against an issue under consideration by some
2 level of government.

3 So personally, we got involved in it, my office
4 got involved in it, as a result of the disbanding of the
5 Old City Civic Association, which is a 40-year running
6 community organization within my district, due to their
7 inability -- and this was really significant -- due to
8 their inability to obtain insurance because of several
9 SLAPP lawsuits that they had been faced with. And after
10 introducing the bill, I was literally overwhelmed with
11 stories from many civic associations and private citizens
12 who had been threatened with, entangled in, and had their
13 lives irrevocably affected by these SLAPP suits.

14 Now, while the pulse of this type of lawsuit has
15 been strongly felt within my district, many individuals
16 from outside of Philadelphia have been chilled in their
17 engagement in civil discourse, affected by overwhelming
18 monetary strain, and suffered even deeper personal effects
19 from SLAPPs.

20 We did a hearing years ago, I think it was about
21 5 or 6 years ago. The Senate Judiciary Committee came into
22 Philadelphia and did it, and we heard from folks literally
23 from all around the country, folks that had lost their
24 homes, their life savings, bankruptcy, because they had
25 been sued and literally could not afford the legal fees.

1 So it's important to acknowledge the need to examine the
2 blatant misuses of our justice system through SLAPPs and
3 provide a meaningful solution.

4 Now, the citizens of this Commonwealth should be
5 able to exercise their First Amendment rights of free
6 speech and government petition without fear of intimidation
7 through the threat of bogus SLAPP lawsuits.

8 Again, thank you for having me here today. Thank
9 you to both Chairmen for holding this hearing on Senate and
10 House Bill 95, and I'm looking forward to your testimony
11 here, the testimony that you're going to receive today, and
12 hopefully get these bills moving.

13 Thank you again for having me.

14 MAJORITY CHAIRMAN KAUFFMAN: Thank you,
15 gentlemen.

16 And I don't know if any Member of the Committee
17 has any initial questions for these gentlemen, but we're
18 going to hear a lot of testimony today. If you do, I'm
19 certain they would be happy to entertain any questions you
20 have.

21 If not, we're going to move on with the agenda.
22 Thank you, guys.

23 And first, we have Evan Mascagni, Policy Director
24 for the Public Participation Project.

25 Evan, you may go ahead.

1 MR. MASCAGNI: Good morning.

2 Thank you for having me, and I thank this
3 Committee for considering this important piece of
4 legislation, which I hope moves quickly and gets enacted as
5 soon as possible.

6 For background, I am the Policy Director of the
7 Public Participation Project. We are the only national
8 nonprofit organization in the country that is dedicated
9 solely to fighting against SLAPPs, and we do so primarily
10 in two ways. The first is, we work at the Federal level on
11 legislation to combat SLAPPs, and then second is part of
12 what we're doing here today, is we work with States who are
13 looking to either enact a new anti-SLAPP law, or in the
14 case here, strengthen an existing anti-SLAPP law.

15 I just want to point out, I previously submitted
16 written testimony on this issue regarding Senate Bill 1095
17 a few years ago. I'm resubmitting that testimony today.
18 But in that one, I spoke generally about the problem of
19 SLAPPs, SLAPPs specific that were taking place in
20 Pennsylvania, and then also commented on that specific
21 legislation, all of which I think is important and worthy
22 of consideration.

23 But today, I did want to start with a discussion
24 about the two cases that this Committee is considering, one
25 from the Supreme Court of the State of Washington and one

1 from the Supreme Court of the State of New Hampshire. Just
2 a few things to remember to start.

3 The first is, in regards to that New Hampshire
4 opinion, that came down in 1994. At that time, there were
5 only a handful of anti-SLAPP laws on the books, and there
6 was very little case law even on those existing statutes.
7 And this was very early in the days of anti-SLAPP
8 legislation across the country, and a lot of States were
9 still grappling with these new laws and the courts were as
10 well.

11 The second thing to point out is the Washington
12 Supreme Court case. Legal scholars across the country,
13 myself included, have agreed that the language used by
14 Washington in its anti-SLAPP statute was overly aggressive
15 and it wasn't consistent with anti-SLAPP statutes across
16 the country, some of which, like California, which have
17 been on the books for over 20 years, they have been tested
18 in the courts, they have been upheld by the courts. So
19 just something to remember with the Washington State law.
20 And I have attached some of the opinions of those legal
21 scholars to reinforce that point and go into more detail.

22 I'm also attaching a law review article from
23 Andrew Rome that was recently published in the Vermont Law
24 Review. I think it does an excellent job of summarizing
25 why the proposed bill here is easily distinguishable from

1 the Washington case.

2 For context in this article, the author was
3 examining Vermont's anti-SLAPP law and was sort of looking
4 at the same issues you all are grappling with here. And I
5 just wanted to read an excerpt from that today that really
6 gets at the heart, I think, of the issue you're
7 considering:

8

9 *"Adopting California's Probability Standard*

10

11 Notwithstanding the opinion of the
12 New Hampshire Supreme Court, the Vermont
13 Legislature should amend § 1041(e) and adopt
14 California's anti-SLAPP burden-shifting
15 *probability* standard. As explored above,
16 anti-SLAPP burden-shifting provisions face
17 criticism that the burden placed on the plaintiff
18 is unconstitutional because it goes above other
19 accepted procedural motions used to dismiss or
20 adjudicate complaints. Moreover, the trial court
21 must weigh evidence and decide disputed issues of
22 fact, which exceeds the limits of summary
23 judgment. The Washington and New Hampshire
24 decisions followed these themes. California's
25 approach resolves both concerns.

1 "First, in California, the plaintiff's
2 burden is consistent with summary judgment. From
3 start to finish in any court proceeding, the
4 plaintiff must demonstrate some level of merit.
5 Under summary judgment's burden-shifting
6 standard, the party with the burden of proof at
7 trial must produce enough evidence to meet that
8 burden (preponderance of the evidence, clear and
9 convincing, or beyond a reasonable doubt). Under
10 California's anti-SLAPP statute -- as in summary
11 judgment -- the courts construe evidence in the
12 light most favorable to the non-moving party. The
13 non-moving party (plaintiff) is required to
14 produce only sufficient prima facie evidence to
15 signal a probability of success on the merits.
16 The requirement remains consistent with a
17 preponderance-of-the-evidence burden, which
18 typically equates to the plaintiff's evidentiary
19 burden during a civil trial. Therefore,
20 California's anti-SLAPP statute is no more
21 cumbersome than summary judgment.

22 "Second, the process courts in California
23 undergo during anti-SLAPP motions does not exceed
24 the limits of summary judgment. In the course
25 of procedural motions to dismiss, trial courts

1 are not supposed to weigh evidence to determine
2 probabilities of success. However, during
3 summary judgment, a court will examine evidence
4 through the lens of the plaintiff's evidentiary
5 burden. Trial judges examine whether 'a jury
6 could reasonably find *either* that the plaintiff
7 proved his case by the quality and quantity of
8 evidence required by the governing law *or* that he
9 did not.' In this way, during summary judgment,
10 trial courts *do* weigh evidence to some degree,
11 but only in deciphering whether the plaintiff met
12 her evidentiary burden. California's anti-SLAPP
13 burden-shifting standard uses the same approach.
14 It asks the court to inquire whether the
15 plaintiff put forth *prima facie* evidence, which
16 -- if taken in a light favorable to the plaintiff
17 -- demonstrates a probability of success on the
18 merits. Consequently, the anti-SLAPP
19 burden-shifting process stays within the lanes of
20 the plaintiff's minimal evidentiary burden at
21 trial."

22
23 And I have attached that full law review article
24 to my testimony, which you can read to get more information
25 on that.

1 And I think as that law review pointed out and
2 numerous California courts have pointed out, because the
3 statute before us today is similar to California's
4 language, I'm confident that this body can rest assured
5 that the statute does not in any way violate the right to a
6 jury trial. And to help ease any remaining concerns, I
7 have attached several opinions from the California courts
8 that show that, and the California Courts of Appeal have
9 consistently pointed out, quote, "The Statute, Properly
10 Construed, Does Not Violate the Right to Trial by Jury,"
11 end quote.

12 And then to switch gears to wrap up here, I am
13 also interested in discussing two important exemptions that
14 I think could be added to this bill.

15 The first was, after 10 years of California's
16 anti-SLAPP laws being on the books, it enacted two
17 exemptions based on its decade of experience with the law,
18 and they said, quote, in response to a "disturbing abuse"
19 of California's anti-SLAPP law, the California Legislature
20 enacted both the commercial speech and public-interest
21 exemptions. Basically, they prohibit anti-SLAPP motions to
22 challenge certain public-interest lawsuits and claims that
23 arise from commercial speech or conduct.

24 I have attached an article that was recently
25 published by our policy analyst, Julio Sharp-Wasserman,

1 that gets specifically into these two exemptions and
2 explains why they're important. But in short, anti-SLAPP
3 statutes, you know, they're designed to help protect
4 against legal bullies who want to use our already
5 overcrowded court systems to try to intimidate, silence, or
6 harass a critic, and these exemptions help make sure that
7 this law is carried out with the Legislature's intent.

8 I want to thank you again for considering this
9 important piece of legislation. I hope you move quickly to
10 enact it and promote the constitutional rights of all
11 Pennsylvania citizens and encourage their continued
12 participation in public debate, because without a strong
13 anti-SLAPP law in Pennsylvania, the legal bullies will
14 continue to prevail.

15 I'm happy to answer any questions, if you have
16 any.

17 MAJORITY CHAIRMAN KAUFFMAN: Any questions from
18 the Committee?

19 Chairman Briggs.

20 MINORITY CHAIRMAN BRIGGS: Thank you very much
21 for your testimony today.

22 In the House Bill, the maker, Representative
23 Diamond, mentioned there's a provision to SLAPP the SLAPP,
24 you know, if somebody brings up a frivolous SLAPP that's
25 deemed unsuccessful. Does California or do other States

1 have that sort of step that you're aware of?

2 MR. MASCAGNI: Yeah. I think that's a great --
3 if what I think you're referring to. But basically if it
4 is shown that a defendant brought an anti-SLAPP motion and
5 they did so solely to cause delay, or their anti-SLAPP
6 motion in and of itself was frivolous, then in that case,
7 yes, many State anti-SLAPP laws have a provision that would
8 require the court to punish that defendant for doing that.

9 So it works sort of both ways, right? If the
10 defendant prevails and shows it was a SLAPP, they can get
11 their attorney's fees paid for. But also, if a plaintiff
12 can show that the anti-SLAPP motion in and of itself was
13 frivolous, then the plaintiff can get their attorney's fees
14 awarded.

15 MAJORITY CHAIRMAN KAUFFMAN: Any other questions?

16 Thank you very much for your testimony today.

17 And we'll be moving on to Thomas G. Wilkinson,
18 Jr., of Cozen O'Connor, who is testifying today on behalf
19 of the Pennsylvania Bar Association.

20 Thank you for being here.

21 MR. WILKINSON: Thank you, Mr. Chairman.

22 I'm Tom Wilkinson, the Past President of the
23 Pennsylvania Bar Association as well as the Pennsylvania
24 Bar Institute. We appreciate the opportunity to present
25 our position on behalf of the 25,000 members of the

1 Pennsylvania Bar Association.

2 I practice at Cozen O'Connor in Philadelphia,
3 primarily commercial litigation, but I also have
4 substantial experience in First Amendment matters, and I
5 live in Representative Tim Briggs' district in Montgomery
6 County.

7 We provided detailed formal testimony in writing,
8 along with a lot of citations, so I'll simply provide a
9 general overview of that testimony.

10 We have been following this legislation since
11 Senator Farnese and others sponsored it in the Senate, and
12 we were fortunate to work with his staff and also with the
13 Senate Judiciary Committee's staff to help tweak some minor
14 changes to the bill during the course of the process.

15 This bill in its current form was presented to
16 our Pennsylvania Bar Board of Governors in 2018 and was
17 unanimously supported, and then also overwhelmingly
18 supported by our House of Delegates, which is our
19 policymaking body, on May 11, 2018.

20 As you know, this received very strong support in
21 the Senate in two different sessions. And the Pennsylvania
22 Bar Association is very supportive, not only of the
23 First Amendment right to free speech and to petition our
24 Legislators and local government officials and to speak out
25 on matters of public concern, but of course these

1 protections are also afforded by the State Constitution.

2 On a brief overview, this proposed bill is, of
3 course, very similar to bills in other States, as the prior
4 speaker noted. And in Pennsylvania, of course, we only
5 have a very limited anti-SLAPP remedy in the environmental
6 context, and that has been very narrowly construed by our
7 Commonwealth Court. So it has even very little utility
8 even when people are speaking about environmental issues of
9 concern.

10 There is also the Noerr-Pennington remedy, which
11 is, you know, a federally developed remedy in the Federal
12 courts, and it serves to immunize parties from certain
13 claims brought in conflict with First Amendment rights,
14 particularly civil rights and other suits. And that has
15 been a foundation basis for many anti-SLAPP suits, but it
16 also has limited utility, particularly in State law cases.

17 We did look specifically at the jury-trial-right
18 issue, which the prior speaker discussed and very well
19 described. With respect to the New Hampshire Supreme Court
20 matter, which I know you have looked at, as he noted, it is
21 a 25-year-old case, and it was merely just an advisory
22 opinion. It was not a fully briefed case that went up to
23 the Supreme Court.

24 Having gone to prelaw at the University of
25 New Hampshire and even lectured at the University of

1 New Hampshire Law School at the invitation of the former
2 Chief Justice of the New Hampshire Supreme Court, I can
3 tell you that the court has improved in reputation a great
4 deal in the last 25 years, and it wouldn't shock me at all
5 that if presented with this issue today, that they may well
6 come out a different way, especially given all of the
7 development and the fact that there are a majority of
8 States now that do have robust anti-SLAPP statutes.

9 With respect to the Washington State case, of
10 course an important factor in that decision was the fact
11 that it applied a very high clear and convincing evidence
12 standard, and the court itself noted that it was going off
13 on the clear and convincing evidence standard, whereas in
14 Pennsylvania under this law, a trial court will review the
15 matter based on a preponderance of the evidence standard.
16 That is, the evidence that demonstrates whether the speaker
17 was acting in fulfillment of his or her constitutionally
18 protected rights of free speech, that's determined on a
19 preponderance of the evidence standard. And the trial
20 court is permitted to take, in appropriate cases,
21 additional evidence and submissions on that issue.

22 The important fail-safe device in Pennsylvania
23 and as it exists in other States is the availability of an
24 interlocutory appeal. That is, if you fail in your
25 anti-SLAPP motion or you prevail in your anti-SLAPP motion,

1 you are permitted to take that up to the intermediate
2 appellate court on an expedited basis and get that matter
3 reviewed. So in the event there is a failure on the part
4 of the trial court to either understand or comprehend or
5 adequately apply the anti-SLAPP statute, it can be
6 addressed in, for example, the Pennsylvania Superior Court,
7 as it would be in many other States, and, of course, in the
8 District of Columbia through the DC circuit.

9 There was some mention before of the right of a
10 prevailing party to receive reasonable attorney's fees and
11 costs. That's a very important protective measure, because
12 there are many small entities such as civic associations
13 that are in a position to pursue an anti-SLAPP statute.
14 They have very small treasuries. I just finished a 5-year
15 stint as our local civic association president. I can tell
16 you, with a \$3,000 treasury, we wouldn't be able to even
17 respond to a complaint, let alone effectively and
18 affirmatively pursue an anti-SLAPP motion.

19 And as Senator Farnese explained, and I commend
20 him for his persistence in pursuing this legislation, it
21 can ruin any local civic association or small nonprofit
22 that speaks out, for example, on zoning amendments or
23 development kinds of issues. That prevailing party
24 attorney's fee device is an opportunity to secure competent
25 counsel to pursue the matter and potentially recover the

1 fees that are incurred.

2 And as the Chair noted, there also is a right to
3 pursue, and Representative Tim Briggs noted, there's a
4 right to pursue a responsive motion. That is, if the
5 anti-SLAPP motion is frivolous, the party prevailing on
6 that motion could pursue fees and costs incurred in
7 responding to the motion.

8 We already have a frivolous motion Rule of Civil
9 Procedure, Rule 1023.1, which was the product of a
10 cooperative effort of the Legislature and the Pennsylvania
11 Bar Association. This supplements that potential recovery
12 in the anti-SLAPP context.

13 So if you get a frivolous anti-SLAPP motion when
14 you have a valid defamation case or a wrongful use of civil
15 proceedings case, a valid case for a tortious interference
16 with contractual relations -- let's say you're a developer
17 and you're pursuing your reasonable rights and remedies and
18 your effort is not designed to chill free speech -- you
19 could potentially pursue a recovery of fees and costs on
20 the other side. So it's a very good fail-safe, protective
21 device.

22 It will not prevent a party from pursuing their
23 contractual rights or their rights in defamation, and we,
24 of course, have some cases to that effect in our testimony.

25 In a practical application, many courts have

1 recognized that the freedom of speech is under attack, not
2 just on social media platforms and on college campuses but
3 also involving both large and small companies and
4 nonprofits. SLAPP suits are often used not to achieve a
5 favorable resolution on the merits but rather to intimidate
6 and discourage the targeted speakers from speaking out
7 through the threat of costly and time-consuming litigation.

8 Our association supports a robust speech on
9 matters of public concern, and such speech should occupy
10 the highest rung of the hierarchy of First Amendment values
11 and is entitled to speech protection, as our Supreme Court
12 of the United States has said on so many occasions.

13 So with that, I would simply say in summary that
14 our association very much supports the adoption of SB 95
15 and HB 95 and commends it to your attention and hopes that
16 this body will act favorably on the recommendation.

17 Thank you.

18 MAJORITY CHAIRMAN KAUFFMAN: Representative
19 Ecker.

20 REPRESENTATIVE ECKER: Thank you for your
21 testimony.

22 This is more of maybe a clarification, a
23 procedural question.

24 How is this different than a preliminary
25 objection; for example, a failure to state a claim. How is

1 this different? Is it because of the communication, or
2 could you explain that briefly?

3 MR. WILKINSON: Well, it is the court's
4 preliminary duty to assess whether the lawsuit that is
5 being challenged, a portion of the lawsuit that's being
6 challenged, is designed to chill First Amendment speech or
7 constitutionally protected speech.

8 In some circumstances, it could be very much like
9 a preliminary objection if it's obvious, just based on the
10 four corners of the complaint, that that's the design of
11 the lawsuit.

12 There are some circumstances where more inquiry
13 may be appropriate, and that's left within the sound
14 discretion of the trial court to determine whether, in a
15 hearing context, whether some testimony or other written
16 submissions would be appropriate to determine, what is this
17 case really all about?

18 Some complaints may not be all that detailed---

19 REPRESENTATIVE ECKER: Sure.

20 MR. WILKINSON: ---and have a lot of chapter and
21 verse, and so it would be for the court to develop some
22 insight as to what the true objective of the lawsuit is.
23 And if only a portion of the lawsuit is prohibited by
24 reason of the anti-SLAPP lawsuit, then the remainder of it
25 would be permitted to proceed.

1 REPRESENTATIVE ECKER: Right.

2 MR. WILKINSON: And that's, again, the same
3 process that's used in virtually all the other States that
4 I'm aware of that have an anti-SLAPP statute.

5 REPRESENTATIVE ECKER: Sure. So really what was
6 happening is some of these things were sneaking through
7 preliminary objections, I'm guessing.

8 MR. WILKINSON: Yeah.

9 REPRESENTATIVE ECKER: And because of discovery
10 that's kind of out there, that they couldn't, it wasn't in
11 the four corners.

12 MR. WILKINSON: It could be. And there is a time
13 frame in which to pursue the anti-SLAPP remedy.

14 REPRESENTATIVE ECKER: Sure.

15 MR. WILKINSON: And it may be possible that, you
16 know, the first lawyer doesn't realize that there's an
17 anti-SLAPP remedy. Or there may be a very short set of
18 preliminary objections filed, but within the time frame
19 allotted, the anti-SLAPP motion is filed, and then it would
20 go on the track of review that way.

21 Now, we have some discussion in our testimony
22 about how this is perhaps more like a motion to dismiss,
23 and under certain circumstances, since additional
24 submissions could be appropriate, also not dissimilar from
25 a summary judgment motion.

1 But the court is making the same kinds of
2 assessments it has to make in those potentially terminal
3 motions. Those kinds of motions are never addressed by a
4 jury---

5 REPRESENTATIVE ECKER: Sure.

6 MR. WILKINSON: ---at least in the United States.

7 And, you know, it's perfectly appropriate for the
8 court with its background and facility with, you know, the
9 constitutionally protected speech to make that assessment
10 with appropriate briefing and oral argument.

11 REPRESENTATIVE ECKER: Great. Thanks for that.

12 MR. WILKINSON: You're welcome.

13 REPRESENTATIVE ECKER: Thanks for that
14 explanation.

15 MAJORITY CHAIRMAN KAUFFMAN: Representative
16 Jozwiak.

17 REPRESENTATIVE JOZWIAK: Thank you, Mr. Chairman.

18 Mr. Wilkinson, great testimony. Thank you very
19 much for everything you said. But you caught my attention
20 when you said college campuses.

21 I talked to a lot of students in the colleges,
22 and they're telling me that if they are a conservative
23 student and they have a liberal professor and they don't
24 agree with the professor, they go from an A to a B, and if
25 they speak up again, they go from a B to a C so they're

1 free to speak up. So would this anti-SLAPP legislation
2 apply to a student in a situation in a college where it
3 determines their grades?

4 MR. WILKINSON: Well, that's a great question. I
5 happen to be a strong proponent of free speech on campus,
6 and as I say, I don't believe it's just a liberal or
7 conservative issue. Although it seems that more often,
8 that the conservative speakers are being precluded through
9 protests from speaking on campus these days, and that's
10 unfortunate.

11 Only if there is a lawsuit pending would you be
12 able to take advantage of the anti-SLAPP remedy. And so
13 therefore, if there's no lawsuit and it's just a matter of
14 a protest on campus, then you wouldn't have the access to
15 the anti-SLAPP remedy. All we can do in that circumstance
16 is hope that the college administration will be very
17 supportive of speech and allow speakers of all different
18 hues to appear and speak and provide information to
19 students, and if students choose to protest, not to
20 protest, you know, and prohibit the speaker from speaking,
21 but instead allow the speaker to speak. And if they don't
22 want to attend, they're free not to attend, or they can
23 protest outside.

24 But as I say, if there was a lawsuit designed to
25 chill that speech, then the person affected by it would be

1 able to pursue the anti-SLAPP remedy. And that happens on
2 occasion; there have been lawsuits arising from speech on
3 certain campuses. But, of course, oftentimes, there's not
4 enough time to present the lawsuit and seek the remedy.

5 REPRESENTATIVE JOZWIAK: So would a student
6 actually be able to file a lawsuit, because you can file --
7 and anybody can sue anybody, I guess, for any reason,
8 depending on the lawsuit.

9 MR. WILKINSON: Well, you -- yes. Under this
10 statutory scheme, there must be a lawsuit that infringes on
11 the First Amendment rights of other speakers for those
12 other speakers to be able to pursue an anti-SLAPP motion.

13 So in the normal case, it wouldn't come up in the
14 college campus context unless there was a litigation. And
15 there have been some celebrated or high-profile instances
16 of litigation of over-speech on campus where there might be
17 a right to pursue an anti-SLAPP motion, but you need to
18 have the initial case first.

19 REPRESENTATIVE JOZWIAK: Thank you.

20 Thank you, Mr. Chairman.

21 MR. WILKINSON: You're welcome.

22 MAJORITY CHAIRMAN KAUFFMAN: Representative
23 Zabel.

24 REPRESENTATIVE ZABEL: Thank you, Chairman
25 Kauffman.

1 I want to begin by thanking Chairman Kauffman for
2 having this hearing. As I look at the cosponsors for this
3 bill, they truly span what is traditionally the political
4 spectrum here in the House, and I think it speaks to how
5 strong the support is for this bill and what a good idea it
6 is and what a long time coming it is. So thank you, Chair,
7 for giving us a hearing on this bill. I think the merits
8 of it are obvious only a few minutes in already.

9 To Mr. Wilkinson, I want to welcome him here.
10 When I started off as an attorney, I began at Cozen
11 O'Connor, and I would ask Tom questions, and here I am,
12 doing it again. So thank you for coming here. Thank you
13 for your testimony.

14 My question is specifically about the bill,
15 Section (e)(3), which involves recovery of costs against
16 the movement in the event of an unsuccessful motion to
17 dismiss.

18 The concern, or as I understand it, the animating
19 spirit behind anti-SLAPP laws is to prevent suppressing
20 speech, and traditionally where that happens is with people
21 who are moneyed or in positions of power can suppress
22 speech by targeting people who are less able to hire, you
23 know, and have litigation behind them. It's in fact
24 happening in my district where a public official is using a
25 defamation lawsuit to what I believe is to silence a few

1 local activists.

2 So my concern is, is the bar, is the standard for
3 Section (e)(3) to recover? My hope is that would be
4 construed by the courts as a high bar. In other words,
5 just merely failing on an anti-SLAPP motion should not be,
6 it should not be easy to come back, I think, on the
7 movement, because that would have that same chilling effect
8 and effect. Because people who are being targeted for
9 anti-SLAPP lawsuits are primarily unable to pay attorney's
10 fees, or not in the way that they can compete on the
11 litigation playing field.

12 So, Tom, can you offer some assurances or not
13 about that (e)(3) section?

14 MR. WILKINSON: Well, in any case like this, you
15 have to have case law development over time, but thank you,
16 Representative Zabel, for that question.

17 If you look at Subsection (e)(3), you'll see that
18 the only opportunity to pursue the remedy of "SLAPP upon
19 SLAPP," for lack of a better phrase, is if the motion to
20 dismiss is frivolous, and that is a fairly high bar, and
21 one might look to the existing statute on frivolous
22 litigation which I cited in our testimony, or is solely
23 intended to cause unnecessary delay.

24 "Solely" means no other basis than to cause
25 unnecessary delay, and that may more often occur, for

1 example, in a development-project-type scenario. At least,
2 that's the most obvious scenario.

3 Yes, you are correct that in a David and Goliath
4 circumstance, it's hypothetically possible for the Goliath,
5 if they prevail on the anti-SLAPP motion, to in turn pursue
6 the smaller party and try to seek fees against the smaller
7 party. But hopefully courts will understand that frivolous
8 is a very high bar and "solely" means "solely" and not just
9 a factor, because it is, of course, not highly unusual for
10 lawsuits to in part be pursued or for claims to be in part
11 pursued in order to, you know, cause some retraction of
12 events or for delay. But it would have to be solely for
13 delay. And even our Rules of Professional Conduct impose
14 discipline on lawyers who pursue litigation or pursue a
15 scheme or a tactic in a case that is, quote, unquote,
16 "solely for delay," and I did cite Rule 3.1 of the Rules of
17 Professional Conduct for that point in the testimony.

18 REPRESENTATIVE ZABEL: Thank you. And of course
19 we never did that together when we were -- we were never
20 filing just for delay.

21 MR. WILKINSON: We never engaged in that kind of
22 misconduct.

23 MAJORITY CHAIRMAN KAUFFMAN: I don't see any
24 further questions. Thank you very much for being here and
25 for your testimony this morning.

1 Moving on, we have Billy Easley, Senior Policy
2 Analyst with Americans for Prosperity.

3 Billy, thank you.

4 MR. EASLEY: Thank you, Mr. Chairman and Members
5 of the Committee, for inviting me to testify.

6 My name is Billy Easley. I'm a Senior Policy
7 Analyst for Americans for Prosperity, working on free
8 speech and technology issues. And I previously served as a
9 legal counsel in the United States Senate on the same
10 issues.

11 AFP is a grassroots organization that advocates
12 for long-term solutions to the country's biggest problems,
13 and one of the biggest issues that we have seen in recent
14 years is the problem of free speech being squelched by both
15 individuals and companies by abusing the legal process,
16 which is why anti-SLAPP has become a major focus of our
17 operations.

18 AFP has endorsed House Bill and Senate Bill 95
19 because they protect the free speech rights of Pennsylvania
20 citizens from frivolous lawsuits designed to silence them.
21 The bills before the Committee today contain the three
22 policy pillars that our organization considers essential to
23 defending individuals from Strategic Lawsuits Against
24 Public Participation.

25 The First Amendment protects people from

1 government restrictions on their speech, and the public and
2 policymakers must always remain vigilant against government
3 erosion of free speech rights. However, we also need to be
4 aware of ways that we can make sure that the law protects
5 individuals from legal abuses and frivolous lawsuits. This
6 has become more common, especially with the adoption of the
7 Internet.

8 One of the classic examples of a SLAPP suit that
9 I have seen, and from speaking to companies that depend on
10 Internet comments, is in the instance of a Yelp review
11 being posted, a restaurant review. Individuals will go to
12 a restaurant and perhaps not have the best particular time
13 at that restaurant, decide to leave a comment on Google, on
14 Yelp, giving them a one-star or two-star review, and then
15 see in the coming weeks a cease-and-desist letter in their
16 mailbox stating that they will be sued for defamation if
17 they do not remove their review. The problem with this
18 issue is that many people are not legally astute
19 individuals and will simply look at this order of
20 cease-and-desist and decide that it's not worth fighting
21 over and decide to take down the review rather than to
22 investigate further.

23 The point of anti-SLAPP laws like the two bills
24 before the Committee is to ensure that individuals have
25 some level of protection to protect them from this sort of

1 incessant discovery and high labor costs that are
2 associated with people defending themselves from such
3 suits.

4 House Bill 95 and Senate Bill 95 would create
5 specific and reasonable free speech protections for
6 Pennsylvanians. These bills should deter bad actors from
7 filing frivolous lawsuits designed to intimidate members of
8 the public and punish them for engaging in free speech
9 protected by the First Amendment. The legislation
10 accomplishes this in three ways:

11 First, by creating a special motion to dismiss
12 that allows judges to swiftly dismiss meritless lawsuits
13 that target constitutionally protected speech.

14 Second, by requiring that judges adjudicate the
15 motion to dismiss within 30 days. This ensures that
16 targets of SLAPP suits are not subject to costly, drawn-out
17 litigation.

18 Finally, the legislation creates a financial
19 disincentive for filing frivolous litigation. If a court
20 grants a special motion to dismiss, the non-moving party is
21 awarded attorney's fees and other associated costs.

22 These three policy pillars, in combination, are
23 the foundation of a strong anti-SLAPP law, and AFP has
24 supported three such laws in other States and has not
25 endorsed any laws that do not contain all of them.

1 Over 30 States have passed similar laws, but not
2 all of them are effective. Some are narrowly written, like
3 Utah, for example, which only defends speech that is
4 presented before a government body like this one.

5 A special motion to dismiss provision serves as
6 an important front-end filter at the beginning of the
7 litigation process. The motion immediately stays
8 discovery, saving targets of these lawsuits time and money.
9 It also allows judges to appropriately assess the basis of
10 the case from the outset, which increases judicial
11 efficiency.

12 Through a variety of procedural steps, judges
13 already have the authority to dismiss frivolous suits or
14 complaints that do not state a sufficient, a legally
15 sufficient claim, but the danger SLAPP suits pose to free
16 speech are unique because of the ease with which these
17 suits can intimidate individuals from engaging in public
18 debate. A special motion to dismiss is appropriate given
19 those circumstances.

20 Litigants need to have a reliable way to defend
21 themselves against frivolous suits that protect their free
22 speech rights. We also need to be certain that the right
23 to trial by jury, which is enshrined by the Pennsylvania
24 State Constitution, is not eroded. Since Committee staff
25 has shown interest in this topic, I will review how other

1 States have dealt with this tension. However, my previous
2 witnesses have spoke at length about this, so I will be
3 brief.

4 Washington and Minnesota's SLAPP statutes shared
5 the same flaw: They mandated that judges engage in
6 fact-finding, and they required that they use a high burden
7 of proof. Washington's law required that "the trial judge
8 weigh the evidence and dismiss a claim unless it makes a
9 factual finding established by clear and convincing
10 evidence a probability of prevailing at trial."

11 Minnesota's law also contained a clear and convincing
12 standard of proof. Both States' courts struck down those
13 provisions because they required trial courts to engage in
14 impermissible fact-finding instead of assuming that the
15 allegations in the complaint are true and assessing the
16 merit of a case from there.

17 I had a whole thing here about the New Hampshire
18 court case, but honestly, I believe the previous witness
19 said it better than I could have, so out of humility, I
20 will not go too deeply into it.

21 AFP supports House and Senate Bill 95 in its
22 current form. Washington, Minnesota, and New Hampshire are
23 in the minority of States in their assessments of the
24 special motion to dismiss, and there are nuanced arguments
25 for why those State courts found that they did not survive

1 constitutional scrutiny.

2 I do want to review California's experience,
3 finally, involving anti-SLAPP laws.

4 California law required that a trial court
5 "determine that the plaintiff has established that there is
6 a probability that the plaintiff will prevail on the
7 claim." However, the California Supreme Court defined this
8 provision as requiring that courts must determine whether a
9 "claim [is] both legally sufficient and supported by a
10 sufficient prima facie showing of facts to sustain a
11 favorable judgment...." That court thus made it clear in
12 subsequent decisions that what this means is that trial
13 courts should not weigh the evidence or resolve conflicting
14 factual claims when making its determination. And that
15 sort of structure is necessary to ensure that the right to
16 trial by jury is not eroded through these sorts of laws.

17 Finally, I wanted to briefly mention why AFP has
18 prioritized this issue.

19 I have worked on anti-SLAPP laws and on campus
20 free speech laws for the last 2 years at Americans for
21 Prosperity. Both of these issues come from the same
22 concern that we have in American society today, which is
23 that we need to be careful about individuals or
24 organizations attempting to prevent people, both on
25 campuses and off of campuses, from being able to discuss

1 issues and topics of debate, and they certainly should not
2 be able to use the legal system to prevent people from
3 being willing to engage in public debate.

4 Mr. Chairman and Members of the Committee, if
5 passage of these bills will make it easier for all
6 Pennsylvanians to participate in civic life, the bills
7 before you today achieve that noble objective.

8 Thank you for your time, and I will take any
9 questions that you might have.

10 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

11 Questions?

12 I don't believe so. Thank you very much for your
13 testimony.

14 And moving on, the next panel is
15 Melissa Melewsy, Media Law Counsel for the Pennsylvania
16 NewsMedia Association; Michael Berry from Ballard Spahr on
17 behalf of the Pennsylvania NewsMedia Association; and
18 Michael Baughman from Pepper Hamilton on behalf of the
19 Pennsylvania NewsMedia Association.

20 Welcome, and you may speak in whatever order you
21 would like.

22 MS. MELEWSKY: Good morning, Chairman Kauffman,
23 Chairman Briggs, and Members of the House Judiciary
24 Committee. Thank you all for the opportunity to talk to
25 you today about this important issue.

1 Are you okay? It is.

2 MAJORITY CHAIRMAN KAUFFMAN: Maybe pull it closer
3 toward you.

4 MS. MELEWSKY: A little closer?

5 MAJORITY CHAIRMAN KAUFFMAN: Yes.

6 MS. MELEWSKY: Is that better?

7 MAJORITY CHAIRMAN KAUFFMAN: Yeah, that's better.

8 MS. MELEWSKY: Thanks.

9 So good morning again. Thanks for the heads-up
10 on the mic.

11 My name is Melissa Melewsky. I'm in-house
12 counsel to the Pennsylvania NewsMedia Association, and our
13 organization represents over 300 traditional, digital, and
14 other news media organizations in the Commonwealth.

15 And in that role, we advocate for change, both
16 in the Legislature and the courts, that supports
17 First Amendment rights, the right to news-gather, and the
18 right to report freely on the workings of government in the
19 Commonwealth.

20 And in that role, I answer the PNA's legal
21 hotline, and I answer about 2,000 inquiries every year from
22 news organizations, journalists, and publishers about the
23 business of the news. And in that role, of those 2,000
24 inquiries a year, I would say about 10 percent deal with
25 prepublication review and concerns from news organizations

1 about the possibility of being sued because of the content
2 of the news that they are considering publishing.

3 We don't litigate for our members, so I'm very
4 limited in those discussions with news organizations,
5 because I can't tell them what it would cost to litigate a
6 case. I can't tell them the likelihood of them being sued
7 or the results if they are. In those cases what I do is
8 explain to them the very limited nature of Pennsylvania's
9 current anti-SLAPP statute and the fact that it more than
10 likely, 99 percent of the time, will not apply to the news
11 coverage that they are considering publishing. And what I
12 also do is I refer them to my co-panelists here today and
13 other attorneys who are experienced in the actual
14 day-to-day litigation of defamation and SLAPP litigation.

15 Here with me today are Michael Baughman, a
16 partner at Pepper Hamilton, and Michael Berry, a partner at
17 Ballard Spahr, both of whom represent media organizations
18 that are members of PNA as well as others who are involved
19 in SLAPP and defamation litigation.

20 At this point, because of the limited nature of
21 what we actually do at PNA, I'm going to turn to my
22 co-panelists and allow them the majority of the time today,
23 because I think what they offer is very different and very
24 important than what we have heard so far today. And I'll
25 turn to Mike Baughman.

1 MR. BAUGHMAN: I'll go first.

2 Good morning, Chairman Kauffman, Chairman Briggs,
3 and Members of the House Judiciary Committee.

4 I am a partner at Pepper Hamilton. I am co-chair
5 of our First Amendment and Newsroom practice. I have been
6 litigating complex defamation actions for all of my
7 23 years of practicing law.

8 So thank you for the opportunity this morning to
9 present testimony in support of the anti-SLAPP legislation
10 that is contemplated by House Bill 95 and Senate Bill 95.
11 I have submitted more fulsome written testimony, and right
12 now, I'll just try to give a summary of that.

13 This important legislation would promote and
14 protect the public's right to express their opinions on
15 speech about matters of public concern by deterring
16 retaliatory lawsuits aimed at silencing and deterring
17 speech through threats of cost and burdens of years of
18 litigation and possibly unwarranted judgments.

19 While Pennsylvania currently has an anti-SLAPP
20 law, it is extremely narrow. It is limited to matters
21 "relating to participation in environmental law or
22 regulation."

23 Pennsylvania should follow the lead of numerous
24 other States, including California, Colorado, Indiana,
25 Louisiana, Oregon, Oklahoma, and Tennessee, which provide

1 more broad protection against lawsuits that seek to chill
2 the exercise of freedom of expression.

3 In a democracy, the free flow of information
4 about matters of public concern must be vigilantly
5 protected so that citizens have the information they need
6 in order to make intelligent decisions about how to govern
7 themselves, because democracy is self-government.

8 Both the U.S. Supreme Court and the Pennsylvania
9 Supreme Court have therefore put substantial limitations on
10 defamation actions involving speech on matters of public
11 concern. But in order for those protections to be a
12 reality, the courts must vigorously enforce those
13 protections early in the case, because as both the
14 U.S. Supreme Court and the courts in this Commonwealth have
15 recognized, the very risk of facing years of expensive,
16 burdensome discovery in a lawsuit can chill exercise of
17 free speech.

18 Unfortunately, based on my experience litigating
19 complex defamation actions over many years, establishing to
20 courts in Pennsylvania that speech is constitutionally
21 protected is a costly, time-consuming process. Given the
22 enormous dockets the trial courts in Pennsylvania face, it
23 is often difficult to obtain a fulsome ruling on whether
24 speech is entitled to constitutional protection until at
25 least the summary judgment stage, and more often than not,

1 at trial.

2 In my experience, it is very rare that trial
3 courts will grant preliminary objections to dismiss
4 defamation cases at the outset of litigation, even in cases
5 involving opinions and commentary about the official
6 actions of elected public officials. And while in my
7 experience defamation defendants stand a better chance at
8 winning summary judgment than preliminary objections, that
9 prospect is still very low. I have handled many cases
10 where summary judgment motions have been denied in one-line
11 orders without any written opinion.

12 My experience is also supported by statistics.
13 According to 2018 data from the Administrative Office of
14 the Pennsylvania Courts, as of January 1, 2018, of the
15 approximately 165,000 cases processed in calendar year 2018
16 by the Pennsylvania trial courts, less than 5 percent were
17 processed by way of dispositive motion.

18 Taking a case through discovery is no small
19 burden. In my experience, discovery costs hundreds of
20 thousands of dollars and sometimes more. Depositions of
21 journalists are burdensome and sometimes put at risk source
22 information that is currently protected by Pennsylvania
23 law.

24 I have also handled defamation cases brought by
25 public officials where summary judgment has been denied and

1 even verdicts entered in the plaintiff's favor by a jury,
2 only to be reversed once an appellate court determined that
3 the speech was constitutionally protected. Trying a
4 complex defamation case can take weeks and cost hundreds of
5 thousands of dollars over and above what has already been
6 spent in discovery.

7 In my opinion, this bill will aid substantially
8 in encouraging the free flow of ideas by addressing some of
9 these problems in current practice. I would like to
10 highlight three of them.

11 First, the bill would require courts to carefully
12 assess whether speech is constitutionally protected at the
13 outset of the case, which, as I noted above, rarely happens
14 today. Requiring judges to decide at the outset of the
15 case whether the case involves constitutionally protected
16 activity would reinforce the U.S. and Pennsylvania Supreme
17 Court's instructions that judges should be gatekeepers of
18 the Constitution.

19 Importantly, the bill would also allow parties to
20 submit appropriate evidence in support of their positions
21 while otherwise staying broad, expensive discovery. Thus,
22 courts will be able to consider specific, focused factual
23 issues as part of the motion without the expense and burden
24 of months or years of discovery. The bill will also
25 require the court to hold a hearing, which will require

1 courts, the trial court, to carefully assess and focus on
2 the issues raised by the motion.

3 Second, the bill will allow the decision to be
4 immediately appealable. This has several important
5 benefits. First, it would ensure that the constitutional
6 question is subject to careful review by the judiciary at
7 the outset of the case. Moreover, allowing immediate
8 appeals may encourage trial judges to be particularly
9 rigorous in their analysis in light of the fact that the
10 decision is going to be subject to an immediate appeal by
11 the appellate court.

12 Among other things, if an appeal is filed, the
13 trial court will be required to issue an opinion in support
14 of its decision, which is otherwise rarely done. In my
15 view, reducing a decision to writing helps ensure that the
16 decision is fully reasoned and thought through, because it
17 gives the writer of the opinion the opportunity to fully
18 develop and vet his or her arguments.

19 Third, the bill would create disincentives to
20 filing SLAPP claims by allowing the defendant to recover
21 their attorney's fees if they prevail on the anti-SLAPP
22 motion.

23 As I said, there currently is little downside in
24 Pennsylvania to filing a defamation action. Dispositive
25 motions are rarely granted, and plaintiffs seeking to

1 punish even constitutionally protected speech can use the
2 threat of enormous legal fees in discovery to leverage
3 unwarranted settlement or to dissuade someone from making a
4 protected communication in the first place. By creating a
5 cost to filing non-meritorious claims, the bill will
6 require persons seeking to bring such claims based on
7 speech about matters of public concern to carefully
8 evaluate the merits of the claim before filing suit.

9 Not all speech is constitutionally protected, and
10 House Bill 95 would not immunize speech that is not, but it
11 would require would-be plaintiffs to carefully analyze the
12 merits of a lawsuit before filing suit and would properly
13 allocate the costs associated with defending claims that do
14 involve protected speech as determined by the courts.

15 For all of these reasons, I urge the Legislature
16 to adopt House Bill 95 and protect the free flow of
17 information in this Commonwealth so that our citizens have
18 the information they need to effectively govern themselves
19 and feel safe publicly discussing matters of public
20 importance.

21 I'm happy to take any questions, or I don't know
22 if you would like Mr. Berry to go first.

23 MR. BERRY: Thank you all.

24 Good morning, Chairman Kauffman, Chairman Briggs,
25 other Members of the Judiciary Committee. Thank you for

1 inviting me to testify today.

2 We are blessed to live in a country with strong
3 First Amendment freedoms, yet our freedoms are threatened
4 each day by people who seek to use the law to squelch
5 speech, by people who bring civil lawsuits to stifle their
6 criticism.

7 To combat that threat, Pennsylvania should pass a
8 robust anti-SLAPP law. I'm grateful that this Committee is
9 considering one today, and I'm grateful that the
10 Pennsylvania NewsMedia Association and the Pennsylvania
11 Association of Broadcasters strongly support the
12 legislation.

13 My own belief in the power of anti-SLAPP laws
14 comes from my personal experience as a First Amendment
15 lawyer. My practice focuses exclusively on representing
16 people in a wide range of matters dealing with the content
17 that they speak, that they write, that they broadcast, and
18 that they publish.

19 I have defended clients in dozens of defamation
20 lawsuits here in Pennsylvania and around the country, from
21 California and Oregon with strong anti-SLAPP statutes to
22 places like Oklahoma, New York, and even the Virgin Islands
23 that don't. All of these cases have one thing in common:
24 the cost.

25 Defending a defamation case can be expensive.

1 The cost of litigating a case just through preliminary
2 objections or a motion to dismiss can cost \$50,000 to
3 \$100,000, possibly much more. If a case proceeds through
4 discovery all the way to summary judgment, the cost of
5 defense can be \$500,000 or more, and if a case proceeds to
6 trial, a lot of defendants are looking at a cost of a
7 million dollars or greater. Those costs are real, and
8 those costs have a real impact.

9 Whether the defendant is a national media
10 company, a small local newspaper, or a fledgling nonprofit,
11 the defendant is forced to come up with that money, and
12 some defendants, most notably individual citizens, simply
13 cannot afford to hire lawyers or bear the cost of defending
14 themselves. In some cases, my firm and Mr. Baughman's firm
15 steps in and represents those folks pro bono, because we
16 believe in their right to speak and we believe that they
17 are entitled to a defense.

18 But not all individuals are that lucky. From a
19 purely economic perspective, all defamation defendants have
20 to consider whether the cost of defense is worth the fight.
21 In a single case, that consideration is unfortunate. For
22 my clients, that fight often involves speech about a matter
23 of public concern. In the totality of all cases, however,
24 this consideration is downright frightening. We are
25 depending on individual defendants to bear the extreme cost

1 of protecting a public good: our collective right to free
2 speech.

3 When litigation is over, even if a defendant has
4 succeeded and won, it and other people must consider
5 whether they are willing to risk facing that cost again in
6 the future or whether to curb their speech to conserve
7 their money. This kind of calculus causes people to
8 conclude that steering clear of controversial topics or
9 people is much simpler and far cheaper than the cost of
10 defending a potential claim.

11 Those are impacts that we can't measure. We can
12 calculate the cost of defending a defamation case that is
13 meritless, but we don't know how many speakers are chilled,
14 how many newsworthy stories go unreported, or how many
15 activists decline to take up a cause because of the danger
16 posed by being hit with a lawsuit they can't afford to
17 defend. This is not the freedom that our founders
18 envisioned. This is the threat that they sought to escape.

19 In Pennsylvania, as Mr. Baughman detailed, these
20 concerns are particularly acute. Here, the granting of
21 preliminary objections is rare, the prospect of
22 interlocutory appellate review is even rarer, and the
23 prospect of costly discovery is nearly certain.

24 In our Commonwealth, the current state of affairs
25 sends a chilling message to Pennsylvanians who seek to

1 speak their minds or report on public affairs. That
2 message is simple: Proceed at your peril.

3 In jurisdictions with strong anti-SLAPP laws, the
4 situation is starkly different. My firm's Media and
5 Entertainment practice groups have lawyers from coast to
6 coast. We litigate defamation cases in States all over the
7 country. As I have detailed in my written testimony, our
8 practice has seen anti-SLAPP laws that help deter and
9 defeat meritless lawsuits, and they do it in a way that
10 both promotes free speech and judicial efficiency.

11 First, the laws allow defendants to file motions
12 seeking early dismissal or requiring plaintiffs to
13 establish at the outset that they have potentially
14 meritorious claims. Representative Ecker asked earlier
15 about the difference between this motion and a motion that
16 is brought through preliminary objections. Here, it would
17 allow issues that aren't permissible on preliminary
18 objections to be raised, like privileges, like the fair
19 report privilege, dealing with actual malice, affirmative
20 defenses, or make the plaintiff come forward with evidence
21 to show that the speech is actually false -- all issues
22 that cannot easily be addressed on preliminary objections
23 currently.

24 Second, the laws provide that discovery is stayed
25 while the motions are pending, and if the motions are

1 denied, defendants can seek immediate appeals. This
2 automatic stay relieves defendants of financial and other
3 burdens associated with full-blown discovery.

4 Meanwhile, appellate courts are empowered to
5 screen out baseless cases. Empirical research shows that
6 when defamation plaintiffs prevail, when they prevail at
7 trial against media defendants, roughly 13 percent of those
8 verdicts are eliminated on post-trial motion. Then on
9 appeal, another 47 percent of plaintiff's judgments are
10 either curbed or fully reversed on appeal. By allowing
11 immediate appeals, anti-SLAPP laws prevent years of
12 unnecessary litigation.

13 Finally, when defendants' anti-SLAPP motions are
14 granted, the law allows them to recover attorney's fees.
15 Together, these provisions -- an early motion, a stay of
16 discovery, a quick appeal, and an award of fees -- protect
17 free speech, deter baseless lawsuits, and promote public
18 discourse. Pennsylvania should enact an anti-SLAPP law
19 with each of these components.

20 I'm grateful for you all considering this
21 legislation today, and Mr. Baughman and I are happy to
22 answer any questions you may have.

23 MAJORITY CHAIRMAN KAUFFMAN: Thank you very much.

24 Questions from the Committee?

25 Representative Zabel.

1 REPRESENTATIVE ZABEL: Thank you, and thank you
2 all for your testimony here today.

3 One of the things I would like you to explain for
4 the benefit of everyone here, including me and the panel,
5 one of the reasons that I think we need this is that courts
6 have not been handling our defamation claims properly
7 insofar as particularly this: The law of defamation I'm
8 hoping you can explain for people.

9 When a private citizen sues for defamation, it's
10 one standard, it's a much different kind of standard,
11 versus when a public official sues, and I imagine
12 representing the NewsMedia, you are frequently dealing with
13 public officials. But when a public official chooses to
14 sue for defamation, that's an entirely different standard
15 that should be hard to meet, but it sounds like in terms of
16 the court system, they're just not adjudicating those
17 claims the way they should.

18 I would like to hear your thoughts on the
19 differences between those two and sort of explaining for
20 the panel that difference.

21 MR. BAUGHMAN: If a public official is suing,
22 you're right, they have to show actual malice under the
23 U.S. Supreme Court's *New York Times v. Sullivan* case. Even
24 if it is a private figure, if the matter, if the speech
25 involves matters of public concern, there are

1 constitutional, additional constitutional protections that
2 apply, including that the plaintiff would have the burden
3 to prove falsity.

4 And as I set forth in my written testimony, the
5 Supreme Court has also said that judges have a
6 responsibility to independently assure themselves that the
7 record supports a showing of actual malice, which is part
8 of the reason I think Mike pointed to all those cases that
9 are reversed. Eventually an appellate court will look at
10 those issues and deal with its own analysis. I think the
11 challenge today is getting to that adjudication.

12 In my experience, it is really hard, and I
13 understand the courts are incredibly burdened, but it is
14 very difficult to get a fulsome ruling until at least
15 summary judgment and more often trial. And I think the
16 advantage of this legislation is it will tell judges that
17 they need to decide it at the outset, they need to hold a
18 hearing, they need to issue an opinion, and it's going to
19 be appealable, which will require sort of a vigorous
20 analysis at the outset.

21 And in my experience, you know, in State court
22 practice, it is much harder to win a motion on the same set
23 of facts as in Federal court, where in Federal court you
24 get an opinion, sort of on the motion to dismiss you sort
25 of get opinions early on, and I think that requiring a

1 decision at the outset sort of with a hearing, with an
2 appeal, will help that.

3 MR. BERRY: And just to add a stroke on what Mike
4 said, the Pennsylvania Supreme Court decided a case, what,
5 13, 14 years ago now that Mike actually handled, that dealt
6 with this question. It dealt with a public figure who
7 brought a defamation case against the media, and the case
8 was dismissed on preliminary objections. It went all the
9 way up to the Pennsylvania Supreme Court, and the
10 Pennsylvania Supreme Court affirmed that dismissal and
11 admonished trial courts that they should screen these cases
12 out carefully on preliminary objections for that showing of
13 actual malice.

14 In my experience, though, in the past, you know,
15 10, 15 years since then, that rarely happens. Trial courts
16 get these motions that raise the same exact issues that
17 were decided in that case and, for whatever reasons,
18 declined them and do it without any explanation whatsoever,
19 forcing you to go through months and years of litigation
20 unnecessarily.

21 MAJORITY CHAIRMAN KAUFFMAN: Thank you very much.

22 I don't believe there are any further questions.
23 I appreciate your testimony this morning. Thank you for
24 your time.

25 MR. BERRY: Thank you.

1 MAJORITY CHAIRMAN KAUFFMAN: And finally, we have
2 Joshua D. Bonn of Nauman Smith Shissler & Hall.

3 Welcome.

4 MR. BONN: Thank you, Mr. Chairman.

5 Thank you all for inviting me here to testify
6 today. My name is Josh Bonn. I'm a private practitioner
7 in Harrisburg at a law firm, Nauman Smith. I have
8 experience in First Amendment cases, public records cases,
9 and municipal law.

10 The reason why I'm here today is that I have a
11 client who was slapped for filing Right-to-Know requests
12 for the purpose of finding out how much money public
13 entities were spending, and this was money that was going
14 from a public entity to a private contractor. The private
15 contractor filed a lawsuit to prevent the client from
16 filing any more Right-to-Know requests and to prevent my
17 client from criticizing that entity.

18 That lawsuit was filed over -- or no, close to
19 2 years ago. There has actually been a countersuit filed
20 in Federal court. The Federal court has ruled that the
21 lawsuit against my client was objectively baseless, but yet
22 that ruling is under appeal, and the State court suit
23 remains pending. So you can only imagine the costs that
24 can go into defending this type of a suit.

25 And one thing I want you to consider, there was

1 questions asked about preliminary objections. Okay, let's
2 say a regular citizen is slapped and they retain a lawyer,
3 they pay a \$10,000 retainer, and they win preliminary
4 objections. Now, that's very unlikely that they would win
5 preliminary objections at the initial stage, but they're
6 not getting their \$10,000 back, and do you think an
7 individual who pays \$10,000 to get a suit dismissed at a
8 preliminary stage is ever going to speak about a matter of
9 public concern? Probably not.

10 And I have provided a detailed legal memorandum
11 with my testimony about the constitutionality of this bill,
12 but I want to spend the remainder of my time discussing why
13 this law is distinguished from laws in other States that
14 have been declared to be unconstitutional.

15 First of all, all those States' Supreme Courts --
16 I believe it's Washington, New Hampshire, and Minnesota
17 that have declared their anti-SLAPP law unconstitutional --
18 it has been based on those States' right to trial by jury,
19 which is that right is provided by State Constitution. And
20 that right is different in every single State, because
21 every single State's Constitution is different and has its
22 own complexities.

23 Pennsylvania's Constitution, for example,
24 Pennsylvania's Constitution, the right to jury, and this is
25 described in my legal brief, but it's retroactive. It only

1 applies to causes of action that existed at the time that
2 the Pennsylvania Constitution was enacted, and that's not
3 necessarily true in the other States examining other
4 Constitutions.

5 Second, the proposed anti-SLAPP law does not
6 require the courts to decide issues of fact, and that was
7 the problem in the other States that have declared their
8 laws unconstitutional. It was asking courts to decide
9 issues of fact.

10 But what this bill requires is for a court to
11 determine if speech is constitutionally protected. Juries
12 do not decide if speech is constitutionally protected.
13 Judges interpret the Constitution, and judges decide
14 whether speech is constitutionally protected, and that
15 decision can be made at a preliminary stage.

16 Now, if there's a legitimate, disputed issue of
17 fact, say if there's a dispute over what someone said and
18 the only testimony against the person is a statement "I
19 heard this person say that," and then there's a factual
20 dispute, did the person actually say it or not, that's for
21 a jury. But if it's a writing and there's no dispute over
22 what the person said, it's for a court to decide whether
23 that writing is constitutionally protected or not.

24 And the final point is that we already have a
25 SLAPP law on the books, and the Pennsylvania Supreme Court

1 has looked to the standards that California courts
2 interpret, the California anti-SLAPP law when it's
3 interpreting Pennsylvania's current SLAPP law. And so the
4 Pennsylvania Supreme Court has said that if Pennsylvania
5 has an anti-SLAPP law, they are going to interpret it as
6 requiring the same evidentiary, or not evidentiary burden,
7 the same decision on constitutional questions as the
8 California law.

9 Pennsylvania's law has been on the books for
10 19 years now. I'm certain that someone would have, if it
11 was unconstitutional, that someone would have raised that
12 claim by now, but yet it has not been, it has not been
13 struck down.

14 So what I ask today is for the House to consider
15 this bill, enact this bill to protect all Pennsylvanians.
16 It's not really fair right now that you have a law that
17 only protects environmental speech. So -- and it's very
18 limited. It's not even all environmental speech. It's
19 just certain types of environmental speech that are in
20 favor of environmental regulations.

21 Let's protect all speech in Pennsylvania. Let's
22 treat everyone equally. Let's give everyone who uses
23 constitutionally protected speech this mechanism to avoid
24 these types of frivolous lawsuits.

25 MAJORITY CHAIRMAN KAUFFMAN: Thank you very much.

1 Questions from the Committee?

2 I guess you get off easy. Thank you very much
3 for being here today. We appreciate it.

4 I thank everyone who has been in attendance and
5 look forward to continuing the conversation on this issue.

6 And if there's no further business before this
7 Committee, this meeting is adjourned. Thank you.

8

9 (AT 10:46 a.m., the public hearing adjourned.)

1 I hereby certify that the foregoing proceedings
2 are a true and accurate transcription produced from audio
3 on the said proceedings and that this is a correct
4 transcript of the same.

5
6
7 *Debra B. Miller*

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