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Thank you, Mr. Chairman and members of the Committee for inviting me to testify. My name is Billy Easley, and I am a Senior Policy Analyst for Americans for Prosperity and I previously served as a legal counsel in the United States Senate. AFP is a grassroots organization that advocates for long-term solutions to the country's biggest problems. AFP endorsed the Free Speech Protection Act because it protects the free speech rights of Pennsylvania citizens from frivolous lawsuits designed to silence them. The bills before the Senate Judiciary Committee today contain the three policy pillars AFP considers essential to defending individuals from strategic lawsuits against public participation – which I will refer to as SLAPPs, for short.

The First Amendment protects the people from government restrictions on their speech. The public and policymakers must always remain vigilant against government erosion of free speech rights. However, in recent decades we've seen private individuals and companies abuse our legal system to restrict speech,

especially with the adoption of the internet. A classic example of a SLAPP suit is when a restaurant owner threatens to sue an individual who leaves a negative review on a website for defamation. In that example, the individual may decide to take down their review rather than go to court because they don't want to deal with the costs of litigation. That's exactly the kind of calculation users of SLAPPs depend on. The threat of costly, long-term litigation has been routinely used to silence whistleblowers, journalists, political protestors, even victims of sexual assault around the country and here in Pennsylvania.

House Bill 95 and Senate Bill 95 would create specific and reasonable free speech protections for Pennsylvanians. These bills should deter bad actors from filing frivolous lawsuits designed to intimidate members of the public and punish them for engaging in speech protected by First Amendment. The legislation accomplishes this in three ways: first, by creating a special motion to dismiss that allows judges to swiftly dismiss meritless lawsuits that target constitutionally protected speech. Second, by requiring that judges adjudicate the motion to dismiss within 30 days. This ensures that targets of SLAPP suits are not subjected to costly, drawn-out litigation. Finally, the legislation creates a financial disincentive for filing frivolous litigation. If a court grants a special motion to dismiss, the nonmoving party is awarded attorneys fees and other associated costs.

These three policy pillars, in combination, are the foundation of a strong, anti-SLAPP law—and AFP will not support any anti-SLAPP law that does not contain them. Over 30 states have passed similar laws, but not all of them are effective. Some are narrowly written, for example, only defending speech that is presented before a governmental body like this one.

The special motion to dismiss provision serves as an important front-end filter at the beginning of the litigation process. The motion immediately stays discovery, saving targets of these lawsuits time and money. It also allows judges to appropriately assess the basis of the case from the outset, which increases judicial efficiency. Through a variety of procedural steps, judges already have the authority to dismiss frivolous suits or complaints that do not state a legally sufficient claim. But the danger SLAPP suits pose to free speech are unique because of the ease with which these suits can intimidate individuals from engaging in public debate. A special motion to dismiss is appropriate given those circumstances.

However, we should not prioritize one important constitutional right over another. Litigants need to have a reliable way to defend themselves against frivolous suits to protect their free speech rights. But we do need to be certain the right to a trial by jury, which is enshrined in the Pennsylvania State Constitution, is not be eroded by anti-SLAPP laws. Since committee staff has shown interest in this topic, I will review how other states have dealt with this tension. Three state

supreme courts have struck down or advised against anti-SLAPP laws because they found that the standard of dismissal violated their state constitution's right to a jury trial: Washington, Minnesota, and New Hampshire.

Washington and Minnesota's statutes shared the same flaw: they both mandated that judges engage in fact-finding using a high burden of proof. Washington's law required "the trial judge to weigh the evidence and dismiss a claim unless it makes a factual finding that the plaintiff established by clear and convincing evidence a probability of prevailing at trial." *Davis v. Cox*, 351 P.3d 862, 871 (Wash. 2015). Minnesota's law also contained a clear and convincing standard of proof. *See Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 636 (Minn. 2017). Both state's courts struck down these provisions because they required trial courts to engage in impermissible fact-finding, instead of assuming that the allegations in the complaint are true and assessing the merit of a case from there.

In an advisory opinion, the Supreme Court of New Hampshire determined that its legislature's proposed anti-SLAPP bill would violate the right to trial by jury. That proposal required trial courts to determine "whether a plaintiff has met the burden of showing a probability of prevailing on the merits of his or her claim [and requires the court] to weigh the pleadings and affidavits on both sides and adjudicate a factual dispute." *Op. of the Justices (SLAPP Suite Procedure)*, 138 N.H. 451. This is much like House Bill 95, which requires that the party that

submits a motion to dismiss establish "by a preponderance of the evidence that the claim is based upon a constitutionally protected communication and, having made that initial determination, the court determines that the nonmoving party has not demonstrated a probability of prevailing."

AFP supports House and Senate Bill 95 in its current form. Washington, Minnesota, and New Hampshire are in the minority of states in their assessments of the special motion to dismiss. However, policymakers can clarify the language out of an abundance of caution.

California's experience is instructive because its anti-SLAPP bill contains language similar House Bill 95's standard of review. California law requires that a trial court "determine that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code 425.16(b)(1). However, the California Supreme Court has instead defined this provision as requiring that courts must determine whether a "claim [is] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." That court thus made it clear that trial courts should *not* weigh evidence or resolve conflicting factual claims when making its determination.

Given this, Texas's anti-SLAPP statute offers the best alternative and model. It requires a plaintiff to "establish by clear and specific evidence a prima facie case for each essential element of the claim in question." The Texas Supreme Court defined "clear and specific evidence" to mean evidence that is unambiguous, and it held that a prima facie showing requires a "minimum quantum of evidence necessary to support a rational inference that the allegation is true." This alternative has been tested by courts and survived scrutiny.

Mr. Chairman and members of the Committee, we should make it easier for all Pennsylvanians to participate in civic life. The bills before you today achieve that noble objective. Thank you for your time, and I'll take any questions you might have.