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**TESTIMONY SUBMITTED BY  
ANDY HOOVER, LEGISLATIVE DIRECTOR, ACLU OF PENNSYLVANIA  
TO  
SENATE JUDICIARY COMMITTEE  
RE: SENATE BILL 1095 (RELIEF FROM "SLAPP")  
PHILADELPHIA, APRIL 24, 2014**

Senator Greenleaf, Senator Farnese, and members of the committee, thank you for the opportunity to offer testimony today on Senate Bill 1095. My name is Andy Hoover. I am the legislative director of the American Civil Liberties Union of Pennsylvania. Founded in 1920, the ACLU is one of the nation's oldest civil rights organizations. I am here today on behalf of the 18,000 members of the ACLU of Pennsylvania.

SB 1095 institutes significant revisions to current Pennsylvania law on immunity from Strategic Lawsuits Against Public Participation, or "SLAPP" suits. The legislation expands that immunity greatly from current law, which is narrowly tailored to environmental concerns, to "issues of public interest." The ACLU of Pennsylvania supports SB 1095. The legislation strengthens public participation in the commonwealth.

The right to free speech, as protected in the First Amendment, is usually thought of as a prohibition on government interference with speech. That is what the First Amendment does. It places a boundary on the government's ability to restrict speech. Most ACLU cases that involve free speech claims are brought against government entities that improperly restrained speech.

SLAPP suits are a different type of threat to the right to free speech. In this type of litigation, speech is chilled by using the court system to burden citizens who have engaged in public participation. Typically, it is brought by corporations and other large, private entities against smaller actors, such as community activists. SLAPP suits have been filed against civil rights advocates, environmental activists, community groups, and those who use the internet to voice public concerns.

The ACLU of Pennsylvania has some history of fighting SLAPP suits. In the summer of 2007, an inmate at Lackawanna County Prison gave birth in her cell without medical attention. The local chapter of Pax Christi, a Catholic peace and justice organization, asked for an independent investigation. When their requests were denied, Pax Christi undertook its own investigation, which included interviewing current and former inmates. The group reported its findings to the county commissioners, but when the commissioners did not respond, Pax Christi sent the report to the media.

In response, Correctional Care, Inc. (CCI), the contractor responsible for healthcare services at the prison, sued Joseph Rogan, a member of Pax Christi, in 2008. CCI asked for \$50,000 plus attorneys' fees and punitive damages and claimed that the report was defamatory and interfered with its contract with the county. Rogan feared losing his home and his retirement savings.

The ACLU of Pennsylvania and the firm of Cozen O'Connor defended Rogan, arguing that the CCI suit violated his First Amendment rights. After the ACLU of Pennsylvania became involved, CCI dropped its litigation against Rogan.<sup>1</sup>

Similarly, the ACLU of Pennsylvania filed a "friend of the court" brief in 2000 in defense of community groups in Pittsburgh that had been sued by the drug retailer CVS. The community groups protested CVS's plan to demolish historic buildings in the city's Homestead neighborhood to open a new store. The community groups were ultimately dropped from the litigation.

Those are rare examples of wins for individuals and community groups in fighting SLAPP suits. You are no doubt aware that the Old City Civic Association of Philadelphia recently disbanded as a result of ongoing litigation and rising insurance costs. Current Pennsylvania law lacks a strong mechanism for short-circuiting this type of litigation. It is only available for those who raise concerns about environmental issues. SB 1095 expands that immunity to all issues of public concern. The ACLU of Pennsylvania advocated for this expansion in 1996 when the General Assembly considered House Bill 281.<sup>2</sup>

To be clear, SB 1095 draws a balance between access to courts and abuse of courts to bully people for exercising their First Amendment rights. The bill provides immunity from litigation for people who engage in "the right of advocacy on issues of public interest" and who communicate that position. It does not, however, provide immunity for someone who engages in acts "not material or relevant" to an issue of public interest, who communicates a message that "was knowingly false when made," "was rendered with reckless disregard" to the truth of the statement, or who "represented a wrongful use of process or abuse of process."

Besides expanding current anti-SLAPP immunity beyond environmental issues, SB 1095 revises SLAPP protection in another positive way. The bill is clear that covered activity includes not only direct communications to government agencies but also communications to third parties about issues of public interest. Thus, the bill ensures coverage of activity like press statements, rally speeches, etc. Courts have generally interpreted the existing statute in this way, but the bill clarifies that.

The ACLU of Pennsylvania supports SB 1095 in its current form. We also have several recommendations to make the bill stronger.

First, we recommend removing the language that requires that the issue of public concern is in connection with some form of government action. By eliminating the government action language, the bill would provide greater protection of First Amendment rights. For example, concerned citizens may want to protest a company's use of unfair labor practices overseas. They may not be seeking any government action in response, but their activities could still be vulnerable to SLAPP litigation. With the current language of the bill, those citizens would not have a mechanism for immunity from the SLAPP suit.

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<sup>1</sup> See <http://www.aclupa.org/our-work/legal/legaldocket/activistsuedforcriticizing/>.

<sup>2</sup> Testimony of Larry Frankel, Executive Director, ACLU of Pennsylvania before the House Subcommittee on Courts, August 13, 1996.

Second, the ACLU of Pennsylvania suggests providing a greater deterrent to SLAPP litigation by including punitive and compensatory damages for defendants who successfully invoke the immunity in the bill. Currently, the bill allows defendants to recover costs and attorneys' fees. Numerous states include additional sanctions against plaintiffs who bring SLAPP suits. In Delaware, Minnesota, Nevada, and Rhode Island, punitive damages may be awarded if the SLAPP is found to be brought for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the right to petition, speak or associate.<sup>3</sup> New York allows for both punitive and compensatory damages if the SLAPP was brought for those purposes.<sup>4</sup> Hawaii provides that, if the court determines that the plaintiff brought a SLAPP, then the plaintiff must pay either actual damages incurred by the defendant or \$5,000, whichever is greater, and the costs of the suit and defendant's reasonable attorney fees.<sup>5</sup> Furthermore, the Hawaii statute provides that the court may assess additional sanctions upon the party, its attorneys, or even the attorney's law firm, if such action would be a sufficient deterrent to similar future action.

Finally, we recommend including legislative findings in SB 1095 that express the desire for broad anti-SLAPP protections. I am aware that there are mixed feelings in the state Senate about legislative findings that are written into bills. However, courts have referenced oral legislative intent to enact broad anti-SLAPP protections in cases to aid in their interpretation of anti-SLAPP statutes.<sup>6</sup> In Pennsylvania, statute dictates that floor debates are not evidence of legislative intent. Therefore, the bill itself needs to include an expression of the intent to give guidance to the courts that will interpret the statute.

In conclusion, the ACLU of Pennsylvania is grateful that Senator Farnese has introduced this legislation and that the Senate Judiciary Committee is willing to consider it. Senate Bill 1095 ensures that Pennsylvanians can exercise their First Amendment rights without the threat of intimidating lawsuits. Senator Greenleaf and Senator Farnese, thank you for the opportunity to present testimony on this issue.

*Ryan Very, Boston University Visiting Legal Fellow, ACLU of Pennsylvania, researched and assisted in preparing this testimony.*

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<sup>3</sup> Del. Code Ann. tit. 10 § 8137 (1992); Minn. Stat. § 554.04 (1994); Neb. Rev. Stat. 25-21,243 (1994); R.I. Gen. Laws § 9-33-1 (1995).

<sup>4</sup> N.Y. Civ. Rights Law § 70-a (1995).

<sup>5</sup> Haw. Rev. Stat. § 634F-2 (2002).

<sup>6</sup> See, e.g., *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 167, 691 N.E.2d 935, 943 (1998).