Prepared Testimony of Professor David Kairys
In Support of Anti-SLAPP Legislation,
Senate Bill 1095, 2013 Session
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Introduction

I am a professor of law at the Beasley School of Law, Temple University. I have taught constitutional law and civil rights for over 20 years. Previously, I practiced in the same areas for another 20 years. One of my main areas of scholarship and practice has been freedom of speech and the First Amendment, and has included arguing free speech cases before the Supreme Court of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the Supreme Court of the United States.[1] I have testified as an expert on SLAPP cases before the Superior Court of New Jersey.[2] My resume is attached.

I support Senate Bill 1095, which extends the statutory protection from SLAPP lawsuits, currently limited to environmental issues, to a general protection against SLAPP lawsuits related to the range of issues of public interest or social significance.

SLAPP Lawsuits

A SLAPP suit – standing for strategic lawsuit against public participation – is a lawsuit that seeks to impose civil liability based on expression, communication, or an attempt to influence government on a substantive issue of public interest or social significance. SLAPP suits gained public attention, and got their distasteful reputation and moniker, after real estate developers in the 1980s regularly brought civil lawsuits against people who opposed

[1] See *Greer v. Spock*, 424 U.S. 828 (1976) (I represented Dr. Benjamin Spock) and other free speech cases cited in my resume. See generally David Kairys, PHILADELPHIA FREEDOM, MEMOIR OF A CIVIL RIGHTS LAWYER (2008).
[2] *Baglini v. Lauletta*, Superior Court of New Jersey, Gloucester Co., No. GLO-L-1716-92, appeal, 338 N.J. Super. 282 (2001).

development. These suits most often claimed defamation and interference with businesses based on a persons' simply filing a complaint with zoning or environmental agencies asking that the agencies enforce established law. The suits, though they had little or no chance of success, sought large sums in damages and required opponents of development to hire lawyers and face litigation costs that are unaffordable by people of ordinary means. These lawsuits – soon to be named SLAPPS – had the desired effect: community organizations and individual critics of the developments were silenced.[3]

Most states[4] provide a remedy for defendants sued in SLAPP lawsuits by statute or by judicial decisions based on the First Amendment, because SLAPP suits intimidate, punish, and deter exercise of First Amendment rights, particularly the right to public participation in and to "petition" government, and thereby undermine freedom of speech and petition and participatory democracy.

Any civil action can be a SLAPP lawsuit; the most common are defamation and torts related to interference in businesses. SLAPP suits are usually brought without regard for the prospects for success. The law in most states provides for their dismissal and/or a counter action for damages and costs, usually called a "counter-SLAPP" or "SLAPP-back" lawsuit.[5]

Anti-SLAPP Decisions and Legislation

The law of SLAPP suits is usually derived from and associated with two antitrust cases that recognized a First Amendment limit on consideration of speech- or petition-protected

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[3] See generally George Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (1996). It turned out that these developer SLAPPS were explicitly planned and designed throughout the industry to silence critics. Id. at chapter 3. For an example of a successful SLAPP in Pennsylvania, see *'Us vs. Them' in Pa. Gaslands*, Philadelphia Inquirer, Dec. 13, 2011, p. A1.

[4] See Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Courts after* Shady Grove, 114 COLUM. L. REV. 367, 375, 375 n. 52 (2014), citing the laws of the various states, and referring to a current online list maintained by the Public Participation Project, http://www.anti-SLAPP.org.

[5] See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern RR. v. Noerr*, 365 U.S. 127 (1961). Pring and Canan, supra note 3; Note, supra note 4.

conduct as a basis for antitrust liability, usually referred to as the "Noerr-Pennington doctrine."[6] This association and application of the doctrine are sound, but a broader analysis and history are most revealing and analytically helpful. The law of SLAPP suits and the Noerr-Pennington doctrine in antitrust cases are both part of a larger and longer development in First Amendment law.

While civil actions for defamation and other torts are a matter of private law, and the First Amendment is a limit on government, the Supreme Court of the United States has long recognized a series of free speech limits on private rights and private causes of action. *New York Times v. Sullivan*,[7] which adopted a free-speech limit on defamation cases brought by public figures, is perhaps the most widely known of these. But they go back at least as far as the recognition in the 1940s that a "company town," though wholly owned and controlled by private, non-governmental entities, must accord the public free speech rights on its streets, sidewalks and parks.[8] Most recently, the Supreme Court, with only one justice dissenting, recognized free speech limits on a claim for intentional infliction of emotional distress, stating that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits."[9]

These First-Amendment limits on private rights are part of and necessary to freedom of speech, liberty, open debate, and unimpeded democracy, which would be unduly burdened and restricted if speakers are deterred and hesitant because their speech on public issues may result in civil liability.

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[6] See *Noerr* and *Pennington*, note 5, supra.
[7] 376 U.S. 254 (1964).
[8] See *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (protecting protest at the funeral of a soldier killed in war by invalidating a civil recovery by the soldier's family); *NAACP v. Claiborne*, 458 U.S. 886 (1982) (protecting an economic boycott aimed at affecting government policy); *New York Times v. Sullivan*, supra; *City of Columbia v. Omni*, 499 U.S. 365 (1991) (antitrust); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (invalidating civil recovery for a parody); *Noerr* and *Pennington*, supra note 5; *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town).
[9] *Snyder v. Phelps*, 131 S.Ct. at 1215.

If we continue to allow such lawsuits to proceed (except on environmental issues), the message and impact will be devastating to freedom, liberty and democracy in Pennsylvania. Anyone with the financial resources to pay for lawyers and lawsuits – with little or no concern for the merits or unlikely success of litigation – would be encouraged to shut up their critics by filing lawsuits demanding large recoveries. They are currently able to pursue such lawsuits at great cost and inconvenience to citizens whose only "offense" is to openly differ with government officials or policies, to speak out against impropriety, or to petition their government with their grievances.

Statutory remedies for SLAPP suits like Senate Bill 1095 provide the most significant relief because they enable the SLAPPed speakers to quickly stop SLAPP suits, to recover their counsel and litigation costs, and to avoid a SLAPP suit hanging over them for an extended period.[10]

Conclusion

Current Pennsylvania law recognizes the need for this anti-SLAPP protection, but limits it to environmental issues. The protection should be extended to all issue of public interest or social significance, which is what Senate Bill 1095 does.

[10] In jurisdictions without anti-SLAPP legislation, the remedy for a SLAPP suit is a counter-suit that often cannot be brought until after defeating the SLAPP suit, which comes after large counsel fees and costs and an extended period in which the pending SLAPP suit has its intended intimidating effect.