

**TESTIMONY OF ROBERT D. RICHARDS**

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**before the  
Judiciary Committee  
The General Assembly of Pennsylvania  
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Chairman Clark, members of the Judiciary Committee, let me begin by thanking you for the opportunity to testify on House Bill No. 281, which provides for the protection of public participation in environmental matters.

My name is Robert D. Richards, and I am an associate professor of journalism and law and the founding director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. As I begin this morning, I would like to commend the several sponsors of House Bill No. 281 for introducing this important measure into the General Assembly. The bill is a corrective measure. It helps to correct an injustice that has been occurring in this Commonwealth and, indeed, across the United States.

Thousands of individuals have been sued for speaking out against a project or activity of business in their communities. Typically, the cause of action is defamation, interference with a business relationship, professional disparagement, and even civil conspiracy. These reputation and business torts encroach upon an area of long-established constitutional doctrine—the Petition Clause of

the First Amendment. Legal Scholars have coined the acronym SLAPP—Strategic Lawsuits Against Public Participation.

It is no secret that the founders of this nation intended for the citizens to have an ability to communicate with their representatives. Moreover, I think I can safely say that our founders never envisioned the use of legal process for the sole purpose of thwarting that vital communication between constituents and their government. But that is precisely what is happening with SLAPP suits. Individuals and groups who attempt to have their voices and opinions voiced and heard are figuratively "clubbed" into submission by onerous protracted litigation, or even just the threat of it.

SLAPPs have stemmed from citizens appearing before governmental bodies, such as this one. They have also been triggered by letters to the editor, events staged by activists and community drives. Citizens have been sued for calling government officials, criticizing government actions and policies. SLAPP suits clearly have a negative impact on the target, but they also have a "chilling effect" on others who might have the urge to contact government. In fact, a common tactic of the SLAPP plaintiff is to file the case against a named defendant or defendants and an additional number of "John Does." For example, in one case in which I was involved as a "friend of the court," the caption included "100 John Does." The additional "John Does" is a subtle reminder to the other citizens in the community that they, too, may be added to the lawsuit should they choose to speak out—that is, should they exercise their rights under the First Amendment.

Nine states have enacted legal protections against these harassing lawsuits. Measures, such as the one before us here today, underscore the importance of the citizens' right to communicate their views to government. They also send a strong message, even by their very enactment, to those who plan to use litigation improperly. The citizens of this Commonwealth should feel comfortable speaking out on an issue, without fear of a multi-million dollar lawsuit draining their energies and their financial resources.

The problem nationwide has become so widespread that three years ago the Attorney General for the State of Florida did a study of SLAPPs in that state. The conclusion of the report, prepared by Attorney General Robert Butterworth's office, was that "many Floridians believe that their public participation activities, particularly in opposition to development proposals, have resulted in actual or threatened SLAPP lawsuits." The report went on to say that as Florida grows, SLAPPs too will increase and the challenge for the "state will be to ensure that the right to participate in the democratic process is not subverted through the use of litigation tactics whose sole purpose is to silence opposition."

That report prompted me to investigate further the situation there because Florida is a state with high degree of land-use activity, and such states are typically fertile ground for SLAPP suits. In one such lawsuit, a lawyer representing an environmental group was sued personally, along with the members of the group. The lawsuit against him was dismissed on summary judgment, but he reported to me that because the SLAPP plaintiff named him personally in the lawsuit, his legal malpractice carrier dropped him after the suit

ended, despite the favorable ruling. These "below-the-belt" tactics are the trademark of the SLAPP filer.

My work on SLAPPs has put me in contact with numerous families who have been targeted in these lawsuits. I can attest to the fact that these families have experienced undue hardship and have been placed under great stress by the burden of protracted litigation. In a case from Frederick County, Maryland, just over the Pennsylvania border, a number of citizens were subpoenaed for depositions in a SLAPP case. These citizens had shown up at a meeting because they were opposed to a trash hauler who was trying to bring trash imported from other states into an area landfill. As might be expected, the citizens were worried about the impact of such waste hauling on their small community's resources.

During the depositions, the plaintiff's attorney asked these citizens questions concerning the value of their homes, the value of their automobiles, and other questions directly related to their personal assets. This line of questioning was designed solely to scare these citizens (and others in the community) and to intimidate them into quiet submission.

Unfortunately, the intimidation works. Many community groups have been fractured by the stress of litigation. As one SLAPP target recounted to me, soon people become so engrossed by the lawsuit, that they forgot about the issue at hand. Citizens who once were actively involved in an issue distance themselves from the named defendants in the hope that they will avoid the lawsuit. As the case drags on, the legal expenses continue to climb for the SLAPP targets, often forcing them to capitulate to the terms of the filer.

That typically translates into an agreement not to oppose the project. In one such Florida case, the settlement of the SLAPP included an injunction (approved by the court) against the citizen forbidding her "from any participation at any homeowners' meeting regarding any claims she had made in the past...." The woman said a lack of funds to continue fighting forced her to settle the case and give up certain of her First Amendment rights "by agreement of the parties."

It is somewhat ironic that we in the United States recoil when we see governments of other countries suppress the speech rights of their citizens. Yet, there has been relatively little public outcry about the use of legal process in this country to accomplish the same goal. I submit to you that the reason is the public, in large part, is unaware the nature of this problem. Judges and lawyers need further education about it. This year, for the first time to my knowledge, the issue was a topic in a Pennsylvania Bar Institute continuing legal education program. I know this to be true because I taught the course. But there is still much more to do.

That is one of the reasons House Bill No. 281 is a vitally important piece of legislation. It contains several provisions that go directly to the heart of using process as a weapon. Section Four—Motion to Strike is just such a provision. It requires a court to strike the lawsuit "unless the court determines that the plaintiff has established that there is a substantial likelihood that the plaintiff will prevail on the case." This imposes a proper burden on the plaintiff essentially to prove up front that there is merit to the claim. We cannot stop SLAPP plaintiffs from filing these lawsuits, but we can ensure that a meritless lawsuit is not allowed to continue down the

litigation track and thereby drain the targets financially and emotionally.

Another important piece of this bill is Section Five, which permits recovery of attorneys fees and the costs of litigation. The costs associated with defending a SLAPP can be extraordinary. The Florida woman I mentioned previously had to give up her fight because she ran out of money. A Pennsylvania woman who won her SLAPP case at trial with legal representation is now preparing to defend the business's appeal of the verdict, without the aid of counsel because she ran out of funds. Courts can clearly be a level playing field, if individuals can afford the price of admission. These citizens are putting their modest resources up against the vast resources of corporations. At the end of the day, the citizens will prevail, but it may have cost them their life savings in the process. This provision does indeed help level the playing field in SLAPP actions.

The third and perhaps most important part of House Bill 281 is Section Three—Immunity from Suit. Substantive immunity for remarks made in furtherance of their First Amendment rights is the only way to truly ensure citizens the full scope of protection. Earlier in my remarks I suggested that Pennsylvania's citizens should feel secure in communicating their views to government—safe in the knowledge that they will not lose their life's assets for simply exercising their constitutional rights. This provision helps accomplish that and is therefore an essential part of the legislation.

As I see it, House Bill No. 281 serves a three-fold mission. First, it provides the citizens of Pennsylvania with the protection

they need to operate as shareholders in the democracy. Second, it helps educate all of us who may be unaware that SLAPPs are becoming all too common. And third, it sends a strong warning to those who intend to use legal process for bad faith purposes.

In closing, let me say that Representative George and the other sponsors of this bill have taken an important step in safeguarding the free-speech rights of all Pennsylvanians. I hope this Committee will, too. I thank you for inviting me here this morning, and I will be happy to answer any questions you may have.

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