

THE CITIZEN PARTICIPATION IN GOVERNMENT AND SOCIETY ACT OF 2009

*Proposed Federal Anti-SLAPP Legislation
Revised as of 5/28/09*

*To protect the constitutional rights of
petition and free speech by creating
immunity from, and procedures to
identify, dismiss and remedy,
Strategic Lawsuits Against Public
Participation (SLAPPs).*

Mark Goldowitz
Director
Federal Anti-SLAPP Project
(510) 486-9123 x. 301
mg@casp.net

Samantha Brown
Legislative Director
Federal Anti-SLAPP Project
(650) 646-8569
sb@anti-SLAPP.org

Draft Proposed Federal Anti-SLAPP Legislation

111th CONGRESS

1st Session

H. R. _____ / **S.** _____

To protect the constitutional rights of petition and free speech by creating immunity from, and procedures to identify, dismiss and remedy, Strategic Lawsuits Against Public Participation (SLAPPs).

IN THE HOUSE OF REPRESENTATIVES/SENATE

May __, 2009

A BILL

To protect the constitutional rights of petition and free speech by creating immunity from, and procedures to identify, dismiss and remedy, Strategic Lawsuits Against Public Participation (SLAPPs).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE AND TABLE OF CONTENTS.

This Act may be cited as the "Citizen Participation in Government and Society Act of 2009."

Section 1. Short Title and Table of Contents.

Section 2. Findings and Purposes.

Section 3. Immunity for Petition Activity.

Section 4. Protections for Petition and Speech Activity.

Section 5. Special Motion to Dismiss.

Section 6. Federal Removal Jurisdiction.

Section 7. Special Motion to Quash.

Section 8. Fees, Costs and Damages.

Section 9. Elimination of Tax Subsidies for Filing and Maintaining SLAPPs.

Section 10. Bankruptcy Non-Dischargeability for SLAPP and SLAPPback Awards.

Section 11. Exemptions.

Section 12. Definitions.

Section 13. Construction.

Section 14. Relationship to Other Laws.

Section 15. Severability.

Section 16. Effective Date.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. The Congress finds and declares that:

- (1) the framers of our Constitution, recognizing participation in government and freedom of speech as inalienable rights essential to the survival of democracy, secured their protection through the First Amendment to the United States Constitution;
- (2) the communications, information, opinions, reports, testimony, claims and arguments that individuals, organizations and businesses provide to the government are essential to wise government decisions and public policy, the public health, safety, and welfare, effective law enforcement, the efficient operation of government programs, the credibility and trust afforded government, and the continuation of America's representative democracy;
- (3) civil lawsuits and counterclaims, often claiming millions of dollars in damages, have been and are being filed against thousands of individuals, organizations and businesses based upon their valid exercise of the rights to petition or free speech, including seeking relief, influencing action, informing, communicating, and otherwise participating with government, the electorate, or in matters of public interest;
- (4) such lawsuits, called Strategic Lawsuits Against Public Participation or SLAPPs, are often ultimately dismissed as groundless or unconstitutional, but not before the defendants are put to great expense, harassment, and interruption of their productive activities;
- (5) it is in the public interest for individuals, organizations and businesses to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process;
- (6) the threat of financial liability, litigation costs, destruction of one's business, loss of one's home, and other personal losses from groundless lawsuits seriously impacts government, interstate commerce, and individual rights by significantly chilling public participation in government, public issues, and in voluntary service;
- (7) SLAPPs are an abuse of the judicial process that waste judicial resources and clog the already overburdened court dockets;
- (8) while some courts and State legislatures have recognized and discouraged SLAPPs, protection against SLAPPs has not been uniform or comprehensive;
- (9) the present tax law subsidizes SLAPP plaintiffs, providing incentives to file and maintain SLAPPs;
- (10) SLAPP victims often suffer damages beyond court costs and attorney's fees; they suffer emotional distress, reputational damage, time lost from work, and other damages as a result of defending baseless lawsuits;
- (11) some SLAPP victims are deprived of the relief to which they are entitled because the current bankruptcy law allows for the discharge of fees, costs and damages awarded against a party for maintaining a SLAPP.

(b) PURPOSES. The purposes of this Act are:

- (1) to protect and encourage citizen participation in government and expression on matters of public interest in furtherance of the letter and spirit of the First Amendment to the United States Constitution;
- (2) to strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to petition the government and to engage in speech about matters of public interest;
- (3) to establish an efficient, uniform and comprehensive method for speedy adjudication of SLAPPs;

- (4) to provide attorney's fees, costs, and additional relief for prevailing SLAPP defendants where appropriate;
- (5) to amend the tax law to remove the current subsidies for the filing and maintenance of SLAPPs;
- (6) to amend the bankruptcy law so that prevailing SLAPP defendants can receive their court-ordered relief;
- (7) to establish a cause of action for prevailing SLAPP defendants so that they may seek relief for the damages incurred in defending a SLAPP.

SEC. 3. IMMUNITY FOR PETITION ACTIVITY.

Any act in furtherance of the constitutional right to petition the government, including seeking relief, influencing action, informing, communicating, or otherwise participating in the processes of government, shall be immune from civil liability, regardless of intent or purpose, except where not aimed at procuring a government or electoral outcome. This immunity shall not apply to any counterclaim brought under Section 8 of this Act, or any claim arising from a claim dismissed pursuant to any state anti-SLAPP law.

SEC. 4. PROTECTIONS FOR PETITION AND SPEECH ACTIVITY.

This Act creates protections for petition and speech activity, including the right to dismiss a specified claim for relief, however characterized, that arises from an act in furtherance of the constitutional right of petition or free speech. Such a claim shall be known as a Strategic Lawsuit Against Public Participation (SLAPP). As used in this Act, "an act in furtherance of the constitutional right of petition or free speech" includes:

- (a) any written or oral statement or writing made or submitted before a legislative, executive, or judicial body, or any other official proceeding authorized by law;
- (b) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law;
- (c) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or
- (d) any other conduct in furtherance of the exercise of the constitutional right of petition, or the constitutional right of free speech in connection with a public issue or an issue of public interest.

SEC. 5. SPECIAL MOTION TO DISMISS.

- (a) A defendant may file a special motion to dismiss any claim against the defendant arising from an act in furtherance of the constitutional right of petition or free speech within 60 days after service of the claim if the claim was filed in federal court or, if the claim was removed to federal court pursuant to Section 6 of this Act, within 30 days after removal.
- (b) A defendant filing a special motion to dismiss under this Act has the initial burden of making a prima facie showing that the claim against which the motion is made arises from an act in furtherance of the constitutional right of petition or free speech. If the defendant meets this burden, the burden shifts to the plaintiff to demonstrate that the claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment. If the defendant's burden is met and the plaintiff's is not, the court shall grant the special motion to dismiss. Otherwise, the court shall deny it.
- (c) Upon the filing of a special motion to dismiss, discovery proceedings in the action shall be stayed. The stay of discovery shall remain in effect until notice of entry of an order denying the motion.

- (1) When a special motion to dismiss under this Section is brought on the grounds that the claim is legally deficient, and no evidence is introduced to support the motion, the court shall not permit any discovery.
 - (2) Notwithstanding the stay imposed by this section, for a special motion other than that described in subsection (c)(1), the court, on noticed motion and for good cause shown, may order that specified discovery be conducted. Discovery shall be disfavored. If the court permits discovery, it shall limit it both as to means and subject to that which is necessary and designed to uncover evidence directly related to the special motion to dismiss, most expeditiously and at least expense to the party from whom discovery is sought. To this end, the court shall consider the following factors before permitting discovery: whether the information sought goes to the heart of a claim or defense at issue in the special motion; whether the party seeking discovery has made a showing on every element for which discovery is not needed; what efforts the party seeking discovery has made to secure information prior to the filing of the action; whether the information is uniquely held by the party from whom discovery is sought; and whether the party seeking discovery has exhausted all other sources of obtaining the needed information.
- (d) In ruling upon a special motion to dismiss, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. The defendant may, but need not, offer evidence of the plaintiff's motive to intimidate, harass, silence or otherwise interfere with the defendant's rights of petition or free speech.
 - (e) Upon the filing of a special motion to dismiss, leave to amend the complaint shall not be granted.
 - (f) The court must hold a hearing on the special motion to dismiss as soon as possible, and no later than 45 days after the filing of the motion. The court must rule on the motion no later than 30 days after the hearing. The court shall explain the reasons for its grant or denial of the motion in a statement for the record. If the special motion to dismiss is granted, dismissal shall be with prejudice.
 - (g) The defendant shall have a right of immediate appeal from a trial court order denying a special motion to dismiss in whole or in part or from a trial court failure to rule within 30 days after the hearing, or within 75 days after the filing of the special motion to dismiss.
 - (h) If the court determines that the plaintiff has established a prima facie case on the underlying claim, that determination shall not be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.
 - (i) Any government body to which the defendant's act was directed, or the Attorney General of the United States or of any State, may intervene to defend or otherwise support the defendant in the claim arising from an act in furtherance of the constitutional right of petition or free speech.

SEC. 6. FEDERAL REMOVAL JURISDICTION.

- (a) A civil action commenced in a State court against any person who asserts as a defense the immunity provided for in Section 3 of this Act, or asserts that the action arises from an act in furtherance of the constitutional right of petition or free speech as defined in Section 4 of this Act, may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending.
- (b) Upon a final denial of a special motion to dismiss filed pursuant to Section 5 of this Act, or the failure to bring such a motion within thirty days after removal, the court shall remand any action removed under this section to the State court from which it was removed.

SEC. 7. SPECIAL MOTION TO QUASH.

- (a) A person whose personally identifying information is sought in connection with an underlying federal action arising from an act in furtherance of the constitutional right of petition or free speech may make a special motion to quash that discovery order, request or subpoena.
- (b) The person bringing the motion to quash under this section must first make a prima facie showing that the underlying claim arises from an act in furtherance of the constitutional right of free speech or petition. If this burden is not met, the special motion to quash shall be denied. If this burden is met, the burden shifts to the plaintiff in the underlying action to demonstrate that the underlying claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment. If the plaintiff meets this burden, the special motion to quash shall be denied. If the plaintiff fails to meet the burden, the special motion to quash shall be granted.

SEC. 8. FEES, COSTS AND DAMAGES.

(a) FEES AND COSTS.

- (1) The court shall award a defendant who prevails on a special motion to dismiss or a moving party who prevails on a special motion to quash the costs of litigation, including reasonable attorney's fees, incurred in connection with the motion and in otherwise defending against the SLAPP, including a motion for attorney's fees or activity to collect said fees.
- (2) If a claim or discovery request is dismissed voluntarily or on the court's motion, after a special motion to dismiss or quash has been filed but prior to the hearing on that motion, the court shall, upon the defendant's or moving party's request, determine the prevailing party on the special motion to dismiss or quash for purposes of determining the defendant's entitlement to fees and costs.
- (3) If the court finds that the special motion to dismiss or special motion to quash is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney's fees and costs to the responding party.

(b) DAMAGES.

- (1) The court shall allow a defendant who moves for dismissal pursuant to Section 5 of this Act to file a counterclaim under Federal Rule of Civil Procedure 13(e), which shall be known as a SLAPPback, to claim damages incurred in prevailing on the motion to dismiss. A defendant may file a SLAPPback counterclaim no later than the filing of a motion for attorney's fees and costs, or no later than the latest date on which such a motion could be filed, if no such motion is filed.
 - (2) The court shall award a defendant who prevails on the counterclaim, the actual and compensatory damages, including damages for emotional distress, and costs and attorney's fees incurred in litigating said counterclaim.
- (c) Nothing in this section shall be construed to affect or preclude the right of any party to any recovery otherwise authorized by common law, statute, or rule.
 - (d) If a government entity or a government official, to the extent said official is sued in his or her official capacity, prevails on a special motion to dismiss or quash, the entity or official may not recover fees or damages pursuant to this section, except that a government official may recover his or her fees or damages when said official has not been provided a defense or representation by a government entity.
 - (e) Nothing in this section implicates, alters, or diminishes the ability of a State to defend itself against any claim on the basis of sovereign immunity.

SEC. 9. ELIMINATION OF TAX SUBSIDIES FOR FILING AND MAINTAINING SLAPPS.

Title 26, Section 162 of the United States Code shall be amended by adding at the end the following:

(r) No deduction shall be allowed for any expense, disbursement or other expenditure if made:

- (1) for the payment of any fees, costs or damages ordered or awarded pursuant to Section 8 of the Citizen Participation in Government and Society Act of 2009, or pursuant to any State anti-SLAPP law as defined in Section 12(k) of said Act;
- (2) for the preparation, filing or maintenance of any claim dismissed by the court pursuant to Section 5 of the Citizen Participation in Government and Society Act of 2009 or to any State anti-SLAPP law as defined in Section 12(k) of said Act, or any request for discovery quashed pursuant to Section 7 of said Act, and for any related legal activity, including opposition to a special motion to dismiss or special motion to quash, or to proceedings for fees or costs, or to collection of those amounts; provided that this section shall not apply to claims dismissed voluntarily or by the court for any other reason. For purposes of this section, dismissed claims finally restored on appeal or by writ shall not be considered dismissed;
- (3) for the unsuccessful defense of any SLAPPback, or any other claim arising from a SLAPP that has been dismissed pursuant to a special motion to dismiss under the Citizen Participation in Government and Society Act of 2009 or any State anti-SLAPP law as defined in Section 12(k) of said Act, and for any related legal activity; provided that, if some SLAPPback claims are successfully defended and others are not, this section applies only to those unsuccessfully defended. For purposes of this section, “unsuccessful defense” does not include settlement, even if such settlement is reduced to judgment.

SEC. 10. BANKRUPTCY NON-DISCHARGABILITY OF SLAPP AND SLAPPBACK AWARDS.

(a) Title 11, Section 523 (a) of the United States Code shall be amended by adding at the end the following:

- (20) For fees, costs or damages awarded against a party by a court for the prosecution of any claim finally dismissed pursuant to Section 5 of the Citizen Participation in Government and Society Act of 2009 or any State anti-SLAPP law as defined in Section 12(k) of said Act, or for any subpoena or discovery order or request quashed pursuant to Section 7 of said Act.

(b) Title 11, Section 1328 (a)(2) of the United States Code shall be amended to read:

“of the kind specified in section 507 (a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), (9), (20) or (21) of section 523 (a).”

SEC. 11. EXEMPTIONS.

- (a) Sections 4 through 10 of this Act shall not apply to any claim brought by the Attorney General, any State attorney general, or any district, city or county attorney, acting as a public prosecutor to enforce laws aimed at public protection.
- (b) Sections 4 through 6 of this Act shall not apply to any SLAPPback or other claim arising from a claim that has been dismissed pursuant to a special motion to dismiss under this Act or pursuant to any State anti-SLAPP law.
- (c) Sections 4 through 10 of this Act shall not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:
 - (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subsection;
 - (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons;
 - (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.
- (d) Sections 4 through 10 of this Act shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, including insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:
 - (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
 - (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, notwithstanding that the conduct or statement concerns an important public issue.
- (e) Subsections (c) and (d) of this Section shall not apply to:
 - (1) Any person engaged in the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing of news or information that concerns local, national, or international events or other matters of public interest, for dissemination to the public, or any person engaged in the dissemination of ideas or expression in any book, academic journal or documentary;
 - (2) Any claim for relief against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including a motion picture or television program, or an article published in a newspaper or magazine of general circulation;
 - (3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.
- (f) Denial of a special motion to dismiss on the grounds that the claim is exempt pursuant to this Section is not subject to the appeal provision in Section 5(g) of this Act.

SEC. 12. DEFINITIONS.

In this Act —

- (a) “Act in furtherance” refers to any act or alleged act in furtherance.
- (b) “Claim” includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.
- (c) “Defendant” means any person against whom a claim is filed that arises from an act in furtherance of the person's constitutional right of petition or free speech.
- (d) “Government” includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a State, or subdivision of a State or other public authority.
- (e) “Government entity” includes a branch, department, agency, State, or subdivision of a State or other public authority.
- (f) “Issue of public interest” includes any information or opinion related to health or safety; environmental, economic or community well-being; the government; a public figure; or a good, product or service in the marketplace.
- (g) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity.
- (h) “Personally identifying information” means first and last name or last name only; home or other physical address including temporary shelter or housing and including a street name or ZIP Code; electronic mail address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's electronic mail address; telephone number; social security number; date of birth, with the exception of the year of birth; Internet protocol address or host name that identifies an individual; or any other information, including the first and last names of children and relatives, racial or ethnic background, or religious affiliation, that, in combination with any other non-personally identifying information, would serve to identify any individual.
- (i) “Plaintiff” means any person on whose behalf is filed a claim that arises from another person’s act in furtherance of the constitutional right of petition or free speech.
- (j) “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States.
- (k) “State anti-SLAPP law” includes ARIZ. REV. STAT. §§ 12-751 – 12-752; ARK. CODE ANN. §§16-63-501 – 16-63-508; CAL. CIV. PROC. CODE § 425.16; DEL. CODE ANN. tit. 10, §§ 8136 - 8138; FLA. STAT. § 768.295; GA. CODE ANN. § 9-11-11.1; GUAM CODE ANN. tit. 7 § 17101 - 17109; HAW. REV. STAT. § 634F-1 – 634F-4; 735 ILL. COMP. STAT. 110/1 – 110/99; IND. CODE § 34-7-7-1 *et seq.*; LA. CODE CIV. PROC. ANN. art. 971; ME. REV. STAT. ANN. tit. 14 § 556; MD. CODE ANN. CTS. & JUD. PROC. § 5-807; MASS. GEN. LAWS ANN. ch. 231 § 59H; MINN. STAT. §§ 554.01 – 554.05; MO. REV. STAT. § 537.528; NEB. REV. STAT. §§25-21,241 – 25-21,246 (1994); NEV. REV. STAT. §§ 41.635 – 41.670 (1993); N.M. STAT. §§ 38-2-9.1 – 38-2-9.2; N.Y. C.P.L.R. 70-a & 76-a; N.Y.C.P.L.R. 3211; OKLA. STAT. tit. 12, § 1443.1; OR. REV. STAT. §§ 31.150 *et seq.*; 27 PA. CON. STAT. § 7707 & §§ 8301 - 8303; R.I. GEN. LAWS §§ 9-33-1 – 9-33-4; TENN. CODE ANN. §§ 4-21-1001 -21-1004; UTAH CODE ANN. §§ 78-58-101 – 78-58-105; WASH. REV. CODE §§ 4.24.500- 4.24.520; doctrine enunciated in *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1368-69 (Colo. 1984); *Harris v. Adkins*, 432 S.E.2d 549 (W.Va. 1993); and any other state legislation or doctrine seeking to protect SLAPP defendants.

SEC. 13. CONSTRUCTION.

This Act shall be liberally construed to effectuate its findings and purposes fully.

SEC. 14. RELATIONSHIP TO OTHER LAWS.

Nothing in this Act shall preempt or supersede any state, constitutional, case or common law that provides the equivalent or greater protection for persons engaging in activities in furtherance of their right of petition or free speech.

SEC. 15. SEVERABILITY.

If any provision of this Act or the application of any provision of this Act to any person or circumstance is held invalid, the application of such provision to other persons or circumstances and the remainder of this Act shall not be affected thereby.

SEC. 16. EFFECTIVE DATE.

This Act shall become effective immediately.