STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN SUPPORT OF SENATE BILL 237

Before the House Civil Justice Committee
Representative Brett Hillyer, Chair

Chairman Hillyer, Vice Chair Mathews, Ranking Member Isaacsohn, and members of the House Civil Justice Committee, thank you for the opportunity to present testimony in support of Senate Bill 237, which would adopt the anti-SLAPP statute known as the Unform Public Expression Protection Act (or "UPEPA").

My name is Jeffrey Nye. I have been working on anti-SLAPP issues since 2012. As a private-practice attorney in Cincinnati, I've represented the occasional defamation plaintiff, but my relevant experience is mainly in representing non-institutional defendants in defamation cases (often pro bono). I speak or present periodically on SLAPPs and anti-SLAPP issues at meetings and conferences, and I first started working with Ohio legislators on anti-SLAPP bills in 2014. I helped draft two prior anti-SLAPP bills that were introduced in the Senate: SB 206 in the 132nd General Assembly (2017) and SB 215 in the 133rd General Assembly (2019).

A "SLAPP"—short for "strategic lawsuit against public participation"—is a meritless lawsuit that is designed to suppress constitutionally protected speech. A SLAPP plaintiff has not suffered any legally compensable injury and seeks no actual redress from the defendant. The true goals of a SLAPP are to punish speakers for their exercising their constitutional rights and to intimidate or chill other people from engaging in similar conduct, by forcing the SLAPP defendant to endure litigation that is expensive, lengthy, invasive, and often embarrassing. The purpose of an anti-SLAPP bill like UPEPA is to give courts and litigants the tools to fight these abusive lawsuits.

Ohio desperately needs an anti-SLAPP statute.

Here is a sampling of things that people have been sued for in Ohio in recent years: asserting that someone "should be ashamed of" themselves; leaving a "neutral" rating on eBay, together with a review that said only "Order retracted"; reposting the plaintiff's tweets on a blog; calling someone "greedy"; leaving a review online that said, accurately, that an item purchased had arrived with $1.40 postage due; a college student reporting sexual harassment by a guest speaker; and more.

None of these were meritorious claims, but each case involved at least dozens, (and often hundreds) of hours of attorney defense time, and took months or years to reach a conclusion. None of the defendants in these cases could have afforded to mount full-blown defenses if they had to pay for them. All of them were fortunate to have found counsel willing to represent them on a pro bono or low-bono basis. (I represented some of these defendants on that basis, and while I'm

HEADQUARTERS
1700 Lake Shore Drive
Columbus, Ohio 43204

MAILING ADDRESS
P.O. Box 16562
Columbus, Ohio 43216-6562

PHONE
(614) 487-2050
(800) 282-6556

FAX & WEB
(614) 487-1008
www.ohiobar.org

fortunate to have been in position to do so, the defendants' ability to vindicate their constitutional rights should not turn on whether they can find that kind of representation.) All these defendants would have benefitted tremendously from an anti-SLAPP statute in Ohio.

Since the first anti-SLAPP statute was adopted in the 1990s, some two thirds of American jurisdictions have enacted one. Nine of those jurisdictions have enacted UPEPA. That includes two states that have adopted UPEPA since SB 237 was introduced earlier this year. Of our five neighboring states, two (Kentucky and Pennsylvania) have enacted UPEPA, and two more (West Virginia and Michigan) have UPEPA bills pending in their legislatures. Ohio is lagging behind its sister states. It's time for us to catch up and join the twenty-first century.

One of the great ironies of Ohio's lack of an anti-SLAPP statute is that the Ohio Constitution contains some of the best speech protections in the country. The Ohio Supreme Court has made it clear time and again that our Constitution offers protection beyond even that of the First Amendment. But without a good anti-SLAPP law, it's difficult or impossible for Ohioans to take advantage of the protections they already have under the Ohio Constitution. I can tell you from personal experience as counsel for defendants in these cases that SLAPP plaintiffs will seek out reasons to file their case in Ohio, even when it has no real connection the state, because the absence of an anti-SLAPP statute makes it a favorable forum for their frivolous litigation.

The problem is that current law and current practice are structured such that the question of whether a statement is constitutionally protected generally will come only at the end of the litigation, after months or years of fighting. Some institutional media companies can endure that kind of litigation, but few other companies, and even fewer individuals, have that level of resources. The result very often is that the speaker will retract (or, these days, delete) their statement instead of asserting and protecting their rights.

When that happens, everyone loses. Not only has the speaker who was sued been wrongly silenced, but other people also don't get to hear what they had to say; and everyone is dissuaded from issuing commentary or leveling criticism in the future— even when it's factually true, and even when it's a matter of opinion about important issues of public concern—because they do not want to be sued.

A good anti-SLAPP statute has four essential components. First, it must put the legal question of whether a statement is constitutionally protected at the beginning of the case, rather than the end of the case. Second, it must stay the litigation while the court considers that question, so the defendant is not put to the expense and harassment of the lawsuit. Third, if the court determines that the statement is constitutionally protected, the defendant must receive a mandatory award of attorney's fees and costs. And fourth, the statute must provide an immediate right of appeal.

UPEPA does all those things. It permits the defendant, by motion, to raise the constitutional question within sixty days of being served with the claim (see lines 111- 117) and requires the court to decide the motion quickly (see lines 152-160 and 184-185). It stays discovery while that motion is being considered (see lines 118-123), subject to limited exceptions based on necessity (see lines 134-139). It provides for a mandatory award of attorney's fees and costs if a defendant prevails on the motion (see lines 199- 202). And it provides for an immediate right of appeal if the motion is denied (see lines 211-216).

One thing UPEPA does not do is change defamation law. The First Amendment and the Ohio Constitution already provide the determinative principles in these cases. Claims that are meritorious today will still be meritorious after the adoption of UPEPA. What UPEPA does is give litigants the right to have constitutional questions decided swiftly.

I sometimes hear the objection that anti-SLAPP laws impermissibly regulate court procedures, which are in the exclusive purview of the Ohio Supreme Court. That is not accurate. Ohio law clearly permits the General Assembly to pass laws that require courts to act promptly to protect constitutional rights. For instance, Ohioans have a constitutional right to just compensation if their property is taken through eminent domain. That right is statutorily protected by R.C. 163.09, which requires a jury to assess compensation within twenty days. Ohioans have a constitutional right to speedy criminal trial. That right is statutorily protected by R.C. 2945.71, which requires trial within 270 days. Ohioans have a constitutional right to raise and parent their children, and if the State tries to take them away based on allegations of abuse, they are statutorily entitled by R.C. 2151.35 to have that claim determined within ninety days.

UPEPA would be no different—it is a statutory mechanism for the enforcement of a constitutional right.

UPEPA is not perfect. As a practitioner in this space there are several amendments that I would like to see. But I understand the realities of lawmaking—and the calendar—and so I would urge you to adopt two amendments in particular at this time.

First, and most importantly, the bill should be amended to clarify that the act creates a "substantive immunity from suit" under Ohio law, rather than merely immunity from liability. This is essential because under current doctrine this amendment would allow the law to apply to cases in federal courts in Ohio. Without this amendment, Ohioans sued in federal courts would not have the important protections that this law provides. (The more complete explanation is that federal courts apply state substantive laws, but disregard state laws that they consider to be procedural. Some federal courts have concluded that some anti-SLAPP laws are procedural, so unscrupulous plaintiffs try to avoid the law by filing their case in federal court. This amendment would close that potential loophole.) The specific amendment I am proposing would be to insert the following language after line 110 of the bill: "(D) The general assembly, in enacting this chapter, intends to confer substantive immunity from suit, and not merely immunity from liability, for any cause of action described in division (B) of this section."

Second, the attorney's fees provision should be strengthened by clarifying that a court must not fail to award fees on the ground that a lawyer defended the claim on a contingent or pro bono basis. It is a common tactic of SLAPP plaintiffs to argue that a lawyer defending their meritless suit agreed to do so on a pro bono basis, and so even though the statute provides for a mandatory award of attorney's fees and costs, the amount of the award should be $0. (I have personally experienced this argument in my defense of SLAPP defendants.) It is essential that courts not reduce fees or award no fees. The best way to reduce the prevalence of SLAPPs is to ensure that more lawyers are willing to defend against SLAPPs. The best way to ensure that more lawyers are willing to defend against SLAPPs is to ensure that lawyers can get paid for their successful defenses—even if they would have done the work pro bono. The specific amendment I am proposing is to insert

the following language in line 202, after "party": "The court shall not fail to award, or reduce an award of, attorney's fees, court costs, and other reasonable litigation expenses under this division on the grounds that the representation of the moving party was undertaken on a pro bono or contingent basis."

There are certainly other amendments I would like to see, but those can be adopted later. For example, the law should require that allegedly defamatory statements be quoted verbatim in the complaint. (SLAPP plaintiffs frequently try to obscure the weakness of their claims by being cagey about the basis for them; I have sometimes litigated these cases for months before learning what the case is even about.) The law should establish a mechanism to protect anonymous speech online. (The true purpose of a significant portion of SLAPP litigation to unmask an anonymous online critic. Anonymous speech is constitutionally protected, and anonymous speakers should not be unmasked without a showing that a plaintiff's claim has merit.) The law should permit Ohioans who have been victimized by SLAPPs in other states to sue for damages in Ohio. (This would help combat "libel tourism," whereby Ohioans are haled into faraway courts to defend meritless claims.)

There are other things that could be improved, too—and I would be happy to discuss them with you—but I urge you to adopt UPEPA (and these proposed amendments) to help protect Ohioans' constitutional rights.

Thank you for the opportunity to submit testimony in support of Senate Bill 237. I would be happy to answer any questions you may have.