

Statement on HB 2054 — Public speech protection act.

Date: January 29, 2015

To: House Judiciary Committee,
c/o Rep. John Barker, Chair
Kansas Legislature

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As a faculty member at the KU School of Law, I teach classes and engage in research related to freedom of speech as guaranteed by the First Amendment to the U.S. Constitution. I also take into account Section 11 of the Kansas Bill of Rights, where it says “all persons may freely speak, write or publish their sentiments on all subjects.” Because of my work, I have read, with great interest, HB 2054 — Public speech protection act. I respectfully offer my personal views below regarding the bill. These views, being entirely my own, are not representative of the law school or KU on this matter or any other.

HB 2054 is a highly commendable initiative, because it aims to protect Kansas citizens from strategic lawsuits against public participation (SLAPP). Such lawsuits lack merit and have no purpose except to stifle criticism on issues of interest to the public. The suits generally are brought by well-funded individuals or entities against critics who lack the means to defend themselves. Because the critics cannot afford to litigate in defense of their freedom of speech, they suffer defeat in court and fall silent to avoid further, unaffordable legal action.

The misuse of legal proceedings to suppress speech is a widely recognized problem, and so is the solution, which is Anti-SLAPP statutes like the one proposed by HB 2054. According to one count, 28 states so far have enacted Anti-SLAPP laws, along with the District of Columbia and the U.S. territory of Guam.¹

A noteworthy strength of HB 2054 is its definition of expression. As Section 1.(a)(2) says: “‘Expression’ means any oral, written or electronic statement or document made in furtherance of the exercise of the constitutional right to free speech or right to petition the government for redress of grievances.” Because expression at issue in SLAPP cases often may be in the form of digital transmissions, a desirable change in the definition might be to substitute a broader term, “communication,” for the words “statement or document.” Nonetheless, as it stands, the definition clearly encompasses the kind of expressive activity that SLAPP plaintiffs seek to

stifle. In Section 1.(b), HB 2054 indicates that a person's expression, as defined in Section 1.(a)(2), generally would be protected from SLAPP actions. Section 1.(b) provides protection against "any claim based on an action involving participation and petition."

However, Section 1.(b) also includes wording that warrants further consideration. Section 1.(b) specifies that HB 2054 protects expression on government-related matters. It does not address expression that is unrelated to government but that concerns a public issue. HB 2054 ideally would be strengthened by specifying the full range of circumstances in which its protection would apply.

An Anti-SLAPP law may protect expression, not only on a matter that involves the government, but also on an issue that arises in the private sector without reference to government. Published comment by public officials on a local ballot measure would be expression on a matter involving government. An Anti-SLAPP law could protect the officials from litigation that lacks merit and is intended to deter them from expressing themselves.² In contrast, published comment by an attorney in private practice about a manufacturer's allegedly defective product would constitute expression on a non-governmental matter and yet be of interest to consumers and the general public. An Anti-SLAPP law could protect the attorney from a groundless legal complaint brought by the manufacturer to squelch public criticism of its product.³

As now worded, Section 1.(b) might be construed as limiting protection to individuals who express criticism on matters in which government is directly engaged. The limitation might be inferred from these lines in Section 1.(b).: "An action involving public participation and petition includes any expression: (1) In a government proceeding, public forum or place open to the public; and (2) regarding an issue, finding, determination, ruling, interpretation, law, rule, policy, program, activity or contract that was or is being considered, enacted, decided, executed or administered by the *government*." (Emphasis added.)

If HB 2054 is to be specific about protecting speech on government-related matters, it ideally also would be specific about protecting speech on issues grounded in the private sector and that are of concern to the public. SLAPP cases filed by one private party to suppress public criticism by another are common. As has been noted, "The paradigm case is a real estate developer filing a defamation or tortious interference suit against a citizen who has spoken out publicly against a proposed development project."⁴

To be sure, the definition of "expression" in Section 1.(a)(2) is not limited. The definition appears to embrace expression on public issues that do not involve government, especially if read in conjunction with Section 1.(1), which requires that the act be "construed liberally to effectuate its general purposes."

Still, in Section 1.(b), HB 2054 should make clear the full scope of its speech protection. For example, the bill could define "an action involving public participation and petition" to include any expression "in connection with a public issue or an issue of public interest."⁵ If HB 2054 were to include such a provision, the bill undoubtedly would protect speakers against the classic kind of SLAPP action, which is illustrated by a well-publicized case in 2004. In that case, a couple were dissatisfied with a company that had installed siding on their house. The couple

established a Web site for the purpose of voicing frustration with the siding company. In response, the company sued the couple, claiming trademark infringement and libel. The couple feared that they would be unable to defend themselves and suffer a devastating loss in court. They were saved only when a public interest law firm stepped in to represent them. The law firm asserted that the siding company's claims were without merit, and the case eventually was dismissed.⁶

In Section 1.(c) through (k), HB 2054 sets forth procedures within the range of Anti-SLAPP approaches that are considered effective.⁷ Like existing Anti-SLAPP laws in other jurisdictions, HB 2054 aims to expedite a judicial decision on whether a plaintiff has brought an action to punish one who speaks out on a public issue. In an Anti-SLAPP law, as one study reported, a SLAPP action "must be specifically defined; the right of free speech and right to petition must be broadly and lawfully protected in order to facilitate multi-platform public participation in representative democracy. A threshold burden of proof should remove suits that lack a likelihood of success on their merits."⁸

An Anti-SLAPP law such as that proposed by HB 2054 is worthy of enactment, as it would facilitate the free flow of information and ideas and encourage citizen engagement. It would remove the chilling prospect of meritless legal actions designed to suppress public discourse.

¹ *State Law: SLAPPs*, Digital Media Law Project, Berkman Center for Internet Law & Society, Harvard University, <http://www.dmlp.org/legal-guide/state-law-slapps>.

² See, e.g., *Vargas v. City of Salinas*, 205 P.3d 207 (Calif. Sup. Ct., 2009).

³ See, e.g., *Simpson Strong-Tie Co., Inc. v. Gore*, 230 P.3d 1117 (Calif. Sup. Ct., 2010).

⁴ Eric David, *A Brief Overview of Anti-SLAPP Statutes*, The Newsroom Law Blog (January 15, 2009), <http://www.newsroomlawblog.com/2009/01/articles/antislapp-statutes/a-brief-overview-of-antislapp-statutes/>.

⁵ See Samantha Brown and Mark Goldowitz, *The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA*, RECIEL 19 (1) 2010. ISSN 0962 8797, Section 4. Scope of Procedural Protections, p. 5,

http://www.campaignfreedom.org/doclib/20110615_Brown2010PublicParticipationAct.pdf; see also *Public Participation Protection Act*, American Legislative Exchange Council, <http://www.alec.org/model-legislation/public-participation-protection-act/>.

⁶ See *Alvis Coating v. Townsend*, Public Citizen, <http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=128>; see also Charles Odum, *Complaints posted on Web site spark lawsuit*, Associated Press / USA Today (November 5, 2004), http://usatoday30.usatoday.com/tech/news/techpolicy/2004-11-05-complaints-site-suit_x.htm.

⁷ See *The Power of Procedure Under Anti-SLAPP Laws*, Law 360, <http://www.law360.com/articles/174337/the-power-of-procedure-under-anti-slapp-laws>.

⁸ Annie Booton, *Taking the Gloves Off: Rationale for an Anti-SLAPP Statute in Kansas*, Media Law Clinic (on file), University of Kansas School of Law (2011), p. 47.