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To: Rep. John Barker, chairman House Judiciary Committee, and of the members of the committee

From: Maxwell Kautsch, attorney at law, Kautsch Law, LLC

RE: Anti-SLAPP legislation, HB 2054

Chairman Barker and members of the committee:

As one who is interested in freedom of expression, I have read HB 2054 and hereby respectfully offer my personal opinion with the hope that it might be helpful to the committee. The adoption of HB 2054, if it includes an amendment allowing for protection of speech directed at private companies and individuals as well as the government, would establish welcome and necessary protections for those who would otherwise be victims of Strategic Litigation Against Public Participation, or SLAPPs. SLAPPs are legal efforts designed to curtail or suppress the speech of individuals or the media. For example, in 2003, a Missouri man was sued by a trash disposal company after he spoke at a public hearing opposing a change in company policy. The trash company sued the man for defamation. Although the lawsuit was eventually dismissed, the costs of litigation were still borne by the defendant. To protect individuals such as the man who spoke at the public hearing against the trash disposal company, Missouri responded by passing its anti-SLAPP legislation in 2004, and along with Nebraska and Colorado, are three of about 30 states to have anti-SLAPP laws. Other examples of SLAPPs might be a religious organization suing a former member of the church for defamation in response to a comment on the religious organization's website, or a doctor suing a patient for defamation after the patient speaks to a news organization about treatment he or she received.

Unfortunately, and although much of the bill includes language that would serve the public policy goals of anti-SLAPP legislation, the current version of HB 2054 would likely not protect the individuals in the above examples because it is too limited in scope. Although subsection (b) provides that this bill applies to "any claim based on an action involving participating and petition," which includes "any expression in a government proceeding, public forum, or place open to the public," the protections set forth throughout the remainder of the bill would apply only if the claim involved 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). While it is helpful to ensure statutory protection against SLAPP

suits filed by government officials or contractors in response to criticism by constituents, the vast majority of SLAPP litigation involves private companies and individuals. Without an appropriate amendment, HB 2054 would be rendered meaningless in the exact circumstances in which anti-SLAPP legislation was designed to be utilized.

However, in all other respects, HB 2054 should be adopted because it is in line with the public policy goals of anti-SLAPP legislation, including establishing of a framework for facilitating prompt resolution of SLAPP cases, providing an immediate right to appeal, and requiring appropriate reimbursement of costs and fees. Subsection (c) provides protection prior to suit ever being filed, as it requires any attorney bringing a claim “in a civil action against a person that arises from that person’s expression” to verify the claim prior to filing. The requirement establishes a reasonable barrier to SLAPP litigation from the outset. Further, prior to resolving the case on its merits, subsection (f) requires the plaintiff to show *prima facie* evidence that he or she is likely to prevail on the claim if the defendant is first able to show that the suit itself is based on an “action involving public participation.” Pursuant to subsection (j), if the plaintiff is unable to meet that burden, or if the court determines that the case was not filed in good faith under subsection (c), the case is dismissed, costs and fees are assessed against the plaintiff, and the defendant has the option to pursue additional remedies, including punitive damages. Further, subsection (i) provides a statutory mechanism for appellate review.

In conclusion, HB 2054 meets many of the public policy goals of anti-SLAPP legislation. However, without allowing for protection for those who express themselves in opposition to private companies or individuals, the bill will not serve its purpose.