No. 111443

IN THE SUPREME COURT OF ILLINOIS

STEVE SANDHOLM,

Plaintiff-Appellant,

v.

RICHARD KUEKER, ARDIS KUECKER, GLEN HUGHES, MICHAEL VENIER, AL KNICKREHM, TIM OLIVER, DAN BURKE, DAVID DEETS, MARY MAHAN-DEATHERAGE, NRG MEDIA, LLC, a limited liability company, GREG DEATHERAGE, ROBERT SHOMAKER, and NEIL PETERSEN,

Defendants-Appellees.

Appeal from The Second District Appellate Court, No 2-09-1015.
There Heard on Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Lee County, Illinois, No 08 L 19, The Honorable David L. Jeffrey, Judge Presiding.

BRIEF OF *AMICI CURIAE*

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, THE ILLINOIS PRESS ASSOCIATION, THE ILLINOIS BROADCASTERS ASSOCIATION, AND THE PUBLIC PARTICIPATION PROJECT

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POINTS AND AUTHORITIES

INTERESTS OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") of Illinois is a statewide, nonprofit, nonpartisan organization with 20,000 members and supporters dedicated to the principles of liberty and equality embodied in the United States and Illinois Constitutions and civil rights laws. The ACLU of Illinois has a long history of protecting individual rights, including freedoms of speech, association, and petition. Among other things, the ACLU of Illinois actively advocated for the passage of the Illinois Citizen Participation Act of 2007. *See* 735 ILCS 110 *et. seq.* (West 2008).

Both the Illinois Press Association ("IPA") and the Illinois Broadcasters Association ("IBA") are press organizations dedicated to promoting and protecting the First Amendment interests of the press and citizens before the Illinois legislature and Illinois courts. The IPA is the largest state press organization in the United States that includes nearly all of the newspapers in Illinois. The IBA is a statewide organization of broadcast companies whose reports are disseminated throughout Illinois and the surrounding states.

The Public Participation Project is based in Washington D.C. As a public interest organization, the Public Participation Project works to enact legislation to protect citizens from SLAPP lawsuits throughout the states as well as in the United States Congress.

The *Amici* have submitted this brief to assist the Court in understanding how the CPA protects the ability of citizens and organizations to exercise their right of free speech, association, and governmental participation.

INTRODUCTION

An informed electorate is vital to the democratic process. The ability of ordinary citizens to openly communicate with the electorate and with government officials in order to influence public and governmental debate must be safeguarded. Unfortunately, such speech often is threatened by retaliatory litigation brought against these speakers by the subjects of their speech. Such suits inhibit the ability of speakers to continue their advocacy on a matter of public concern by diverting their scarce resources into costly and time-consuming litigation. The threat of such suits deters other speakers from expressing their views on matters of public concern. These suits often are called Strategic Lawsuits Against Public Participation, or "SLAPPs."

In 2007, Illinois responded to this growing problem by enacting the Citizen Participation Act (the "CPA" or the "Act"), which grants a conditional immunity to individuals and organizations speaking in pursuit of government action from SLAPPs such as the lawsuit now before this Court. *See* 735 ILCS 110 *et seq.*[1] In doing so, Illinois joined a growing a number of states that have enacted specific legislation to protect the First Amendment right to free speech as it relates to the process of government.[2] The Illinois CPA provides that any claim that is "based on, relates to, or is

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[1] As explained in the Act itself, "[t]here has been a disturbing increase in lawsuits termed 'Strategic Lawsuits Against Public Participation' in government or 'SLAPPs' as they are popularly called." 735 ILCS 110/5.

[2] At least 26 other states have enacted Anti-SLAPP legislation: Ariz. Rev. Stat. Ann. §§ 12-751 to 12-752, Ark. Code Ann. §§ 16-63-501 to -508; Cal. Civ. Proc. Code §§ 425.16-18; Del. Code Ann. tit. 10, §§ 8136-8138; Fla. Stat. Ann. § 768.295; Ga. Code Ann. § 9-11-11.1; Haw. Rev. Stat. Ann. §§ 634F-1 to -4; Ind. Code Ann. § 34-7-7-1 to -10; 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. Ann. § 554.01-.05; Mo. Ann. Stat. § 537.528; Neb. Rev. Stat. §§ 25-21,241 to -21,246; Nev. Rev. Stat. Ann.

in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government . . . are immune from liability. . . *regardless of intent or purpose*, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15 (emphasis added). The Act places the burden on a plaintiff to provide "clear and convincing evidence" that the defendants' expression falls outside the Act's protection. *See* 735 ILCS 110/20(c).

The CPA is now under attack by SLAPP plaintiffs who, like the Plaintiff here, seek to severely limit its laudable policy objectives or nullify its protections all together. The interest of the *Amici* emanate from their collective concern for protecting the public's right to petition the government that is embodied in the CPA.

ARGUMENT

I. THE PURPOSE OF THE CPA IS TO PROTECT ASSOCIATION AND PETITIONING.

A. Prior to the CPA, Unchecked SLAPP Suits Significantly Burdened Citizens' Ability to Petition the Government.

Prior to the enactment of the CPA, people who engaged in petitioning speech by such methods as leafleting, picketing, and writing letters to the media and government officials were frequently subjected to retaliatory litigation. For example, citizen residents who petitioned local government to stop construction projects repeatedly were sued by the developers. For instance, in *Tamarack Development LLC v. Schultz*, No. 03 LA 235

§§ 41.650-.670; N.M. Stat. Ann. §§ 38-2-9.1 to -9.2; N.Y. Civ. Rights Law §§ 70-a, 76-a; N.Y. C.P.L.R. 3211(g), 3212(h); Okl. Stat. Ann. tit. 12, § 1443.1; Or. Rev. Stat. Ann. §§ 31.150-.155; 27 Pa. Cons. Stat. Ann. §§ 7707, 8301-05; R.I. Gen. Laws §§ 9-33-1 to -4; Tenn. Code Ann. §§ 4-21-1001 to -1004; Utah Code Ann. §§ 78B-6-1401 to -1405; Vt. Stat. Ann. tit. 12, § 1041; Wash. Rev. Code Ann. §§ 4.24.500-.520.

(Cir. Ct. McHenry County, 2003), a developer proposed to annex land into the Village of Richmond. Residents opposed this proposal, and one resident ran for Village Trustee on a campaign of opposition to the annexation. The developer responded by filing a SLAPP suit against the resident regarding his public criticisms of the annexation. The lawsuit was eventually dismissed, but only after three rounds of legal briefing regarding three successive complaints. The *Tamarack* court also denied the defendants' request that the developer pay the $300,000 in legal fees that they had incurred in defending their right to seek public support for governmental action.

Other examples of SLAPPS against citizens opposing development plans abound throughout Illinois prior to the enactment of the CPA. *See, e.g.,* John Etheredge, *Slander, Libel Lawsuit over Oswego Project Dismissed*, Ledger-Sentinel, Sept. 6, 2007 (developer brought defamation suit against residents who opposed shopping center construction by means of a letter to government officials); Jason King, *Board Member Sued for Remarks Developer Says Publication Defamed His Company*, Chicago Daily Herald, Feb. 12, 2005, at 3 (developer brought defamation suit against citizen group that opposed development by means of leaflets); Hugh Dellios, *Builder's Suit Puts Clamp on Picketing Homeowners*, Chicago Tribune, Apr. 4, 1990, at D1 (developer sued homeowners who protested the poor quality of construction of their homes by means of picketing); *Adreani v. Hansen*, 80 Ill. App. 3d 726, 729–31, 400 N.E.2d 679, 682-83 (1st Dist. 1980) (developer brought defamation suit against residents who criticized the developer's conduct by means of a letter to a newspaper). *See also Meyer v. McKeown*, 266 Ill. App. 3d 324, 324, 641 N.E.2d 1212, 1212 (3d Dist. 1994) (developer brought defamation suit against elected official who criticized the developer's conduct by means of a constituent

newsletter). *See generally* George Pring & Penelope Canan, SLAPPS: Getting Sued for Speaking Out, 30-40 (1996) (describing developer SLAPP suits in other states).

Prior to the enactment of the CPA, other kinds of SLAPPs in Illinois discouraged free speech seeking favorable government action. For example, citizens who petitioned government for protection from improper conduct by government employees repeatedly were subject to retaliatory litigation brought by those employees. *See, e.g., Myers v. Levy*, 348 Ill. App. 3d 906, 909 808 N.E.2d 1139, 1143 (2d Dist. 2004) (parents petitioned a school board by means of a petition and a letter regarding a coach's conduct, and were sued by the coach for defamation); *Stevens v. Tillman*, 855 F.2d 394, 395 (7th Cir. 1988) (a parent petitioned a school by means of handbills and pickets regarding a principal's effectiveness, and was sued by the principal for defamation). *See also* Tim Poor, *Free Speech Fight Leaves Victor Drained*, St. Louis Post-Dispatch, Sept. 20, 1992, at 1B (reporting on a case where a parent raised concerns about the school board after a board meeting, and was sued by two board members).

SLAPPs often have the purpose and effect of tying the speaker up in court, and thereby inhibiting the speaker's ability to participate in the ongoing public policy debate that spawned the suit. While most citizens ultimately prevail on the merits against such SLAPP suits, they are nonetheless forced to shoulder the substantial burden, expense, and distraction of years of litigation. *E.g., Kirchoff v. Curran*, No. 90-MR-190 (20th Judicial Cir., St. Clair County) (years of SLAPP litigation, including a motion for summary judgment, in response to a parent's criticism of school board officials to the press after a board meeting); *Philip I. Mappa Interests, Ltd. v. Kendle,* 196 Ill. App. 3d 703, 705, 554 N.E.2d 1008, 1009 (1st Dist. 1990) (years of SLAPP litigation, including two motions to

dismiss and an appeal, in responses to a resident's lawsuit challenging a developer's plans); *King v. Levin*, 184 Ill. App. 3d 557, 558, 540 N.E.2d 492, 493 (1st Dist. 1989) (years of litigation, including a five-day trial and an appeal, in response to a resident's threat to sue a state agency if it supported a development plan).

B. The CPA Reflects the Legislature's Policy Determination That Petitioning is in the Public Interest.

The Illinois legislature enacted the CPA in response to this growth of SLAPP suits that burdened citizens' right to petition the government. As the CPA explains:

> The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.

735 ILCS 110/5. The CPA further explains that its purpose is to "encourage[] and safeguard[] with great diligence" "the constitutional rights of citizens and organizations to be involved and participate freely in the process of government," and to "encourage public participation in government to the maximum extent permitted by law." *Id.* Also, the CPA affirms that "reports . . . provided by citizens are vital to . . . the making of public policy and decisions, and the continuation of representative democracy." *Id.*

As Plaintiff points out (Pl.'s Opening Brief ("Br.") at 27), the CPA aims "to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government." 735 ILCS 110/5. But Plaintiff misunderstands this statutory language when he argues that the Appellate Court's decision "fails to strike any balance" between these interests. (Br. at 27-31.) Rather, by enacting the CPA, the legislature has ***already conducted*** the necessary balancing. Specifically, the CPA creates a conditional

immunity for petitioning speech to protect it from the grave and imminent danger of retaliatory litigation. If the plaintiff can prove by clear and convincing evidence that the defendant's petitioning speech was "not genuinely aimed at procuring favorable government action," then the CPA allows the suit to proceed. 735 ILCS 110/15; *id.* at 20(c). Some plaintiffs will satisfy this standard. But if the plaintiff cannot satisfy this standard, then the CPA requires prompt dismissal of the suit.

This conditional immunity is necessary to ensure that SLAPPs do not undermine the quality and legitimacy of government decision making by chilling and deterring citizen participation in government. The CPA's grant of conditional immunity comprises the legislature's measured balancing of the competing interests. *Cf. Mich. Ave. Nat'l Bank v. County of Cook*, 191 Ill. 2d 493, 519-20, 732 N.E.2d 528, 543 (2000) (explaining that the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 *et seq.*, is "an exercise by the General Assembly of its broad power to determine whether a statute that restricts or alters an existing remedy is reasonably necessary to promote the general welfare").

II. THE CPA IS A MEASURED ADJUSTMENT OF EXISTING ILLINOIS JURISPRUDENCE.

Plaintiff characterizes the CPA as a "radical departure from the common law," one that "create[s] a whole new area of tort immunity in defamation and employment torts against public employees." (Br. at 26.) However, a review of Illinois case law and history demonstrates that the Act only modestly and properly expands existing legal immunities.

A. Immunities For Petitioning Activities are Well-Established.

Petitioning is already immune from various private causes of action, unless the plaintiff can prove that it was a "sham" not genuinely aimed at procuring favorable government action. This conditional immunity originated in antitrust law. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-80 (1990) (discussing *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) and *UMW v. Pennington*, 381 U.S. 657, 670 (1965)). This constitutional protection of petitioning is sometimes referred to as "the *Noerr-Pennington* doctrine," after these two leading cases.

This constitutional doctrine has been extended beyond its origins in antitrust law to the common law tort of interference with a business relationship. *Havoco of Am., Ltd. v. Hollowbow,* 702 F.2d 643, 649-51 (7th Cir. 1983); *Nat'l Org. for Women, Inc. v. Scheidler*, No. 86 C 78888, 1997 WL.610782, at *28-29 (N.D. Ill. Sept. 23,1997). It has also been expanded to the claim that a private party unlawfully conspired with the government to violate the U.S. Constitution. *Stahelin v. Forest Preserve District of DuPage County*, 376 Ill. App. 3d 765, 775-77, 877 N.E.2d 1121, 1132-33 (2d Dist. 2007); *Aida Food, Inc. v. City of Chicago*, No. 03 C 4341, 2004 WL 719663, at *8 (N.D. Ill. March 31, 2004); *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 524-26 (N.D. Ill. 1990).

This doctrine immunizes a party who petitions "through improper means," so long as he "genuinely seeks to achieve his government result." *City of Columbia*, 499 U.S. at 380. This standard ensures that courts are not forced to act as arbiters of truth and legitimate argument in the often heated debate of politics. *Id.* at 382 (holding that this

conditional immunity ensures that the courts are not required to "regulat[e] . . . the political process" and "[p]olic[e] the legitimate boundaries" of petitioning activities).

As demonstrated by the CPA's text and its legislative history,[3] the Illinois CPA adopted the *Noerr-Pennington* standard for petitioning speech that seeks a favorable government outcome. 735 ILCS 110/15 (allowing a suit against petitioning speech to proceed only if the plaintiff can prove it was "not genuinely aimed at procuring favorable government action").

B. Immunities From Defamation Actions Are Well-Established.

Likewise, speech in various contexts is ***already*** absolutely immune from the common law tort of defamation – even if the speaker acted with malice, *i.e.*, knew or should have known that their statement was false. For example, a defamation suit cannot be brought against an ordinary citizen who makes a statement during and related to a legislative proceeding. *Krueger v. Lewis*, 359 Ill. App. 3d 515, 523-24, 834 N.E.2d 457, 465-66 (1st Dist. 2005); *Stevens v. Porr*, No. 1-04-0491, 2005 WL 3743514, at *2-3 (1st Dist. March 31, 2005); *Joseph v. Collis*, 272 Ill. App. 3d 200, 210-11, 649 N.E.2d 964, 972 (2d Dist. 1995); *see also* Restatement (Second) of Torts § 590A. This absolute immunity even extends to unsworn and unsolicited citizen statements, such as the shouted accusation from an audience member at a hearing that a legislator supported a bill because he was taking bribes. *Krueger*, 359 Ill. App. 3d at 524, 834 N.E.2d at 466.

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[3] *See* 95th Ill. Gen. Assembly, House Debates, May 31, 2007, at 1 (statement during floor debate by Rep. Franks, a sponsor of the Illinois Citizen Participation Act, that the Act "codifies the standard" from *City of Columbia* "when dealing with citizen participation lawsuits").

Absolute immunity from defamation liability also extends to a number of other arenas, including the following:

- ***speech during judicial and quasi-judicial proceedings***, *Edelman v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 165-66, 788 N.E.2d 740, 748-49 (1st Dist. 2003) (communications to a bankruptcy trustee); *Hartlep v. Torres*, 324 Ill. App. 3d 817, 819-20, 756 N.E.2d 371, 373-74 (1st Dist. 2001) (statements to a village disciplinary committee); *Bushell v. Caterpillar, Inc.*, 291 Ill. App. 3d 559, 562-63, 683 N.E.2d 1286, 1288 (3d Dist. 1997) (statements during labor arbitration); *Defend v. Lascelles*, 149 Ill. App. 3d 630, 633-34, 500 N.E.2d 712, 714-15 (4th Dist. 1986) (legal pleadings); *Thomas v. Petrulis*, 125 Ill. App. 3d 415, 423-24, 465 N.E.2d 1059, 1064-65 (2nd Dist. 1984) (claims filed with the EEOC); *see also* Restatement (Second) of Torts §§ 586-88 (1977);
- ***speech required by law***, *Anderson v. Beach*, 386 Ill. App. 3d 246, 249, 897 N.E.2d 361, 365-66 (1st Dist. 2008) (police officer's speech in compliance with duty to report police misconduct); *Busch v. Bates*, 323 Ill. App. 3d 823, 833-34, 753 N.E.2d 1184, 1192-93 (5th Dist. 2001) (same); *Weber v. Cueto*, 209 Ill. App. 3d 936, 947, 568 N.E.2d 513, 520 (5th Dist. 1991) (attorney's speech in compliance with duty to report attorney misconduct); *see also* Restatement (Second) of Torts § 592A; and
- ***the accurate re-publication of speech during an open public meeting***, *Solaia Tech., LLC v. Specialty Publ'g. Co.*, 221 Ill. 2d 558, 587, 852 N.E.2d 825, 843 (2006); *see also* Restatement (Second) of Torts § 611.

These absolute immunities, long recognized in Illinois, ensure that government policy is made only after the decision-makers have heard the broadest array of facts and

opinions from all interested citizens. *See Krueger*, 359 Ill. App. 3d at 522, 834 N.E.2d at 464 ("[A]bsolute privilege in this context ensures that decision makers will be more fully informed to enact suitable legislation. . . . by ensuring that citizens will be allowed to speak freely and without fear that their participation in this democratic process will result in a lawsuit."). *See also Edelman*, 338 Ill. App. 3d at 165-66, 788 N.E.2d at 749; *Bushell*, 291 Ill. App. 3d at 561, 683 N.E.2d at 1287; *Muck v. Van Bibber*, 251 Ill. App. 3d 240, 243, 621 N.E.2d 1043, 1046 (4th Dist. 1993); *Defend*, 149 Ill. App. 3d at 634, 500 N.E.2d at 715 ("[I]t is uniformly recognized that the judicial system would be best served if persons with knowledge of relevant facts could report those facts to the court without fear of civil liability") (internal citations omitted). As demonstrated by these previously existing protections, Illinois has long protected the ability of the public to participate in the process of government in an unfettered way. Moreover, the CPA and these pre-CPA absolute immunities advance the same government interest. In the words of the CPA, "information" and "arguments" provided by ordinary citizens are "vital" to "the making of public policy and decisions." 735 ILCS 110/5.

In cases involving these pre-CPA absolute immunities, courts repeatedly have held that these critical benefits to the body politic justify absolute immunity from defamation litigation, even where the speaker acted with malice. *Bushell*, 291 Ill. App. 3d at 561, 683 N.E.2d at 1287 ("Absolute privilege provides complete immunity from civil action, even though the statements are made with malice, because public policy favors the free and unhindered flow of information."); *Defend*, 149 Ill. App. 3d at 635-36, 500 N.E.2d at 715-16. *See also Solaia*, 221 Ill. 2d at 587, 852 N.E.2d at 843; *Anderson*,

386 Ill. App. 3d at 249, 897 N.E.2d at 365-66; *Busch*, 323 Ill. App. 3d at 833, 753 N.E.2d at 1192; *Weber*, 209 Ill. App. 3d at 942, 568 N.E.2d at 516.

The CPA simply closes a gap in the protections provided by this constellation of pre-CPA immunities. Before the CPA, these immunities would have protected a citizen's statement during an official legislative or judicial proceeding—but not her identical statement five minutes later on the sidewalk outside, during a follow-up conversation with a legislator, a journalist, or a fellow citizen. Thus, the CPA is ***not*** a "radical departure" from Illinois common law. (*Cf.* Br. at 26.) Rather, the CPA is a measured and appropriate adjustment of pre-CPA protections, fully in-line with Illinois jurisprudence.

The Supreme Court decisions that Plaintiff cites (Br. at 17) do not suggest otherwise. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), the Court found that certain statements in a newspaper article did not constitute protected opinion. And in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court established a constitutional floor for protection of speech, to wit, the requirement of malice in defamation suits directed at speech about government officials. These cases have no bearing on the interpretation or constitutionality of statutes like the Illinois CPA that provide a conditional immunity from defamation claims that is comparable to both the *Noerr-Pennington* doctrine and the pre-CPA absolute immunities at Illinois common law.

III. THE CPA COMPORTS WITH STATUTES IN OTHER STATES THAT PROVIDE BROAD PROTECTION FOR PETITIONING SPEECH.

A. Other States' Anti-SLAPP Acts Contain Similarly Broad Protections.

At least three jurisdictions have adopted anti-SLAPP statutes that provide conditional immunities for petitioning speech from retaliatory litigation that are comparable to the protections afforded by the Illinois CPA.

Under Rhode Island's anti-SLAPP statute, a party's exercise of his or her right of petition or free speech in connection with a matter of public concern is "conditionally immune from civil claims, counterclaims, or cross-claims . . . except if the petition or free speech constitutes a sham." R.I. Gen. Laws § 9-33-2(a). Pursuant to this statute, a "[p]etition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result or outcome, regardless of ultimate motive or purpose." *Id.* This statute further explains that a "sham" exists only if a petition is both:

> (1) objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring such government action, result, or outcome, and
>
> (2) subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.

Id. The purpose of Rhode Island's conditional immunity is to encourage public participation in the governmental processes.[4]

[4] *See* R.I. Gen. Laws § 9-33-1 ("The legislature finds and declares that full participation by persons and organizations and robust discussion of issues of public concern before the legislative, judicial, and administrative bodies and in other public fora are essential to the democratic process, that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; [and] that such litigation is disfavored . . . .").

The Rhode Island courts have broadly interpreted the conditional immunity created by the Rhode Island anti-SLAPP statute. *See, e.g., Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 752-54 (R.I. 2004) (conditional immunity for letter to editor of local newspaper criticizing government committee planning school building); *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1211-12 (R.I. 2000) (conditional immunity for statements by residents to media concerning conditions at nearby recycling facility, seeking "to spark or spur governmental action"); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 63-64 (R.I. 1996) (conditional immunity for written statements to government officials regarding conditions at landfill).[5]

The core provision of the Illinois CPA is very similar to the foregoing provision of the Rhode Island anti-SLAPP statute. *See* 735 ILCS 110/15 (providing conditional immunity for petitioning speech, "regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action"). As in Illinois, the Rhode Island statute codifies the *Noerr-Pennington* standard. Indeed, the ACLU of Illinois' legislative memoranda to the Governor and legislative leaders advocating passage of the Illinois CPA emphasized its similarity to the Rhode Island anti-SLAPP statute. *See* Memorandum from the ACLU to Governor Rod Blagojevich (June 18, 2007), and ACLU Memorandum to Michael Madigan, Speaker of the Illinois General Assembly, In Support

[5] Notably, this Court has previously relied upon the *Alves* and *Global Waste Recycling, Inc.* courts' interpretation of the Rhode Island anti-SLAPP act. *See Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 636, 939 N.E.2d 389, 398 (2010).

of Senate Bill 168 ("The Citizen Participation Act") (October 7, 2004) (hereafter referred to as "ACLU Legislative Memos").[6]

The Guam anti-SLAPP statute is even more similar to the Illinois CPA. *See* Guam Code, Title 7, §§ 17104 & 17106(e) (creating a conditional immunity for petitioning speech, "regardless of intent or purpose," unless the plaintiff can prove by clear and convincing evidence that it was "not aimed at procuring any government or electoral action, result or outcome").

The Maine anti-SLAPP statute also provides a broad conditional immunity that is comparable to the one provided by the Illinois CPA. Specifically, the plaintiff cannot proceed on their suit unless they can prove that the defendant's "exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law," and also that the petitioning "caused actual injury" to the plaintiff. *See* Me. Rev. Stat. tit. 14, § 556 (defining "the right to petition" to include "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; [or] any statement reasonably likely to enlist public participation in an effort to effect such consideration," including citizen letters to newspapers). *See, e.g., Schelling v. Lindell*, 942 A.2d 1226, 1230-31 (Me. 2008) (holding that the Maine anti-SLAPP statute protects a letter to the editor seeking reconsideration of a legislative action).

Finally, the anti-SLAPP statutes in these three jurisdictions and many others provide procedural safeguards comparable to the ones provided by the Illinois CPA.

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[6] The former memo is available at http://aclu-il.org/legislative/alerts/sb1434memo.pdf. The latter memorandum is attached hereto as Exhibit 1.

These include a stay of discovery,[7] and fee-shifting against the unsuccessful plaintiff and towards the successful defendant.[8]

B. California's Anti-SLAPP Act Affords Different Protections Than The CPA.

Dissatisfied with the Illinois legislature's policy choice, as codified in the Act, Plaintiff proffers several policy arguments, relying heavily on California's anti-SLAPP statute. (Br. at 18-19.) This reliance is misplaced. California's law is markedly different than Illinois', applying to a narrower set of circumstances and involving a different analytical framework to conditionally immunize tortious conduct. *See Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 122, 938 N.E.2d 542, 552–53 (2d Dist. 2010) (discussing restrictions in California's anti-SLAPP law which are not present in Illinois law).

In addition, Plaintiff asks this Court to narrow or even invalidate the Illinois CPA because California's experience has indicated, according to Plaintiff, a "disturbing abuse" of the anti-SLAPP statute to procedurally dismiss claims before their merits can be analyzed fully. (Br. at 19.) Plaintiff points to California's 2003 amendment to its anti-SLAPP statutory regime. However, while the Illinois legislature in 2007 could have enacted a narrower anti-SLAPP statute like California's, it instead chose to enact broader protection for participants in the political and governmental process, like those in Rhode Island.

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[7] *Compare* 735 ILCS 110/20(b) *with* Ark. Code Ann. § 16-63-507(a)(1); Ga. Code Ann. § 9-11-11.1(d); Nev. Rev. Stat. Ann.§ 41.660(3)(b); Md. Code Ann., Cts. & Jud. Proc. § 5-807(d)(2); Me. Rev. Stat. tit 14, § 556; and R.I. Gen. Laws § 9-33-2(b).

[8] *Compare* 735 ILCS 110/25 *with* Ariz. Rev. Stat. Ann. § 12-752(D); Fla. Stat. Ann. § 768.295(5); Del. Code Ann. tit. 10, § 8138(a); Me. Rev. Stat. tit. 14 § 556; Neb. Rev. Stat. § 25-21,243(1); 27 Pa. Cons. Stat. Ann. § 7707; R.I. Gen. Laws § 9-33-2(d); and Wash. Rev. Code Ann. § 4.24.510.

IV. THE CPA IS CONSISTENT WITH THE UNITED STATES AND ILLINOIS CONSTITUTIONS.

A. Immunities That Foreclose Certain Causes of Action Are Not Unconstitutional.

Contrary to Plaintiff's arguments (Br. at 32-34), neither the First Amendment to the U.S. Constitution nor Article I, § 12 of the Illinois Constitution guarantees a remedy for an individual who has been purportedly defamed. The tort of defamation is a creature of common law (or legislative) origin, not a "fundamental liberty interest" protected by the federal constitution. *See Paul v. Davis*, 424 U.S. 693, 711-12 (1976) (holding that defamation of one's character, by itself, is not a violation of the federal constitution).

Accordingly, as discussed previously, and as the Appellate Court noted below, *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 942 N.E.2d 544, 558-59 (2d Dist. 2010), certain common law and statutory privileges may operate to make even *per se* defamatory statements non-actionable. Such privileges do not violate the Illinois constitution, *e.g.*, *Defend*, 149 Ill. App. 3d at 643, 500 N.E.2d 712 at 721 ("We therefore reject the defendants' argument that granting an absolute privilege . . . offends the Illinois Constitution. . . ."), nor do they violate the First Amendment, *Carson v. Block*, 790 F.2d 562, 566 (7th Cir. 1986) (stating that "[l]ibel and slander are not violations of the constitution," and collecting cases establishing absolute immunity even in spite of "malicious libel").

Moreover, the Illinois legislature has the inherent power to modify the common law by altering, amending, or even abolishing certain rights. *Michigan Ave. Nat'l Bank v. County of Cook*, 191 Ill. 2d 493, 519, 732 N.E.2d 528, 543 (2000) (holding that the "legislature has the inherent authority to repeal or change the common law and may do

away with all or part of it"); *accord Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986) ("There is no fundamental right to particular state-law tort claims."). In acting to amend or restrict common law remedies, the Illinois legislature operates under the general principles that guide all state statutory enactments: the legislation must be constitutional and must be rationally related to a legitimate government interest. *See Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 406-07, 689 N.E.2d 1057, 1077 (1997); *People v. Gersch*, 135 Ill. 2d 384, 395-96, 553 N.E.2d 281, 286–87 (1990).

Here, the CPA—irrespective of whether it confers a qualified immunity, or, as Plaintiff erroneously contends, absolute immunity—is a valid exercise of the Illinois legislature's power to modify the common law defamation tort. Indeed, if it were not, then all of the other well-established immunities, *see supra* Part II(B), would be rendered unconstitutional as well. Plaintiff makes no attempt to claim that the Act, and the appellate court's interpretation extending immunity to Defendants for their purportedly defamatory statements and publications, is not rationally related to furthering the state's interest in protecting and encouraging Defendants' participation in government by petitioning for government action in response to a state employee's conduct.

Plaintiff contends that his reputational interests are more important than Defendants' rights to petition and participate in government policy-making. (*See* Br. at 17.) Plaintiff is mistaken. Defendants' rights protected by the Act are entitled to constitutional protection, but Plaintiff's allegedly damaged reputation is not. It is settled law that libel and slander are not violations of the Illinois or United States Constitutions. *See Paul*, 424 U.S. at 711–712; *Carson*, 790 F.2d at 566; *Bushell*, 291 Ill. App. 3d at 561, 683 N.E.2d at 1287 ("[A]bsolute privilege rests on the idea that conduct which otherwise

would be actionable is permitted to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.") (internal citations omitted.) Nor, as Plaintiff contends (Br. at 16-17), does the Supreme Court's decision in *McDonald v. Smith*, 472 U.S. 479, 485 (1985), which held that the Petition Clause ***did not require*** states to implement an absolute privilege for petitioners' speech, ***prevent*** the Illinois legislature from expanding the petitioners' privilege from liability for defamation.

By enacting the CPA, the Illinois General Assembly has balanced and calibrated both the general public's interest in petitioning speech that seeks favorable government action, and the reputational interests of people who are the subjects of such speech. Specifically, the CPA creates a conditional immunity—not an absolute immunity—that allows defamation litigation against petitioning speech to proceed, if the speech was not "genuinely aimed" at procuring favorable governmental action. *See* 735 ILCS 110/15. Illinois courts recognize that the legislature has the inherent power to balance various interests and implement reasonable changes to common law rights. *See Michigan Ave. Nat'l Bank*, 191 Ill.2d at 519, 732 N.E.2d at 543; *Best*, 179 Ill. 2d at 406-07, 689 N.E.2d at 1077.

Plaintiff relies heavily on *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975), a case unrelated to immunity and government petitioning, for his argument that the protection of one's reputation is paramount. (*See* Br. at 33.) In fact, the *Troman* court specifically stated: "Our holding in the present case is, of course, ***not intended to remove any of the absolute or qualified privileges*** which have heretofore been recognized in this State to the extent that the facts may warrant their application." 62 Ill. 2d at 198, 340

N.E.2d at 299 (emphasis added). Accordingly, it is erroneous to suggest that *Troman* somehow trumps the application of a privilege now recognized by the legislature.

Similarly, Plaintiff's reliance on *Myers v. Levy*, 348 Ill. App. 3d 906, 808 N.E.2d 1139 (2d Dist. 2004), is misguided. In the *Myers* case, a group of parents successfully petitioned public school officials regarding their dissatisfaction with a coach. The parents sent a letter to the school board alleging that the coach showed little or no concern for players' injuries and sought his removal as head coach. 348 Ill. App. 3d at 910, 808 N.E.2d at 1144. The coach then sued for defamation. The Second District reversed the award of summary judgment in favor of the defendant, finding that a question of fact remained as to whether the defendant had acted with actual malice or recklessness, 348 Ill. App. 3d at 920, 808 N.E.2d at 1152, which led to lengthy, expensive discovery on remand. Decided prior to the passage of the CPA, *Myers* was actually one of the cases that spurred its enactment. *See supra* ACLU Legislative Memos.

B. Other States' Anti-SLAPP Acts Have Withstood Similar Constitutional Attacks.

Plaintiff does not cite to a single case in which an anti-SLAPP Act was found to be unconstitutional—because there are none. As the Minnesota Court of Appeals recently noted in *Nexus v. Swift*, "we do not find[] any authority holding any of these [anti-SLAPP] statutes unconstitutional. Rather, the anti-SLAPP statutes that have been challenged have been upheld." 785 N.W.2d 771, 778-79 (Minn. Ct. App. 2010). *See also Hometown Props, Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996) (rejecting all of defendant's seven arguments for finding that the Rhode Island anti-SLAPP statute was unconstitutional); *Guam Greyhound, Inc. v. Brizill*, No. CVA07-021, 2008 WL 4206682,

at *5-6 (Sup. Ct. Guam Sept. 11, 2008) ("Even though [Guam's anti-SLAPP statute] could in certain situations limit objectively reasonable defamation claims by declaring certain qualifying acts 'immune from liability,' it is well within the Legislature's power to subject such claims to qualifications, limitations, or defenses.") (citation omitted); *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46, 52 (Ct. App. 1st Dist. 1995) (rejecting equal protection and due process constitutional challenges to California's anti-SLAPP law).

Also erroneous is Plaintiff's assertion that "constitutional right to remedy provisions have been used to find Anti-SLAPP statutes unconstitutional in other states," to which he cites *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935 (Mass. 1998). (Br. at 37.) The *Duracraft* court did ***not*** find the anti-SLAPP statute unconstitutional. Rather, the court found that the anti-SLAPP statute did not apply to the breach of contract claims at issue there. *Id.* at 941. In construing its state's anti-SLAPP statute, the Massachusetts Supreme Court explained that "[t]he special movant who 'asserts' protection for its petitioning activities would have to make a threshold showing through the pleadings and affidavits that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Id.* at 943. Similarly, the Appellate Court here adopted a two-step analysis to determine whether Defendants' speech was objectively and subjectively aimed at procuring government action before granting them qualified immunity under the CPA. *Sandholm*, 405 Ill. App. 3d 835, 942 N.E.2d at 568-69. Plaintiff also cites *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So.2d 562 (Fla. Dist. Ct. App. 1993), as supporting his access to courts argument. (Br. at 35.) This case is clearly

distinguishable. In 1993, Florida had not adopted an anti-SLAPP statute and the case was decided in favor of following prior state precedent rather than extending the *Noerr-Pennington* doctrine to defamation and tort actions. *Id.* at 566-69. Unlike here, the court's analysis was not governed by a legislative act which expressly abrogated common law defamation remedies and which pronounced the interests it sought to protect. Thus, Plaintiff has not, and cannot, point to any authorities that question the constitutionality of anti-SLAPP statutes like the CPA.

V. THE CPA WAS CORRECTLY APPLIED IN THIS CASE.

A. The Parents' Comments Are Quintessential Petitioning Activity That Should Be Immune Under The CPA.

Here, the statute quite plainly applies to the parent Defendants' comments made on the internet and on a radio broadcast, both before ***and*** after these parents petitioned the Dixon High School principal, School Board, and Superintendent urging the removal of the Plaintiff from his position as the school's Athletic Director and head basketball coach.

Keucker's first letter, entitled "Hostages in the Gym," was posted online on March 9, 2008, in advance of the Board of Education meeting. The letter stated, "It is time for change. I call upon the Principal [Mr. Grady], the Superintendent [Mr. Brown], and the Board of Education to act. . . . Demonstrate to the student body and our community that [Sandholm's] bullying is excessive and will not be tolerated."[9]

A second posting, on March 10, 2008, urged: "Everyone should call Mr. Grady, Mr. Brown, or the Board to let them know how you feel . . . They need input before they can act." *Id.* That posting also urged, "If you have not called Mr. Grady, please do so.

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[9] *See* Northern Illinois Sports Beat Forum, http://nisbforums.proboards.com/index.cgi?board=about&action=display&thread=1144&page=1 (last visited May 11, 2011).

Let him know your thoughts. . . . Now is the time to express ourselves. . . . If you agree with this request please express this by being present at the next Board of Education meeting on Wednesday, March 19th . . . at 7:30 p.m. . . . at the Business Office, 1335 Franklin Grove Rd, Dixon." *Id.*

The parents' subsequent speech on the radio program criticized the School Board's decision to reject their formal, direct petition, and instead retain Sandholm. Almost a month after the radio broadcast, the School Board met again and decided to remove Sandholm as Athletic Director, while retaining him as head basketball coach. (Br. at A50-51.)

As the Appellate Court explained, "in plaintiff's own words in his complaint, the statements alleged all surrounded defendants' 'campaign to have [plaintiff] removed as basketball coach and athletic director'. . . . After a school board meeting that did not end in a favorable result for defendants, ***defendants sought to gain more support*** through a Web site and speaking publicly. ***This is part of the process of influencing the government to make a decision in a petitioner's favor.***" *Sandholm*, 405 Ill. App. 3d 835, 942 N.E.2d at 569 (emphasis added).

Thus, the Defendants' speech in this case quite clearly satisfies the statutory definition of speech "*in furtherance of* the moving party's rights to petition . . . or to *otherwise* participate *in government*." 735 ILCS 110/15 (emphasis added); *see also Wright Development Group, LLC*, 238 Ill. 2d at 636, 939 N.E.2d at 398.

B. The Media Defendants Are Also Protected By The CPA.

The Act specifically protects not just statements made directly to the government, but also statements made to the electorate that seek to affect government decision

making. *See* 735 ILCS 110/10 (defining "Government" to include "a branch, department, agency, instrumentality, official, employee, agent . . . a state, a subdivision of a state, or another public authority ***including the electorate***.") (emphasis added).

As such, there can be no debate that the media Defendants also are protected by the statute, as the press is an important constitutionally-protected vehicle for citizens to appeal to their fellow citizens to support governmental action. *See, e.g., E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-41 (1961) ("[A] publicity campaign to influence governmental action falls clearly into the category of [First Amendment protected] political activity"); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 158-160 (3rd Cir. 1988) (holding that publicity campaign seeking governmental action against nursing home, including letters to CBS News and 60 Minutes, were protected as petitioning activities "endemic to a democratic government").

Finding that members of the press are protected by the CPA is sound public policy, given the vital role that the media plays in reaching the electorate. As the Rhode Island Supreme Court explained:

> [P]ublic complaints to newspaper reporters is a frequently used method for members of a community to affect local matters of interest or concern. Members of the public and residents of neighborhoods often use the news media as a forum for communicating their concerns to whatever governmental authorities may have an interest in or power over the matter at hand. This method is frequently successful in achieving a response from local town administrators to governors, to legislators to presidents. Concerning the American experience, it's undoubtedly realistic to expect some success in securing a governmental response when this method is utilized.

Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208, 1211-12; *see also Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 754 (R.I. 2004) (letter to a newspaper was a

"prototypical example" of free speech in a public forum on issue of public concern); *Maietta Constr., Inc. v. Wainwright*, 847 A.2d 1169, 1173 (Me. 2004) (statements to newspapers advocating government action "clearly amount to petitioning activity" that is protected).

This Court also has acknowledged the media's role in assisting citizens in engaging in petitioning activity. In *Wright Development Group, LLC,* 238 Ill. 2d at 639, 939 N.E.2d at 400, this Court held that the CPA "clearly applies to [a citizen's] statement to a reporter made during a public forum concerning proposed legislation . . . ." *See also Sandholm*, 405 Ill. App. 3d 835, 942 N.E.2d at 569 (explaining that Defendants NRG and Knickrehm "participated in the process by providing a forum for defendant to speak about their position").

The *Sandholm* trial court's application of the Act was appropriate. The speech in this case was unquestionably directed to spurring other citizens in the community to come forward, and to persuade the school board and Superintendent to reconsider their prior rejection of the citizens' petition. That is, the disputed speech sought *to continue the process* of procuring favorable governmental action. Yet Defendants find themselves in the midst of a retaliatory, time-consuming lawsuit—precisely what the Generally Assembly sought to quell with the enactment of the CPA. The Appellate Court therefore correctly affirmed the trial court's decision that the Act provided immunity to the claims alleged by Plaintiff.

CONCLUSION

For the reasons stated herein, the American Civil Liberties Union of Illinois, Illinois Press Association, Illinois Broadcasters Association, and the Public Participation Project respectfully request that this Court affirm the Appellate Court's ruling that (1) the CPA provides immunity to the claims alleged by Plaintiff, and (2) the CPA is constitutional.

Dated: May 11, 2011

Respectfully submitted,

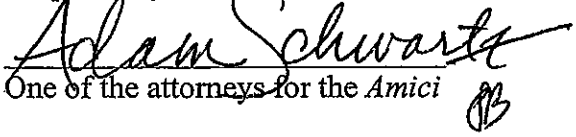

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EXHIBIT 1

American Civil Liberties Union of Illinois
Legislative Office
P.O. Box 506
New Lenox, IL 60451
(815) 462-5997

TO: Michael Madigan, Speaker of the Illinois General Assembly

FROM: Mary Dixon, Legislative Director of the ACLU of Illinois
Adam Schwartz, Senior Staff Counsel of the ACLU of Illinois

CC: Rob Uhe, Chief Counsel to the Speaker

DATE: October 7, 2004

RE: In Support of Senate Bill 168 ("The Citizen Participation Act")

The right to petition the government for redress of grievances is expressly protected by the United States and Illinois Constitutions. See U.S. Const. amend. I; Ill. Const. art I, § 5. Indeed, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." Eastern Rail Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961).

Unfortunately, numerous civil actions for money damages have been filed in Illinois against citizens and organizations solely because of their valid attempts to petition the government, including residents who opposed development plans in their neighborhoods, and parents who criticized school officials. These are called "SLAPP" suits – that is, "Strategic Litigation Against Public Participation." The nominal charges in SLAPP suits include defamation and interference with contractual relations, but the real objective is "to silence criticism." Westfield Partners Ltd. v. Hogan, 740 F.Supp. 523, 525 (N.D. Ill. 1990). While the citizen-defendants usually prevail in court, defense against SLAPP suits is often time consuming and expensive, and thereby can prevent the citizen-defendants from engaging in further efforts to petition the government. Moreover, the threat of SLAPP suits often chills and diminishes citizen participation in the democratic process.

The solution is anti-SLAPP legislation. The Illinois Senate already voted 59-0 in favor of the anti-SLAPP bill (S.B. 168) now pending before the Illinois House.

Part I of this memorandum illustrates the harms caused by SLAPP suits in Illinois, and demonstrates the need to limit and expeditiously resolve these abusive suits. Part II

explains how Senate Bill 168 would provide this relief. Finally, Parts III and IV demonstrate, respectively, that the SLAPP problem is not solved by Illinois' existing "absolute privilege" doctrine, and that the proposed law would not violate Illinois' "separation of powers" doctrine.

I. The problem: unchecked SLAPP suits in Illinois.

Unchecked SLAPP suits have caused significant harms here in Illinois – harms which could have been avoided by anti-SLAPP legislation. For example:

- In 2003, a developer proposed to annex land into the Village of Richmond. Dan Deters and other residents opposed this proposal, and ran for Village Trustee on a campaign of opposition to the annexation. The developer responded by filing a SLAPP suit against Deters regarding his public criticisms of the annexation. This frivolous case was eventually dismissed, but only after three rounds of legal briefing regarding three successive legal complaints. The court denied Mr. Deters' request that the developer pay the $30,000 in legal fees that he and a co-defendant had incurred. (For further information about this SLAPP suit, please call Mr. Deters, at (815) 678-4831.)

- A developer proposed to build a multi-unit building in Chicago's Lincoln Park neighborhood. The Park West Community Association ("PWCA"), a non-profit neighborhood group, opposed this plan. The PWCA successfully petitioned their alderman and the city council to "downzone" the area and thereby block the plan. In 2002, the developer responded by filing a SLAPP suit against the PWCA and one of its members, seeking hundreds of thousands of dollars in damages. This frivolous case was eventually dismissed, but only after extensive briefing before the circuit court and the appellate court. Both courts denied the PWCA's request that the developer pay their legal fees. (For further information about this SLAPP suit, please call the PWCA's attorney, Don E. Glickman, at (312) 346-1080.)

As explained in greater detail in Part II, had Senate Bill 168 been law in 2002, the suit against Mr. Deters and the suit against the PWCA would have been resolved within three months at the latest in the lower court. Any appeal would have been considered by the appellate court on an expedited basis. Since both defendants could prove the suits concerned acts in furtherance of their constitutional right to petition government that were aimed at procuring favorable government action, motions to dismiss filed by Deters and the PWCA would have been granted and fees would be assessed against the plaintiffs.

In numerous other Illinois cases, SLAPP victims who lacked the protection of anti-SLAPP legislation ultimately prevailed in court, but only after the burden, expense, and distraction of years of litigation. See, e.g., Kirchoff v. Curran, No. 90-MR-190 (20th Judicial Circuit, St. Clair County) (years of SLAPP litigation, including a motion for summary judgment, in response to a parent's criticism of school board officials to the press after a board meeting); Philip I. Mappa Interests, Ltd. v. Kendle, 554 N.E.2d 1008

(Ill. App. Ct. 1st Dist. 1990) (years of SLAPP litigation, including two motions to dismiss and an appeal, in response to a resident's lawsuit challenging a developer's plans); King v. Levin, 540 N.E.2d 492 (Ill. App. Ct. 1st Dist. 1989) (years of litigation, including a five-day trial and an appeal, in response to a resident's threat to sue a state agency if it supported a development plan); Havoco of America, Ltd., 702 F.2d 643 (7th Cir. 1983) (years of litigation, including summary judgment and an appeal, in response to a business complaint filed with a federal regulatory agency).

II. The solution: enactment of Senate Bill 168.

Senate Bill 168 contains critical measures necessary to stop SLAPP suits in Illinois from burdening the right to petition the government.

A. Conditional immunity.

Senate Bill 168 provides: "Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." See S.B. 168 at § 15. Rhode Island's anti-SLAPP statute provides similar protection to citizen-defendants. See R.I. Statutes § 9-33-2(a) (providing "conditional[] immun[ity]" for petitioning "in connection with a matter of public concern," with the sole exception of "sham" petitioning "not genuinely aimed at procuring favorable government action").[1]

This would codify the standard set forth in the leading Supreme Court decision regarding the right to petition, which holds in the context of anti-trust litigation that the petitioner-defendant's subjective intent is not legally relevant, except for the "sham" circumstance in which petitioning the government is not genuinely aimed at a favorable governmental action. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379-84 (1991) (clarifying the Court's Noerr/Pennington line of anti-trust SLAPP decisions). Accord Havoco of America, Ltd. v. Hollobow, 702 F.2d 643, 649 (7th Cir. 1983) (reaching the same conclusion in the context of alleged tortious interference with a business opportunity); Westfield Partners Ltd. v. Hogan, 740 F. Supp. 523 (N.D. Ill. 1990) (reaching the same conclusion in the context of alleged conspiracy with public officials in violation of § 1983). If the citizen-defendant's subjective intent is more broadly at issue, then an abusive SLAPP suit is far more likely to proceed through discovery and on to trial – with all of the resulting expense.

Unfortunately, at least one Illinois court has declined to apply this protective standard to a defamation SLAPP suit, and instead required the case to drag on regarding the citizen-defendant's alleges mental state of malice or recklessness. See Myers v. Levy, 808 N.E.2d 1139, 1150-52 (Ill App. Ct. 2nd Dist. 2004) (after parents successfully petitioned

[1] Rhode Island's statute also provides some of the other anti-SLAPP protection discussed below, including a discovery stay, id. at §9-33-2(b), and fee shifting, id. at § 9-33-2(d).

public school officials regarding their dissatisfaction with a coach, the coach sued the parents for defamation, and the appellate court reversed the award of summary judgment for the parents).[2] Thus, every time a citizen-petitioner criticizes a public official or employee on a matter of public concern, they are subject to a retaliatory defamation action that includes lengthy and expensive discovery and factual adjudication regarding their subjective state of mind at the time of petitioning. Senate Bill 168 would remedy this problem.

Senate Bill 168 also would require the plaintiff in a SLAPP suit to prove by clear and convincing evidence that the citizen-defendant lacks this statutory immunity. See S.B. 168 at § 20(c). Illinois case law presently places the burden of proof in SLAPP cases on the plaintiff. See, e.g., King v. Levin, 540 N.E.2d 492, 495-96 (Ill. App. Ct. 1st Dist. 1989).

B. Expedited resolution.

The bill ensures expedited resolution of whether the citizen-defendant has the conditional immunity described above. Specifically, the circuit court must rule within 90 days on a citizen-defendant's motion to end the suit on grounds of immunity. See S.B. 168 at § 20(a). Moreover, the appellate court must expedite a citizen-defendant's appeal from the denial of such a motion. Id. at § 20(a). Also, discovery is stayed pending resolution of such a motion, unless the plaintiff can show good cause to take discovery regarding immunity. Id. at § 20(b). These measures are necessary to minimize the duration, expense, and other burdens caused by SLAPP suits.

C. Limited fee shifting.

If a citizen-defendant prevails on an immunity motion, the bill requires the plaintiff to pay the defendant for the reasonable attorney fees and costs incurred in connection with the motion. See S.B. 168 at § 25. Otherwise, even if the SLAPP suit is dismissed, it achieves its objective: the unfair imposition of a price tag on the right to petition the government, and the resulting chill on future public participation by all members of the public.

III. The "absolute privilege" doctrine is no substitute for Senate Bill 168.

The "absolute privilege" is an affirmative defense to defamation lawsuits. "In light of the complete immunity provided by an absolute privilege, the classification of absolutely privileged communication is necessarily narrow." Krueger v. Lewis, 794 N.E.2d 970, 974 (Ill. App. Ct. 1st Dist. 2003). The narrow situations where the privilege generally applies in Illinois include: (a) statements made during legislative and judicial proceedings, see, e.g., id.; and (b) statements made pursuant to a legally mandated duty, see, e.g., Weber v. Cueto, 568 N.E.2d 513, 517 (Ill. App. Ct. 5th Dist. 1991).

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[2]Parents sent a letter to the school board alleging that the coach showed little or no concern for players' injuries and sought his removal as head coach.

This privilege will not protect a host of citizens who seek to participate in the democratic process and thereby influence government policy. The following actions associated with petitioning the government are probably unprotected by this privilege: sending a letter to the editor of a newspaper; holding a sign at a demonstration; distributing a leaflet in front of city hall; and speaking to the press after a deliberative meeting of government officials.

IV. Senate Bill 168 does not violate the Illinois "separation of powers" doctrine.

The Illinois Constitution guarantees the separation of powers between the legislative, executive, and judicial branches of government. See Ill. Const. 1970, art. II, § 1. Nonetheless, "the constitutional authority to promulgate procedural rules can be concurrent between the court and the legislature." In re S.G., 677 N.E.2d 920, 928 (Ill. 1997). Indeed, "statutory provisions governing [judicial] procedure are not uncommon." Strukoff v. Strukoff, 389 N.E.2d 1170, 1173 (Ill. 1979). Thus, for example, the Illinois Supreme Court has upheld an Illinois statute that requires judges to hear or dismiss wardship petitions within 90 days of service. S.G., 677 N.E.2d at 930. Illinois courts have upheld a variety of other Illinois statutes creating related judicial procedures. See, e.g., Strukoff, 389 N.E.2d at 1173-74 (upholding a statute requiring judges to bifurcate divorce trials into a grounds section and a division of property section); Davidson v. Davidson, 612 N.E.2d 71 (Ill. App. Ct. 1st Dist. 1993) (upholding a statute requiring judges to give preference in scheduling trials to persons who are 70 or more years old).

The court procedures mandated by Senate Bill 168 easily fall within this body of judicial precedent. For example, the 90-day deadline to dispose of a citizen-defendant's motion to dismiss, see S.B. 168 at § 20(a), is closely analogous to the 90-deadline upheld in S.G.

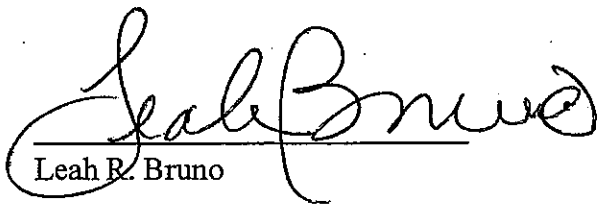
CONCLUSION

For all of these reasons, the ACLU of Illinois urges enactment of Senate Bill 168 to protect the right to petition and limit abusive SLAPP suits.

CERTIFICATE OF COMPLIANCE

I, Leah R. Bruno, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 27 pages.

Date: May 11, 2011



Leah R. Bruno

CERTIFICATE OF SERVICE

Leah R. Bruno, an attorney, certifies that she caused a copy of the Motion of American Civil Liberties Union of Illinois, Illinois Press Association, Illinois Broadcasters Association, and Public Participation Project For Leave to File Amicus Curiae Brief Instanter, the proposed Amicus Curiae brief, and a proposed order to be served upon:

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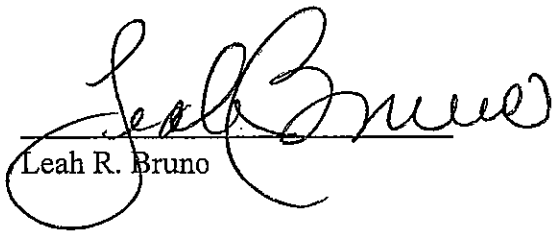
Dixon, IL 61021

by causing a copy to be sent via U.S. Mail, postage pre-paid, on this 11th day of May, 2011.



Leah R. Bruno