Nos. 08-2438 and 09-2180
(consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

SHORELINE TOWERS CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation, *Plaintiff-Appellant*, EDWARD FRISCHHOLZ, as President of the Board of Directors of the Shoreline Towers Condominium Association, an Illinois not-for-profit corporation *Plaintiff*, v. DEBRA GASSMAN, an individual, *Defendant-Appellee*.	Appeal from the Circuit Court of Cook County, Illinois County Department, Chancery Division Circuit Case No. 07 CH 06273 Honorable Kathleen M. Pantle, Judge Presiding Appeal No. 08-2438 Date of Order: March 25, 2008 Post-Trial Order: August 19, 2008 Appeal No. 09-2180 Date of Order: July 30, 2009

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INTEREST OF THE *AMICUS*

For more than ninety years, the Anti-Defamation League ("ADL") has been one of this Nation's leading voices in defending and advancing the fundamental democratic principles of equality, fairness, and justice. ADL's mission, first enunciated in 1913, "is to stop, by appeals to reason and conscience and, if necessary, by appeals to law, the defamation of the Jewish people," with the "ultimate purpose ... to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." *ADL Charter* (October 1913). Today, with a network of thirty regional and satellite offices in the United States and abroad, ADL carries out its mission through education, open dialogue, and public participation at all levels of government. As a premier advocate of civil rights and human relations, ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals, and strives to protect civil rights for all.

Consistent with its mission, ADL encourages and promotes citizen participation to confront discrimination of all kinds. ADL believes that the courageous actions of a single citizen in standing up to bigotry and prejudice can and do make a difference in advancing justice and fair treatment for all. ADL has seen this belief confirmed on countless occasions. Accordingly, ADL has become deeply concerned with the proliferation of Strategic Lawsuits Against Public Participation ("SLAPP suits"), an insidious phenomenon wherein individuals and entities employ private lawsuits as a blunt instrument to intimidate and suppress those who would otherwise challenge unjust conduct. In 2007, Illinois joined a majority of the states when its General Assembly unanimously passed legislation, the Citizen Participation Act, 735 ILCS 110/1 *et seq*., to

protect its residents against such SLAPP suits. The Citizen Participation Act is a valuable tool in preserving the people's rights of petition, speech, association, and government participation against indirect restraint and encroachment, and should be applied vigorously in furtherance of that purpose.

The United States today is home to more than 2,000 different faiths and denominations, and the United States Department of Justice has reported that religious discrimination is "a growing problem." U.S. Dept. of Justice, *Report on Enforcement of Laws Protecting Religious Freedom, Fiscal Years 2001-2006*, at 4. "The attacks of 9/11, and the resulting increase in bias crimes and discrimination against Muslims, as well as Sikhs and others mistakenly perceived to be Muslim, underscored the need for rigorous enforcement of religious civil rights laws." *Id.* From 1997 to 2009, for example, complaints of religious discrimination in employment filed with the United States Equal Employment Opportunity Commission have risen by 198%, from 1,709 to 3,386, and complaints resolved on the merits rose by 220%, from 258 to 568. *See* U.S. EEOC, *Religion-Based Charges FY 1997 - FY 2009* (available at http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm). The Department of Justice has seen corresponding or even more pronounced increases in education discrimination cases involving religion, housing discrimination cases involving religion, and litigation involving issues of religious freedom and discrimination. *Report on Enforcement of Laws Protecting Religious Freedom*, at 5, 17-18.

Faced with a potentially volatile national environment where incidents of religious discrimination are on the rise, there is a pressing need for citizen participation. The resources of the Department of Justice, the EEOC, and other public agencies, no

matter how dedicated, can only reach so far. To confront the blight of religious discrimination and bigotry in its myriad forms will require participatory action by citizens of conscience. In that context, anti-SLAPP statutes like the Citizen Participation Act play an essential role in protecting those who exercise their rights of petition, speech, association, and participation, such that the threat of private litigation does not deter them from taking action to correct a wrong. Accordingly, ADL supports vigorous enforcement of the Citizen Participation Act to shield public participation.

ADL submits this brief as a non-partisan friend of the Court to explore (1) what a SLAPP suit is, with particular attention to the allegations of the present case; (2) the dangers that SLAPP suits pose to citizen participation; and (3) the value of the Citizen Participation Act in confronting such suits.

ARGUMENT

I. The Definition of a "SLAPP Suit" Includes Claims Targeting a Citizen for Exercising Her Rights of Free Expression, Petition, and Association in Furtherance of a Sacred Religious Observance

This appeal is particularly suitable for this Court to consider the application of the Citizen Participation Act, because the claims at issue in this case are well within the scope of what the Illinois General Assembly targeted as "SLAPP suits" when it passed that legislation. Defendant-Appellee Debra Gassman ("Gassman") exercised her rights of free expression, petition, and association in furtherance of a sacred Jewish religious observance--the hanging of a *mezuzah* on the doorposts of her home--with the goal of procuring a favorable government outcome. She was ultimately successful in achieving her goal. In response, Plaintiff-Appellant Shoreline Towers Condominium Association (the "Association") has sued Gassman on various theories, and explicitly alleges her participatory actions as a substantial and material basis for its claims against her. The ADL respectfully submits that the General Assembly unanimously passed the Citizen Participation Act to address precisely this sort of retaliatory lawsuit against an individual who has exercised her constitutional rights in order to prompt governmental action to protect a public good, in this case, the right of religious freedom.

Gassman's participation led the Association to change its rules so that members of the Jewish faith may now exercise their religious observance and display a *mezuzah* on the doorposts of their homes, and further resulted in the adoption of new legal protections for residents throughout the City of Chicago to ensure that others would enjoy that same freedom. If the Association were permitted to pursue its lawsuit in reprisal against Gassman, effectively punishing her for seeking to bring about positive change by subjecting her to the emotional and financial burdens of retaliatory litigation, then not

only would she suffer the ruinous costs of such litigation, but others in her position would likely be chilled from participating in the future. The Citizen Participation Act is the remedy adopted by the people of Illinois to avoid these harsh consequences. A review of its text and history is helpful in understanding how and why the Association's claims against Gassman lie at the core of the General Assembly's anti-SLAPP initiative.

A. Under the Citizen Participation Act, "SLAPP Suits" Encompass All Claims that Target Constitutional Expression and Participation in Pursuit of a Favorable Government Outcome as a Basis for Liability.

The Association's argument that the trial court erred in applying the Citizen Participation Act to its claims against Gassman highlights a common problem in anti-SLAPP litigation. (*See* Pl. Br. at 26-28). Confronted with an action or a motion to dismiss under an anti-SLAPP statute, plaintiffs routinely contend that their particular claims fall outside the definition of a SLAPP suit, and lie beyond the reach of the anti-SLAPP statute's remedial provisions. Here, for example, the Association argues that SLAPP suits are "lawsuits brought to silence public outcry regarding issues of significant public concern," characterizes SLAPP suits as actions brought against "a person or group [who] was using a public forum to voice an opinion regarding a public issue," and suggests that, "[i]t could hardly be argued that [Gassman's] campaign of defamation, tortious interference, harassment, intimidation, and personal attacks, as to the affairs of a private condominium association, and against the members of the Board personally, rises to the level of an ongoing attempt to petition a governmental entity for public redress." (Pl. Br. at 26). The Association further asserts that its Complaint "cannot be characterized or reasonably construed as a SLAPP suit because it was not meant or calculated to quell or stop Defendant from further demonstration or outcry." (*Id.*).

Arguments of this type are not unusual in connection with the application of anti-

SLAPP legislation, as plaintiffs rarely if ever acknowledge that their actions are SLAPP suits. It is part of the nature of SLAPP suits that they "'masquerade as ordinary lawsuits' and thus are not easy to recognize, even by the courts." Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 Loy. L.A. L. Rev. 801, 804 (2000) (*quoting* George Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 8-9 (1989)). Consequently, "[a]sserted SLAPP plaintiffs obviously do not describe themselves as such." Kathleen L. Daerr-Bannon, *Causes of Action: Bringing and Defending Anti-SLAPP Motions to Strike or Dismiss*, 22 Causes of Action 317, § 3 (2007). Both the text and the history of the Citizen Participation Act, however, leave no doubt that a SLAPP suit includes the filing of claims against a citizen in retaliation for her filing of complaints, speaking to the press, and associating with others in order to exercise her right to follow the sacred Jewish observance of hanging a *mezuzah* on the doorposts of her home.

The Citizen Participation Act applies to any claim that "is based on, relates to, or is 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." 735 ILCS 110/15. It places a wall of immunity around the exercise of one's constitutional rights of participation: "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." *Id.* This protection is unqualified; the statute "shall be construed liberally to effectuate its purposes and intent fully." 735 ILCS 110/30(b).

The broad text of the Citizen Participation Act is consistent with its history, which

confirms the General Assembly's intention to immunize from liability all participatory conduct genuinely directed at achieving a favorable government outcome. According to the legislative history, the phrase "genuinely aimed at procuring favorable government action, result, or outcome" in Section 15 of the Citizen Participation Act is taken from the United States Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991). House sponsor Jack D. Franks stated at the third reading of the bill, "what this Bill does is it codifies the standard in a 1991 U.S. Supreme Court case, the *City of Columbia v. Omni Outdoor Advertising*, when dealing with citizen participation lawsuits." 95th Ill. Gen. Assembly, House Debates, Floor Debate, Third Reading, May 31, 2007 at 1.

In *Omni*, the Supreme Court held that a "concerted effort to influence public officials" is immune from federal liability under the Sherman Antitrust Act, "regardless of intent or purpose," except in those narrow circumstances where the defendant's actions "are 'not genuinely aimed at procuring favorable government action' at all[.]" 499 U.S. at 380 (*quoting Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965)). Thus, "one 'who genuinely seeks to achieve his governmental result, but does so ***through improper means***," remains immune from liability. *Id.* (*quoting Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 500 n. 4 (1988)) (emphasis in original). By incorporating this standard into the Citizen Participation Act, Illinois has elected to immunize from liability the exercise of one's constitutional rights of petition, speech, association, and participation where genuinely directed at achieving a favorable government outcome. That is so regardless of any purported ill-motive or means allegedly employed in pursuit of such a goal. So long as an individual's exercise of his or

her constitutional rights of participation is genuinely directed at procuring a favorable government action, her conduct is protected and immunized from retaliatory liability under the Citizen Participation Act.

It follows from both the text and history of the Citizen Participation Act, then, that SLAPP suits are defined by their targeting of constitutional expression and participation as a basis for liability, regardless of the form that the SLAPP suit's specific claims may take. No particular theories of liability are categorically excluded from the reach of the Citizen Participation Act, precisely because anti-SLAPP lawmakers have recognized that there is no limit to the diversity of claims that a creative plaintiff can assert in a SLAPP suit. An action can readily be framed as one for defamation, tortious interference, harassment, intimidation, personal attacks, or anything else, yet still have as its target the defendant's exercise of his or her rights of petition, speech, association, or participation to achieve a favorable government action, result, or outcome. Indeed, the potential breadth of such claims has been the subject of considerable attention, in terms remarkably prescient of the present suit:

> ***Libel and slander***, ***tortious interference*** with contract or business advantage, ***conspiracy***, antitrust violations, restraint of trade or unfair competition are only the most frequent claims alleged in SLAPP complaints. Additionally, process violations of ***malicious prosecution***; judicial or administrative abuse of process; ***constitutional and civil rights violations***; and other violations of the law such as trespass, nuisance, ***emotional harms***, attacks on tax exemptions are common, but not exclusive, claims. ***The SLAPP action may encompass allegations of a myriad number of claims, and "shotgun" pleading is frequent. Most cases are filed in state rather than federal courts and, in fact, the disputes are essentially local in nature***.

Daerr-Bannon, 22 Causes of Action 317, § 3 (emphasis added). *See also* Tate, 33 Loy. L.A. L. Rev. at 804-05 ("The most frequent type of SLAPP suit is for ***defamation***, but the causes of action are myriad. They include business torts (such as ***interference*** with

contractual rights or with prospective economic advantage), anti-trust, ***intentional infliction of emotional distress***, invasion of privacy, ***civil rights violations***, constitutional rights violations, ***conspiracy***, nuisance, judicial process abuse, and ***malicious prosecution***.") (emphasis added).

The law of other states with a developed body of anti-SLAPP precedent further illuminates the appropriateness of construing SLAPP suits through a broad prism. California, for example, has the most mature body of anti-SLAPP case law, and its courts have broadly applied California's anti-SLAPP statute in a number of contexts (landlord-tenant issues, zoning issues, homeowner association issues, etc.) involving a variety of claims asserted against both individuals and citizens' groups for acts pertaining to both public and private speech and conduct relating to matters of public interest.[1] The experience of California teaches that SLAPP suits are identified not through a bright-line test of the types of claims asserted or the relief sought, but rather based on a reasoned examination of the circumstances of the case to determine whether the suit is ultimately directed at conduct falling within the defendant's rights of petition, speech, association, or participation to procure a favorable government action, result, or outcome.

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[1] *See* 2 Law of Defamation § 9:107 (2d ed. 2007); *Briggs v. Eden Council for Hope and Opportunity*, 969 P.2d 564 (Cal. 1999) (public organization assisting tenants to pursue legal claims against landlord falls under anti-SLAPP statute); *Walsh v. Peskin*, No. A097306, 2002 WL 1897986, * 2-3 (Cal. Ct. App. 2002) (condominium association board member's act of encouraging tenants to file an action for wrongful eviction was in furtherance of the constitutional right of petition and, therefore, was protected by the anti-SLAPP statute); *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1418-20 (Cal. Ct. App. 2001) (actions conducted by lessees and lawyer in defense of condominium owner's forcible detainer actions protected by anti-SLAPP statute); *Foothills Townhome Ass'n v. Christiansen*, 65 Cal. App. 4th 688, 694-95 (Cal. Ct. App. 1998) (suit in retaliation for homeowner challenging assessment involved matters of sufficient public interest to invoke the protections of the anti-SLAPP statute).

B. The Association's Lawsuit Against Gassman for Exercising Her Rights of Petition and Expression to Seek Favorable Government Action Regarding Her Religious Observance Is a SLAPP Suit.

With these definitional principles as background, it is readily apparent that the Association's claims against Gassman are within the scope of the Citizen Participation Act. The statute does not just protect "public outcry" regarding matters of "significant public concern," nor the use of a "public forum" to speak out regarding a "public issue"; it protects from liability all constitutional forms of expression and participation in pursuit of a favorable government action. Here, the Association brought a ten-count Complaint--what might be termed a "shotgun" pleading--against Gassman, asserting four counts of injunction predicated on interference, defamation, or infliction of emotional distress (Counts I, III, V, and VII), two counts of defamation (Counts II and IV), one count of intentional infliction of emotional distress (Count VI), one count of civil conspiracy (Count VIII), one count of malicious prosecution (Count IX), and one count of civil rights violations (Count X). (A00014-59). These are all recognizable SLAPP claims. *See* Daerr-Bannon, 22 Causes of Action 317, § 3; Tate, 33 Loy. L.A. L. Rev. at 804-05; 2 Law of Defamation § 9:107.

Moreover, the Complaint is unambiguously predicated upon acts of petition, speech, association, and participation by Gassman in pursuit of a favorable government action. The Association alleges as grounds for liability, *inter alia*:

- Gassman filed a religious discrimination complaint against the Association with the City of Chicago Commission on Human Relations for barring her from displaying a *mezuzah* on the doorpost of her condominium unit (Complaint ¶¶ 18-19, A00016);
- Gassman filed a religious discrimination complaint against the Association with the Attorney General of the State of Illinois (*Id.* ¶¶ 20-21, A00017);
- Gassman filed a religious discrimination claim against the Association

with the Illinois Department of Human Rights (*Id*. ¶¶ 22-24, A00017);

- Gassman filed a religious discrimination claim against the Association in federal court (*Id*. ¶¶ 25-30, A00018-19);
- Gassman supplied information used in the publication of articles in the *Jewish Star*, which the Association alleges contained false characterizations of its policies (*Id*. ¶¶ 36-39, A00020);
- Gassman discussed her claims with the Association's employees (*Id*., ¶¶ 59, 62, 64, 66-67, A00023-24); and
- Gassman associated with Lynn Bloch, who also filed a religious discrimination lawsuit against the Association (*Id*., ¶ 96, A00028).

The right to petition, of course, "extends to all departments of the Government." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). In this case, the Complaint alleges as grounds for civil liability that Gassman filed claims of religious discrimination with four departments of government, provided information used by a public newspaper in the publication of articles regarding Gassman's claims of religious discrimination, discussed her claims with others, and associated with a person who filed a similar claim. By its own allegations, therefore, the Association seeks to penalize Gassman for exercising her rights of petition, speech, association, and participation in connection with a dispute regarding core rights of religious expression--whether the Association could bar Gassman from displaying a *mezuzah* on the doorposts of her home in accordance with Jewish law. Filing lawsuits, speaking with newspapers, and associating with other individuals are, of course, core forms of constitutional expression. *See, e.g., The Florida Star v. B.J.F.*, 491 U.S. 524, 533-36 (1989) (holding that the First Amendment protects the publication in a newspaper of truthful information that is lawfully obtained); *NAACP v. Button*, 371 U.S. 415, 428-31 (1963) (holding that filing lawsuits to seek redress for the infringement of constitutionally protected rights is

constitutionally protected expression and association protected by the First and Fourteenth Amendments); *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008) ("The First Amendment right to petition the government for the redress of grievances extends to the courts in general and applies to litigation in particular.").

In evaluating the participatory nature of Gassman's acts, and her service of the public interest in pursuing her claims of religious discrimination, it is noteworthy that Gassman's claims resulted both in a change of policy on the part of the Association and in the commencement of a change in the law to better protect the public's freedom of religious expression and observance. The hanging of a *mezuzah* on one's door is a sacred observance to members of the Jewish faith. A *mezuzah* is commanded by Jewish law to be placed on every door in a home or business owned by a Jewish person. 14 *Encyclopedia Judaica 2nd Edition*, 156–57. This command is derived from Deuteronomy 6:9 and 11:20 in which the Jewish people are instructed, "…you shall write them on the doorposts of your house and upon your gates." A *mezuzah* is therefore not a decorative choice for observant Jews; it is a sanctified obligation. In practice, the *mezuzah* is "one of the most widely observed commandments of Judaism." *Id*. at 157.

Here, the Association's regulations mandated that Gassman choose between her religious beliefs and complying with the rules of the Association, and Gassman responded by petitioning several departments of government--what the Association characterized as a "redundant overuse of the legal system" (Pl. Response, at 8, A00157)--to change the regulations. The Association concedes that Gassman's actions resulted in an amendment to its rules to permit the display of religious items on the doorposts of condominiums in the Association's building, and that the publication of her efforts

further resulted in the introduction of a city ordinance to incorporate the protection of such religious observances into the law. (Complaint ¶¶ 21, 25, 84, Exh. 6, A00017-18, A00026, A00109-124). Thus, Gassman's efforts resulted in a tangible change protecting free religious expression. These are precisely the circumstances the Citizen Participation Act was enacted to address, preventing a private citizen from being penalized through burdensome, expensive, and distracting litigation for exercising her First Amendment participatory rights and thereby promoting the public good.

II. SLAPP Suits Are a Serious and Ongoing Threat to Citizen Participation

Dealing with the ongoing problem of retaliatory lawsuits that target lawful and constitutional forms of citizen participation is an issue that extends beyond the interests of the private litigants involved in the immediate appeal. It is a matter of grave concern to all citizens and organizations who believe in the idea that a robust citizenry can be a powerful instrument to achieve social justice, equality, and positive change through the democratic process. SLAPP suits, left unchecked, quell such vigorous citizen participation and imperil the core values of petition, speech, and association. That is why the General Assembly acted unanimously to pass the Citizen Participation Act, and why the courts of Illinois should act forcefully to apply the statute in furtherance of its purpose of deterring and remedying SLAPP suits.

It is a fundamental premise of American constitutional law that "the rights to assemble peaceably and to petition for a redress or grievances are among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). These rights "are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.'" *Id.*

(*quoting Thomas v. Collins*, 323 U.S. 516, 530 (1945)). Thus, the right of assembly to petition for a redress of grievances "is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937). *See also United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."). The Supreme Court memorialized the interrelationship and inviolability of the rights of speech, assembly, and petition in *Schneider v. Smith*, 390 U.S. 17, 25 (1968):

> The First Amendment's ban against Congress 'abridging' freedom of speech, the right peaceably to assemble and to petition, and the 'associational freedom' that goes with those rights creates a preserve where the views of the individual are made inviolate. This is the philosophy of Jefferson that "(t)he opinions of men are not the object of civil government, nor under its jurisdiction * * *. (I)t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order * * *."

Id. (*quoting* A Bill for Establishing Religious Freedom, *Jeffersonian Cyclopedia* 976 (1900)).

Courts have long recognized the practical reality that indirect restraints pose as great a threat to the people's rights of petition, speech, association, and participation as direct legal prohibitions. "The First Amendment would ... be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *United Mine Workers*, 389 U.S. at 222. That is the danger created by SLAPP suits; they are actions that exploit the apparatus of the courts through private lawsuits for defamation, malicious prosecution, and like causes of action to harass, intimidate, and discourage citizens engaged in the lawful exercise of their First Amendment rights. Though SLAPP suits often lack merit on the facts or the law, and the defendant is typically the prevailing

party, the financial hardship and psychological toll of such suits indirectly restrains individuals from exercising their rights of petition, speech, association, and participation for fear of entanglement in years of retaliatory litigation. The perpetual threat of SLAPP suits thus acts to cow dissent and to suppress beneficial citizen participation.

The phenomenon and rising incidence of SLAPP suits has drawn considerable attention from legal commentators and the courts. No scholars have contributed more to the body of literature on SLAPPs than Professors George Pring and Penelope Canan of the University of Denver, who in 1988 first coined the term "SLAPP" and described the emergence and exponential growth of SLAPP suits as a means to intimidate citizen advocates. *See* George Pring and Penelope Canan, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988); George Pring and Penelope Canan, *Studying Strategic Lawsuits Against Public Participation: Mixing Qualitative and Quantitative Approaches*, 22 L. & Soc'y Rev. 384 (1988).

Pring and Canan conducted an intensive, ten-year interdisciplinary study of SLAPP suits, finding that there had been a "litigation explosion" of such actions. George Pring and Penelope Canan, *SLAPPs: An Overview of the Practice*, 935 A.L.I./A.B.A. 1, 1-3 (1994). From their analysis of the empirical data, Pring and Canan concluded that SLAPP suits constitute "a new breed of lawsuits that is stalking America," under which ordinary citizens concerned about public issues are being "sued into silence … by the thousands" simply for "speaking out on political issues." George Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* 1-3 (1996). Pring and Canan warned that this trend carries, "an ominous message for every American, because SLAPPs threaten the very future of 'citizen involvement' or 'public participation' in government, long

viewed as essential in our representative democracy." *Id*. at 28-29. In the scholars' assessment, "[t]he real value at stake is, quite simply, whether our nation will continue to encourage, to protect, and to be a government 'of the people, by the people, and for the people.'" *Id*. *See also* 2 Law of Defamation § 9:107 ("Such a 'strategic' suit against those participating in the process of government may have a chilling effect on the grass-roots exercise of First Amendment rights, such as petitioning the government for a redress of grievances.").

Since the publication of Pring and Canan's landmark study, more than 500 scholarly articles and more than 300 state and federal cases have discussed the existence, characteristics, prevalence, and remedies for SLAPP suits. Illinois courts at both the state and federal level have contributed to this body of literature. For example, in *Westfield Partners Ltd. v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990), the district court noted "with a great deal of alarm" the "growing trend of what have come to be known as 'SLAPP suits'" as a means to "silence criticism[.]" *Id*. at 524-25. The court observed that "[t]he filing of such suits has seen increasing use over the past decade," and admonished that they should be viewed "with a great deal of skepticism." *Id*. at 525. Five years later, in *Levin v. King*, 271 Ill.App.3d 728 (1st Dist. 1995), this Court found that it was not empowered to recognize SLAPP suits as extraordinary civil litigation to satisfy the elements of a malicious prosecution suit, because "we believe this is a matter best left to either legislative debate or for our supreme court's rule making authority[.]" *Id*. at 735.

The reluctance of the *Levin* court to craft a judicial remedy for SLAPP suits, though understandable, unquestionably had negative consequences for citizen participation in Illinois. Twelve years passed between the Court's ruling in *Levin* and the

General Assembly's enactment of the Citizen Participation Act in 2007. During that time, "numerous civil actions 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." Mary Dixon and Adam Schwartz, *In Support of Senate Bill 1434 ("The Citizen Participation Act")* (June 18, 2007) (collecting cases) (available at www.aclu-il.org/legislative/alerts/sb1434memo.pdf). The defendants in these lawsuits, lacking the protection of anti-SLAPP legislation, bore the "burden, expense, and distraction of years of litigation" before they were able to extricate themselves from the SLAPP suits. *Id*. (*discussing*, *inter alia*, *Levin*, 271 Ill.App.3d 728; *Philip I. Mappa Interests, Ltd. v. Kendle*, 196 Ill.App.3d 703 (1st Dist. 1990); *Kirchoff v. Curran*, No. 90-MR-190 (20th Judicial Circuit, St. Clair County); *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643 (7th Cir. 1983)). Illinois, in short, was squarely confronted with the question posed by Pring and Canan--whether this State will continue to encourage and to protect the rights of petition, speech, association, and participation, and thereby be a government "of the people, by the people, and for the people."

III. The Citizen Participation Act Is a Valuable Tool to Disarm SLAPP Suits

Against this backdrop of abusive litigation tactics to quell and silence dissent, the importance of the Citizen Participation Act as an instrument to protect citizen participation against the threat of SLAPP suits is manifest. With the enactment of the Citizen Participation Act in 2007, Illinois became the twenty-sixth and most recent state to provide statutory protection against SLAPPs.[2] At least two other states provide

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[2] These states and one territory include: Arizona (Ariz. Rev. Stat. §§ 12-751 - 12-752); Arkansas (Ark. Code §§ 16-63-501 - 16-63-508); California (Cal. Civ. Proc. Code §§

common law protection against SLAPPs, and at least two more states are considering statutory action.[3]

The states enacting anti-SLAPP legislation have done so to prevent lawsuits from chilling the valid exercise of their respective citizens' constitutional rights of freedom of speech, petition and assembly. One state leading the charge for the enforcement of anti-SLAPP legislation, California, included in its statute specific findings concerning the need for such legislation:

> The Legislature finds and declares 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

425.16-425.18); Delaware (Del. Code Ann. tit. 10, §§ 8136 to 8138); Florida (Fla. Stat. Ann. § 768.295); Georgia (Ga. Cod Ann. § 9-11-11.1); Guam (Guam Code Ann. tit. 7, §§ 17101 - 17109); Hawaii (Hawaii Rev. Stat. § 634F); Illinois (735 ILCS 110/1 - 110/99)); Indiana (Ind. Code §§ 34-7-7-1 to 34-7-7-10); Louisiana (La. Code Civ. Pro. Ann. art. 971); Maine (Me. Rev. Stat. Ann. tit. 14, § 556); Maryland (Md. Code §5-807); Massachusetts (Mass. Gen. Laws Ann. ch. 231, § 59H); Minnesota (Minn. Stat. §§ 554.01 to 554.05), Missouri (RS Mo. 537.528); Nebraska (Neb. Rev. Stat. §§ 25-21-241 to 246); Nevada (Nev. Rev. Stat. §§ 41.635 to 41.670); New Mexico (N.M. Stat. Ann. §§ 38-2-9.1 and 9.2); New York (Civil Rights Law 70-1 and 76-a; N.Y.C.P.L.R. 3211(g) and 3212(h)); Oklahoma (Okla. Stat. Ann. tit. 12, § 1443.1); Oregon (Or. Rev. Stat. § 30.150 - 31.155); Pennsylvania (42 Pa Cons Stat §§ 27-77-7707, 27-83-8301 to 27-83-8305); Rhode Island (R.I. Gen Laws §§ 9-33-1 to 9-33-4); Tennessee (Tenn. Code Ann. §§ 4-21-1001 to 4-21-1004); Utah (Utah Code Ann. § 78-58-101 - 78-58-105); Vermont (12 V.S.A. §1041); and Washington (Wash. Rev. Code Ann. §§ 4.24.500 to 4.24.520). *See* http://www.casp.net; 2 Law of Defamation at § 9:107.

[3] The courts of Colorado and West Virginia have adopted common law protections against SLAPPs. *See* http://www.casp.net; *Protect Our Environment, Inc. v. District Ct. In And For The County Of Jefferson*, 677 P.2d 1361 (Colo. 1984); *W.O. Brisben Cos. v. Krystkowiak*, 66 P.3d 133 (Colo. App. Aug. 29, 2002), *aff'd on other grounds*, *Krystkowiak v W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004); *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981); *Harris v. Adkins*, 432 S.E.2d 549 (W. Va. 1993). South Carolina also introduced anti-SLAPP legislation in its 2009 legislative session, and Texas has an anti-SLAPP bill outstanding since the 2007 legislative session. *See* http://www.casp.net; HB 1089, HB 1130.

See Cal. Civ. Proc. Code §425.16(a).

This public policy concern is mirrored in other states' anti-SLAPP statutes, including the Citizen Participation Act. Indeed, the General Assembly was even more expansive in describing the goals and scope of the Citizen Participation Act:

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.
>
> Civil actions for money damages have been filed against citizens and organizations of this State as a result of their valid exercise of their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and communicate with government. There has been a disturbing increase in lawsuits termed "Strategic Lawsuits Against Public Participation" in government or "SLAPPs" as they are popularly called.
>
> 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.
>
> It is in the public interest and it is the purpose of this Act 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; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants.

735 ILCS 110/5.

The Citizen Participation Act counters the threat of SLAPP suits by allowing the defendant targeted by such a suit to bring a motion "to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is 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." 735 ILCS 110/15. As discussed above, the statute expressly immunizes the exercise of one's constitutional rights of participation from suit, and is to be "construed liberally" to effectuate its purpose and intent. *Id.*; 735 ILCS 110/30(b).

In addition to substantive immunity for citizen participation and the right to bring a dispositive motion in response to the filing of a SLAPP suit, the Citizen Participation Act incorporates numerous procedural protections that facilitate the prompt dismissal of SLAPP suits while minimizing the litigation burden associated with such suits. Upon the filing of a motion to dismiss under Section 15 of the Act, a hearing and decision "must occur within 90 days after notice of the motion is given to the respondent," and the appellate court is to "expedite any appeal or other writ, whether interlocutory or not, from a trial court order denying that motion[.]" 735 ILCS 110/20(a). Discovery is suspended pending a decision on the motion. 735 ILCS 110/20(b). The standard for granting a dispositive motion brought under the Citizen Participation Act is permissive; "[t]he court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act." 735 ILCS 110/20(c). Finally, the statute provides for the recovery of fees and costs on the part of the SLAPP suit defendant. "The court shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs incurred in connection with the motion." 735 ILCS 110/25.

Notably, the Citizen Participation Act is broader than previous anti-SLAPP

legislation considered by the General Assembly. An earlier anti-SLAPP proposal in Illinois, which the General Assembly did not enact, provided for special motions to dismiss SLAPP suits, but only where such suits arise from "any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or Illinois Constitution ***in connection with a public issue***[.]" *See* Ill. 92nd Gen. Assembly, House Bill 4315 at 1-2 (emphasis added). The Citizen Participation Act, by contrast, disposes of the requirement that the exercise of the rights of petition or free speech be "in connection with a public issue." Thus, while the General Assembly did at one time consider legislation that would have been addressed, as the Association suggests, only to "issues of significant public concern" or "public issues" (Pl. Br. at 26), the legislation that the General Assembly ultimately adopted by unanimous vote contains no such restrictions.

Indeed, the Citizen Participation Act is among the broadest of the anti-SLAPP statutes to be adopted by the twenty-six states to have done so. One commentator has suggested that anti-SLAPP statutes may be characterized as narrow, moderate, or broad, as follows:

> The range of activity protected under anti-SLAPP statutes falls into three general categories: (1) statute worded narrowly so as to allow anti-SLAPP protection only in certain statutorily defined circumstances ("Narrow Statutes"); (2) statutes that apply only to participation in the processes of government or to communication specifically intended to procure government action ("Moderate Statutes"); and (3) statutes that extent the definition of protected activity to cover the exercise of a party's right to petition or free speech on any matter of public concern ("Broad Statutes").

Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 Val. U. L. Rev. 1235, 1248 (Spring, 2007).

A majority of the states to adopt anti-SLAPP legislation have enacted either

Narrow or Moderate Statutes. *See id.* at 1248-60. The Citizen Participation Act, however, is comparable in its language and scope to the other six states to have adopted Broad Statutes. *See id*. at 1260-62 & n. 116-17 (discussing the anti-SLAPP laws of the other six "Broad Statute" states, including Arkansas, California, Indiana, Louisiana, Maryland, and Oregon). Like the other Broad Statutes, the Citizen Participation Act defines the range of protected participatory activity broadly to include all acts "in furtherance of the constitutional rights to petition, speech, association, and participation in government …, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15. *Compare with* Ark. Code Ann. § 16-63-503(1) (defining protected activity as "[a]n act in furtherance of the right of free speech or the right to petition government for a redress of grievances"); Cal. Civ. Proc. Code § 425.16(e) (defining protected activity as, *inter alia*, any 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); Ind. Code § 34-7-7-2 (defining protected activity as any conduct in furtherance of the exercise of the constitutional right of petition or free speech); La. Code Civ. Proc. Ann. art. 971 (adopting a definition of protected activity similar to California); Md. Code Ann. § 5-807 (defining protected activity as "communicating with a federal, State, or local government body or the public at large" in a manner that, without constitutional malice, "reports on, comments on, rules on, challenges, opposes, or in any other way exercises rights under the First Amendment of the U.S. Constitution"); Or. Rev. Stat. §§ 30.142-30.146 (adopting a definition of protected activity similar to California).

In sum, though the General Assembly could have followed the Narrow or

Moderate Statute states, it instead selected the broadest available anti-SLAPP remedies, and it did so unanimously. That decision reflects the seriousness that Illinois has assigned to the danger of retaliatory SLAPP suits being used to silence dissent. The Citizen Participation Act offers a broad and effective remedy against the chilling effect that SLAPP suits have had upon citizen participation in Illinois. Citizens who previously faced the threat of prolonged litigation at ruinous personal expense are now immunized from liability for exercising their constitutional rights of participation. In furtherance of that immunity, defendants in SLAPP suits are empowered with a potent procedural mechanism to secure the dismissal of such suits expeditiously, without incurring costs of discovery, under a favorable legal standard that places the burden on the proponent of the SLAPP suit to justify its claims, and with the SLAPP plaintiff bearing the expense if the motion to dismiss is granted. It is difficult to overstate the value of this remedy in the context of anti-participatory SLAPP suits. Prior to the Citizen Participation Act, citizens who petitioned for a redress of grievances bore the risk that their efforts would ensnare them in years of time-consuming and financially burdensome litigation. Today, it is the SLAPP plaintiff who bears the risk that filing a retaliatory suit in response to citizen participation will result in prompt dismissal and payment of the defendant's fees and expenses. The Citizen Participation Act thus serves the dual goals of discouraging SLAPP suits and providing an effective remedy to individuals and organizations who are targeted by SLAPP litigation.

CONCLUSION

For the foregoing reasons, the ADL respectfully submits its view to the Court, as a friend of the Court, that the Citizen Participation Act should be construed broadly in a manner consistent with its text and purpose, to encompass as a "SLAPP suit" any and all claims that are brought against a citizen in whole or in part based on that citizen's exercise of his or her rights of petition, speech, association, or participation with the genuine aim of procuring a favorable government action, result, or outcome. In light of the real and demonstrable danger that such SLAPP suits pose to citizen participation in the democratic process to achieve positive change, as well as the growing problem of religious discrimination and the necessity of citizen participation to combat such discrimination, the ADL encourages the courts of Illinois to employ the Citizen Participation Act actively to remedy the abusive filing of SLAPP suits to punish and chill citizen participation in this state.

DATED: January 27, 2010 **ANTI-DEFAMATION LEAGUE**

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in 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 24 pages.

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CERTIFICATE OF SERVICE

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