



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

Lisa Sandberg

### **S.B. 206**

132nd General Assembly  
(As Introduced)

**Sens.** Huffman, Uecker, Lehner, Terhar, Jordan

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### **BILL SUMMARY**

- Creates the "Ohio Citizen Participation Act."
- Provides that any person who engages in a protected communication is immune from suit in any civil action for a claim based on that communication.
- Specifies that the Ohio Citizen Participation Act does not apply to certain specified actions, including an enforcement action that is brought in the name of Ohio or a political subdivision of Ohio by the Attorney General or the Chief Legal Officer of the political subdivision.
- Provides that the person against whom a civil action is brought can file a special motion to strike the action and specifies the procedure the court must follow with regard to that motion.
- Allows a person subject to a foreign claim based on a protected communication to bring a claim in a civil action in an Ohio court against the person filing the foreign claim.
- Specifies the procedure when a civil action based on a protected communication involves an online communication with an anonymous user.
- Includes an order that denies a special motion to strike and an order that grants leave to discover the identity of an anonymous user who has made an online communication among the final orders that may be reviewed, affirmed, modified, or reversed, with or without retrial.
- Provides that nothing in Ohio's law regarding libel and slander are to be construed as limiting or abrogating any other defense, remedy, immunity, or privilege available under other constitutional, statutory, common law, or administrative provisions or rules relating to claims based on protected communications.

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## CONTENT AND OPERATION

### Ohio Citizen Participation Act

The bill specifies that R.C. 2305.61 to 2305.68 is the "Ohio Citizen Participation Act."<sup>1</sup>

#### Immunity from civil action

Under the bill, any person who engages in a protected communication is immune from suit in any civil action for a claim based on that communication.<sup>2</sup> A "protected communication" means any written or oral statement or communication for which a speaker may not be subject to liability in a civil action under the First Amendment to the United States Constitution, Article I, Section 11 of the Ohio Constitution, or a similar provision in the applicable constitution of the jurisprudence in which the statement or communication was made. "Protected communication" includes the following:<sup>3</sup>

- A written or oral statement or communication that is aimed at procuring any governmental or electoral action, result, or outcome;
- Any written or oral statement or communication of information or a complaint made to a member of the General Assembly or to any officer or employee of the government of the United States, Ohio, or of a political subdivision of Ohio, regarding a matter reasonably of concern to the governmental entity involved;
- Any written or oral statement or communication made in direct connection with an issue under consideration by an executive, legislative, or judicial body of the United States, Ohio, or a political subdivision of Ohio, or any other official proceeding authorized by law;
- Any written or oral statement or communication made in direct connection with an issue of public interest;
- Any written or oral statement or communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

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<sup>1</sup> R.C. 2305.62(A).

<sup>2</sup> R.C. 2305.62(B)(1).

<sup>3</sup> R.C. 2305.61(D).



A "written or oral statement or communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, and electronic. An electronic statement or communication includes a statement or communication made on an Internet website.<sup>4</sup> An "issue of public interest" means any issue of interest to the public, including any issue related to health and safety; environmental, economic, or community well-being; the government; a public official or public figure; or goods, products, or services in the marketplace.<sup>5</sup>

Nothing in the "Ohio Citizen Participation Act" can be construed as limiting or abrogating any other defense, remedy, immunity, or privilege available under other constitutional, statutory, common law, or administrative provisions or rules relating to claims based on protected communications.<sup>6</sup> The Act does not apply to any of the following:<sup>7</sup>

- An enforcement action that is brought in the name of Ohio or a political subdivision of Ohio by the Attorney General or the chief legal officer of a political subdivision of Ohio;
- Except as provided below, a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the action arises out of a statement or conduct made in relation to the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer;
- A legal action seeking recovery for bodily injury, wrongful death, or survival, or to statements made regarding that legal action;
- A legal action brought under Ch. 3901-1 to 3901-11 of the Ohio Administrative Code or arising out of an insurance contract.

The second bullet point does not apply to any action against any person or entity based upon the creation, dissemination, exhibition, or advertisement, or a similar promotion, of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, an art show or exhibit, or an article published in a newspaper or magazine of general circulation.

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<sup>4</sup> R.C. 2305.61(E).

<sup>5</sup> R.C. 2305.61(B).

<sup>6</sup> R.C. 2305.62(B)(2).

<sup>7</sup> R.C. 2305.62(C).



## Special motion to strike

The bill provides that if a claim is brought against a person based upon a protected communication, the defendant may file a special motion to strike the action.<sup>8</sup> The plaintiff must file the special motion to strike the action not later than 60 days after the service of the complaint on the moving defendant. The court may extend the 60-day period for good cause shown.<sup>9</sup>

If a special motion to strike is filed, the court must do all of the following:<sup>10</sup>

(1) Determine whether the defendant has established, by a preponderance of the evidence, that the claim in the civil action is based upon a protected communication.

(2) If the court determines that the defendant has met the burden set forth above, determine whether the plaintiff in the action has presented clear and specific admissible evidence of a prima facie case for each essential element of the plaintiff's claim.

(3) If the court determines that the plaintiff has established a probability of prevailing on the claim, ensure all of the following:

(a) That the determination is not admitted into evidence at any later stage of the underlying action or any subsequent proceeding;

(b) That the determination will not affect the burden of proof that is applied in the underlying action or any subsequent proceeding;

(c) That filing a special motion to strike does not operate as a waiver of any defense based upon personal jurisdiction.

(4) Stay any discovery in the action until after both of the following:

(a) A ruling by the court on the special motion to strike;

(b) The disposition of any appeal from the court's ruling on the special motion to strike.

The court may allow specified and limited discovery relevant to the special motion to strike upon the court's own motion, or upon the motion of a party to the special motion to strike, if the party seeking discovery shows by affidavit good cause

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<sup>8</sup> R.C. 2305.63(A).

<sup>9</sup> R.C. 2305.63(B).

<sup>10</sup> R.C. 2305.63(C).



why discovery is necessary and why the party's burden cannot be discharged without specified and limited discovery.

(5) Issue a briefing schedule to the parties to the action for the special motion to strike that does the following:

(a) Permits the plaintiff to file and serve a memorandum in opposition to the defendant's special motion to strike:

(i) Within 14 days after the motion is served on the plaintiff;

(ii) Upon a showing of exceptional circumstances, within a period of up to 28 days as allowed by the court after the motion is served on the plaintiff;

(iii) Within a period approved by the court to which the plaintiff and defendant agree.

(b) Permits the defendant to file and serve a reply in support of the defendant's special motion to strike, if any:

(i) Within 14 days after the plaintiff's memorandum in opposition is served on the defendant;

(ii) Upon a showing of good cause, within a period of up to 28 days as allowed by the court after the plaintiff's memorandum in opposition is served on the defendant;

(iii) Within a period approved by the court to which the plaintiff and defendant agree.

(c) If requested by any party or the court, provides for a hearing on the special motion to strike not later than 30 days after the defendant either files and serves the defendant's reply in support of the defendant's special motion to strike or notifies the court and the plaintiff that the defendant waives the defendant's right to file a reply brief.

(6) Rule on the special motion to strike within 30 days after any of the following:

(a) The hearing on the special motion to strike, if a hearing is requested by any party or the court;

(b) The defendant's reply in support of the motion is filed, served on the plaintiff, and provided to the court, or the defendant notifies the plaintiff and the court that the defendant waives the defendant's right to file a reply brief, if no hearing is requested by any party or the court.



(7) Dismiss the action, if the plaintiff fails to timely file a memorandum in opposition to the special motion to strike.

In making its determination under (1) and (2) above, the court must consider the pleadings and admissible evidence in any supporting or opposing affidavits stating the facts on which the claim or defense is based. At the defendant's option, the defendant may present the defendant's evidence through testimony, subject to cross-examination by the plaintiff.<sup>11</sup> If the court dismisses the claim pursuant to a special motion to strike, the dismissal acts as an adjudication upon the merits.<sup>12</sup>

Under the bill, "defendant" means the person against whom a claim based on a protected communication is made, regardless of whether that claim appears in a complaint, counterclaim, cross-claim, or third-party complaint. "Plaintiff" means the person making a claim based on a protected communication, regardless of whether that claim appears in a complaint, counterclaim, cross-claim, or third-party complaint.<sup>13</sup>

### **Monetary awards**

If the court grants a special motion to strike, the following apply:<sup>14</sup>

(1) The court must award reasonable attorney's fees and court costs to the defendant. The court cannot fail to award, or reduce an award of, attorney's fees and court costs on the grounds that the defense of the claim was undertaken on a pro bono or contingent basis.

(2) The court may award, in addition to reasonable attorney's fees and court costs, such punitive or exemplary monetary sanctions as the court finds sufficient to deter the filing of similar actions in the future.

(3) The defendant may bring a separate claim or action, or with leave of the court may bring a counterclaim, to recover the following:

(a) Actual compensatory damages proximately caused by the claim, or \$500, whichever is greater;

(b) Punitive damages as provided by R.C. 2315.21;

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<sup>11</sup> R.C. 2305.63(D).

<sup>12</sup> R.C. 2305.63(E).

<sup>13</sup> R.C. 2305.61(A) and (C).

<sup>14</sup> R.C. 2305.64(A).



(c) Reasonable attorney's fees and court costs of bringing the separate claim, action, or counterclaim.

(4) If all or any portion of any award made by the court pursuant to (1) and (2) above remains unpaid 90 days after being made, the court, upon motion of the defendant, may in its discretion impose joint and several liability for any unpaid amount of the award against the attorney or attorneys who signed the pleading in which the claim was raised, if the court finds that the attorney or attorneys knew or should have known that the claim was based on a protected communication.

If the court denies a special motion to strike and finds that the motion was frivolous conduct, the court, after the disposition of any appeal from the court's ruling on the special motion to strike, may award to the plaintiff reasonable attorney's fees, court costs, and other reasonable expenses incurred in responding to the special motion to strike. The court must follow the procedures set forth in R.C. 2323.51 (frivolous conduct) in making that award.<sup>15</sup>

If the court denies a special motion to strike, the denial is a final order under R.C. 2505.02 and the defendant has an interlocutory right of appeal under that section.<sup>16</sup>

### **Foreign claim based on a protected communication**

Under the bill, any person subject to a foreign claim based on a protected communication may bring a claim in a civil action in the courts of Ohio against the person filing the foreign claim based on a protected communication against the person filing the foreign claim. Such claim may be filed at any time, but not later than one year after the dismissal or final judgment of the foreign claim based on a protected communication.<sup>17</sup> A "foreign claim based on a protected communication" means any claim in a civil action brought against a person based on a protected communication, if such action was commenced in any court outside of Ohio against a person who was a resident of Ohio at one or more of the following times:<sup>18</sup>

- (1) The time the person made the protected communication;
- (2) The time the action was commenced against the person;
- (3) The time the person was served in the action.

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<sup>15</sup> R.C. 2305.64(B).

<sup>16</sup> R.C. 2305.64(C).

<sup>17</sup> R.C. 2305.65(B).

<sup>18</sup> R.C. 2305.65(A).



If the court establishes by a preponderance of the evidence in the action that the person subject to the foreign claim based on a protected communication would have prevailed on a special motion to strike if the foreign claim based on a protected communication had been filed in Ohio, the court:<sup>19</sup>

(1) Must award to the person reasonable attorney's fees and costs for the defense of the foreign claim based on a protected communication in the same manner provided for the award of attorney's fees and court costs (described in (1) above under "**Monetary awards**");

(2) Must award to the person reasonable attorney's fees and costs incurred in connection with the claim;

(3) Must award to the person either actual compensatory damages proximately caused by the filing of the foreign claim based on a protected communication or statutory damages of \$500, whichever is greater;

(4) May award such punitive or exemplary monetary sanctions as the court finds sufficient to deter the filing of similar actions against Ohio residents.

For the purposes of Ohio law regarding personal jurisdiction and Civil Rule 4.3 (out-of-state service of process), the filing of a foreign claim based on a protected communication constitutes an act outside Ohio which causes tortious injury in Ohio and which is committed with the purpose of injuring persons, and a person filing a foreign claim based on a protected communication may reasonably expect that injury would incur in Ohio to a person against whom a foreign claim based on a protected communication is filed.<sup>20</sup>

### **Action involving an online communication**

The bill prohibits a party to an action involving an online communication from seeking to discover, by subpoena or otherwise, the identity of an anonymous user without first obtaining leave from the court in which the action is filed.<sup>21</sup> An "anonymous user" is a person or entity who has engaged in an online communication without publicly revealing the person's or entity's identity, including a person or entity communicating only through a pseudonym.<sup>22</sup> An "online communication" means any communication made through a computer, computer system, computer network,

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<sup>19</sup> R.C. 2305.65(C).

<sup>20</sup> R.C. 2305.65(D).

<sup>21</sup> R.C. 2305.67(A).

<sup>22</sup> R.C. 2305.66(A).





telecommunication, telecommunications device, telecommunications service, information service, or other digital or electronic method of communication.<sup>23</sup>

A court cannot grant leave to discover the identity of an anonymous user unless all of the following have occurred:<sup>24</sup>

(1) The court considers any written or oral evidence offered by any party or witness or any affidavit that may be material in making a determination.

(2) At least 14 days have passed from the date that the anonymous user has received the notice described in (4), below, unless that time period has been enlarged by order of the court or an agreement between the parties.

(3) The anonymous user has had an opportunity to respond to the movant's motion within the time period described in (2), above.

(4) The party seeking to discover the anonymous user's identity has established by clear and specific admissible evidence, each of the following elements:

(a) That the party has provided sufficient notice to the anonymous user that the anonymous user's identity is being sought, including a notice with the required language described below and a copy of the party's motion for leave to seek the identity of the anonymous user;

(b) That the party has quoted verbatim to the court and the anonymous user the communication alleged to be actionable;

(c) That the party has sufficiently alleged each element of the cause of action, such that the party would survive a special motion to strike or a motion to dismiss;

(d) That the party has presented admissible evidence supporting the allegations contained in the action;

(e) That the online communication is not a protected communication;

(f) That the right to identify the anonymous user outweighs the right of an anonymous user to speak anonymously pursuant to the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.

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<sup>23</sup> R.C. 2305.66(B).

<sup>24</sup> R.C. 2305.67(B).



The notice informs the anonymous user that a lawsuit has been filed relating to the user's speech and that the user must act quickly to protect the user's right to remain anonymous. The notice also informs the user of the court in which the action is filed and that the party making the allegations has asked the court to require the user's Internet service provider, the website on which the communication is made, or a similar entity to force the Internet service provider, website, or entity to reveal the user's identity. Finally, the notice suggests that the user contact an attorney but that the user has the right to represent the user's self if the user was not communicating as a corporation or other business entity. The user or attorney can contest the party's ability to discover the user's identity.<sup>25</sup>

Nothing in the provisions described under "**Action involving an online communication**," above, precludes an Internet service provider or other recipient of a subpoena or discovery request from moving to quash the subpoena or objecting to the discovery request under Civil Rule 45, or under any other applicable rule of procedure, statute, common law rule, or constitutional principle.<sup>26</sup>

### **Right to defend against action**

The bill states that a website operator, Internet service provider, or other similar entity has an unconditional right to intervene in any action in which a party seeks to identify an anonymous user of the website, Internet service provider, or other similar entity. Regardless of whether intervention is sought, a website operator, Internet service provider, or other similar entity has standing to contest and defend against an attempt by a party to identify an anonymous user of its website or service.<sup>27</sup> A website operator is the person or entity responsible for the maintenance, content, or operation of an Internet website.<sup>28</sup>

An anonymous user may contest and defend against an attempt by a party to identify an anonymous user of the anonymous user's website without first having to reveal the anonymous user's identity. The anonymous user may also file a special motion to strike without having to reveal the anonymous user's identity.<sup>29</sup> It is sufficient

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<sup>25</sup> R.C. 2305.67(C).

<sup>26</sup> R.C. 2305.67(D).

<sup>27</sup> R.C. 2305.68(A).

<sup>28</sup> R.C. 2305.66(D).

<sup>29</sup> R.C. 2305.68(B) and (C).

that the anonymous user be identified and referred to by the parties and the court by means of a pseudonym.<sup>30</sup>

If an anonymous user or website operator appears in an action for the purpose of filing a special motion to strike, or to contest a party's subpoena or discovery request, the anonymous user's appearance cannot operate as a waiver of any defense based on personal jurisdiction.<sup>31</sup>

## **Final order**

The bill adds to the current list of final orders that may be reviewed, affirmed, modified, or reversed, with or without retrial, an order that denies a special motion to strike and an order that grants leave under the provisions of the bill to discover the identity of an anonymous user who has made an online communication.<sup>32</sup>

## **Libel and slander laws**

The bill provides that nothing in Ohio's law regarding libel and slander are to be construed as limiting or abrogating any other defense, remedy, immunity, or privilege available under other constitutional, statutory, common law, or administrative provisions or rules relating to claims based on protected communications brought under the provisions of the bill.<sup>33</sup>

## **Purpose clause**

The bill provides, in uncodified law, that the General Assembly hereby declares that its purpose in enacting the "Ohio Citizen Participation Act" and R.C. 2739.021, and amending R.C. 2505.02, are to: (1) encourage and safeguard the constitutional rights of persons to petition, speak freely, and associate freely, (2) encourage and safeguard the rights of persons to participate in government to the maximum extent permitted by law, (3) protect the rights of persons to speak and act with respect to issues of public concern, and, at the same time, (4) protect the rights of persons to file meritorious lawsuits for demonstrable injury. The General Assembly declares that the Revised Code sections in this bill be construed liberally to effectuate their purpose and intent fully.<sup>34</sup>

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<sup>30</sup> R.C. 2305.68(D).

<sup>31</sup> R.C. 2305.68(E).

<sup>32</sup> R.C. 2505.02(B)(8) and (9).

<sup>33</sup> R.C. 2739.021, by reference to R.C. 2739.01 and 2739.02, not in the bill.

<sup>34</sup> Section 3.



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## HISTORY

ACTION

DATE

Introduced

10-03-17

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