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Testimony, Free Speech Under Attack: The Legal Assault on Environmental Activists and the First Amendment

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Free Speech Under Attack (Part III):
The Legal Assault on Environmental Activists and the First Amendment

Testimony before the Subcommittee on Civil Rights and Civil Liberties House Committee on
Oversight and Reform United States House of Representatives

September 14, 2022

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International Development Graduate Program, University of Washington School of Law

Chairman Raskin, Ranking Member Mace, members of the committee, thank you for the invitation to participate in this important hearing this morning.

My name is Anita Ramasastry. I am the Henry M. Jackson Professor of Law and Director of the Sustainable International Development Graduate Program at the University of Washington School of Law in Seattle. From 2017-2019, I served as President of the Uniform Law Commission, which is an unpaid role. The Uniform Law Commission established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. From 2016-2022, I also served as an expert appointed by the UN Human Rights Council to work with governments, business and civil society to address issues relating to corporations and human rights abuses. The views I express in this testimony are my own and should not be construed as representing any official position of the organizations I have mentioned above.

As an expert in the field of business and human rights, I have followed the growing trend of the use of Strategic Litigation Against Participation (known as SLAPP suits) and legal proceedings to silence protest and freedom of expression and assembly throughout the globe. Increasingly, we are witnessing shrinking civil space not only in the US and North America, but across all continents.¹ I have worked actively with companies, civil society and business to address this phenomena, and also to ensure that businesses take steps to protect the rights of human rights defenders.²

I will make three key points today and will be pleased to answer questions from the committee.

I. The Growing Trend of SLAPP Suits as a Means to Silence Dissent

¹ Bennett Freeman, Shared pace under pressure: Business Support for Civic Freedoms and Human Rights Defenders International Service for Human Rights and Business and Human Rights Resource Center (2018). <https://media.business-humanrights.org/media/documents/fdfe07e3d812cfcfed4235fbbf820a3d77599b13.pdf>

² United Nations Working Group on Business and Human Rights, Guidance on Ensuring Respect for Human Rights Defenders A/HRC/47/39/Add.2: (June 2021) <https://www.ohchr.org/en/documents/thematic-reports/ahrc4739add2-guiding-principles-business-and-human-rights-guidance>

Across the globe, defenders who speak out against issues of public concern face a range of attacks because they raise concerns about human rights risks and harms associated with economic activity. SLAPP suits which are criminal or civil lawsuits brought or initiated by business entities to intimidate critics, are one type of attack. These lawsuits can drain the resources of community members, environmental advocates, and journalists who speak out in support of human rights and the environment. Such legal actions have a broader chilling effect, deterring others from speaking out for fear of being sued.³

SLAPP suits typically involve a civil complaint or counterclaim seeking monetary compensation and/or an injunction against a non-governmental group or individual because of their communication with the public or with a government body; on an issue of public interest.⁴ The term “SLAPP” was coined in the 1980s. We have known about the phenomenon for nearly two decades. So why are we here today?

The reason is an escalation globally and in the US in SLAPP litigation as a tool to close civic space. The fossil fuel sector is one case in point. The Business and Human Rights Resource Center, a respected documentation center, notes that between 2015 and 2021 it identified 355 cases that bear the hallmarks of SLAPPs brought or initiated by business actors against individuals and groups related to their defense of human rights and/or the environment⁵ These suits were analyzed against a larger backdrop of more than 3,100 reported attacks on human rights defenders globally.⁶

In the European context, the Index on Censorship has identified cases which could qualify as SLAPPs in every Member State of the European Union, as well as Norway and each of the legal systems of the United Kingdom⁷ As noted in a 2020 study commissioned by the European Commission, Ad-Hoc Request on SLAPPs in the EU, “SLAPPs are increasingly used across member states, in an environment that is getting more and more hostile towards journalists, human rights defenders, and various NGOs”.⁸

The SLAPP trend in the United States, is aided by costly legal fees, and the so-called “American rule” whereby each party is responsible for their own legal fees. In a 2017 report, the Index on Censorship identified civil litigation as one of a number of growing threats to US

³ <https://www.business-humanrights.org/en/from-us/slapps-database/>; According to UNESCO recent declines in media freedom can largely be attributed to ‘subtle or indirect forms of restrictions and legal threats’ (2022:48). UNESCO, World Trends in Freedom of Expression and Media Development, Global Report 2021/2022.

⁴ W Pring, 'SLAPPs: Strategic Lawsuits against Public Participation' (1989) 7 *Pace Environmental Law Review* 3. See also 43 TA Waldman, 'Slapp Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation' (1992) 39 *UCLA Law Review* 979.

⁵ See Database and Briefing SLAPPed but not silenced: Defending human rights in the face of legal risks (2022) https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v657.pdf

⁶ Id.

⁷ Petra Bárd, Judit Bayer, Ngo Chun Luk, and Lina Vosyliute. ‘SLAPP in the EU context’ (2020)

⁸ Id.

press freedom.⁹ Corporations have also turned to using the Racketeering Influenced and Corrupt Organizations Act (RICO) to intimidate advocacy groups and activists by enabling corporations to paint groups and their affiliates as “criminal enterprises”, while claiming vast damages. RICO entitles plaintiffs to claim treble damages as a punitive measure.¹⁰

It should be no surprise that SLAPPs are multiplying in areas such as environmental protection,, A typical example is when a large company sues journalists or advocates who have exposed an environmental disaster and a company’s failure to prevent and/or remediate such a disaster¹¹

There seems to be a rising volume of legal actions brough by the energy sector against civil society groups. The Business and Human Rights Resource Center, which tracks SLAPP actions, found that 12 carbon majors brought at least 24 lawsuits against 71 environmental & human rights defenders between 2015 and 2018, seeking a total \$904 million in damages.¹² Just this week, EarthRights International released a report in which it identified 152 cases over the past ten years where the fossil fuel industry has used SLAPP suits and what it describes as other judicial harassment tactics in attempts to silence or punish its critics in the United States.

Many fossil fuel companies have made public commitments to respect for the human rights in their business operations. This includes subscribing to key international frameworks that commit companies to strong consultation with civil society and communities to identify and prevent harms. These frameworks require companies to ensure respect for respect for human rights defenders and their right to peaceful assembly. The data concerning SLAPP-like actions is inconsistent with these commitments.¹³

II. SLAPP Actions chills free speech and assembly

Why should we be concerned about these numbers? The reason is that SLAPPs can impose devastating consequences on those who are sued, draining them financially and emotionally and discouraging them from exercising their rights to free speech. Civil society groups that face these suits, may opt to end their advocacy rather than be encumbered with protracted litigation.

When early studies identifying SLAPPs emerged, it was recognized that the most problematic feature was the psychological and financial toll caused by lengthy trials, which effectively resulted in sufficient deterrence that even if corporations lost the case, they still succeeded in

⁹ <https://www.indexoncensorship.org/wp-content/uploads/2017/04/US-Report-Web-Final-27-April-2017-1.pdf>

¹⁰ UN Special Rapporteur on the Right to Peaceful Assembly and Association, Information note on SLAPSS and Freedom of Assembly and Association
<https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>

¹¹ The Use of SLAPPs to Silence Journalists, NGOs and Civil Society
[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf) European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs (June 2021)

¹² https://media.business-humanrights.org/media/documents/files/Big_Polluters_and_SLAPPs_Briefing_FINAL.pdf

¹³ <https://www.ipieca.org/news/ungps-and-oil-and-gas/>

discouraging future activity. Case law from the 1980s first identified the need to distinguish lawsuits that had a legitimate claim from frivolous suits which simply aimed at restricting the defendant's First Amendment rights. The Colorado Supreme Court ruled that these types of lawsuits are "baseless" and may result in harm to the public and its access to a marketplace of ideas by having a chilling effect on constitutionally protected activities.¹⁴

SLAPPs are typically cast as civil or criminal claims such as defamation or libel and have several common features. First, they are vexatious. The aim is not to win the case but to divert time and resources to stifle legitimate criticism. The aim of distracting or deterring is often achieved by making the legal process expensive and time-consuming.

SLAPPs are a threat to public participation, democracy, and the rule of law, and a direct attack on rights such as the right to freedom of expression and assembly. As an expert who has worked with the United Nations observing the impacts of such proceedings on communities and individual human rights defenders and organizations, I have seen the effect of prolonged and protracted litigation that often involves multiple parties and casts a wide net.¹⁵

The annual report of the Council of Europe Platform notes that in some cases, the threat of bringing such a suit, including through letters sent by powerful law firms, was enough to bring about the desired effect of stopping investigative reporting. While not the precise subject of today's hearing, I would note that the role of lawyers and certain law firms that engage in a high volume of these cases, raises concerns about their role and commitment to high ethical standards.

III. Restoring Balance: Federal and State Anti-SLAPP Legislation as a Meant to Providing Safeguards that preserve

How should Congress address this trend and restore balance, promoting avenues for free expression and assembly? I believe a key solution is the adoption of anti-SLAPP laws, that allow courts to review cases at an early stage in the proceedings, to see if they are indeed of public concern, and whether the SLAPP Suit itself is frivolous or has merit. This is not about precluding all litigation. If a claim is meritorious, it should survive a preliminary assessment by a court.

In recent years, several states have adopted or amended their anti-SLAPP laws. As of April 2022, 32 states and the District of Columbia have anti-SLAPP laws.¹⁶ The Uniform Law Commission recently drafted and approved for enactment the Uniform Public Expression Participation Act. This state-of-the-art anti SLAPP law is designed to be adopted by States and already has been

¹⁴ *Protect Our Mountain Environment Inc v District Court* 677 P2d 1361 (Colo 1984). *Id.* paras 1368-1369. P Shapiro, 'SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International' (2020) 19(1) *Review of European Community & International Environmental Law*

¹⁵ <https://www.ohchr.org/sites/default/files/2022-04/20220224ARstatementUN-EUHighLevelPolicyDialogue.pdf>

¹⁶ <https://www.rcfp.org/introduction-anti-slapp-guide/>

enacted in states as diverse as Kentucky and Washington.¹⁷ The drafting of this act was undertaken during my presidency of the Uniform Law Commission. The act had strong and robust support from commissioners of varying backgrounds and viewpoints. The act contains a clear framework for the efficient review and dismissal of SLAPPs. If a respondent cannot establish a prima facie case then the claims may be dismissed.

With the state reforms currently underway, do we need a federal statute? I believe the answer is yes, and that they can co-exist as a matter of cooperative federalism. If a corporation sues a civil society organization in federal court for a state law tort, such as libel, it is not clear whether they can invoke the protections of a state's anti-SLAPP law, assuming one exists. A federal law, combined with stronger state laws, will also preclude forum shopping.

I urge Congress and the House of Representatives will act to restore balance, and to protect and preserve the ability of civil society to participate in public debates concerning important topics such as climate change, environmental impacts of the fossil fuel industry and other related topics without fear of being dragged into lawsuits that will take significant toll on their ability to engage in the civic sphere. The protracted nature of such proceedings as well as the tremendous cost for civil society groups to defend themselves is what causes deterrence and a chilling effect.

¹⁷ <https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1#:~:text=The%20Uniform%20Public%20Expression%20Protection,to%20silence%20and%20intimidate%20the>