

SENATE No. 1132

The Commonwealth of Massachusetts

PRESENTED BY:

Bruce E. Tarr

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to strategic litigation against public participation.

PETITION OF:

NAME:

Bruce E. Tarr

DISTRICT/ADDRESS:

First Essex and Middlesex

SENATE No. 1132

By Mr. Tarr, a petition (accompanied by bill, Senate, No. 1132) of Bruce E. Tarr for legislation relative to strategic litigation against public participation. The Judiciary.

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Third General Court
(2023-2024)**

An Act relative to strategic litigation against public participation.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 59H of Chapter 231 of the General Laws, as appearing in the 2020
2 Official Edition, is hereby amended by striking the section in its entirety and inserting in place
3 there of the following new section:-

4 A. Substantive Immunity

5 The purpose of this statute is to ensure full participation by citizens and organizations in
6 the robust discussion of issues in furtherance of the right of petition, and of the rights of freedom
7 of speech and of expression in connection with any matter of public concern. Because there has
8 been a disturbing increase in lawsuits brought primarily to chill the valid exercise of First
9 Amendment rights to speak on public issues, this statute recognizes that such litigation is
10 disfavored and should be resolved quickly with minimum cost to those exercising their rights
11 protected by the First Amendment to the U.S. Constitution or Article 16 of the Massachusetts
12 Declaration of Rights. In furtherance of this purpose, in any case in which a party asserts that the

13 civil claims, counterclaims, cross claims or pre-suit discovery against said party are based, either
14 in whole or in part, on said party's exercise of its right of petition, or of its rights of freedom of
15 speech or freedom of expression in connection with any matter of public concern under the
16 Constitution of the United States or of the Commonwealth, said party may bring a special motion
17 to dismiss.

18 1. All laws of this commonwealth shall be construed to afford a qualified immunity from
19 suits and proceedings and from liability for any defendant or counter-defendant in any action,
20 case, claim, arbitration, or administrative proceeding, that impacts their First Amendment rights.
21 This immunity shall be broadly construed to protect all First Amendment rights.

22 2. This immunity may be invoked by a defendant or counter-defendant at any time, but it
23 can be waived if the defendant or counter-defendant substantially litigates the case beyond a
24 jurisdictional challenge before raising the immunity, unless facts later develop demonstrating the
25 immunity should apply, and such facts were not available to the defendant prior.

26 3. This immunity may be invoked by making a showing that a claim or counterclaim is
27 based upon the defendant or counter-defendant's use of the rights afforded under the First
28 Amendment to the U.S. Constitution or the free speech provision of the Massachusetts
29 Constitution, see art. 16 of the Declaration of Rights, as amended by art. 77 of the Amendments
30 to the Massachusetts Constitution.

31 4. This immunity may be invoked so long as a claim or counter-claim is based upon at
32 least one act in furtherance of these rights, even if the claim or counter-claim is also based on
33 acts not in furtherance of these rights.

34 5. This immunity may only be overcome by a showing by the plaintiff or counter-plaintiff
35 that the claim or counterclaim is of sufficient merit, with prima facie evidence, there is a
36 probability of prevailing on the claim or counterclaim. If invoked in federal court or in a court
37 outside the Commonwealth, the plaintiff must show that the claim can survive a motion to
38 dismiss or a motion for summary judgment, or analogous motion, as applicable.

39 6. Given that this is a substantive immunity from suit, not just liability, any denial of a
40 motion invoking this immunity shall be appealable on an interlocutory basis in the state courts of
41 Massachusetts and, to the fullest extent permissible, in the jurisdiction in which the matter is
42 pending.

43 7. If a defendant or counter-defendant successfully invokes this immunity, that defendant
44 or counter-defendant shall be entitled to all actual costs, disbursements and reasonable attorneys'
45 fees expended in the defense of the case as well as all actual costs, disbursements and reasonable
46 attorneys' fees expended in any successful appeal. The rights and remedies of this statute apply
47 to claims brought by the Commonwealth or its subdivisions against any person or entity and, to
48 the fullest extent possible, sovereign immunity for the recovery by such defendant of fees, costs,
49 and damages provided in this statute is hereby waived. The provisions of this statute shall not
50 apply to a cause of action asserted against a governmental unit or an employee or agent of a
51 governmental unit acting or purporting to act in an official capacity.

52 8. If a defendant or counter-defendant successfully disposes of all claims or counter-
53 claims by a party brought against it under this Section, the defendant or counter-defendant may
54 recover all actual costs, disbursements, and reasonable attorneys' fees incurred in defending

55 itself from the claims or counter-claims, regardless of whether such costs, disbursements, or
56 attorneys' fees are related to a motion under this Section.

57 9. If fewer than all claims or counterclaims are disposed of under this Section, the
58 defendant or counter-defendant may only recover those costs, disbursements, and attorneys' fees
59 incurred in connection with a motion under this Section.

60 10. This immunity may be exercised either by a motion to dismiss invoking the
61 immunity, a motion for judgment on the pleadings, or an early motion for summary judgment
62 invoking the immunity. The party invoking this immunity may also bring a counterclaim for
63 violation of the Anti-SLAPP law.

64 B. Special Motion to Dismiss Procedure

65 The purpose of this section is to provide procedures through which Section A will apply
66 in all courts in this Commonwealth.

67 1. In federal courts and in foreign jurisdictions, these procedural rules are severable from
68 the anti-SLAPP substantive immunity established in the foregoing section. In Massachusetts
69 state courts, and wherever these rules are not in conflict with those of the tribunal, if an action is
70 brought against a person in violation of the Substantive Immunity from anti-SLAPP litigation,
71 the person against whom the action is brought may bring a special motion to dismiss or an Anti-
72 SLAPP counterclaim, or both.

73 2. A special motion to dismiss may be filed 7 days after notice of an intent to bring an
74 Anti-SLAPP motion is served upon the plaintiff (or other authority bringing the claim)

75 3. If a special motion to dismiss is filed, the court shall:

76 (a) Determine whether the moving party has established by a preponderance of the
77 evidence that the claim fits within the substantive immunity protections;

78 (b) If the court determines that the moving party has met the burden pursuant to sub-
79 paragraph (a), determine whether the non-moving party has demonstrated with prima facie
80 evidence a probability of prevailing on the claim;

81 (c) If the court determines that the non-moving party has established a probability of
82 prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:

83 (1) Be admitted into evidence at any later stage of the underlying action or subsequent
84 proceeding; or

85 (2) Affect the burden of proof that is applied in the underlying action or subsequent
86 proceeding;

87 (d) Consider such evidence, written or oral, by witnesses or affidavits, as may be
88 material in making a determination pursuant to paragraphs (a) and (b);

89 (e) Except as otherwise provided in subsection 4, stay all other portions of the case,
90 including discovery and motion practice pending:

91 (1) A ruling by the court on the motion; and,

92 (2) The disposition of any appeal from the ruling on the motion; and,

93 (f) Rule on the motion within 30 judicial days after the motion is served upon the
94 plaintiff, with such time to be extended by good cause shown or as the court's schedule requires.

95 4. Upon a showing by a party that information necessary to meet or oppose the burden
96 pursuant to paragraph (3) is in the possession of another party or a third party and is not
97 reasonably available without discovery, the court shall allow limited discovery for the purpose of
98 ascertaining such information.

99 (a) This showing must be demonstrated by separate motion, and must be accompanied by
100 an affidavit, signed under penalty of perjury, by the moving party and the moving party's
101 attorney,

102 (b) This motion must lay out, with specificity, the discovery requested, the reason it the
103 specific discovery is necessary, and why it cannot be gathered in any other way.

104 (c) If the motion lacks such specificity, it must be denied and the reasonable attorneys'
105 fees incurred in opposing it must be awarded to the non-moving party.

106 (d) Before bringing such discovery motion, the prospective moving party must meet and
107 confer with the non-moving party in order to resolve the matter without a motion. If the non-
108 moving party has unreasonably declined to agree to the discovery, the moving party shall be
109 entitled to the reasonable attorneys' fees incurred in bringing the motion.

110 5. If the court dismisses the action pursuant to a special motion to dismiss, the dismissal
111 operates as an adjudication upon the merits.

112 6. If the plaintiff or counter-plaintiff notices dismissal or moves to voluntarily dismiss the
113 action, or seeks to amend the complaint, after a special motion to dismiss is filed,

114 (a) Such notice of dismissal or motion to dismiss shall function as an admission that the
115 special motion was meritorious, and thus the court must grant the motion.

116 (b) Such motion to amend shall function as an admission that the special motion was
117 meritorious as to any claims that the amendment would remove,

118 7. The court may modify any deadlines pursuant to this section or any other deadlines
119 relating to a complaint filed pursuant to this section if such modification would serve the
120 interests of justice.

121 C. The SLAPP Back Statute:

122 The purpose of this section is to provide a positive cause of action for persons who have
123 been aggrieved by a SLAPP suit, but require additional remedies to be made whole.

124 1. If any claim, action, administrative proceeding, or any action of any kind is brought
125 against a party, and that party wishes to invoke the anti-SLAPP law by way of separate action,
126 they may do so.

127 2. If an action is brought, and a party successfully invokes the anti-SLAPP statute, that
128 person may bring a separate action to recover any damages, costs and fees that could not be
129 recovered in the trial court.

130 3. The elements of this claim are:

131 a. claim was filed,

132 b. there was an anti-SLAPP motion filed (or an equivalent in federal court)

133 c. The motion was successful. The motion shall be considered “successful” if a court
134 rules it so or if the Plaintiff in the prior action withdraws its claim(s) after the motion is filed, but
135 before the court can adjudicate it.

136 d. if the claim is successful, the court shall:

137 1) Award statutory damages of no less than \$10,000

138 2) Award other compensatory damages

139 3) Award the prevailing plaintiff attorneys fees and costs.

140 4) Award compensatory damages;

141 5) Award the prevailing plaintiff attorneys fees and costs.

142 4. If any citizen of this Commonwealth is sued in another jurisdiction, and that citizen
143 raises the anti-SLAPP protections in Chapter 231 § 59H, but the other jurisdiction declines to
144 apply Chapter 231 § 59H, and that citizen ultimately prevails in the action, then that citizen shall
145 have a cause of action against the plaintiff or counter-plaintiff in the foreign action if a-f, below,
146 are proven:

147 a. The claim would have been subject to Chapter 231 § 59H, if it had been brought in the
148 state courts in Massachusetts;

149 b. The defendant or counter-defendant in the foreign action invoked Chapter 231 § 59H;

150 c. The foreign court declined to apply Chapter 231 § 59H;

151 d. The Massachusetts defendant prevailed in that foreign action - including obtaining a
152 dismissal without prejudice or a dismissal for a lack of personal jurisdiction; and,

153 e. The Massachusetts defendant in the foreign action gave the plaintiff in the foreign
154 action notice, in writing, that if the Massachusetts defendant in the foreign action prevailed, the
155 Massachusetts defendant in the foreign action would bring a claim under this section,

156 f. If these five elements are proven by a preponderance of the evidence, then the plaintiff
157 in this action shall be entitled to:

158 1. Statutory damages of between \$10,000 and \$100,000;

159 2. Damages in an amount equal to the actual costs, disbursements and reasonable
160 attorneys' fees expended in the foreign action, which were incurred after the giving of notice;

161 3. All actual costs, disbursements and reasonable attorneys' fees expended in bringing the
162 Massachusetts action; and

163 4. Punitive damages.

164 D. Retroactivity

165 The provisions of this law shall apply to all actions pending in the Commonwealth at the
166 time of its passage and, to the fullest extent permissible, to actions pending in federal courts and
167 foreign jurisdictions.

168 E. Codification of New York Times v. Sullivan

169 The purpose of this section is to ensure that if the Supreme Court of the United States
170 overturns New York Times v. Sullivan, the rule laid down by that decision remains in effect in
171 this Commonwealth.

172 In this Commonwealth, no party shall be liable for speech about a public official, no
173 matter the cause of action styled, unless the plaintiff proves that the statement was knowingly
174 false or made with reckless disregard for the truth.

175 A Defamation Plaintiff may meet this standard if the Plaintiff shows that the Defendant
176 willfully ignored contrary facts or failed to engage in a reasonable investigation into the facts.
177 Reasonableness shall be determined from a point of view of a reasonable person under the
178 circumstances of the particular case.