COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS
DEPARTMENT

SUPERIOR COURT

JOSEPH F. DUGAS and PAUL REVERE III,	)	
Plaintiffs,	)	
v.	)	C.A. No. BACV2008-491
PETER ROBBINS and JOHN DOE,	)	
Defendants.	)	

MEMORANDUM OF *AMICI CURIAE* CITIZEN MEDIA LAW PROJECT ET AL. IN SUPPORT OF APPLICATION OF THE MASSACHUSETTS ANTI-SLAPP LAW TO PETITIONING ACTIVITY BY MEMBERS OF THE NEWS MEDIA AND BLOGGERS

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STATEMENT OF INTEREST

As described more fully in the accompanying Motion of Citizen Media Law Project et al. For Leave to File a Memorandum of Law as *Amici Curiae*, *amici* are news organizations and non-profit organizations that publish on the Internet and seek to protect the rights of journalists and other citizens to publish online.[1] *Amici* are concerned that if the Court were to deny members of the news media and bloggers the important protections afforded by the Massachusetts anti-SLAPP law, this would chill their efforts to inform citizens of the Commonwealth about issues before the government.

BACKGROUND

This case involves a defamation lawsuit filed against Peter Robbins, author of the Robbins Report, a blog[2] that appears on the popular community Web site *Cape Cod Today*, and an anonymous commenter on that blog. The dispute arose over a March 11, 2008 blog post by Mr. Robbins in which he criticized a number of individuals, including plaintiffs Joseph Dugas and attorney Paul Revere III, who had challenged orders and permits issued by the Town of Barnstable Conservation Commission and the Massachusetts Department of Environmental Protection that authorized dredging in Barnstable Harbor.

On August 29, 2008, defendant Robbins filed a special motion to dismiss the complaint pursuant to Massachusetts' anti-SLAPP law, Mass. Gen. Laws ch. 231, § 59H (West 2008). At a hearing on defendant's motion held on September 26, 2008, the Court asked the parties to submit

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[1] *Amici* wish to acknowledge the invaluable assistance of Harvard Law School clinical student Thomas Sullivan, who served as the primary author of this brief.

[2] A blog or "weblog" is a "[a] frequently updated web site consisting of personal observations, excerpts from other sources, etc., typically run by a single person, and usually with hyperlinks to other sites; an online journal or diary." Oxford English Dictionary, http://dictionary.oed.com (last visited Nov. 6, 2008). In some cases, blogs are operated by or associated with traditional news media, *see, e.g.*, N.Y. Times.com, Blogs, http://www.nytimes.com/ref/topnews/blog-index.html (last visited Nov. 6, 2008), but in many cases they are run by new media companies or by individual bloggers themselves. Some bloggers are compensated, many are not; those that are may receive compensation in various ways — through a percentage of advertising revenue, a flat fee per post, by salary, or other means.

supplemental briefs addressing whether the compensation Mr. Robbins receives for his blogging activities makes him a member of the "news media" and, if so, whether that status would put him outside the protections afforded by the Massachusetts anti-SLAPP law.

SUMMARY OF ARGUMENT

The undersigned *amici curiae* respectfully submit that a compensated blogger such as defendant Robbins is fully entitled to the protections set forth in, and remedies prescribed by, the Commonwealth's anti-SLAPP statute regardless of whether he or she is characterized as a member of the news media. To hold otherwise would contradict the plain language of the anti-SLAPP statute and Massachusetts case law interpreting the statute. It also would undermine the law's purpose of curbing the chilling effects of lawsuits designed to limit public participation.

Anti-SLAPP laws protect citizens and organizations that engage in "petitioning" activities by prohibiting lawsuits aimed at curtailing such activities. While the Massachusetts anti-SLAPP law was originally directed at lawsuits involving development projects, the legislature intended for the statute to be interpreted broadly, as subsequent decisions have borne out.

Regardless of how the Court characterizes the publishing activities of defendant Robbins, he would not fall outside Massachusetts' anti-SLAPP law simply because he was found to be a member of the news media. Members of the news media who engage in petitioning activities are fully covered by the anti-SLAPP law. The news media potentially engage in at least three different types of petitioning activity that fall within the protections afforded by the statute. They engage in news reporting to influence, inform, and bring about governmental consideration of issues and to foster public participation in order to effect such consideration. They publish editorial statements with these same purposes in mind. And they also make statements directly to legislative, judicial, and other governmental bodies.

The fact that Mr. Robbins receives compensation for his publishing activities does not preclude application of the anti-SLAPP law. Under the Supreme Judicial Court's holding in *Kobrin v. Gastfriend*, a blogger who is compensated for his work can still have a personal interest in an issue under governmental consideration sufficient to qualify for protection under the statute. He or she can have a direct interest in a matter under governmental consideration; an interest in an issue as a member of the community directly affected by that issue; or an interest in informing the public and engendering discussion about issues of public concern.

For these reasons, as set forth more fully herein, a compensated blogger may be entitled to the protections of the Commonwealth's anti-SLAPP statute regardless of whether he or she is characterized as a member of the news media.

ARGUMENT

SLAPP stands for "Strategic Lawsuit Against Public Participation" and typically refers to a lawsuit filed in retaliation against an individual or organization that speaks out on a public issue or controversy.[3] Most SLAPPs would fail if fully litigated, but the party that files a SLAPP suit usually does not intend to take it through to a judgment. The point of a SLAPP is to intimidate and silence the target through the threat of an expensive lawsuit. As the General Court noted in enacting the Massachusetts anti-SLAPP statute, "there [had] 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." *See* preamble to 1994 House Doc. No. 1520.

[3] This term was first used by Professors Penelope Canan and George W. Pring. *See generally* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).

To guard against the chilling effect of SLAPPs, twenty-six states and one U.S. territory have enacted anti-SLAPP statutes.[4] In many of these states (including Massachusetts), these laws allow a defendant facing a SLAPP suit to file a special motion to dismiss, receive an expedited review of that motion and a stay of discovery until the motion is decided, and recover attorneys' fees if the motion is successful. *See* Mass. Gen. Laws ch. 231, §59H. These protections are essential. As the California Court of Appeals has recognized, "[b]ecause winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPP's. Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as merely a cost of doing business." *Dixon v. Superior Court,* 36 Cal. Rptr. 2d 687, 693 (Cal. Ct. App. 1994) (quoting *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 450 (Cal. Ct. App. 1994)).

To effectuate the purposes underlying these anti-SLAPP laws, courts have recognized that they need to be read to cover many kinds of activities. For example, the California Court of Appeals held that the term "public forum" in that state's anti-SLAPP law must be construed to include newspapers to serve "the fundamental purpose underlying the anti-SLAPP statute, which seeks to protect against 'lawsuits brought primarily to chill the valid exercise of constitutional rights' and 'abuse of the judicial process . . . .'" *Nygard, Inc. v. Uusi-Kerttula*, 72 Cal. Rptr. 3d

[4] Ariz. Rev. Stat. Ann. § 12-752 (2008); Ark. Code Ann. §§ 16-63-501 to -508 (West 2008); Cal. Civ. Proc. § 425.16 (West 2008); Del. Code Ann. tit. 10, §§ 8136-8137 (West 2008); Fla. Stat. Ann. § 720.304 (West 2008); Fla. Stat. Ann. § 768.295 (West 2008); Guam Code Ann. tit. 7, §§ 17101-17109 (2006); Ga. Code Ann. § 9-11-11.1 (West 2008); Haw. Rev. Stat. § 634F-1 to -4 (2008); 735 Ill. Comp. Stat. 110/1 (West 2008); Ind. Code Ann. §§ 34-7-7-1 to -10 (West 2008); La. Code Civ. Proc. Ann. art. 971 (2008); Me. Rev. Stat. Ann. tit. 14, § 556 (2008); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (West 2008); Minn. Stat. Ann. §§ 554.01-.05 (West 2008); Mo. Ann. Stat. § 537.528 (West 2008); Neb. Rev. Stat. §§ 25-21,241-,246 (2008); Nev. Rev. Stat. Ann. §§ 41.635-.670 (West 2008); N.M. Stat. Ann. § 38-2-9.1 (West 2008); N.Y. Civ. Rights Law §§ 70-a, 76-a (McKinney 2008), N.Y. C.P.L.R. 3211(g), 3212(h) (McKinney 2008); Okla. Stat. Ann. tit. 12, § 1443.1 (West 2008); Or. Rev. Stat. §§ 31.150-.155 (West 2008); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301-05 (West 2008); R.I. Gen. Laws § 9-33-1 to -4 (West 2008); Tenn. Code Ann. §§ 4-21-1001 to -1004 (West 2008); Utah Code Ann. §§ 78B-6-1401 to -1405 (West 2008); Wash. Rev. Code Ann. § 4.24.510 (West 2008).

210, 217 (Cal. Ct. App. 2008) (quoting Cal. Civ. Proc. Code § 425.16(a)). The same fundamental purpose underlies the Massachusetts statute, and this Court should construe it in similarly broad terms.

I. Members of the "News Media" Who Engage in Petitioning Activities Are Covered By the Massachusetts Anti-SLAPP Law.

Regardless of how the Court characterizes the publishing activities of defendant Robbins, he would not fall outside Massachusetts' anti-SLAPP law simply because he was found to be a member of the news media. [5]

A. The Anti-SLAPP Law Applies to Any Party Engaged in Petitioning Activity.

The Massachusetts anti-SLAPP law does not limit the type of party that may bring a special motion to dismiss. Rather, the statute's protections extend to "any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition." Mass. Gen. Laws ch. 231, § 59H. In enacting the statute, "the Legislature intended to enact very broad protection for petitioning activities," *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 162 (1998), and the statute enumerates five types of activities that fall within its scope, including *any written or oral statement* (1) "made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding"; (2) "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding"; (3) "reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding"; (4) "reasonably likely to enlist public

[5] *Amici* take no position on whether Mr. Robbins is a member of the "news media." Instead, *amici* believe that the Massachusetts anti-SLAPP law, Mass G. L. c. 231, § 59H, applies to all parties, including members of the news media, who engage in petitioning activities.

participation in an effort to effect such consideration"; or (5) "any other statement falling within constitutional protection of the right to petition government." Mass. Gen. Laws ch. 231 § 59H.

One court in the Commonwealth has already ruled that a newspaper article "falls squarely with[in] the protection of [the anti-SLAPP law] as a '. . . written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding.'" *Salvo v. Ottoway Newspapers*, No. 97-2123-C, 1998 WL 34060940, at *2 (Mass. Super. May 13, 1998) (quoting Mass. Gen. Laws ch. 231, § 59H). This conclusion is in line with the Supreme Judicial Court's recognition that, while the anti-SLAPP law was originally designed to protect against "lawsuits directed at individual citizens of modest means for speaking publicly against development projects," *Duracraft Corp.*, 427 Mass. at 161, "the Legislature intended to enact very broad protection for petitioning activities," *id.* at 162.

Accordingly, courts in Massachusetts have found the anti-SLAPP law's protections apply to a wide range of parties, including limited liability corporations, *SMS Financial V, LLC v. Conti*, 68 Mass. App. Ct. 738, 746-47 (2007); citizens groups, *see Plante v. Wylie*, 63 Mass. App. Ct. 151, 156 (2005); and hosts of community blogs, *MacDonald v. Paton,* 57 Mass. App. Ct. 290, 291-92 (2003). Moreover, the Supreme Judicial Court has noted that "there is no statutory requirement that petitioning parties directly commence or initiate proceedings." *Kobrin v. Gastfriend*, 443 Mass. 327, 338 (2005).

B. The News Media May Engage in at Least Three Separate Types of Petitioning Activities.

As the Appeals Court stated in *North American Expositions Company v. Corcoran*, to determine if particular conduct constitutes petitioning activity, "[t]he central inquiry is whether the communication 'had the potential or intent to redress a grievance, or directly or indirectly to

influence, inform, or bring about governmental consideration of the issue.'" 70 Mass. App. Ct. 411, 420 (2007) (quoting *Global NAPs, Inc. v. Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 607 (2005)). *Amici* recognize that not every news article or piece of opinion journalism the news media publishes will necessarily satisfy this inquiry and thus be covered by the anti-SLAPP law. But the news media routinely engage in at least three types of activities that may constitute petitioning under this test.[6]

1. News Media Directly or Indirectly Influence, Inform, and Bring About Governmental Consideration of Issues Through News Reporting.

The news media routinely influence and inform the public and governmental bodies through factual news reporting. As the Supreme Judicial Court has recognized, "the media are agents of the public and serve as its eyes and ears in matters of public concern." *ELM Medical Laboratory v. RKO General, Inc.*, 403 Mass. 779, 783 (1989). The news media exist to "enlighten[] their fellow subjects upon their rights and the duties of rulers." *Commonwealth v. Blanding*, 20 Mass (3 Pick.) 304, 314 (1825); *see also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667 (1990) ("We have consistently recognized the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'") (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 781 (1978)).

Factual reporting by the news media is likely to fall under several of the enumerated petitioning activities in the anti-SLAPP law. Factual reporting can, among other things, "encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding" and "enlist public participation in an effort to effect such consideration." Mass. Gen. Laws ch. 231, § 59H. Indeed, the news media in Massachusetts

[6] One Massachusetts court has suggested, in *dicta*, that media defendants cannot claim the anti-SLAPP law's protections. See *Islamic Soc. of Boston v. Boston Herald, Inc.*, No. 05-4637, 2006 WL 2423287, at *9 (Mass. Super. July 21, 2006). The issue was not before the court, however, as it was ruling on the applicability of the anti-SLAPP statute to *non-media defendants*. *Id.* Furthermore, Justice Sanders cited no authority in support of her conclusion.

frequently provide officials with information that leads to consideration by governmental bodies and encourage the public to become involved. In one recent example, a WBZ-TV report questioning the accounting practices of Assabet Valley Regional Technical High School led to an inquiry by the Office of the Inspector General. *See* Priyanka Dayal, *IG School Report Blasted; Assabet Denies Hiding $6M*, Worcester Telegram & Gazette, Mar. 19, 2008, at A1.[7]

As noted above, one Massachusetts court has already recognized that a newspaper publisher is covered by the anti-SLAPP law. In *Salvo,* the plaintiff brought a libel action against the publisher of the *Salem Evening News*. The *News* had published an article reporting on a development proposal that was about to be presented to the town's planning board. The article accused the plaintiff of seeking to build on "marginal land," getting the city to swap some land with him, and building a home "on what was thought to be unbuildable wetlands." *Salvo*, 1998 WL 34060940, at *1. Although the Essex Superior Court found that the article in question lacked any reasonable factual support and therefore the plaintiff's libel claim was not subject to dismissal, the court held that the defendant newspaper fell within the protection of the anti-SLAPP law. *Id.* at *2.

Not every statement by the news media, regardless of how tangential it is to an issue under consideration or review by a governmental body, is entitled to the protection of the anti-SLAPP law. *See Global NAPs*, 63 Mass. App. Ct. at 607 (stating that "tangential statements intended, at most, to influence public opinion in a general way unrelated to governmental involvement" are not covered by the statute). But statements by the news media that are

[7] Similarly, an article in the *Boston Phoenix* raising questions about police misconduct led to a review by the Boston Police Department of how a case was built against a man wrongfully convicted of shooting a police officer. *See* David S. Bernstein, *More Than a Few Loose Ends: BPD To Review Cowans Evidence*, Boston Phoenix, Mar. 5, 2008. In May 2008, responding to an April story in the *Boston Globe* alleging a group representing ticket brokers had hired a friend of Speaker DiMasi as a lobbyist, the Massachusetts Republican Party filed a complaint with the Commonwealth's Ethics Commission. *See* Andrea Estes & Stephen Kurkjian, *Ticket Brokers Acknowledge Hiring Speaker's Longtime Friend*, Boston Globe, May 14, 2008, at B1.

"reasonably likely to encourage consideration or review of an issue" by a governmental body or are "reasonably likely to enlist public participation in an effort to effect such consideration," are covered by the plain language of the anti-SLAPP law's broad definition of petitioning activity. Mass. Gen. Laws ch. 231, § 59H.

2. News Media Directly or Indirectly Influence, Inform, and Bring About Governmental Consideration of Issues Through Editorial Statements.

Besides factual reporting, the news media also influence and inform through opinion journalism. If anything, the case for providing protection for the news media's opinion-based work under the anti-SLAPP law is even stronger than the case for protecting factual reporting. While factual reporting informs, opinion journalism both informs and directly encourages governmental bodies to act and calls on the public to participate in governmental decisionmaking. As in *Salvo*, such writings by the news media "fall[] squarely with[in] the protection of" the anti-SLAPP law." 1998 WL 34060940, at *2.

In a very similar context, one court in the Commonwealth has found that letters to the editor in a newspaper constitute petitioning under the anti-SLAPP law if "the letters are statements that are 'reasonably likely to encourage consideration or review' by the government, or are 'reasonably likely to enlist public participation.'" *Thomson v. Town of Andover Bd. of Appeals,* No. 931716, 1995 WL 1212920, at *1 (Mass. Super. July 25, 1995).[8] There is no reason the statute's protections should not be extended to statements by the newspaper itself. It would be nonsensical to provide the anti-SLAPP law's protection to a letter to the editor that appeared on a newspaper's editorial page but deny that protection to an editorial written by a staff writer or paid freelancer on the same subject that appeared side-by-side with the letter.

[8] The Supreme Judicial Court of Maine has reached the same conclusion. *See Schelling v. Lindell*, 942 A.2d 1226, 1230–31 (Me. 2008).

Editorials and other opinion pieces created by the news media play important roles in informing government officials and provoking action. For example, the Massachusetts Ethics Commission apparently began an inquiry into an Executive Office of Public Safety official after a member of the Commission's staff read an editorial in the *Boston Globe* in 2004 demanding an investigation. *See* Sean P. Murphy, *Ethics Commission drops charges against O'Toole*, Boston Globe, Oct. 1, 2008, at B4.[9] The Commission might never have looked into the case in the first place if not for the *Globe's* editorial.

3. News Media May Make Statements Directly to a Governmental Body About an Issue Under Consideration.

Representatives of the news media also occasionally engage in direct petitioning activity through written or oral statements to governmental bodies. Indeed, this *amici curiae* brief is an example of the news media exercising their right of petition in this manner. Members of the news media also routinely testify before the legislature about issues of concern to the profession as a whole, *see* Casey Ross, *Journalists Make Pitch for State Shield Law*, Boston Herald, June 13, 2007, at 8, and go before the courts and other governmental bodies on matters that affect any business entity, such as zoning issues. The news media certainly have the same rights as any other petitioners in these contexts.

II. A Compensated Blogger Can Have an Interest in the Issue Under Governmental Consideration Sufficient to Qualify for Protection Under the Anti-SLAPP Law.

The Court has asked the parties to address whether the fact that defendant receives compensation for his blogging activities excludes him from the protections afforded by Massachusetts' anti-SLAPP statute. That the petitioning party receives compensation does not, by itself, take the party outside the anti-SLAPP law's protections.

[9] The Commission ultimately dropped the investigation, because too much time had lapsed since the events at issue had occurred.

The Massachusetts anti-SLAPP law contains no language requiring that a party who receives compensation for its petitioning activities be excluded from the statute's protections. The Supreme Judicial Court's statement in *Kobrin v. Gastfriend* that parties must "petition the government on their own behalf," 443 Mass. at 332, supports no such exclusion either.

In *Kobrin*, the court held that the defendant, a psychiatrist who was retained by the Board of Registration in Medicine to render an expert opinion concerning the plaintiff's medical practices, was not entitled to invoke the anti-SLAPP law because he "was acting *solely on behalf of the board as an expert investigator and witness*." 443 Mass. at 329 (emphasis added). Furthermore, the court remarked that the defendant had no interest of his own; rather, "[t]he board contracted with the defendant to engage in investigative activities in aid of *the board's* case against the plaintiff." *Id.* (emphasis in original).

The *Kobrin* court was careful to limit its holding to the facts before it, noting that "no definition of the phrase ['right of petition under the constitution'] will encompass every case that falls within the statute's reach, and some difficult factual situations will have to be assessed on a case-by-case basis." 443 Mass. at 332 n.8. Moreover, the *Kobrin* court cited with approval *Baker v. Parsons*, 434 Mass. 543 (2001), where the Supreme Judicial Court held that a scientist for an environmental group whose comment was sought by permitting agencies had a sufficient interest to allow her to take advantage of the anti-SLAPP statute, despite her lack of a direct personal stake in the matters at issue. The *Kobrin* court said that the defendant's interest in *Baker* was sufficient because her remarks were based on her personal observations over fifteen years of studying birds on the island and because "[s]he concluded her comments by calling on the responsible Federal and State regulatory agencies to halt the continued degradation of the site." *Kobrin*, 443 Mass. at 339-40.

Where a petitioning party has an interest in a matter under government consideration, it does not lose that interest simply because it is compensated in some fashion for engaging in the petitioning activity. The publisher-defendant in *Salvo* — a commercial news venture — received compensation from advertisers and from subscribers to its newspaper. The defendant in *Baker* undoubtedly received a salary from the environmental group that employed her as its senior staff scientist. In both of these cases the courts' focus was properly on whether the defendants had engaged in activities covered by the anti-SLAPP law's broad definition of the right of petition, not whether they were in some way compensated for those activities.

Nor is there any requirement that the petitioning party's sole motivation or purpose be to influence government proceedings. In fact, such a requirement would be contrary to the plain language of the anti-SLAPP statute which applies, *inter alia*, to "*any statement reasonably likely* to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding" and to "*any statement reasonably likely* to enlist public participation in an effort to effect such consideration." Mass. Gen. Laws ch. 231, §59H (emphases added). Case law interpreting the statute has borne this out. *See, e.g., North American Expositions Company*, 70 Mass. App. Ct. at 420 (noting that the "central inquiry is whether the communication 'had the *potential* or intent to redress a grievance, or directly or indirectly to influence, inform, or bring about governmental consideration .'") (emphasis added) (quoting *Global NAPs*, 63 Mass. App. Ct. at 607).[10]

Indeed, the logical extension of this argument would exclude every Web site that accepts advertising or collects income from subscribers. *See Kronemyer v. Internet Movie Data Base,*

[10] *Cadle Co. v. Schlichtmann*, 448 Mass. 242 (2007), is not inconsistent with this position. In *Cadle*, the Supreme Judicial Court found that statements an attorney made on his website were not entitled to the protection of the anti-SLAPP law because the defendant was simply "advertising his legal services," and the site provided no mechanism for enlisting public participation. *Id.* at 250. Accordingly, the holding in *Cadle* should be limited to a situation in which a defendant has a "palpable commercial motivation" behind the statements at issue. *Id.* at 252.

Inc., 59 Cal. Rptr. 3d 48, 54 (Ct. App. 2007) (noting that Web site advertising does not automatically make statements on the site "commercial speech" under the California anti-SLAPP law). Unlike the defendant in *Kobrin*, who "had no other connection to, or interest in, the allegations involving the plaintiff," 443 Mass. at 337, and therefore was not entitled to invoke the Massachusetts anti-SLAPP law, a blogger who is compensated for his or her work may have at least four possible interests sufficient to confer protection under the statute.

A. A Compensated Blogger May Have a Specific Interest in the Matter Under Governmental Consideration.

A blogger who is compensated for his or her work may have a specific interest in the matter under consideration because its resolution can have a direct impact on his or her work. For example, bloggers have lobbied Congress to pass a reporters' "shield law," which would give them greater protection against having to reveal their sources. *See* Aoife McCarthy, *Blogger Lobbies for Journalism Rights*, Politico, May 8, 2007.[11] As noted above, when individuals testify before the legislature or submit written statements, they are surely protected by the anti-SLAPP law. Individuals also are protected if they submit a "letter to the editor" of their local newspaper. *Thomson,* 1995 WL 1212920, at *1. It would be inconsistent not to protect similar statements because they are published on a blog instead of in a newspaper.

B. A Compensated Blogger, as a Member of the Community, May Have an Interest in the Resolution of Issues of Concern to the Community.

Similarly, as a member of the community, a blogger who receives compensation for his work may have an interest in the resolution of issues of concern to that community. Bloggers buy houses for which they would pay more if property taxes were raised, *see* Posting of Paul to BloggingBelmont.com (Oct. 13, 2008 8:33 EST);[12] bloggers have children about whose

[11] Available at http://www.politico.com/news/stories/0507/3893.html.
[12] Available at http://bloggingbelmont.wordpress.com/2008/10/13/no-on-question-1-you-betcha/#more-228.

educations they may express concerns, *see* Posting to Whos of Who-cester (Oct. 7, 2008 12:51 EST);[13] and bloggers own cars that are damaged when they run over potholes, *see* Posting to Link Farm (March 11, 2008 10:03 EST).[14] Like the scientist in *Baker v. Parsons*, bloggers can comment based on their personal observations and use their blogs as megaphones to call on the government to do something. When bloggers speak on these issues, they are petitioning in their status as citizens, whether they are compensated or not.

C. A Compensated Blogger May Have an Interest in Informing the Public About Issues of Public Concern.

A blogger who is compensated for his work also may have an interest in keeping the public informed about issues affecting the community, an interest which should be sufficient under *Kobrin* for the anti-SLAPP law to apply. "An informed public depends on accurate and effective reporting by the news media. . . . In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government." *Saxby v. Washington Post Co.*, 417 U.S 843, 863 (1974) (Powell, J., dissenting). Limiting the protection of the anti-SLAPP law to those who have only a personal and direct stake in an issue before the government would cut out many efforts at enlisting public participation, an express purpose of the statute. Such a limitation is found nowhere in the statute's "very broad protection for petitioning activities." *Duracraft*, 427 Mass. at 162.

This is true even if the speaker is not located physically in the community in question. For example, *amicus* Citizen Media Law Project, located in Cambridge, has covered stories from around the Commonwealth on its blog. *See, e.g.,* Posting of David Ardia to Citizen Media Law

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[13] Available at http://who-cester.blogspot.com/2008/10/superintendent-search-process.html.
[14] Available at http://blog.masslive.com/linkfarm/2008/03/2008_masslive_pothole_contest.html.

Project Blog (Sept. 4, 2008).[15] It would be counter to the statute's express purpose of "encourag[ing] consideration or review of an issue" under governmental consideration if a blogger's right to petition ends at a local border. Mass. Gen. Laws ch. 231, §59H.

D. A Compensated Blogger Can Influence, Inform and Bring About Governmental Consideration of Issues by Acting as Forum for Speech By Citizens.

In addition to informing and influencing the government directly through his or her own statements, a blogger may provide a forum for others' speech by allowing members of the community to comment on issues and thereby "enlist public participation in an effort to effect" consideration by the government. Mass. Gen. Laws ch. 231, §59H.

In a case involving the publisher of a Web site, the Appeals Court found that providing a public forum of this type constitutes petitioning activity under the anti-SLAPP law. In *MacDonald v. Paton*, the defendant operated a website that functioned as "an interactive public forum on issues relating to . . . town governance, including education funding and municipal use of tax dollars." 57 Mass. App. Ct. at 294. Part of this site was a satirical dictionary, which included definitions sent in via email by visitors to the site. The plaintiff claimed one of these definitions defamed him. *Id.* The court determined that the defendant's operation of the site — which served as "a *technological version of a meeting of citizens on the Town Green*, a space where concerned individuals could come together to share information, express political opinions, and rally on town issues of concern to the community" — constituted defendant's own "petitioning activities" within the meaning of the anti-SLAPP law. *Id.* at 295 (emphasis added). Clearly, the value of acting as a "technological version of a meeting of citizens on the Town Green" is not diminished if a blogger or website operator receives compensation.

[15] Available at http://www.citmedialaw.org/blog/2008/cape-cod-blogger-peter-robbins-sued-libel-over-comments-about-local-dredging-dispute.

CONCLUSION

A blogger is fully entitled to the protections set forth in and remedies prescribed by the Massachusetts anti-SLAPP statute regardless of whether he is characterized as a member of the "news media" and regardless of whether he receives compensation for his publishing activities. Nothing in the plain language of the statute or the prior decisions of Massachusetts courts precludes application of the anti-SLAPP law to such parties for such activities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher T. Bavitz, hereby certify that a true copy of the attached Memorandum of *Amici Curiae* was served upon the attorney of record for each party by email and first-class mail on November 7, 2008.

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