

Statement Before The  
**HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS**  
Monday, March 21, 2022  
2:00 PM  
Via Videoconference and Conference Room 309

in consideration of  
**SB 3329, SD1, HD1**  
**RELATING TO PUBLIC PARTICIPATION IN GOVERNMENT.**

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the House Judiciary & Hawaiian Affairs Committee

Common Cause Hawaii supports SB 3329, SD1, HD1, which repeals chapter 634F, Hawaii Revised Statutes and enacts the Uniform Public Expression Protection Act (UPEPA).

The UPEPA serves as a model for Anti-SLAPP laws nationwide and should be adopted in Hawaii. The UPEPA has strong protections for First Amendment rights and demonstrates states' desire to protect the ability of their people to speak freely or lawfully petition about matters of public concern.

A SLAPP lawsuit -- Strategic Lawsuit Against Public Participation -- is brought to harass or retaliate against a party for exercising an important and lawful right under the federal or state Constitution or some other statute. The UPEPA will address anti-SLAPP actions and provide protection for SLAPP victims from meritless lawsuits seeking to silence public participation and action.

Thank you for the opportunity to testify in support of SB 3329, SD1, HD1. If you have further questions of me, please contact me at [sma@commoncause.org](mailto:sma@commoncause.org).

Very respectfully yours,

Sandy Ma  
Executive Director, Common Cause Hawaii



HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS  
Monday, March 21, 2022, 2 pm, State Capitol Room 325 & Videoconference  
SB 3329, SD1, HD1

Relating to Public Participation in Government

**TESTIMONY**

Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Nakashima and Committee Members:

The League of Women Voters of Hawaii strongly supports SB 3329, SD1, HD1.

Effective public participation in government proceedings commonly requires press releases, organizing, lobbying, oral and written testimony, and occasionally lawsuits. However, the current wording of Chapter 634F, Hawaii Revised Statutes, only concerns SLAPP suits “solely based on” public testimony at government proceedings.

In July 2020 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Public Expression Protection Act to address SLAPP suits which are not “solely based on” public testimony at government proceedings. The provisions of the Uniform Public Expression Protection Act have been incorporated in SB 3329, SD1, HD1.

Thank you for the opportunity to submit testimony.

**SB-3329-HD-1**

Submitted on: 3/18/2022 3:59:44 PM

Testimony for JHA on 3/21/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Elizabeth Kent	Commission to Promote Uniform State Laws	Support	Remotely Via Zoom

Comments:

Aloha,

Thank you for the opportunity to testify in strong support of SB 3329, SD 1, HD 1, which would enact the Uniform Public Expression Protection Act (UPEPA). UPEPA addresses the problem of strategic lawsuits against public participation, often called “SLAPP” suits. A SLAPP may be a defamation, invasion of privacy, nuisance, or other claim, but its real goal is to entangle the defendant in expensive litigation and stifle the ability to engage in constitutionally protected activities. This bill protects the public’s right to engage in activities protected by the First Amendment without abusive, expensive legal retaliation.

The act addresses communication in governmental proceedings and under consideration in governmental proceedings. The UPEPA also specifically protects exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association guaranteed by the United States constitution or the state Constitution.

I urge you to support this uniform law.

Respectfully,

Elizabeth Kent, Commission to Promote Uniform Laws



*Eric W. Gill, Financial Secretary-Treasurer*

*Gemma G. Weinstein, President*

*Godfrey Maeshiro, Senior Vice President*

March 18, 2022

Committee on Judiciary & Hawaiian Affairs  
Representative Mark Nakashima, Chair  
Representative Scot Matayoshi, Vice Chair

**Testimony in support of SB 3329 SD1 HD1**

Chair Nakashima, Vice Chair Matayoshi and members of the Committee,

Thank you for the opportunity to testify **in support of SB 3329 SD1 HD1**. UNITE HERE Local 5 represents over 11,500 people working in the hotel, food service and health care industries throughout Hawaii. SLAPP suits can add significant legal expense for anyone petitioning the government or using their free speech rights. In order for Hawaii residents to be able to exercise our First Amendment rights on matters of public concern, we need adequate protection from retaliatory legal actions. Hawaii currently has an Anti-SLAPP statute - HRS 634F – however, it is not working as intended. Current language leaves the statute open to the possibility of a narrow interpretation that fails to protect SLAPP defendants. Hawaii law needs to be broadened in order to prevent the chilling effect on free speech and public participation created by SLAPP suits or the threat thereof.

SB 3329 SD1 HD1 is modeled off of the Uniform Law Commission's Uniform Public Expression Protection Act. The model act has broader protections, clearer procedures for expedited dismissal of SLAPP claims, and will modernize Hawaii's Anti-SLAPP law to align with the trends in other states.

Please support SB3329 SD1 HD1.

Thank you for your consideration.



Testimony Before The  
House Committee on Judiciary and Hawaiian Affairs  
**COMMENTS ON SB 3329 SD 1 HD 1**  
March 21, 2022, 2:00PM, Room 325

My name is Kevin Chang and I am the Executive Director of [Kua'āina Ulu 'Auamo \(or KUA\)](#). KUA works to empower grassroots rural and Native Hawaiian mālama 'āina groups to celebrate their places and pass on their traditions to better Hawai'i and achieve 'āina momona— an abundant, productive ecological system that supports community well-being.

KUA employs a community-driven approach that currently supports a statewide network of 36 mālama 'āina community groups collectively referred to as E Alu Pū (moving forward together), 40 fishpond projects and practitioners called the Hui Mālama Loko I'a, and a growing group of over 60 Limu practitioners and supporters called the Limu Hui. A number of the communities we serve, and KUA itself have played a role in the development of the Makai Watch program and supported DOCARE's growth and capacity to better work with citizens, especially our practitioners in rural and Native Hawaiian communities.

**KUA supports SB 3329 SD1 HD1 as an incremental step towards 'āina momona.**

A primary function of KUA includes development of an 'auwai, a stream of resources, tools, policies, bridges, relationships, and networks that help to cultivate and take our communities' work to greater levels of collective impact. A core catalyst for the flow in this 'auwai includes our citizens ability to express themselves freely in defense of the environment and on behalf of their culture and future generations. This freedom of speech, which we often take for granted, is often be curbed by frivolous lawsuits by parties more resourced than the average grassroots efforts.

This bill proposes to adopt the Uniform Public Expression Protection Act (UPEPA) which addresses the problem of strategic lawsuits against public participation, often called "SLAPP" suits. A SLAPP may be a defamation, invasion of privacy, nuisance, or other claim stealthily used to entangle the defendant in expensive litigation and stifle the ability to engage in constitutionally protected activities. This bill protects the public's right to engage in activities protected by the First Amendment without abusive, expensive legal retaliation.

The communities we work with are committed to ensuring the long-term health of our biocultural resources because they have depended on them for generations.. We believe the vision of 'āina momona our communities hold requires their ability to voice freely the aloha they have for Hawai'i and their places.

Mahalo for this opportunity to testify in support.

Aloha 'Āina Momona.



Hawai'i

Committee: House Committee on Judiciary & Hawaiian Affairs  
Hearing Date/Time: Monday, March 21, 2022, 2:00 p.m.  
Place: Via Videoconference  
Re: Testimony of the ACLU of Hawai'i in Support of S.B. 3329 SD1 HD1  
Relating to Public Participation in Government

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes **in support of S.B. 3329 SD1 HD1**. This measure repeals and replaces Hawai'i's Citizen Participation in Government Act (enacted in 2002, and codified at HRS Chapter 634F) with the Uniform Law Commission's Uniform Public Expression Protection Act, which establishes a robust set of mechanisms to protect people who are sued for exercising their First Amendment rights on matters of public concern.

Freedom of expression is among the core rights protected by both the U.S. and Hawai'i constitutions, and is therefore among the rights that the ACLU of Hawai'i vigilantly protects.

One threat to the people's right to free expression—especially on matters in the public interest—is what is known as a "Strategic Lawsuit Against Public Participation" ("SLAPP").<sup>1</sup> A SLAPP is a civil lawsuit that is filed against people or organizations who exercise their First Amendment rights by speaking out on issues of public interest or concern. But unlike a typical lawsuit, a SLAPP's primary purpose is to intimidate, discourage, and wear down (emotionally and financially) the target from engaging in advocacy by exploiting the heavy burdens of a lawsuit. In essence, SLAPPs are designed to use the civil legal system to stifle public debate—not just by retaliating against those who speak out, but also by chilling others from speaking. As examples, SLAPPs have been filed against journalists who criticized politicians, environmental groups who petitioned government officials to reject development proposals, filmmakers who exposed scandals, and citizens who posted Yelp reviews identifying deceptive business practices.<sup>2</sup>

Two decades ago, the Hawai'i Legislature correctly recognized the grave threat that SLAPPs pose to public participation by enacting the Citizen Participation in Government Act<sup>3</sup> ("Chapter 634F"). Like similar laws nationwide, Chapter 634F is an anti-SLAPP law designed to provide

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<sup>1</sup> See Last Week Tonight with John Oliver, *SLAPP Suits*, HBO (Nov. 10, 2019), <https://youtu.be/UN8bJb8biZU> (explaining "how SLAPP suits are designed to stifle public dissent").

<sup>2</sup> *Understanding Anti-SLAPP laws*, Reporters Committee for Freedom of the Press (accessed: Feb. 19, 2022), <https://www.rcfp.org/resources/anti-slapp-laws/#antislappstories> (listing recent examples of SLAPPs nationwide).

<sup>3</sup> 2002 Haw. Sess. Laws Act 187 (H.B. 741).

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee  
March 21, 2022  
Page 2 of 2

citizens targeted for engaging in public advocacy with certain protections, including the ability to quickly dismiss, and to seek compensation for defending against, SLAPPs.

Despite its good intentions, however, Chapter 634F has not fulfilled its original promise. In short, Chapter 634F does not currently provide strong enough protection against SLAPPs.

The ACLU of Hawai‘i has seen, firsthand, the shortcomings of Chapter 634F. In 2019, a hui of environmental advocates and organizations filed a lawsuit challenging the legality of the process by which the City and County of Honolulu had fast-tracked a developer’s permits to build a large commercial development near a marine protected area.<sup>4</sup> In response, the developer filed a SLAPP against the advocates, who in turn sought to invoke Chapter 634F’s protections in an attempt to dismiss the SLAPP. Recognizing the harmful precedent that could be set by a successful SLAPP in this context, the ACLU of Hawai‘i filed an amicus brief in support of the advocates, explaining (among other things) that their conduct was a prototypical example of the exercise of the constitutional right to petition the government for redress of grievances.<sup>5</sup> Unfortunately, the court ruled that the advocates’ conduct was *not* protected by Chapter 634F, leaving them no choice but to spend substantial time and money defending against the SLAPP.

S.B. 3329 SD1 HD1 would resolve this problem (and others) by updating Hawaii’s anti-SLAPP law to reflect the Uniform Public Expression Protection Act, which is a uniform law—adopted by the non-partisan, non-profit Uniform Law Commission—that integrates lessons from states nationwide to frame broad, clear, and effective protections to citizens against SLAPPs.

The ACLU of Hawai‘i respectfully requests that the Committee pass this measure. Thank you for the opportunity to testify.

Sincerely,



Wookie Kim  
Legal Director  
ACLU of Hawai‘i

*The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai‘i has been serving Hawai‘i for over 50 years.*

<sup>4</sup> See HNN Staff, *Lawsuit filed over potential development of Oahu’s Shark’s Cove*, Hawaii News Now (Jan. 12, 2019), <https://www.hawaiinewsnow.com/2019/01/13/lawsuit-filed-over-potential-development-oahu-sharks-cove>.

<sup>5</sup> See ACLU of Hawai‘i Amicus Brief, *Save Sharks Cov Alliance v. City and County of Honolulu*, Civ. No. 19-1-0057-01 JHA (First Circuit Court, Oct. 13, 2020), available at <https://tinyurl.com/bdcw5y47>.

**SB-3329-HD-1**

Submitted on: 3/19/2022 11:08:46 AM

Testimony for JHA on 3/21/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Ted Bohlen	Climate Protectors Hawai'i	Support	Written Testimony Only

Comments:

To: The Honorable Mark Nakashima, Chair, The Honorable Scot Matayoshi, Vice Chair, and Members of the House Committee on Judiciary and Hawaiian Affairs

From: Climate Protectors Hawai'i (by Ted Bohlen)

Re: Hearing SB3329 SD1 HD1– RELATING TO PUBLIC PARTICIPATION IN GOVERNMENT Monday, March 21, 2022, 2:00 p.m., C.R. 325 and by videoconference

Aloha Chair Nakashima, Chair, Vice Chair Matayoshi, and Members of the House Committee on Judiciary and Hawaiian Affairs:

The Climate Protectors Hawai'i is a group focused on reversing the climate crisis and encouraging Hawai'i to lead the world towards a safe and sustainable climate and future. **The Climate Protectors Hawai'i strongly supports SB3329 SD1!**

The enactment in 2002 of Hawai'i's Citizen Participation in Government Act, codified as chapter 634F, Hawaii Revised Statutes, was intended to promote the rights of citizens to vigorously participate in government and to protect citizens from the chilling effect of retributive "strategic lawsuit[s] against public participation" or "SLAPP" suits. To minimize the damage of SLAPP claims against citizens, Hawai'i's "Anti-SLAPP" law seeks to shift the burden of litigation back to the party bringing the SLAPP claim by providing for expedited judicial review, a stay on discovery, and sanctions. Despite the broad intentions of the legislature that the law "shall be construed liberally to fully effectuate its purposes and intent", section 634F-4, Hawaii Revised Statutes, Hawai'i's 2002 Anti-SLAPP law, has not been effective at protecting citizen participation. The Public Participation Project rates Hawaii's law at only the "C" level compared to other state laws. Our courts have often declined to apply its procedural protections due to its narrow and confusing provisions. The Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws, 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. Due to the rise in SLAPP suits nationally, the need to strengthen protection for citizen participation in government and to increase consistency among states with anti-SLAPP laws, in 2020 the Uniform Law Commission proposed the Uniform Public Expression Protection Act as a model act to assist states in modernizing their anti-SLAPP laws. The purpose of this Act is to enact the Uniform Public Expression Protection Act. To protect public participation at all levels of government, Hawai'i should adopt the provisions of



the model act recommended by the Uniform Law Commission. By adopting the Uniform Act provisions, Hawai'i will have an anti-SLAPP law that is among the best in the nation, with procedural protections for all parties, and clearer instructions for the courts on how to fairly and expeditiously dispose of SLAPP claims to ensure citizens are protected from punitive SLAPP suits.

**Please protect Hawai'i citizens against SLAPP suits by approving SB3329 SD1 HD1.**

Mahalo!

Climate Protectors Hawai'i (by Ted Bohlen)



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**Mālama Pūpūkea-Waimea**  
Post Office Box 188  
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**Board of Directors**

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March 18, 2022

Rep. Mark M. Nakashima, Chair  
Rep. Scot Z. Matayoshi, Vice Chair  
Members, Committee on Judiciary & Hawaiian Affairs

JHA Hearing: Monday, March 21, 2022, 2:00 pm  
SB3329 SD1 – Uniform Public Expression Protection Act

Aloha Chair Nakashima, Vice Chair Matayoshi, and Members of the  
Government Reform Committee,

**Mālama Pūpūkea-Waimea (MPW) strongly supports SB3329 SD1 HD1 to adopt the Uniform Public Expression Protection Act ("UPEPA") to modernize Hawai'i's Anti-SLAPP statute, HRS Ch. 634F.**

MPW is a Hawai'i non-profit organization founded on the North Shore of O'ahu in 2005. Our mission is "working to replenish and sustain the natural and cultural resources of the Pūpūkea and Waimea ahupua'a for present and future generations through active community stewardship, education, and partnerships." For eighteen years, we have focused our stewardship and education efforts on the Pūpūkea Marine Life Conservation District (MLCD), one of only three MLCDs on O'ahu and eleven statewide.

MPW is an education and stewardship organization that does not ordinarily undertake litigation. However, because of a direct threat to the health of the MLCD, MPW undertook legal action in 2019 to ensure that a commercial development directly across from Sharks Cove complied with all applicable laws. A citizens lawsuit was filed only after MPW and others had tried for many years, by participating in all available governmental processes, to remedy the improper permits issued by the City and County of Honolulu Department of Planning and Permitting and the Honolulu City Council.

In an effort to intimidate MPW and the other plaintiffs in the Save Sharks Cove Alliance ("SSCA"), the commercial developer filed counterclaims seeking \$13 million in unspecified damages, a classic type of Strategic Litigation Against Public Participation ("SLAPP") designed to terrorize active public interest groups and individuals.

SSCA filed a motion seeking protection, and an expedited dismissal of the SLAPP claims, under the Hawai'i Anti-SLAPP statute, HRS Ch. 634F, and on constitutional right to petition grounds. Unfortunately, the Circuit Court judge found that HRS Ch. 634F was too narrowly written to apply and therefore SSCA could not avail itself of the statute's protective provisions. The court did dismiss one of the counterclaims

(for failure to state a claim) and the remaining claim was eventually settled for \$0. However, despite the lack of merit to either SLAPP claim, the dark black SLAPP cloud lasted for months, threw the intended monkey wrench into the case, and created a huge burden on the public interest plaintiffs, adding major costs, delay, complications, and emotional distress.

As far as MPW is aware from legal research and discussions with others in the public interest law community, HRS Ch. 634F has never successfully protected a citizen from a SLAPP claim as was intended by the drafters of the statute in 2002, primarily due to the courts' narrow interpretation of its provisions, despite that the Legislature stated in HRS § 634F-5 that the law "shall be construed liberally to fully effectuate its purposes and intent" (an important provision that would be retained in SD1).

The adoption of UPEPA, as recently approved by the Uniform Law Commission, would be a well-balanced, comprehensive uniform law update of HRS Ch. 634F. Even though the proposed bill does not retroactively fix the flaws in Hawai'i's Anti-SLAPP law that already failed MPW and SSCA, reforming HRS Ch. 634F now would be for the greater public good and a positive step forward for protecting citizen participation in government and public expression rights broadly in Hawai'i.

The extensive ULC work on UPEPA is available on the ULC web site including an annotated version of the the proposed model law: <https://www.uniformlaws.org/viewdocument/enactment-kit-99?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments>

We understand that Washington State had recently adopted UPEPA, and other states have it under consideration. By joining the states adopting UPEPA, Hawai'i will have an updated law, be moving from a "C" grade for its current law<sup>1</sup> to the "A" level, and will have the benefit of having available much more robust case law that our courts can look to (as persuasive legal decisions) from other states that also adopt the Act.

Particularly at a time when faith in state and county government appears to be at risk, passing UPEPA would be a major step forward for democracy and citizen engagement in Hawai'i.

**Thank you for passing SB3329 SD1 HD1.**

Mahalo nui and best regards,



Denise Antolini President, MPW

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<sup>1</sup> See Public Participation Project, STATE ANTI-SLAPP LAW SCORECARD, scoring Hawai'i as "C" on the map of states: <https://anti-slapp.org/your-states-free-speech-protection/>



**Written Testimony of  
Lane Shetterly, Oregon Uniform Law Commissioner  
In Support of  
SB 3329 SD1 HD1  
Before the House Judiciary & Hawaiian Affairs Committee  
Monday, March 21, 2022**

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the House Judiciary & Hawaiian Affairs Committee:

I write to express my support for SB 3329 SD1 HD1, which would enact the Uniform Public Expression Protection Act (“UPEPA”). The UPEPA was developed over the course of several years by the Uniform Law Commission (ULC), a non-partisan organization of the states. I had the honor of serving as the Chair of the UPEPA Drafting Committee, and I write to you to explain the background of the act, why uniformity is so important, and why we support SB 3329 SD1 HD1, which is under consideration by your committee.<sup>1</sup>

**Purpose and Content of the Act**

*What is a “SLAPP”*

A SLAPP suit—or Strategic Lawsuit Against Public Participation—is a suit that is brought not to seek real redress or relief for harm or to vindicate one’s legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation. SLAPP suits have been a recognized type of litigation since the 1980s, as have anti-SLAPP statutes, designed to protect hapless defendants from the abusive effect of SLAPP suits. SLAPP suits, which typically manifest themselves in the form of defamation, tortious interference, conspiracy, nuisance, and intentional infliction of emotional distress claims, can effectively silence important speech, particularly when they are brought by parties with substantial resources against individuals who lack the means to mount a healthy defense. That is true even when the cases have no merit; the suits achieve success because defendants can’t afford to defend them, and ultimately either retract their statements or agree to censor themselves in the future.

*The Creation and Expansion of “Anti-SLAPP” Legislation*

Thirty-three states, plus the District of Columbia and Territory of Guam, have some version of an anti-SLAPP statute now. Some of the older statutes are narrowly drawn, designed to protect persons under limited circumstances, such as from statements made in testimony before a zoning board or planning commission. Hawaii’s current statute falls under this category, as it is only applicable to situations in which a person provides oral or written testimony to a governmental body during a governmental proceeding. Haw. Rev. Stat. § 634F-1.

Other, more modern statutes are much more broadly drafted, covering speech and conduct in a wide variety of circumstances. These modern statutes encompass any action that arises out of a person’s exercise of free

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<sup>1</sup> For more information on the ULC’s development of UPEPA, please visit our “enactment kit”:  
<https://www.uniformlaws.org/viewdocument/enactment-kit-99?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments>

speech rights on issues of public import, no matter the forum. In our Uniform Law Commission drafting committee we examined the development of anti-SLAPP statutes around the country and sought to capture best practices. We tried to learn from mistakes made, and we sought to identify trends going forward, to craft an Act that captured the best elements of existing anti-SLAPP statutes and one that advanced the best public policy. In drafting the UPEPA, the Committee determined that the Act should apply broadly to cover constitutionally protected communication. The need for a broad statute makes itself more apparent each passing day, as citizens, using “new” media such as Twitter, Facebook, Instagram, and business-review sites like Yelp, find themselves speaking out—in ways not imaginable even 15 or 20 years ago—against an ever-expanding universe of others with competing interests.

### ***Why Uniformity Is Important***

Given the increasing frequency with which citizens use the internet to speak out on various issues, the jurisdictional limitations that used to constrain where civil lawsuits could be brought have eroded. Consequently, we have begun to observe the rise of “libel tourism”; that is, a type of forum shopping by which a plaintiff who has choices among the states in which to bring a libel action—the most common type of “SLAPP” suit—will file in a state that does not have an anti-SLAPP law or has a “weak” or narrow one. Given the significant differences among state statutes—which, aside from scope, include differing burdens of proof assigned to the parties, different rules relating to discovery, and different remedies for prevailing parties—uniformity is sorely needed. The adoption of a uniform act among the states will not only reduce the incidence of and the motivation for forum shopping, but it will clarify to all what kinds of protections citizens have when they choose to participate in public discourse.

### **How the Act Works**

Below is a summary of how the UPEPA works, step by step.

#### ***Phase 1 – Filing of the Motion and Scope of the Act***

First, the party targeted by the SLAPP (the party who has been sued) files a motion for expedited relief under Section 3 of the uniform act. The filing of the motion stays all proceedings between the moving party and responding party (unless the court grants specific relief from the stay) until the court rules on the motion. The moving party must file the motion within 60 days after being served with a complaint, crossclaim, counterclaim, or other pleading that asserts a cause of action to which the act applies. Section 2 of UPEPA explains that the act applies if the cause of action asserted against a person is based on the person’s:

1. Communication in a legislative, executive, judicial, administrative, or other governmental proceeding (this is the scope of Hawaii’s current statute);
2. Communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding (such as a statement in the press or a letter to the editor); or
3. Exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or the State constitution, on a matter of public concern.

Section 2(c) provides exemptions from the scope of the act; the act does not apply to a cause of action asserted:

1. Against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;

2. By a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety; or
3. Against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services.

Once the motion is filed, the responding party can defeat the motion by showing that the action does not fall within the scope of the act. If the court finds that the action is not within the scope, the moving party loses the motion and may appeal immediately. However, if the court finds the action is within the scope, then the parties move to the second phase of the motion process.

### ***Phase 2 – Prima Facie Viability***

In this phase, the responding party (the party who filed the SLAPP claims or lawsuit) must show that its cause of action states a prima facie case as to each essential element of the claim. In short, the responding party must establish that it has evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. If the respondent cannot establish a prima facie case, then the court must grant the motion and the cause of action (or portion of the cause of action) must be dismissed. If the responding party does establish a prima facie case, then the court moves to phase three of the motion procedure.

### ***Phase 3 – Legal Viability***

In this phase, the burden shifts back to the party that filed the motion to either show that:

1. The responding party failed to state a cause of action upon which relief can be granted; or
2. There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

If the moving party meets this burden, then the moving party wins and the cause of action is stricken with prejudice (Section 7). The responding party may appeal at the conclusion of the case. If the moving party fails to meet its burden (i.e., the court finds the responding party's case to be viable as a matter of law), then the moving party will lose the motion and may appeal immediately (Section 9).

### **Support for the UPEPA**

As with all ULC drafting projects, the drafting process to create the UPEPA was open and collaborative. Stakeholders included individuals from government and industry, First Amendment advocates, the Motion Picture Association of America, Inc., the National Center for State Courts, the Public Participation Project, the American Association for Justice, and the American College of Real Estate Lawyers. These stakeholders shared their expertise and perspective with the Committee over the course of a three-year drafting process. As a result of this thorough drafting process, several states have taken an early interest in the UPEPA—besides Hawaii, the UPEPA has also been introduced in Iowa, Missouri, Kentucky, and Indiana. Washington was the first state to enact UPEPA in 2021.

As Chair of the Drafting Committee, I hope I have conveyed adequately how the Uniform Public Expression Protection Act would provide Hawaii citizens much needed protection for their Constitutional rights to fully participate in governmental proceedings and exercise their rights to freedom of speech, freedom of the press, and petition the government, without fear of meritless litigation that would otherwise impair these rights.

If you have any questions, please feel free to contact me. Thank you for the opportunity to provide

testimony to your Committee on this important judicial policy matter.

Respectfully Submitted,

Lane Shetterly  
*Oregon Uniform Law Commissioner  
Chair, UPEPA Drafting Committee*

# **TESTIMONY OF EVAN OUE ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF HB 886**

Date: Monday March 22, 2022

Time: 2:00 p.m.

My name is Evan Oue and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in **SUPPORT** of SB 3329 SD1 HD1, Relating to Public Participation in Government.

HAJ is stands in support of this measure as it is designed to prevent an abusive type of litigation called a “SLAPP,” or “strategic lawsuit against public participation.” A SLAPP may be filed as a defamation, invasion of privacy, nuisance, or other type of claim, but its real purpose is to silence and intimidate the defendant from engaging in constitutionally protected activities, such as free speech. This especially presents a real problem for obvious reasons here in Hawaii, as often times community groups or individuals will speak out against large entities. The model language being proposed has broader protections, clearer procedures for expedited dismissal of SLAPP claims, and will modernize Hawai'i's Anti-SLAPP law.

HAJ supports SB 3329 SD1 HD1 as it promotes free speech and prevents abuse of Hawaii's justice system. Thank you for allowing us to testify regarding this measure. Please feel free to contact us should you have any questions or desire additional information.





*Hawaii's Thousand Friends*

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March 21, 2022

COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Rep. Mark M. Nakashima, Chair  
Rep. Scot Z. Matayoshi, Vice Chair  
Committee Members

SB 3329 SD1 HD1  
RELATING TO PUBLIC PARTICIPATION IN GOVERNMENT

Hawaii's Thousand Friends, a statewide non-profit dedicated to ensuring that appropriate land and water planning and management decisions are made to protect the environment, human health and cultural and natural resources, supports SB 3329 SD1 HD1, which protects public participation in government by adopting the Uniform Public Expression Protection Act (UPEPA).

UPEPA is designed to prevent the abusive use of SLAPP (strategic lawsuit against public participation) <https://www.uniformlaws.org> ›

Hawaii has an anti-SLAPP law HRS 634F but unfortunately narrow court interpretation of the law renders it useless in protecting individuals and organizations that are participating in their government and acting in the public interest.

Citizens and organizations do not take legal action randomly, lightly or easily but do so when necessary to protect the public interest.

SLAPP lawsuits, which are meant to intimidate and discourage public involvement in government, are quite effective. Once an individual or organization is threatened with or sued under a SLAPP lawsuit all public participation stops, anxiety and fear replace optimistic action.

To help protect Hawaii's citizens from unwarranted harassment and pressure as we take part in the public participation process we urge the committee to pass SB 3329 CD1 HD1.

Aloha Chair Nakashima, Vice Chair Matayoshi and Members of the Judiciary & Hawaiian Affairs Committee:

I was first elected as a State Representative in 1996 and for several years I researched and introduced legislation to address the issue of Strategic Lawsuits Against Public Participation (SLAPP). Neither I nor my constituents would benefit from these bills, however, I felt this issue needed to be addressed due to our collective experiences testifying against unpermitted boating activities at the Hanalei River mouth in the mid-1980's before county and state agencies. For over 25-years, we all battled in both state and federal courts frivolous lawsuits meant to intimidate and harass our participation where we were simply asking that existing laws, regulations and processes be adhered to. I was sued as an individual and later in my official role as a Kauai County Planning Commissioner and it has taken a period of 25 years to have all these frivolous lawsuits eventually dismissed or be fully litigated where myself and other individuals and the county, state and federal agencies involved (the defendants) eventually prevailed.

In 2002, I was the primary introducer of House Bill 741, which was signed into law as Act 187. Unfortunately, Hawaii's existing statute has been narrowly interpreted by the courts and is too compromised to be effective, straying from the intent of House Bill No. 741, HD 1, SD 1, CD 1 and Conference Committee Report No. 21-02 which states that "the purpose of this measure is to protect parties who fall victim to civil litigation lodged to stifle legitimate forms of civil and political expression."

For this reason, I strongly support Senate Bill 3329, SD1 modeled after the comprehensive and clarifying work done by the Uniform Law Commission to finally fulfill the legislative intent of what this body passed in 2002.

Thank you for the opportunity to share my thoughts.

Sincerely,

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**SB-3329-HD-1**

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Testimony for JHA on 3/21/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Larry McElheny	Individual	Support	Written Testimony Only

Comments:

Aloha

Please support this very important bill.

Mahalo

Larry McElheny

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