

Statement Before The
HOUSE COMMITTEE ON FINANCE
Thursday, March 31, 2022
2:30 PM
Conference Room 308 and Via Videoconference

in consideration of
SB 3329, SD1, HD2
RELATING TO PUBLIC PARTICIPATION IN GOVERNMENT.

Chair LUKE, Vice Chair YAMASHITA, and Members of the House Finance Committee

Common Cause Hawaii supports SB 3329, SD1, HD2, which repeals the Citizen Participation in Government Act 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, HD2. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



SIERRA CLUB OF HAWAI'I

HOUSE COMMITTEE ON FINANCE

March 31, 2022 2:30 PM Conference Room 308

In SUPPORT of SB3329 SD1 HD2: Relating to Public Participation in Government

Aloha Chair Luke, Vice Chair Yamashita, and Members of the Finance Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i **strongly supports** SB3329 SD1 HD2, which will help to protect public participation in governmental processes from retaliatory litigation used to discourage such participation.

Public participation in governmental processes is critical to ensuring that our policies and decisions are well-informed, objective, and accountable to the public interest. Our legal system, meanwhile, is also intended to ensure the fair administration of justice and to protect the rights of all individuals, regardless of the political or economic influence of parties and litigants. Unfortunately, entities with considerable political and economic power have in some cases been able to use our legal system to retaliate against those seeking to exercise their rights to participate in the very governmental processes that are intended to solicit public and expert input. The significant and visible burden borne by those targeted by such retaliation may not only preclude them from further civic engagement, but may also have a substantial chilling effect on the broader community who might otherwise seek to participate in governmental processes.

By clarifying and strengthening Hawai'i laws that are intended to protect public participation in governmental processes, this measure will reduce the ability of powerful entities to misuse our legal system through retaliatory actions that harm individuals and communities, and thereby undermine the public interest.

Accordingly, the Sierra Club of Hawai'i respectfully urges the Committee to **PASS SB3329 SD1 HD2**.

Mahalo nui for the opportunity to testify.



Testimony Before The
House Committee on Finance
COMMENTS ON SB 3329 SD 1 HD 2
March 30, 2022, 2:30PM, Room 308

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 HD2 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.



HOUSE COMMITTEE ON FINANCE

Thursday, March 31, 2022, 2:30 pm, State Capitol Room 308 & Videoconference
SB 3329, SD1, HD2

Relating to Public Participation in Government

TESTIMONY

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

Chair Luke and Committee Members:

The League of Women Voters of Hawaii strongly supports SB 3329, SD1, HD2.

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, is limited to 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, HD2.

Thank you for the opportunity to submit testimony.



**Written Testimony of
Lane Shetterly, Oregon Uniform Law Commissioner
In Support of
SB 3329 SD1 HD2
Before the House Finance Committee
Thursday, March 31, 2022**

Dear Chair Luke, Vice Chair Yamashita, and Members of the House Finance Committee:

I write to express my support for SB 3329 SD1 HD2, 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 HD2, which is under consideration by your committee.¹

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 speech rights on issues of public import, no matter the forum. In our Uniform Law Commission drafting

¹ 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>

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*

SB-3329-HD-2

Submitted on: 3/29/2022 9:15:18 AM

Testimony for FIN on 3/31/2022 2:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Elizabeth Kent	Commission to Promote Uniform Laws	Support	Remotely Via Zoom

Comments:

Aloha,

Thank you for the opportunity to testify in strong support of SB 3329, SD 1, HD 2, 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

SB-3329-HD-2

Submitted on: 3/29/2022 11:33:00 AM

Testimony for FIN on 3/31/2022 2:30:00 PM

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

Comments:

The Honorable Sylvia Luke, Chair, The Honorable Kyle Yamashita, Vice Chair, and Members of the House Committee on Finance

From: Hawai'i Reef and Ocean Coalition and Climate Protectors Hawai'i (by Ted Bohlen)

Re: Hearing **SB3329 SD1 HD2 RELATING TO PUBLIC PARTICIPATION IN GOVERNMENT.**

Hearing: Thursday, March 31, 2022, 2:30 p.m., CR 308 and by videoconference

Aloha Chair Luke, Vice Chair Yamashita, and Members of the House Committee on Finance:

The Hawai'i Reef and Ocean Coalition and Climate Protectors Hawai'i are citizens' groups that vigorously participate in government processes. **The Hawai'i Reef and Ocean Coalition and Climate Protectors Hawai'i strongly support SB3329 SD1 HD2!**

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 HD2.

Mahalo!

Hawai'i Reef and Ocean Coalition and Climate Protectors Hawai'i (by Ted Bohlen)



Eric W. Gill, Financial Secretary-Treasurer

Gemma G. Weinstein, President

Godfrey Maeshiro, Senior Vice President

March 29, 2022

Committee on Finance
Representative Sylvia Luke, Chair
Representative Kyle Yamashita, Vice Chair

Testimony in support of SB 3329 SD1 HD2

Chair Luke, Vice Chair Yamashita and members of the Committee,

Thank you for the opportunity to testify **in support of SB 3329 SD1 HD2**. 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 HD2 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 HD2.

Thank you for your consideration.



MOTION PICTURE ASSOCIATION

**TESTIMONY OF BEN SHEFFNER
SENIOR VICE PRESIDENT & ASSOCIATE GENERAL COUNSEL,
COPYRIGHT & LEGAL AFFAIRS
IN SUPPORT OF
S.B. 3329 SD1 HD2 (HAWAI‘I PUBLIC EXPRESSION PROTECTION ACT)
HAWAI‘I HOUSE OF REPRESENTATIVES
COMMITTEE ON FINANCE
MARCH 31, 2022**

Chair Luke, Vice Chair Yamashita, and members of the Committee on Finance:

Thank you for the opportunity to submit testimony in support of S.B. 3329 SD1 HD2, which would enact in Hawai‘i the Uniform Law Commission’s (“ULC”) Uniform Public Expression Protection Act (“UPEPA”), and establish a robust set of mechanisms to protect Hawai‘i citizens, non-profit groups, and businesses sued for exercise of their First Amendment rights on issues of public concern.

I am an attorney with the Motion Picture Association (“MPA”), and had the honor of serving on the ULC’s drafting committee for UPEPA. The MPA is the trade association for the six major U.S. motion picture and television producers and distributors: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. In addition to their traditional entertainment functions, several of the MPA’s members have as corporate affiliates major news organizations (including ABC, NBC, and CBS News, and CNN) and dozens of owned-and-operated television stations with broadcast news operations.

As you are likely aware, Hawai‘i is a very important state for our industry. Thanks in large measure to the Motion Picture, Digital Media, and Film Production Income Tax Credit, not to mention the state’s stunning scenery, Hawai‘i has become a major center for film and television production. Our industry directly employs about 4,200 people in Hawai‘i, representing over \$250 million in annual wages, and is responsible for supporting a total of approximately 10,450 jobs among vendors and other businesses that provide services to in-state productions. Films shot in Hawai‘i in recent years include *Jungle Cruise*, *Jumanji: The Next Level*, *Jurassic World: Fallen Kingdom*, and *Kong: Skull Island*; television series include *NCIS: Hawai‘i*, *Magnum PI*, *The White Lotus*, *Temptation Island*, *Doogie Kamealoha, M.D.*, and of course *Hawai‘i Five-0*.

S.B. 3329 SD1 HD2 would update and strengthen Hawai‘i’s existing anti-SLAPP statute, enacted in 2002 and codified at Haw. Rev. Stat. §634F. While the existing statute may protect those who speak before government bodies, it is drafted too narrowly to guarantee the free-speech rights of Hawai‘i citizens, nonprofit groups, news organizations, motion picture and television producers, and others who exercise their First Amendment right to speak out on public issues in other fora. Specifically, S.B. 3329 SD1 HD2 would enact the ULC’s Uniform Public Expression Protection Act, which was carefully drafted by a committee of anti-SLAPP experts from around the country, approved by the ULC in a near-unanimous vote in 2020, and draws from the strongest such laws around the country, including those in California, Oregon, Texas, Georgia, and Tennessee.

While S.B. 3329 SD1 HD2 will benefit all citizens of Hawai‘i who wish to speak out on matters of public concern, I want to focus here on why anti-SLAPP statutes like this one are so important to the industry we at the Motion Picture Association represent. Put simply, movie and

TV studios, and their affiliated news organizations, are in the business of free speech. And because not everyone likes how they are portrayed in a movie, TV show, or a news broadcast, our members are frequently the target of litigation by companies or individuals. While we almost always end up prevailing due to our protections under the First Amendment, these lawsuits are not just expensive and burdensome to defend, but—even more important—can chill the exercise of free speech on important and controversial topics. Strong anti-SLAPP laws like S.B. 3329 SD1 HD2 go a long way to providing a remedy against such abusive lawsuits, and, even better, deter many of them from being filed in the first place. To give just a few examples of the types of cases where the strong California anti-SLAPP statute has resulted in quick dismissals of lawsuits against the MPA’s members and other producers of entertainment content:

- A joke told by Jay Leno on *The Tonight Show*¹;
- The portrayal of an actress in a docudrama about a famous feud involving other actresses²;
- The portrayal of a soldier in the Oscar-award-winning film *The Hurt Locker*³;
- A line of dialogue in the film *American Hustle*⁴;
- A claim for defamation and invasion of privacy by a person who had been convicted of accessory after the fact involving a murder, over his portrayal in a documentary⁵; and
- Jokes on a talk radio show about a reality TV show contestant.⁶

¹ *Drake v. Leno*, 34 Med.L.Rptr. 2510 (San Francisco Co. Sup. Ct. 2006).

² *De Havilland v. FX Networks, LLC*, 21 Cal.App.5th 845 (2018).

³ *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016).

⁴ *Brodeur v. Atlas Entertainment, Inc.*, No. B263379, 2016 WL 3244871 (Cal. Ct. App. June 6, 2016) (unpublished).

⁵ *Gates v. Discovery Communications*, 34 Cal.4th 679 (Cal. Sup. Ct. 2004).

⁶ *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798 (2002).

While there are many factors involved in choosing where to film a movie or TV show, there is no doubt that the existence of a strong anti-SLAPP statute in a particular state creates a legal and business environment conducive to production. Enacting S.B. 3329 SD1 HD2 into law will make clear that Hawai'i places a high value on freedom of speech and expression, and welcomes those—including producers of movies and television programs—who wish to speak out on matters of public concern, even highly controversial ones.

Again, we thank you for considering this bill and urge you to support its passage. I am available to answer any questions you may have at Ben_Sheffner@motionpictures.org or (310) 713-8473. You may also contact the MPA's advocate in Hawai'i Bruce Coppa at brucopp@gmail.com or (808) 223-7971.



Hawaii's Thousand Friends

335 Hahani Street #342132 * Kailua, HI 96734 * Phone/Fax (808) 262-0682 E-Mail: htf3000@gmail.com

March 31, 2022

COMMITTEE ON FINANCE

Rep. Sylvia Luke, Chair
Rep. Kyle T. Yamashita, Vice Chair
Committee Members

SB 3329 SD1 HD2
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 HD2, 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 HD2.



Hawai‘i

Committee: House Committee on Finance
Hearing Date/Time: Thursday, March 31, 2022, 2:30 p.m.
Place: Via Videoconference
Re: Testimony of the ACLU of Hawai‘i in Support of S.B. 3329 SD1 HD2
Relating to Public Participation in Government

Dear Chair Luke, Vice Chair Yamashita, 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 HD2**. 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”).¹ 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.²

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 Act³ (“Chapter 634F”). Like similar laws nationwide, Chapter 634F is an anti-SLAPP law designed to provide

¹ 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”).

² *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).

³ 2002 Haw. Sess. Laws Act 187 (H.B. 741).

Chair Luke, Vice Chair Yamashita, and Members of the Committee
March 31, 2022
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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.⁴ 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.⁵ 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 HD2 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.

⁴ 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>.

⁵ 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>.



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March 30, 2022

Rep. Sylvia Luke, Chair
Rep. Kyle T. Yamashita, Vice Chair
Members, House Committee on Finance

FIN Hearing: Thursday, March 31, 2022, 2:30 pm
SB3329 SD1 HD2 – Uniform Public Expression Protection Act

Aloha Chair Luke, Vice Chair Yamashita, and Members of the House Finance Committee,

Mālama Pūpūkea-Waimea (MPW) strongly supports SB3329 SD1 HD2 that proposes 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 intimidate public interest groups and individuals.

SSCA filed a motion seeking protection under the Hawai’i Anti-SLAPP statute, HRS Ch. 634F, which allows for an expedited dismissal of SLAPP claims, and on constitutional right to petition grounds. Unfortunately, the Circuit Court judge found that HRS Ch. 634F was too narrowly written to apply to the SLAPP claims and therefore SSCA could not avail itself of the statute’s protective provisions. Ultimately, SSCA prevailed - the court dismissed outright 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 by the developer, 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 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 SB3329).

The adoption by the Hawai’i Legislature of the **Uniform Public Expression Protection Act (“UPEPA”)**, a uniform law that was recently approved by the Uniform Law Commission, would be a well-balanced, comprehensive, modernized 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 law¹ 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 government affairs in Hawai’i.

Thank you for passing SB3329 SD1 HD2.

Mahalo nui and best regards,



Denise Antolini
President, Mālama Pūpūkea-Waimea

¹ 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/>

Aloha Chair Luke, Vice Chair Yamashita and Members of the Finance Committee:

When 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. 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. 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 also county, state and federal agencies involved (all listed as the defendants) eventually prevailed. There must be a faster way for the courts to identify and to dispose of meritless lawsuits when one is simply exercising public participation in a governmental process.

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 not effective in carrying out 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, HD2, 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,

Mina Morita
P.O. Box 791
Hanalei, Kauai, HI 96714
herminamorita@gmail.com

SB-3329-HD-2

Submitted on: 3/29/2022 8:46:01 PM

Testimony for FIN on 3/31/2022 2:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Janet L Pappas	Individual	Support	Written Testimony Only

Comments:

Dear FIN Chair and committee members,

Due to an increasing number of SLAPP lawsuits across the country, i.e., "strategic lawsuit[s] against public participation", legislators and other Hawaii organizations are supporting SB3329 to replace the Hawaii's Citizen Participation in Government Act (enacted in 2002) with the Uniform Public Expression Protection Act. The latter is recommended by the Uniform Law Commission and will protect public participation at all levels of government. SB3329 is also supported by Common Cause Hawaii and the League of Women voters of Hawaii. With procedural protections for all parties, and clearer instructions for the courts on how to fairly and expeditiously dispose of SLAPP claims, citizens are better protected from these punitive suits by enacting the Uniform Public Expression Protection Act.

Please pass this important bill.

Sincerely,

Jan Pappas

Aiea, Hawaii 96701

SB-3329-HD-2

Submitted on: 3/30/2022 10:21:24 AM

Testimony for FIN on 3/31/2022 2:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Barbara Polk	Individual	Support	Written Testimony Only

Comments:

Please pass this important bill!. SLAP suits, designed to discourage public discussion of an issue, have become increasingly common. The previously passed law needs amendment to improve its coverage and make it's provisions clear.

Please pass SB3329 SD1 HD2!

SB-3329-HD-2

Submitted on: 3/30/2022 10:47:20 AM

Testimony for FIN on 3/31/2022 2:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Jacquelynn Levien	Individual	Support	Written Testimony Only

Comments:

Aloha,

My name is Jackie Levien, and I write in **support of S.B. 3329 Proposed S.D. 1** (“Proposed SD1”), which repeals and replaces H.R.S. Chapter 634F, Hawai‘i’s Citizen Participation in Government Act (“Chapter 634F”), with the Uniform Law Commission’s Uniform Public Expression Protection Act. While Chapter 634F endeavored to protect the constitutional guarantees of freedom of speech and petition for the people of Hawai‘i, its scope has proven too narrow to truly address the problem of Strategic Lawsuits Against Public Participation, or “SLAPPs.” SLAPPs dissuade community members from participating in the legal process, distract from the merits of the issues before courts, burden public interest litigants with higher costs, and expose civic groups to grave financial risk—and have continued to do so in Hawai‘i despite the (limited) protections provided by Chapter 634F.

As an attorney in California and Hawai‘i who has litigated against SLAPPs in both jurisdictions, I have been deeply concerned about the unjust impacts of Hawai‘i’s overly narrow anti-SLAPP protections. Indeed, in recent prominent litigation on O‘ahu, *Save Sharks Cove Alliance v. City and County of Honolulu*, Civ. No. 19-1-0057-01 JHA (1st Cir. 2019), a land developer filed a SLAPP counterclaim against environmental groups in retaliation for the groups’ initiation of civil litigation concerning the developer’s compliance with various permitting procedures. The counterclaim was an aggressive tactic seeking to chill petitioning activity, and ultimately, to steamroll the legal process into one about money and threats, rather than merits and the rule of law. Despite the frivolousness of the counterclaim, Chapter 634F was not broad enough to protect the Save Sharks Cove Alliance from having to incur the pain and expense of defending against a counterclaim based squarely on its petitioning activity.

SD1 remedies many of the deficiencies in Chapter 634F. SD1 would update Chapter 634F to reflect the Uniform Public Expression Protection Act, legislation adopted by the non-partisan and non-profit Uniform Law Commission, as well as several other state legislatures. Most significantly, SD1 broadens the scope of protected conduct while also providing a mechanism for deterring inappropriate use of anti-SLAPP procedures. First, Section 3(a) protects, *inter alia*, “[e]xercise 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 Hawai‘i State Constitution, on a matter of public concern”—a breadth proven necessary for protecting public interest groups from litigation meant to bankrupt them out of civic engagement. However, Section 10 permits the Court to award attorney’s fees and costs to the non-moving party if “the

court finds that the motion was frivolous or filed solely with intent to delay the proceeding”—a provision rendering inappropriate anti-SLAPP motions costly and pointless. This legislation expertly balances Hawai‘i’s interest in protecting petitioning activity with litigants’ interest in access to efficient justice.

SD1 is thoughtful and practical legislation that will provide much needed protection to all citizens of Hawai‘i as they exercise their First Amendment rights. I thus respectfully request that the Committee pass this measure.

Mahalo,

Jackie Levien

SB-3329-HD-2

Submitted on: 3/30/2022 12:37:59 PM

Testimony for FIN on 3/31/2022 2:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Larry McElheny	Individual	Support	Written Testimony Only

Comments:

Aloha

Please support this very important bill.

Mahalo

Larry McElheny

(808) 237-9354

SB-3329-HD-2

Submitted on: 3/30/2022 1:23:05 PM

Testimony for FIN on 3/31/2022 2:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Wendy Gibson-Viviani	Individual	Support	Written Testimony Only

Comments:

TO: COMMITTEE ON FINANCE

FROM: Wendy Gibson-Viviani RN/BSN

RE: SB3329 **(In Support)**

Hearing: March 31, 2022 at 2:30 p.m.

Dear Chair Rep. Sylvia Luke, Vice-Chair Rep. Kyle T. Yamashita, and Members of the Committee

I am Wendy Gibson-Viviani, a healthcare professional (RN) who has lived and worked in Hawaii for 29 years. I support SB3329 because:

- I am aware that the HRS Ch.634F is not protecting citizens from SLAPP claims.
- I believe that replacing the Citizen Participation in Government Act with the Uniform Public Expression Protection Act could help encourage more participation in democratic actions.

Please help improve our laws to help protect citizens who are engaging in freedom of speech activities. Thank you for the opportunity to testify. Please support SB3229.

Wendy Gibson-Viviani RN/BSN

Kailua