Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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Written Testimony of
Lane Shetterly, Oregon Uniform Law Commissioner
In Support of
Proposed SD1 to SB 3329
Before the Senate Judiciary Committee
Tuesday, February 22, 2022

Dear Chair Rhoads, Vice Chair Keohokalole, and Members of the Senate Judiciary Committee:

I write to express my support for proposed SD1 to SB 3329, 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 the substitute bill to enact UPEPA that 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

[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

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

SB-3329
Submitted on: 2/20/2022 7:18:01 PM
Testimony for JDC on 2/22/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Elizabeth Kent	Testifying for Commission to Promote Uniform Laws	Support	Yes

Comments:

Aloha,

Thank you for the opportunity to testify in strong support of SB 3329, proposed SD 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, Uniform Law Commissioner (Commission to Promote Uniform Laws)

MĀLAMA PŪPŪKEA-WAIMEA
PROTECTING OUR OCEAN'S RESOURCE

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February 20, 2022

Senator Rhoads, Chair
Senator Keohokalole, Vice Chair
Committee on Judiciary Members

JDC Hearing: Tuesday, Feb. 22, 2022, 9:30 am
SB3329 Proposed SD1 – Uniform Public Expression Protection Act

Aloha Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee,

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

MPW is a Hawaiʻi non-profit organization founded on the North Shore of Oʻahu in 2005. Our mission is "working to replenish and sustain the natural and cultural resources of the Pūpūkea and Waimea ahupuaʻa 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 Oʻahu 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 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 developer filed counterclaims seeking $13 million in unspecified damages, a classic type of Strategic Litigation Against Public Participation ("SLAPP") designed to terrorize the public interest groups and individuals involved.

SSCA filed a motion seeking protection and an expedited dismissal of the SLAPP claims under the Hawaiʻi Anti-SLAPP statute, HRS 634F, and on constitutional right to petition grounds. Unfortunately, the Circuit Court judge found that HRS 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 claims, 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 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" (a provision that would be retained under the proposed SD1).

The adoption of UPEPA, as recently approved by the Uniform Law Commission, would be a well-balanced, comprehensive uniform law update of HRS 634F. Even though the proposed bill cannot fix the flaws in the Anti-SLAPP law that already failed MPW and SSCA, reforming HRS 634F now would be for the greater public good and a positive step forward for protecting citizen participation in government and public expression rights 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[1] 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 Proposed SD1.

Mahalo nui and best regards,

Denise Antolini President, MPW

[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/

ACLU Hawai'i

Committee:	Senate Committee on Judiciary
Hearing Date/Time:	Tuesday, February 22, 2022, 9:30 a.m.
Place:	Via Videoconference
Re:	*Testimony of the ACLU of Hawai'i in Support of S.B. 3329 Proposed SD1 Relating to Public Participation in Government*

Dear Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes **in support of S.B. 3329 Proposed SD1.** This measure repeals and replaces Hawaii'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 Act[3] ("Chapter 634F"). Like similar laws nationwide, Chapter 634F is an anti-SLAPP law designed to provide

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[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).

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 Proposed SD1 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.

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[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-oahus-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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SENATE COMMITTEE ON JUDICIARY
Tuesday, February 22, 2022, 9:30 am, Videoconference
SB 3329 Proposed SD1
Relating to Public Participation in Government
TESTIMONY
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Rhoads and Committee Members:

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

Effective public participation in government proceedings commonly requires press releases, organizing, lobbying, oral and written testimony, and occasionally lawsuits. Unfortunately, Chapter 634F, Hawaii Revised Statutes, as currently drafted, will not quickly resolve SLAPP suits filed to discourage, but not "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 Proposed SD1 and their rationale explained in an attachment which follows this testimony.

Thank you for the opportunity to submit testimony.

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT

IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-NINTH YEAR
JULY 10–15, 2020

WITH PREFATORY NOTE AND COMMENTS

October 2, 2020

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 129th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

- ULC keeps state law up-to-date by addressing important and timely legal issues.

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following:

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OTHER PARTICIPANTS

ROBERT T. SHERWIN	Texas, *Reporter*
LAURA L. PRATHER	Texas, *American Bar Association Advisor*
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UNIFORM PUBLIC EXPRESSION PROTECTION ACT

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UNIFORM PUBLIC EXPRESSION PROTECTION ACT

Prefatory Note

Special Thanks. The Committee wishes to thank Thomas R. Burke, Stanley W. Lamport, Ben Sheffner, and Ashley H. Verdon, all of whom served as Observers during the drafting process, for their steady and valued input and expertise.

Introduction. In the late 1980s, commentators began observing that the civil litigation system was increasingly being used in an illegitimate way: not to seek 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. These kinds of abusive lawsuits are particularly troublesome when defendants find themselves targeted for exercising their constitutional rights to publish and speak freely, petition the government, and associate with others. Commentators dubbed these kinds of civil actions "Strategic Lawsuits Against Public Participation," or SLAPPs.

SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues—from zoning, to the environment, to politics, to education. They are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs may clothe themselves, their unifying features make them a dangerous force: Their purpose is to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity.

Anti-SLAPP Laws in the United States. To limit the detrimental effects SLAPPs can have, 32 states, as well as the District of Columbia and the Territory of Guam, have enacted laws to both assist defendants in seeking dismissal and to deter vexatious litigants from bringing such suits in the first place. An Anti-SLAPP law, at its core, is one by which a legislature imposes external change upon judicial procedure, in implicit recognition that the judiciary has not itself modified its own procedures to deal with this specific brand of abusive litigation. Although procedural in operation, these laws protect *substantive rights*, and therefore have *substantive effects*. So, it should not be surprising that each of the 34 legislative enactments have been performed statutorily—*none* are achieved through civil-procedure rules. The states that have passed anti-SLAPP legislation, in one form or another, are:

Arizona (2006) (Ariz. Rev. Stat. Ann. § 12-752) (2006)
Arkansas (2005) (Ark. Code Ann. § 16-63-501 through § 16-63-508) (2005)
California (1992) (Cal. Civ. Proc. Code § 425.16 through § 425.18)
Colorado (2019) (Col. Rev. Stat. Ann. § 13-20-1101)
Connecticut (2018) (Conn. Gen. Stat. Ann. § 52-196a)
Delaware (1992) (Del. Code Ann. tit. 10, § 8136, through § 8138)
District of Columbia (2012) (D.C. Code § 16-5501 through § 16-5505)
Florida (2004, 2000) (Fla. Stat. Ann. §§ 720.304, 768.295)
Georgia (1996) (Ga. Code. Ann. § 9-11-11.1)
Guam (1998) (Guam Code Ann. tit. 7, § 17101 through § 17109)

Hawaii (2002) (Haw. Rev. Stat. § 634F-1 through § 634F-4)
Illinois (2007) (735 Ill. Comp. Stat. 110/15 through 110/99)
Indiana (1998) (Ind. Code § 34-7-7-1 through § 34-7-7-10)
Kansas (2016) (Kan. Stat. Ann § 60-5320)
Louisiana (1999) (La. Code Civ. Proc. Ann. art. 971)
Maine (1995) (Me. Rev. Stat. Ann. tit. 14, § 556)
Maryland (2004) (Md. Code Ann., Cts. & Jud. Proc. § 5-807)
Massachusetts (1994) (Mass. Gen. Laws ch. 231, §59H)
Minnesota (1994) (Minn. Stat. § 554.01 through § 554.06) (Held unconstitutional by *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 635-37 (Minn. 2017))
Missouri (2004) (Mo. Rev. Stat. § 537.528)
Nebraska (1994) (Neb. Rev. Stat. § 25-21,243 through § 25-21,246)
Nevada (1997) (Nev. Rev. Stat. § 41.635 through 41.670)
New Mexico (2001) (N.M. Stat. § 38-2-9.1 through § 38-2-9.2)
New York (1992) (NY. Civ. Rights Law § 70-a and § 76-a)
Oklahoma (2014) (Okla. Stat. tit. 12, § 1430 through § 1440)
Oregon (2001) (Or. Rev. Stat. § 31.150 through § 31.155)
Pennsylvania (2000) (27 Pa. Consol. Stat. § 8301 through § 8305, and § 7707)
Rhode Island (1993) (R.I. Gen. Laws § 9-33-1 through § 9-33-4)
Tennessee (2019, 1997) (Tenn. Code. Ann. § 20-17-101 through § 20-17-110; § 4-21-1001 through § 4-21-1004)
Texas (2011) (Tex. Civ. Prac. & Rem. Code § 27.001 through § 27.011)
Utah (2008) (Utah Code § 78B-6-1401 through § 78B-6-1405)
Vermont (2005) (Vt. Stat. Ann. tit. 12 § 1041)
Virginia (2007) (Va. Code Ann. § 8.01-223.2)
Washington (2010, 1989) (Wash. Rev. Code § 4.24.500 through § 4.24.525) (Held unconstitutional by *Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015))

Many early anti-SLAPP statutes were narrowly drawn by limiting their use to particular types of parties or cases—for example, to lawsuits *brought by* public applicants or permittees, or to lawsuits *brought against* defendants speaking in a particular forum or on a particular topic. More recently, however, legislatures have recognized that narrow anti-SLAPP laws are ineffectual in curbing the many forms of abusive litigation that SLAPPs can take. To that end, most modern statutory enactments have been broad with respect to the parties that may use the acts and the kinds of cases to which the acts apply.

The recent trend further evidences a shift toward statutes that achieve their goals by generally employing at least **five mechanisms:**

1. Creating specific vehicles for filing motions to dismiss or strike early in the litigation process;
2. Requiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they're heard;
3. Requiring the plaintiff to demonstrate the case has some degree of merit;
4. Imposing cost-shifting sanctions that award attorney's fees and other costs when the

plaintiff is unable to carry its burden; and

5. Allowing for an interlocutory appeal of a decision to deny the defendant's motion.

The Need for a Uniform Anti-SLAPP Act. Although there is certainly a movement toward broad statutes that utilize the five tools described above, the precise ways in which different states have constructed their laws are far from cohesive. This degree of variance from state to state—and an absence of protection in 18 states—leads to confusion and disorder among plaintiffs, defendants, and courts. It also contributes to what can be called "litigation tourism"; that is, a type of forum shopping by which a plaintiff who has choices among the states in which to bring a lawsuit will do so in a state that lacks strong and clear anti-SLAPP protections. Several recent high-profile examples of this type of forum shopping have made the need for uniformity all the more evident.

The Uniform Public Expression Protection Act seeks to harmonize these varying approaches by enunciating a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner. In doing so, the Act actually serves two purposes: protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries.

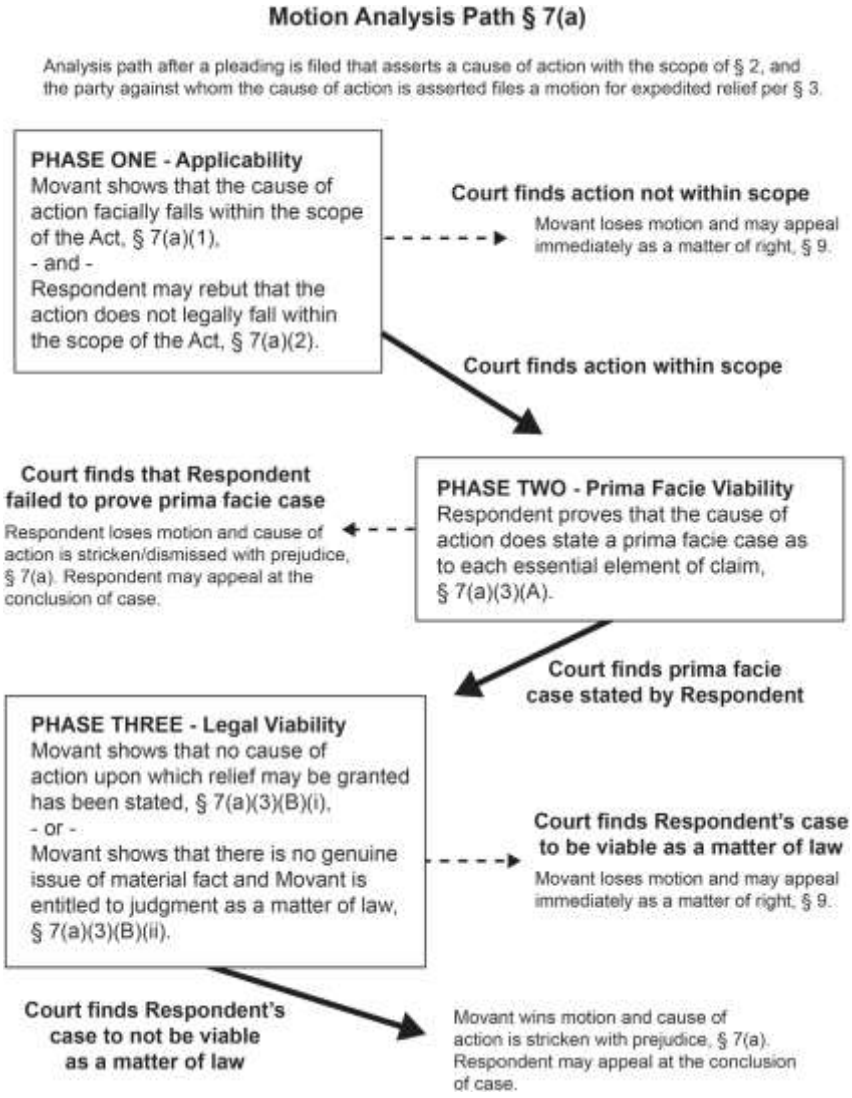
The Uniform Public Expression Protection Act, Generally. The Uniform Public Expression Protection Act follows the recent trend of state legislatures to enact broad statutory protections for its citizens. It does so by utilizing all five of the tools mentioned above in a motion practice that carefully and clearly identifies particular burdens for each party to meet at particular phases in the motion's procedure.

The general flow of a motion under the Act employs a three-phase analysis seen in many states' statutes. Upon the filing of a motion, all proceedings—including discovery—between the moving party and responding party are stayed, subject to a few specific exceptions. In the **first phase**, the court effectively decides whether the Act applies. It does so by first determining if the responding party's (typically the plaintiff's) cause of action implicates the moving party's (typically the defendant's) right to free speech, petition, or association. The burden is on the moving party to make the initial showing that the Act applies. If the court holds that the moving party *has not* carried that burden, then the motion is denied, the stay of proceedings is lifted, and the parties proceed to litigate the merits of the case (subject to the ability of the moving party to interlocutorily appeal the motion's denial). If the court determines that the moving party *has* carried its burden, then the responding party can show its cause of action fits within one of the three exceptions to the Act. If it carries that burden—for example, by showing that its cause of action is against an agent of a governmental unit acting or purporting to act in an official capacity—then the Act does not apply, and the motion is denied. If it fails to carry that burden, then the court proceeds to the second step of the analysis.

In the **second phase**, the court determines if the responding party has a viable cause of action from a prima-facie perspective. In this phase, the burden is on the responding party to establish a prima-facie case for each essential element of the cause of action challenged by the motion. If the court holds that the responding party *has not* carried its burden to establish a

prima-facie case, then the motion is granted, and the responding party's cause of action is terminated with prejudice to refiling. The moving party is entitled to its costs, attorney's fees, and expenses. If the court holds that the responding party *has* carried its burden, then—and only then—the court proceeds to the third step of the analysis.

In the **third phase**, the court determines if the responding party has a *legally* viable cause of action. In this phase, the burden shifts *back* to the moving party to show either that the responding party failed to state a cause of action upon which relief can be granted (for example, a claim that is barred by res judicata, or preempted by some other law), or that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law (for example, if the cause of action, while perhaps factually viable, is time-barred by limitations). If the moving party makes such a showing, the motion is granted; if it fails to make such a showing, the motion is denied.



UNIFORM PUBLIC EXPRESSION PROTECTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Public Expression Protection Act.

Comment

Although "SLAPP"—an acronym for "Strategic Lawsuit Against Public Participation"—does not appear in the Act's title, the Uniform Public Expression Protection Act should be considered an anti-SLAPP act. Although "[t]he paradigm SLAPP is a suit filed by a large developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans," SLAPPs "are by no means limited to environmental issues, nor are the defendants necessarily local organizations with limited resources." *Hupp v Freedom Commc'ns*, 163 Cal. Rptr. 3d 919, 922 (Cal. Ct. App. 2013). "[W]hile SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Id.*

SECTION 2. SCOPE.

(a) In this section:

(1) "Goods or services" does not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work.

(2) "Governmental unit" means a public corporation or government or governmental subdivision, agency, or instrumentality.

(3) "Person" means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

(b) Except as otherwise provided in subsection (c), this [act] applies to a [cause of action] asserted in a civil action against a person based on the person's:

(1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

(2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; 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 [cite to the state's constitution], on a matter of public concern.

(c) This [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.

Legislative Note: *If a state does not use the term "cause of action", the state should use its comparable term, such as "claim for relief" in subsections (b) and (c). The state also should substitute its comparable term for the term "[cause of action]" in Sections 3, 4(f), 7, 13, and 14.*

Comments

1. Most courts explain the resolution of anti-SLAPP motions in terms of either a three- or two-pronged procedure. *E.g., Younkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018) ("Reviewing a[n anti-SLAPP] motion to dismiss requires a three-step analysis."); *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 713 (Cal. 2019) ("A court evaluates an anti-SLAPP motion in two steps."). Section 2 of the Act constitutes the **first step** of that procedure, where the moving party (typically the defendant) must show that the responding party's (typically the plaintiff's) cause of action arises from the movant's exercise of First Amendment rights on a matter of public concern. This step focuses on the *movant's activity*, and whether the movant can show that it has been sued for that activity. *See, e.g., Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) ("The anti-SLAPP statute's definitional focus is not [on] the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning." (emphasis original)). If the movant cannot

satisfy the first step—in other words, cannot show that the cause of action is linked to First Amendment activity on a matter of public concern—then the court will deny the motion without ever proceeding to the second or third step. THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 1.2 (2019). Further discussion of how a court adjudicates the first step, including the parties' burdens and the materials a court should review, appears in Comments 2 and 3 to Section 7.

2. Although the Act operates in a procedural manner—specifically, by altering the typical procedure parties follow at the outset of litigation—the *rights* the act protects are most certainly *substantive* in nature. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972-973 (9th Cir. 1999) (applying California's anti-SLAPP law to diversity actions in federal court because the statute was "crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'"). Otherwise stated, the Act's procedural features are designed to prevent substantive consequences: the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit. *Williams v. Cordillera Comms., Inc.*, No. 2:13–CV–124, 2014 WL 2611746, at * 1 (S.D. Tex. June 11, 2014). As stated by one California court, "[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights." *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317 (4th Dist. 2004).

3. The statute is only applicable to civil actions. It has no applicability in criminal proceedings.

4. The term "civil action" should be construed consistently with Fed. R. Civ. P. 1.

5. The term "cause of action" refers to a group of operative facts that give rise to one or more bases for recovery in a civil action. The term contemplates that in one civil action, a party seeking relief may assert multiple causes of action that invoke different facts and theories for relief. In some jurisdictions, other terms of art, such as "claim for relief," "ground of action," "right of action," or "case theory," might be more appropriate than "cause of action." *See, e.g., Baral v. Schnitt*, 376 P.3d 604, 616 (Cal. 2016) (holding that when the California Legislature used the term "cause of action" in its anti-SLAPP statute, "it had in mind *allegations* of protected activity that are asserted as grounds for relief" (emphasis original)). Regardless of the term used by a state, the Act can be utilized to challenge part or all of a single cause of action, or multiple causes of action in the same case. *See id.* at 615 ("A single cause of action . . . may include more than one instance of alleged wrongdoing."). Otherwise stated, a single civil action can contain both a cause of action subject to the Act and one not subject to the Act.

6. Sections 2(b)(1) and (2) apply to a cause of action brought against a person based on the person's communication. "Communication" should be construed broadly—consistent with holdings of the Supreme Court of the United States—to include any expressive conduct that likewise implicates the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("[W]e have long recognized that [First Amendment] protection does not end at the spoken or written word."); *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (holding that conduct constitutes "communication" when it is accompanied by an intent to convey a particularized message and, given the surrounding circumstances, the likelihood is great that the message will

be understood by those who view it); *Rumsfeld v. Forum for Acad. and Institutional Rights*, 547 U.S. 47, 65-66 (2006); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969). Conduct is not specifically mentioned in the Act so as to avoid parties from attempting to use it to shield themselves from liability for *nonexpressive* conduct that nevertheless tangentially relates to a matter of public concern. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). But the Act *is* intended to protect *expressive* conduct. For example, a person's work on behalf of a political campaign might include constitutionally protected expressive conduct, such as putting up campaign signs or organizing a rally. The Act would protect that conduct. But a person who damages another candidate's campaign signs or physically threatens attendees at an opposing rally would not be engaging in expressive conduct, and therefore should not be able to utilize the Act, even though the conduct tangentially relates to matters of public concern.

7. Sections 2(b)(1)-(3) identify three different instances in which the Act may be utilized. Section 2(b)(1) protects communication that occurs before any legislative, executive, judicial, administrative, or other governmental proceeding—effectively, any speech or expressive conduct that would implicate one's right to petition the government. Section 2(b)(2) operates similarly, but extends to speech or expressive conduct *about* those matters being considered in legislative, executive, judicial, administrative, or other governmental proceedings—the speech or conduct need not take place *before* the governmental body. Section 2(b)(3) operates differently than (1) and (2) and provides the broadest degree of protection; it applies to *any* exercise of the right of free speech or press, free association, or assembly or petition, so long as that exercise is on a matter of public concern.

8. The terms "freedom of speech or of the press," "the right to assemble or petition," and "the right of association" should all be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court.

9. The term "matter of public concern" should be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (holding that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public'" (citations omitted)); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."). "The [matter-of-public-concern] inquiry turns on the 'content, form, and context' of the speech." *Lane v. Franks*, 573 U.S. 228, 241 (2014) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). The term should also be construed consistently with terms like "public issue" and "matter of public interest" seen in some state statutes. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (employing the terms "public issue" and "issue of public interest"); *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1164-65 (Cal. 2019).

The California Supreme Court breaks "matter of public concern" (or in its statute, "public issue" or "issue of public interest") into a two-part analysis. *FilmOn.com*, 439 P.3d at 1165.

"First, we ask what 'public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful." *Id.* (citation omitted). The court observed that the first step is typically not difficult for the movant: "[V]irtually always, defendants succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest." *Id*. But the second step is where many movants fail. The inquiry "demands 'some degree of closeness' between the challenged statements and the asserted public interest." *Id.* (citation omitted). As other California courts have noted, "it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 506 (Cal. Ct. App. 2004); *see also Dyer v. Childress*, 55 Cal. Rptr. 3d 544, 548 (2007) ("The fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not enough." (citation omitted)).

The California Supreme Court explains that what it means to "contribute to the public debate" "will perhaps differ based on the state of public discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." *FilmOn, Inc.*, 439 P.3d at 1166.

Further discussion of how a court adjudicates whether a cause of action is based on the moving party's exercise of First Amendment rights on a matter of public concern, including the movant's burden and the materials a court should review, appears in Comment 2 to Section 7.

10. Section 2(c) provides a list of exemptions, or situations to which the Act does not apply. It is the burden of the responding party to establish the applicability of one or more exemptions. Thus, even if a movant can show the Act applies under Section 2(b), the Act may nevertheless *not* apply if the non-movant can show the cause of action is exempt. Further discussion of how a court adjudicates whether a cause of action is exempt, including the responding party's burden and the materials a court should review, appears in Comment 3 to Section 7.

11. The term "governmental unit or an employee or agent of a governmental unit acting in an official capacity" includes any private people or entities working as government contractors, to the extent the cause of action pertains to that government contract.

12. The term "dramatic, literary, musical, political, journalistic, or artistic work" used in Section (a)(3) should be construed broadly to include newspapers, magazines, books, plays, motion pictures, television programs, video games, or Internet websites or other electronic mediums.

13. Section 2(c)(3) carves out from the scope of the Act "communication[s] related to [a] person's sale or lease of [ ] goods or services" when that person is primarily engaged in the selling, leasing, or licensing of those goods or services. In other words, "commercial speech" is

exempted from the protections of the Act. By way of illustration, if a mattress store is sued for false statements made in its advertising of mattresses—whether by an aggrieved consumer or a competitor—the mattress store would not be able to avail itself of the Act. But if the same mattress store were sued for tortious interference for organizing a petition campaign to oppose the building of a new school, its activity would not be related to the sale or lease of goods or services, and it could use the Act for protection of its First Amendment conduct.

But the "commercial-speech exemption" does not apply to the creation, dissemination, exhibition, or advertisement of a dramatic, literary, musical, political, journalistic, or artistic work. This is consistent with the holdings of most courts that the contents of works protected by the First Amendment are not considered "goods or services," even if sold for profit. *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."); *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (ideas and expressions in a book are not a product); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 239 (Tex. 1993) ("We conclude that the ideas, thoughts, words, and information conveyed by the magazine . . . are not products."). This ensures that claims targeting those in the business of making and selling works protected by the First Amendment are not denied the ability to invoke the Act. *See Dyer v. Childress*, 147 Cal. App. 4th 1273, 1283 (2007) (expressive works exception to the commercial speech exemption was "intended to 'exempt the news media and other media defendants (such as the motion picture industry) from the [commercial-speech exemption] when the underlying act relates to news gathering and reporting to the public with respect to the news media or to activities involved in the creation or dissemination of any works of a motion picture or television studio.'" (citations omitted)).

SECTION 3. SPECIAL MOTION FOR EXPEDITED RELIEF. Not later than [60] days after a party is served with a [complaint] [petition], crossclaim, counterclaim, third-party claim, or other pleading that asserts a [cause of action] to which this [act] applies, or at a later time on a showing of good cause, the party may file a special motion for expedited relief to [dismiss] [strike] the [cause of action] or part of the [cause of action].

Legislative Note: *A state should use the term "complaint" or "petition", or both, to describe any procedural means by which a cause of action may be asserted.*

A state should title its motion one to "dismiss" or "strike" in accordance with its procedures and customs. The state also should substitute its term for the term "[dismiss] [strike]" in Section 7(a).

A state may need to amend its statutes or rules of civil procedure to prevent a motion under this section from being considered a first pleading or motion that waives a defense or precludes the filing of another pleading or motion.

Comments

1. Unlike a defense under Fed. R. Civ. P. 12(b), the motion need not be filed prior to other pleadings in the case, and a party should not be estopped from filing a motion by taking any other actions in the case.

2. The Act should apply not just to initial claims brought by a plaintiff against a defendant, but to *any* claim brought by *any* party who seeks to punish or intimidate another party for the exercise of its constitutional rights. In this connection, initial defendants frequently use their ability to bring counterclaims and crossclaims for abusive purposes, and the Act should be available to seek dismissal of such claims.

3. The terms "complaint" and "petition" are intended to include any amended pleadings that assert a cause of action for the first time in a case.

4. "Crossclaim" means a cause of action asserted between co-plaintiffs or co-defendants in the same civil action.

5. "Counterclaim" means a cause of action asserted by a party against an opposing party after an original claim has been made by that opposing party. The term should be construed synonymously with terms like "counteraction," "countersuit," and "cross-demand."

6. "Third-party" claim should be construed in accordance with Fed. R. Civ. P. 14.

7. "Good cause" means a reason factually or legally sufficient to appropriately explain why the motion was not brought within the prescribed deadline. This section should not be construed to require a party to seek leave of court prior to filing a motion later than the prescribed deadline. Instead, a court should make any good-cause determination as part of its ruling on the motion under Section 8.

8. Some states may choose to title their special motion one to "dismiss," while others may title it one to "strike." The choice of title is not substantive in nature and does not affect uniformity or construction of the statute.

SECTION 4. STAY.

(a) Except as otherwise provided in subsections (d) through (g), on the filing of a motion under Section 3:

(1) all other proceedings between the moving party and responding party, including discovery and a pending hearing or motion, are stayed; and

(2) on motion by the moving party, the court may stay a hearing or motion

involving another party, or discovery by another party, if the hearing or ruling on the motion would adjudicate, or the discovery would relate to, an issue material to the motion under Section 3.

(b) A stay under subsection (a) remains in effect until entry of an order ruling on the motion under Section 3 and expiration of the time under Section 9 for the moving party to appeal the order.

(c) Except as otherwise provided in subsections (e), (f), and (g), if a party appeals from an order ruling on a motion under Section 3, all proceedings between all parties in the action are stayed. The stay remains in effect until the conclusion of the appeal.

(d) During a stay under subsection (a), the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden under Section 7(a) and the information is not reasonably available unless discovery is allowed.

(e) A motion under Section 10 for costs, attorney's fees, and expenses is not subject to a stay under this section.

(f) A stay under this section does not affect a party's ability voluntarily to [dismiss] [nonsuit] a [cause of action] or part of a [cause of action] or move to [sever] a [cause of action].

(g) During a stay under this section, the court for good cause may hear and rule on:

(1) a motion unrelated to the motion under Section 3; and

(2) a motion seeking a special or preliminary injunction to protect against an imminent threat to public health or safety.

Legislative Note: *In subsection (f), a state should use the term "dismiss" or "nonsuit" in accordance with its procedures and customs. The state also should substitute its term for the term "[dismiss] [nonsuit]" in Section 7(b) and (c).*

If a state does not use the term "sever" to describe a motion to sever, the state should use its comparable term in subsection (f).

Comments

1. Section 4 furthers the purpose of the Act by protecting a moving party from the burdens of litigation—which include not only discovery, but responding to motions and other potentially abusive tactics—until the court adjudicates the motion and the moving party's appellate rights with respect to the motion are exhausted.

2. Section 4(a)(1) provides that the stay only applies to proceedings between the parties to the motion, but Section 4(a)(2) allows the moving party to seek a stay of proceedings and discovery between *other* parties if there are legal or factual issues at play in those proceedings that are material to the party's motion. Otherwise stated, if a defendant moves to dismiss a plaintiff's cause of action, that motion should not stay proceedings or discovery between the plaintiff and *other* defendants—or between other defendants themselves—unless those proceedings involve legal or factual issues that are material to the motion, or the discovery is relevant to the motion.

By way of illustration, a candidate for political office sues two defendants—his opponent, for defamation over comments made about the plaintiff during the campaign, and his opponent's campaign manager, for hacking into the plaintiff's campaign's computer files and erasing valuable donor lists and other data. Only the plaintiff's opponent moves to dismiss under the Act; the campaign manager does not. In that case, the plaintiff could still proceed with discovery and dispositive motions against the campaign manager, because the claim concerning the hacking is entirely unrelated to the defamation claim. The moving defendant has no interest that would be affected by the hacking claim. But under slightly altered facts, a different outcome might exist: The plaintiff alleges that (1) the opposing campaign manager violated the plaintiff's privacy rights by stealing sensitive personal information in the hacking incident; and (2) the opposing candidate violated the plaintiff's privacy rights by disclosing that sensitive personal information in a speech. Again, the opposing candidate moves to dismiss under the Act; the campaign manager does not. In that case, the causes of action are so interrelated that the moving defendant would not be able to protect his interests without participating in the case against his co-defendant—something he would not have to do if he prevails on the motion. In such an example, the court should grant a request to stay the proceedings as between the plaintiff and non-moving defendant, because the moving defendant would have no way of protecting his interests without participating in the case.

3. Section 4(c) provides that *all* proceedings between all parties in the case are stayed if a party appeals an order under the Act. This subsection protects a moving party from having to battle related claims—some of which might be subject to a motion under the Act and some which are not—at the same time in two different courts. For example, if two plaintiffs file causes of action against a single defendant, and the defendant only moves to dismiss against one plaintiff but not the other, the defendant should be able to appeal a denial of that motion without also having to simultaneously defend related causes of action (albeit ones not subject to the Act) in the trial court brought by the other plaintiff.

By way of illustration, multiple plaintiffs—all contestants on a reality TV show contest—sue one defendant—the TV producer—in a single case for their negative treatment on the show. Each plaintiff's claim is distinct and centers on separate statements. The defendant files a motion to dismiss under the Act against only one plaintiff. The motion is denied; the defendant appeals under Section 9. At that point, *all* the proceedings are stayed, because the defendant should not be required to try claims in the trial court while appealing other claims from the same case in the appellate court.

To the extent any party not subject to the motion desires to move forward in the trial court on what it believes are unrelated causes of action while the appeal of the motion's order is pending, it retains the right under Section 4(f) to request a severance of those causes of action.

4. Section 4(d) provides the court with discretion to permit a party to conduct specified, limited discovery aimed at the sole purpose of collecting enough evidence to meet its burden or burdens under Section 7(a) of the Act. This provision recognizes that a party may not have the evidence it needs—for example, evidence of another individual's state of mind in a defamation action—prior to filing or responding to a motion. The provision allows the party to attempt to obtain that evidence without opening the case up to full-scale discovery and incurring those burdens and costs.

5. Section 4(g) serves the ultimate purpose of the Act: to allow a party to avoid the expense and burden of frivolous litigation until the court can determine that the claims are not frivolous. In that connection, a court should be free to hear any motion that does not affect the moving party's right to be free from an abusive cause of action, including a motion to conduct discovery on causes of action unrelated to the cause of action being challenged under the Act, and motions for preliminary injunctive relief seeking to protect against an imminent threat to public health or safety.

SECTION 5. HEARING.

(a) The court shall hear a motion under Section 3 not later than [60] days after filing of the motion, unless the court orders a later hearing:

(1) to allow discovery under Section 4(d); or

(2) for other good cause.

(b) If the court orders a later hearing under subsection (a)(1), the court shall hear the motion under Section 3 not later than [60] days after the court order allowing the discovery, unless the court orders a later hearing under subsection (a)(2).

Comments

1. Section 5 should not be construed to prevent the parties from agreeing to a later hearing date and presenting that agreement to the court with a request to find "other good cause" for a later hearing. Nevertheless, the court, and not the parties, is responsible for controlling the pace of litigation, and the court should affirmatively find that good cause does exist independent of a mere agreement by the parties to a later hearing date.

2. The question of whether the Act requires a live hearing or whether a court may consider the motion on written submission should be governed by the local customs of the jurisdiction.

3. State law and local customs of the jurisdiction should dictate the consequences for a court failing to comply with the timelines set forth in this section.

SECTION 6. PROOF. In ruling on a motion under Section 3, the court shall consider the pleadings, the motion, any reply or response to the motion, and any evidence that could be considered in ruling on a motion for summary judgment under [cite to the state's statute or rule governing summary judgment].

Comments

1. The Act establishes a procedure that shares many attributes with summary judgment. *See Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019) (describing the California statute as a "summary-judgment-like procedure"); *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 312-13 (Fla. Dist. Ct. App. 2019) (equating a motion under Florida's law to one for summary judgment). So, consistent with summary-judgment practice, parties should submit admissible, competent evidence—such as affidavits, deposition testimony, or tangible evidence—for the court to consider. *See Sweetwater Union High Sch. Dist.*, 434 P.3d at 1157 ("There are important differences between [anti-SLAPP motions and motions for summary judgment]. Chief among them is that an anti-SLAPP motion is filed much earlier and before discovery. However, to the extent both schemes are designed to determine whether a suit should be allowed to move forward, both schemes should require a showing based on evidence potentially admissible at trial presented in the proper form."). A court should use the parties' pleadings to frame the issues in the case, but a party should not be able to rely on its *own* pleadings as substantive evidence. *See id.*; *Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620, 636, 637 (Cal. Ct. App. 1996), disapproved of on another point in *Equilon Enters. v. Consumer Cause, Inc.*, 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002). A party may rely on an *opposing party's* pleadings as substantive evidence, consistent with the general rule that an opposing party's pleadings constitute admissible admissions. *See Faiella v. Fed. Nat'l Mortg. Ass'n*, 928 F.3d 141, 146 (1st Cir. 2019) ("A party ordinarily is bound by his representations to a court"); *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984) ("[S]tipulations and admissions in the pleadings are generally binding on the parties and the Court.").

2. The question of whether the Act requires a live hearing or whether a court may consider the motion on written submission should be governed by the local customs of the jurisdiction.

SECTION 7. [DISMISSAL OF] [STRIKING] CAUSE OF ACTION IN WHOLE OR PART.

(a) In ruling on a motion under Section 3, the court shall [dismiss] [strike] with prejudice a [cause of action], or part of a [cause of action], if:

(1) the moving party establishes under Section 2(b) that this [act] applies;

(2) the responding party fails to establish under Section 2(c) that this [act] does not apply; and

(3) either:

(A) the responding party fails to establish a prima facie case as to each essential element of the [cause of action]; or

(B) the moving party establishes that:

(i) the responding party failed to state a [cause of action] upon which relief can be granted; or

(ii) 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].

(b) A voluntary [dismissal] [nonsuit] without prejudice of a responding party's [cause of action], or part of a [cause of action], that is the subject of a motion under Section 3 does not affect a moving party's right to obtain a ruling on the motion and seek costs, attorney's fees, and expenses under Section 10.

(c) A voluntary [dismissal] [nonsuit] with prejudice of a responding party's [cause of action], or part of a [cause of action], that is the subject of a motion under Section 3 establishes

for the purpose of Section 10 that the moving party prevailed on the motion.

Comments

1. Section 7(a) recognizes that a court can strike or dismiss a part of a cause of action—for example, certain operative facts or theories of liability—and deny the motion as to other parts of the cause of action. *E.g.*, *Baral v. Schnitt*, 376 P.3d 604, 615 (Cal. 2016) (holding that California's statute can be utilized to challenge all or only part of a single cause of action, because a single cause of action may rely on multiple instances of conduct, only some of which may be protected).

2. Section 7(a)(1) establishes "Phase One" of the motion's procedure—applicability. In this phase, the party filing the motion has the burden to establish the Act applies for one of the reasons identified in Section 2(b). To use the Act, a movant need not prove that the responding party has violated a constitutional right—only that the responding party's suit arises from the movant's constitutionally protected activity. THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 3.2 (2019). Nor does the moving party need to show that the responding party *intended* to chill constitutional activities (motivation is irrelevant to the phase-one analysis) or prove that the responding party *actually* chilled the movant's protected activities. *Id*. But "[t]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail it [as] one arising from such." *Navellier v. Sletten*, 52 P.3d 695, 708-09 (Cal. 2002). Rather, the Act is available to a moving party if the conduct underlying the cause of action was "itself" an "act in furtherance" of the party's exercise of First Amendment rights on a matter of public concern. *See City of Cotati v. Cashman*, 52 P.3d 695, 701 (2002). The moving party meets this burden by demonstrating two things: first, that it engaged in conduct that fits one of the three categories spelled out in Section 2(b); and second, that the moved-upon cause of action is premised on that conduct. *See id.* In short, the Act's "definitional focus is not the form of the [non-movant's] cause of action but, rather, the [movant's] activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Navellier*, 52 P.3d at 711.

In many instances, the moving party will be able to carry its burden simply by using the responding party's pleadings. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) ("When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more."). As pointed out in Comment 2 to Section 6, a party is always free to use an opposing party's pleadings as stipulations and admissions, and when the Complaint spells out the cause of action and the activity underlying that cause of action, the moving party will be able to satisfy its burden rather easily. For example, if a defendant is sued by a public official for defamation, and the Complaint identifies the allegedly defamatory statement made by the defendant, then the defendant should need to do no more than attach the Complaint as an exhibit to its motion—the Complaint itself would clearly demonstrate that the defendant is being sued for speaking out about a public official (undoubtedly a matter of public concern).

In other instances, the moving party will have to attach evidence to its motion to establish that the cause of action is based on the exercise of protected activity. That's because a creative

plaintiff can disguise what is actually a SLAPP as a "garden variety" tort action. "Thus, a court must look past how the plaintiff characterizes the defendant's conduct to determine, based on evidence presented, whether the plaintiff's claims are based on protected speech or conduct." BURKE, *supra* at § 3.4.

But the fact that the movant's burden must be carried with evidence—whether that be the responding party's pleadings or evidence the movant presents—does not mean the inquiry is a factual one. On the contrary, the motion is legal in nature, and the burden is likewise legal. Thus, the court should not impose a factual burden on the moving party—like "preponderance of the evidence" or "clear and convincing evidence"—typically seen in fact-finding inquiries. Rather, like other legal rulings, the court should simply make a determination, based on the evidence produced by the moving party, whether a cause of action brought against the moving party is based on its (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding; (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; 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, on a matter of public concern. It should do so without weighing the parties' evidence against each other, but instead by determining whether the evidence put forth by the movant establishes the legal standard. If the moving party fails to prove the Act applies, the motion must be denied.

3. Section 7(a)(2) is also part of "Phase One" of the motion's procedure. Even if the Act applies for one of the reasons identified in Section 2(b), the Act may nevertheless *not* apply if the party against whom the motion is filed can establish the applicability of an exemption identified in Section 2(c). A party seeking to establish the applicability of an exemption bears the burden of proof on that exemption. Like establishing applicability under Section 2(b), the burden to establish *non-applicability* under Section 2(c) is legal, and not factual. The responding party may use the moving party's motion, or affidavits or any other evidence admissible in a summary-judgment proceeding, to carry its burden. And like the Section 2(b) analysis, the court should decide whether the cause of action is exempt from the act without weighing the evidence against that of the moving party, but instead by determining whether the evidence produced by the responding party establishes the applicability of an exemption. If the responding party so establishes, the motion must be denied. If the moving party proves the Act applies *and* the responding party *cannot* establish the applicability of an exemption, the court moves to "Phase Two" of the motion's procedure.

4. Section 7(a)(3)(A) establishes "Phase Two" of the motion's procedure—prima-facie viability. Anti-SLAPP laws "do not insulate defendants from *any* liability for claims arising from protected rights of petition or speech. [They] only provide[] a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019) (emphasis original) (citations omitted). Phase Two (as well as Phase Three) is where that "weeding out" occurs.

In this phase, the party against whom the motion is filed has the burden to show its case has merit by establishing a prima-facie case as to *each* essential element of the cause of action being challenged by the motion. *See Baral v. Schnitt*, 376 P.3d 604, 613 (Cal. 2016) (holding

that a responding party cannot prevail on an anti-SLAPP motion by establishing a prima-facie case on any *one* part of a cause of action). The moving party has no burden in this phase. "Prima facie" means evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376-77 (Tex. 2019) (prima-facie evidence "is 'the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true'"); *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002) ("[T]he plaintiff must demonstrate that the complaint is [ ] supported by a sufficient prima-facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.").

Precisely how the responding party carries its burden to establish a prima-facie case "will vary from case to case, depending on the nature of the complaint and the thrust of the motion." *Baral*, 376 P.3d at 614. But the responding party should be afforded "a certain degree of leeway" in carrying its burden "due to 'the early stage at which the motion is brought and heard and the limited opportunity to conduct discovery.'" *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 44 Cal. Rptr. 3d 517, 529 (2006) (citations omitted). California courts have "repeatedly described the anti-SLAPP procedure as operating like an early summary judgment motion." THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 5.2 (2019). "[A] plaintiff's burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment." *Yu v. Signet Bank/Virginia*, 126 Cal. Rptr. 2d 516, 530 (Cal. Ct. App. 2002) (disapproved of on other grounds by *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 413 P.3d 650 (Cal. 2018)).

Accordingly, all a responding party must do to satisfy its burden under Phase Two is produce evidence that, if believed, would satisfy each element of the challenged cause of action. A court may not weigh that evidence, but rather must take it as true and determine whether it meets the elements of the moved-upon cause of action. *Sweetwater Union High Sch. Dist.*, 434 P.3d at 1157. If the responding party cannot establish a prima-facie case, then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed. If the responding party *does* establish a prima-facie case, then (and only then) the court moves to "Phase Three" of the motion's procedure.

5. Section 7(a)(3)(B) establishes "Phase Three" of the motion's procedure—legal viability. Even if a responding party makes a prima-facie showing under Section 7(a)(3)(A), the moving party may still prevail if it shows that the responding party failed to state a cause of action upon which relief can be granted *or* that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law—in other words, that the cause of action is not *legally* sound. In this phase, the burden shifts back to the moving party. If the moving party makes a showing under Section 7(a)(3)(B), then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed. If the moving party does not make such a showing—and the responding party successfully established a prima-facie case in "Phase Two"—then the motion must be denied.

For example, a plaintiff desiring to build a "big box" store sues a defendant for tortious interference based on the defendant's efforts to organize a public campaign adverse to the plaintiff. The defendant moves to dismiss under the Act and establishes that the suit targets her

First Amendment activity on a matter of public concern. Thus, the motion moves to Phase Two. In that phase, the plaintiff is able to establish a prima-facie case on each essential element of its tortious interference cause of action. Thus, the motion moves to Phase Three. But in that final phase, the defendant shows that the claim is barred by limitations. In such an instance, the court must grant the motion, because the defendant showed itself to be entitled to judgment as a matter of law.

Although Phase Three uses traditional summary judgment and Fed. R. Civ. P. 12(b)(6) language, it does not serve as a replacement for those vehicles. On the contrary, summary judgment and other dismissal mechanisms remain options for defendants who cannot establish that they have been sued for protected activity. In other words, to get to Phase Three—and be entitled to the Act's sanctions under Section 10—a movant must first prevail under Phase One by showing the Act's applicability. But by employing a legal-viability standard, the Act recognizes that a SLAPP plaintiff can just as easily harass a defendant with a *legally* nonviable claim as it can with a *factually* nonviable one.

6. Sections 7(b) and (c) recognize that a party may desire to dismiss or nonsuit a cause of action after a motion is filed in order to avoid the sanctions that accompany a dismissal under Section 10. Both sections serve to maintain the moving party's ability to seek attorney's fees and costs—even though the offending cause of action has been dismissed—because the filing of a motion under the Act is costly, and many plaintiffs refuse to voluntarily dismiss their claims until a motion has been filed. But a prudent moving party should take efforts to inform opposing parties that it intends to file a motion under the Act, so as to give them an opportunity to voluntarily dismiss offending claims before a motion is filed. Courts may take a moving party's failure to do so into account when calculating the reasonableness of the moving party's attorney's fees.

7. Section 7(b) protects a moving party from the gamesmanship of a responding party who dismisses a cause of action after the filing of a motion, only to refile the offending cause of action after the motion is rendered moot by the claim's dismissal.

8. Once a motion has been filed, a voluntary dismissal or nonsuit of the responding party's cause of action does not deprive the court of jurisdiction.

9. State law should dictate the effect of a dismissal of only part of a cause of action.

SECTION 8. RULING. The court shall rule on a motion under Section 3 not later than [60] days after a hearing under Section 5.

Comment

State law and local customs of the jurisdiction should dictate the consequences for a court not complying with the timelines set forth in this section.

SECTION 9. APPEAL. A moving party may appeal as a matter of right from an order denying, in whole or in part, a motion under Section 3. The appeal must be filed not later than [21] days after entry of the order.

Legislative Note: *A state should insert a time to appeal consistent with other interlocutory appeals.*

This section may require amendment of a state's interlocutory appeal statute or court rule.

Comments

1. "If the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression. Thus, [anti-SLAPP statutes] protect the defendant from the burdens of trial, not merely from ultimate judgments of liability." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (superseded by statute on unrelated grounds as stated in *Fyk v. Facebook, Inc.*, No. 19-16232, 2020 WL 3124258, at *2 (9th Cir. June 12, 2020)).

2. This section should not be construed to foreclose an interlocutory appeal of an order granting, in whole or in part, a motion under Section 3, if state law would otherwise permit such an appeal.

3. This section is not intended to affect any separate writ procedure a state may have.

4. This section is not intended to prevent a court from entering an order certifying a question or otherwise permitting an immediate appeal of an order that dismisses only part of a claim.

5. A party who chooses not to interlocutorily appeal under this section should not be foreclosed from filing an ordinary, non-interlocutory appeal of a court's denial of a motion under Section 3 following the entry of a final, appealable judgment.

SECTION 10. COSTS, ATTORNEY'S FEES, AND EXPENSES. On a motion under Section 3, the court shall award court costs, reasonable attorney's fees, and reasonable litigation expenses related to the motion:

(1) to the moving party if the moving party prevails on the motion; or

(2) to the responding party if the responding party prevails on the motion and the court finds that the motion was frivolous or filed solely with intent to delay the proceeding.

Comments

1. The mandatory nature of the relief provided for by this section is integral to the uniformity of the Act. States that do not impose a mandatory award upon dismissal of a cause of action will become safe havens for abusive litigants. Without the prospect of having to financially reimburse a successful moving party, SLAPP plaintiffs will be able to file their frivolous suits in such states with impunity, knowing that, at worst, their claims will only be dismissed. But because moving parties would be financially responsible for the expense of obtaining that dismissal, the effect of the abusive cause of action is nevertheless achieved. The only way to assure a truly uniform application of the Act is to require the award of attorney's fees to successful moving parties.

2. Nothing in this section should be construed to prevent a court, in appropriate circumstances, from awarding sanctions under other applicable law or court rule against a party, the party's attorney, or both. For instance, many states have adopted court rules analogous to Fed. R. Civ. P. 11, and the constricted breadth of Section 10 should not act as a shield or restriction against the imposition of such sanctions where they would be otherwise warranted.

3. The term "costs" includes filing fees, as well as other monetary amounts a state may define as a "cost."

4. The term "attorney's fees" means the fees paid to the attorney to compensate for his or her time and effort in the prosecution or defense of the motion.

5. The term "litigation expenses" means the hard costs an attorney incurs in the prosecution or defense of the motion. Typical expenses in a case can include copies and faxes, postage, couriers, expert witnesses, consultants, private court reporters, and travel.

SECTION 11. CONSTRUCTION. This [act] must be broadly construed and applied to protect the 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 [cite to the state's constitution].

Comment

Similar expressions of intent by states that their anti-SLAPP statutes be broadly construed have been pivotal to courts' interpretations of those statutes. *See, e.g., ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (recognizing that the Texas Legislature "has instructed that the [statute] 'shall be construed liberally to effectuate its purpose and intent fully'"); *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 573 (Cal. 1999) ("The Legislature's 1997 amendment of [California's anti-SLAPP statute] to mandate that it be broadly construed apparently was prompted by judicial decisions . . . that had narrowly construed it. . . . That the Legislature added its broad construction proviso ..... plainly indicates these decisions

were mistaken in their narrow view of the relevant legislative intent.").

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. TRANSITIONAL PROVISION. This [act] applies to a civil action filed or [cause of action] asserted in a civil action on or after [the effective date of this [act]].

[SECTION 14. SAVINGS CLAUSE. This [act] does not affect a [cause of action] asserted before [the effective date of this [act]] in a civil action or a motion under [cite to the state's current anti-SLAPP law] regarding the [cause of action].]

Legislative Note: A state should include this section if the state has an existing procedure for a special motion for expedited relief that is being repealed because this act replaces it.

[SECTION 15. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

[SECTION 16. REPEALS; CONFORMING AMENDMENTS.

(a) . . .

(b) . . .

(c) . . .]

Legislative Note: *Section 9 may require amendment of a state's interlocutory appeal statute or court rule.*

A state may need to amend its statutes or rules of civil procedure to prevent a motion under this act from being considered a first pleading or motion that waives a defense or precludes the filing of another pleading or motion.

SECTION 17. EFFECTIVE DATE. This [act] takes effect . . . .

SB-3329
Submitted on: 2/19/2022 1:31:20 PM
Testimony for JDC on 2/22/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Lauren Blickley	Testifying for Surfrider Foundation	Support	No

Comments:

Surfrider Foundation strongly supports the proposed SD1, which will adopt the Uniform Law Commission‘s proposed **Uniform Public Expression Protection Act** in Hawai‘i. The model act has broader protections, clearer procedures for expedited dismissal of SLAPP claims, and will modernize Hawai'i's Anti-SLAPP law (HRS 634F).

Mahalo for your support.

SIERRA CLUB OF HAWAIʻI

SENATE COMMITTEE ON JUDICIARY

February 22, 2022 9:30 AM Conference Room 430

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

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Aloha Chair Rhoads, Vice Chair Keohokalole, and Members of the Judiciary Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawaiʻi **strongly supports** the Proposed SD1 draft of SB3329, 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 Hawaiʻi 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 Hawaiʻi respectfully urges the Committee to **PASS SB3329 as amended in the proposed SD1 draft.**

Mahalo nui for the opportunity to testify.

UNITE HERE! LOCAL 5 HAWAII

Eric W. Gill, Financial Secretary-Treasurer Gemma G. Weinstein, President Godfrey Maeshiro, Senior Vice President

February 20, 2022

Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Testimony in support of SB 3329 SD 1

Chair Rhoads, Vice Chair Keohokalole and members of the Committee,

Thank you for the opportunity to testify **in support of SB 3329 SD 1**. 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 SD 1 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 Hawai'i's Anti-SLAPP law to align with the trends in other states.

Please support SB3329 SD1.

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 PROPOSED SD1 (HAWAIʻI PUBLIC EXPRESSION PROTECTION ACT)
HAWAIʻI SENATE COMMITTEE ON THE JUDICIARY
FEBRUARY 22, 2022

Chairman Rhoads, Vice Chairman Keohokalole, and members of the Judiciary Committee:

Thank you for the opportunity to submit testimony in support of S.B. 3329 Proposed SD1, which would enact in Hawaiʻi the Uniform Law Commission's ("ULC") Uniform Public Expression Protection Act ("UPEPA"), and establish a robust set of mechanisms to protect Hawaiʻi 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 Proposed SD1 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 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 Proposed SD1 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 Proposed SD 1 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 actresses[2];
- 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 documentary[5]; 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 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.

SB-3329
Submitted on: 2/20/2022 7:33:29 PM
Testimony for JDC on 2/22/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Ted Bohlen	Testifying for Climate Protectors Hawai‘i	Support	No

Comments:

To: The Honorable Karl Rhoads, Chair,

The Honorable Jarrett Keohokalole, Vice Chair, and Members of the

Senate Committee on Judiciary

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

Re: Hearing **SB3329– RELATING TO PUBLIC PARTICIPATION IN GOVERNMENT**

Tuesday February 22, 2022, 9:30 a.m., by videoconference

Position: **STRONG SUPPORT, especially for the PROPOSED SD1!**

Aloha Chair Rhoads, Vice Chair Keohokalole, and Members of the Senate Committee on Judiciary:

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, in particular the PROPOSED 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 the PROPOSED SD1 as SB3329 SD1.

Mahalo!

Climate Protectors Hawai‘i (by Ted Bohlen)

Common Cause
Hawaii
Holding Power Accountable

P.O. Box 2240
Honolulu, Hawaii 96804
808.275.6275
www.commoncause.org/hi

Statement Before The
SENATE COMMITTEE ON JUDICIARY
Tuesday, February 22, 2022
9:30 AM
Via Videoconference

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

Chair RHOADS, Vice Chair KEOHOKALOLE, and Members of the Senate Judiciary Committee

Common Cause Hawaii supports SB 3329, proposed SD1, 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, proposed SD1. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

Submitted by Hawaii's Thousand Friends- In Support

THE SENATE
THIRTY-FIRST LEGISLATURE, 2022
STATE OF HAWAII

S.B. NO. 3329 S.D. 1 Proposed

A BILL FOR AN ACT

RELATING TO PUBLIC PARTICIPATION IN GOVERNMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that 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.

The legislature further finds that 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 Anti-SLAPP law, has not been effective at protecting citizen participation. The law has been rated at the "C" level compared to other state laws,

and courts have often declined to apply its procedural protections due to its narrow and confusing provisions.

The legislature also finds that 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 legislature finds that 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.

The purpose of this Act is to enact the Uniform Public Expression Protection Act.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER

HAWAII PUBLIC EXPRESSION PROTECTION ACT

§ -1 **Short Title.** This chapter may be cited as the Hawaii Public Expression Protection Act.

§ -2 **Definitions.** As used in the chapter, unless the context otherwise requires:

"Goods or services" does not include a dramatic, literary, musical, political, journalistic, or artistic work.

"Governmental unit" means a public corporation or government or governmental subdivision, agency, or instrumentality.

"Person" means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

§ -3 **Scope of chapter.** (a) Except as otherwise provided in subsection (b), this chapter shall apply to a cause of action asserted against a person based on the person's:

(1) Communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

(2) Communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; 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 Hawaii State Constitution, on a matter of public concern.

(b) This act shall 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.

§ -4 Required procedures; motions; stays. (a) Notwithstanding any law to the contrary, including rules of the court, no later than sixty days after a party is served with a complaint, crossclaim, counterclaim, third-party claim, or other pleading that asserts a cause of action to which this chapter applies, or at a later time on a showing of good cause, the party may file a special motion to dismiss the cause of action or part of the cause of action.

(b) Except as otherwise provided in this section:

(1) All other proceedings between the moving party and responding party in an action, including discovery and a pending hearing or motion, shall be stayed upon the filing of a motion under subsection (a); and

(2) On motion by the moving party, the court may stay:

(A) A hearing or motion involving another party if the ruling on the hearing or motion would adjudicate a legal or factual issue that is material to the motion under subsection (a); or

(B) Discovery by another party if the discovery relates to the issue.

(c) A stay under subsection (b) shall remain in effect until entry of an order ruling on the motion filed under subsection (a) and the expiration of the time to appeal the order.

(d) If a party appeals from an order ruling on a motion filed under subsection (a), all proceedings between all parties in an action shall be stayed. The stay shall remain in effect until the conclusion of the appeal.

(e) During a stay under subsection (b), the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden imposed by section -7(a) and is not reasonably available without discovery.

(f) A motion for costs and expenses under section -10 shall not be subject to a stay under this section.

(g) A stay under this section shall not affect a party's ability to voluntarily dismiss a cause of action or part of a cause of action or move to sever a cause of action.

(h) During a stay under this section, the court for good cause may hear and rule on a motion:

(1) Unrelated to the motion under subsection (a); and

(2) Seeking a special or preliminary injunction to protect against an imminent threat to public health or safety.

§ -5 **Expedited hearings.** (a) The court shall hear a motion under section -4(a) no later than sixty days after filing of the motion, unless the court orders a later hearing:

(1) To allow discovery under section -4(e); or

(2) For other good cause.

(b) If the court orders a later hearing under subsection (a)(1), the court shall hear the motion under section -4(a) no later than sixty days after the court order allowing the discovery, subject to subsection (a)(2).

§ -6 **Evidence.** In ruling on a motion under section -4(a), the court shall consider the parties' pleadings, the motion, any replies and responses to the motion, and any evidence that could be considered in ruling on a motion for

summary judgment under the applicable Hawaii rules of civil procedure.

§ -7 **Dismissal of cause of action.** (a) In ruling on a motion under section -4(a), the court shall dismiss with prejudice a cause of action or part of a cause of action if:

(1) The moving party establishes under section -3(a) that this chapter applies;

(2) The responding party fails to establish under section -3(b) that this act does not apply; and

(3) Either:

(A) The responding party fails to establish a prima facie case as to each essential element of the cause of action; or

(B) The moving party establishes that:

(i) The responding party failed to state a cause of action upon which relief can be granted; or

(ii) There is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

(b) A voluntary dismissal without prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under section -4(a) shall not affect a moving party's right to obtain a ruling on the motion and seek costs, reasonable attorney's fees, and reasonable litigation expenses under section -10.

(c) A voluntary dismissal with prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under section -4(a) shall establish for the purpose of section -10 that the moving party prevailed on the motion.

§ -8 **Court ruling.** The court shall rule on a motion under section -4(a) no later than sixty days after the hearing under section -5.

§ -9 **Appeal.** A moving party may appeal within thirty days as a matter of right from an order denying, in whole or in part, a motion under section -4(a).

§ -10 **Costs; attorney's fees, and expenses.** On a motion under section -4(a) the court shall award costs, reasonable attorney's fees, and reasonable litigation expenses related to the motion:

(1) To the moving party if the moving party prevails on the motion; or

(2) To the responding party if the responding party prevails on the motion and the court finds that the motion was frivolous or filed solely with intent to delay the proceeding.

§ -11 **Rule of construction.** This chapter shall be construed liberally to fully effectuate its purposes and intent to protect the 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 Hawaii State Constitution.

§ -12 **Uniformity of application and construction.** In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

SECTION 3. Chapter 634F, Hawaii Revised Statutes, is repealed.

SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 5. This Act shall take effect upon its approval.

S.B. NO. 3329 S.D. 1 Proposed

Report Title:
Public Participation in Government; Scope of Application; Strategic Lawsuits Against Public Participation; Discovery; Suspension

Description:
Repeals chapter 634F, Hawaii Revised Statutes. Enacts the Uniform Public Expression Protection Act. (Proposed SD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

SB-3329
Submitted on: 2/21/2022 8:36:27 AM
Testimony for JDC on 2/22/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Maxx Phillips	Testifying for Center for Biological Diversity	Support	No

Comments:

Aloha Chair Rhoads and Members of the Committee on Judiciary,

The Center is in **strong support of SB3329 Proposed SD1**, which would adopt the Uniform Law Commission's proposed **Uniform Public Expression Protection Act** in Hawai‘i.

In a nut shell, the model act has broader protections, clearer procedures for expedited dismissal of strategic lawsuit against public participation (SLAPP) claims, and will modernize Hawai‘i's Anti-SLAPP law (HRS 634F).

This reform is crucial in order to unsure community members and non-profits are actually protected from egregious SLAPP claims. Our current anti-SLAPP law still allows for these “intimidation lawsuit,” intended to censor, scare, and silence concerned community members by burdening them with the cost of a legal defense in the hopes that they will abandon their opposition.

Please support and pass **SB3329 Proposed SD1.**

Mahalo,

Maxx Phillips

Hawai‘i Director and Staff Attorney

Center *for* Biological Diversity

1188 Bishop Street, Suite 2412

Honolulu, Hawai‘i 96813

LATE

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

Date: Tuesday February 22, 2022

Time: 9:30 a.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, 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 individuals 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 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.

LATE

Feb 21st, 2022

RE: Testimony in SUPPORT of SB3329 SD 1 Proposed relating to Public Participation in Government

Dear Chair Rhoads and Senate Judicial Committee members,

The Outdoor Circle has advocated for Hawaii's natural and scenic beauty protections for 110 years and knows that robust and direct ability to participate in our public processes is essential for a free society.

Current Hawaii law under HRS 634F-4 has proven to be insufficient in protecting against so-called SLAPP lawsuits. SB3329 SD 1 Proposed allows for model language provided by the Uniform Law Commission in the form of a Uniform Public Expression Protection Act. This model of legislation elevates Hawaii to better protect the public's right to participate at all levels of government and we strongly support its passage.

Thank you for your consideration of our testimony,

Winston Welch
Executive Director

1314 S. King Street #306 | Honolulu, Hawai'i 96814
T: 808-593-0300 | mail@outdoorcircle.org | www.outdoorcircle.org

SB-3329
Submitted on: 2/19/2022 12:13:29 PM
Testimony for JDC on 2/22/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
John Thielst	Individual	Support	No

Comments:

I support this bill to protect indivisuals rights to speeak out

SB-3329
Submitted on: 2/19/2022 7:54:46 PM
Testimony for JDC on 2/22/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Barbara Polk	Individual	Support	No

Comments:

Aloha Chair Rhoads, Voce Chair Keohokalole, and members of the Senate Committee on the Judiciary:

I urge you to support SB3329SB1. The use of suits to limit citizen participation in government is an increasing and abominable practice,. If democracy is to survive, this must be ended. Please pass this bill!

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
Submitted on: 2/20/2022 3:07:31 PM
Testimony for JDC on 2/22/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Angela Huntemer	Individual	Support	No

Comments:

Aloha Chair and Committee Members,

Please support this bill that would have Hawaii adopt 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.

I have seen how citizen voices were impacted by the use of SLAPP suits and how lack of guidance in our legal code led to a lack of help from the judical system.

Please support SB3329, Mahalo.

SB-3329
Submitted on: 2/20/2022 9:33:38 PM
Testimony for JDC on 2/22/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Larry McElheny	Individual	Support	No

Comments:

Aloha Committee Members

I am strongly in favor of this important bill and I respectfully request that you give it your full support as well. Thank you for considering my testimony.

Larry McElheny

(808) 237-9354