

DRAFT
FOR DISCUSSION ONLY

ANTI-SLAPP ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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ON UNIFORM STATE LAWS

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October 26, 2018

ANTI-SLAPP ACT

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ANTI-SLAPP ACT
TABLE OF CONTENTS

Prefatory Note..... 1

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

SECTION 101. SHORT TITLE. 2
SECTION 102. DEFINITIONS..... 2

ARTICLE 2

SCOPE; EXCLUSIONS

SECTION 201. APPLICABILITY..... 4
SECTION 202. EXCLUSIONS..... 4

ARTICLE 3

PROCEDURES

SECTION 301. MOTION TO DISMISS..... 7
SECTION 302. DISCOVERY..... 7
SECTION 303. HEARING..... 7
SECTION 304. AMENDMENT AND NONSUIT. 7
SECTION 305. DISMISSAL..... 7
SECTION 306. PROOF..... 7
SECTION 307. RULING..... 8
SECTION 308. INTERVENTION..... 8
SECTION 309. APPEAL..... 8

ARTICLE 4

ATTORNEY’S FEES, COSTS, AND OTHER RELIEF

SECTION 401. RELIEF FOR SUCCESSFUL MOVING PARTY..... 9
SECTION 402. RELIEF FOR SUCCESSFUL RESPONDING PARTY..... 10

ARTICLE 5

MISCELLANEOUS PROVISIONS

SECTION 501. SUBSTANTIVE NATURE OF STATUTE..... 10

SECTION 502. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	10
SECTION 503. SEVERABILITY.....	10
SECTION 504. REPEAL OF EXISTING ANTI-SLAPP STATUTE.	10
SECTION 505. EFFECTIVE DATE.....	10

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ANTI-SLAPP ACT

Prefatory Note

4 “Strategic lawsuit against public participation,” or SLAPP, is a term used to describe a
5 specific kind of civil action brought by a plaintiff whose real aim is to silence or intimidate the
6 defendant, or punish the defendant by subjecting it to costly and lengthy litigation. SLAPPs defy
7 simple definition. They can be brought by and against individuals, corporate entities, or
8 government officials across all points of the political or social spectrum. They can address a
9 wide variety of issues from zoning to the environment to politics to education. They are often
10 cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference,
11 nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs
12 may clothe themselves, their unifying features make them a dangerous force: They are brought
13 not to remedy civil wrongs, but rather to ensnare their targets in costly litigation that will deter
14 them and others from engaging in constitutionally protected activity such as free speech and
15 petition.

16
17 To limit the detrimental effects these abusive lawsuits can have, 31 states, as well as the
18 District of Columbia and the Territory of Guam, have enacted laws that establish special and
19 expedited procedures to aid defendants in seeking early dismissal of SLAPPs. Though grouped
20 under the “anti-SLAPP” moniker, these statutes vary widely in scope, form, and procedure. For
21 example, some anti-SLAPP laws are triggered by any claim that implicates free speech on a
22 public issue, while others apply only to speech in specific settings or concerning specific
23 subjects. Some statutes provide for special motions to dismiss, while others employ traditional
24 summary judgment procedures. Some stay the discovery process and provide for attorney’s fees
25 and sanctions, while others do not. Two state supreme courts have struck down their states’ laws
26 over concerns that they infringe upon the right to a civil jury trial.

27
28 This degree of variance from state to state—and an absence of protection in at least 19
29 states—leads to confusion and disorder among plaintiffs, defendants, and courts. It also
30 contributes to what can be labeled as “litigation tourism,” that is, a type of forum shopping by
31 which a plaintiff who has choices among the states in which to bring a lawsuit will do so in a
32 state that lacks strong and clear anti-SLAPP protections.

33
34 The Anti-SLAPP Act seeks to harmonize these varying approaches by enunciating a clear
35 process through which SLAPPs can be challenged and their merits fairly evaluated in an
36 expedited manner. In doing so, the Act serves the dual purposes of protecting individuals’ rights
37 to petition and speak freely on issues of public interest while, at the same time, protecting the
38 rights of people and entities to file meritorious lawsuits for real injuries.

1 ANTI-SLAPP ACT

2 ARTICLE 1

3 GENERAL PROVISIONS AND DEFINITIONS

4 SECTION 101. SHORT TITLE. This [act] may be cited as the Anti-SLAPP Act.

5 Discussion Notes

6 *Lack of “Purpose” clause.* ULC Drafting Rule 501 prohibits the inclusion of a statement
7 of purpose, noting that “[a] well drafted act requires no extraneous statement within itself of
8 what it seeks to accomplish or the reasons prompting its enactment. A Prefatory Note or
9 Comments supply this detail to aid in its passage and interpretation. A purpose section may
10 create uncertainty by giving support to specious arguments that substantive provisions of the act
11 may be ignored because they are inconsistent with the purpose section.”
12

13 *Title.* The authority to determine the short title of an act is vested in the National
14 Conference’s Executive Committee, which has, in approving this project, designated it the “Anti-
15 SLAPP Act.”
16

17 As discussed in the prefatory note, the term “SLAPP” refers specifically to the idea of
18 participating in public affairs. Indeed, some states’ anti-SLAPP statutes—particularly those
19 passed in the infancy of the movement—were limited in scope to only protect defendants being
20 sued by public applicants or permittees, or defendants who had engaged in speech on a particular
21 topic (such as the government or the environment) or in a particular forum (like before a
22 governmental body). But as the Drafting Committee has agreed, a strong anti-SLAPP statute
23 should extend broadly to protect any speech or activity that is constitutionally protected, even if
24 that speech or activity doesn’t necessarily relate to participation in government or public affairs.
25

26 The question, then, is whether the “anti-SLAPP” moniker is still an appropriate label.
27 Relatedly, are courts and litigants confused when a statute’s name fails to accurately describe a
28 statute’s aim? Would a different title do a better job of conveying the law’s scope and breadth?
29 Or, given nearly 30 years of efforts to spread anti-SLAPP laws across the country, would a name
30 change be akin to “starting over” and confuse legislators and courts in a different way?
31

32 SECTION 102. DEFINITIONS. In this [act]:

33 (1) “Claim” means any civil lawsuit or civil cause of action requesting monetary or
34 injunctive relief, including a cross-claim, counterclaim, or any other pleading or filing requesting
35 monetary or injunctive relief. The term does not include a motion to dismiss under Section 301
36 or an appeal of a court’s ruling under Section 309.

1 (2) “Moving party” means a person who files a motion to dismiss under Section 301.

2 (3) “Person” means an individual, estate, business or nonprofit entity, or other legal
3 entity. The term does not include a public corporation, government or governmental subdivision,
4 agency, or instrumentality.

5 (4) “Responding party” means a person against whom a motion to dismiss under Section
6 301 is filed.

7 **Discussion Notes**

8 **General definitions.** The Drafting Rules of the Uniform Law Commission call for a
9 general definitions section to appear at the beginning of an act (after the short title) if there are
10 to-be-defined terms that are used generally throughout the statute. If a term is used only in a
11 single section, its definition should be located in that particular section.

12
13 **“Claim” versus “cause of action” or other operative term.** In establishing what kinds of
14 actions to which the statute should apply, the Committee can take several paths. On one hand,
15 the statute could follow the lead states that have used the broad term “claim,” and then define
16 that word to whatever degree the Committee wishes. The other option is to follow California
17 (and others) and simply use the term “cause of action,” “legal action,” “civil cause of action,” or
18 “cause of action for money damages or injunctive relief.”

19
20 There are two problems with using the term “claim.” The first is that it requires
21 definition. That definition then either needs to establish a limited set of circumstances to which
22 the term applies (invariably leaving some kinds of actions out) or, as most states have done,
23 provide a “catch all” phrase (like, “or other civil judicial pleading or filing requesting relief”) that
24 broadens the term to a seemingly infinite degree. Texas, for instance, has struggled with that
25 last phrase. Is a request for pre-suit discovery a “judicial pleading requesting relief”? What
26 about a statutory cause of action brought to remove an elected official from office? Texas courts
27 have said both are “claims” under the statute. What about an appeal of an order denying an anti-
28 SLAPP motion to dismiss? Or an anti-SLAPP motion itself? Texas courts have held those—
29 despite also being “judicial pleadings or filings requesting relief”—are NOT “claims” subject to
30 dismissal.

31
32 The second problem is that regardless of how the term “claim” is defined, it may be
33 confusing as to whether the Motion applies to an individual cause of action or the case as a
34 whole. Various members of the Committee have expressed concern about what courts are to do
35 with lawsuits that contain both valid *and* abusive causes of action. A broad term like “claim”
36 might cause courts to wonder the same.

37
38 **Person.** The definition of “person” is prescribed by Rule 305 of the ULC Drafting Rules.
39

1 **ARTICLE 2**

2 **SCOPE; EXCLUSIONS**

3 **SECTION 201. APPLICABILITY.**

4 (a) In this section, “exercise of the right of free speech, free association, or petition, as
5 guaranteed by the United States Constitution and the [state] Constitution, in connection with an
6 issue of public interest,” means any of the following:

7 (1) a written or oral statement or writing made in a legislative, executive, or
8 judicial proceeding;

9 (2) a written or oral statement or writing made in connection with an issue under
10 consideration or review by a legislative, executive, or judicial body, or any other official
11 proceeding authorized by law;

12 (3) a written or oral statement or writing made in a place open to the public or a
13 public forum in connection with an issue of public interest; or

14 (4) any other conduct in furtherance of the exercise of the constitutional right of
15 free speech, free association, or petition, in connection with an issue of public interest.

16 (b) This [act] applies to any claim brought against a person based on that person’s
17 exercise of the right of free speech, free association, or petition, as guaranteed by the United
18 States Constitution and the [state] Constitution, in connection with an issue of public interest.

19 **SECTION 202. EXCLUSIONS.** This [act] does not apply to:

20 (1) any claim brought by the attorney general, a district attorney, or a city attorney, acting
21 as a public prosecutor, to enforce laws aimed at protecting the public.

22 (2) any claim brought against a person primarily engaged in the business of selling or
23 leasing goods or services, if the statement or conduct on which the claim is based arises out of

1 the sale or lease of those goods or services.

2 **Discussion Notes**

3 **Applicability.** From the outset, the Committee has agreed that the most difficult task in
4 drafting the statute will be defining *and* limiting its scope. The members have concurred that the
5 statute should have a broad scope, not limited to particular kinds of parties, issues, or forums.
6 But it’s easy to see the challenge in drafting a statute that meets that goal *without* becoming too
7 unwieldy or confusing.

8
9 During our first meeting, some members of the Committee noted the practical importance
10 of the “(e)(4)” definitional subsection—a catch-all—in California’s statute. This draft more or
11 less follows that model. But the problem is that it really does nothing to define the original term;
12 the statute effectively says this: “The exercise of a person’s constitutional right in connection
13 with an issue of public interest means any conduct in furtherance of a person’s constitutional
14 right in connection with an issue of public interest.” In other words, the definition does nothing
15 except define the term as the term itself. What’s the point of the definition?

16
17 On the other end of the broad-scope spectrum is Texas’s statute, which applies to any
18 “legal action [] based on, relat[ed] to, or [] in response to a party’s exercise of the right of free
19 speech, right to petition, or right of association.” It defines those three terms separately. Free
20 speech means “a communication made in connection with a matter of public concern.” “Public
21 concern,” meanwhile, is defined to *include* (without limitation) five issues: health or safety;
22 environmental, economic, or community well-being; the government; a public official or public
23 figure; or a good, product, or service in the marketplace. On the surface, it would seem that
24 defining the term “matter of public concern” by referencing five specific topics would result in a
25 narrower statute than California’s, which leaves the “public issue” definition open. But in
26 reality, Texas courts have been quick to apply the law to all sorts of cases that have nothing to do
27 with the exercise of one’s constitutional rights.

28
29 For example, in 2017 the Texas Supreme Court addressed a defamation case brought by
30 an oil rig worker against his employer. The worker claimed that his supervisor defamed him by
31 falsely saying the worker failed to record a gauge reading. The employer moved to dismiss
32 under the anti-SLAPP statute, arguing that failing to record a gauge reading on an oil rig related
33 to health and safety. Although the mid-level court of appeals had reasoned that at its heart, the
34 case was just a private employment dispute about whether an employee did or didn’t do his job,
35 the Texas Supreme Court disagreed and held that even a “tangential” relationship to health and
36 safety satisfied the statute.

37
38 After the Texas Supreme Court decided that case, a mid-level appellate court addressed a
39 set of facts it described as nothing more than a “family fracas” where a young woman’s parents
40 didn’t like the man she was marrying. They apparently made statements to the effect that he was
41 mentally ill and abusive toward their daughter. He sued for slander. The court held the anti-
42 SLAPP law applied because the statements at issue pertained to “health and safety” (mental well-
43 being and domestic abuse).

44

1 The Texas statute’s definitions of “right to petition” and “right of association” haven’t
2 helped either. In the “petition” definition, the wording includes any “communication in or
3 pertaining to a judicial proceeding.” That has led courts to apply the statute to declaratory
4 judgment actions brought in response to a pre-suit litigation demand letter, cloud-to-title suits
5 brought by private landowners against entities who have filed fraudulent liens, and other kinds of
6 cases having nothing to do with the traditional notion of petitioning the government.
7

8 Meanwhile, the definition of “right to association” is “a communication between
9 individuals who join together to collectively express, promote, pursue, or defend common
10 interests.” That has led Texas courts to apply the statute to claims for trade secret
11 misappropriation, breaches of covenants not to compete, and tortious interference with
12 prospective relations when business employees strike out to start a competing business and go
13 after their former employees’ customers. Again—activity having little or nothing to do with the
14 Constitution.
15

16 The other practical problem with the Texas approach concerns enactability—defining
17 terms with specific examples and instances only invites special interests to lobby for inclusion of
18 their particular issues, further gumming up the statute.
19

20 With these concerns in mind, the Committee reached consensus that the better approach
21 was to *not* include an itemized list of things to which the statute would apply. Rather, the
22 members expressed a preference for a statute whose scope extended to the outer boundaries of
23 *constitutionally* protected speech, petition, and association. Nevertheless, no consensus was
24 reached on how to define that concept.
25

26 ***Enforcement actions.*** At least nine anti-SLAPP statutes provide exemptions for what
27 they call “enforcement actions.” The Committee agreed the statute should probably also contain
28 an exemption for public actions brought by attorneys general and the like, as omitting the
29 exemption could affect enactability. Additional work may be needed to explore how often these
30 exemptions are used and why some states have opted to include them. As it is currently drafted,
31 the term “action . . . to enforce laws aimed at protecting the public” is used in lieu of
32 “enforcement action.” No states actually define the term “enforcement action,” and so if the
33 Committee decides to use that term instead, it should consider whether a definition is
34 warranted.
35

36 The Committee concurred the statute should *not* include a California-like exemption for
37 *private* enforcement actions.
38

39 ***Commercial Speech Exemption.*** The Commercial Speech Exemption as currently
40 drafted is much shorter and simpler than what appears in most states’ laws. The Committee
41 should discuss whether this (or a similar) drafting effectively encompasses the goal of the
42 exemption, or whether we need to be more specific as to its application.

1 **ARTICLE 3**

2 **PROCEDURES**

3 **SECTION 301. MOTION TO DISMISS.** Within [60] days of service of a pleading
4 containing one or more claims to which this [act] applies, or, at any later time upon a showing of
5 good cause, a person may file a motion to dismiss the applicable claim or claims.

6 **SECTION 302. DISCOVERY.**

7 (1) All discovery and any pending hearings or motions in the case are stayed upon the
8 filing of a motion to dismiss under Section 301. The stay of discovery remains in effect until the
9 entry of the order ruling on the motion.

10 (2) Notwithstanding the stay imposed by this section, the court, on motion and for good
11 cause shown, may order that specified discovery relevant to the motion may be conducted.

12 **SECTION 303. HEARING.** The court shall hear the moving party's motion to dismiss
13 as soon as is practicable given the conditions of its docket, giving the motion a preferential
14 setting to ensure a speedy resolution of the issues presented.

15 **SECTION 304. AMENDMENT AND NONSUIT.** A responding party's pleading
16 amendment, including a voluntary nonsuit of the claim in question, does not affect the moving
17 party's ability to obtain a ruling on its motion to dismiss.

18 **SECTION 305. DISMISSAL.** If the moving party under Section 301 shows it is more
19 likely than not that a claim is subject to this [act], the Court shall dismiss the claim unless the
20 responding party establishes a prima facie case for each essential element of the claim.

21 **SECTION 306. PROOF.**

22 (1) In determining whether the moving party has shown it is more likely than not that a
23 claim is subject to this [act], the court shall review the responding party's pleadings along with

1 any affidavits offered by the moving party.

2 (2) In determining whether the responding party has demonstrated a prima facie case for
3 each essential element of the claim in question, the court shall review the affidavits offered by
4 the responding party, while taking into account the nature of the claim as pleaded by the
5 responding party.

6 **SECTION 307. RULING.**

7 (1) The court shall rule on a party’s motion to dismiss as soon as is practicable given the
8 conditions of its docket to ensure a speedy resolution of the issues presented.

9 (2) If the court declines to dismiss a claim under Section 304, the fact that such a ruling
10 has been made and the substance of the ruling may not be admitted into evidence at any later
11 stage of the case.

12 **SECTION 308. INTERVENTION.** The Attorney General or the chief legal officer or
13 attorney of a political subdivision of this State may defend or otherwise support the person
14 against whom a claim subject to this [act] is brought.

15 **SECTION 309. APPEAL.** An appellate court shall expedite an appeal or other writ,
16 whether interlocutory or not, from a trial court ruling on a motion to dismiss a claim filed under
17 Section 301.

18 **Discussion Notes**

19 **Timing.** The Committee agreed to set a deadline for the filing of a motion to dismiss, but
20 *not* for the court to hold a hearing or rule. Should the Committee desire to reconsider that
21 decision, it would be easy to insert bracketed periods of time in Sections 303 and 307, as
22 opposed to leaving it open to “as soon as is practicable.”
23

24 **Amendment and nonsuit.** Section 304 is specifically intended to address some
25 Committee members’ fears that nonmovants might continually amend their Complaints to
26 prevent the court from deciding whether to dismiss. As it’s currently drafted, the statute would
27 allow the movant to move forward with a hearing even after nonsuit or amendment and obtain a
28 dismissal on that claim. Because a dismissal would be with prejudice (see Section 305(2)),

1 doctrines such as *res judicata* and collateral estoppel could be used to prevent other procedural
2 game playing by the nonmovant.

3
4 ***Defenses and privileges.*** The current draft does not include a provision that would
5 require the court to dismiss if the movant could establish a valid “defense” to the plaintiff’s
6 claim. Oklahoma’s statute, for example, says “[n]otwithstanding the [dismissal] provisions of ...
7 this section, the court shall dismiss a legal action against the moving party if the moving party
8 establishes by a preponderance of the evidence each essential element of a valid defense to the
9 nonmovant’s claim.” The problem with such provisions is that they may well be
10 unconstitutional. The process of litigating a defense—unlike asking the plaintiff to merely
11 establish a prima facie case—arguably injects the same infirmity present in the Washington
12 statute, where courts were charged with weighing the evidence and invading the province of a
13 jury. That’s especially true when the standard courts are charged with—as is the case in
14 Oklahoma—is a “preponderance” of the evidence. If the Committee desires to include such a
15 provision, it should be careful to word it in a way that does not invite a factual analysis or
16 weighing of evidence.

17
18 ***Proof.*** Section 306 replaces many statutes’ commonly used language that a court “shall
19 consider the pleadings and supporting and opposing affidavits stating the facts on which the
20 liability or defense is based.” The problem with that language is that it does not make
21 sufficiently clear whether the responding party, in establishing a prima facie case, must submit
22 *competent* evidence in opposition of the motion, or whether it can simply point to factual
23 allegations in its pleadings. Although courts in California have been clear that only competent,
24 admissible evidence will suffice, courts in Texas, Louisiana, and other states have construed the
25 language to mean that courts must “treat the pleadings as evidence.” As a result, the statute
26 should be more clear as to the evidentiary obligations of the parties and what kinds of evidence a
27 court can consider.

28
29 ***Intervention.*** Section 308 is a provision contained in at least 10 anti-SLAPP statutes.
30 The Committee should consider whether its exclusion would be a barrier to enactment,
31 particularly in those states that currently contain such a provision.

32 **ARTICLE 4**

33 **ATTORNEY’S FEES, COSTS, AND OTHER RELIEF**

34
35 **SECTION 401. RELIEF FOR SUCCESSFUL MOVING PARTY.** If the court
36 dismisses a claim under Section 305, the court:

37 (1) shall award the moving party court costs, reasonable attorney’s fees, and any other
38 expenses incurred in connection with the motion to dismiss.

39 (2) may award additional relief, including sanctions upon the responding party and its

1 attorneys or law firms, as the court determines are necessary to deter repetition of the conduct
2 and comparable conduct by others similarly situated.

3 **SECTION 402. RELIEF FOR SUCCESSFUL RESPONDING PARTY.** If the court
4 declines to dismiss a claim under Section 304 and finds that the motion to dismiss is frivolous or
5 was filed solely with the intent to delay the proceedings, the court may award the responding
6 party its reasonable attorney’s fees and any other expenses incurred in connection with the
7 motion to dismiss.

8 **ARTICLE 5**

9 **MISCELLANEOUS PROVISIONS**

10 **SECTION 501. SUBSTANTIVE NATURE OF STATUTE.** The constitutional rights
11 and remedies guaranteed by this [act] are substantive in nature.

12 **SECTION 502. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
13 applying and construing this uniform [act], consideration must be given to the need to promote
14 uniformity of the law with respect to its subject matter among states that enact it.

15 **SECTION 503. SEVERABILITY.** If any provision of this [act] or its application to
16 any person or circumstance is held invalid, the invalidity does not affect other provisions or
17 applications of this [act] which can be given effect without the invalid provision or application,
18 and to this end the provisions of this [act] are severable.

19 **SECTION 504. REPEAL OF EXISTING ANTI-SLAPP STATUTE.** Any [anti-
20 SLAPP statute] previously enacted by this State shall be repealed and fully replaced by this [act].

21 **SECTION 505. EFFECTIVE DATE.** This [act] takes effect ...

22 **Discussion Notes**

23 *Substance versus procedure.* The purpose of Section 501 is to make clear to federal
24 courts that the statute is substantive and should apply in diversity actions. The ULC Drafting

1 Rules don't explicitly prohibit a provision that instructs courts to broadly construe the statute, but
2 the Commissioners generally disfavor those kinds of inclusions. Several members of the
3 Committee suggested the word "immunity" be used somewhere in the statute to increase the
4 likelihood of application by federal courts, but this draft has not used that term.
5

6 ***Severability.*** The ULC Drafting Rules provide that a severability section is "rarely
7 needed ... because nearly all states have either a general severability act or a decision by the
8 highest court of the state stating a general rule of severability." That said, we can include
9 severability language if we believe there is "a risk that one or more provisions of the act may be
10 declared unconstitutional or otherwise invalid." When that's true, the statute should include a
11 "legislative note" that reads "Include this section only if this state lacks a general severability
12 statute or a decision by the highest court of this state stating a general rule of severability."