

DRAFT  
FOR DISCUSSION ONLY

# UNIFORM PUBLIC PARTICIPATION PROTECTION ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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March 13–14, 2020 Drafting Committee Meeting



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ON UNIFORM STATE LAWS

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February 24, 2020

## UNIFORM PUBLIC PARTICIPATION PROTECTION ACT

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**UNIFORM PUBLIC PARTICIPATION PROTECTION ACT**

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1 **UNIFORM PUBLIC PARTICIPATION PROTECTION ACT**

2 **Prefatory Note**

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

15  
16 To limit the detrimental effects these lawsuits can have, 31 states, as well as the District  
17 of Columbia and the Territory of Guam, have enacted laws that establish special and expedited  
18 procedures to aid defendants in seeking early dismissal of SLAPPs. Though grouped under the  
19 “anti-SLAPP” moniker, these statutes vary widely in scope, form, and procedure. For example,  
20 some anti-SLAPP laws are triggered by any claim that implicates free speech on a public issue,  
21 while others apply only to speech in specific settings or concerning specific subjects. Some  
22 statutes provide for special motions to dismiss, while others employ traditional summary  
23 judgment procedures. Some stay the discovery process and provide for attorney’s fees and  
24 sanctions, while others do not. Two state supreme courts have struck down their states’ laws  
25 over concerns that they infringe upon the right to a civil jury trial.

26  
27 This degree of variance from state to state—and an absence of protection in at least 19  
28 states—leads to confusion and disorder among plaintiffs, defendants, and courts. It also  
29 contributes to what can be labeled as “litigation tourism;” that is, a type of forum shopping by  
30 which a plaintiff who has choices among the states in which to bring a lawsuit will do so in a  
31 state that lacks strong and clear anti-SLAPP protections.

32  
33 The Public Participation Protection Act seeks to harmonize these varying approaches by  
34 enunciating a clear process through which SLAPPs can be challenged and their merits fairly  
35 evaluated in an expedited manner. In doing so, the Act serves the dual purposes of protecting  
36 individuals’ rights to petition and speak freely on issues of public interest while, at the same  
37 time, protecting the rights of people and entities to file meritorious lawsuits for real injuries.

1 **UNIFORM PUBLIC PARTICIPATION PROTECTION ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Public

3 Participation Protection Act.

4 **Comments**

5 The Committee has requested that the name be changed to the Uniform Protecting Rights  
6 of Public Participation Act. The Executive Committee has designated the act a uniform act.

7  
8 **Style Committee Note**

9  
10 The Style Committee has been assigned the role of monitoring new guidelines recently  
11 approved by the Executive Committee for naming acts. We are to work with the Drafting  
12 Committee before a name-change request is sent to the Executive Committee. The first guideline  
13 is that the title should begin with the subject matter of the act, which the researcher might look  
14 for first in an index. Ordinarily, starting with an “ing” word like “Protecting” and a non-specific  
15 word like “Rights” don’t do that. The committee understood why the drafting committee didn’t  
16 think “Public Participation” was very helpful standing alone and we had a further problem  
17 because the word “participation” is not used in the act anywhere. Given that the act applies only  
18 to a “communication”, the Committee suggested “Public Communication Protection Act”. A  
19 possibility that occurred to me after the meeting is “Public Communication Rights Protection  
20 Act”.

21  
22 **SECTION 2. SCOPE.**

23 (a) In this section, “person” means an individual, estate, business or nonprofit entity,  
24 public corporation, government or governmental subdivision, agency, or instrumentality, or other  
25 legal entity.

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

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

30 (2) on an issue under consideration or review in a legislative, executive, judicial,  
31 administrative, or other governmental proceeding; or

32 (3) exercising the right of free speech, free association, or petition, guaranteed by

1 the United States Constitution or the [state] Constitution, on a matter of public concern.

2 (c) This [act] does not apply to a cause of action brought:

3 (1) against a governmental entity, agent or instrumentality of a governmental  
4 entity, or employee of a governmental entity acting in the employee’s official capacity;

5 (2) by a governmental entity to enforce a law or regulation and to protect against  
6 an imminent threat to public health or safety;

7 (3) against a person primarily engaged in the business of selling or leasing goods  
8 or services if the communication on which the cause of action is based arises out of the person’s  
9 sale or lease of goods or services, unless the cause of action arises out of the creation,  
10 dissemination, exhibition, or advertisement or other similar promotion, of a dramatic, literary,  
11 musical, political, or artistic work, including a motion picture, television program, or matter  
12 published on an Internet website or other electronic medium or in a newspaper or magazine;

13 (4) by a person seeking recovery for bodily injury, wrongful death, or survival,  
14 unless the cause of action arises out of the dissemination, exhibition, or advertisement or other  
15 similar promotion of a dramatic, literary, musical, political, or artistic work, including a motion  
16 picture, television program, or matter published on an Internet website or other electronic  
17 medium or in a newspaper or magazine; or

18 (5) by a person seeking recovery under an insurance contract or [the state’s  
19 insurance code].

20 **Style Committee Notes**

21 Subsection (b): We edited this to reflect better that a single “civil action” (Fed. R. Civ. P.  
22 1) can under the joinder rules contain both a cause of action subject to the act and one not subject  
23 to the act.

24  
25 “Party” vs. “person”: We concluded that “person” works better here than “party”. The  
26 communication under (now) (b) and the provision of goods or services under (c)(3) occur before

1 the person is a party, and under (c)(3), the person engaged in the business does so as a person not  
2 a party. More broadly, it seems important to make the point that the act applies to everyone  
3 within our definition of “person”—it appears the act applies to claims by the government that  
4 don’t fit within the exclusion in (c)(2).

5  
6 Definition of “communication”: We think you need to add a definition of  
7 “communication”, which seems to be the core of that to which the act applies. The fact that in  
8 the exclusion in (c)(3), you made reference to “conduct or communication” suggests ambiguity  
9 because under (b), the act applies onto to a communication. You probably intend that conduct  
10 can be a communication in some circumstances, but that shows why a definition is needed. We,  
11 of course, wouldn’t undertake to craft one, but if you do, subsection (a) would be “(a) In this  
12 section:” with definitions tabulated as indented paragraphs “(1) “Communication” means...” and  
13 “(2) “Person” means...”

14  
15 “Other governmental proceeding”: The Committee wasn’t sure what kind of proceeding  
16 “other governmental proceeding” would cover that wouldn’t be covered by what precedes it. Is  
17 there such a thing? If there is one, it at least should be explained in a comment.

18  
19 Subsection (c)(1), (2) (“Government” vs. “governmental entity): Is there a reason the  
20 phrasing of government entities (other than the addition of employees) doesn’t track the  
21 reference to government in the definition of person?

22  
23 Subsection (c)(2): We were unclear whether the “law or regulation” had to have as its  
24 purpose protecting against an imminent threat or whether it was enough that the government  
25 entity was using a law or regulation to address what the entity perceived to be an imminent  
26 threat. We assumed the latter and added “and”. If you mean the former, it needs to be rewritten  
27 to make it clearer. More broadly, we had trouble with “law or regulation”. “Law” in a uniform  
28 act includes common law decisions, administrative rules, and statutes - both state and federal if  
29 “law” isn’t qualified by “of this state other than this [act]”. And we use “rules” rather than  
30 “regulations” when referring to Administrative Procedure Act rules. Obviously, if Code of  
31 Federal Regulations provisions are included, that would need to be made clear. So, the issue is,  
32 do you really mean “law or rule” or do you mean “a statute or rule” or “a statute, rule, or federal  
33 regulation”, or perhaps something else?

34  
35 Subsection (c)(3), (4): We thought in (3) the “creation ...” was a series of 4, not a series  
36 or 3 plus 1, so we deleted the “or” and a comma accordingly (we similarly edited (4)). We  
37 assume the omission of “creation” in (4) – it is in (3) – was deliberate. Also: acknowledging that  
38 “including” doesn’t have to list everything, would it be advisable to add “book” to “newspaper or  
39 magazine”?

40  
41 Subsection (c)(4): Does “survival” need to be bracketed with a Legislative Note to insert  
42 whatever term the state uses for an action for damages suffered by a decedent before the  
43 decedent died? We weren’t sure whether states always use “survival” to describe that action.

44  
45 Subsection (c)(5): do you mean any provision in the insurance code? Perhaps a  
46 Legislative Note is needed to explain what reference should be inserted.

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

6       *Legislative Note:* A state should use the term “complaint”, “petition”, or both, to describe any  
7 procedural means through which a cause of action may be brought. A state should title its  
8 motion one to “dismiss” or “strike” in accordance with its procedures and customs.

9  
10                                       **Comments**

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

13  
14           Some states may choose to title their Special Motion one to “Dismiss”, while others may  
15 title it one to “Strike”. The choice of title is not substantive in nature and should in no way affect  
16 uniformity or construction of the statute.

17  
18           **SECTION 4. STAY.**

19           (a) Except as otherwise provided in this section, all proceedings in an action, including  
20 discovery and a pending hearing or motion, are stayed on the filing of a motion under Section 3.  
21 The stay remains in effect until entry of an order ruling on the motion and the conclusion of any  
22 appeal of the order or expiration of the time to appeal the order.

23           (b) During a stay under subsection (a), the court may allow limited discovery for the  
24 purpose of obtaining specified information if a party shows that the information is necessary to  
25 meet or oppose a burden imposed by Section 6 and is not reasonably available without discovery.

26           (c) A motion for relief under Section 9 or 10 is not subject to a stay under subsection (a).

27           (d) A stay under subsection (a) does not affect a party’s ability to voluntarily [dismiss]  
28 [nonsuit] a cause of action or part of a cause of action subject to Section 6(b) and (c).

29           (e) During a stay under subsection (a), the court for good cause may hear and rule on a



1 motion unrelated to a motion under Section 3.

2 **Legislative Note:** *A state should use the term “dismiss” or “nonsuit” in accordance with its*  
3 *procedures and customs.*

4  
5

**Comment**

6 This section should not be construed to affect a court’s ability to hear and rule, upon a  
7 finding of good cause, on motions for prejudgment remedies.

8  
9

**Style Committee Note**

10

11 We moved your subsection (c) to the end because it seemed like a catchall. But it seemed  
12 like a broad escape to the stay - any motion? any good cause? It obviously is substantive, but it  
13 doesn’t seem limited to things like a TRO or preliminary injunction. We changed “entertain” to  
14 “hear” – see Section 5(a) – and “rule” – our edit in Section 7.

15  
16

**SECTION 5. EXPEDITED HEARING.**

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

- 19 (1) because of other matters on the court’s docket;  
20 (2) to allow discovery under Section 4(b); or  
21 (3) for other good cause.

22 (b) If the court orders a later hearing under subsection (a)(2), the court shall hear the  
23 motion under Section 3 not later than [60] days after the court issues a ruling allowing for the  
24 discovery.

25 **SECTION 6. [DISMISSAL OF] [STRIKING] CAUSE OF ACTION.**

26 (a) The court shall [dismiss] [strike] with prejudice a cause of action or a part of a cause  
27 of action if:

- 28 (1) the moving party establishes that this [act] applies under Section 2 to the cause  
29 of action; and

30 (2) either:

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

3 (B) the moving party establishes that there is no genuine issue as to any  
4 material fact and the party is entitled to judgment as a matter of law.

5 (b) A voluntary [dismissal] [nonsuit] without prejudice of a responding party’s cause of  
6 action does not affect a moving party’s right to obtain a ruling on a motion filed under Section 3  
7 before the [dismissal] [nonsuit].

8 (c) A voluntary [dismissal] [nonsuit] with prejudice of a responding party’s cause of  
9 action entitles the moving party to relief under Section 9 on a motion filed under Section 3  
10 before the [dismissal] [nonsuit].

11 *Legislative Notes: A state should use the term “dismissal” or “nonsuit” in accordance with its*  
12 *procedures and customs. A state should title the court’s order one to “dismiss” or “strike” in*  
13 *accordance with its procedures and customs.*

14  
15 **Comment**

16  
17 Once a motion under Section 3 has been filed, a voluntary [nonsuit] [dismissal] of the  
18 responding party’s cause of action does not deprive the court of jurisdiction.

19  
20 **Style Committee Note**

21  
22 At the least, the title needs to be changed to bracket “[Dismissal of]” and add “[Striking]  
23 Cause of Action” since you give alternatives of dismiss or strike, as was done in Section 3. But  
24 it occurred to us you might want the title to be “EXPEDITED RELIEF” so it parallels Section 3  
25 (“Motion for Expedited Relief”) and Section 5 (“Expedited Hearing”). We also switched the  
26 order of “nonsuit” and “dismissal” to put “dismissal” first – to match the order in [now] Section  
27 4(d) and reflect that the Federal Rules use “dismiss” rather than “nonsuit” and most “Federal-  
28 Rules jurisdictions” would too.

29  
30 **SECTION 7. RULING.** The court shall rule on a motion under Section 3 not later than  
31 [60] days after the hearing under Section 5.

1           **SECTION 8. APPEAL.** A moving party may appeal immediately from an order  
2 denying, in whole or in part, a motion under Section 3 [under [the state’s interlocutory-appeal  
3 statute or rule]].

4 *Legislative Note: If a state has a statute or rule specifying instances in which an interlocutory*  
5 *appeal is permitted, it should cite the statute or rule in this section. This section may require*  
6 *amendment of a state’s interlocutory appeal statute.*

7  
8                                   **Comment**  
9

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

13  
14                                   **Style Committee Note**  
15

16           It appeared from the bracketed reference to the state’s existing interlocutory appeal  
17 statute that your intent was to grant an interlocutory appeal of right from an order denying a  
18 Section 3 motion – as Federal Rule 23(f) does regarding a class action certification ruling – but  
19 to give the state the option to say that appeal of right is taken procedurally pursuant to the state’s  
20 interlocutory appeal statute. If that is what you mean, that isn’t clear in the Comment, which  
21 seems inconsistent with that. More broadly, the risk is that the reference would be understood to  
22 be to the state’s discretionary interlocutory appeal provision resembling 28 USC 2102(b) –  
23 requiring discretionary determinations in favor of immediate appeal by both the trial court and  
24 the appellate court – which would be inconsistent with an appeal of right. So, this section may  
25 need some work. Or it may be your intent is to say it is an appeal of right unless the state wants  
26 to make it discretionary by adding the bracketed language. If so, that would need to be explained  
27 too.

28  
29           **SECTION 9. RELIEF FOR SUCCESSFUL MOVING PARTY.** If the moving party  
30 prevails on a motion under Section 3, the court shall award the moving party costs, reasonable  
31 attorney’s fees, and reasonable expenses related to the motion.

32                                   **Comment**

33           The relief provided for by this section includes any court costs, reasonable attorney’s  
34 fees, and any other reasonable expenses associated with filing a motion under this section.

35  
36           **SECTION 10. RELIEF FOR SUCCESSFUL RESPONDING PARTY.** If the  
37 responding party prevails on a motion under Section 3 and the court finds that the motion was

1 frivolous or filed solely with the intent to delay the proceeding, the court shall award the  
2 responding party costs, reasonable attorney’s fees, and reasonable expenses related to the  
3 motion.

4 **Style Committee Note**  
5

6 We understand that “solely” is substantive, but we worry how much it takes to create a  
7 mixed motive and thus escape liability – desire to encourage settlement by the risk of the motion  
8 being granted wrongly? Running up the other side’s expenses. Perhaps discussion in a Comment  
9 would suffice.

10  
11 **SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

12 applying and construing this uniform act, consideration must be given to the need to promote  
13 uniformity of the law with respect to its subject matter among states that enact it.

14 **SECTION 12. TRANSITIONAL PROVISION.** This [act] applies to a civil action

15 filed or cause of action asserted in a civil action on or after [the effective date of this [act]].

16 **Style Committee Note**  
17

18 This is the provision moved from your original Section 2(a)(1). We revised the language  
19 to make it clearer this act applies not only to an original action filed after the effective date but  
20 also to a cause of action added by amendment, counterclaim, etc. after the effective date even  
21 though the action was commenced before the effective date. We assumed that was your intent,  
22 but we could be wrong. By the way, would “commenced” be a better word than “filed”, given  
23 the term used in most states?  
24

25 **[SECTION 13. SEVERABILITY.** If any provision of this [act] or its application to

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

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

1           **SECTION 14. REPEALS; CONFORMING AMENDMENTS.**

2           (a) . . .

3           (b) . . .

4           (c) . . . ]

5    *Legislative Note: Section 8 may require amendment of a state’s interlocutory appeal statute.*

6           **SECTION 15. EFFECTIVE DATE.** This [act] takes effect . . . .