From: Committee Chair Lane Shetterly
To: Committee Members, Advisors, and Observers
Sent: April 30, 2020
Subject: Uniform Public Participation Protection Act: a message from Committee Chair Lane Shetterly

Colleagues:

I am writing to update you on discussions I have had with Prof. James Concannon, our Style Committee liaison, regarding two provisions (Subsection 2(3)(b) and Section 11) of our Act that he said the Style Committee would object to. My purpose in sending this email is to let you know the preliminary agreement we have reached to accommodate the Style Committee's concerns, while preserving as much as possible the Committee's intentions with the Act.

I will address each of the two provisions, Prof. Concannon's concerns with them, and the proposed resolution, below.

Section 2(b)(3)

Section 2(b)(3), as approved by the committee at our last meeting in Chicago, provides as follows:

"(b) Except as otherwise provided in subsection (c), this [act] applies in a civil action to a cause of action brought against a person based on:
"* * *
"(3) the person's exercise of the right of free speech or of the press, or the right of association or petition, guaranteed by the United States Constitution or the [state] Constitution, on a matter of public concern."

Prof. Concannon offered these comments to the language of Subsection (3): *"Is there a reason Section 2(b)(3) doesn't track the language of the First Amendment? I would have expected it to read: "the person's exercise of the ~~right of free~~ freedom of speech or of the press, or the right ~~of association~~ to assemble or petition, guaranteed by…'"*

After some deliberation, I responded as follows:

"As to your first first proposed change (substituting "freedom of speech" in place of "right of free speech," we think we like our language. Granted, your language aligns with the language of the First Amendment, but we think ours is more common phrasing and easily understood and it accomplishes the same thing.

"As to your second proposed change, you make a good point. It's true that the First Amendment grants the right to assemble. My modest research indicates that freedom of association is different and seems to have its roots in case law interpreting the 14th Amendment. The phrases seem to be often used interchangeably (and I think the committee did not make a distinction between them), but they are not the same thing. So you have a point that "right of association" is not like the other rights listed in Section 2(b)(3), because it is not an explicit First Amendment right, whereas the other rights listed there are.

"But rather than delete the right of association, and thereby limit our Act to strictly First Amendment rights, we would propose the following phrasing: " * * the person's exercise of the right*

*of ~~free~~ freedom of speech or of the press, ~~or~~ the right to assemble or petition, or the right of association guaranteed by * * * ." Including the right "to assemble" makes sense, since it is one of the First Amendment rights. But Section 2(b)(3) doesn't limit the rights protected under the Act to the First Amendment, so including the right of association, as something distinct from the right to assemble, makes sense.*

"I would be concerned that to lose the right of association from the Act would be more than a stylistic change, and would not be received well by the committee, whereas the addition of the first amendment right to assemble (while also keeping the right of association) would be more in the way of a stylistic change consistent with what the committee had in mind."

After further email exchanges, we settled on the following proposed language for Subsection 2(b)(3):

"the person's exercise of the right of ~~free~~ freedom of speech or of the press, the right to assemble or petition, or the right of association ~~or petition~~, guaranteed by the United States Constitution or the [state] Constitution, on a matter of public concern."

I am of the opinion this change is actually an improvement to the draft, and is fully consistent with the Committee's intentions, as I understood them, and I recommend that the Committee accept the changes to Subsection 2(b)(3).

Section 11

Section 11, as approved by the drafting committee in Chicago, reads as follows:

"The Uniform Free Speech Protection Act must be broadly construed and applied to protect the exercise of the right of free speech and of the press, and the right of association and petition, guaranteed by the United States Constitution or [state] Constitution while protecting the rights of persons to pursue meritorious causes of action."

Prof. Concannon initially raised two objections with regard to Section 11. At first, he understood the section to be the Committee's attempt to address the Erie doctrine that the Style Committee had rejected from the prior draft. After some back and forth, he accepted that this was not related to the Erie doctrine, but a direction to state courts on the interpretation and application of the Act. That solved his first objection.

His second objection was that the section, as drafted, "adds nothing," in that it directs the court to both protect the exercise of the protected rights and "the rights of persons to pursue meritorious causes of action." I think our committee saw that as an expression of the balancing of rights that's inherent in the Act. He (Style) sees it as equivocating.

After deliberation and some further conversation on that issue, we have tentatively agreed on the following proposed re-draft of Section 11 (which incorporates the changes from Subsection 2(b)(3), in how it lists the affected rights):

"~~The Uniform Free Speech Protection Act~~ This [act] must be broadly construed and applied to protect the exercise of the right of ~~free~~ freedom of speech or of the press, the right to assemble or petition,

and the right of association ~~or petition~~, guaranteed by the United States Constitution or [state] Constitution ~~while protecting the rights of persons to pursue meritorious causes of action~~."
This is a more narrowly focused directive that focuses on the rights being protected under the Act. While we would lose the last clause, directing the court to also consider the rights of persons to being meritorious actions, I don't think that changes how courts will actually apply the Act. The Act already directs the court to take into account the merits of the action against which an Anti-SLAPP motion has been filed. (See Section 7.) I would be happy to ask our own Prof. Sherwin to include a comment to Section 11 that points that out. And the Act is, after all, called the "Free Speech Protection" Act, such that this revised language and focus in Section 11 is reflective of the overall intent of the Act as indicated by the title. I would urge approval of the proposed change to Section 11.

I am not asking for a vote on these recommended changes. Rather, if anyone has a strong objection to either or both of the proposed changes, please let me know by email by 5:00 this Friday, May 1. My email is lane@siso-law.com. Please send a cc of any message to Kaitlin Wolff, kwolff@uniformlaws.org, and Prof. Sherwin, robert.sherwin@ttu.edu, as well. If it appears we have substantial dissent, I will ask Kaitlin to schedule a quick committee meeting by phone or Zoom (or whatever virtual meeting platform the Conference is using). If I don't hear substantial disagreement with these changes by this Friday at 5:00, I will let Prof. Concannon know and we will proceed with the changes.

Lane P. Shetterly
Committee Chair