



August 3, 2021

VIA ELECTRONIC MAIL ONLY

To all members of the Interim Joint Judiciary Committee

Re: The Uniform Public Expression Protection Act

Dear Members of the Interim Joint Judiciary Committee:

Thank you for taking the time to consider the Uniform Public Expression Protection Act (“UPEPA”). The UPEPA was developed over the course of several years by the Uniform Law Commission, non-partisan organization of the states. The Uniform Law Commission strives to draft uniform state legislation in areas of the law where uniformity is desirable and achievable. I had the honor of serving as the Chair of the Drafting Committee for the UPEPA, and I write to you to explain the background of the act and why uniformity is so important, and why we support the bill draft to enact UPEPA that is currently under consideration in Kentucky.

### **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. Other, more modern statutes are much more broadly drafted, covering speech and conduct in a wide variety of circumstances.

A primary difference among the various state statutes centers on their scope. Some states have enacted protections that only apply to suits related to limited activities, specific individuals, or certain forums. Conversely, other states—and this appears to be the trend—have adopted statutes that essentially encompass any action that arises out of a person’s exercise of free speech rights on issues of public import. 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 slowly started to erode. 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, rules relating to discovery, and 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;
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 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 may argue 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.

I note that the proposed Kentucky version of UPEPA under consideration includes some additional exemptions from the scope of the act that are not included in UPEPA. We have reviewed these additional exemptions and are of the opinion that they are not materially inconsistent with the purpose and policy of UPEPA, such that the inclusion of these additional exemptions would not, in our opinion, render the bill, as proposed, non-uniform.

### ***Phase 2 – Prima Facie Viability***

In this phase, the responding party (the plaintiff, who filed the lawsuit) must show that the cause of action states a prima facie case as to each essential element of the claim. In short, the responding party must provide 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 moving party (the defendant) 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 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 (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).

Section 10(2) of the proposed Kentucky bill includes some additional language that is not in UPEPA, where it provides for the award of reasonable attorney's fees incurred in defending against a compulsory counterclaim if the court finds the counterclaim is frivolous or solely intended for delay. As with the additional exemptions in Section 2 of the bill, we do not consider this additional language to be materially at odds with the purpose and policy of UPEPA.

### **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 Kentucky, the UPEPA has also been introduced in Iowa, Missouri, and Indiana. Washington was the first state to enact UPEPA this legislative session.

As Chair of the Drafting Committee, I can assure you that the Uniform Public Expression Protection Act would give the people of Kentucky 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.

Respectfully Submitted,



Lane Shetterly  
Oregon Uniform Law Commissioner  
Chair, UPEPA Drafting Committee