

# MAINE STATE LEGISLATURE

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L.D. 870

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Date: 3/22/24

(Filing No. S- (04))

## MAJORITY

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## JUDICIARY

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## STATE OF MAINE

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## SENATE

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## 131ST LEGISLATURE

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## SECOND REGULAR SESSION

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COMMITTEE AMENDMENT "A" to S.P. 367, L.D. 870, "An Act to Strengthen Freedom of Speech Protections by Extending Laws Against Strategic Lawsuits Against Public Participation"

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Amend the bill by striking out the title and substituting the following:

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**'An Act to Strengthen Freedom of Speech Protections by Enacting the Uniform Public Expression Protection Act'**

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Amend the bill by striking out everything after the enacting clause and inserting the following:

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### **'PREFATORY NOTE**

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**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.

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**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.

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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

# **COMMITTEE AMENDMENT**

- 1 make them a dangerous force: Their purpose is to ensnare their targets in costly litigation
- 2 that chills society from engaging in constitutionally protected activity.
- 3 **Anti-SLAPP Laws in the United States.** To limit the detrimental effects SLAPPs can
- 4 have, 32 states, as well as the District of Columbia and the Territory of Guam, have enacted
- 5 laws to both assist defendants in seeking dismissal and to deter vexatious litigants from
- 6 bringing such suits in the first place. An Anti-SLAPP law, at its core, is one by which a
- 7 legislature imposes external change upon judicial procedure, in implicit recognition that
- 8 the judiciary has not itself modified its own procedures to deal with this specific brand of
- 9 abusive litigation. Although procedural in operation, these laws protect substantive rights,
- 10 and therefore have substantive effects. So, it should not be surprising that each of the 34
- 11 legislative enactments have been performed statutorily—none are achieved through civil-
- 12 procedure rules. The states that have passed anti-SLAPP legislation, in one form or another,
- 13 are:
- 14 Arizona (2006) (Ariz. Rev. Stat. Ann. § 12-752) (2006)
- 15 Arkansas (2005) (Ark. Code Ann. § 16-63-501 through § 16-63-508) (2005)
- 16 California (1992) (Cal. Civ. Proc. Code § 425.16 through § 425.18)
- 17 Colorado (2019) (Col. Rev. Stat. Ann. § 13-20-1101)
- 18 Connecticut (2018) (Conn. Gen. Stat. Ann. § 52-196a)
- 19 Delaware (1992) (Del. Code Ann. tit. 10, § 8136, through § 8138)
- 20 District of Columbia (2012) (D.C. Code § 16-5501 through § 16-5505)
- 21 Florida (2004, 2000) (Fla. Stat. Ann. §§ 720.304, 768.295)
- 22 Georgia (1996) (Ga. Code Ann. § 9-11-11.1)
- 23 Guam (1998) (Guam Code Ann. tit. 7, § 17101 through § 17109) 2
- 24 Hawaii (2002) (Haw. Rev. Stat. § 634F-1 through § 634F-4)
- 25 Illinois (2007) (735 Ill. Comp. Stat. 110/15 through 110/99)
- 26 Indiana (1998) (Ind. Code § 34-7-7-1 through § 34-7-7-10)
- 27 Kansas (2016) (Kan. Stat. Ann § 60-5320)
- 28 Louisiana (1999) (La. Code Civ. Proc. Ann. art. 971)
- 29 Maine (1995) (Me. Rev. Stat. Ann. tit. 14, § 556)
- 30 Maryland (2004) (Md. Code Ann., Cts. & Jud. Proc. § 5-807)
- 31 Massachusetts (1994) (Mass. Gen. Laws ch. 231, §59H)
- 32 Minnesota (1994) (Minn. Stat. § 554.01 through § 554.06) (Held unconstitutional by
- 33 *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 635-37 (Minn.
- 34 2017))
- 35 Missouri (2004) (Mo. Rev. Stat. § 537.528)
- 36 Nebraska (1994) (Neb. Rev. Stat. § 25-21,243 through § 25-21,246)
- 37 Nevada (1997) (Nev. Rev. Stat. § 41.635 through 41.670)
- 38 New Mexico (2001) (N.M. Stat. § 38-2-9.1 through § 38-2-9.2)

- 1 New York (1992) (NY. Civ. Rights Law § 70-a and § 76-a)
- 2 Oklahoma (2014) (Okla. Stat. tit. 12, § 1430 through § 1440)
- 3 Oregon (2001) (Or. Rev. Stat. § 31.150 through § 31.155)
- 4 Pennsylvania (2000) (27 Pa. Consol. Stat. § 8301 through § 8305, and § 7707)
- 5 Rhode Island (1993) (R.I. Gen. Laws § 9-33-1 through § 9-33-4)
- 6 Tennessee (2019, 1997) (Tenn. Code. Ann. § 20-17-101 through § 20-17-110; § 4-21-
- 7 1001 through § 4-21-1004)
- 8 Texas (2011) (Tex. Civ. Prac. & Rem. Code § 27.001 through § 27.011)
- 9 Utah (2008) (Utah Code § 78B-6-1401 through § 78B-6-1405)
- 10 Vermont (2005) (Vt. Stat. Ann. tit. 12 § 1041)
- 11 Virginia (2007) (Va. Code Ann. § 8.01-223.2)
- 12 Washington (2010, 1989) (Wash. Rev. Code § 4.24.500 through § 4.24.525) (Held
- 13 unconstitutional by Davis v. Cox, 351 P.3d 862, 875 (Wash. 2015))

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

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

- 23 1. Creating specific vehicles for filing motions to dismiss or strike early in the litigation  
 24 process;
- 25 2. Requiring the expedited hearing of these motions, coupled with a stay or limitation  
 26 of discovery until after they're heard;
- 27 3. Requiring the plaintiff to demonstrate the case has some degree of merit;
- 28 4. Imposing cost-shifting sanctions that award attorney's fees and other costs when the  
 29 plaintiff is unable to carry its burden; and
- 30 5. Allowing for an interlocutory appeal of a decision to deny the defendant's motion.

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

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

7 **The Uniform Public Expression Protection Act, Generally.** The Uniform Public  
 8 Expression Protection Act follows the recent trend of state legislatures to enact broad  
 9 statutory protections for its citizens. It does so by utilizing all five of the tools mentioned  
 10 above in a motion practice that carefully and clearly identifies particular burdens for each  
 11 party to meet at particular phases in the motion’s procedure. The general flow of a motion  
 12 under the Act employs a three-phase analysis seen in many states’ statutes. Upon the filing  
 13 of a motion, all proceedings—including discovery—between the moving party and  
 14 responding party are stayed, subject to a few specific exceptions. In the first phase, the  
 15 court effectively decides whether the Act applies. It does so by first determining if the  
 16 responding party’s (typically the plaintiff’s) cause of action implicates the moving party’s  
 17 (typically the defendant’s) right to free speech, petition, or association. The burden is on  
 18 the moving party to make the initial showing that the Act applies. If the court holds that the  
 19 moving party has not carried that burden, then the motion is denied, the stay of proceedings  
 20 is lifted, and the parties proceed to litigate the merits of the case (subject to the ability of  
 21 the moving party to interlocutorily appeal the motion’s denial). If the court determines that  
 22 the moving party has carried its burden, then the responding party can show its cause of  
 23 action fits within one of the three exceptions to the Act. If it carries that burden—for  
 24 example, by showing that its cause of action is against an agent of a governmental unit  
 25 acting or purporting to act in an official capacity—then the Act does not apply, and the  
 26 motion is denied. If it fails to carry that burden, then the court proceeds to the second step  
 27 of the analysis.

28 In the **second phase**, the court determines if the responding party has a viable cause of  
 29 action from a prima-facie perspective. In this phase, the burden is on the responding party  
 30 to establish a prima-facie case for each essential element of the cause of action challenged  
 31 by the motion. If the court holds that the responding party has not carried its burden to  
 32 establish a prima-facie case, then the motion is granted, and the responding party’s cause  
 33 of action is terminated with prejudice to refile. The moving party is entitled to its costs,  
 34 attorney’s fees, and expenses. If the court holds that the responding party has carried its  
 35 burden, then—and only then—the court proceeds to the third step of the analysis.

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

44 **Sec. 1. 14 MRSA §556**, as amended by PL 2023, c. 322, §1, is repealed.

45 **Sec. 2. 14 MRSA c. 203, sub-c. 5** is enacted to read:

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**SUBCHAPTER 5**

**UNIFORM PUBLIC EXPRESSION PROTECTION ACT**

**§731. Short title**

This subchapter may be known and cited as "the Uniform Public Expression Protection Act."

**Comments**

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.

**§732. Definitions**

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

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

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

**§733. Applicability**

**1. Goods or services.** For the purposes of this section, "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. Cause of action asserted.** Except as otherwise provided in subsection 3, this subchapter applies to a cause of action asserted in a civil action against a person based on the person's:

**A. Communication in a legislative, executive, judicial, administrative or other governmental proceeding;**

**B. Communication on an issue under consideration or review in a legislative, executive, judicial, administrative or other governmental proceeding;**

**C. 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 by the Constitution of Maine, on a matter of public concern; or**

- 1 D. Written or oral statement made in connection with a discrimination complaint
- 2 pursuant to the Maine Human Rights Act or any written or oral statement made in
- 3 connection with a complaint pursuant to Title 20-A, chapter 445 or the so-called Title
- 4 IX provisions of the federal Education Amendments of 1972, Public Law 92-318.
- 5 **3. Exceptions.** This subchapter does not apply to a cause of action asserted:
- 6 A. Against a governmental unit or an employee or agent of a governmental unit acting
- 7 or purporting to act in an official capacity;
- 8 B. By a governmental unit or an employee or agent of a governmental unit acting in an
- 9 official capacity to enforce a law to protect against an imminent threat to public health
- 10 or safety; or
- 11 C. Against a person primarily engaged in the business of selling or leasing goods or
- 12 services if the cause of action arises out of a communication related to the person's sale
- 13 or lease of the goods or services.

**Comments**

15 1. Most courts explain the resolution of anti-SLAPP motions in terms of either a three-  
 16 or two-pronged procedure. E.g., *Younkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018)  
 17 ("Reviewing a[n anti-SLAPP] motion to dismiss requires a three-step analysis."); *Wilson*  
 18 *v. Cable News Network, Inc.*, 444 P.3d 706, 713 (Cal. 2019) ("A court evaluates an anti-  
 19 SLAPP motion in two steps."). Section 2 of the Act constitutes the first step of that  
 20 procedure, where the moving party (typically the defendant) must show that the responding  
 21 party's (typically the plaintiff's) cause of action arises from the movant's exercise of First  
 22 Amendment rights on a matter of public concern. This step focuses on the movant's activity,  
 23 and whether the movant can show that it has been sued for that activity. See, e.g., *Navellier*  
 24 *v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) ("The anti-SLAPP statute's definitional focus is  
 25 not [on] the form of the plaintiff's cause of action but, rather, the defendant's activity that  
 26 gives rise to his or her asserted liability and whether that activity constitutes protected  
 27 speech or petitioning." (emphasis original)). If the movant cannot satisfy the first step—in  
 28 other words, cannot show that the cause of action is linked to First Amendment activity on  
 29 a matter of public concern—then the court will deny the motion without ever proceeding  
 30 to the second or third step. THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 1.2  
 31 (2019). Further discussion of how a court adjudicates the first step, including the parties'  
 32 burdens and the materials a court should review, appears in Comments 2 and 3 to Section  
 33 7.

34 2. Although the Act operates in a procedural manner—specifically, by altering the  
 35 typical procedure parties follow at the outset of litigation—the rights the act protects are  
 36 most certainly substantive in nature. See *U.S. ex rel. Newsham v. Lockheed Missiles &*  
 37 *Space Co., Inc.*, 190 F.3d 963, 972-973 (9th Cir. 1999) (applying California's anti-SLAPP  
 38 law to diversity actions in federal court because the statute was "crafted to serve an interest  
 39 not directly addressed by the Federal Rules: the protection of 'the constitutional rights of  
 40 freedom of speech and petition for redress of grievances.'"). Otherwise stated, the Act's  
 41 procedural features are designed to prevent substantive consequences: the impairment of  
 42 First Amendment rights and the time and expense of defending against litigation that has  
 43 no demonstrable merit. *Williams v. Cordillera Comms., Inc.*, No. 2:13-CV-124, 2014 WL

1 2611746, at \* 1 (S.D. Tex. June 11, 2014). As stated by one California court, "[t]he point  
2 of the anti-SLAPP statute is that you have a right not to be dragged through the courts  
3 because you exercised your constitutional rights." *People ex rel. Lockyer v. Brar*, 115 Cal.  
4 App. 4th 1315, 1317 (4th Dist. 2004).

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

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

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

21 6. Sections 2(b)(1) and (2) apply to a cause of action brought against a person based on  
22 the person's communication. "Communication" should be construed broadly—consistent  
23 with holdings of the Supreme Court of the United States—to include any expressive  
24 conduct that likewise implicates the First Amendment. See *Texas v. Johnson*, 491 U.S. 397,  
25 404 (1989) ("[W]e have long recognized that [First Amendment] protection does not end  
26 at the spoken or written word."); *Spence v. Washington*, 418 U.S. 405, 409-11 (1974)  
27 (holding that conduct constitutes "communication" when it is accompanied by an intent to  
28 convey a particularized message and, given the surrounding circumstances, the likelihood  
29 is great that the message will be understood by those who view it); *Rumsfeld v. Forum for  
30 Acad. and Institutional Rights*, 547 U.S. 47, 65-66 (2006); *Tinker v. Des Moines Indep.  
31 Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969). Conduct is not specifically mentioned in  
32 the Act so as to avoid parties from attempting to use it to shield themselves from liability  
33 for nonexpressive conduct that nevertheless tangentially relates to a matter of public  
34 concern. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the  
35 view that an apparently limitless variety of conduct can be labeled 'speech' whenever the  
36 person engaging in the conduct intends thereby to express an idea."). But the Act is intended  
37 to protect expressive conduct. For example, a person's work on behalf of a political  
38 campaign might include constitutionally protected expressive conduct, such as putting up  
39 campaign signs or organizing a rally. The Act would protect that conduct. But a person  
40 who damages another candidate's campaign signs or physically threatens attendees at an  
41 opposing rally would not be engaging in expressive conduct, and therefore should not be  
42 able to utilize the Act, even though the conduct tangentially relates to matters of public  
43 concern.



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

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

15           9. The term "matter of public concern" should be construed consistently with caselaw  
16 of the Supreme Court of the United States and the state's highest court. See, e.g., *Snyder v.*  
17 *Phelps*, 562 U.S. 443, 453 (2011) (holding that "[s]peech deals with matters of public  
18 concern when it can 'be fairly considered as relating to any matter of political, social, or  
19 other concern to the community,' or when it 'is a subject of legitimate news interest; that is,  
20 a subject of general interest and of value and concern to the public'" (citations omitted));  
21 *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists  
22 principally to protect discourse on public matters, but we have long recognized that it is  
23 difficult to distinguish politics from entertainment, and dangerous to try."). "The [matter-  
24 of-public-concern] inquiry turns on the 'content, form, and context' of the speech." *Lane v.*  
25 *Franks*, 573 U.S. 228, 241 (2014) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48  
26 (1983)). The term should also be construed consistently with terms like "public issue" and  
27 "matter of public interest" seen in some state statutes. See, e.g., CAL. CIV. PROC. CODE  
28 § 425.16 (employing the terms "public issue" and "issue of public interest"); *FilmOn.com*  
29 *Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1164-65 (Cal. 2019).

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

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

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

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

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

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

27 13. Section 2(c)(3) carves out from the scope of the Act "communication[s] related to  
 28 [a] person's sale or lease of [ ] goods or services" when that person is primarily engaged in  
 29 the selling, leasing, or licensing of those goods or services. In other words, "commercial  
 30 speech" is exempted from the protections of the Act. By way of illustration, if a mattress  
 31 store is sued for false statements made in its advertising of mattresses—whether by an  
 32 aggrieved consumer or a competitor—the mattress store would not be able to avail itself of  
 33 the Act. But if the same mattress store were sued for tortious interference for organizing a  
 34 petition campaign to oppose the building of a new school, its activity would not be related  
 35 to the sale or lease of goods or services, and it could use the Act for protection of its First  
 36 Amendment conduct.

37 But the "commercial-speech exemption" does not apply to the creation, dissemination,  
 38 exhibition, or advertisement of a dramatic, literary, musical, political, journalistic, or  
 39 artistic work. This is consistent with the holdings of most courts that the contents of works  
 40 protected by the First Amendment are not considered "goods or services," even if sold for  
 41 profit. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("That books,  
 42 newspapers, and magazines are published and sold for profit does not prevent them from

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1 being a form of expression whose liberty is safeguarded by the First Amendment."); *Winter*  
 2 *v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (ideas and expressions in a  
 3 book are not a product); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 239 (Tex. 1993)  
 4 ("We conclude that the ideas, thoughts, words, and information conveyed by the magazine  
 5 . . . are not products."). This ensures that claims targeting those in the business of making  
 6 and selling works protected by the First Amendment are not denied the ability to invoke  
 7 the Act. See *Dyer v. Childress*, 147 Cal. App. 4th 1273, 1283 (2007) (expressive works  
 8 exception to the commercial speech exemption was "intended to 'exempt the news media  
 9 and other media defendants (such as the motion picture industry) from the [commercial-  
 10 speech exemption] when the underlying act relates to news gathering and reporting to the  
 11 public with respect to the news media or to activities involved in the creation or  
 12 dissemination of any works of a motion picture or television studio.'" (citations omitted)).

### 13 **§734. Special motion for expedited relief**

14 Not later than 60 days after a party is served with a complaint, petition, cross-claim,  
 15 counterclaim, 3rd-party claim or other pleading that asserts a cause of action to which this  
 16 subchapter applies, or at a later time on a showing of good cause, the party may file a  
 17 special motion for expedited relief to dismiss the cause of action or part of the cause of  
 18 action.

### 19 **Comments**

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

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

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

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

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

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

36 7. "Good cause" means a reason factually or legally sufficient to appropriately explain  
 37 why the motion was not brought within the prescribed deadline. This section should not be  
 38 construed to require a party to seek leave of court prior to filing a motion later than the

1 prescribed deadline. Instead, a court should make any good-cause determination as part of  
2 its ruling on the motion under Section 8.

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

6 **§735. Stay**

7 **1. Stay proceedings.** Except as otherwise provided in subsections 4 to 7, on the filing  
8 of a motion under section 734:

9 **A. All other proceedings between the moving party and responding party, including**  
10 **discovery and a pending hearing or motion, are stayed; and**

11 **B. On motion by the moving party, the court may stay a hearing or motion involving**  
12 **another party, or discovery by another party, if the hearing or ruling on the motion**  
13 **would adjudicate, or the discovery would relate to, an issue material to the motion**  
14 **under section 734.**

15 **2. Length of stay.** A stay under subsection 1 remains in effect until entry of an order  
16 ruling on the motion under section 734 and expiration of the time under the Maine Rules  
17 of Appellate Procedure for the moving party to appeal the order.

18 **3. Stay on appeal.** Except as otherwise provided in subsections 5, 6 and 7, if a party  
19 appeals from an order ruling on a motion under section 734, all proceedings between all  
20 parties in the action are stayed. The stay remains in effect until the conclusion of the appeal.

21 **4. Limited discovery.** During a stay under subsection 1, the court may allow limited  
22 discovery if a party shows that specific information is necessary to establish whether a  
23 party has satisfied or failed to satisfy a burden under section 738, subsection 1 and the  
24 information is not reasonably available unless discovery is allowed.

25 **5. Motion for costs, attorney's fees and expenses.** A motion under section 740 for  
26 costs, attorney's fees and expenses is not subject to a stay under this section.

27 **6. Dismissal.** A stay granted under this section does not affect a party's ability  
28 voluntarily to dismiss a cause of action or part of a cause of action or move to sever a cause  
29 of action.

30 **7. Other motions.** During a stay under this section, the court for good cause may hear  
31 and rule on:

32 **A. A motion unrelated to the motion under section 734; and**

33 **B. A motion seeking a special or preliminary injunction to protect against an imminent**  
34 **threat to public health or safety.**

35 **Comments**

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

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

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

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

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

43           To the extent any party not subject to the motion desires to move forward in the trial  
44 court on what it believes are unrelated causes of action while the appeal of the motion's

1 order is pending, it retains the right under Section 4(f) to request a severance of those causes  
2 of action.

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

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

17 **§736. Judicial priority**

18 An action under this subchapter may be advanced on the docket and receive priority  
19 over other cases when the court determines that the interests of justice so require.

20 **Comments**

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

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

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

31 **§737. Proof**

32 In ruling on a motion under section 734, the court shall consider the pleadings, the  
33 motion, any reply or response to the motion and any evidence that could be considered in  
34 ruling on a motion for summary judgment under Rule 56 of the Maine Rules of Civil  
35 Procedure.

36 **Comments**

37 1. The Act establishes a procedure that shares many attributes with summary judgment.  
38 See Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co., 434 P.3d 1152, 1157 (Cal.

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

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

25 **§738. Dismissal of cause of action in whole or in part**

26 **1. Dismissal with prejudice.** In ruling on a motion under section 734, the court shall  
 27 dismiss with prejudice a cause of action, or part of a cause of action, if:

- 28 A. The moving party establishes under section 733, subsection 2 that this Act applies;
- 29 B. The responding party fails to establish under section 733, subsection 3 that this Act  
 30 does not apply; and
- 31 C. Either:
  - 32 (1) The responding party fails to establish a prima facie case as to each essential  
 33 element of the cause of action; or
  - 34 (2) The moving party establishes that:
    - 35 (a) The responding party failed to state a cause of action upon which relief can  
 36 be granted; or
    - 37 (b) There is no genuine issue as to any material fact and the moving party is  
 38 entitled to judgment as a matter of law on the cause of action or part of the  
 39 cause of action.

40 **2. Dismissal without prejudice; right to costs, attorney's fees and expenses.** A  
 41 voluntary dismissal without prejudice of a responding party's cause of action, or part of a  
 42 cause of action, that is the subject of a motion under section 734 does not affect a moving

1 party's right to obtain a ruling on the motion and seek costs, attorney's fees and expenses  
 2 under section 740.

3 **3. Dismissal with prejudice; prevailed on motion. A voluntary dismissal with**  
 4 **prejudice of a responding party's cause of action, or part of a cause of action, that is the**  
 5 **subject of a motion under section 734 establishes for the purpose of section 740 that the**  
 6 **moving party prevailed on the motion.**

7 **Comments**

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

14 2. Section 7(a)(1) establishes "Phase One" of the motion's procedure—applicability. In  
 15 this phase, the party filing the motion has the burden to establish the Act applies for one of  
 16 the reasons identified in Section 2(b). To use the Act, a movant need not prove that the  
 17 responding party has violated a constitutional right—only that the responding party's suit  
 18 arises from the movant's constitutionally protected activity. THOMAS R. BURKE, ANTI-  
 19 SLAPP LITIGATION § 3.2 (2019). Nor does the moving party need to show that the  
 20 responding party intended to chill constitutional activities (motivation is irrelevant to the  
 21 phase-one analysis) or prove that the responding party actually chilled the movant's  
 22 protected activities. Id. But "[t]he mere fact that an action was filed after protected activity  
 23 took place does not mean the action arose from that activity for the purposes of the anti-  
 24 SLAPP statute. Moreover, that a cause of action arguably may have been 'triggered' by  
 25 protected activity does not entail it [as] one arising from such." Navellier v. Sletten, 52 P.3d  
 26 695, 708-09 (Cal. 2002). Rather, the Act is available to a moving party if the conduct  
 27 underlying the cause of action was "itself" an "act in furtherance" of the party's exercise of  
 28 First Amendment rights on a matter of public concern. See City of Cotati v. Cashman, 52  
 29 P.3d 695, 701 (2002). The moving party meets this burden by demonstrating two things:  
 30 first, that it engaged in conduct that fits one of the three categories spelled out in Section  
 31 2(b); and second, that the moved-upon cause of action is premised on that conduct. See id.  
 32 In short, the Act's "definitional focus is not the form of the [non-movant's] cause of action  
 33 but, rather, the [movant's] activity that gives rise to his or her asserted liability—and  
 34 whether that activity constitutes protected speech or petitioning." Navellier, 52 P.3d at 711.

35 In many instances, the moving party will be able to carry its burden simply by using  
 36 the responding party's pleadings. See Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017)  
 37 ("When it is clear from the plaintiff's pleadings that the action is covered by the Act, the  
 38 defendant need show no more."). As pointed out in Comment 2 to Section 6, a party is  
 39 always free to use an opposing party's pleadings as stipulations and admissions, and when  
 40 the Complaint spells out the cause of action and the activity underlying that cause of action,  
 41 the moving party will be able to satisfy its burden rather easily. For example, if a defendant  
 42 is sued by a public official for defamation, and the Complaint identifies the allegedly  
 43 defamatory statement made by the defendant, then the defendant should need to do no more



1 than attach the Complaint as an exhibit to its motion—the Complaint itself would clearly  
2 demonstrate that the defendant is being sued for speaking out about a public official  
3 (undoubtedly a matter of public concern).

4 In other instances, the moving party will have to attach evidence to its motion to  
5 establish that the cause of action is based on the exercise of protected activity. That's  
6 because a creative plaintiff can disguise what is actually a SLAPP as a "garden variety" tort  
7 action. "Thus, a court must look past how the plaintiff characterizes the defendant's conduct  
8 to determine, based on evidence presented, whether the plaintiff's claims are based on  
9 protected speech or conduct." BURKE, supra at § 3.4. But the fact that the movant's burden  
10 must be carried with evidence—whether that be the responding party's pleadings or  
11 evidence the movant presents—does not mean the inquiry is a factual one. On the contrary,  
12 the motion is legal in nature, and the burden is likewise legal. Thus, the court should not  
13 impose a factual burden on the moving party—like "preponderance of the evidence" or  
14 "clear and convincing evidence"—typically seen in fact-finding inquiries. Rather, like other  
15 legal rulings, the court should simply make a determination, based on the evidence  
16 produced by the moving party, whether a cause of action brought against the moving party  
17 is based on its (1) communication in a legislative, executive, judicial, administrative, or  
18 other governmental proceeding; (2) communication on an issue under consideration or  
19 review in a legislative, executive, judicial, administrative, or other governmental  
20 proceeding; or (3) exercise of the right of freedom of speech or of the press, the right to  
21 assemble or petition, or the right of association, on a matter of public concern. It should do  
22 so without weighing the parties' evidence against each other, but instead by determining  
23 whether the evidence put forth by the movant establishes the legal standard. If the moving  
24 party fails to prove the Act applies, the motion must be denied.

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

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

# COMMITTEE AMENDMENT

1 In this phase, the party against whom the motion is filed has the burden to show its case  
 2 has merit by establishing a prima-facie case as to each essential element of the cause of  
 3 action being challenged by the motion. See Baral v. Schnitt, 376 P.3d 604, 613 (Cal. 2016)  
 4 (holding that a responding party cannot prevail on an anti-SLAPP motion by establishing  
 5 a prima-facie case on any one part of a cause of action). The moving party has no burden  
 6 in this phase. "Prima facie" means evidence sufficient as a matter of law to establish a given  
 7 fact if it is not rebutted or contradicted. Dallas Morning News, Inc. v. Hall, 579 S.W.3d  
 8 370, 376-77 (Tex. 2019) (prima-facie evidence "is 'the minimum quantum of evidence  
 9 necessary to support a rational inference that the allegation of fact is true'"); Wilson v.  
 10 Parker, Covert & Chidester, 50 P.3d 733, 739 (Cal. 2002) ("[T]he plaintiff must  
 11 demonstrate that the complaint is [ ] supported by a sufficient prima-facie showing of facts  
 12 to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.").  
 13 Precisely how the responding party carries its burden to establish a prima-facie case "will  
 14 vary from case to case, depending on the nature of the complaint and the thrust of the  
 15 motion." Baral, 376 P.3d at 614. But the responding party should be afforded "a certain  
 16 degree of leeway" in carrying its burden "due to 'the early stage at which the motion is  
 17 brought and heard and the limited opportunity to conduct discovery.'" Integrated Healthcare  
 18 Holdings, Inc. v. Fitzgibbons, 44 Cal. Rptr. 3d 517, 529 (2006) (citations omitted).  
 19 California courts have "repeatedly described the anti-SLAPP procedure as operating like  
 20 an early summary judgment motion." THOMAS R. BURKE, ANTI-SLAPP LITIGATION  
 21 § 5.2 (2019). "[A] plaintiff's burden as to the second prong of the anti-SLAPP test is akin  
 22 to that of a party opposing a motion for summary judgment." Yu v. Signet Bank/Virginia,  
 23 126 Cal. Rptr. 2d 516, 530 (Cal. Ct. App. 2002) (disapproved of on other grounds by  
 24 Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism, 413 P.3d 650 (Cal.  
 25 2018)).

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

34 5. Section 7(a)(3)(B) establishes "Phase Three" of the motion's procedure—legal  
 35 viability. Even if a responding party makes a prima-facie showing under Section  
 36 7(a)(3)(A), the moving party may still prevail if it shows that the responding party failed  
 37 to state a cause of action upon which relief can be granted or that there is no genuine issue  
 38 as to any material fact and the party is entitled to judgment as a matter of law—in other  
 39 words, that the cause of action is not legally sound. In this phase, the burden shifts back to  
 40 the moving party. If the moving party makes a showing under Section 7(a)(3)(B), then the  
 41 motion must be granted and the cause of action (or portion of the cause of action) must be  
 42 stricken or dismissed. If the moving party does not make such a showing—and the  
 43 responding party successfully established a prima-facie case in "Phase Two"—then the  
 44 motion must be denied.

**COMMITTEE AMENDMENT**

1 For example, a plaintiff desiring to build a "big box" store sues a defendant for tortious  
 2 interference based on the defendant's efforts to organize a public campaign adverse to the  
 3 plaintiff. The defendant moves to dismiss under the Act and establishes that the suit targets  
 4 he First Amendment activity on a matter of public concern. Thus, the motion moves to  
 5 Phase Two. In that phase, the plaintiff is able to establish a prima-facie case on each  
 6 essential element of its tortious interference cause of action. Thus, the motion moves to  
 7 Phase Three. But in that final phase, the defendant shows that the claim is barred by  
 8 limitations. In such an instance, the court must grant the motion, because the defendant  
 9 showed itself to be entitled to judgment as a matter of law.

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

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

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

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

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

34 **§739. Appeal**

35 A moving party may appeal as a matter of right from an order denying, in whole or in  
 36 part, a motion under section 734. An appeal of a judgment or order under this subchapter  
 37 is governed by the Maine Rules of Appellate Procedure.

38 **Comments**

39 1. "If the defendant were required to wait until final judgment to appeal the denial of a  
 40 meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial

1 of the motion would not remedy the fact that the defendant had been compelled to defend  
 2 against a meritless claim brought to chill rights of free expression. Thus, [anti-SLAPP  
 3 statutes] protect the defendant from the burdens of trial, not merely from ultimate  
 4 judgments of liability." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (superseded  
 5 by statute on unrelated grounds as stated in *Fyk v. Facebook, Inc.*, No. 19-16232, 2020 WL  
 6 3124258, at \*2 (9th Cir. June 12, 2020)).

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

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

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

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

17 **§740. Costs, attorney's fees and expenses**

18 On a motion under section 734, the court shall award court costs, attorney's fees and  
 19 reasonable litigation expenses related to the motion:

20 1. If moving party prevails. To the moving party if the moving party prevails on the  
 21 motion; or

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

25 **Comments**

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

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

1 a shield or restriction against the imposition of such sanctions where they would be  
2 otherwise warranted.

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

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

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

10 **§741. Construction**

11 This subchapter must be broadly construed and applied to protect the exercise of the  
12 right of freedom of speech and of the press, the right to assemble and petition and the right  
13 of association guaranteed by the United States Constitution or by the Constitution of Maine.

14 **Comments**

15 Similar expressions of intent by states that their anti-SLAPP statutes be broadly  
16 construed have been pivotal to courts' interpretations of those statutes. See, e.g.,  
17 ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 898 (Tex. 2017) (recognizing that  
18 the Texas Legislature "has instructed that the [statute] 'shall be construed liberally to  
19 effectuate its purpose and intent fully'"); Briggs v. Eden Council for Hope & Opportunity,  
20 969 P.2d 564, 573 (Cal. 1999) ("The Legislature's 1997 amendment of [California's anti-  
21 SLAPP statute] to mandate that it be broadly construed apparently was prompted by  
22 judicial decisions . . . that had narrowly construed it. . . . That the Legislature added its  
23 broad construction proviso . . . plainly indicates these decisions were mistaken in their  
24 narrow view of the relevant legislative intent.").

25 **§742. Uniformity of application and construction**

26 In applying and construing this chapter, consideration must be given to the need to  
27 promote uniformity of the law with respect to its subject matter among states that enact it.

28 **Sec. 3. Application.** This Act applies to a civil action filed or cause of action asserted  
29 in a civil action on or after January 1, 2025.

30 **Sec. 4. Savings clause.** This Act does not affect a cause of action asserted before  
31 January 1, 2025 in a civil action or a motion under the Maine Revised Statutes, Title 14,  
32 former section 556 regarding the cause of action.

33 **Sec. 5. Legislative intent.** This Act is the Maine enactment of the Uniform Public  
34 Expression Protection Act as revised by the National Conference of Commissioners on  
35 Uniform State Laws. The text of the uniform act has been changed to conform to the Maine  
36 statutory conventions. The changes are technical in nature and it is the intent of the  
37 Legislature that this Act be interpreted as substantively the same as the uniform act.

1 **Sec. 6. Comments.** The Legislature accepts the Uniform Comments composed by  
2 the National Conference of Commissioners on Uniform State Laws as part of the Uniform  
3 Public Expression Protection Act.

4 **Sec. 7. Effective date.** This Act takes effect January 1, 2025.'

5 Amend the bill by relettering or renumbering any nonconsecutive Part letter or section  
6 number to read consecutively.

7 **SUMMARY**

8 This amendment repeals the State's law against strategic lawsuits against public  
9 participation, or the anti-SLAPP law, and replaces it with the Uniform Law Commission's  
10 Uniform Public Expression Protection Act. This legislation takes effect January 1, 2025.