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**STATE OF MAINE
SENATE
131ST LEGISLATURE
SECOND REGULAR SESSION**

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

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

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

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

'PREFATORY NOTE

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.

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.

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:

1 **SUBCHAPTER 5**

2 **UNIFORM PUBLIC EXPRESSION PROTECTION ACT**

3 **§731. Short title**

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

6 **Comments**

7 Although "SLAPP"—an acronym for "Strategic Lawsuit Against Public
8 Participation"—does not appear in the Act's title, the Uniform Public Expression Protection
9 Act should be considered an anti-SLAPP act. Although "[t]he paradigm SLAPP is a suit
10 filed by a large developer against environmental activists or a neighborhood association
11 intended to chill the defendants' continued political or legal opposition to the developers'
12 plans," SLAPPs "are by no means limited to environmental issues, nor are the defendants
13 necessarily local organizations with limited resources." *Hupp v Freedom Commc'ns*, 163
14 Cal. Rptr. 3d 919, 922 (Cal. Ct. App. 2013). "[W]hile SLAPP suits 'masquerade as ordinary
15 lawsuits' the conceptual features which reveal them as SLAPP's are that they are generally
16 meritless suits brought by large private interests to deter common citizens from exercising
17 their political or legal rights or to punish them for doing so." *Id.*

18 **§732. Definitions**

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

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

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

25 **§733. Applicability**

26 **1. Goods or services.** For the purposes of this section, "goods or services" does not
27 include the creation, dissemination, exhibition or advertisement or similar promotion of a
28 dramatic, literary, musical, political, journalistic or artistic work.

29 **2. Cause of action asserted.** Except as otherwise provided in subsection 3, this
30 subchapter applies to a cause of action asserted in a civil action against a person based on
31 the person's:

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

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

36 C. Exercise of the right of freedom of speech or of the press, the right to assemble or
37 petition or the right of association, guaranteed by the United States Constitution or by
38 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.

14 **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

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.

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.

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.

