

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 3237

BY DELEGATE PUSHKIN

[Introduced March 16, 2021; Referred to the
Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §55-19-1, §55-19-2, §55-19-3, §55-19-4, §55-19-5, §55-19-6, §55-19-7 and
 3 §55-19-8, all relating to the establishing of the West Virginia Public Participation Act;
 4 providing legislative findings and declarations; defining terms; authorizing litigants to
 5 petition for dismissal of strategic lawsuits against public participation; establishing
 6 procedures for dismissal; setting burdens of proof; providing for judicial review of any
 7 decision on a petition for dismissal; providing for the award of attorneys’ fees, costs and
 8 other relief; and providing for exceptions and limitations on the applicability of the West
 9 Virginia Public Participation Act.

Be it enacted by the Legislature of West Virginia:

CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.

**ARTICLE 19. LIMITATIONS OF ACTIONS REGARDING FREEDOM OF SPEECH AND
PUBLIC PARTICIPATION.**

§55-19-1. Short Title.

1 This article shall be known by and may be cited as the “West Virginia Public Participation
 2 Act.”

§55-19-2. Legislative declarations and purpose.

1 The Legislature hereby finds and declares:

2 (1) It is in the public interest to encourage participation by the citizens of West Virginia in
 3 matters of public significance through the exercise of the constitutional rights of freedom of speech
 4 protected under Article III, Section 7 of the Constitution of the State of West Virginia, as well as
 5 the First Amendment to the Constitution of the United States;

6 (2) The valid exercise of the constitutional rights of freedom of speech, the right to petition
 7 government, and the right of association should not be chilled through abuse of the judicial
 8 process;

9 (3) It is the purpose of this article to encourage and safeguard the exercise of the
10 constitutional rights of persons to speak freely, to associate freely, and to petition to participate in
11 government to the fullest extent permitted by law while, at the same time, protecting the rights of
12 persons to file meritorious lawsuits for demonstrable injury; and,

13 (4) This article is enacted in view of these findings, and the protections provided in both
14 the Constitution of the State of West Virginia and the Constitution of the United States, and shall
15 be liberally construed in light thereof to effectuate the purpose and intent of this article.

§55-19-3. Definitions.

1 For purposes of this article:

2 (1) “Claim” or “cause of action” means a lawsuit, petition, complaint, cross-claim,
3 counterclaim, or any other judicial pleading or filing that requests legal or equitable relief;

4 (2) “Defendant” or “defending party” means any person or entity against whom a cause of
5 action is asserted, including a counterclaim defendant, cross-claim defendant or third-party
6 defendant;

7 (3) “Entity” means a firm, sole proprietorship, partnership, corporation, association or other
8 entity engaged in business;

9 (4) “Exercise of the right of association” means the exercise of the constitutional right to
10 join together to take collective action on a matter of public concern that falls within the protection
11 of the Constitution of the State of West Virginia and the Constitution of the United States;

12 (5) “Exercise of the right of free speech” means a communication made in connection with
13 a matter of public concern or religious expression that falls within the protection of the Constitution
14 of the State of West Virginia and the Constitution of the United States;

15 (6) “Exercise of the right to petition” means a communication that falls within the protection
16 of the Constitution of the State of West Virginia and the Constitution of the United States and:

17 (A) Is intended to encourage consideration or review of an issue by a federal, state, or
18 local legislative, executive, judicial, or other governmental body; or

19 (B) Is intended to enlist public participation in an effort to effect consideration of an issue
 20 by a federal, state or local legislative, executive, judicial, or other governmental body;

21 (7) "Matter of public concern" means an issue related to:

22 (A) Health or safety;

23 (B) Environmental, economic, or community well-being;

24 (C) The government;

25 (D) A public official or public figure; or

26 (E) A good, product, or service in the marketplace.

27 (8) "Plaintiff" means any person asserting a claim or cause of action.

28 (9) "Prosecuting attorney" means a prosecuting attorney, assistant prosecuting attorney
 29 or duly appointed special prosecuting attorney; and

30 (10) "Strategic lawsuit against public participation" means a claim or cause of action
 31 against a defendant or defending party based upon, or in response to, the defendant's lawful
 32 exercise of the constitutional right to free speech, right to petition or right of association on a
 33 matter of public concern.

§55-19-4. Limitations on strategic lawsuits against public participation; procedures.

1 (a) For any cause of action asserted against a person or entity in response to his or her
 2 exercise of the right of free speech, right to petition, or right of association on a matter of public
 3 concern, the defending party may petition to dismiss the alleged strategic lawsuit against public
 4 participation in accordance with the provisions of this article.

5 (b) A defending party may petition to dismiss a strategic lawsuit against public participation
 6 within 60 calendar days from the date of service of the cause of action or, in the court's discretion,
 7 at any later time that the court deems proper.

8 (c) If a motion to dismiss is filed under §55-19-4(b) of this code, the court shall conduct an
 9 expedited hearing on the matter. A response to the motion to dismiss, including any opposing
 10 affidavits, may be served and filed by the plaintiff no less than five days before the expedited

11 hearing on the petition or, in the court's discretion, at any earlier time that the court deems proper.

12 (d) Any cause of action in which the defense set forth in §55-19-4(b) of this code is
13 asserted shall be stayed by the court until the entry of an order ruling on the pending motion to
14 dismiss. The court may allow specified and limited discovery relevant to the motion to dismiss
15 upon a showing of good cause.

16 (e) If a court does not rule upon a motion to dismiss filed pursuant to §55-19-4(b) of this
17 code within 60 days of filing of the motion, then the petition shall be considered denied by
18 operation of law and the defending party may appeal in accordance with §55-19-6 of this code.

§55-19-5. Dismissal of action; burdens of proof;

1 (a) Except as provided for in §55-19-5(b) of this code, on the motion of a person or entity
2 filed pursuant to §55-19-4(b) of this code, a court shall dismiss with prejudice any cause of action
3 filed against a defending party if the party shows by a preponderance of the evidence that the
4 cause of action is a strategic lawsuit against public participation that is based on the defending
5 party's lawful exercise of the constitutional right of free speech, right to petition, or right of
6 association on a matter of public concern.

7 (b) A court shall not dismiss a cause of action against a defending party if the plaintiff
8 establishes by clear and convincing evidence a *prima facie* case for each essential legal element
9 of any claims set forth in the cause of action.

10 (c) Notwithstanding the provisions of §55-19-5(b) of this code, the court shall dismiss a
11 cause of action if the defending party establishes a valid legal defense to the claims set forth in
12 the cause of action.

13 (d) If the court denies a motion to dismiss filed pursuant to §55-19-4(b) of this code, the
14 fact that the court has denied the motion and the substance of the court's ruling on the motion is
15 not admissible as evidence in support of the plaintiff's claims against the defending party.

§55-19-6. Judicial review; appeal to Supreme Court of Appeals.

1 Any party adversely affected by an order entered pursuant to §55-19-4 of this code shall
2 be entitled to judicial review thereof. The court's order dismissing or refusing to dismiss a cause
3 of action pursuant to a petition filed under §55-19-4(b) of this code is immediately appealable to
4 the Supreme Court of Appeals, or in any such intermediate appellate courts created pursuant to
5 Section 1, Article VIII of the Constitution of the State of West Virginia: *Provided*, That any such
6 appeal seeking review of the court's determination shall be filed with said court within 30 days
7 from the date of entry of the judgment of the court.

§55-19-7. Award of costs, expenses and attorneys' fees; other relief.

1 (a) If the court dismisses a cause of action pursuant to a petition filed under §55-19-4(b)
2 of this code, the court shall award the defending party its costs, attorneys' fees, and other
3 reasonable litigation expenses incurred in defense against the strategic lawsuit against public
4 participation.

5 (b) In its discretion, the court may provide for any additional relief, including sanctions, that
6 it determines may be necessary to deter repeated abuse of strategic lawsuits against public
7 participation.

8 (c) If the court finds that a petition filed pursuant to §55-19-4(b) of this code was frivolous
9 or was filed solely for the purpose of unnecessary delay with no reasonable basis in law or fact,
10 and makes specific written findings and conclusions establishing such finding, the court may
11 award to the plaintiff party court costs and reasonable attorneys' fees incurred in opposing the
12 petition.

§55-19-8. Applicability and limitations.

1 (a) *Applicability.* – Except as otherwise provided in this subsection, the provisions of this
2 article shall apply to all cause of actions filed on or after the effective date of its enactment. The
3 West Virginia Public Participation Act shall not apply to:

4 (1) Any enforcement action that is brought in the name of the state or a political subdivision

5 of this state, with the exception of an action directed at a person or entity requesting information
6 pursuant to §29B-1-1 et seq. of this code, by the Attorney General or prosecuting attorney;

7 (2) Any cause of action that arises out of the sale or lease of goods or services, including
8 insurance products, between a seller and an actual or potential buyer or customer, if the statement
9 or conduct in question relates to the sale or lease of goods, services, or an insurance product,
10 insurance services, or a commercial transaction in which the intended audience is an actual or
11 potential buyer or customer: *Provided*, That for the purposes of this subdivision consumer
12 comments or reviews of a business, good, or service posted on a publicly available website or
13 social media platform do not arise out of the sale or lease of goods or services;

14 (3) Any cause of action seeking recovery for personal injury or wrongful death;

15 (4) Any claim pertaining to family law under the provisions of this code;

16 (5) Any cause of action brought under the insurance code, as set forth in chapter 33 of
17 this code, or arising out of an insurance contract; or

18 (6) Any statements made with actual knowledge that they are false or that were published
19 with a reckless and willful disregard of the truth.

20 (b) *Limitations.* – Nothing in this article shall:

21 (1) Create any new cause of action or abrogate or modify, in any way, any constitutional
22 immunity or common law or statutory privilege or immunity heretofore enjoyed by any person, or
23 otherwise alter or affect any other defense or remedy established by statute or common law; or

24 (2) Be construed as to prevent the filing of a cause of action for defamation, or to otherwise
25 limit, abrogate, or modify existing statutes or case law, or any other defense, remedy, privileges,
26 or immunities as established by statute or common law with respect to a defamation claim.

NOTE: The purpose of this bill is to establish the West Virginia Public Participation Act. The bill provides additional protections to individuals and entities engaged in the exercise of the protected constitutional rights of free speech, freedom to petition and freedom of association by allowing for the filing of a motion to dismiss in response to strategic lawsuits against public participation. The bill establishes procedures for reviewing strategic lawsuits

against public participation and sets forth the applicability and limitations of the defense.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.