MARYLAND GENERAL ASSEMBLY

House Judiciary Committee

Testimony of James A. McLaughlin[*] on behalf of the Maryland-Delaware-D.C. Press Association and The Washington Post in support of House Bill 379

(Civil Actions – Strategic Lawsuits Against Public Participation)

February 5, 2020

Thank you for the opportunity to testify today on House Bill 379, which would provide a much-needed strengthening of Maryland's anti-SLAPP statute. I am here on behalf of both The Washington Post, where I serve as newsroom counsel and head of government affairs, and the Maryland-Delaware-D.C. Press Association, a trade association whose members include all of the daily and most of the non-daily newspapers in Maryland, Delaware and the District of Columbia. This is, I believe, the fifth time I have testified in Annapolis in support of various proposals to modernize Maryland's Anti-SLAPP Act, which was a cutting-edge statute when enacted in 2004, but has become increasingly outdated.

Of the two "hats" I wear today – The Washington Post and the Press Association – it is clearly the latter group, the Press Association, that has the most vital need for a stronger anti-SLAPP law in Maryland. While no publisher wants to have to spend tens or hundreds of thousands of dollars (at minimum) fending off meritless libel suits, The Washington Post has the resources to do so without compromising its news coverage or acquiescing to legal threats. But the majority of news organizations doing business in Maryland – and, I should note, paying taxes in Maryland, employing Maryland citizens, and providing a public good in the form of news coverage of their local communities – simply do not have the ability to withstand calculated legal attacks in which the true goal of the defamation plaintiff is not to win the case, but simply to inflict the pain of litigation itself – and, ultimately, to punish and deter speech. A conservative estimate of the cost of defending a run-of-the-mill libel case against a news organization is $50,000 to $100,000 for initial case evaluation, answers, and 12(b)(6) motions, and while such amounts might be part of the cost of doing business for larger media companies, they can be absolutely back-breaking for smaller ones. That is the very real

[*] Deputy General Counsel and Director of Government Affairs, The Washington Post; Chair, Government Affairs Committee, Maryland-Delaware-D.C. Press Association; Adjunct Professor, Georgetown University Law Center.

problem that House Bill 379 seeks to address – the use of abusive litigation to intimidate, punish, and suppress speech on matters of public concern.

Notably, though SLAPP suits often arise in a news media context, anti-SLAPP laws are at least equally important for securing the rights of average citizens. When the concept of "SLAPPs" was being developed in the late 1980s, the prototypical SLAPP situation was a real estate developer seeking to quelch opposition to a building project by filing defamation claims against individuals who dared speak out against the proposed plans. More recently iterations include:

- The increasingly common spectacle of wealthy foreign nationals – often Russian or Ukrainian oligarchs or Middle East oil executives – having firms on retainer that monitor their clients' press coverage and send dozens of threatening letters to US publications demanding take-down or correction and/or disputing accurate coverage – generally in an effort to get a message across that it's "not worth it" to write about that subject;

- Politically and ideologically motivated lawsuits – often for libel or false light invasion of privacy – against publications based on extremely thin, sometimes nonexistent, references to them in news coverage (example: the Lokhova lawsuit in which a friend of former National Security Adviser Lt. Gen. Michael Flynn is suing dozens of news outlets for libel, even though some – like the Post – did not ever mention her name in coverage);

- In the consumer protection area, efforts by businesses, hotels, restaurants, and other service providers to squelch negative reviews on platforms such as Yelp! and Angie's List, often by suing or threatening to sue for libel any individuals who post negative reviews. Even if the review is accurate, it is rarely an appealing option for the posters to defend their reviews court.

No statute could perfectly prevent all of these scenarios from ever happening again. But House Bill 379 immeasurably improves the existing Maryland Anti-SLAPP Act in several ways:

(1) by replacing the prior Act's "bad faith" requirement – which was difficult if not impossible to prove, and out of sync with literally all other state anti-SLAPP laws – with an objective standard based on the content of the communication, its context (Section A(3)), and whether the plaintiff can demonstrate that the lawsuit has "substantial basis in both law and fact" (Section E(2));

(2) by providing mandatory, presumptive fee-shifting when a special motion to dismiss on Anti-SLAPP grounds is granted (Section E(3)), which would immediately level the playing

field when a much deeper-pocketed libel plaintiff seeks to bully a citizen or small news outlet by threatening litigation which will bankrupt it (as in the Dan Snyder/City Paper example); and;

(3) by refining the Act's "early look" procedures (Section E(1)), in which courts deciding anti-SLAPP motions are directed to set hearings promptly, rule expeditiously, and stay discovery during the pendency of the underlying government proceeding to which the communication at issue relates – all of which is designed to ensure that the act of litigation itself does not chill or, worse, "freeze" speech about a particular controversy.

In sum, House Bill 379 is a welcome effort to put some teeth into Maryland's venerable, but aging, Anti-SLAPP Act. Passage of the bill would be in the finest traditions of Maryland as historically one of the leaders in protecting freedoms of speech and press. This is a stronger, better bill than the last three Anti-SLAPP proposals, and I urge the Committee to report it favorably. I thank Delegate Rosenberg, who has been the key lawmaker on anti-SLAPP protection since the original 2004 bill, as well as the bill's cosponsor, Delegate Cardin. I would be glad to answer questions.