MARYLAND GENERAL ASSEMBLY

Senate Judicial Proceedings Committee

Testimony of James A. McLaughlin[*] on behalf of
The Washington Post in support of Senate Bill 619

(Courts – Strategic Lawsuits Against Public Participation)

March 15, 2023

Chairman Smith, Vice-Chairman Waldstreicher, and members of the Committee, thank you for the opportunity to testify today. The Washington Post supports Senate Bill 619. This bill would update Maryland's aging anti-SLAPP law for a modern environment in which, increasingly, libel suits are being used as a tool of aggression to silence unwelcome speech about matters of public importance.

Senate Bill 619 is substantially the same as last year's Senate Bill 315, which was co-sponsored by Senators Hettleman, Smith and Waldstreicher. Both last year and this year, the House passed the cross-filed equivalent by large majorities. (House Bill 70 passed by 96-36 vote in February 2021; this year's House Bill 129 passed by a 98-39 vote on March 2.) This legislation represents a moderate – but sorely needed – attempt to bring Maryland's law into the mainstream of the anti-SLAPP protections offered by 31 other states and the District of Columbia.

The problem that anti-SLAPP laws seek to address has only gotten worse in recent years – namely, the growing use of libel suits not to redress true injury to reputation, but to punish and deter constitutionally protected speech simply by inflicting the financial pain of litigation. A recent white paper by Media Law Resource Center documents the rise in such lawsuits.[1] MLRC's study, which was co-authored by eminent First Amendment lawyers including Floyd Abrams and Lee Levine, presents data about the "weaponization" of libel suits, disproving the misperception that such cases are effectively foreclosed by the "actual malice requirement" of *New York Times v. Sullivan*, 376 U.S. 254 (1964). It is supported by real-world examples of how such claims are used to dissuade newsgathering and reporting.

---

[*] Deputy General Counsel and Director of Government Affairs, The Washington Post; Adjunct Professor, Georgetown University Law Center (teaching First Amendment and media law).

[1] *See* Media Law Resource Center, "New York Times v. Sullivan: The Case for Preserving an Essential Precedent, available at https://medialaw.org/issue/new-york-times-v-sullivan-the-case-for-preserving-an-essential-precedent/.

No single piece of legislation can solve these problems, of course. But Senate Bill 619 would make several common-sense, incremental improvements to address the most glaring defects in a law that has fallen into near-total disuse.[2] These measures include:

(1) It would replace the existing statute's requirement that a lawsuit is not a SLAPP unless it was brought with subjective "bad faith" by the plaintiff. Currently, Maryland appears to be the only state anti-SLAPP law in the nation that contains such a requirement – and for good reason, as any inquiry into the plaintiff's subjective mindset is likely to be fact-specific, requiring costly discovery and defeating the purpose of anti-SLAPP protection.

(2) It would increase the likelihood of fee-shifting when an anti-SLAPP motion is successful, directing that the court "shall award costs and reasonable attorney's fees to the moving party if the court determines that equity and justice require it." Fee-shifting – or even the strong prospect of it – can level the playing field by preventing a deep-pocketed "libel bully" from threatening smaller publishers or ordinary citizens with lawsuits that, even if unsuccessful, would break them financially. Notably, Senate Bill 619's fee-shifting provision is still more limited than that of model anti-SLAPP laws which impose mandatory fee-shifting whenever the anti-SLAPP movant prevails.

(3) It would refine the existing statute's "early look" procedures for efficiently resolving litigation, by directing courts to rule "expeditiously" on anti-SLAPP motions and to stay discovery – expressly excepting any limited discovery necessary to decide the anti-SLAPP motion itself.

Crucially, Senate Bill 619 – like anti-SLAPP laws generally – does not favor speech of any particular viewpoint. Anti-SLAPP laws can be, and regularly are, invoked by speakers and commentators across the political spectrum. One of the first major cases interpreting the District of Columbia's Anti-SLAPP Act, *Mann v. National Review*, involved a conservative publication, The National Review, that had harshly criticized a climate scientist. Supported by numerous media *amici* (including The Washington Post), The National Review invoked the protections of the D.C. Anti-SLAPP Act to defend itself. Nor is the Post's current support of Senate Bill 619 connected to any individual case, contrary to the claims of some of the bill's opponents (who have asserted a link to the Nicholas Sandmann case). The Post has publicly testified in support of versions of this legislation since at least 2014, long before the Sandmann case arose. More fundamentally, any libel plaintiff with a reasonably good case will have little trouble surviving an anti-SLAPP motion under Senate Bill 619's standard, as they need only show that the complaint "has substantial justification in law and fact." This is

[2] In his testimony on House Bill 129, Paul Alan Levy of Public Citizen noted that there is only *one* reported decision in which a case has been dismissed under the Maryland Anti-SLAPP Act, which has been on the books since 2004.

a much less demanding test than having to show an actual likelihood of success on the merits (as some anti-SLAPP laws require, necessitating a showing as to each essential element in the claim). A plaintiff who cannot show even a "substantial justification in law and fact" for their complaint should not have filed it, frankly.

For all these reasons, the Post urges a favorable report of Senate Bill 619. We thank Senator Hettleman for her continued leadership on this issue in the Senate, and Delegate Rosenberg for authoring and supporting the legislation in the House.