Written Statement of Paul Alan Levy
Public Citizen Litigation Group
on Senate Bill 619

It is indeed good news that the Senate is again considering taking steps to bolster its anti-SLAPP law to provide the level of protection for speech on matters of public interest that many other states, as well as the District of Columbia, provide against abusive litigation. The bill offered by Senator Hettleman takes important steps in that direction.

A good anti-SLAPP law provides important support for the right of Americans to participate in the process of self-government as well as to alert other consumers to problems encountered with businesses and others in the marketplace. It provides, that is, important protection for a vigorous marketplace of ideas. Too often consumers and citizen activists have been victimized by merciless litigation filed over their criticism of powerful figures who object to the criticism.

First, a little bit about us. Public Citizen is a public interest organization based in Washington, D.C. It has members and supporters in all fifty states, including about 13,000 in Maryland. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and its lawyers have brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs and public debates. *See generally* https://www.citizen.org/topic/justice-the-courts/first-amendment. Public Citizen Litigation Group, the litigation arm of Public Citizen Foundation, has litigated anti-SLAPP motions on behalf of parties, filed amicus briefs in cases about the meaning or application of anti-SLAPP statutes, and represented or advised parties facing SLAPP suits, in California, Florida, Georgia, Massachusetts, Nevada, New York, Rhode Island, Texas, Washington, and the District of Columbia, each of which has an anti-SLAPP law. And often, we help speakers look for counsel in SLAPP cases; in doing so, it has been significantly easier for people to find counsel in cases

where a good anti-SLAPP law would provide support, as opposed to cases where there is either no anti-SLAPP law, or only a weak anti-SLAPP law. In addition, we are involved in litigation around the country helping consumers protect their right of access to court to obtain redress against companies seeking to avoid accountability for injuries caused by their products. All of these experiences inform our views about Senate Bill 619.

The Need for Anti-SLAPP Statutes

Anti-SLAPP statutes are not intended to be a general protection for everything allegedly protected by the First Amendment. Rather, they are a response to a particularly abusive form of litigation—Strategic Litigation Against Public Participation—in which powerful local (or larger) interests seek to suppress public participation in debate about matters of public interest. In this sort of case, the plaintiff seeks not so much to obtain a remedy for wrongful speech as to stop the criticism, and intimidate future critics, by imposing the costs of litigation on the critics. Generally, the plaintiffs in SLAPP suits tend to be wealthy and/or powerful, while the defendants tend to be individuals, non-profit groups, or publications that have less financial ability to sustain a lengthy litigation than the plaintiff does. A plaintiff's knowledge that the targets of litigation can't afford to defend increases the incentive to sue.

In a SLAPP suit, the speaker loses just by having to litigate—that is, by having to spend money on lawyers with no hope of recovering those expenses, not to speak of suffering the anxiety that comes with being a defendant. If the challenged speakers were plaintiffs, who stood to recover an award of damages, they might be able to afford counsel by entering into a contingent fee agreement; but it is hard to conceive of how a contingent fee agreement for the defense against a lawsuit would work. Given the fact that SLAPP suits are intended to do their work by wearing down the critic, the result is too often that, rather than continue to engage in

effective criticism, the critic accepts a settlement such as withdrawing or retracting true statements, and/or paying a small amount to the plaintiff. At the same time, the fact that the critic has had to back down—or spent tens of thousands of dollars to litigate the case—sends a message to other potential critics that this is a company, or a political figure, that is just too expensive to criticize. So SLAPPs are an effective means of suppressing criticism both in the short run and in the long run; and they deprive the community of valuable commentary that elected officials and their appointed agencies can use to formulate public policy, and that members of the public can use effectively to help decide what candidates or policies to support, what businesses to patronize, and what goods or services to buy or avoid.

Although Maryland was one of the first states to adopt an anti-SLAPP law, its narrow scope and relatively cumbersome standards and procedures have prevented it from working effectively, and roughly half of the states now have stronger anti-SLAPP laws. And, indeed, the Uniform Law Commission recently adopted a uniform "Public Expression Protection Act" which has begun to be adopted in several states without their own anti-SLAPP laws.

Some Local Examples of SLAPPs

A well-known example of a SLAPP lawsuit in our area was brought in the District of Columbia several years ago by football team owner Dan Snyder over critical coverage in a local free newspaper, the Washington City Paper. After the newspaper's sports reporter published a number of stories, Snyder brought suit against the reporter and against the City Paper's owner, a small company that owned five similar "free" papers around the country. Snyder also named as a defendant a hedge fund that had acquired the holding company's assets in a bankruptcy proceeding. Snyder then baldly warned the hedge fund that the cost of the litigation would

exceed the value of its investment in the paper.[1]

The impact of a good anti-SLAPP statute on a case like Snyder's is well-illustrated by the case's procedural history. Snyder could have sued in Washington D.C. in the first place, because that is where the Washington City Paper and the individual reporter were located, but instead he sued in New York, the home of the hedge fund that owned the City Paper's parent company. Notably, New York's anti-SLAPP statute at the time was very narrow and would not have applied to Snyder's lawsuit. (New York upgraded its anti-SLAPP law, in a manner very similar to Senate Bill 619, in 2020.) When Snyder apparently recognized that he had no legitimate claim against the hedge fund, he refiled lawsuit in D.C., where he faced an anti-SLAPP motion filed by the remaining defendants. Before that motion could be granted, he dismissed his case. I have talked both with the City Paper's publisher at the time, and with its lawyers, and there is no doubt that the DC anti-SLAPP statute played a crucial role in protecting free speech in that case. This is a case in which a very small and underfunded newspaper was able to avoid sinking all of its revenues into the defense of a merciless libel suit, and risking all of its assets at the same time, and in which a powerful local figure was playing on such prospects to try to intimidate the publisher.

Another local SLAPP suit was filed a few years ago by Karen Williams and Paul Wickre, a Bethesda, Maryland couple, against a pair of bloggers, residents of West Virginia and Indiana, respectively, one of whom worked for the American Legion, whose web site for veterans

[1] His counsel said, "Mr. Snyder has more than sufficient means to protect his reputation and defend himself and his wife against your paper's concerted attempt at character assassination. We presume that defending such litigation would not be a rational strategy for an investment fund such as yours. Indeed, the cost of the litigation would presumably quickly outstrip the asset value of the Washington City Paper." *See* Carr, *Ridiculed, an N.F.L. Owner Goes to Court***,** (New York Times Feb. 7. 2011), https://www.nytimes.com/2011/02/07/business/media/07carr.html

specialized in blowing the whistle on people who make false claims about military service. After the blog focused its attention on a large-scale military contractor who, the blog alleged, lied about being a Navy Seal, the contractor hired Wickre to find a way to take down the blog. In pursuit of this objective, Wickre began threatening the bloggers with having the American Legion summoned to appear on Capitol Hill. Wickre's email cc'd his wife, Williams, who was a Congressional staff member, using her official House of Representatives email account. The blog turned its attention to Wickre and Williams, suggesting among other things that Wickre might be wrongfully using his wife's political connections, which spurred some strong comments among the blog's readers. Wickre and Williams then initiated "peace order" proceedings seeking a broad prior restraint against any mention of either one of them on the blog. A hearing officer split the baby, dismissing Wickre's peace order claim but granting an injunction against any mention of Karen Williams on any internet site. Only after the bloggers appealed to the Circuit Court for Montgomery County, and traveled to Maryland to appear at the de novo trial in the case, did Williams withdraw her peace order claim. I have heard of a number of other situations in which people who are unhappy about the ways in which they have been criticized on blogs have misused Maryland's peace order procedures to try to quiet online criticism. Abuse of similar processes in other states that provide simplified procedures to obtain civil orders of protection against bothersome neighbors or spouses is an increasing source of concern around the country

Yet another example of SLAPP litigation involves a Maryland resident named Brett Kimberlin. After being released from prison for his involvement in a bombing at the Indianapolis Speedway, where he developed skills as a jailhouse lawyer, Kimberlin settled in Maryland, where he began filing pro se defamation lawsuits in state and federal courts in

Maryland. *E.g.*, *Kimberlin v. Nat'l Bloggers Club*, 2015 WL 1242763, at *14 (D. Md. Mar. 17, 2015), *appeal dismissed*, 604 F. App'x 327 (4th Cir. 2015), *dismissed sub nom. Kimberlin v. Frey,* 2017 WL 3141909 (D. Md. July 21, 2017), *aff'd*, 714 Fed. Appx. 291 (4th Cir. 2018); *Kimberlin v. Walker*, 2016 WL 392409, at *1 (Md. Ct. Spec. App. Feb. 2, 2016). My understanding from talking to some publishers whom he sued is that he managed to exact confidential settlements from some critics who worried about the fact that, as a pro se plaintiff, he might have nothing better to do than to write complaints and motion papers, while it costs them a great deal of money to hire counsel to defend themselves. Kimberlin then boasted of these "confidential settlements" to intimidate new prospective defendants who did not want to run up their legal expenses defending against him.

More recently, a Baltimore developer filed a lawsuit against residents of a condominium and row house community that it had built. *MCB Woodberry Developer v. Council of Owners of Millrace Condo.*, 265 A.3d 1140 (Md. Spec. App. 2021). Those residents successfully opposed efforts by the developer to introduce new construction which, the residents believed, would make their community less pleasant. The developer contended that the terms of the community declaration, which provided that the community as a whole could not take a public position without the consent of a board on which the developer maintained the majority of the votes, also barred individual residents from expressing their opinions publicly, and hence that, when residents exercised their own First Amendment rights to seek redress from city officials, they were in breach of contract. The complaint sought compensatory damages and attorney fees, and specifically pleaded a demand for $25 million in punitive damages. The trial court had no difficulty in finding that the community declaration did not bar the residents' free speech, and dismissed the suit under the anti-SLAPP law because the amount of punitive damages pleaded in

the complaint was so plainly designed to have an in terrorem effect on the defendants that its inclusion showed bad faith on the part of the plaintiff, and the Court of Special Appeals affirmed this ruling. This is the **first** time the Maryland anti-SLAPP law has ever been used successfully, despite its limitation to bad faith lawsuits. But the standard for finding cases to be within the scope of the anti-SLAPP law is so difficult that Court of Appeals rightly likened case to an asteroid strike hitting the planet Earth, like the Cretaceous-Paleogene extinction event. 265 A.3d at 1144.

How Anti-SLAPP Laws Like SB 619 Combat Such Lawsuits

Anti-SLAPP statutes employ strong measures that are intended to better enable SLAPPed speakers to resist such litigation, and to make it harder for SLAPPing plaintiffs to prevail by the simple measure of wearing down their critics. Senate Bill 619 takes a large step toward applying such measures.

First, Section A(3) of the bill expands the scope of Maryland's anti-SLAPP law by making explicit that it covers speech on matters of public interest beyond those pending before government bodies, such as posts on blogs, consumer review sites such as Yelp, the comment sections of newspaper articles, community listservs, and the like. All of these sources provide a rich vein of public commentary as well as providing useful information on which members of the community can draw in making sound decisions as consumers and as citizens about what businesses they should patronize, what goods and services they should buy, and what political figures or other political issues deserve their votes or their support. And lawsuits, or threatened lawsuits, against those who provide useful information for their fellow citizens to consider can deprive the marketplace of ideas of valuable information. It is good to see the Maryland legislature considering a SLAPP bill that will protect Marylanders who engage in such speech,

while at the same time making it possible for those whose interests are hurt by false and malicious speech to retain access to the courts to protect themselves when they can show actual malice and the other elements of a defamation or other claim.

An amendment made to a previous House bill, in response to a suggestion from representatives of the Maryland Association for Justice, who testified in the House Judiciary Committee in favor of the bill, added specific protection for speech made in communications to government officials, in the form of a new subsection (A)(3)(4); we support including that provision. It is worth noting that the Maryland Association for Justice has testified without reservation in favor of the bill.

Second, Section C of the bill excludes from the application of anti-SLAPP remedies lawsuits brought in the public interest or on behalf of the general public, and lawsuits that are brought over commercial communications by individuals or companies. Public Citizen strongly supports those exclusions; anti-SLAPP laws administer powerful medicine to discourage the bringing of weak and meritless claims over protected speech, and it is important not to make such remedies available to discourage ordinary consumers and workers from protecting their rights against companies that they believe have wronged them. Without those exceptions, ordinary consumer litigation over false and deceptive trade practices and product liability claims could be subjected to anti-SLAPP remedies—imagine a tort claim brought over a product advertised as being safe but which fails to warn consumers of an unreasonable risk of injury, *e.g. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), or a false advertising claim against Nike for falsely claiming that its sportswear is not made with child labor or in sweatshops, as in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). Such cases ought not be subjected to anti-SLAPP remedies.

Third, Section A(3) of the bill, in combination with Section (E)(2), eliminates the former

limitation of anti-SLAPP treatment to lawsuits that are brought in bad faith; instead, it imposes an objective test that gives that plaintiff an opportunity to show that there is a substantial justification in law and fact for the lawsuit. It is almost impossible for a defendant to establish, at the outset of the litigation and without any discovery, that a lawsuit has been brought in bad faith. Bad faith in litigation is most commonly addressed after the lawsuit is over, when the defendant asks to have attorney fees awarded under the "bad faith" exception to the American Rule that litigants bear their own fees. But this is a very high standard, and the judge can assess whether there was bad faith by assessing the course of the litigation. But the purpose of an anti-SLAPP law is to protect speakers from being dragged through a litigation defense in the first place, and force to suppress their speech to avoid having to defend. The very fact that the dismissal in the *Clipper Mill* case mentioned above at page 6 is the first time Maryland's anti-SLAPP law has **ever** produced a dismissal shows how ineffective this statute has been, because of the bad faith provision. (Presumably, future plaintiffs will avoid that developer's mistake of pleading an outrageously high damages amount in the complaint). Although the bill is not explicit about what will be required of the plaintiff at the prompt hearing that the bill requires, we hope that the Committee report will make clear that the bill requires a plaintiff to make an evidentiary showing.

Fourth, as all good anti-SLAPP statutes do, Section (E)(1) of the bill responds to the "wear-down-the-defendant" objective by requiring a court to take an "early look" at the merits of the case, and Section (E)(2) allows the defendant to seek a stay of further proceedings pending resolution of the anti-SLAPP motion. In many states, anti-SLAPP laws expressly cut off discovery during the pendency of an anti-SLAPP motion unless good cause is shown to seek discovery as needed to meet the plaintiff's burden. Unlike most cases, where it is enough to

plead generally and then use discovery to obtain the evidence needed to take the case to trial, in this special class of case it is fair to expect the plaintiff not to come to court in the first place unless it has evidence of the civil wrong of which it complains. Rather than entirely cutting off discovery, this bill leaves the issue of discovery to the trial judge's informed discretion to allow "specified discovery" that is not "unduly burdensome." At the same time, as previously amended during the course of consideration, the bill borrows a feature of the District of Columbia's anti-SLAPP law by providing for cost-shifting during discovery, so that the plaintiff is required to cover any expenses that the discovery imposes on the defendant. We agree that this amendment represents a sensible compromise among the competing interests.

Fifth, the bill responds to the intimidation and inability-to-afford-a-defense factors that make SLAPP suits so effective by providing a financing mechanism for the defense against SLAPPs, in the form of an award of attorney fees. In this respect, anti-SLAPP statutes are similar to Title VII, the anti-trust laws, and various environmental and whistleblower statutes that provide for a presumptive award of attorney fees in favor of the plaintiff. The very adoption of a fees provision in these statutes encourages lawyers to develop expertise in the subject matter and to show a willingness to take on cases with the hope of recovering attorney fees through the statutes' fee shifting provisions. The attorney fee provision of an anti-SLAPP statute represents a public policy judgment that causes of action addressed to speech on public issues are disfavored, at least to the extent that they are brought without having evidence at hand at the outset.

Finally, a decision to adopt an anti-SLAPP statute represents a judgment that people who speak out on public issues need special protection against abusive litigation. The test set forth in the statute is an objective one. And although the archetypical case is a suit for defamation, good

anti-SLAPP statutes are not specific to one cause of action, because otherwise plaintiffs hoping to use oppressive lawsuits based on ultimately meritless claims to suppress speech whose content irks or offends them would simply plead a different cause of action: false light invasion of privacy, intentional infliction of emotional distress, intentional interference in business relationships, trademark infringement, trademark dilution, misappropriation of name and other causes of action. Indeed, the *Clipper Mill* case was a breach of contract claim, with the plaintiff contending that the community declaration contained a non-disparagement clause (even though § 14-1325 of the Maryland Commercial Code forbids non-disparagement clauses in consumer contracts). The bill takes the right approach by making the statute apply whenever a lawsuit is brought over speech of a certain protected character, instead of trying to enumerate causes of action to which it does and does not apply.

Rebutting Criticisms of the Bill

At the hearing of the Judicial Proceedings Committee last year, the committee heard from two types of opponents. One set of opponents were disappointed plaintiffs who had brought lawsuits against their critics in other jurisdictions where they had to deal with anti-SLAPP motions, and who contended that anti-SLAPP laws were unfair to them, and to plaintiffs with meritorious claims. That criticism is wrong – plaintiffs who bring meritorious lawsuits against their critics should have no difficulty overcoming anti-SLAPP motions. Some examples are provided by recent high-profile lawsuits brought against Alex Jones in Texas and by Sarah Palin in New York. Texas has a strong anti-SLAPP law, but the parents who sued Jones for falsely claiming that they had made up the story about their children being murdered at Sandy Hook Elementary School had no trouble overcoming the Jones anti-SLAPP motion; then they recovered a huge jury verdict against him. And Sarah Palin apparently had more than enough

evidence against the New York Times to get to trial on her libel suit attacking an editorial that blamed an advertisement she had run for an incident in which Republican Senators and Representatives were targeted during a baseball practice in Virginia. But she lost the jury verdict.

What anti-SLAPP laws do is create a financial disincentive for the bringing of **weak** claims over speech. The danger of facing an award of attorney fees if an anti-SLAPP motion is granted creates a financial incentive for plaintiffs to settle instead of pursuing litigation to the bitter end, just as the danger of an award of damages, not to speak of the cost of defending litigation, creates an incentive for defendants to settle when suits are brought over their allegedly wrongful speech. In a world where we prefer to let the marketplace of ideas and an informed electorate decide who is right and who is wrong about matters of legitimate public debate, a law which creates counter-incentives to weak lawsuits directed at speech is a good thing.

And if those opponents testify again this year, we would urge members of the committee to listen with a skeptical ear and to ask the witnesses whether they were, in the end, able to achieve favorable settlements of their cases. I looked at the cases of the witnesses who testified last year and my conclusion was that they got results from their litigation (both cases were settled, but one of the settlements was confidential). If these witnesses testify again I can share this research with the committee.

On the other hand, last year two representatives of local anti-abortion groups criticized the proposed anti-SLAPP amendments as allegedly helping only major allegedly liberal media companies such as the Washington Post, and enable liberals to "weaponize the courts" against conservative and religious speakers.

There is no factual basis for these criticisms. Anti-SLAPP laws are viewpoint neutral;

they can be invoked by speakers of all persuasions, and they are most frequently invoked by individual speakers or bloggers and by small, thinly-capitalized entities, including public interest groups and small media companies, much more so than by major media companies. Of the four examples I gave at the beginning of my testimony, one of media defendants was a tiny newspaper that is distributed for free, making its revenue entirely from advertising (sued by Dan Snyder); in another case, the media defendants were conservatives such as Glenn Beck, Michele Malkin, and Breitbart.com. (I represented a conservative blogger called Ace of Spades because of the important free speech issues presented, even though I detested the blogger's point of view). In the latter case, the plaintiff had established himself as a proponent of liberal causes and the speech over which he sued involved accusations that liberals were hypocrites for accepting support from a convicted bomber, who had at one time expressed unconventional views about sex with minors. In another case, the defendants sued by Wickre and Williams were associated with a conservative veterans' organization. In each of these cases, conservative voices could have made effective use of an anti-SLAPP law to get baseless lawsuits dismissed quickly and cheaply. For example, the plaintiff in the Kimberlin case was allowed to stretch his conservative critics on the rack of litigation for four years until the last of the defendants finally obtained summary judgment against him, plus another year until that ruling was summarily affirmed on appeal. *Kimberlin v. Breitbart Holdings*, 735 Fed. Appx. 106 (4th Cir. 2018). And if anti-abortion groups testify along these lines again this year, members of the committee might ask them whether they are aware of the cases in which anti-abortion groups have successfully invoked anti-SLAPP laws in other states to protect their controversial speech. (Again, I can supply the committee with examples.)

The viewpoint neutrality of anti-SLAPP laws is well illustrated by the experiences of

Donald Trump in litigation in the federal courts in California, which have held that anti-SLAPP laws apply in federal courts. A libel claim filed by Trump University against students who criticized its fraudulent practices was held subject to California's anti-SLAPP law, *Makaeff v. Trump U.*, 715 F.3d 254, 263 (9th Cir. 2013), but a few years later Trump was able to secure dismissal under the Texas anti-SLAPP law of a lawsuit brought by porn star "Stormy Daniels" that accused Trump of defaming her in a tweet. *Clifford v. Trump*, 818 Fed. Appx. 746, 750 (9th Cir. 2020). As these examples show, the anti-SLAPP laws are viewpoint neutral.

Indeed, in the District of Columbia, two of the leading anti-SLAPP cases decided by the D.C. Court of Appeals involved conservative speakers who were sued for criticizing liberal opponents. In *Doe v. Burke*, 133 A.3d 569 (D.C. App. 2016), several anonymous Internet users were sued for statements placed in a Wikipedia article about a liberal lawyer known for bringing human rights lawsuits against big companies; the blogger was defended by the Center for Individual Rights, a conservative non-profit law firm. And in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1226 (D.C. App. 2016), *as amended* (Dec. 13, 2018), a conservative group was sued for defamation by a climate change scientist over its accusation that he had misrepresented the data in some foundational research that provided the basis for arguments about the dangers of global warming; the defendants were again defended by the Center for Individual Rights. In each case, the conservative defendants invoked the D.C. Anti-SLAPP law, successfully in *Doe v. Burke*, where CIR received a substantial award of attorney fees, but unsuccessfully in *CEI v. Mann*, because the plaintiff in that case was able to offer good evidence that the statements about him were false and uttered with actual malice, and hence the suit was allowed to proceed.

The result in *CEI v. Mann* provides an important reminder: Anti-SLAPP motions often

do not succeed; they only require the plaintiff to show that it has a strong enough legal argument, and supporting evidence, to warrant putting the defendant to the expense of defending. The aim of these laws is to weed out weak lawsuits directed at speech on matters of public importance, but not to prevent meritorious lawsuits from being pursued.[2] That is why the opposing witnesses' reference to the defamation action filed by Nicholas Sandmann against the Washington Post in federal court in Kentucky is a red herring. The Washington Post moved to dismiss in that case, not relying on a state anti-SLAPP law but on the ground that it had a good basis for its reporting, and the trial judge subjected the complaint to a searching examination, initially dismissing the complaint altogether, *Sandmann v. WP Co. LLC*, 401 F. Supp. 3d 781, 794 (E.D. Ky. 2019), but ultimately allowing Sandmann to pursue claims over three statements by the Post that the judge felt had enough chance of success that the case should be allowed to proceed into discovery. And Sandmann secured a substantial settlement against the Post. Senate Bill 619, similarly, gives judges the discretion to allow focused discovery where it appears from the parties' arguments, and from the evidence presented at an early stage, that specific discovery could enable the plaintiff to defeat an anti-SLAPP motion, and there is no reason to think that a Maryland judge would not have ruled similarly applying SB 619. Indeed, I read the briefs at the time, and it seemed to me that, even if there had been an anti-SLAPP law in Kentucky, the Post had made some mistakes in its earliest, contemporaneous reporting on the situation, and Sandmann seemed to have good evidence that some of the statements were false; thus it is quite

[2] In the House committtee, Delegate Arikan expressed concern during the hearing that an anti-SLAPP law could make it impossible to bring libel claims over false reviews about local businesses on Yelp. But such libel plaintiffs often succeed by defeating anti-SLAPP motions, in states like California that have strong anti-SLAPP laws, by presenting evidence that false statements of fact were made. *E.g.*, *Simoni v. Swan*, B290682, 2019 WL 5485209, at *7 (Cal. App. Oct. 25, 2019); *Dakhil v. Monnett*, B285044, 2019 WL 92755, at *9 (Cal. App. Jan. 3, 2019); *Bently Reserve LP v. Papaliolios*, 160 Cal. Rptr. 3d 423, 437 (Cal. App.. 2013) *Wong v. Jing*, 117 Cal. Rptr. 3d 747, 765 (Cal. App.. 2010).

likely that a motion to dismiss under an anti-SLAPP law like SB 619 could well have failed with respect to the few statements at issue.

Whatever one might think about the Washington Post and about its owner, animosity toward them does not provide a good reason to oppose the bill.

A Few Suggestions for Improving the Bill

First, SB 768, introduced by Senator Smith in 2019, contained an amendment to section 12-303 of the Maryland Code that would have authorized interlocutory appeals from decisions denying a motion to dismiss under the proposed anti-SLAPP law. These provisions are important, especially early in the life of an anti-SLAPP law, because in some states we have found that a number of trial judges are hostile to the entire concept of anti-SLAPP legislation, and hence are reluctant to grant dismissal of SLAPP suits at the outset of litigation or to award attorney fees against plaintiffs who have filed SLAPP suits, even after finding that they were unsupported by law or fact. The anti-SLAPP statutes in all of the states that have adopted strong ones include provisions for appeal. We urge the Committee to consider using the language that was originally proposed in SB 768, adding the following to section 12-303:

> (B) A party may appeal from a ruling or a failure to rule on a motion to dismiss an alleged SLAPP suit under § 5–807 of this article.

Second, in Section E(2), lines 32 to 34, the formulation of the showing that a plaintiff whose lawsuit is within the definitional scope of a SLAPP suit must make to avoid dismissal should be clarified. The bill uses the phrase "substantial justification in law and fact." Certainly a court could construe the term "law and fact" to demand the presentation of **evidence** in support of the factual allegations of a complaint, just as, for example, Maryland appellate courts commonly describe certain issues in litigation as presenting a "mixed question of law and fact." By that, they mean to formulate a standard for reviewing a court's analysis of evidence. To the

extent that the bill is intended to demand the presentation of evidence to support a claim based on protected speech, it should say so explicitly.

Thank you for allowing me to present this written testimony.