MARYLAND GENERAL ASSEMBLY

House Judiciary Committee

Testimony of Maxwell S. Mishkin[*] in Support of House Bill 129

(Civil Actions – Strategic Lawsuits Against Public Participation)

January 25, 2023

Mr. Chair, Mr. Vice-Chair, and Members of the Committee, thank you for the opportunity to testify in support of House Bill 129, which would strengthen Maryland's commitment to freedom of expression by updating our state's anti-SLAPP law. I am here today to attest that robust anti-SLAPP statutes protect the reporting, advocacy, commentary, and debate that we all need to be informed members of our participatory democracy.

I am speaking today only on my own behalf, but my testimony is informed by my experience as an attorney in the Media and Entertainment Law Group at Ballard Spahr LLP, where my colleagues and I have the privilege of counseling and litigating on behalf of clients that range from global news and entertainment companies to local newspapers and freelance journalists, as well as nonprofits, documentary filmmakers, and other content creators of all stripes. Our work includes regularly defending against SLAPP suits in jurisdictions with strong anti-SLAPP laws and in jurisdictions with weak or no anti-SLAPP laws whatsoever.

SLAPPs – Strategic Lawsuits Against Public Participation – are a powerful weapon for plaintiffs looking to attack and ultimately chill speech that they find undesirable. For one, it takes far less resources to *file* libel lawsuits than it takes to *defend* such lawsuits, even when they are meritless. Frequent libel plaintiff Donald Trump admitted as much in speaking to the press in 2016 about his unsuccessful defamation case against a journalist who reported on his net worth: "I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable, which I'm happy about."[1] For another, even the threat of a libel lawsuit can discourage important speech. As the federal appellate court for the District of Columbia observed, "[u]nless persons . . . desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors," and such "self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'"[2]

The threat to free speech that SLAPP suits pose is not static – it continues to grow. My recently retired colleague Lee Levine, one of the nation's leading First Amendment attorneys and scholars, wrote last year that "public officials and other powerful people and entities are now

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[1] Paul Farhi, *What really gets under Trump's skin? A reporter questioning his net worth*, The Washington Post (Mar. 8, 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html.

[2] *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (quoting *Smith v. California*, 361 U.S. 147, 154 (1959)).

instituting libel actions at an unprecedented and deeply troubling rate," and that "the vast majority of these cases has been brought, not to secure compensation for actual injury to reputation, but rather to punish the press for speaking truth to power and to dissuade it from doing so in the future, lest it pay the price of the burdens and enormous expense of litigation, regardless of the merits of the claim."[3]

House Bill 129 would not solve all these problems, but it would protect important speech in several significant ways. If updated, Maryland's anti-SLAPP law would place the burden on the plaintiff at the initial stage of the case to show that the lawsuit "has substantial justification in law and fact," making it far more likely that meritless defamation actions on matters of public concern will be dismissed promptly and efficiently. Moreover, under House Bill 129, the anti-SLAPP law would provide that when a SLAPP suit is dismissed, the plaintiff should be obliged to pay the defendant's reasonable attorneys' fees and costs. These changes have been adopted by many other states around the country, and they help achieve the right balance between allowing claims with merit to survive while weeding out the frivolous ones designed to harass speakers.

House Bill 129 is important for another reason as well. In the landmark case *New York Times v. Sullivan*,[4] the Supreme Court held that the First Amendment requires public official libel plaintiffs to prove not just that the speech at issue is false, but that those statements had been published with knowledge of their falsity or despite a high degree of awareness of their probable falsity. This standard, known as "actual malice" or "constitutional malice," is a demanding one, but it is expressly intended to serve our "profound national commitment" to promoting "debate on public issues," even though it "may well include vehement, caustic, and sometimes unpleasantly sharp" speech.[5]

One noted legal scholar called the *Sullivan* decision "an occasion for dancing in the streets."[6] An esteemed South African advocate, preparing to take the bench in his country after the end of apartheid, said this American ruling "'shone like lanterns to illuminate the role that judges should play in keeping society open and strengthening democracy.'"[7] But two Justices of the Supreme Court have in recent years sought to overturn or otherwise revisit *Sullivan*.[8] Libel

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[3] *See* New York Times v. Sullivan: *The Case for Preserving an Essential Precedent* at 193, Media Law Resource Ctr. (Mar. 2022), https://medialaw.org/new-york-times-v-sullivan-the-case-for-preserving-an-essential-precedent/.

[4] 376 U.S. 254 (1964).

[5] *Id.* at 270-72.

[6] *See supra* note 3 at iii (quoting Harry Kalven Jr., *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 S. Ct. Rev. 191, 221 n.125).

[7] *See id.* (quoting Lee C. Bollinger & Geoffrey R. Stone, *The Free Speech Century* 182 (2019)).

[8] *See McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari); *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 2425 (Gorsuch, J., dissenting from denial of certiorari); *Coral Ridge Ministries Media, Inc. v. SPLC*, 142 S. Ct. 2453 (2022) (Thomas, J., dissenting from denial of certiorari).

plaintiffs have quickly responded by asking the Supreme Court to lift the actual malice requirement. As Floyd Abrams put it, *Sullivan* thus finds itself "newly controversial and even potentially at risk."[9]

House Bill 129 would mitigate this danger as well by providing (in Section D) that a "defendant in a SLAPP suit is not civilly liable for communicating with a federal, State, or local government body or the public at large, if the defendant, without constitutional malice, acted in furtherance of the defendant's right of petition or free speech under the United States Constitution or the Maryland Constitution or Declaration of Rights regarding any matter within the authority of a government body or any public issue or issue of public interest." By requiring proof of actual malice as a matter of state law, therefore, House Bill 129 backstops *Sullivan* and reaffirms that Maryland will remain a leader in protecting free speech and a free press.

House Bill 129 is a rare proposal in that it benefits everyone who speaks or publishes on matters of public concern: individuals and organizations, long-established institutions and fast-growing startups, for-profits and nonprofits, conservatives and liberals, the bipartisan and the nonpartisan and the apolitical alike. And most importantly, it benefits the public by protecting the "freedom of expression upon public questions" necessary "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[10]

With thanks in particular to Delegate Rosenberg, who has led the effort to strengthen Maryland's anti-SLAPP law for nearly two decades, I very much appreciate the opportunity to offer my support today for House Bill 129 and urge the Committee to report it favorably. I would be glad to answer any questions on this important matter.

[9] *See supra* note 3 at iii.

[10] *Sullivan*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).