MCASA - FAV_SB1042
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MCASA
Maryland Coalition Against Sexual Assault

Working to end sexual violence in Maryland

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Testimony Supporting House Bill 379
Lisae C. Jordan, Executive Director & Counsel
March 12, 2020

The Maryland Coalition Against Sexual Assault (MCASA) is a non-profit membership organization that includes the State's seventeen rape crisis centers, law enforcement, mental health and health care providers, attorneys, educators, survivors of sexual violence and other concerned individuals. MCASA includes the Sexual Assault Legal Institute (SALI), a statewide legal services provider for survivors of sexual assault. MCASA represents the unified voice and combined energy of all of its members working to eliminate sexual violence. We urge the Judicial Proceedings Committee to report favorably on Senate Bill 1042.

Senate Bill 1042 -- SLAPP Suits

This bill clarifies and supports the exercise of constitutional rights to petition and exercise free speech by amending the law regarding SLAPP Suits – Strategic Lawsuits Against Public Participation. Sexual assault survivors across the country are increasingly facing lawsuits brought to discourage exercising their rights in college sexual misconduct proceedings and related Title IX actions. Some survivors encouraged to speak out about sexual violence by the #MeToo movement have also been met with lawsuits designed to silence them. While not all of these retaliatory suits will qualify as SLAPP suits, some will and SB 1042 will help discourage this type of litigation abuse.

The Maryland Coalition Against Sexual Assault urges
the Judicial Proceedings Committee to
report favorably on Senate Bill 1042

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March 12, 2020

To: The Honorable William C. Smith, Jr.
Chair, Senate Judicial Proceedings Committee

From: The Office of the Attorney General

Re: Senate Bill 1042 – Civil Actions – Strategic Lawsuits Against Public Participation – **SUPPORT**

The Office of the Attorney General urges the Committee to report favorably on Senate Bill 1042. Strategic Lawsuits Against Public Participation (hereinafter, SLAPP) are antithetical to the right to speech and petition enshrined in the First Amendment in the United States Constitution, and are counter to the American belief of free speech and healthy debate.

SLAPP lawsuits are lawsuits that are intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.[1] A lawsuit is a SLAPP suit if it is brought against a person based on an act or statement of the person that was done or made in furtherance of the person's right of petition or free speech under the United States Constitution, the Maryland Constitution, or the Maryland Declaration of Rights in connection with a public issue or an issue of public interest.[2] Unfortunately, these types of lawsuits became so persuasive and successful at chilling speech that Maryland, along with 24 other states, passed anti-SLAPP laws. However, Maryland's anti-SLAPP law is outdated, and in need of reform.[3]

Senate Bill 1042 will provide the necessary updates to the anti-SLAPP law to protect First Amendment rights of Marylanders, and ensure that Marylanders are not brought to court to defend meritless suits for expressing their beliefs and opinions.

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[1] Public Participation Project, *What is SLAPP?*, https://anti-slapp.org/what-is-a-slapp.
[2] House Bill 379, *Fiscal and Policy Notice*, http://mgaleg.maryland.gov/2020RS/fnotes/bil_0009/hb0379.pdf.
[3] *See* anti-slapp.org/Maryland (grading Maryland at a D for anti-SLAPP law), https://anti-slapp.org/maryland (last accessed March 9, 2020).

For the reasons, the Office of the Attorney General urges the Committee for a favorable report of Senate Bill 1042.

cc: Members of the Senate Judicial Proceedings Committee

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Written Statement of Paul Alan Levy
Public Citizen Litigation Group
on Senate Bill 1042

It is indeed good news that Maryland is 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 Senators Hettleman, Sydnor and Smith takes important steps in that direction, bolstering the protection for speakers while at the same time including important exceptions for pro-consumer litigation comparable to the exceptions afforded by other states with similarly-worded anti-SLAPP statutes.

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. As litigators and advocates, we have seen case after case in which consumers and citizen activists, and the lawyers who represent them, have been victimized by meritless 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, and the District of Columbia, each of which has an anti-SLAPP law. And often, in free speech cases where we have decided that we cannot ourselves provide representation, we help speakers look for counsel; 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. We have also litigated free speech cases in Maryland.

In addition, we are deeply 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 Bill 1042.

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. The critics can't afford lengthy litigation, and the plaintiff knows it. 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.

In a SLAPP suit, the speaker loses just by having to litigate—that is, by having to spend their savings 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 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.

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 Redskins' 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.

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 is very narrow and would not have applied to Snyder's lawsuit. 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.

Several examples of SLAPP suits filed with an eye to state anti-SLAPP laws were recently considered in Virginia. California Congressman Devin Nunes has filed lawsuits in state court in Virginia against the Fresno Bee, a newspaper located in his home district in California's central valley, which has carried several articles about him and run editorials criticizing him. He has also sued Twitter (a company based in San Francisco), and some anonymous Twitter users who have been making fun of him, identifying themselves as "Devin Nunes's Cow" and "Devin Nunes's Mom." He has filed other suits in Virginia against other detractors. It is likely, I think, that he is filing these lawsuits in Virginia, rather than in California where the newspaper, Twitter and, so far as I can tell, the Twitter users as well, are located, because California has a robust anti-SLAPP law under which his lawsuits would likely be dismissed quickly. Meanwhile, Nunes's Virginia lawyer has been issuing threats to sue additional detractors, such as a member of Congress from California, and a California prosecutor who ran against Nunes in 2018. This sort of threat is intended to have consequences—to make the recipient worry that he or she is going to have to find a lawyer all the

way across the country to defend against a lawsuit, unless she drops her criticisms. New anti-SLAPP laws were under consideration in the Virginia legislature, with the objective of deterring "libel tourism" in that state. Unfortunately, competing versions were adopted in the House and Senate, and there was no time to reconcile them in last weekend's rush to wrap up the session; we understand that the sponsors will be back in 2021. It is good to see the House and Senate sponsors coordinating more closely in Maryland, because adoption of Senate Bill 1042 would certainly discourage libel tourism here in Maryland.

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, who run a web site for veterans that specializes 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, the employer of one of the bloggers, summoned to appear on Capitol Hill. Wickre's email cc'd Williams, 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 the 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 recent example of SLAPP litigation involves a Maryland resident named Brett Kimberlin. After being released from prison, where he developed skills as a jailhouse lawyer, Kimberlin settled in Maryland, where he has become known for filing pro se defamation lawsuits in state and federal courts in Maryland against anyone who published criticisms of him. *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). As these citations tell you, he is able to be extremely persistent in using litigation against critics. And my understanding from talking to some publishers whom he has sued is that he managed to exact confidential settlements from some critics who worry 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. He then boasted of these "confidential settlements" to intimidate new prospective defendants who do not want to run up their legal expenses defending against him.

How Anti-SLAPP Laws Like SB 1042 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. House Bill 1042 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 the 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 official, in the form of a new subsection (A)(3)(4); we certainly support adding that provision to the Senate bill as well.

Second, as originally introduced in the House, Section C of the bill excluded 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 strong 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. One substantial concern that we have with the House bill, as actually adopted in the other chamber, relates to the commercial speech exception. In what we understand to be a drafting error, the House eliminated the exception for lawsuits brought over a business's characterization of its own goods or services in an effort to encourage purchase or use of those goods or services. Without that exception, 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 US 654 (2003). Such cases ought not be subjected to anti-SLAPP remedies, and the changes made to section (C)(2) of the House bill should not be adopted in this chamber. An amendment has been prepared that would address some perceived phrasing issues in the original House bill

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. 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 "targeted discovery" that is not "unduly burdensome. At the same time, as amended during the course of consideration by the House Judiciary Committee, the bill borrows from one of the most interesting features 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. 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.

A Few Suggestions for Improving the Bill

Public Citizen supports SB 1042 as introduced; we would be happy to see this bill adopted as written. However , given that some amendments have been suggested, and some adopted by the House of Delegates, we put forward a small number of suggestions for tweaking the bill.

First, there appears to be a drafting error: on page 1 of the bill, line 23, the bill inserts a new Subsection (A) in section 5-807(b); then on page 2, line 23, the very next section of 5-807(b) would

be Subsection (C). There does not appear to be any Subsection (B). Similarly, some of the subsections in the bill are given Arabic numerals even though Roman numerals appear to be more appropriate

Second, the exclusions in subsection (C)(1) should properly be construed to exclude any court proceedings brought by state or municipal bodies. Even so, it would be preferable to expressly provide that suits by the attorney general on behalf of Maryland, by a municipal attorney on behalf of a city or county, or by a state or local regulatory body, are outside the scope of anti-SLAPP laws. The animating concern about wealthy and powerful individuals or companies suing to suppress criticism through oppressive litigation aimed to wear down a critic does not apply to suits by the government. Accordingly, the strong anti-SLAPP statutes in other states include an express exception for legal proceedings brought in the name of a government body. Although such law enforcement proceedings could be deemed in the public interest and hence protected by that exclusion, this exception could also be made expressly.

Third, in Section E(2), lines 31 and 32. 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 and to speak at the committee hearing.

POSSIBLE AMENDMENTS

1. Similar to the change made to HB 379 as adopted in the House of Delegates. SB 1042's definition of SLAPP's could include communications to government officials. by adding the following subsection (4) to Section 3(1):

(4) To a government official or an individual running for public office

2. Section (C) could be re-labeled as Section (B). Similarly, the subsections of (Section A(3), which defines the scope of anti-SLAPP coverage, could be given Roman numerals I, II, III and IV instead of 1, 2, 3, and 4

3. As a recommended in our testimony, the bill should exempt from SLAPP coverage any lawsuit brought in the name of the public by a law enforcement official by adding the following subsection 3 to section (C) re-labeled as (B) (this language is adapted from California's anti-SLAPP law)

(3) It is any enforcement action brought in the name of the State of Maryland or of one of its agencies or municipalities by the Attorney General, district attorney, or city attorney, acting as a public law enforcement officer.

4. As adopted in the House, the discovery provision in Section (D) (which should be relabeled as (C) assuming that (C) is re-labeled as (B)) could be revised as follows:

(3) (I) If it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified targeted discovery be conducted;

(II) An order under this section shall be conditioned on the plaintiff paying any expenses incurred by the defendant in responding to the discovery.

5. Public Citizen considers the language of section (C) (2) to be acceptable as is. However, it does

not object to the following proposed re-wording, which we understand has been offered by others:

(2) The lawsuit:

(I) involves a defendant who primarily engages in the business of selling or leasing goods or services, including insurance, securities, or financial instruments; and

(II) The statements or conduct at issue in the lawsuit consisted of representations of fact about the defendant's or a business competitor's business operations, goods, or services:

1. For the purpose of obtaining approval for, promoting, or securing sales or leases of or commercial transactions in the defendant's goods or services; or

2. In the course of delivering the defendant's goods or services.

Lowe_FAV_SB1042
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Position: FAV

March 12, 2020

Re: Civil Actions - Strategic Lawsuits Against Public Participation - SB 1042

My name is Luther Lowe, I am the Senior Vice President of Public Policy for Yelp, an online platform dedicated to connecting people with great local places. Our users have written over 200 million reviews on everything from coffee shops and restaurants to DMVs and doctor's offices.

In order to maintain consumer platforms like ours, we strongly advocate for legislation that protects consumers' ability to share honest, first-hand experiences with their peers without fear of threats, fines, or lawsuits.

Maryland residents have a deep tradition of sharing opinions, whether directly through word of mouth to friends and neighbors, in newspaper editorials, on TV, or, increasingly, on the internet. The "feedback economy" has taken root and consumer review platforms, like Yelp, are empowering people to make more informed decisions by allowing them to tap into others' experiences.

As consumer review platforms have grown, however, some businesses have tried to stop people from sharing their opinions online, and have gone to great lengths to do so.

For example, in 2016, a Georgia-based dentist filed a lawsuit in a Baltimore circuit court over reviews left on Yelp and other platforms. The writer of these reviews was also from Georgia; however, the defendant at the other end of this lawsuit was a fictitious Baltimore resident. Legal documents were forged and a court order in favor of the plaintiff was written and signed. This was orchestrated by a reputation management company based here, whose owner used this scheme in multiple cases and states. While this scheme was eventually uncovered and the owner punished, it speaks to the extremes some will go to silence critics.

Strengthening Maryland's anti-SLAPP law to include issues of public concern is an easy way to protect consumers from unscrupulous actors that directly target them for sharing their opinions online.

By definition, the claims made in a SLAPP are meritless — they're simply malicious actions designed to establish a dilemma for the speaker: remove the speech at issue, or spend tens of thousands of dollars, if not much more, and several years defending your right to honestly speak about everyday experiences.

At Yelp, we believe that litigation is a poor substitute for customer service. This is why we are supportive of SB 1042 and believe it will provide Marylanders with a powerful tool to fight back against entities that seek to chill their legitimate speech. The protection of free speech, both offline and on, has always been, and should continue to be, a top priority of the government. We applaud the committee for taking up this issue and look forward to a future where people can share their firsthand experiences with local businesses without facing the threat of a SLAPP.

Washington Post FAV SB 1042

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Position: FAV

MARYLAND GENERAL ASSEMBLY

Senate Judiciary Proceedings Committee

Testimony of James A. McLaughlin[*] on behalf of the Maryland-Delaware-D.C. Press Association and The Washington Post in support of Senate Bill 1042

(Civil Actions – Strategic Lawsuits Against Public Participation)

March 12, 2020

The Maryland-Delaware-D.C. Press Association and The Washington Post strongly support Senate Bill 1042, which would strengthen and modernize Maryland's anti-SLAPP law. We believe this legislation is sorely needed, and we thank Senators Hettleman, Sydnor and Smith – and Delegates Rosenberg, Cardin, Griffith and McComas in the House – for recognizing and addressing a growing problem.

In the past several years, there has been an alarming trend toward the use of libel lawsuits (or, in many cases, the explicit *threat* of such lawsuits) as an offensive "weapon" by which the powerful seek to punish – and ultimately, silence – critics, rather than as a means of recovering for genuine injury. Currently, for instance, one U.S. Congressman has filed more than half a dozen libel suits against media companies seeking $1.2 *billion* in supposed damages arising from routine news reports about a public official's discharge of his duties -- the kind of scenario that was seemingly foreclosed more than 50 years ago by the Supreme Court in *New York Times v. Sullivan*, and a case that would have been considered unthinkable even 10 years ago. The problem, however, is that in such litigation, the plaintiff's aim isn't to prevail so much as it is to inflict the financial pain of litigation itself, and thereby cause future speakers to think twice about

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

criticizing the plaintiff. Even a frivolous lawsuit must be defended, and typically at a cost in the low six figures even if it is dismissed at an early stage.

Senate Bill 1042 would make Maryland's anti-SLAPP law a much more effective bulwark against such abuse of the litigation process, in several important ways:

First, it would remedy a longtime weakness in the existing statute by replacing its subjective "bad faith" requirement – i.e., the requirement that an anti-SLAPP movant show that the plaintiff's suit was brought in actual bad faith – with an objective standard focusing on the obvious lack of merit in a complaint rather than requiring factual discovery into the plaintiff's state of mind. The subjective bad-faith standard, though well-intentioned, was unique among state anti-SLAPP laws, and it clearly defeats the purpose of having an anti-SLAPP law to require costly discovery before an anti-SLAPP motion can be adjudicated.

Second, it establishes mandatory fee-shifting when an anti-SLAPP motion to dismiss is successful. This is perhaps the most important element to any strong anti-SLAPP statute, since the threat of having to pay the opposing party's legal fees is one of the only conceivable deterrents to a deep-pocketed libel plaintiff attempting to use the cost of the litigation process to bully an ordinary citizen or cash-strapped local newspaper. Simply put, it is a means of leveling the playing field.

Third, it refines the Act's "early look" procedures by directing courts reviewing anti-SLAPP motions to set hearings promptly, stay discovery pending the outcome, and rule expeditiously. These are appropriate procedural steps toward ensuring, as far as possible, that the act of litigation does not chill speech about a particular public controversy.

It also bears noting that none of these changes would prevent *meritorious* libel claims from going forward. If a plaintiff has a legitimate case, he or she will have no problem showing that the lawsuit should not be dismissed pursuant to Section (A) of Senate Bill 1042. Indeed, experience has shown that libel cases frequently make it to trial even in jurisdictions with the strongest possibly anti-SLAPP laws, like California. This legislation would simply enhance the ability of courts to weed out obviously meritless defamation cases at an early stage, and (by requiring fee-shifting) deter future abuse of the litigation process by libel "bullies."

For all these reasons, MDDC Press Association and the Post urge the passage of Senate Bill 1042. In fact, this is without question the strongest and best of the anti-SLAPP improvement bills introduced in Maryland in recent years, and we strongly support its enactment. Thank you.

Waterkeepers_FAV_SB1042
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Testimony in Support of Senate Bill 1042 – Courts – Civil Actions – Strategic Lawsuits Against Public Participation (SLAPP) – Senator Hettleman

March 12, 2020

Dear Chairman Smith, Vice Chair Waldstreicher, and Members of the Committee:

Thank you for this opportunity to submit testimony in support of Senate Bill 1042 – the 'Strategic Lawsuits Against Public Participation (SLAPP)' bill – on behalf of Waterkeepers Chesapeake. Waterkeepers Chesapeake is a coalition of seventeen Waterkeepers, Riverkeepers, and Coastkeepers working to make the waters of the Chesapeake and Coastal Bays swimmable and fishable. Maryland Waterkeepers have an interest in allowing citizens and citizen groups to freely advocate for healthy and thriving aquatic habitats across the state.

SLAPP suits chill free speech and a healthy debate by targeting those who communicate with their government or speak out on issues of public interest. SB 1042 would strengthen the protections of Maryland's anti-SLAPP law, by clarifying the definition of a SLAPP suit and dismissal proceedings. SLAPPs are intended to intimidate and force citizens and citizen groups to spend years and many thousands of dollars to defend against baseless lawsuits.

Today, more than ever before, citizens play a crucial role in ensuring compliance with the nation's environmental laws. Sixteen of the nation's principal federal environmental laws invite citizens to sue as "private attorneys general" to force compliance, or to force agencies to perform mandatory duties. These citizen suit provisions allow "any person" to bring a civil action for violation of these environmental laws, with the citizen (or citizen group) stepping into the shoes of the government as the enforcing body. Threats to public health – from power plant toxic emissions, to coal ash pollution, to radioactive waste, to failing sewer systems – can all be halted through the use of citizen suit enforcement.

Still these actions are time consuming and expensive for the individual or organization to take on. Environmental organizations work off of citizen donations and tight budgets. The burden of the costs of litigation are often too expensive for many to bear and so numerous civil and criminal violations of environmental laws go unchallenged. Additionally, citizens do not enjoy the sovereign immunity that governments do, leaving them vulnerable to lawsuits, such as SLAPPs. SLAPP suits add an additional threat to these organizations and individuals who might otherwise bring an action to help enforce environmental laws and protect public health and their communities.

Citizen suit authority reflects "a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced."[1] Several states already have anti-SLAPP suit statutes more stringent than the ones currently in Maryland. The laws need to be strengthened in order to protect citizens from intimidation and harassment, when availing themselves of their First Amendment rights.

We feel that SB 1042 respects and maintains the difficult balance of protecting citizens' free speech while avoiding overly punitive measures so as not to deter the filing of valid lawsuits and ensure every deserving party gets their day in court. We urge you to give a favorable report on SB 1042 that is much-needed to spare civic minded citizens the expense and inconvenience of defending frivolous lawsuits that intentionally attack their rights.

Sincerely,

Betsy Nicholas
Executive Director
Waterkeepers Chesapeake

[1] *Natural Resources Defense Council v. Yain*, 510 E2d 692, 700 (D.C. Cir. 1974).

MDDC_FAV_SB 1042
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Maryland | Delaware | DC Press Association
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To: Judicial Proceedings Committee

From: Rebecca Snyder, Executive Director, MDDC Press Association

Date: March 12, 2020

Re: SB 1042 - SUPPORT

The Maryland-Delaware-District of Columbia Press Association represents a diverse membership of newspaper publications, from large metro dailies like the Washington Post and the Baltimore Sun, to hometown newspapers such as The Annapolis Capital and the Maryland Gazette to publications such as The Daily Record, Baltimore Jewish Times, and online-only publications such as MarylandReporter.com and Baltimore Brew.

The Press Association is pleased to support Senate Bill 1042, which would strengthen Maryland's anti-SLAPP law by removing Maryland's unusual "bad faith" provision, clarifying the definition of a SLAPP suit and dismissal proceedings, shifting of attorneys' fees, and providing for interlocutory appeals so that the defendant can make a timely appeal. We feel this legislation respects and maintains the difficult balance of protecting citizens' free speech while avoiding overly punitive measures so as not to deter the filing of valid lawsuits and ensure every deserving party gets their day in court.

SLAPPs stifle public debate, threaten news reporting and diminish civic engagement – principles fundamental to our democracy. This is especially important to members of the press because informing and engaging the public can leave publications vulnerable to frivolous lawsuits. As businesses, our members cannot absorb large litigation costs. Legal challenges can present a significant burden for news organizations, both financially, in the form of legal fees, and because responding to often-frivolous challenges can be a time-consuming distraction for editors, reporters, photographers and managers. That burden, in both money and time, diminishes our members' ability to cover the communities they serve.

Within our membership, SLAPP suits take a toll. The Frederick News-Post, although fortunate in recent years to avoid the kind of drawn-out cases that can cost hundreds of thousands in legal fees, still has spent up to $45,000 a year responding to legal challenges, typically cases of alleged defamation. In some, there may be legitimate questions of law at stake. Most, however, are frivolous, like the time the local restaurant sued them because that quoted a police report that used the restaurant's name in describing the location of a shooting. Getting that dismissed cost about $7,500.

That is money that is not spent on reporting staff or on other investments to support their journalistic mission. For many news organizations, an expense like that could have a chilling effect on their willingness to report certain stories.

For instance, Carroll County Times and reporter Brett Lake were defendants in a 2012 suit that claimed then-reporter Lake defamed the Chief Deputy State's Attorney Daggett in a series of articles that were fairly reported and substantiated by PIA requests and witness testimony. Under the existing anti-SLAPP law, Landmark Communications, the then-owner of the Carroll County Times, moved for summary judgement. Daggett appealed and the case dragged on for another three years, resolving in favor of the Carroll County Times in 2015. This suit placed a considerable burden on the publication and cost it hundreds of thousands of dollars in legal fees. This lawsuit could have been prevented with the appeals process contemplated in this bill.

For some of our members, one SLAPP suit could mean financial ruin. Many of our members are small business owners who have put everything they own into their publication because they believe in the importance of covering their local community. Susan Lyons, a long-time publisher of Coastal Point, is one of those members. Her weekly publication covers nine small communities and sometimes their reporter is the only person sitting in a small-town planning and zoning meeting. Coastal Point reports what happened so neighbors know that a gas station is being built on the property next door to them, that parking fees are going up, that the school is having overpopulation problems, that drug addicts are breaking into cars and garages in their neighborhood. Things that they need to know that no one else is going to tell them. Not radio, not TV, not even daily papers. Community news is the glue that binds non-profits, businesses, schools, local government and families together in an area. Susan believes a SLAPP suit would devastate her business and publication. Defending a suit and spending thousands of dollars on litigation - even if she knew she was in the right - is something to think long and hard about. She says:

> "I would have to take out loans (if I could even get them for something like this) and would have years of stress and worry that I might somehow lose. Would it be worth putting everything that I have worked so hard for on the line? It is my home, my reputation, my income, my family, my employees that depend on me that I am putting on the line. I can see where a small business could say that it is not worth the fight and just back off. Too much is at stake. **It is not right that whoever has the deepest pockets gets what they want even if it is not in the best interest of the community**."

Any journalistic organization that does its job will occasionally discomfort the subjects of its reporting. When there is harm and a real cause for action, there should be recourse. We support the proposed changes to Maryland's anti-SLAPP legislation as an important rebalancing that makes it harder to silence journalists. We urge a favorable report.

This legislation is also supported by

Public Participation Project
Fighting for Free Speech

Tripadvisor

ACLU_Spielberger_FAV_SB1042
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OFFICERS AND DIRECTORS
JOHN HENDERSON
PRESIDENT

Testimony for the Senate Judicial Proceedings Committee
March 12, 2020

SB 1042 – Civil Actions – Strategic Lawsuit Against Public Participation

FAVORABLE

The ACLU of Maryland supports SB 1042, which would strengthen Maryland's anti-SLAPP law to better protect free speech rights against lawsuits intended to stifle debate of matters of public concern.

Strategic Lawsuits Against Public Participation, or "SLAPP" lawsuits are designed for individuals in positions of power to censor, intimidate, and silence their critics by burdening them with expensive, baseless lawsuits and threats of huge damage awards. Advocates, journalists, consumers, and concerned residents are forced to defend in court against abusive litigation, simply because they offended the wrong person while exercising their Constitutional rights. Freedom of speech necessarily protects speech that some find offensive. However, free speech rights and the right to petition are such fundamental rights, because they allow us to fully participate in our democracy and the process of self-government. It is therefore vital to have robust safeguards to protect against those who use their power to infringe on such important individual rights.

This bill balances the competing rights of free speech with legitimate concerns about defamation, misrepresentation, and fraud. It helps ensure that people with lawful claims have their day in court without silencing critics in the public square.

In particular, this bill:

- clarifies the definition of a SLAPP suit, particularly removing a "bad faith" provision and aligning language around the Constitutional rights of free speech and petition;
- provides to parties a new opportunity to appeal a ruling on a motion to dismiss; and
- shifts attorneys' fees.

In so doing, the bill lessens the legal and financial barriers for those who find themselves facing unconstitutional claims, and makes it easier for courts to dismiss those frivolous claims without forcing individuals through a lengthy and costly trial.

SB 1042 addresses one of the most fundamental rights of what it means to live in this country: the right to speak our minds and engage in public debate on government policies, political candidates, and other matters of public interest. The result of SLAPP lawsuits is a system in which only those with means are afforded their full Constitutional rights. This bill is an important step toward ensuring that these rights are afforded to all.

For the foregoing reasons, we urge a favorable report on SB 1042.

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Uploaded by: TUTMAN, FRED
Position: FAV

Patuxent RIVERKEEPER®

March 12, 2020

Att: The Honorable William Smith, Chair
Senate Judicial Proceedings Committee
Maryland General Assembly

Dear Sir,

Patuxent Riverkeeper supports SB 1042 becau se it strengthens the current State laws related to SLAPP lawsuits. Our organization has recently been the target of such a SLAPP lawsuit. I will explain very generally about the circumstances to illustrate why we need to update these anti-SLAPP laws.

Patuxent Riverkeeper, like all licensed Waterkeeper organizations, and like many other citizen watchdog groups relies heavily on citizen participation to do our work of helping to enforce environmental laws and to protect public health and safety from environmental threats. It is part of our charter and our licensing to respond to citizen complaints related to water quality pollution. But if citizens fear communicating with us about local water quality problems, and if our organization or civic-minded complainants face civil lawsuits as a reprisal for using the First Amendment, then our efforts at promoting enforcement of environmental laws would be chilled if citizens are potentially subject to SLAPP lawsuits for their trouble.

In 2016 Patuxent Riverkeeper was the target of a classic SLAPP suit. Our research revealed that a polluter has been fined by the State and County autho rities for numerous violations of water quality laws, zoning laws, public health laws and more. When we wrote a single letter to the Maryland Department of the Environment relating our concerns about this particular enterprise and its numerous violations, we learned that the State Atto rne y General's office was already prosecuting them. Completely independent of our own report, the State of Maryland Department of the Environment imposed over $300,000 of fines and the n entered into a consent decre e with the violator. Subsequently the same violator filed a defamation and false light lawsuit against our organization arguing that our single written report to the State resulted in economic loss and moreover damage to their reputation with a member of the Maryland Senate. Intriguingly, their claim for damages was precisely the amount of their State fines.

Interestingly, when we contacted the referenced member of the Maryland Senate, he told us that while he was contacted by this business hoping for assistance at reducing their State fines, he was unable or unwilling to help them when his own research revealed the extent and the magnitude of their ongoing violations, and the pending State legal enforcement case against them. In essence, a Maryland Senator conducted his own investigation and reached the same conclusion we did! Moreover, the polluter had a history of filing similar lawsuits against various neighbors who complained about the disruptions to residential life caused by his business.

The case against us was eventually dismissed after nearly a year of legal depositions, pre-trial motions and legal expenditure. It was dismissed with a strong admonishment against baseless and harassing lawsuits. But, our organization had to bear the cost and time investment of defending a legal case where the plaintiffs had already conceded in a consent decree virtually all the violations we complained about in our original letter to the State. And today, they remain in violation of that same consent decree. At the initial judicial hearing held to adjudicate our motion for summary judgment, not only did the plaintiffs fail to actually produce the actual letter to MDE that they claim defamed them, but the judge declined to dismiss the case and scheduled it for trial. In short, the current SLAPP statute was of no help in preventing the expense and effort of a needless and pointless trial. Actually, there was no indication that the judge actually weighed the current SLAPP Statute in this latest decision. Notably, the existing statute expressly forbids prosecution based upon citizen's written communications with their government. Interestingly, our tormentors made clear that they might drop the lawsuit against us if we simply revealed the names and identities of any neighboring citizen complainants we might have been in touch with, presumably so they might be "SLAPP'ed" as well.

So the present day SLAPP statute as currently written really does not serve as a deterrent to frivolous and malicious prosecution. Had HB-379 been passed into law it would have provided clearer guidance and potentially spared both the public and private cost of a trial that is no more than a form of economic harassment and bullying by monied and guilty bad actors. In our case there was absolutely no question that the litigation was a reprisal for nothing more than good faith citizen vigilance reporting violations to the lawful authorities. In that instance, the State was doing its job by prosecuting this violator. *But the violator was and continues to attack citizens as a vindictive reprisal in order deter future such reports and watchfulness*. This legal case, issued in bad faith as well as many others just like it, continue to consume both public and private resources needlessly for a cases highly likely to fail on merit. Their point is entirely to silence citizens. Clearly, the purpose is not really to prevail but rather to stall and tie up citizen resources, to intimidate and compel citizens to be silent about reporting information about pollution that is their right--and to get them to spend their resources on defending lawsuits instead of on continued vigilance. Moreover, it seeks to coerce the disclosure of further information about other citizens. In the end, this enterprise with a massive history of past and present violations sought to further suppress citizen participation and vigilance, while evading compliance with the relevant environmental laws.

Several other States have SLAPP suit statutes that are much more stringent and forceful than the ones currently in effect here in Maryland. The current statute was a good start but ultimately it is not equal to its goals, if the aim of the Statute is and was to deter frivolous and/or

malicious lawsuits and speedily dispose of them in order to protect already crowded court dockets, and to spare citizens the distress of being sued for doing the right thing.

So clearly, the laws need to be made stronger in order to protect both citizens as well as society from harassment from monied and aggressive violators who want to contort the legal process in order to stifle citizen engagement. We urge you to give a favorable report on SB-1042 that is much needed to spare civic - minded Marylanders the trouble of defending malicious lawsuits that intentionally attack our rights.

Thank you very much for your consideration.

Frederick L. Tutman
Riverkeeper, CEO
Patuxent Riverkeeper

Patuxent Riverkeeper Center; 17412 Nottingham Road; Upper Marlboro,MD 20772 301-276-7913

Hettleman_FWA_SB1042
Uploaded by: Senator Hettleman, Senator Hettleman
Position: FWA

SHELLY HETTLEMAN
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The Senate of Maryland
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TESTIMONY OF SENATOR SHELLY HETTLEMAN
SB 1042 – CIVIL ATIONS – STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

A SLAPP suit, which stands for Strategic Lawsuit Against Public Participation is intended to shut down free speech by someone who has made a public statement before a public body or a citizen who has spoken out about an issue or provided a review or criticized a powerful public figure. It is intended to silence, inflict financial damage, and intimidate. This bill would assist the defendant in such a lawsuit and make it more difficult for plaintiffs to exert their power in wearing down the defendant.

The bill clarifies that our SLAPP statute extends speech beyond just those before governmental entities to include online and blog reviews, letters to the editor, and other venues commonly used by community members to share thoughts and ideas and to assist the community in choosing goods and services in the marketplace. (Section (A)(3))

The bill makes a number of very important improvements to our current SLAPP statute:

1) It eliminates the requirement that a plaintiff demonstrate "bad faith" in bringing forth the suit. This was a unique provision in our law that proved difficult and costly, requiring extensive discovery. The current bill requires focus on a meritless complaint. (Section (A)(3) and (E)(2))
2) It enables attorneys' fees to be shifted, providing a deterrent to a deep-pocketed plaintiff. (Section (E)(4))
3) It requires courts to act promptly and hold discovery until there are expeditious rulings. (Section (E)(1) & (2))

It's important to note that none of these changes to current law would serve as a chilling effect to legitimate lawsuits since expedited procedures would weed out meritorious claims efficiently.

The bill was amended by the House and includes provisions to make explicit that communication to a government official is included (Section (A)(3)(4)). We will offer another clarifying amendment to ensure that certain commercial speech does not qualify under the

SLAPP statute, enabling appropriate suits over product liability and deceptive trade to remain outside the SLAPP scope:

The revised language would replace p. 3, lines 8-15

(2) THE LAWSUIT INVOLVES:

(I) A DEFENDANT WHO PRIMARILY ENGAGES IN THE BUSINESS OF SELLING OR LEASING GOODS OR SERVICES, INCLUDING INSURANCE, SECURITIES, OR FINANCIAL INSTRUMENTS; AND

(II) THE STATEMENTS OR CONDUCT AT ISSUE IN THE LAWSUIT CONSISTED OF REPRESENTATIONS OF FACT ABOUT THE DEFENDANT'S OR A BUSINESS COMPETITOR'S BUSINESS OPERATIONS, GOODS, OR SERVICES:

(1) FOR THE PURPOSE OF OBTAINING APPROVAL FOR, PROMOTING, OR SECURING SALES OR LEASE OF OR COMMERCIAL TRANSACTIONS IN THE DEFENDANT'S GOODS OR SERVICES; OR

(2) IN THE COURSE OF DELIVERING THE DEFENDANT'S GOODS OR SERVICES IS ALLEGED TO HAVE MADE A STATEMENT OR ENGAGED IN CONDUCT THAT DISPARAGES A BUSINESS COMPEITITOR'S BUSINESS OPERATIONS, GOODS, OR SERVICES

MDJudiciary_UNF_SB1042
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Position: UNF

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO:	Senate Judicial Proceedings Committee
FROM:	Legislative Committee Suzanne D. Pelz, Esq. 410-260-1523
RE:	Senate Bill 1042 Courts - Civil Actions – Strategic Lawsuits Against Public Participation
DATE:	February 20, 2020 (3/12)
POSITION:	Oppose as drafted

The Maryland Judiciary opposes Senate Bill 1042 as drafted. This legislation addresses "SLAPP" (strategic lawsuits against public participation) lawsuits, which are bad faith lawsuits intended to deter the defendant or other similar persons from speaking out on certain public issues.

In particular, the Judiciary has concerns with the inclusion of judicial proceedings which could as drafted affect pending civil actions through crossclaims, counterclaims, or third-party claims.

cc. Hon. Shelly Hettleman
Judicial Council
Legislative Committee
Kelley O'Connor