Written Statement of Paul Alan Levy
Public Citizen Litigation Group
on House Bill 379

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 Delegates Rosenberg, Cardin, McComas, and Griffith 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* http://www.citizen.org/litigation/briefs/internet.htm. 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 379.

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 are currently pending 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 against 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. A new anti-SLAPP law is under consideration in the Virginia legislature; if it passes it would deter "libel tourism' in that state. Adoption of House Bill 379 would similarly 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 HB 379 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 379 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.

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. This exception would properly be construed to protect lawsuits brought by state or municipal authorities to enforce regulations protecting the public interest—for example, civil actions brought to enforce campaign finance or lobbying restrictions.

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. This bill does not include such a provision and does not set any standards for stay motions, leaving the matter to the trial judge's discretion. 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. Again, the Committee's report on the bill should make that clear.

Fourth, just as a dismissal is subject to immediate appeal, so too the denial of an anti-SLAPP motion is subject to immediate appeal. The amendment adding Subsection (B) to Article 12-303 would implement this protection.

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, the 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 caused 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

I have 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).

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. We urge that this exception 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.