

# MARYLAND GENERAL ASSEMBLY

## Senate Judicial Proceedings Committee

### Testimony of James A. McLaughlin\* on Behalf of The Washington Post in Support of Senate Bill 167

#### (Courts – Strategic Lawsuits Against Public Participation)

January 15, 2025

Chairman Smith, Vice Chair Waldstreicher and members of the Committee, I am submitting this testimony on behalf of The Washington Post, which is pleased to **support** Senate Bill 167. This bill would update Maryland's 2004 anti-SLAPP statute to deal with a modern environment in which, increasingly, libel lawsuits are used as a tool of aggression to silence unwelcome or unpopular speech on matters of public importance. It does so in a responsible, common-sense way.

Senate Bill 167 is substantially the same as last year's [House Bill 129](#), which has been approved by the House several times in the past few years.

The fundamental problem that anti-SLAPP laws seek to address has only gotten worse in recent years – namely, the use of libel litigation not to redress actual injury to reputation, but to punish and/or chill criticism solely by inflicting the financial pain of litigation (often without regard for the outcome). A recent white paper by Media Law Resource Center documents the dramatic rise in such tactics.<sup>4</sup> MLRC's study, which was co-authored in part by First Amendment luminaries Floyd Abrams and Lee Levine, presents evidence of the "weaponization" of libel suits, disproving the misconception that such cases are effectively foreclosed by the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964). The study is illustrated by real-world examples

---

\* Deputy General Counsel and Director of Government Affairs, The Washington Post; Adjunct Professor, Georgetown University Law Center (teaching First Amendment/media law); member, Board of Directors, Maryland-Delaware-D.C. Press Association.

<sup>1</sup> House Bill 129 (2023) was favorably reported by the Judiciary Committee on February 27, 2023, and passed the House by 98-39 vote on March 2, 2023. See <https://legiscan.com/MD/bill/HB129/2023>.

<sup>2</sup> See HB70 (2022) (passed House by 96-36 vote on February 17, 2022) <https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0070?ys=2022RS>.

<sup>3</sup> See HB308 (2021) (passed House by 94-39 vote on March 22, 2021) <https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0308?ys=2021RS>.

<sup>4</sup> See Media Law Resource Center, "New York Times v. Sullivan: The Case for Preserving an Essential Precedent, available at <https://medialaw.org/issue/new-york-times-v-sullivan-the-case-for-preserving-an-essential-precedent/>.

of how such efforts seek to curb constitutionally protected newsgathering and reporting, often overtly. In Maryland, these problems are exacerbated by a weak anti-SLAPP law – one that was adequate when first enacted, but is now graded as a “D” by the Public Participation Project, the leading authority on state anti-SLAPP laws.<sup>5</sup>

No legislation can fully reverse these problems. But Senate Bill 167 takes appropriate, concrete steps toward restoring a functional anti-SLAPP law to Maryland. In particular, it would:

- (1) discard the existing statute’s requirement that a lawsuit is not a SLAPP unless it can be shown that it was brought in subjective “bad faith” by the plaintiff. There is good reason why no other state anti-SLAPP law contains such a requirement – namely, it appears to require a fact-specific inquiry into the actual state of mind of the plaintiff, delaying resolution and increasing cost in violation of the purposes of anti-SLAPP protection.
- (2) strengthen the likelihood of fee-shifting when an anti-SLAPP motion is successful by providing that a court “shall award costs and reasonable attorney’s fees to the moving party if the court determines that equity and justice require it.” This provision levels the playing field for smaller publishers and ordinary citizens, in particular, by diluting the ability of a “libel bully” to simply threaten to bankrupt the speaker through litigation that they can’t afford. (Notably, HB 330’s proposed standard is still more moderate than the mandatory fee-shifting of many anti-SLAPP laws.)
- (3) It refines the existing statute’s “early look” procedures, directing courts to rule expeditiously on anti-SLAPP motions and to stay discovery except to the extent needed to decide the motion fairly.

It is also important to note that Senate Bill 167 – and anti-SLAPP laws in general – do not favor speech of any particular viewpoint. Anti-SLAPP laws are regularly invoked by speakers and commentators of all political stripes. The leading case interpreting the District of Columbia’s anti-SLAPP Act, for instance, involves the conservative publication *The National Review*, which invoked the Act’s protections – with amicus support by The Washington Post, among others – to defend itself against a libel claim brought by a climate scientist whom TNR had criticized. The bill also does not foreclose meritorious libel suits from proceeding. So long as the plaintiff can show that their claim has a “substantial justification in law and fact” – a lower standard than the actual likelihood of success required by some anti-SLAPP statutes – their case will continue.

---

<sup>5</sup> See <https://anti-slapp.org/maryland>.

For these reasons, The Washington Post requests a favorable report of Senate Bill 167. We thank the bill's sponsor, Senator Hettleman, for her leadership on this vitally important issue.