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HB 818

Award of Attorney's Fees and Expenses – Violation of Maryland Constitutional Right

House Judiciary Committee, February 19, 2025

FAVORABLE

The Public Justice Center and many other public interest legal advocacy organizations, some of which have joined this testimony (see p. 3), have long supported this legislation. HB 818 will accomplish one simple objective:

A Maryland court may award reasonable attorney's fees and costs to a person who wins a claim under the Maryland Constitution or Maryland Declaration of Rights.

Under current law, plaintiffs who have valid Constitutional claims usually bring them in federal court, because federal law provides for reasonable attorney's fees under 42 U.S.C. § 1988. Without the possibility of an attorney's fee award, it is difficult to find an attorney to bring meritorious cases, especially when the damage amount is low or none (as with injunctions to restore rights).

By creating a similar attorney's fee provision in Maryland law, **Maryland constitutional claims will be decided in Maryland courts by Maryland judges under Maryland standards** instead of in federal courts under federal law. **The option to rely on Maryland's court to enforce our Constitution is more important now than ever before.** Among other reasons, Marylanders from the Eastern Shore or Western Maryland must find an attorney who practices in federal court, and must assert their claims in Baltimore or Greenbelt, rather than in their home counties. For those concerned about federal courts telling state and local governments what to do, this bill allows litigation about state and local government to be addressed in local state courts.

Will awarding attorney's fees mean more cases will be filed? Will this cost the State or local governments more? No.

- For the most part, these cases are already being brought, and when plaintiffs prevail, the state and local governments are already paying attorney's fees – because plaintiffs bring them in federal court. **This bill will not create more cases, but it will shift cases from federal to state courts.** The same state and local government resources that go into defending and paying losing claims in federal court will be used to defend and pay losing claims in Maryland courts. Maryland courts however, can be faster and more efficient than federal courts, so there can be savings to all parties in bringing these cases home.
- **Fee-shifting increases compliance with the law while generating the lowest level of litigation, because government will face increased incentives to comply with the law, to avoid litigation in the first place, and to settle any meritorious claims that do arise.** Because plaintiffs only receive fees if they prevail,

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there still is no incentive to bring non-meritorious claims. Private attorneys who practice in this field have testified in supporting this bill in the past that they simply cannot afford to pursue civil rights and constitutional litigation unless there is a strong chance of success, even with a fee-shifting provision. And prevailing defendants may be awarded attorney's fees if the case is frivolous. This standard, awarding fees to defendants only in frivolous cases, is right in line with hundreds of state and federal remedial statutes that award attorney's fees. This approach is tested and it works. All of these laws recognize that the purposes of the fee-shifting provision are to enable meritorious cases in the public interest that otherwise could not be brought, to encourage defendants' compliance with the law, and to discourage scorched-earth litigation. Suggestions to amend the bill to provide for attorney's fees to defendants whenever they prevail are misguided. Such a provision would make it far riskier for any plaintiff to seek enforcement of constitutional rights even than it is currently, chilling enforcement of important constitutional protections, exactly the opposite of what this tried and true fee-shifting mechanism intends to accomplish.

- **The assurance of a reasonable fee if successful will also attract private lawyers who could not otherwise take on poor clients or unpopular causes.** The inclusion of the private bar will lead to greater access to the courts for those who live in rural areas distant from federal courts. Attorneys outside of the major metropolitan areas, where most public interest law organizations are located, are more willing to take on local clients if they can litigate on home turf. Plaintiffs outside of urban areas will have more options for counsel and so will be more able to protect their rights.
- When, as sometimes regrettably happens, the government is the wrong-doer, **private enforcement is the only possibility for vindication of constitutional rights.** When individuals or large classes of persons are denied equal protection or due process of law, there is likely to be no one who can step up to enforce the Maryland Constitution if a private individual cannot afford to pay a lawyer's fees or cannot find a private lawyer who is willing to take on a major, complex case pro bono. This bill is critical to our system of checks and balances.

What are some examples of cases that could be brought under the Maryland Constitution and Declaration of Rights, in which prevailing plaintiffs could be awarded attorney's fees?

- ✓ A farmer seeking judicial review of a zoning decision outlawing mineral extraction on land zoned for agricultural use, as a regulatory taking in violation of Article 24 (due process clause) of the Maryland Declaration of Rights.
- ✓ Seeking an injunction to achieve equal rehabilitation opportunities for girls in the juvenile justice system under Articles 24 (equal protection clause) and 46 (equal protection based on sex clause) of the Maryland Declaration of Rights.
- ✓ Seeking relief from police brutality under Articles 24 (due process clause) and 26 (unreasonable searches and seizures clause) of the Maryland Declaration of Rights.
- ✓ Seeking adequate access to health care for prisoners, under Articles 24 (due process clause) and 16 (cruel and unusual pains and penalties clause) of the Maryland Declaration of Rights.

Good reasons for the Judiciary Committee to issue a FAVORABLE report on HB 818:

- Providing better access to our courts –
- Discouraging state agencies from violating our constitutional rights –
- Making people whole when the state does violate their constitutional rights –
- Having Maryland courts decide Maryland constitutional issues.

If you have any questions, please contact Debra Gardner, Legal Director, 410 625 9409 ext. 228, gardnerd@publicjustice.org.

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