

**Written Testimony before the Michigan House Criminal Justice Committee
in support of House Bill No. 5788**

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Chair Hope, Vice Chair Andrews, Vice Chair Filler, and Members of the Committee, good morning. Thank you all for the opportunity to speak with you today.

My name is Danielle Canepa. I'm an attorney practicing civil rights law at Pitt McGehee Palmer Bonanni and Rivers, a Michigan law firm protecting civil rights for over 30 years. Our firm is known for leadership roles in a number of significant cases, including the Flint Water case, cases against US Olympic Committee and the FBI following the widespread sexual abuse committed by Larry Nassar, and the recent *Bauserman* case, which exonerated 3,000 Michiganders who were falsely accused of unemployment fraud by state AI software.

My own civil rights practice includes defending clients against the retaliatory lawsuits known as "SLAPP suits" -- Strategic Litigation Against Public Participation.

A. How SLAPP Suits Work

SLAPP suits are lawsuits used to intentionally silence someone from exercising their First Amendment right of free speech, by intimidating them with the legal process and burdening them with legal costs. This may sound niche and technical, but it's actually increasingly common. Beginning in the 1980s, legal scholars noticed that real estate developers were suing their critics for defamation and coined the term "SLAPP suit."¹ More recently, defamation SLAPP suits are

¹ See Pring and Canan, *SLAPPs: Getting Sued for Speaking Out* (1996), at 30.

used more and more to attack women who report sexual assault or domestic violence.

As we all know, the very First Amendment in our Bill of Rights protects freedom of speech.² The Michigan Constitution enshrines this same right.³ Free speech is essential to a democracy to allow the free exchange of ideas. There are a small group of exceptions. As individuals, we do not have a right to speech to incite immediate violence or illegal conduct; we do not have a right to make genuine threats of serious bodily harm. We do not have a right to express obscenity. And we do not have a right to commit defamation.

SLAPP suits use this defamation exception to claim that a person's speech is illegal. But as we can all intuit, criticizing a public real estate proposal or disclosing sexual assault is not defamation. Defamation requires a **false** statement, made with **negligence** about whether it was true.⁴ Expressing sincere concerns about a local development project or describing a sexual assault that truly happened is not defamatory when they are factually true and the speaker believes they are true. And most importantly for our purposes here, the law is clear that speech "on matters of public concern" is protected speech. Speech deals with matters of public concern when it fairly relates "to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

² "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Am. I.

³ "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const. 1963, art. 1, § 5. The United States and Michigan Constitutions provide the same protections of the freedom of speech. *In re Contempt of Dudzinski*, 257 Mich. App. 96, 100, 667 N.W.2d 68 (2003).

⁴ Defamation is "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication [defamation per quod]." *Smith v. Anon. Joint Enterprise*, 487 Mich. 102, 113, 793 N.W.2d 533 (2010).

So if speech on public issues is already protected by our state and federal constitutions, why do we need an anti-SLAPP bill?

B. Why we need HB 5788

Without an anti-SLAPP law like HB 5788, ordinary people must summon the money and the legal assistance to survive an entire lawsuit to prove that their speech was protected by the First Amendment. The average lawsuit takes about two years to get to trial. By that time, the damage is done: the speaker has suffered the very significant costs of a lawsuit and likely gone silent to avoid any other trouble.

To illustrate this point, I'd like to highlight for the Committee the typical parties involved in a SLAPP suit. The people who suddenly find themselves *targeted* by a SLAPP lawsuit are frequently ordinary people, without legal expertise or formal political affiliation who speak out on public issues. They may be speaking on a proposed development project, a local landlord, a government official, an environmental issue, land use, or a former boss. They may have spoken to the press, posted on social media, or organized a meeting of concerned community members.

SLAPP suits are typically *filed* by a person or company with the money to pay for a strategic lawsuit that is ultimately going to lose. The point is not to win — it's to intimidate and silence. Even if the case ultimately loses at trial, the person who filed the suit has often succeeded in two ways. First, the lawsuit effectively silences the target because they are terrified of being subject to any legal consequences. Second, they have been forced to pay significant money to defend themselves. Defending a basic lawsuit from start to finish can easily cost \$50,000 or much more. An ordinary person either pulls together the money, sees their insurance premium impacted, or incurs significant debt.

SLAPP suits are also an egregious waste of taxpayer dollars and court resources. Managing a frivolous lawsuit consumes court time, public funds, and delays justice for legitimate cases.

House Bill 5788 specifically remedies these retaliatory lawsuits that have no legal merit. It expedites the legal process by requiring a court hearing with 60 days to determine whether the case should be dismissed for lack of a plausible claim or

lack of essential evidence. This Bill allows the party asserting defamation to request specific evidence to prove that their claim is legitimate.

A legitimate defamation lawsuit will survive this process unscathed because a legitimate case will have the evidence to show that the basic elements of defamation are present. Both parties also have the right of appeal.

The Uniform Public Expression Protection Act does not increase the burden of proof or costs for either party — it just expedites the case to allow the court to assess whether the First Amendment protects the speech at issue in 60 days instead of two years. This Bill follows an anti-SLAPP model that has an extremely broad coalition of supporters — from the National Right to Life Committee to the ACLU.

Michigan should embrace this opportunity to protect free speech and pass the Uniform Public Expression Protection Act, House Bill 5788.

Respectfully submitted,

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