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Written Testimony of George Freeman, Executive Director, Media Law Resource Center
IN SUPPORT OF H.R. 2304, THE SPEAK FREE ACT
Before the House of Representatives Judiciary Committee
Subcommittee on the Constitution and Civil Justice
June 22, 2016

Mr. Chairman Franks, Ranking Member Cohen, and Distinguished Members of the Subcommittee,

I thank you for the privilege to present written testimony on behalf of the Media Law Resource Center (MLRC) in support of H.R. 2304, the SPEAK FREE Act. I am writing as the Executive Director of the MLRC.

Founded in 1980 as the “Libel Defense Resource Center,” the MLRC is the leading trade organization for media organizations and media law firms in the United States. Our membership of more than 120 media companies and 200 law firms represents the entire range of media, from the United States’ largest publishers, broadcasting networks, and digital platforms to local newspapers and radio stations, and from the nation’s most prominent and experienced media law firms to solo practitioners. The MLRC’s current member list is attached hereto. We are a member-funded Section 501(c)(6) non-profit organization, and have received no government grants or contracts in the current or previous two fiscal years.

The primary function of the MLRC is to support the work of our members in advancing First Amendment and media rights. We carry out that function by analyzing emergent or recurring legal issues that impact freedom of expression, providing professional resources and educational events for our members and the public, and coordinating legislative and judicial efforts by our members. In particular, we have focused on the issue of strategic lawsuits against public participation (SLAPPs), the subject of the bill now before the Subcommittee.

SLAPP lawsuits represent a direct perversion of our system of justice in order to deprive citizens of their First Amendment rights, with regard to both sharing and receiving informational and cultural content. These lawsuits are most appalling when they are filed by large corporations

to silence individuals, as in the paradigmatic example of a real estate developer suing a homeowner who raises objections before a zoning board. However, there is perhaps a greater danger when SLAPP lawsuits are directed at a media outlet, because such a suit has the potential to chill the dissemination of such kinds of information to the public at large.

Indeed, the litigation costs involved in defending against SLAPPs can be prohibitive not only for individuals but for media organizations of all sizes, which must weigh the expenditure of defense costs against the substantial costs of developing, producing and distributing new content. Further complicating the issue, there is no single form of SLAPP suit and no single context in which these cases are brought; a SLAPP suit could as easily be a meritless trademark lawsuit by a disgruntled manufacturer against a product reviewer as it is a developer's censorious defamation claim against a homeowner.

Due to the persistence and prevalence of this form of abuse of the courts, the MLRC and our various members have become deeply involved in the promulgation, expansion, and understanding of anti-SLAPP laws in the various states over the last twenty years. As a result, the MLRC has a thorough understanding of both the successes and limitations of current anti-SLAPP legislation at the state level. While potent anti-SLAPP laws such as those in California,¹ Texas² and Nevada³ have provided a quick exit from censorious and meritless lawsuits for many defendants (and conserved substantial judicial resources in those states' courts), state legislation is not a complete solution for three principal reasons.

First, twenty-two states (including Iowa and Ohio) and all U.S. territories except Guam currently have no statutory protection against SLAPP lawsuits.⁴ Meanwhile, of the twenty-eight states and two additional U.S. jurisdictions⁵ that have anti-SLAPP laws, ten (notably including

¹ Cal. Civ. Proc. Code 425.16 (2010).

² Texas Citizens Participation Act, H.B. No. 2973 (2011).

³ Nev. Rev. Stat. 41.650 (2010).

⁴ Colorado has no statute on point but its citizens enjoy a limited form of judicially created protection against SLAPP suits to penalize petitioning activity, *see Protect Our Mountain Environment, Inc. v. Dist. Ct.*, 677 P.2d 1361 (Colo. 1984).

⁵ The additional jurisdictions are the District of Columbia, *see D.C. Law 18-0351* (2011), and Guam, *see Guam Code Ann. tit. 7 §§ 17101-17109* (1998).

Arizona,⁶ Tennessee,⁷ and New York⁸) are substantially limited in their scope and provide limited (if any) protection for journalists and media outlets. Outside of narrowly defined circumstances, media organizations and citizens speaking on issues of public concern in these states have no anti-SLAPP protection, and can be targeted with SLAPP lawsuits with relative impunity.

Second, even in states with robust anti-SLAPP laws, plaintiffs can sometimes evade those laws by filing state law SLAPP claims in federal court under diversity jurisdiction. There is a split between the federal circuits on whether state anti-SLAPP laws apply to state law claims in federal diversity cases, with the U.S. Courts of Appeals for the First,⁹ Fifth,¹⁰ and Ninth¹¹ Circuits holding that such laws do apply to state claims, while the U.S. Court of Appeals for the D.C. Circuit¹² has reached the opposite result. The U.S. Supreme Court declined to address the circuit split earlier this year when it denied certiorari in a case from the Ninth Circuit, leaving the issue in substantial doubt.¹³

Finally, state anti-SLAPP laws generally do not apply to federal claims filed in federal court. Thus, meritless cases nominally filed under federal statutes such as the Lanham Act's false advertising provisions¹⁴ are not subject to current anti-SLAPP laws. Even in those federal circuits that do apply state anti-SLAPP laws to state claims in diversity, federal law claims might nevertheless proceed with chilling effect.

It is critical to note that while federal laws, just like state laws, have substantive limitations that might allow a defendant to obtain pre-trial dismissal of these claims, this only deals with the result of the case and not the procedural cost to get there. Nothing prevents SLAPP claims from being filed, and the point of a SLAPP suit is not to win. Rather, it is to force

⁶ Ariz. Rev. Stat. Ann. 12-751 (2011).

⁷ Tenn. Code Ann. 4-21-1003 (2011).

⁸ N.Y. Civ. Rights Law 70-a (McKinney 2011).

⁹ *Godin v. Schenks*, 629 F.3d 79 (1st. Cir. 2010).

¹⁰ *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009).

¹¹ *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

¹² *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015).

¹³ *Mebo Int'l, Inc. v. Yamanaka*, No. 14-15359, 607 Fed. Appx. 768 (9th Cir. July 20, 2015), *cert. den.*, 577 U.S. ____ (Mar. 21, 2016).

¹⁴ 15 U.S.C. §§ 1125(a).

a speaker or publisher to expend significant financial resources to defend itself in court, or better (from the SLAPP plaintiff's perspective) to force a settlement in which the defendant agrees to withdraw its statement and shut up. Therefore, if would-be SLAPP plaintiffs can accomplish their goals by filing a federal claim, they will. For that reason, the federal gap in state anti-SLAPP law coverage will push SLAPP cases into federal court until corrective measures are taken.

The MLRC strongly supports the enactment of a federal anti-SLAPP law that would close the holes in anti-SLAPP protection nationwide, and urges the committee to support H.R. 2304. It has been our privilege to facilitate discussions among media stakeholders regarding the scope of the SPEAK FREE Act and its balance between addressing the problem of SLAPP suits and avoiding an undue burden on legitimate claims (including those that might be asserted by media organizations), and we are committed to serving that function moving forward. We are available to respond to any questions the Committee might have.