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U.S. House of Representatives Judiciary Committee
Subcommittee on the Constitution and Civil Justice

H.R. 2304, the SPEAK FREE Act

June 22, 2016

Mr. Chairman and Members of the Subcommittee:

I am Bruce D. Brown, the Executive Director of the Reporters Committee for Freedom of the Press, a nonprofit organization that has been defending the First Amendment rights of journalists since 1970. It is an honor to appear before this Committee again. I last testified in 2009 regarding the SPEECH Act. *See* 28 U.S.C. §§ 4101-05. My CV is attached. I have a brief statement for the record in support of H.R. 2304 which I can supplement after the hearing if the Committee seeks additional information.

I. *Anti-SLAPP laws serve the public interest by protecting speech on matters of public concern.*

Anti-SLAPP statutes are an effective way to terminate meritless lawsuits, thus reducing burdens on the courts, and at the same time promoting the exercise of speech rights. While journalists and news organizations certainly benefit from these laws, anyone who speaks out on controversial matters enjoys the benefit of anti-SLAPP protections.

The Reporters Committee has extensively supported anti-SLAPP efforts in recent years. For example, we recently urged the Eleventh Circuit to uphold the application of a state anti-SLAPP statute in federal court as the applicability of these laws in federal diversity cases is still at issue in some circuits.[1] We have been involved in a number of cases in both local and federal D.C. courts that have examined the issue of interlocutory appeals, applicability in federal court, and recovery of fees after a successful motion.[2] We filed amicus briefs in several Washington state cases concerning how anti-SLAPP statutes affect the rights of parties to litigate claims.[3] We have also submitted or joined briefs in Georgia, California and Nevada and have provided written testimony to the Nevada and Maryland legislatures to support efforts to amend their respective anti-SLAPP statutes.[4]

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[1] *Tobinick v. Novella*, No. 15-14889 (11th Cir., brief filed May 31, 2016) (applicability in federal courts).

[2] *3M Company v. Boulter*, Nos. 12-7012, 12-7017 (D.C. Cir., brief filed Sept. 24, 2012) (applicability in federal courts); *Abbas v. Foreign Policy Group*, No. 13–7171 (D.C. Cir., decided April 24, 2015) (applicability in federal courts); *Competitive Enterprise Institute and National Review v. Mann*, 14-CV-101, 14-CV-126 (D.C., brief filed Aug. 11, 2014; earlier brief filed April 22, 2014) (availability of interlocutory appeal); *Doe v. Burke*, 13-CV-83 (D.C., brief filed Oct. 17, 2013) (availability of interlocutory appeal); *Sherrod v. Breitbart* , No. 11-7088 (D.C. Cir., brief filed Sept. 25, 2012) (applicability in federal courts); *The Washington Travel Clinic PLLC v. Kandrac* , No. 14-CV-60 (D.C., brief filed Sept. 17, 2014) (availability of interlocutory appeal).

[3] *Castello v. City of Seattle*, No. 10-36181 (9th Cir., brief filed Sept. 16, 2011) (defending the constitutionality of the anti-SLAPP law); *Davis v. Cox*, No. 90233-0 (Wash., brief filed Dec. 5, 2014) (defending the constitutionality of the anti-SLAPP law); *United States Mission Corporation v. KIRO TV, Inc.*, No. 66868-4-I (Wash. Ct.App., Div. I, brief filed Aug. 17, 2012) (defending the constitutionality of the anti-SLAPP law).

[4] *New World Communications of Atlanta v. Ladner*, No. S15C0592 (Ga., brief filed Feb. 2, 2015) (seeking review of a narrow ruling limiting anti-SLAPP protection to statements at official

As our own work shows, anti-SLAPP laws have been used effectively in many contexts and across the political spectrum. Cases in which the Reporters Committee has filed briefs have concerned lawsuits over disputed medical cures, allegations of evidence tampering by climate researchers, claims of corruption of Palestinian Authority officials, a Wikipedia entry about the shooting deaths of Iraqi civilians by U.S. government contractors, a debate regarding an anti-Israel boycott by members of a food co-op, and arguments over whether Mitt Romney should have rejected donations from a conservative billionaire.[5] Each case has arisen from a controversy on a matter in which the public has an important interest.

II. *A federal law is necessary to ensure that anti-SLAPP protections are applied in federal court.*

State anti-SLAPP laws have been very useful in helping journalists and other defendants avoid frivolous litigation as they report on or engage in public controversies. But a federal statute is needed because not all states have anti-SLAPP laws and some federal courts will not apply state provisions in federal courts in diversity-jurisdiction cases.

When a traditional tort claim ends up in federal court on diversity jurisdiction grounds, it seems obvious that state anti-SLAPP laws should apply to those claims because of the substantive protections they offer. The First Circuit held in 2010 that the Maine anti-SLAPP law "created a supplemental and *substantive* rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional [] activities."[6] As the Ninth Circuit recognized in 1999, while anti-SLAPP statutes have a "commonality of purpose" with the federal rules governing early dismissal, "there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims. . . . The Anti–SLAPP statute, moreover, is crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'"[7] These protections are similar to the immunities enjoyed by government officials when they are sued under Section 1983.[8]

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proceedings); *Angel v. Winograd*, No. B261707 (Cal. Ct. App., 2nd Dist., brief filed Dec. 21, 2015) (opposing ruling that anti-SLAPP protection does not apply to statements that contradict a government agency's findings); *Adelson v. National Jewish Democratic Council*, No. 67120 (Nev., brief filed June 12, 2015); Letter to Nevada State Assembly on Proposed Revisions to Anti-SLAPP Law (April 23, 2015), *available at* http://rcfp.org/x?fhUA; Testimony regarding Maryland anti-SLAPP bill (Feb. 15, 2012), *available at* http://rcfp.org/x?3aTq.

[5] *Tobinick, supra* at fn. 1 (disputed medical cures); *Competitive Enterprise Institute, supra* at fn. 2 (climate research); *Abbas, supra,* at fn. 2 (corruption in Palestinian Authority); *Doe, supra* at fn. 2 (Iraqi civilian deaths); *Davis, supra* at fn. 3 (anti-Israeli boycott); and *Adelson, supra* at fn. 4 (Romney donation).

[6] *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010) (emphasis added).

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

[8] *See generally Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

But not all federal courts agree. The D.C. Circuit recently declined, for example, to apply the D.C. anti-SLAPP law in federal court.[9] And even in the circuits where rights under the relevant state anti-SLAPP statutes are currently recognized in district court, that protection may be in jeopardy. While the Ninth Circuit has upheld the practice of applying anti-SLAPP laws in federal courts, four judges of that court dissented from a denial of a petition for rehearing en banc in an anti-SLAPP case.[10] H.R. 2304 is needed to guarantee the viability of anti-SLAPP protections in federal court.

III. *The interlocutory appeals provision is essential to the overall efficacy of the bill.*

The heart of any anti-SLAPP provision is a mechanism to allow dismissal of frivolous suits. But the interlocutory appeal provision of this bill is every bit as essential because appellate review of an adverse decision is necessary to fully realizing the objective of an anti-SLAPP law. If a speaker loses an anti-SLAPP motion and is not allowed to immediately appeal that decision, the right is completely lost – it would be pointless to appeal the lack of an early dismissal only after going through a full trial on the merits of a case and then have an appellate court decide much later that the claim was frivolous from the start. In this sense, the interlocutory appeal provision flows naturally from the concept of substantive rights akin to immunity protections. And these interests are particularly important in the First Amendment area because on appeal judgments in matters implicating press rights are upheld in fewer than 25% of cases according to one recent study.[11]

For the reasons above among others, I support the passage of H.R. 2304.

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[9] *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1334 (D.C. Cir., 2015).

[10] *Makaeff v. Trump University LLC*, 736 F.3d 1180, 1188 (9th Cir., 2013)(Watford dissenting).

[11] *See* Media Law Resource Center, "MLRC 2012 Report on Trials and Damages," 2012 MLRC Bulletin 1, p. 74 (February 2012).