EXAMINING H.R. 2304, THE "SPEAK FREE ACT"

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

ON

H.R. 2304

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Material submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice. This material is available at the Subcommittee and can also be accessed at:

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EXAMINING H.R. 2304, THE "SPEAK FREE ACT"

WEDNESDAY, JUNE 22, 2016

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 1 p.m., in Room 210, Cannon House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, DeSantis, Goodlatte, Gohmert, and Farenthold.

Staff Present: (Majority) John Coleman, Counsel; Tricia White, Clerk; (Minority) James J. Park, Chief Counsel; Matthew Morgan, Professional Staff Member; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order, and without objection, the Chair is authorized to declare recesses of the Committee at any time.

So good afternoon to all of you. The Subcommittee today will examine H.R. 2304, the "SPEAK FREE Act of 2015," a bipartisan bill designed to protect Americans from meritless lawsuits that target their right to free speech, and their right to petition their government.

The First Amendment states that, "Congress shall make no law respecting an establishment of a religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the government for redress of grievances."

Those sacred rights, endowed by our Creator, and recognized by our Founding Fathers, place clear limitations on our Federal Government, and guarantee freedom of religion, speech, peaceable assembly, and the right of Americans to participate in their own government.

History makes clear that when these rights are robustly defended, Americans are afforded the opportunity to pursue truth, and scientific advancement, to create a culture of innovation within our Nation, and to hold American government accountable. Without such protections, all other rights are at grave risk.

George Washington recognized this risk when he proclaimed to the officers of the Army in 1783 that, "If men are to be precluded from offering their sentiments on a matter which may involve the

most serious and alarming consequences that can invite the consideration of mankind, reason is of no use to us. The freedom of speech may be taken away, and dumb and silent, we may be led like sheep to the slaughter."

Americans today still believe that free speech is foundational to freedom itself. According to a 2015 poll conducted by the Pew Research Center, 95 percent of Americans believe that people should be able to make statements that publicly criticize government's policies. A majority of Americans, roughly 7 in 10, also considered it very important for people to be able to use the Internet without government censorship on matters of free speech.

Despite the fundamental nature of these freedoms, and their importance in American life, Americans' ability to exercise their First Amendment rights has been threatened by lawsuits called strategic lawsuits against public participation, or SLAPPs.

These lawsuits, often brought by private parties, are filed against persons in retaliation for speaking out on a public issue or controversy. These kinds of lawsuits are solely intended to censor and intimidate critics by burdening them with expensive litigation in our court system.

In response, 28 States, the District of Columbia, and one U.S. territory have enacted anti-SLAPP laws, with varying degrees of protection. One key feature found in most of these laws, however, is a special motion to dismiss a claim if it is based on an action related to protected speech, or the right to petition.

For example, California, which enacted its anti-SLAPP law in 1992, provides a special motion to strike a complaint that is filed against a person based on "an act of furtherance of a person's right of petition or free speech under the United States or California Constitution, in connection with a public issue."

With decades of precedent at the State level, this hearing is intended to examine what similar protections are needed at the Federal level. Mr. Farenthold, of Texas, who is a Member of the House Judiciary Committee, introduced H.R. 2304, the "SPEAK FREE Act of 2015," on June 1, 2015.

This legislation, which currently enjoys broad bipartisan support, addresses SLAPPs by amending lawsuit rules to allow a person against whom a lawsuit is asserted to file a special motion to dismiss claims that "arise from an oral or written statement, or other expression, or conduct in furtherance of such expression, by the defendant in connection with an official proceeding, or about a matter of public concern."

Ladies and gentlemen, free speech is a vital component of government accountability, public enlightenment, and the collective pursuit of truth itself. My hope is that today's hearing will shed light on the kinds of SLAPPs filed, as well as how this bill would address the problem.

And I would like to thank our witnesses for being here, and I look forward to their testimony. And I would now yield to the distinguished gentleman from Virginia, the Chairman of the full Committee, Mr. Goodlatte.

[The bill, H.R. 2304, follows:]

I

114TH CONGRESS
1ST SESSION

H. R. 2304

To amend title 28, United States Code, to create a special motion to dismiss strategic lawsuits against public participation (SLAPP suits).

IN THE HOUSE OF REPRESENTATIVES

MAY 13, 2015

Mr. FARENTHOLD (for himself, Ms. ESHOO, Mr. ISSA, Mr. FRANKS of Arizona, and Mr. POLIS) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, to create a special motion to dismiss strategic lawsuits against public participation (SLAPP suits).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015" or the "SPEAK FREE Act of 2015".

SEC. 2. SPECIAL MOTION TO DISMISS STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION.

(a) IN GENERAL.—Part VI of title 28, United States Code, is amended by adding after chapter 181 the following new chapter:

"CHAPTER 182—SPECIAL MOTION TO DISMISS STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

"§ 4201. Strategic lawsuit against public participation defined

"In this chapter, the term 'strategic lawsuit against public participation' or 'SLAPP suit' means a claim that arises from an oral or written statement or other expression, or conduct in furtherance of such expression, by the person against whom the claim is asserted that was made in connection with an official proceeding or about a matter of public concern.

"§ 4202. Special motion to dismiss strategic lawsuit against public participation

"(a) IN GENERAL.—Except as provided in subsection (b), a person against whom a SLAPP suit is asserted may

file a special motion to dismiss. If the party filing a special motion to dismiss a SLAPP suit makes a prima facie showing that the claim at issue arises from an oral or written statement or other expression by the defendant that was made in connection with an official proceeding or about a matter of public concern, then the motion shall be granted and the claim dismissed with prejudice, unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

"(b) EXCEPTIONS.—

"(1) ENFORCEMENT ACTIONS.—The court shall not grant a special motion to dismiss under this section if the claim is an enforcement action brought by an agency or entity of the Federal Government or a State or local government.

"(2) COMMERCIAL SPEECH.—Except as provided in subsection (c), the court shall not grant a special motion to dismiss under this section if the claim is brought against a person primarily engaged in the business of selling or leasing goods or services where such claim arises from the statement or conduct of such person and such statement or conduct—

"(A) consists of representations of fact about such person's or a business competitor's goods or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services; and

"(B) arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

"(3) PUBLIC INTEREST.—Except as provided in subsection (c), the court shall not grant a special motion to dismiss under this section if the claim is a public interest claim.

"(c) LIMITATIONS ON EXCEPTIONS.—Paragraphs (2) and (3) of subsection (b) shall not apply as to—

"(1) any claim against a person or entity engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public;

"(2) any claim against any person or entity based upon statements or conduct concerning the creation, dissemination, exhibition, advertisement, or other similar promotion of journalistic, consumer commentary, dramatic, literary, musical, political, or artistic works, including motion pictures, television programs, or articles published online or in a newspaper or magazine of general circulation; or

"(3) any claim against a nonprofit organization that receives more than 50 percent of annual revenue grants or awards from, programs of, or reimbursements for services rendered to the Federal, State, or local government.

"(d) TIME LIMIT.—Unless the court grants an extension, a motion to dismiss a SLAPP suit shall be filed—

"(1) not later than 45 days after the date of service of the claim, if the claim is filed in a Federal court; or

"(2) not later than 30 days after the date of removal, if the claim is removed to Federal court under section 4206.

"(e) HEARING.—

"(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), the court shall set a hearing on a special motion to dismiss a SLAPP suit on a date

not later than 30 days after the date of service of the special motion to dismiss a SLAPP suit.

"(2) HEARING POSTPONED.—Except as provided in paragraph (3), the court may postpone the hearing for up to 60 days, but shall set the hearing on a date that is not later than 90 days after the date of service of the special motion to dismiss a SLAPP suit, if—

"(A) the docket conditions of the court require a later hearing;

"(B) there is a showing of good cause; or

"(C) the parties agree to postpone the hearing.

"(3) EXTENSION FOR DISCOVERY.—If the court allows specified discovery under subsection (a) of section 4203, the court may extend the hearing date to allow specified discovery under that subsection, but the court shall set the hearing on a date not later than 120 days after the date of service of the special motion to dismiss a SLAPP suit.

"(f) RULING.—The court must rule on a special motion to dismiss a SLAPP suit not later than 30 days after the date on which the final paper is required to be filed or the date argument is heard, whichever is later.

"(g) EVIDENCE.—

"(1) IN GENERAL.—In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and affidavits stating the facts on which the liability or defense is based.

"(2) DISCOVERY.—If the court has ordered specified discovery pursuant to section 4203, the court may consider such discovery.

"§ 4203. Stay of discovery

"(a) IN GENERAL.—Except as provided in subsection (b), upon the filing of a special motion to dismiss under section 4202, discovery proceedings in the action shall be stayed until a final and unappealable order is entered on such motion unless good cause is shown for specified discovery.

"(b) EXCEPTION.—A stay issued under subsection (a) based on the filing of a special motion to dismiss under section 4202, that only seeks dismissal of a third-party claim or a cross claim asserted by a defendant shall only apply to discovery that is requested by the party asserting the third-party claim or cross claim or discovery that relates solely to the third-party claim or cross claim.

"§ 4204. Interlocutory appeal

"An aggrieved party may take an immediate interlocutory appeal from an order granting or denying in

whole or in part a special motion to dismiss under section 4202.

"§ 4205. Motion to quash

"A person whose personally identifying information is sought in connection with a claim subject to the procedure described in section 4202(a) may at any time file a motion to quash the order to produce the information. If the party filing a motion to quash makes a prima facie showing that the order is for personally identifying information, then the motion shall be granted and the order to produce the personally identifying information shall be quashed, unless the responding party demonstrates with an evidentiary showing that the claim is likely to succeed on the merits of each and every element of the claim, in which case the motion to quash shall be denied. No determinations made in deciding a motion to quash under this section shall impede or otherwise diminish the availability of the procedures described in section 4202(a).

"§ 4206. Removal

"(a) SPECIAL MOTION TO DISMISS SLAPP SUIT.—

"(1) IN GENERAL.—Except as provided in paragraph (2), a civil action in a State court that raises a claim described in section 4202(a) may be removed to the district court of the United States for the judicial district and division embracing the place where

the civil action is pending. The grounds for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

"(2) EXCEPTION.—Removal may not be requested under paragraph (1) on the basis of a third-party claim or a cross claim asserted by a defendant.

"(3) REMAND.—If a civil action is removed under paragraph (1) and an order denying in its entirety a motion to dismiss filed under section 4202 is not appealed within the time permitted by law or all potential appellate proceedings have been exhausted, the court shall remand the remaining claims to the State court from which the civil action was removed. The remaining claims shall not be remanded to State court if the order granted a motion to dismiss in part and such order is not appealed within the time permitted by law or all potential appellate proceedings have been exhausted.

"(b) MOTION TO QUASH.—A proceeding in a State court in which a request or order that reasonably appears to be a request or order described in section 4205 is sought or issued may be removed to the district court of the United States for the judicial district and division embracing the place where the civil action is pending by any

person that seeks to file a motion to quash under section 4205 and asserts a defense based on the First Amendment to the Constitution or laws of the United States.

"§ 4207. Fees, costs, and sanctions

"(a) ATTORNEYS FEES.—Except as provided in subsection (c), a court shall award a person that files and prevails on a motion to dismiss under section 4202 or a motion to quash under section 4205, litigation costs, expert witness fees, and reasonable attorneys fees. A party shall be a prevailing party as to a special motion to dismiss or to quash if a claim or discovery request is voluntarily dismissed or withdrawn after the filing of a special motion to dismiss.

"(b) FRIVOLOUS MOTIONS TO DISMISS.—Except as provided in subsection (c), if a court finds that a motion to dismiss under section 4202, a motion to quash under section 4205, or a notice of removal under section 4206 is frivolous or is solely intended to cause unnecessary delay, the court shall award litigation costs, expert witness fees, and reasonable attorneys fees to the party that responded to the motion or notice.

"(c) EXCEPTION.—The Federal Government and the government of a State, or political subdivision thereof, may not recover litigation costs, expert witness fees, or attorneys fees under this section.

"§ 4208. Definitions

"In this chapter:

"(1) MATTER OF PUBLIC CONCERN.—The term 'matter of public concern' means an issue related to—

"(A) health or safety;

"(B) environmental, economic, or community well-being;

"(C) the government;

"(D) a public official or public figure; or

"(E) a good, product, or service in the marketplace.

"(2) NONPROFIT ORGANIZATION.—The term 'nonprofit organization' means any organization that is described in section 501(c) of the Internal Revenue Code of 1986 and is exempt from tax under section 501(a) of such Code.

"(3) PUBLIC INTEREST CLAIM.—The term 'public interest claim' means a claim—

"(A) that is brought solely on behalf of the general public;

"(B) where private enforcement is necessary;

"(C) that places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter;

"(D) that, if successful, enforces an important right affecting the public interest and confers a significant benefit on the general public; and

"(E) notwithstanding attorneys fees, costs, or penalties, would provide relief only for the general public or a class of which the plaintiff is a member.

"(4) STATE.—The term 'State' means each of the several States, the District of Columbia, each commonwealth, territory, or possession of the United States, and each federally recognized Indian tribe.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) TABLE OF CHAPTERS.—The table of chapters for part VI of title 28, United States Code, is amended by inserting after the item relating to chapter 181 the following new item:

"182. Special Motion to dismiss strategic lawsuits against public participation ..... 4201".

(2) INTERLOCUTORY DECISIONS.—Section 1292(a) of title 28, United States Code, is amended—

(A) in paragraph (1), by striking the semicolon at the end and inserting a period;

(B) in paragraph (2), by striking the semicolon at the end and inserting a period; and

(C) by adding at the end the following:

"(4) Interlocutory orders granting or denying in whole or in part special motions to dismiss under section 4202.".

(3) EXCEPTIONS TO DISCHARGE.—Section 523(a) of title 11, United States Code, is amended—

(A) in paragraph (18), by striking "; or" at the end and inserting a semicolon;

(B) in paragraph (19), by striking the period at the end and inserting "; or"; and

(C) by inserting after paragraph (19) the following:

"(20) for litigation costs, expert witness fees, or reasonable attorney's fees awarded by a court under chapter 182 of title 28 or under comparable State laws.".

(c) RELATIONSHIP TO OTHER LAWS.—Nothing in this Act, or the amendments made by this Act, shall preempt or supersede any Federal or State statutory, constitutional, case, or common law that provides the equivalent or greater protection for persons engaging in activities protected by the First Amendment to the Constitution of the United States.

(d) RULE OF CONSTRUCTION.—This Act, and the amendments made by this Act, shall be construed broadly to effectuate the purpose and intent of this Act.

○

Mr. GOODLATTE. Well, thank you very much, Mr. Chairman. I have a brief opening statement, then I would like to yield to the gentleman from Texas, Mr. Farenthold, for an opening statement on his part. He is a Member of the full Judiciary Committee, but not the Subcommittee, and he has been integrally involved in this issue.

It is clear that our Founders believed that the free expression of ideas are integral to the wellbeing of our Nation. John Adams, in his writing on the importance of the press, for example, states: "Care has been taken that the art of printing should be encouraged, and that it should be easy and cheap and safe for any person to communicate his thoughts to the public.

"And you, Messieurs printers, whatever the tyrants of the earth may say of your paper, have done important service to your country by your readiness and freedom in publishing the speculations of the curious.

"The stale, impudent insinuations of slander and sedition are so much the more to your honor, for the jaws of power are always opened to devour, and her arm is always stretched out, if possible, to destroy the freedom of thinking, speaking, and writing."

In the digital age, we continue to witness our world impacted by what one Federal district court judge has called "the most participatory marketplace of mass speech ever seen." Indeed, the Internet provides a nearly unlimited lowcost forum for all kinds of constitutionally-protected communication.

But within the context of lawsuits referred to as strategic lawsuits against public participation, or SLAPPs, the cost of Internet expression protected by the First Amendment is on the rise. Today's hearing, I hope, will examine the most common kinds of SLAPPs heard in Federal court, as well as their impact on the right to free expression, and the right to petition the government.

I look forward to today's discussion of the "SPEAK FREE Act of 2015," and I would like to thank all the witnesses for their testimony. And it is now my pleasure to yield to the gentleman from Texas, Mr. Farenthold.

Mr. FARENTHOLD. Thank you, Chairman Goodlatte, and I will be brief as well. I think you hit on the most important part now. Pretty much everybody with a computer who can make it to a Starbucks is a publisher now, and we have the greatest marketplace of ideas in the world on the Internet.

We have got a sharing economy, and an economy based on people making decisions about what to purchase online, where to visit, where to go to dinner, where to go to lunch, all driven by reviews written by folks just like you and me. And we have got a group of folks out there who are abusing the legal system by saying, "Look, if they post something bad about us, let's sue them, and cost them tens of thousands of dollars to get that suit down."

It is no good having a site with reviews on it if all the reviews are positive, and the people posting negative reviews are silenced.

What this bill does, what the SPEAK FREE Act does, is make it easier for those who are victimized by abusive lawsuits to silence their voices to end this early on in the litigation proceeding, before they rack up thousands or tens of thousands of dollars in legal fees.

I think this is an important piece of legislation to protect the First Amendment rights, and carry forth the vision of our Founding Fathers that everybody have a voice, and everybody be heard with their truthful, honest, good-faith reviews. And again, thank you for yielding, and I look forward to hearing the testimony. I yield back.

Mr. FRANKS. And I thank the gentleman. Without objection, other Members' opening statements will be made part of the record.

[The prepared statement of Mr. Cohen follows:]

Statement of the Honorable Steve Cohen for the Hearing on "Examining H.R. 2304, the SPEAK FREE Act" Before the Subcommittee on the Constitution and Civil Justice

Wednesday, June 22, 2016 at 1:00 p.m.
2226 Rayburn House Office Building

I thank Chairman Trent Franks for holding today's hearing on H.R. 2304, the SPEAK FREE Act of 2015, which is intended to address concern over strategic lawsuits against public participation, or "SLAPP" suits.

The bill's proponents assert that anti-SLAPP legislation is necessary to protect First Amendment values from being undermined by abusive lawsuits intended to stifle speech and public participation.

There are few stronger champions than me of free speech, a free press, the right to peaceably assemble, and the right to petition the government for a redress of grievances.

Along with the right to vote, these rights are fundamental to the functioning of our democracy and, indeed, to our very identity as a Nation.

The strength and extent of our commitment to these values is what separates us from other nations, including other democracies.

I have fought throughout my legislative career to defend these rights whenever they came under threat.

As Bruce Brown, one of our witnesses, knows, I was the lead House sponsor of the SPEECH Act back in 2009, which President Barack Obama signed into law in 2010.

That law protects American authors and publishers from "libel tourists" who file defamation suits against them in foreign jurisdictions with defamation laws that are not subject to First Amendment-level safeguards for free speech and a free press by prohibiting domestic courts from recognizing and enforcing such judgments.

I was proud to work on a bipartisan basis to shepherd that legislation into law, and I note that Chairman Franks was a cosponsor of that legislation.

Also in 2009, I introduced legislation to address "SLAPP suits," to serve as a marker for the issue.

While the bill before us is broader than my old proposal in significant ways, I am glad that we have the opportunity for a public discussion of the issue.

H.R. 2304 appears to put some of my fundamental values in tension. For as much as I am a defender of free speech, I care equally deeply about other rights, including civil rights and the right to one's day in court, both of which the bill might threaten.

H.R. 2304 provides for a special motion to dismiss, which allows a defendant to have a case dismissed so long as it "arises from" expression or conduct in furtherance of expression "in connection with an official proceeding or about a matter of public concern."

"Matter of public concern," in turn, includes any issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; *or a good, product, or service in the marketplace.*

So long as the case falls within these broad parameters, the court must grant the special motion to dismiss unless the plaintiff shows that he or she is "likely to succeed on the merits" of his or her claim, without the benefit of discovery.

This is an exceedingly difficult standard to meet in any context, and may well be impossible to meet without discovery, whether or not the plaintiff's claim has merit.

The major criticism that has been raised about H.R. 2304 is that its extremely broad scope, together with its exceedingly narrow exceptions and its lopsidedly defendant-friendly procedural scheme, may undermine the pursuit of *legitimate* lawsuits, including those to enforce civil rights, stop employment discrimination, blow the whistle on fraud, ensure fair competition, and protect copyright.

Indeed, most civil rights laws depend for their enforcement on the ability of private plaintiffs to pursue litigation. In light of limited resources at enforcement agencies, such "private attorneys general" provisions are central to ensuring that civil rights and other federal rights are enforced.

And it is no real argument to say that the bill only targets frivolous lawsuits, for nothing in the bill really distinguishes legitimate from illegitimate claims in the application of its procedural provisions.

Nor is there any real disincentive for a potentially abusive *defendant* to use the bill's various procedural provisions to engage in dilatory litigation tactics, driving up costs for a plaintiff, delaying adjudication of claims, and dissuading similarly-situated persons from even filing suit.

The fee-shifting provision available to a non-movant in a special motion to dismiss is a weak "stick" against a potentially abusive defendant because it is sharply limited, available only when a court finds that a motion to dismiss, a motion to quash, or a removal petition was "frivolous" or "solely intended to cause unnecessary delay."

This is just one of many criticisms that have been raised against this bill by interests as varied as consumer advocates, civil justice groups, and the movie industry. I take these concerns seriously, and I hope that the bill's supporters do as well.

I would like to know from all of our witnesses today whether a better legislative balance between protecting speech and ensuring access to justice can be struck, or whether such balance is impossible.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr. for the Hearing on "Examining H.R. 2304, the SPEAK FREE Act" Before the Subcommittee on the Constitution and Civil Justice

Wednesday, June 22, 2016 at 1:00 p.m.
2226 Rayburn House Office Building

H.R. 2304, the so-called "SPEAK FREE Act," purports to prevent meritless lawsuits and to protect free speech, which sounds like a good idea on the surface.

But our job is to examine the actual text of the legislation. When one strips away the First Amendment sheen from H.R. 2304, it is clear that this is yet another measure intended to severely impede the ability of those with legitimate claims to obtain justice in court.

The bill accomplishes this objective in several respects.

To begin with, the bill's "special motion to dismiss" procedure would make it exceedingly difficult, if not impossible, for even legitimate claims to avoid dismissal.

To prevent dismissal, a plaintiff must prove that he or she is "likely to succeed on the merits," even though discovery has been stayed in the case.

Such a burden may be almost impossible to meet, even if a court should find "good cause" to permit "specified discovery," as the bill allows.

The plaintiff's burden in avoiding dismissal would be substantially higher than in a regular motion to dismiss under Rule 12 or a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

And, even if the special motion to dismiss were meritless, this procedure – combined with the availability of interlocutory appeals under this bill – would significantly delay resolution of a plaintiff's potentially meritorious claims and drive up litigation costs to the point where it would be cost-prohibitive.

In short, the bill would make it *too* burdensome and *too* expensive to continue litigation in many cases, including those asserting meritorious claims.

It could also dissuade those with meritorious claims from even filing suit in the first place.

Compounding this concern about the effects of the special motion to dismiss is the fact that as a result of H.R. 2304's exceedingly broad scope, civil rights and whistleblower cases, among others, would be threatened.

The bill allows a defendant in any lawsuit that "arises from" expression or an act in furtherance of such expression "in connection with an official proceeding or about a matter of public concern" to file a "special motion to dismiss" the lawsuit.

In turn, the bill broadly defines "matter of public concern" to include, among other things, *any issue* related to "health or safety," "community well-being," "the government," or "a good, product, or service in the marketplace."

As a result, H.R. 2304 could apply, for example, to a sexual harassment claim under Title VII of the Civil Rights Act of 1964.

It could also apply to private *qui tam* lawsuits brought under the False Claims Act to fight fraud against taxpayers, which are crucial to that law's enforcement scheme.

In short, the bill could effectively preclude plaintiffs from pursuing legitimate claims in the kinds of cases that I and many others care about.

Finally, H.R. 2304's removal provisions are unconstitutional and represent a deep intrusion into state sovereignty.

For example, the bill currently authorizes removal of purely state-law claims to federal court in the absence of diversity jurisdiction or the presence of a federal question, which goes beyond the bounds of Article III of the Constitution.

But even if these constitutional infirmities are cured, it would simply be bad policy to empower federal courts to decide a potentially broad range of state law matters.

Removal of a state court case to federal court always implicates federalism concerns, which is why the federal courts generally disfavor federal jurisdiction and read removal statutes narrowly.

By intruding deeply into state sovereignty, the bill's removal provisions violate our fundamental constitutional structure.

Notwithstanding these serious concerns, I do look forward to hearing from our witnesses today and thank them for their participation.

Mr. FRANKS. Now before I introduce the witnesses, I would like to submit several items into the record.

The first submission includes a letter, a statement, and an L.A. Times editorial from the Public Participation Project in support of H.R. 2304; a second is a letter from law professors in support of the bill.

Third is a joint letter in support of the bill from several Internet-based companies and related businesses.

Fourth is the written testimony of George Freeman, executive director of the Media Law Research Cente.

Fifth is a statement of David Diesenfeld, who is an attorney in California, in support of the bill.

Sixth is a written statement from Tom O'Brian, Deputy General Counsel of Glassdoor Incorporated, in support of the bill.

Seventh is a letter in support of the bill from the Internet Association.

Eighth is a statement from Tracy Rosenberg, executive director of the Media Alliance, in support of the bill.

The ninth and last is a statement from Daniel O'Connor, vice president of Public Policy at the Computer and Communications Association's support of the bill.

And without objections, these statements will be entered into the record.*

So now let me introduce our witnesses. Out first witness is Aaron Schur. Mr. Schur is the senior director of litigation at Yelp Incorporated.

Our second witness is Bruce D. Brown. Mr. Brown is the executive director of the Reporters Committee for Freedom of the Press.

Our third witness is Alexander Reinert. Mr. Reinert is a professor of law at the Benjamin N. Cardozo School of Law in New York City.

Our fourth and final witness is Laura Prather. Ms. Prather is a partner in the litigation practice group in the Austin office of Haynes and Boone, LLP.

Each of the witnesses' written statements will be entered into the record in its entirety, and I would ask that each witness summarize his or her testimony in 5 minutes or less; and to help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

So before I recognize the witness, it is the tradition of the Subcommittee that they be sworn, so if you would please all stand to be sworn.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God? You may be seated. Let the record reflect that the witnesses answered in the affirmative.

And I will now recognize our first witness, Mr. Schur. And, Mr. Schur, if you would make sure you turn that microphone on before speaking, sir.

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*__Note:__ The submitted material is not printed in this hearing record but is on file with the Subcommittee, and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=105106

TESTIMONY OF AARON SCHUR, SENIOR DIRECTOR OF LITIGATION, YELP INC.

Mr. SCHUR. Thank you very much, and good afternoon, Chairman Franks, and Members of the Subcommittee. Thank you for the opportunity to appear before you to discuss the "SPEAK FREE Act of 2015." My name is Aaron Schur, and I am the senior director for litigation at Yelp, an online platform dedicated to connecting people with great local places. In this role, I am responsible for Yelp's litigation defense, which in many cases involves Yelp being sued solely for its role in allowing consumers to speak out about local businesses online, including cases where users themselves are named as our codefendants.

I am also responsible for making sure Yelp appropriately evaluates and makes proper objections to subpoenas we receive each month from plaintiffs seeking Yelp's users' personal information in order to press legal claims, often without substance. Additionally, I help our user support team respond to users who have been sued, and aid them in finding counsel to take up their cases. This is particularly difficult, and sometimes impossible, when a defendant has limited or even average means.

People frequently share their opinions and experiences, including about local businesses, with their friends and family. For an offline example, imagine the following scenario: a new restaurant opens up in your neighborhood, and you are first in line to try it. After dinner, you leave the restaurant happy and full. Your food was great, the staff was responsive, and the atmosphere was lively.

A week later, when your friends ask you where you should go to dinner, you tell them about your experience at this restaurant, and you recommend that they should go, too. Online, this type of feedback is amplified. Your review of a restaurant or any number of services or products can now be read by hundreds, or even thousands or millions of others.

Just because users have access to a larger audience online, which sites like Yelp enable, it does not mean they lose their right to free speech. Yet some businesses use strategic lawsuits against public participation, the meritless lawsuits that we call SLAPPs, to silence their critics, diminishing their ability to exercise their First Amendment rights.

The SPEAK FREE Act seeks to prevent this, ensuring that honest speakers have a way to quickly and economically end meritless lawsuits targeting them for what they have said, regardless of where they live, or whether the claims at issue are considered under Federal or State law.

More than 100 million reviews have been posted to Yelp, and with people writing and reading reviews at an increasing rate, about half of these were written over the last 2 years. On Yelp, businesses also have the opportunity to publicly or directly respond to their customers, analyze consumer feedback, and share their own experiences and stories.

The interaction between business and consumer is a laboratory of speech in response to speech, exactly what the First Amendment is supposed to protect. But in recent years, Yelp has observed an increase in the number of businesses using SLAPPs to silence their critics. We also regularly hear from users Nationwide who have

been targeted for their honest opinions about industries across the spectrum, including pet sitters, flooring companies, and dentists.

Here is an example of a threat a user from New York reported to us less than a week ago: "I wrote a review on a dentist's page. He sued me for that review for $100,000. Although what I wrote was true, I agreed to take that review out because I cannot afford the lawsuit fee. The dentist said he would stop the lawsuit if I removed the review."

While statements of honest opinions and truthful experiences are not bases for liability in this country, unfortunately we have seen that even the simple threat of a lawsuit is a highly effective tool to get users to remove their reviews from consumer advocacy sites like Yelp. The specter of lopsided litigation against an opponent with better financial resources is simply more than the average person is willing to take on, especially as winning provides no mechanism to recoup legal expenses.

It is simply easier for the average person to take down his or her review, a fact some businesses and their lawyers know full well. These businesses face very little risk in bringing meritless lawsuits with solely the goal of removing information from public view.

Such actions have a chilling effect on the targeted consumer, who is less likely to share his or her experiences in the future, and may also ward off other consumers who think that the potential cost of speaking their mind is too great. By discouraging public discourse, these businesses artificially inflate their reputation, leading to a skewed and unbalanced marketplace.

Those people able and willing to defend their cases must still bear the burden of substantial legal fees before their words are vindicated in court. And there is seldom a mechanism to recover those fees, leaving them doubly harmed, first by the original poor service received from the business, and second, by the financial drain of a lawsuit.

Thus the fee-shifting component of the SPEAK FREE Act is of critical importance, as it deters meritless cases in the first instance, incentivizes attorneys to take cases on behalf of those who could not otherwise afford a defense, and enables those who have the means to defend themselves, an opportunity to be made whole when they prevail in court.

When a business uses a SLAPP to threaten or intimidate a consumer, it discourages public discourse and harms the online information ecosystem. The benefit of transparency, which is what online review platforms provide, is having a more perfect feedback loop. Consumers share their experiences with businesses, and businesses engage with their consumers in efforts to understand what they are doing right, or should consider improving.

In conclusion, Mr. Chairman, Yelp is dedicated to protecting free speech rights online. We strongly support the SPEAK FREE Act, because it strengthens those protections, and look forward to working with you and other Members of this Committee as this legislation moves forward. I welcome your questions on this important topic.

[The prepared statement of Mr. Schur follows:]

[WRITTEN TESTIMONY]
Statement of Aaron Schur
Senior Director of Legal
Yelp

Hearing before the U.S. House Subcommittee on Constitution and Civil Justice on H.R. 2304, the "SPEAK FREE Act."

June 22, 2016

INTRODUCTION

Good afternoon Chairman Franks, Ranking Member Cohen, and members of the Subcommittee on Constitution and Civil Justice. Thank you for the opportunity to appear before you to discuss the SPEAK FREE Act of 2015.

My name is Aaron Schur, and I am the Senior Director of Litigation at Yelp, an online platform dedicated to connecting people with great local places. In this role, I am responsible for Yelp's litigation caseload, which often involves Yelp being sued solely for its role in allowing consumers to speak out about local businesses online, including cases where users are named as our co-defendants. I am also responsible for making sure Yelp appropriately evaluates and makes proper objections to the several subpoenas we receive each month from plaintiffs seeking Yelp users' personal information in order to press legal claims, most often without substance, against them. Additionally, I help our User Support team respond to users that have been sued, and occasionally aid them in finding counsel to take up their cases. Locating effective representation in these cases is particularly difficult, and sometimes impossible, when a defendant has limited or even average means.

People frequently share their opinions and experiences, including about local businesses, with their friends and family. For an "offline" example, imagine the following scenario: A new restaurant opens up in your neighborhood and you're first in line to try it. After dinner, you leave the restaurant happy and full. The food was great, the staff was responsive, and the atmosphere was lively. A week later, when a few friends ask you where they should go for dinner, you tell them about your experience at this restaurant and recommend that they should go.

Online, this type of feedback is amplified. Your review of a restaurant or any number of services and products can now be read by hundreds (or even thousands or millions). Many of those readers will rely on that review to help them make a more informed purchasing decision. On Yelp, about 78% of the time, these reviews focus on what is being done right (and correspondingly are rated three stars or above). This immediate and direct consumer feedback also inserts transparency into the marketplace, allowing businesses to improve their products or services accordingly.

Just because users have access to a larger audience online, which sites like Yelp enable, doesn't mean they lose their free speech rights. Yet, some businesses use Strategic Lawsuits Against Public Participation (SLAPPs) to silence their critics, neutralizing their ability to speak freely.

Pamela Boling is a SLAPP victim.[1] In 2015, she left a Yelp review of a local tax prep company. The review was critical but represented Jennifer's honest and first-hand experience with the company. For sharing her opinion, the business hit her with a SLAPP. Being from Nevada, a state with a recently strengthened anti-SLAPP law, Pamela was able to introduce a special motion to dismiss the case because it lacked merit. A judge found in her favor, and awarded her attorney' fees under Nevada's anti-SLAPP law.

Matthew White is another SLAPP victim.[2] He left a Yelp review of a flooring company in Colorado, sharing his complaints about the service he received. Six months later, he was hit with a SLAPP, and while he initially pursued the case, the exorbitant costs he incurred forced him to settle, although he continued to maintain his review was truthful. Colorado has no anti-SLAPP law, and so Matthew had no way to efficiently and cost-effectively resolve his case early.

This discrepancy in options and outcomes is one reason why the SPEAK FREE Act is critical to ensuring that consumers nationwide are on equal footing when faced with lawsuits challenging their ability to publicly and honestly express their opinions.

Yelp regularly hears from users nationwide targeted for their honest opinions, here is a small sample of the threats our user community has reported to us over just the past few weeks, in their own words (I have anonymized these reports, and edited them for brevity):

June 16, 2016: Yelp User From New York

I wrote a review on [a Dentist's] page. He sued me for that review for $100,000. Although what I wrote was true, I agreed to take that review out because I [can't] afford [the] lawsuit fee. The dentist said he would stop [the] lawsuit if I remove the review.

May 18, 2016: Yelp User From Florida

I have already spoken to my lawyer, and I will . . . keep [Yelp] in the loop. It is sad that some [Y]elpers might be naturally intimidated into removing a low star review after a threat by a

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[1] Techdirt (Apr. 12, 2016), https://www.techdirt.com/articles/20160410/10523934143/tax-prep-company-tries-to-sue-unhappy-customer-into-silence-hit-with-damages-anti-slapp-order.shtml/; Tim Cushing, *Tax Prep Company Tries To Sue Unhappy Customer Into Silence; Hit With Damages In Anti-SLAPP Order.*

[2] Fox31 Denver (May 18, 2015), http://kdvr.com/2015/05/18/yelp-review-gets-couple-sued/; Rob Low, *Yelp review gets couple sued.*

business owner. I suppose that I have an unusual situation in that our family... already has a team of corporate lawyers that I can connect with.

May 16, 2016: Yelp User From Virginia

[A Dentist] has threatened me with a huge lawsuit if I don't take the review down. Also, he is falsely accusing me of defamation . . . Everything I wrote in the review and updates are true. I have paid receipts from them for the work I originally came in for.

This last reviewer from Virginia also flagged to Yelp the specific threat the business made through Yelp's messaging system, which began as follows:

The "truth" can be an expensive defense in a courtroom and the burden of proof is on you to prove what you write happened.

This threat starkly shows the danger of SLAPPs, leveraging the threat of expensive proceedings to manipulate others. When we receive these kinds of reports, we try and connect the users with legal resources, but in cases like the above, where the forum state has no strong anti-SLAPP law, it is extremely difficult to obtain affordable legal assistance. Truth should not be an "expensive defense" for someone honestly exercising his or her right of free speech. Anti-SLAPP laws reduce the impact of threats like these by offering a mechanism to quickly end meritless cases, clearly articulate the relative burden for each party in the case, and greatly lessen the financial risks a speaker and their lawyer take to stand behind honest statements.

SLAPPs can also take the form of federal claims. In *Lee v. Makhenevich*, a 2013 case in the U.S. District Court for the Southern District of New York, a dentist hired a lawyer to send letters to a Yelp reviewer threatening copyright damages of $100 for each day a critical review of her dental practice remained online. The Yelp reviewer brought a declaratory judgment action to shed light on this practice, and won.

In *Garruto v. Longo*, a 2012 case in U.S. District Court for the District of New Jersey, a Yelp reviewer who wrote a critical review of a pet store was targeted with a meritless claim under the Anticybersquatting Consumer Protection Act. That claim was ultimately dismissed.

And last year, in the California federal courts, Yelp obtained dismissal of *Jeung v. Yelp Inc.*, a meritless SLAPP brought under the Fair Labor Standards Act asserting that any consumer that posted a review on Yelp must be considered a Yelp employee and entitled to payment, a nonsensical litigation strategy designed to make Yelp's review platform financially unsupportable.

SLAPPs are a large problem, TripAdvisor — a peer review site — estimates that about 2,500 of their users in 2015 reported wanting to remove a review in response to harassment from from businesses. This number is undoubtedly low, as many more users likely removed their reviews without taking the time to inform TripAdvisor of their reasons for doing so.

The SPEAK FREE Act will ensure that honest speakers have a way to quickly and economically end meritless lawsuits targeting them for what they have said — regardless of where they live or whether the claims at issue are asserted under federal or state law. Protecting consumers from SLAPPs is essential to fostering a growing online economy and ensuring everyone is able to exercise their Constitutional right to free speech.

ABOUT YELP AND THE VALUE OF ONLINE REVIEWS

Yelp is a go-to source for finding great restaurants, doctors, mechanics, and more. Currently, our platform currently averages more than 21 million mobile app users, 69 million mobile web visitors, and 77 million desktops visitors each month. Yelp users have posted more than 100 million reviews, and with people writing and reading reviews at an increasing rate, over half of these were written in the last two years. On Yelp, businesses also have the opportunity to respond to their customers (publicly if they like), analyze consumer feedback, and, when necessary, share their own experiences and stories.

As a company that thrives on user participation, Yelp's success — and the success of other online user-generated platforms — highlights the reliance people place on access to the experiences and opinions of others. With increased access, people are able to make better informed decisions on how they're going to spend their money and time.

This is supported by a 2015 study, which concluded that nearly 70% of all American shoppers rely on online reviews before making a purchase.[3] Additionally, in a study commissioned by Yelp in 2014, Nielsen found that 4 out of 5 of our users visit Yelp with the intention of buying a product or service. Of those who end up making a purchase, 85% do so within a week of viewing our site. Similar numbers can be found across review platforms and industries. When deciding which television to buy, restaurant to patronize, or company to work at, reviews serve an important role in the public's decision-making process.

HOW SLAPPS HURT CONSUMERS

In recent years, Yelp has observed an increase in the number of businesses using SLAPPs to silence their critics.

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[3] The Consumerist (Jun. 3, 2015), https://consumerist.com/2015/06/03/nearly-70-of-consumers-rely-on-online-reviews-before-making-a-purchase/; Ashlee Kieler, *Nearly 70% Of Consumers Rely On Online Reviews Before Making A Purchase.*

While statements of honest opinion and truthful experience are not bases for liability in this country, unfortunately, we've seen that even the simple threat of a lawsuit is highly effective at getting users to remove their reviews from consumer advocacy sites like ours. The spectre of lopsided litigation against an opponent with better financial resources is simply more than the average person is willing to take on, especially as even a successful defense generally provides no mechanism to recoup legal expenses.

Consumers don't expect to be threatened with a lawsuit for sharing their opinion online, and they certainly aren't prepared to take on the steep price tag that accompanies litigation. It is much easier for the average person to take down his or her review, a fact some businesses and their lawyers know full well and exploit accordingly. These businesses face very little risk in bringing meritless lawsuits with solely the goal of removal in mind. Such actions have a chilling effect on the targeted consumer who is less likely to share his or her experience in the future, and may also ward off other consumers. Further, by discouraging public discourse, these businesses artificially inflate their reputation, leading to a skewed and unbalanced marketplace.

Those people who are able and willing to defend their cases still must bear the burden of substantial legal fees before their words are vindicated in court, and there is seldom a mechanism to recover those fees, leaving them doubly harmed — first by the original poor service received, and second by the financial drain of the lawsuit. Thus, the fee shifting component of the SPEAK FREE Act, which mirrors similar provisions in several state anti-SLAPP laws, is of critical importance, as it deters meritless cases in the first instance, incentivizes attorneys to take cases on behalf of those who could not otherwise afford a defense of even a meritless case, and enables those who have the means to defend themselves an opportunity to be made whole when they prevail before the court.

When a business uses a SLAPP to threaten or intimidate a consumer, that business is discouraging public discourse and harming the online ecosystem. The benefit of transparency — which is what online review platforms provide — is having a more perfect feedback loop. Consumers are sharing their experiences with products and services, and businesses are engaging their consumers in efforts to understand what they're doing right or may need to improve.

For years, Yelp has been fighting to expand the protections of consumer free speech in courts and legislative bodies across the country. This is not only to protect our users from SLAPPs, but to protect the entire internet ecosystem from frivolous attacks against free speech. Any online speech can be the target of these meritless lawsuits, including speech shared on social media platforms, in blogs, and in news publications. With the intent of silencing a critic, businesses, powerful individuals, and even interest groups are throwing around their weight and abusing the legal system to their advantage. All of this comes at the expense of consumers and the online communities in which their opinions flourish.

CONCLUSION

In conclusion, Mr. Chairman, Yelp is dedicated to protecting free speech rights online. We strongly support the SPEAK FREE Act and look forward to working with you and other members of the Committee as this legislation moves forward.

I welcome your questions on this important topic.

Mr. FRANKS. Well, thank you, Mr. Schur. And I now recognize our second witness, Mr. Brown. And sir, you would also turn on that microphone.

TESTIMONY OF BRUCE D. BROWN, EXECUTIVE DIRECTOR, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Mr. BROWN. Thank you, Mr. Chairman, and Members of this Committee. I am Bruce Brown, executive director of the Reporters Committee for Freedom of the Press. The Reporters Committee has been, since 1970, defending the First Amendment rights of journalists and news organizations. We typically get involved in SLAPP cases when we do pro bono friend of court or amicus briefs in different cases around the country where SLAPP statutes are at issue, and I have detailed in my written statement some of those cases in recent years.

I was last before the Judiciary Committee in 2009, testifying in support of legislation to counter the threat from libel tourism that became known as the SPEECH Act. And I would suggest that the SPEECH Act is a good model for what Congress can do in the anti-SLAPP area.

In the libel tourism area, there were concerns that libel litigation in foreign courts was being used strategically to deter the exercise of First Amendment rights. Congress then initiated and enacted a series of reforms to make libel tourism less attractive to plaintiffs who are taking advantage of an end-run around the First Amendment and due process. It provides defendants with a mechanism to seek to declare those judgments unenforceable in the United States. It provides for attorneys' fees to a defendant who is successful in doing so. And it contains a removal provision for enforcement actions brought in State court.

The point was not that every foreign lawsuit arising out of SPEECH Activity is inherently meritless, and must be stopped. Rather, the SPEECH Act contains provisions to allow the plaintiff who has a legitimate case to prevail. And the law did not, in its final form, authorize counter-suits, as some had initially suggested.

Rather, by establishing some modest new rights, Congress tilted the scales slightly more in the direction of protecting speech. And generally speaking, with this new deterrence in place, we are hearing a lot less about libel tourism today.

Congress should take similar action through H.R. 2304, an anti-SLAPP legislation, in order to make plaintiffs think twice before filing a meritless suit attacking speech on a matter of public concern. By creating new substantive rights to protect expression, Congress would be doing with domestic cases what it did with foreign cases in the SPEECH Act.

As I noted in my written submission, the availability of anti-SLAPP remedies in Federal court diversity cases, along with interlocutory review, are two key provisions that would strengthen the ability of all speakers, from the kinds of publishers and journalists we might work with at the Reporters Committee, to all Internet bloggers, community activists, and other speakers, to fend off meritless cases while at the same time ensuring that cases with merit are not unreasonably blocked from moving forward.

Before coming to the Reporters Committee, I defended a city paper reporter sued by Washington Redskins owner Dan Snyder for libel. Along with counsel representing the newspaper, we believe the newly-enacted, the then-newly-enacted D.C. anti-SLAPP bill, and our motion under the new law, led to Mr. Snyder's rather abrupt, excuse me, decision to withdraw his suit before his allegations could be tested in court and subject to the SLAPP back. The deterrent effect of these laws can be very significant, even to Mr. Snyder.

Thank you again for the opportunity to testify, and I look forward to answering your questions here, or by supplementing the record after the hearing. Thank you.

[The prepared statement of Mr. Brown follows:]

Testimony of Bruce D. Brown
Executive Director
The Reporters Committee for Freedom of the Press

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).

Mr. FRANKS. Thank you, sir. And I would now recognize our third witness, Mr. Reinert. And, sir, make sure that microphone is on.

TESTIMONY OF ALEXANDER A. REINERT, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW

Mr. REINERT. It is. Thank you, Chairman Franks, Members of the Subcommittee. Good afternoon. I am Alex Reinert; I am a law professor at the Benjamin N. Cardozo School of Law. Thank you for inviting me to testify here today regarding H.R. 2304, the "SPEAK FREE Act of 2015."

Mr. Chairman, I like Yelp; I use it. I am sure James Madison would have liked it, too. I cannot imagine he would have liked it so much that he would have been willing to throw overboard Article III, the Seventh Amendment, and State sovereignty on the basis of a potential problem that has been supported only by anecdotes, and neither should this Subcommittee. And respectfully, the Constitution does not permit you to do so.

So I want to start with the constitutional problems with this Act. First, the legislation runs afoul of the Constitution on jurisdictional grounds. Section 4206(a) authorizes removal from State to Federal court of purely State law claims in the absence of diversity of citizenship between the parties.

There is no beating around the bush with respect to this provision. Congress cannot expand district court jurisdiction beyond the bounds of Article III, section 2; and Section 4206(a) does just that.

Removal of Federal question or diversity claims would be permissible, but that is already covered by 28 USC, Section 1441. So to the extent that 4206(a) expands removal power to State law claims between non-diverse parties, it is unconstitutional, flatly.

Section 4206(b) is just as problematic, if not more, because it appears to give non-parties the power to remove a case from State court to Federal court if that non-party's personal identifying information is sought by one of the parties.

Aside from the intrusion on litigant autonomy, let's recall that if I am a defendant, and I want to remove a case from State court to Federal court, I cannot do it by myself, I need the other defendants to agree. That is because we care about litigant autonomy.

So first of all, aside from the intrusion on litigant autonomy occasioned by a non-party removing the case, there is simply no basis for Federal jurisdiction extending to a non-party's objection to particular discovery being sought in State court.

The constitutional difficulties are not just jurisdictional, they are substantive as well. The special motion to dismiss, in Section 4202(a), contemplates dismissal with prejudice, pre-discovery, if the plaintiff cannot meet the burden of showing "that the claim is likely to succeed on the merits."

I am aware of no other instance in which a plaintiff has been asked to demonstrate a likelihood of success on the merits in order to survive a motion to dismiss. That is because it is unconstitutional. The standard at summary judgment after discovery, the well-worn standard on summary judgment after discovery, is that a plaintiff need only show that a reasonable jury could find for her. Not that a reasonable jury is more likely than not to find for her.

And so the reason that the proposed standard has never been used in Federal court to filter a claim at the pre-discovery stage is because it is inconsistent with the Seventh Amendment, as the District of Minnesota has said recently, and as State courts have agreed with respect to State anti-SLAPP laws with respect to their own State protections of the right to jury trial.

There also are several difficult constitutional questions about whether Congress has the authority to accomplish the substantial displacement of State law and authority that would accompany H.R. 2304. I have covered these in detail in my prepared written remarks, and I will not linger too much on them.

But I will say, in Mr. Brown's written statement, he has testified that he supports H.R. 2304 because he thinks that the substantive laws of the States that have anti-SLAPP laws should be accorded respect in Federal court. That is the opposite of what H.R. 2304 does. It does not accord respect to any State law. It displaces all State law regarding SLAPPs.

So let us assume that the constitutional objections can be overcome somehow, which I think is doubtful, but possible. Still, one must ask whether this displacement of State law inherent in H.R. 2304 is appropriate or necessary from a policy perspective.

And I will say, the stated rationale of its proponents is that this is merely taking anti-SLAPP laws and putting them at the Federal level. This is not a traditional State anti-SLAPP law; it covers grounds that are far beyond the original definition of a SLAPP suit; and the proponents base their support for the legislation on mere anecdotes.

So with respect, a statute that unconstitutionally expands the jurisdiction of the Federal courts, significantly burdens and imperils important civil rights and allied litigation, imposes new and unprecedented procedures in Federal court, and displaces State sovereignty, should not advance based on anecdotes alone.

Once again, I thank you for the opportunity to testify here today, and I look forward to your questions.

[The prepared statement of Mr. Reinert follows:]

Prepared Statement of Alexander A. Reinert

Professor of Law
Benjamin N. Cardozo School of Law

Hearing on H.R. 2304, the SPEAK FREE Act of 2015

Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives

June 22, 2016

Chairman Franks, Ranking Member Cohen, and members of the Subcommittee. Thank you for inviting me to testify today regarding H.R. 2304, the SPEAK FREE Act of 2015. The proposed legislation will impose significant barriers to important civil rights and public interest litigation and introduce unwarranted and unprecedented changes to the procedures by which cases are adjudicated in federal court. It is an unwarranted intrusion into states' rights and is almost certainly unconstitutional. There is no evidence that the problem H.R. 2304 is trying to solve actually exists on a scale sufficient to justify any legislation, but even if such evidence were presented H.R. 2304 is so broad and disruptive that the game is not worth the candle. It would require substantial amendments for H.R. 2304 to be both constitutional and an appropriate piece of legislation.

INTRODUCTION

H.R. 2304 purports to target "Strategic Lawsuits Against Public Participation," also known as "SLAPP suits." Anti-SLAPP measures are currently in effect in some 28 states, and as a general matter seek to protect individuals who exercise their right to petition the government to address pressing social problems. Anti-SLAPP laws were put into place because of the concern that some people refrained from speaking on important issues because of the concern for defamation liability and related torts. It should be noted that even in the limited form in which they currently exist in some states, there is no empirical evidence that anti-SLAPP measures actually accomplish their original purpose; indeed, close observers have noted that anti-SLAPP laws have become just another tool for powerful interests to delay justice in meritorious cases. In any event, H.R. 2304 takes the rationale behind state anti-SLAPP measures, federalizes it, and then expands the coverage of anti-SLAPP legislation beyond all recognition. What it creates is a tool that is bound to be abused against important litigation, that will burden the federal courts with additional cases and motion practice, and that is almost certainly unconstitutional.

It is ironic that H.R. 2304 would imperil the very right to petition that original anti-SLAPP measures were meant to protect. For one aspect of the right to petition is "the right of individuals to appeal to courts and other forums . . . for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011). Yet H.R. 2304 would, in the name of protecting this right, impose substantial obstacles and penalties against individual litigants bringing important public interest cases in federal and state court. Enacting H.R. 2304 in its current form would be a grave mistake.

By way of background, I teach and conduct research in the areas of civil procedure, federal courts, and constitutional law. Some of my scholarship has focused on how courts interpret and apply procedural rules, in particular some of the kinds of rules implicated by H.R. 2304. I also have litigated civil rights cases in federal court for more than 15 years, full-time while in private practice and part-time since I became an academic. I appear before this Subcommittee in my individual capacity. As my home institution's guidelines require, I attest that my testimony is not authorized by and should not be construed as reflecting the position of the Benjamin N. Cardozo School of Law.

I. The Unwarranted Breadth of H.R. 2304

A. H.R. 2304's Plain Language Will Threaten Many Civil Rights and Related Claims That Should Not Be Considered SLAPP Suits

The failings of H.R. 2304 begin with its broad definition of a SLAPP suit. Whereas most state anti-SLAPP laws link their definition of SLAPP suits to an individual's exercise of her right to petition the government to address public grievances,[1] H.R. 2304's definition is extremely broad. It covers any claim that "arises from an oral or written statement or other expression, or conduct in furtherance of such expression" where the expression "was made in connection with an official proceeding *or* about a matter of public concern." H.R. 2304 § 4201 (emphasis added). No definition of "official proceeding" is contained in H.R. 2304, which is problematic on its own.[2] This problem is trivial given that "matter of public concern" is defined broadly to mean "an issue related to . . . health or safety; . . . environmental, economic, or community well-being; . . . the government; . . . a public official or public figure; or . . . a good, product, or service in the marketplace." H.R. 2304 § 4208.

Read broadly, as the drafters have instructed courts to do, H.R. 2304 will sweep within its ambit speech and conduct that is not protected by the First Amendment. It will apply to a wide range of undoubtedly non-SLAPP claims, including civil rights, employment discrimination, whistleblower, securities fraud, antitrust, and products liability cases. For example, securities fraud claims have been brought against BP for the company's statements to the government about how much oil was leaking from its drilling platform before the Deepwater Horizon explosion. The United States Supreme Court has permitted similar claims to go forward based on a defendant's failure to disclose certain adverse events associated with a product. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 30-31, 131 S. Ct. 1309, 1313-14, 179 L. Ed. 2d 398 (2011) (finding that plaintiff stated valid securities claim). Antitrust claims have been brought against name-brand pharmaceutical companies that file baseless patent lawsuits against generic competitors to delay entry into the market of generic drugs and then settle the cases by agreeing to pay the generic competitors to delay entry into the market. *See FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). These types of claims would be based on statements made "in connection with an official proceeding or about a matter of public concern." H.R. 2304 § 4201. And whistleblower claims almost always will arise from communications covered by the proposed legislation. *See, e.g., United States ex rel. Blaum v. Triad Isotopes, Inc.*, 104 F. Supp. 3d 901, 914-15 (N.D. Ill. 2015) (whistleblower case based on false statements made to government); *Hansen v. California*

[1] Of the 28 states that have enacted anti-SLAPP measures, 23 tie the anti-SLAPP procedures to claims involving the right to petition through participating in governmental proceedings in some way, usually in precise language. *See, e.g.*, Ariz. Rev. Stat. § 12-751(1); Ark. Code Ann. § 16-63-503(1); Cal. Civ. Proc. Code § 425.16(b)(1); Del. Code Ann. tit. 10, § 8136(a)(1); Fla. Stat. Ann. § 768.295(2)(a); Ga. Code Ann. § 9-11-11.1(c); Haw. Rev. Stat. § 634F-1; 735 Ill. Comp. Stat. Ann. 110/15; Ind. Code Ann. § 34-7-7-2; Me. Rev. Stat. Ann. tit. 14 § 556; Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(1); Mass. Gen. Laws Ann. ch. 231, § 59H; Minn. Stat. Ann. § 554.01(6); Mo. Ann. Stat. § 537.528(1); Neb. Rev. Stat. Ann. § 25-21,242(1); Nev. Rev. Stat. Ann. § 41.637; N.M. Stat. Ann. § 38-2-9.1(A); N.Y. Civ. Rights Law § 76-a(1)(a); Okla. Stat. Ann. tit. 12, § 1443.1(A); 27 Pa. Stat. and Cons. Stat. Ann. § 8301 (limited to environmental issues); 9 R.I. Gen. Laws Ann. § 9-33-2(e); Tenn. Code Ann. § 4-21-1003(a); Utah Code Ann. § 78B-6-1402(4); *see also* D.C. Code Ann. § 16-5501.

[2] Texas, by contrast, has at least attempted to define what constitutes an official proceeding through its definition of the "right to petition." Tex. Civ. Prac. & Rem. Code Ann. § 27.001(4)(A)).

Dep't of Corr. & Rehab., 171 Cal. App. 4th 1537 (Cal. Ct. App. 2008) (applying California's anti-SLAPP statute to whistleblower retaliation claim). H.R. 2304 would impose significant hurdles for plaintiffs to overcome when pursuing such claims, even though they are far removed from the alleged purpose of anti-SLAPP laws.

Most concerning, however, H.R. 2304 would substantially burden important civil rights litigation that Congress has affirmatively sought to incentivize through specific legislation. A large proportion of civil rights and employment discrimination cases are based in whole or in part on statements or conduct that would be encompassed by H.R. 2304's broad reach. One example is a case like *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996), which held that Title VII's anti-retaliation provision protected an African-American employee against whom an employer filed false criminal charges because the employer believed he was going to file an EEOC charge. Under H.R. 2304, the plaintiff's claim would arise from a statement "made in connection with an official proceeding" (the false criminal prosecution) or "about a matter of public concern." H.R. 2304 § 4201. As such, claims like Mr. Berry's would be subject to a special motion proceeding. Placing such barriers against important civil rights claims would at best delay adjudication of the controversy and at worse saddle plaintiffs with the defendant's attorneys' fees, perhaps chilling people from filing suit in the first place.

In addition, Title VII claims based on the creation of a hostile work environment are almost always based on oral or written statements that would fall within H.R. 2304. *See, e.g.*, *Macias v. Sw. Cheese Co., LLC*, 624 F. App'x 628, 631 (10th Cir. 2015) (involving gender-based hostile work environment claims based on statements and conduct by co-worker); *Aponte-Rivera v. DHL Sols. (USA), Inc.*, 650 F.3d 803, 806-07 (1st Cir. 2011) (upholding jury verdict for hostile work environment claim where supervisors routinely denigrated women's ability to serve in authority positions); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 66-68 (2d Cir. 2000) (finding summary judgment improper where there was evidence that co-worker made racist comments about non-white employees and complaints to supervisors were disregarded). Indeed, one of the Supreme Court's seminal cases on sex discrimination, *Faragher v. City of Boca Raton*, 524 U.S. 775, 780-81 (1998), involved the plaintiffs' claim that that the City and its employees had created a hostile work environment "by repeatedly subjecting Faragher and other female lifeguards to 'uninvited and offensive touching,' by making lewd remarks, and by speaking of women in offensive terms." The complaint contained specific allegations that one supervisor once said that he would never promote a woman to the rank of lieutenant, and that another had told one of the plaintiffs, "Date me or clean the toilets for a year." *Id.* This critically important case in the pantheon of sex discrimination jurisprudence would be categorized as a SLAPP suit under H.R. 2304. *See also Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 63-64 (1992) (plaintiff's claim was based in part on school official's discouraging the plaintiff from pressing charges against a teacher who sexually assaulted the student).

Cases involving discrimination in housing would also be subject to H.R. 2304's special proceedings, even though the Fair Housing Act (FHA) is meant to encourage and support such claims. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412-13 (1968) (involving FHA claim based on statement by defendants that it was their "general policy not to sell houses and lots to Negroes"). Indeed, the FHA specifically prohibits "mak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination

based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C.A. § 3604(c). By definition, then an action brought under Section 3604(c) will be considered a SLAPP suit under H.R. 2304, because it will involve a statement about a "good, product, or service in the marketplace." H.R. 2304 § 4208(1)(E). Thus, a landlord sued under 3604(c) for stating that he did not want to rent to "too many" black people, as in *United States v. Hylton*, 944 F. Supp. 2d 176, 184 (D. Conn. 2013), *aff'd*, 590 F. App'x 13 (2d Cir. 2014), could delay or even obtain an improper dismissal under H.R. 2304. And a well-resourced defendant could recover attorneys' fees for bringing a successful motion to dismiss against a public interest organization seeking to establish liability for the defendant's posting of messages that communicated discriminatory housing advertisements. *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (dismissing Section 3604(c) claim brought on theory that Craigslist was liable for posting discriminatory housing advertisements). This is so even though speech that violates Section 3604(c) is not protected by the First Amendment. *Campbell v. Robb*, 162 F. App'x 460, 472 (6th Cir. 2006).

Many civil rights claims involving alleged violations of constitutional rights often turn on, and arise from, oral or written expressions that would be within the ambit of H.R. 2304. There are countless examples of similar civil rights claims which involve claims based on statements that would be encompassed by Section 4201 of the proposed legislation. *See, e.g.*, *Elmore v. Fulton Cty. Sch. Dist.*, 605 F. App'x 906, 908 (11th Cir. 2015) (police officer intentionally withheld exculpatory information from an affidavit in support of a probable cause, resulting in the plaintiff's unlawful arrest); *Williams v. City of Alexander, Ark.*, 772 F.3d 1307, 1311 (8th Cir. 2014) ("A reasonable jury could find that Walters fabricated the officer's memo and intentionally included a false statement in the affidavit to make good on his promise to 'destroy' Williams."); *Pines v. Bailey*, 563 F. App'x 814, 816 (2d Cir. 2014) (finding that qualified immunity is available in case in which plaintiff alleged that defendant intentionally or recklessly made false statements and omitted material information necessary for the magistrate to make an adequate probable cause determination); *Howard v. Gee*, 538 F. App'x 884, 888 (11th Cir. 2013) ("Viewing the facts in the light most favorable to Howard, Deputy Highsmith violated Howard's Fourth Amendments rights by filing a false incident report that led to Howard's arrest and prosecution."); *Evans v. Chalmers*, 703 F.3d 636, 651 (4th Cir. 2012) (in case brought by exonerated Duke lacrosse team members, dismissing claims against officers even if they included false information in their probable cause affidavits); *Mar. v. Twin Cities Police Auth.*, No. C 14-00512 SI, 2014 WL 3725931, at *12 (N.D. Cal. July 25, 2014) (awarding attorneys' fees to defendants who successfully filed anti-SLAPP motion in false arrest case).

None of these constitutional or statutory claims is a classic SLAPP suit. They are generally brought by individual plaintiffs against powerful government or private interests, and Congress has historically sought to encourage them through affirmative statutory provisions. They are not brought to suppress an individual's participation in public life; to the contrary, they are sometimes the only outlet for disempowered groups to remedy structural inequality. H.R. 2304 would threaten this litigation, to remedy a problem that has not been established in any empirical way.[3] In the civil rights context,

[3] To my knowledge, the only empirical evidence regarding SLAPP suits is both dated and insufficient, amounting to a cumulative study of about 250 cases over a period of many decades. *See* Joseph W. Beatty, *The Legal Literature on SLAPPS: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire!"*, 9

the application of H.R. 2304 would be especially pernicious, because even a plaintiff whose constitutional rights were indisputably violated could have her claim dismissed on qualified immunity grounds, thereby triggering the cost-shifting provisions of H.R. 2304.

B. H.R. 2304 Would Deter Plaintiffs From Filing Important Cases Aimed At Advancing Legal Protections For Disfavored Groups

H.R. 2304 would thus chill plaintiffs from filing cases that, whether successful or not, have been important in moving our law in a positive direction. Consider Lilly Ledbetter, who sued Goodyear Tire and Rubber Company because she was paid less than similarly qualified men. Her lawsuit was dismissed, not because it was unmeritorious, but because of a statute of limitations ruling by the Supreme Court which ultimately was legislatively overruled by the 111th Congress. Ms. Ledbetter's claim would be considered a SLAPP suit under H.R. 2304. Her claims "ar[ose]" out of and "oral or written statement" (namely, the discriminatory performance evaluations) "related to . . . a good, product or service in the marketplace." Indeed, if H.R. 2304 were in effect during the time that Ms. Ledbetter brought her lawsuit, she would have had to pay the defendant's attorneys' fees because she would not have been able to demonstrate a likelihood of success given the defendant's valid statute of limitations defense. Nor, as I will detail below, would Ms. Ledbetter's claim fit within any of the exceptions found in the proposed legislation.

Just as notably, one of the precursors to *Brown v. Board of Education* fits within H.R. 2304's definition of a SLAPP suit and would have been subject to the special procedures contemplated therein. In *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950), the plaintiff challenged the segregated conditions in the University of Oklahoma Graduate School, which were imposed upon him by written conditions communicated to him when he was accepted to the University. *Id.* at 640. Thus, Mr. McLaurin's claim arose from a "communication" regarding a matter of "public concern." H.R. 2304 § 4201. Nor would *McLaurin* be considered a "public interest claim" under the statute, because the plaintiff sought an injunction for his own benefit, not "solely" for the benefit of the general public. If this proposed legislation existed 70 years ago, one of the pillars of *Brown v. Board* may never have been initiated by the plaintiffs.[4]

C. The Fear That H.R. 2304 Will Threaten Important Litigation Is Confirmed By Application of Anti-SLAPP Laws in State Court, and Is Unaddressed By H.R. 2304's Exclusions and Exceptions

I can imagine at least three different responses to these concerns, and I will address each one in turn. First, a proponent of this legislation might claim that the concerns I have expressed are hyperbolic and that there is no reason to fear H.R. 2304 being applied to these kinds of

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U. Fla. J.L. & Pub. Pol'y 85, 88-89 (1997) (describing and critiquing original research that claimed to establish the SLAPP suit "problem").

[4] It would not be difficult to find other examples. *Shelley v. Kraemer*, 334 U.S. 1 (1948), the seminal case establishing that racially restrictive covenants may not be enforced because they amount to discriminatory state action, involved communication that would be covered by this legislation. For in *Shelley*, the dispute centered on the fact that the residential contracts specifically provided that "This property shall not be used or occupied by any person or persons except those of the Caucasian race." *Id.* at 6-7.

claims. As I will demonstrate below, given that state anti-SLAPP statutes – many of them more narrowly drawn than H.R. 2304 -- have been applied to similar civil rights and discrimination claims, there is simply no reason to believe that the proposed legislation will be applied any less broadly. Lawyers use the tools we give them, and if this legislation is passed, any clever lawyer will do her best to find a way to categorize a claim as a SLAPP suit. And given the plain language of the statute, judges will be compelled to give H.R. 2304 a broad scope.

Second, a proponent might respond that the exceptions to the statute, particularly the "public interest" exception, will account for the concerns raised above. In actuality, however, the "public interest" exception is so narrowly drawn, and so far removed from what the legal community would regard as public interest litigation, that it might not ever apply to the types of claims I have described above.

Finally, a proponent might claim that there is no harm to subjecting civil rights and allied claims to H.R. 2304's procedures, because they are only meant to ensure that meritorious SLAPP claims go forward. Even if this were so, the procedures would still impose numerous obstacles to these cases, imposing additional costs and delay that might deter many plaintiffs from proceeding with meritorious cases. In any event, all available empirical evidence demonstrates that there is no reason to believe that the procedures found in H.R. 2304 will actually filter in meritorious claims and filter out meritless ones.

1. The Experience in States with Anti-SLAPP Laws Confirms that It Will Be Applied to Important Civil Rights and Allied Claims

First, for those who believe that this legislation will not be read to apply to important civil rights and public interest litigation, this view cannot be supported by the jurisprudence from those states that have experimented with narrower anti-SLAPP legislation. In California, the anti-SLAPP statute has been applied to fraud claims, employment discrimination claims, and other important civil rights claims. *Hunter v. CBS Broadcasting Inc.*, 221 Cal. App. 4th 1510 (Cal. Ct. App. 2013) (applying anti-SLAPP law to gender- and age-discrimination claim because television station's First Amendment interests were implicated by how it chose to create television programming and therefore whom it chose to hire to deliver programming); *Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002) (applying anti-SLAPP law to fraud claim); *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-CV-03522-WHO, 2015 WL 5071977, at *1 (N.D. Cal. Aug. 27, 2015) (addressing discovery in context of anti-SLAPP motion filed against claim brought by a non-profit, professional association of abortion providers who claimed that defendants "issued allegedly misleading videotapes of NAF members that they had obtained by false pretenses."); *Hansen v. Ca. Dept. of Corrections & Rehabilitation*, 171 Cal.App.4th 1537, 1545–46 (Cal. Ct. App. 2008) (finding a retaliatory discharge claim subject to an anti-SLAPP motion).

Perhaps most striking is the decision in *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414 (9th Cir. 2014). In that case, a disability rights organization filed suit to require that CNN caption videos posted on its web site. The Ninth Circuit held that the action was encompassed by California's anti-SLAPP statute, because it implicated CNN's First Amendment rights. *Id.* at 420-21. Similar examples can be found in how litigants have made use of anti-SLAPP statutes in other states. *Tervita, LLC v. Sutterfield*,

482 S.W.3d 280, 284 (Tex. App. 2015) (applying Texas anti-SLAPP law to plaintiff's employment discrimination and hostile work environment claim); *John v. Douglas Cty. Sch. Dist.*, 219 P.3d 1276 (Nev. 2009) (applying Nevada anti-SLAPP suit to federal employment discrimination claim). Given that state anti-SLAPP statutes have been given this broad reading, the same should be expected of H.R. 2304 if it is enacted.

2. H.R. 2304's Exceptions and Exclusions Will Not Apply to Important Public Interest Claims

Proponents might accept that the statute will be given a broad reading, but argue that the exceptions to the statute's coverage will protect against its use against important civil rights and allied claims. This is wishful thinking, because the exceptions contained in H.R. 2304 do very little to mitigate the breadth of the statute. The commercial speech exception, found in Section 4202(b)(2), is quite limited, and would not, for example, apply to the types of cases I describe above. Statements creating a hostile work environment, making false allegations in criminal proceedings, or expressing racial preferences in housing would not appear to fall within Section 4202(b)(2)'s ambit.

Nor would the "public interest" exception encompass individual civil rights actions, class actions concerning areas in which the federal, state or local governments may also regulate, or many other important areas of litigation. Indeed, it is not clear that the "public interest" exception would encompass any litigation that is justiciable in federal court, given the requirement that any "public interest claim" be brought "solely on behalf of the general public." H.R. 2304 § 4208(3). It is well settled that there is no Article III standing where a plaintiff seeks solely to vindicate the interests of the "general public," as opposed to seeking a remedy for an injury that concretely affects the individual litigants involved. *See, e.g.*, *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). Therefore, if a lawsuit were to seek a remedy "solely on behalf of the general public," it could not even be adjudicated in federal court, rendering H.R. 2304's "public interest" exception dead on arrival. The only litigants who may be able to vindicate the interests of the "general public" in federal court are federal, state, or local entities, but those cases already are captured by the "enforcement actions" exception. H.R. 2304 § 4202(b)(1). This is to say nothing of the vague terms used in the "public interest" exception, such as "an important right affecting the public interest," determining when private enforcement is "necessary," what constitutes a "disproportionate" financial burden, or establishing when litigation has conferred "a significant benefit on the general public." H.R. 2304 § 4208(3).

As a lawyer has conducted public interest litigation for my entire career and as a scholar who conducts research in areas that implicate public interest work, I am skeptical of any attempt to define the outer contours of "public interest" litigation. The public interest community is rich and nuanced – it encompasses traditional "private attorney general" civil rights litigation, employment discrimination cases, structural reform cases, affirmative litigation by governmental entities, antitrust suits, consumer rights claims, and even more. H.R. 2304's "public interest" exception captures almost none of the litigation recognized as public interest by lawyers in the field.

3. H.R. 2304's Procedures Will Not Be An Effective Filter For Meritorious Claims

Finally, a proponent might claim that applying H.R. 2304's procedures to the types of cases I have identified is not a problem, because those cases will survive a special motion to dismiss if they are meritorious. This argument is subject to two rejoinders.

First, there is no evidence to suggest that the heightened procedural barriers imposed by H.R. 2304 will be effective at filtering meritless cases out of court and keeping meritorious cases in. To the contrary, all available empirical evidence suggests that the kinds of procedural barriers the legislation imposes will not reliably assist courts in screening for merit. For example, although heightened pleading standards have been introduced over time through legislation like the Private Securities Litigation Reform Act and through judicial fiat as in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), there is no evidence that increasing the burden on plaintiffs at the pleading stage actually results in higher quality or more meritorious cases. *See generally* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119 (2011) (providing empirical evidence suggesting that heightened pleading standards do not provide a better filter for weeding out meritless cases); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 Va. L. Rev. 2117, 2120 (2015) (reporting data suggesting that pleading standards imposed by *Iqbal* and *Twombly* have not effectively filtered cases based on their underlying merit; Searle Civil Justice Institute, *Measuring The Effects of a Heightened Pleading Standard Under Twombly and Iqbal* vii (Oct. 2013) (finding no significantly significant difference in summary judgment outcomes in employment discrimination cases after comparing pre-Twombly and post-Iqbal cases, while finding a modest improvement in quality in contracts cases);. As I have argued in my scholarship, it is unrealistic to expect federal courts to engage in reliable merits determination at such an early stage of the case, absent discovery or some adversarial testing of evidence. *See generally* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. Pa. L. Rev. 1767 (2014).

Second, even if H.R. 2304 were successful at the margins in filtering some cases based on their merit, the procedures would still impose numerous obstacles to these cases, imposing additional costs and delay that might deter many plaintiffs from proceeding with meritorious cases. Consideration of whether to adopt such procedures requires a consideration of these costs, but it is not clear to me that they have been taken into account in the proposed legislation.

D. H.R. 2304 Is Broader than California's Anti-SLAPP Law, And California's Experience Should Counsel Hesitation Before H.R. 2304 Is Enacted

Although some proponents of H.R. 2304 have claimed that it is modeled on California's anti-SLAPP statute, the two statutes are at best distant cousins. California's law would not encompass nearly as many types of claims as H.R. 2304, because it defines a SLAPP suit more narrowly. California defines a SLAPP as a lawsuit "arising from any act of that person in furtherance of the person's *right of petition or free speech* under the United States Constitution or the California Constitution *in connection with a public issue*." Cal. Civ. Proc. Code § 425.16(b)(1) (emphasis added). Under H.R. 2304, there is no qualification that the statement be constitutionally protected free speech or petition activity. There are types of speech that are

expressly not protected by First Amendment (*i.e.*, obscenity, inciting violence, defamation, making true threats, etc.) and that type of unprotected speech could be protected under H.R. 2304. California's anti-SLAPP statute also imposes a lower burden on plaintiffs to survive a special motion to dismiss. In California, a plaintiff "need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP." *Soukup v. Law Offices of Herbert Hafif*, 139 P.3d 30, 51 (Cal. 2006). Under H.R. 2304, a plaintiff must demonstrate that a claim is "likely to succeed on the merits." *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-36 (D.C. Cir. 2015) (acknowledging that likelihood of success standard is harder to meet than Rule 12 or Rule 56 standards).

Moreover, even California's law is overly broad and has been interpreted to encompass important civil rights claims, as I have detailed above. Indeed, a lawsuit by an advocacy organization for deaf people seeking to increase access to CNN's web-site was determined to be a SLAPP suit under California law. *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414 (9th Cir. 2014). H.R. 2304 would encompass similar lawsuits and more, and subject them to rigorous pleading standards, onerous fee-shifting provisions, and excessive delay.

Judges in California have had ample experience with that state's anti-SLAPP law, and their patience is wearing thin. As California Supreme Court Justice Janice Rodgers Brown noted in a dissenting opinion in 2002, "[t]he cure has become the disease — SLAPP motions are now just the latest form of abusive litigation." *Navellier v. Sletten*, 29 Cal. 4th 82, 96 (2002) (Brown, J., dissenting). And although California's legislature took steps in 1999 to reduce abusive anti-SLAPP motions, there is little evidence that those steps have met with success. In 2014, it was estimated that there were over 2,000 published opinions from California appellate courts interpreting California's Anti-SLAPP statute; that number is likely much higher now.[5]

California courts have come to lament the existence of the anti-SLAPP law, observing that the law is being abused by defendants who continually seek to expand the definition of a SLAPP suit. The following are just a sample of the statements of exasperation that California's judiciary has expressed about the anti-SLAPP law:

> *Another appeal in an anti-SLAPP case. Another appeal by a defendant whose anti-SLAPP motion failed below. Another appeal that, assuming it has no merit, will result in an inordinate delay of the plaintiff's case and cause him to incur more unnecessary attorney fees. And no merit it has.*[6]

> *It is now almost five years since plaintiff filed his lawsuit, and trial is not yet in sight. Such delay hardly seems defensible, particularly when it is due in no small part to nonmeritorious appeals by defendants who lost anti-SLAPP motions, the first appeal*

[5] Frank J. Broccolo and Laura L. Richardson, *Calif. Case Law Is An Excellent Anti-SLAPP Resource,* LAW360 (February 28, 2014), available at http://www.law360.com/articles/512540/calif-case-law-is-an-excellent-anti-slapp-resource.

[6] *Moriarty v. Laramar Management Corp.*, Cal App., First App. Dist., No. No A137608 (Jan. 29, 2014) (unpublished opinion); available at: http://www.courts.ca.gov/opinions/nonpub/A137608.PDF.

voluntarily dismissed after languishing for a long period and this appeal rejected as utterly without merit. As we said, something is wrong with this picture, and we hope the Legislature will see fit to change it.[7]

We cannot help but observe the increasing frequency with which anti-SLAPP motions are brought, imposing an added burden on opposing parties as well as the courts. While a special motion to strike is an appropriate screening mechanism to eliminate meritless litigation at an early stage, such motions should only be brought when they fit within the parameters of [the California Anti-SLAPP statute].[8]

H.R. 2304 is even broader than California's law, and therefore even more likely to lead to abuse. But even if it were more similar in scope to California's law, adoption of the statute would be unwarranted because of the extent to which it interferes with state sovereignty and because its constitutionality is doubtful at best.

II. H.R. 2304's Substantial Interference with State Sovereignty Is Inappropriate Given the Tenuous Grounds for the Exercise of Congressional Power in this Area

H.R. 2304 displaces state sovereign judgments, without any demonstration of the kind of federal interest that one would expect and require before displacing state law. H.R. 2304 is broader than many of the anti-SLAPP laws that exist in the 28 states that have them, and for the remaining jurisdictions that have not enacted anti-SLAPP laws, H.R. 2304 imposes new and substantial obstacles to plaintiffs seeking to vindicate purely state law claims. The virtue of federalism is that it liberates states to craft their own approaches to pressing social problems, particularly through the substantive law that governs relationships between state citizens. The decision to adopt or forego anti-SLAPP laws is one example of the kind of experimentation that federalism is meant to foster. Of course, when Congress is exercising its enumerated powers, it may cut this experimentation short. But it is far from clear that H.R. 2304 is a valid exercise of Congress's powers, found in either Article I or in Section 5 of the Fourteenth Amendment.[9]

H.R 2304 does not appear to be a valid exercise of Congress's Section 5 authority to enforce the Fourteenth Amendment. This is because the Supreme Court has imposed stringent requirements on congressional exercise of this authority. Valid Section 5 authority is premised on a careful definition of the right to be protected, creation of an exacting factual record to establish the need for protection of the right, and "congruence and proportionality" between the right being protected and the remedy provided by Congress. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997) (introducing congruence and proportionality test); *see also Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (applying *Boerne*'s test to portions of ADA). It is far from clear that any of these elements is met

[7] *Grewal v. Jammu*, 191 Cal.App.4th 977, 994 (Cal. Ct. App. 2011).

[8] *Moore v. Shaw*, 116 Cal.App.4th 182, 200 n.11 (Cal. Ct. App. 2004).

[9] In the absence of any specification of the basis upon which the drafters of H.R. 2304 purport to legislate, I am assuming that the source of authority would either be Article I or Section 5. I am hard-pressed to imagine any other source of positive legislative authority to enact this particular statute.

here, let alone all three. Were H.R. 2304 limited to cases in which a litigant's First Amendment rights were being threatened by SLAPP litigation, that would be a start, but even then Congress would need to have a factual record to justify such legislation under its Section 5 enforcement power.

Nor does H.R. 2304 appear to be a valid exercise of Congress's Article I power. There is no reference to interstate commerce in H.R. 2304, which could be one basis for preempting state anti-SLAPP laws (or for preempting a state's decision not to enact an anti-SLAPP law). For this to be a valid basis in support of H.R. 2304, proponents would, I believe, have to establish that the activities regulated by the statute "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). Some of the activity governed by H.R. 2304 likely would satisfy this test, but other activity would in my view certainly not. For example, it is difficult to see how interstate commerce would be implicated in civil rights cases brought under state law where the defendant allegedly brought false criminal charges against the plaintiff.

What is left is Congressional power to craft uniform procedures to govern in federal court. When this power is exercised, however, it must take care to steer clear of state substantive rights. Congress has the power to "make rules governing the practice and pleading in [federal] courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965). Some aspects of H.R. 2304 might fall within this definition. But in the closely related *Erie* context, many federal courts have held that state anti-SLAPP laws are examples of substantive law making by states.[10] *Block v. Tanenhaus*, 815 F.3d 218, 221 n.2 (5th Cir. 2016) (noting that Fifth Circuit had applied Louisiana's anti-SLAPP law in diversity case, under *Erie* doctrine); *Cuba v. Pylant*, 814 F.3d 701, 707 n.5 (5th Cir. 2016) ("The *Henry* court reasoned that even though the Louisiana anti-SLAPP statute was built around a procedural device—a special motion to dismiss—it nonetheless applied in federal court under the *Erie* doctrine because it was functionally substantive."); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013) (holding that California's anti-SLAPP statute is applicable in federal court); *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir.2010) (holding that Maine's anti-SLAPP statute could be applied in the district court because Federal Rules of Civil Procedure 12 and 56 are not so broad as to "attempt[ ] to answer the same question" as the statute); *Adelson v. Harris*, 774 F.3d 803, 808-09 (2d Cir. 2014) (finding that aspects of state anti-SLAPP statute apply in diversity action in federal court because it is "substantive" for *Erie* purposes); Wright & Miller, 19 Fed. Prac. & Proc. Juris. § 4509 ("Although most state courts have found that anti-SLAPP statutes are procedural in nature, federal courts have held that anti-SLAPP statutes implicate substantive rights for purposes of applying the *Erie* doctrine."); *but see Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (holding that the District of Columbia's anti-SLAPP law could not be applied in federal court in a diversity case because it conflicted with Federal Rules of Civil Procedure 12 and 56). Here, Congress appears to be seeking to enact substantive policy through this legislation, which at least raises the

[10] As *Hanna* observed, the power of federal courts to displace state substantive law through judicial common law-making is less robust than Congressional power to displace substantive state law through its enumerated powers. But if Congress is regulating on the basis of its power to create the procedures that govern federal courts, it should be exceptionally careful when it is crafting rules that are directed at specific kinds of state law claims.

question as to whether it is proper to do so through its power over the procedures that govern federal courts.

Even if Congress had the authority to preempt state decisions about how to resolve these categories of state law claims, I have seen no evidence that such a drastic measure is necessary or appropriate.[11] Some states have passed anti-SLAPP laws, while some states, including Washington and New Hampshire, have found the SLAPP laws to violate their State Constitutions. In our federalist system, states have chosen what works best for them to address these types of lawsuits. This bill overrides those state decisions. This preemption is especially offensive since most of the non-SLAPP lawsuits that will be negatively impacted by this legislation arise under state law and will likely be filed in state courts.

H.R. 2304 goes beyond interference with state anti-SLAPP laws, however. It also will function to impose other federal standards on the adjudication of non-diverse state law claims, where none currently exist. Take standing jurisprudence as just one example. In federal court, a litigant must have Article III standing to bring a claim. In state court, standing requirements are determined by state law, and in some cases are more permissive than Article III requirements. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (recognizing that Arizona courts could apply lenient state standing requirements to federal claim pending in state court). As just one example, some states permit litigants to bring so-called "generalized grievances" in state court. *See*, *e.g.* Cal. Civ. Proc. Code §526a (explicitly creating taxpayer standing). In federal court, these claims would be dismissed on standing grounds for lack of a concrete injury in fact.

H.R. 2304 would work serious mischief in this area. Because it would authorize the removal of actions that are currently not removable (*i.e.*, state law claims between non-diverse parties in which there is no substantial embedded federal issue), state law claims filed in state court in which the plaintiff's claim is justiciable on state standing grounds would be subjected to federal standing requirements, even though the state law claim does not implicate any substantial federal interest and is between non-diverse parties. Indeed, a plaintiff filing a meritorious and justiciable action in state court would have to pay the defendant's attorneys' fees if the action were removed to federal court and dismissed for being nonjusticiable under federal law.[12] After all, a plaintiff with a nonjusticiable claim cannot demonstrate a likelihood of success on the merits. In this way, H.R. 2304 would substitute federal standing jurisprudence for state standing rules, even in state law claims for which there is no grounds for federal jurisdiction. This is just one of the many ways that H.R. 2304 will intrude on state sovereignty.

III. H.R. 2304 Will Impose Substantial Burdens on Federal Courts

At a time when federal courts are increasingly over-burdened and under-staffed, H.R. 2304 imposes new and onerous burdens on federal courts, the limits of which are difficult to contemplate. According to the National Center for State Courts, approximately 17 million civil cases were initiated in state courts in 2013. By contrast, about 270,000 civil cases were initiated

[11] *See* Beatty, *supra* note 3.

[12] This kind of arbitrariness would likely amount to a due process violation, demonstrating yet another one of H.R. 2304's constitutional infirmities.

in federal court over the same time period. If only 2% of the civil cases filed in state court could be removed under H.R. 2304, it would more than double the number of cases pending in federal courts. Even if only 0.2% of the civil cases filed in state court could be removed, it would increase the federal caseload by about 13%.

If this were the only way in which H.R. 2304 increased the federal judicial workload, it would be enough to raise concerns. But H.R. 2304 adds several new procedural steps to resolving the broad range of claims encompassed by the statute. First, when a defendant removes a state court action, and when the defendant files a special motion to dismiss, a court will have to determine whether a claim or claims even fits within the scope of H.R. 2304. This will require the parsing of vague language of both exclusion and inclusion, found in Sections 4202 and 4208 (e.g., "official proceeding" and "enforcement action" in Section 4202, "related to" in Section 4208(1), and "necessary," "disproportionate," "important right," and "significant benefit," all in Section 4208(3)).

Second, if the Court determines that the statute applies, it must resolve a defendant's special motion to dismiss, which requires a determination of whether a claim is "likely to succeed on the merits." H.R. 2304 § 4202 (a). Federal courts generally only use this standard when determining whether to grant so-called provisional remedies – stays, preliminary injunctions, etc. – a context very different from that implicated in H.R. 2304. In the area of provisional remedies, a court is seeking to determine whether to temporarily alter or maintain the status quo until a final adjudication can be completed. By definition, it contemplates future proceedings at which formal and accurate fact-finding can be completed. Moreover, even at such a provisional stage, courts almost always have some sort of factual record on which to base their decision.

H.R. 2304, by contrast contemplates courts assessing likelihood of success as a way of pretermitting a plaintiff's claim, at a time when the court has access to no evidentiary record at all, resulting in a dismissal of a case on grounds never before contemplated under the Federal Rules of Civil Procedure. And it imposes the burden on the plaintiff to show likely success. If this is intended to permit judges to weigh evidence at this stage, it will present Seventh Amendment concerns, which may be enough on their own to render the constitutionality of H.R. 2304 doubtful. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (explaining that on summary judgment "the judge must ask ... not whether ... the evidence unmistakably favors one side or the other but whether a fairminded jury could return a verdict for the plaintiff on the evidence presented"); *id.* at 255 ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether . . . . ruling on a motion for summary judgment or for a directed verdict."); *Unity Healthcare, Inc. v. Cty. of Hennepin*, 308 F.R.D. 537, 549 (D. Minn. 2015) (holding that Minnesota's anti-SLAPP statute could not be applied in federal court because it violated Seventh Amendment to resolve factual disputes); *cf. Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015) (finding that Washington anti-SLAPP statute violated state right to trial by jury by requiring trial judges to adjudicate factual questions in nonfrivolous cases); *Colt v. Freedom Comm., Inc.*, 1 Cal. Rptr. 3d 245, 249-50 (Cal. Ct. App. 2003) (noting that, for purposes of California's anti-SLAPP statute, judge may not weigh evidence without violating right to a jury trial). If it is not intended to permit judges to weigh evidence, it is unclear what the statute is asking of federal courts. It may be that the goal

is to impose a heightened pleading standard, which might overcome the Seventh Amendment concerns, but as I explained above, imposing a heightened pleading standard at such an early stage has not been shown to improve the quality of cases pending in federal court.

Granted, H.R. 2304 contemplates "specified discovery" for "good cause shown," but this provision simply complicates matters. One wonders how a court could adjudicate a motion to dismiss on the merits in the absence of discovery, and so one would expect that good cause would almost always be shown.[13] But even if discovery were allowed, a judge would still have to determine a likelihood of success for a plaintiff to continue, a standard that is higher than the current summary judgment standard under Rule 56. *See Anderson*, 477 U.S. at 252. So at best H.R. 2304 heightens the standard for a plaintiff to proceed post-discovery and at worst the legislation heightens the standard for a plaintiff to proceed pre-discovery.[14]

Not only does this legislation add to the burdens on trial courts, but by providing an interlocutory appeal (a rarity in federal law), it will extend the time and costs necessary to adjudicate claims, further prejudicing plaintiffs, and impose additional burdens on our federal appellate courts. And even if only a small proportion of cases results in an interlocutory appeal, it will substantially increase the case load on federal appellate courts, delaying justice for all litigants with appeals pending.

Finally, it is worth noting that the attorneys' fees provision, Section 4207(a), mandates the awarding of attorneys' fees for a party who prevails on a special motion to dismiss or a nonparty who prevails on a motion to quash. The imposition of attorney's fees in contradiction to the "American Rule," by itself, could cause plaintiffs with equitable positions to refrain from extending the law.[15] But it is also striking that attorneys' fees and costs are mandatory even if a claim or discovery request is voluntarily dismissed or withdrawn after the filing of a special motion to dismiss or motion to quash. H.R. 2304 § 4207(a). This should be contrasted with the limited right to attorneys' fees provided in civil rights actions under 42 U.S.C. § 1988, which after *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 605 (2001), cannot be awarded on a so-called "catalyst theory." In other words, where a civil rights plaintiff obtains success because a defendant settles or foregoes unconstitutional conduct without some "judicially sanctioned change in the legal relationship of the parties," she may not obtain attorneys' fees under Section 1988. *Id.* at 605. But if a defendant moves under H.R. 2304 and a plaintiff voluntarily dismisses her claim, the defendant

[13] Unfortunately, H.R. 2304 provides not guidance to courts as to how to resolve the special motion to dismiss. It tells courts that they "may consider" discovery, and that courts "shall consider the pleadings and affidavits stating the facts on which the liability or defense is based." H.R. 2304 § 4202(g). But it is unclear if this means that, in the absence of discovery, a court is to take all allegations in a complaint to be true, or if a court may make its own factual determinations even in the absence of discovery. And if there is discovery available, a court is not told how it should weigh the discovery, contrary to the well-established rules governing Fed. R. Civ. P. 56.

[14] The bill also grants defendants a special motion to quash where the plaintiffs seeks personally identifiable information. To defeat this motion, plaintiffs must prove with "evidentiary showing that the claim is likely to succeed on the merits of each and every element of the claim." H.R. 2304 § 4205. There is no similar provision that I know of in federal law that requires such a showing before a plaintiff may obtain relevant discovery.

[15] Fed R. Civ. P. 11(b)(2) recognizes that it may be reasonable file a complaint that seeks to extend, modify, or establish new law.

will obtain attorneys' fees. H.R. 2304 puts defendants in "SLAPP" suits in a better position than plaintiffs in important civil rights claims, for no evident reason.

At bottom, H.R. 2304 rewrites procedural rules for a particular class of cases, many of which have no business being in federal court. Many of H.R. 2304's rules are in direct conflict with the Federal Rules of Civil Procedure – heightened pleading, discovery stays, and interlocutory appeals, to name a few – but have not been considered through the rulemaking process that typically are relied upon to amend the Federal Rules. All of these rules put a heavy thumb on the scale in favor of defendants, even though the Federal Rules are intended to be even-handed. It is quite unusual, in fact, for a procedural statute to be written in such a defendant-friendly and plaintiff-hostile manner – rarely do procedural provisions specify that certain procedures are only available to litigants based on their status as "plaintiff" or "defendant."[16] The result is a set of procedures that burdens federal courts and plaintiffs alike.

IV. H.R. 2304 Is Almost Certainly Unconstitutional

H.R. 2304 is likely unconstitutional in at least three ways, two of which I already have discussed – it is unclear that Congress has the authority to enact this legislation as a substantive matter; and the particular special motion to dismiss procedure likely runs afoul of the Seventh Amendment. I will not return to those issues here, but instead will focus on a distinct reason that H.R. 2304 is almost certainly unconstitutional: through its removal and remand provisions, it authorizes jurisdiction over matters outside the boundaries of Article III.

It is well-established that Congress may not confer upon federal courts jurisdiction beyond that enumerated in Article III, Section 2, which, inter alia, gives federal courts jurisdiction over cases "arising" under the Constitution and the laws of the United States and cases in which the parties are diverse (that is, "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," U.S. Const., Art. III, § 2, cl. 1).[17] Congress may not "expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1980).

H.R. 2304 contravenes this basic teaching in at least two ways. First, H.R. 2304 authorizes the removal of any action filed in state court that falls within the definition found in Section 4201. As established above, this definition is overly broad, but most importantly for jurisdictional purposes, it includes cases that are most certainly not encompassed by Article III – namely state court actions between nondiverse parties in which there is no embedded federal issue. Notably, Section 4206(a), which authorizes removal, makes no mention of the First Amendment or any other federal law. A defendant in a purely state law claim may therefore remove a plaintiff's action to federal court in the absence of diversity or any First Amendment issue. Were Section 4206(a) limited to claims founded on federal law, or diversity claims, or

[16] For example, H.R. 2304 § 4206(a)(2) exempts from coverage third-party claims and "cross-claims" brought by "defendants." The reason or this exclusion is difficult to understand, given that there is no logical reason to believe that nominal defendants might not also bring SLAPP claims in their ancillary litigation.

[17] H.R. 2304 cannot credibly claim to exercise jurisdiction through any of the other "heads" of jurisdiction found in Article III, so I am only addressing diversity and "arising under" jurisdiction in my testimony.

even to claims in which a First Amendment defense is raised, there would be no jurisdictional defect in the removal provision. As it stands, however, H.R. 2304 is not consistent with the historically-accepted purposes of removal -- to enable adjudication in a neutral forum (removal based on diversity jurisdiction) or to allow the federal courts to adjudicate issues of federal law (removal based on federal-question jurisdiction). Instead, H.R. 2304 contemplates removal to allow a federal court to determine whether a plaintiff "is likely to succeed on the merits" (§ 4202(a)) of a wholly *state-law* claim.

The jurisdictional infirmities of Section 4206(b) are, if it can be believed, even more stark. For Section 4206(b) contemplates removal to federal court by a non-party to the litigation, if the non-party is "[a] person whose personally identifying information is sought in connection with" a claim embraced by Section 4201. There is no precedent for allowing a non-party to remove an entire case from state court to federal court simply because of the possibility that the non-party may be the subject of discovery in state court. The reason is simple: there is no authority found in Article III for such a procedure. Article III does not contemplate jurisdiction over "proceedings", as the drafters of Section 4206(b) seem to imply; it authorizes jurisdiction over "cases" or "controversies," the requirements of which are well-worn and not satisfied by Section 4206(b).

Finally, the remand procedures in H.R. 2304 are at best incoherent and at worst constitutionally suspect. Pursuant to Section 4206(a)(3), an action removed under Section 4206(a)(1) will be remanded to state court if the special motion to dismiss is denied. So far so good. But if the special motion to dismiss is granted in part and the order is not appealed or all appeals have been exhausted, the remaining claims (i.e., those claims that are not covered by H.R. 2304) will not be remanded. In other words, the federal court will retain jurisdiction over state law, non-diverse claims, that do not implicate any potential First Amendment issues, even if such claims are not amenable to original or supplemental jurisdiction. There may be circumstances in which exercise of jurisdiction over such a claim is permissible, but Section 4206(a)(3) is not calculated to identify them.

CONCLUSION

It may be that a narrower version of H.R. 2304 could be drafted that would be constitutionally valid and protect against the kind of interference with First Amendment rights that some proponents have identified as a motivation for the proposed legislation. As it currently stands, however, there is a long distance to travel between the current version of the statute and an acceptable one. A statute that unconstitutionally expands the jurisdiction of the federal courts, significantly burdens and imperils important civil rights and allied litigation, imposes new and unprecedented procedures in federal court, and displaces state sovereignty should not advance without some demonstration of the scope of the problem to be remedied, and a plan for doing so consistent with the Constitution.

Mr. FRANKS. Thank you, sir. And I will now recognize our fourth and final witness, Ms. Prather. And, Ms. Prather, if you would turn your microphone on.

TESTIMONY OF LAURA LEE PRATHER, PARTNER, HAYNES AND BOONE, LLP

Ms. PRATHER. Mr. Chairman, Members of the Subcommittee, my name is Laura Prather. I am a partner with the law firm of Haynes and Boone in Austin, Texas, and a board member of the Public Participation Project, a nonprofit organization devoted to educating the public about SLAPP suits, and advocating for the passage of anti-SLAPP laws.

I am testifying here on behalf of the Public Participation Project today, and I thank you for the opportunity to testify in support of H.R. 2304, the "SPEAK FREE Act of 2015." I have been practicing law for 25 years, and the vast majority of my career has been devoted to defending First Amendment rights at the courthouse and at the legislature.

In recent years, I have spent a significant portion of my time defending SLAPP victims. Seeing the frequency with which SLAPP suits were filed, I also took part in the passage of the Texas Citizens Participation Act, their version of an anti-SLAPP statute.

This month marks the fifth anniversary since that passage. The Texas experience demonstrates, and consistent with congressional experience here, that anti-SLAPP laws are good public policy. They help one who may not have means to fight meritless lawsuits have a system in place to do so. They promote judicial economy by getting rid of meritless claims that currently clog up the legal system, and they promote free speech rights, civic engagement and public discourse.

First Amendment rights should not depend on where one resides, or the type of claim that is filed against them. There are three primary reasons for the need for passage of a Federal anti-SLAPP law.

The first is, the patchwork for State protection that currently exist invites forum shopping.

The second is the fact that there is a circuit split right now on whether Federal courts will apply State anti-SLAPP laws in diversity cases; and the third is the fact that current State anti-SLAPP laws simply do not apply to meritless Federal claims. The passage of the Federal anti-SLAPP law would provide consistency and predictability in the protection of First Amendment rights.

Let's start with the patchwork. Members of this Committee are from a number of different states. Some states have narrow anti-SLAPP laws, some have none, some have broad anti-SLAPP laws. What happens in those scenarios? It encourages people to forum shop, like the Dan Snyder example that Mr. Brown pointed out. He filed a lawsuit in New York, against a hedge fund that owned the Washington City Paper, after admitting that he had never even read the article at issue in the lawsuit. That lawsuit was filed in New York to avoid D.C.'s anti-SLAPP law.

Ultimately, he had to refile in D.C., and then he dismissed without there ever being a decision on the application of the D.C. law. There are countless examples of cases like that where people spe-

cifically choose a State in which there is no anti-SLAPP law, or a weak anti-SLAPP law, in which to file their claims.

Second, there is now a circuit split with regard to whether State anti-SLAPP laws apply in Federal diversity cases. Up until recently, every circuit that had decided the issue decided that anti-SLAPP laws were substantive, and they should be applied to State law claims in diversity cases. The D.C. Circuit decided differently. The U.S. Supreme Court earlier this year in the Mebo case, denied the petition to review on that issue, leaving it uncertain, and leaving us with more inconsistency and questions about the application of First Amendment rights for our citizens.

Third issue is the issue of Federal claims. There is currently no protection for those creative SLAPP claims that come in the form of a Federal cause of action. By definition, there is no particular cause of action. It is not limited by anything other than the fertile minds of the lawyers and the parties to who bring the claims. So what we are seeing now is, instead of filing a State law defamation claim, or an invasion of privacy claim, what we are seeing is people using very creative intellectual property claims in Federal forums so as to avoid anti-SLAPP statutes.

In addition, like SLAPP claims that are not in any one particular form or fashion, SLAPP victims also are not any one form or fashion as well. You have SLAPP victims that are individuals, homeowners that are getting sued by their homeowner's associations.

You have SLAPP victims that are businesses. Better Business Bureau gets sued regularly for their reliability reports. Politicians get sued for their campaign literature. The media gets sued for investigative reporting that they have done where they have uncovered significant amounts of Medicaid fraud.

Whistleblowers get sued very, very frequently; they get sued for shining the light on things like—in Texas we had a case where a lobbyist-turned-whistleblower shone the light on a $110 million in no-bid contracts that were being offered by a State official. That led to an FBI investigation, a Public Integrity Unit investigation, and a State Auditor's Office investigation.

What ended up happening? The whistleblower got sued for $90 million by the company that was receiving the no-bid contracts. The anti-SLAPP law protected that whistleblower.

In addition, trial lawyers. Trial lawyers get sued, often for statements that they make to the media, or for complaints that they file on behalf of their clients. Trial lawyers use anti-SLAPP laws to defend against those cases. We had a case in Texas involving a media report on Medicaid fraud. Not only was the media sued, but the individual plaintiff's lawyer who was seeking class-action plaintiffs was sued. Both parties used the anti-SLAPP statute to get rid of the lawsuit.

This is a real problem; it is not anecdotal; it is a real problem. This happens on a daily basis. This is a nonpartisan issue, it is a both-sides-of-the-aisle issue, and it is one that the American Bar Association, academics, domestic violence groups, and organizations from the right and the left side of the aisle have come forward to support.

I applaud this Committee for hearing this important matter, and I am happy to answer any questions the Committee has.

[The prepared statement of Ms. Prather follows:]**

UNITED STATES
HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
CONSTITUTION AND CIVIL RIGHTS

EXAMINING H.R. 2304,
the SPEAK FREE Act

Statement of
Laura Lee Prather, Partner
Haynes and Boone, LLP
Austin, Texas

On Behalf of
The Public Participation Project

June 22, 2016

**Note: This witness statement is not printed in its entirety. The complete statement is available at the Subcommittee and can also be accessed at:
http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=105106

TESTIMONY OF LAURA LEE PRATHER

Mr. Chairman Franks, Ranking Member Cohen, and Distinguished Members of the Subcommittee, good afternoon. My name is Laura Prather. I am a partner at the law firm of Haynes and Boone LLP in Austin, Texas. Thank you for the invitation to testify on H.R. 2304, the SPEAK FREE Act. My practice focuses on First Amendment and intellectual property litigation, counseling and legislative efforts. I have been handling speech related and content protection claims in state and federal court for 25 years. I have also been involved in several legislative efforts to encourage free speech and increase government transparency. This includes being instrumental in the passage of the Texas Citizens Participation Act, commonly known as Texas' Anti-SLAPP statute, including drafting, negotiating, and forming the coalition that supported passage of the legislation.

Today I am here to discuss the need for a federal Anti-SLAPP statute in the form of the SPEAK FREE Act.

I currently serve on the Board of Directors for the Public Participation Project (or PPP). I am pleased and honored to testify today on behalf of the PPP. Founded in 2008, the Public Participation Project was formed for the purpose of educating the public about SLAPPs, or Strategic Lawsuits Against Public Participation, and the consequences of these types of destructive lawsuits. Our mission is to obtain passage of federal Anti-SLAPP legislation in Congress and to assist individuals and organizations working to pass state Anti-SLAPP laws. Members of our Board of Directors and PPP staff regularly defend SLAPP targets and have worked with numerous State legislatures, including those in Texas, California, New York, Florida and others to pass and strengthen their Anti-SLAPP laws. PPP and our coalition of supporters, which includes organizations, businesses and individuals from both sides of the aisle, strongly support the passage of H.R. 2304, the SPEAK FREE Act. A list of supporters is attached as Appendix A.

Identifying The Problem

Let me say at the outset that SLAPP suits differ from ordinary lawsuits in that they seek to dissuade one from exercising a lawful right, such as testifying at a City Council meeting, complaining to a medical board about an unfit doctor, investigating fraud in our education system, or participating in a political campaign. When meritless lawsuits target truthful speech, lawful petitioning, and legal association, they have been dubbed "Strategic Lawsuits Against Public Participation" (SLAPP suits).[1] SLAPP suits chill First Amendment activities by subjecting citizens who exercise their constitutional rights to the intimidation and expense of litigation. While legitimate litigation serves to right a wrong, the primary motivation behind a SLAPP suit is to extinguish lawful speech. SLAPP filers harness the judicial process as a weapon in a strategy to win a political, social, or economic battle.

A significant portion of my practice involves defending SLAPP targets in litigation arising out of traditional media and online content. The SLAPP victims I have defended include: individual homeowners sued by their HOA for disclosure of fraud; politicians sued by their opponents for campaign literature; the Better Business Bureau sued for the protected opinions expressed in its reliability reports; and countless media organizations sued for their investigative reporting exposing things like millions of dollars in Medicaid fraud or predatory teachers who have moved from one school district to another after inappropriate behavior with their students. In short, SLAPP suits are a problem.[2]

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[1] Professors Pring and Canan of the University of Denver are two of the primary scholars who analyzed this legal phenomenon and coined the term "SLAPP." George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press 1996).

[2] This is not an infrequent problem either; it is one that exists on a daily basis and threatens the core values of our democracy. Case in point: Lance Armstrong. He is an admitted perjurer who lied about years of rampant drug use while winning the Tour de France. Despite the knowledge of dozens (or more) about Armstrong's drug use, his vehement

Further, with the rise of the internet, lawsuits aimed at silencing those civically engaged citizens are becoming more common, and are a threat to the growth of our society. The Internet age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism and other forms of speech. Unfortunately, with the rise of the internet, there has also been an increase in meritless lawsuits aimed at silencing critics, brought for the purpose of harassing and intimidating those who urge a government result or speak out on an issue of public interest. The rise of this sort of litigation is directly related to the rise of the popularity of the internet. The main difference is that pre-Internet comments on and criticisms about service and experiences with corporate America or the government were received by a limited audience – those within earshot or to whom a letter was mailed. Now, in real-time, one's statements can go global instantaneously with the click of a button on the internet. In either situation, if the statements are false, defamation laws exist to protect and hold people accountable for what they say. That is where the line belongs – not with the bully being able to silence speech before words are spoken. In response to these "bullies," twenty-nine states, as well as the District of Columbia and the territory of Guam, have adopted Anti-SLAPP legislation.

It is important to note, SLAPP claims do not merely come in the form of defamation complaints or any other particular cause of action. The defining characteristic of a SLAPP suit is its intention to deter one from exercising one's constitutional rights. Because of the insidious nature of a SLAPP claim, there is neither a prototypical SLAPP filer nor a prototypical SLAPP claim – the limits are solely confined by the fertile minds of the lawyers or their clients. SLAPP suit filers often camouflage their grievances against the target's constitutional activities by filing varying types of

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denials continued to survive because each time a truth-teller challenged his statements, they were SLAPPed with a lawsuit and retaliated against until they submitted to relinquishing their First Amendment rights. A system that allows such rampant abuse of our judicial branch is not what our forefathers had envisioned when they adopted the constitutional protections for free speech and a fair trial.

claims, including: defamation, business torts, copyright and/or trademark infringement, process violations, conspiracy, and constitutional and civil rights violations. Other less common causes of action may include claims for nuisance, trespass, and emotional harms. A nationwide study of SLAPP suit litigation identified defamation in the form of libel, slander and business libel as the most common cause of action that houses a SLAPP purpose.[3] Business torts was the second most common cause of action, including interference with contract or business, antitrust, restraint of trade, and unfair competition.[4] Furthermore, SLAPP victims are not just individuals sued by those with more resources, but can also be corporations being targeted by disgruntled former employees or the media being used as a scapegoat for uncovering corporate malfeasance.

Until now, if one got sued for what one said, that individual or entity had three choices for how to respond — none of which were terribly attractive options. They could retract what they said — even if they believed it to be true — in an effort to appease their accuser. They could choose not to fight the lawsuit and allow a default judgment to be entered against them and then have their property seized and liens placed against their assets. Or, they could spend a significant amount of money hiring a lawyer to represent them in the case, which generally took years to defend and immeasurable time in discovery until a motion for summary judgment was filed and, hopefully won.

H.R. 2304 recognizes that SLAPP cases come in all shapes and sizes and aims to stop the bullies, facilitate judicial economy[5] and foster First Amendment rights by providing an expedited

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[3] Professors Pring and Canan of the University of Denver are two of the primary scholars who analyzed this legal phenomenon and coined the term "SLAPP." George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press 1996) at 27.

[4] *Id.*

[5] The California Judicial Council maintains data on Anti-SLAPP court filings, which is available upon request. This data demonstrates that Anti-SLAPP motions are little more than a tiny fraction of trial courts' civil dockets. Between fiscal years 2010 and 2014, parties filed a total of 2,051 Anti-SLAPP motions in trial courts, or roughly 410 Anti-SLAPP motions per year on average. Given the 5,006,580 total civil filings over that same period, these 2,051 motions constitute only about 0.041% of total civil filings. (*See* Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2015) Superior Courts Data for Figures 3-16, p. 70). During that same time period, California appellate courts issued opinions in 585 Anti-SLAPP appeals out of a total of 48,403 total appeals during that same time period. Thus,

motion to dismiss procedure when one is simply sued for what one says without there being a valid basis for the claim. When this happens, the fees are shifted so that the party who brought the case ends up paying the fees that were spent fighting the meritless claim. This means a lot when you are the consumer who has been sued for speaking out and you have no insurance to protect you against a baseless lawsuit.[6] One would assume the consumer would ultimately prevail in a lawsuit without the Anti-SLAPP statute being passed; the practical reality, though, is that the consumer could be bankrupted by the cost of defending himself in the process. The fee shifting provision can also help to serve as a deterrent to those who would otherwise fund their own lawyers cost to file a baseless suit but might think twice about filing such a claim when they risk paying the other side's fees.[7]

Passage of State Anti-SLAPP Laws is on the Rise

Long before the internet became popular as a forum for public speech, California recognized the problem when well-funded companies were suing citizens who were holding the companies accountable. The solution California came up with in 1992 was the adoption of an Anti-SLAPP law that made it easier for defendants to seek early dismissal of these suits at no cost to them. Since that time, similar measures have been adopted in 29 other states, the District of Columbia, and the territory of Guam. In the last year we have seen Kansas[8] pass an Anti-SLAPP

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roughly 1.209% of the total appellate opinions issued by California courts were Anti-SLAPP opinions. (*Id.*, Courts of Appeal Data for Figures 22-27, p. 67). The data clearly shows that no systematic abuse of the Anti-SLAPP statute is occurring. The information is also significant because it shows that while the number of cases involving Anti-SLAPP motions is very small in comparison to the overall number of civil cases, it is still significant enough to show that SLAPP suits are a problem.

[6] Even if one has insurance to protect against such a claim, they are still forced to pay a deductible (which may be beyond their means) and/or see a sharp increase in their insurance rates going forward.

[7] California's Anti-SLAPP law has been on the books for over twenty years. It is difficult to accurately quantify how many SLAPPs have not been filed thanks to this law, but it is substantial. Marty Singer, a prominent Los Angeles entertainment litigator, was once quoted in a 2002 California Law Business article as saying that the California Anti-SLAPP Law is "sort of like a deterrent" to filing defamation lawsuits on behalf of celebrities. "Instead of filing three to five suits a year, I think I would file 50 a year, if I didn't tell the clients how expensive it would be."

[8] *See* http://kslegislature.org/li/b2015_16/measures/sb319/.

law and Florida[9] and Georgia[10] strengthen their Anti-SLAPP statutes by broadening the scope of their protection.

Five years ago, the Texas Legislature passed its Anti-SLAPP statute (The Texas Citizens' Participation Act) unanimously out of both chambers. In getting the law passed, we saw resounding support for the bill with droves of public testimony from those who had been SLAPPed with meritless lawsuits, including individuals like author Carla Main, who spoke about her experience being sued by an influential developer after writing a book about eminent domain. A number of homeowners came forward and testified about their experience getting sued by their homebuilder under civil R.I.C.O. for putting signs in their yard expressing their opinion about their construction – lawsuits some had been defending for a decade. Media groups testified about the impact on their newsrooms in having to defend against lawsuits where they were sued for merely reporting on public records or for providing a conduit for a whistleblower. We also saw countless groups including some strange bedfellows come together and put in cards in support of the bill – Texas Municipal League and the Freedom of Information Foundation of Texas, the Texas Trial Lawyers Association and the Texans for Lawsuit Reform, and the ACLU and the Texas League of Conservative Voters, to name a few. This experience, and others, proves the issue is not "red" or "blue" nor is it individual verses business. It transcends all parties and groups because of its universal purpose to promote free speech.

The Need for Federal Legislation

There are three primary reasons that we need federal legislation: first, there is a patch-work of state laws in the area creating an invitation for forum shopping and inconsistent application of laws; second, there is a split of authority as to whether state Anti-SLAPP laws apply in federal court;

[9] *See* http://m.flsenate.gov/session/bill/2015/1312. Florida previously had two narrow Anti-SLAPP statutes, one of which protected only parcel owners from suits brought by home owners associations on the basis of speech.
[10] *See* http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/513.

and, third, even in those States that have Anti-SLAPP statutes, they generally do not apply to federal claims.

The SPEAK FREE Act would prevent forum shopping

The Legislatures in twenty-nine states, the District of Columbia, and the territory of Guam have all seen the merit in passing Anti-SLAPP legislation to curtail the ability of bullies from using the court system to squelch the First Amendment rights of others. The breadth of these statutes vary significantly, though, with a majority only covering statements made in governmental proceedings.[11] This has left a patchwork of protection that savvy plaintiffs have been known to work around by filing actions in jurisdictions that have not enacted SLAPP statutes.

This patchwork of state laws have led to two loopholes that SLAPP-happy plaintiffs have discovered and used as a tool to avoid state Anti-SLAPP laws: 1) "forum shopping" by plaintiffs, who file their SLAPPs in jurisdictions where Anti-SLAPP protections are absent or weak, and 2) filing a federal claim in federal court (or in some jurisdictions such as D.C., any claim in federal court).

As an example, in November 2010, the *Washington City Paper* published a story critical of Washington Redskins owner Daniel Snyder. The article noted, along with many other issues fans had with Snyder, the fees the Redskins charged for fans to attend preseason practices, lawsuits against season ticket holders for failing to pay for their tickets during the difficult economy, and his multiple firings of the team's head coaches. The article also detailed Snyder's management and ownership practices outside of professional football.

Snyder's attorney responded by sending a letter to the hedge fund that owns the weekly paper, threatening to sue in response to the article. In a stunning acknowledgment as to the true

[11] *See* Reporters Committee for Free Press Chart on Anti-SLAPP laws from 2012 attached hereto as Appendix B. Since the time this chart was prepared, Oklahoma and Kansas have both passed broad Anti-SLAPP statutes, and Florida and Georgia have expanded the breadth of their Anti-SLAPP statutes.

motive in filing this frivolous lawsuit, the attorney wrote, "Mr. Snyder has more than sufficient means to protect his reputation and defend himself and his wife against your paper's concerted attempt at character assassination. We presume defending such litigation would not be a rational strategy for an investment fund such as yours. Indeed, the cost of litigation would presumably quickly outstrip the value of the *Washington City Paper*."

Floyd Abrams, an eminent First Amendment attorney, and counsel for the paper, told *The New York Times*, "This litigation is so self-evidently lacking in merit and so ludicrous on its face that it is difficult to imagine that it was commenced for any reason but to seek to intimidate."

In an article published by the Citizen Media Law Project, Marc Randazaa, First Amendment attorney and editor of the blog *Legal Satyricon*, described the lawsuit as "frivolous" and as "a classic SLAPP suit – not filed because it has a chance of success – but filed because the cost of defending it will be punitive."

In a classic example of blatant forum shopping, Snyder originally filed the lawsuit in New York, where the hedge fund is located, despite the fact that the Washington DC region is home to the paper, the Redskins, and Snyder. Two months before Snyder's attorneys filed the suit in New York, the Council of the District of Columbia passed a strong Anti-SLAPP law, which would probably cover Snyder's lawsuit because he is a public figure. New York State's Anti-SLAPP law, by contrast, is notoriously weak. Snyder was forced to re-file his SLAPP in Washington, D.C. naming the author of the article as an additional defendant and dropping the hedge fund as a defendant after his attorneys claimed that they had determined that the hedge fund had not been involved in the publication of the article. Snyder eventually dropped the lawsuit, leaving D.C.'s new Anti-SLAPP law untested at the time. One of the most significant ironies in the entire case, and one that

establishes without a doubt that this was a SLAPP suit, is the fact that Snyder himself has admitted he never read the article at issue prior to filing suit.[12]

A circuit split exists on whether state Anti-SLAPP laws apply in federal diversity cases

Another quandary presented by this primarily state–born protection is whether it applies in federal court. For more than fifteen years, federal courts have applied State Anti-SLAPP statutes to federal cases when sitting in diversity jurisdiction because they have viewed SLAPP statutes as being designed to prevent substantive consequences – the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law.[13] In 2014, however, the D.C. Circuit found the *Erie* doctrine barred the application of the D.C. Anti-SLAPP statute in federal court.[14] The conflict now results in a circuit split. On March 21, 2016, the U.S. Supreme Court declined to address this problem when it denied the petition for certification in the *Mebo International v. Yamanaka,* 607 Fed. Appx. 768 (9th Cir. 2015), *cert. denied* 136 S. Ct. 1449 (March 21, 2016), further highlighting the need for the passage of H.R. 2304.

State Anti-SLAPP Laws Do Not Reach Federal Question Claims

Different federal courts have agreed that state Anti-SLAPP laws do not apply to federal claims in federal court.[15] For example, in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*[16], and later, *Restaino v. Bah (In re Bah)*[17], the Ninth Circuit held that federal claims in federal courts are not subject to California's Anti-SLAPP law. Essentially what this means is that even in

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[12] *See* http://dc.sbnation.com/washington-redskins/2011/9/8/2413469/dan-snyder-washington-city-paper-lawsuit/in/1734593; *see also* http://www.nytimes.com/2011/09/11/magazine/redskins-owner-dan-snyder-on-being-a-marked-man.html.
[13] *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999).
[14] *See Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).
[15] *See Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999); *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010).
[16] *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F.Supp.2d 1127 (N.D. Cal. 1999).
[17] *Restaino v. Bah (In re Bah)*, 321 B.R. 41 (B.A.P. 9th Cir. 2005).

states with broad Anti-SLAPP statutes, a plaintiff can avoid a state's Anti-SLAPP law by filing a federal claim in federal court. The passage of the SPEAK FREE Act would solve this problem.

Legal Organizations in Favor of Anti-SLAPP

In addition to the wide-ranging support of individuals, businesses and organizations listed in Appendix A, it is also noteworthy that the American Bar Association has weighed in in favor of Anti-SLAPP legislation.

On August 7, 2012, the American Bar Association adopted a resolution encouraging legislatures, including Congress, to enact and strengthen Anti-SLAPP laws. The House of Delegates resolution makes Anti-SLAPP legislation the official policy of the organized Bar in the United States. It reads:

> RESOLVED, That the American Bar Association encourages federal, state and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).

The Resolution was drafted by a committee of the ABA Forum on Communications Law and co-sponsored by three powerful ABA components: the Section of Litigation, the Section on Individual Rights and Responsibilities, and the Torts and Insurance Practice Section. A copy of the Resolution and accompanying Report are attached to this testimony as Appendix C.

Two years later, on July 1, 2014, the American Legal Exchange Council (ALEC) also adopted a Model Anti-SLAPP Policy entitled the Public Participation Protection Act, a copy of which is attached as Appendix D.

CONLUSION

Citizen participation is at the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, the involvement of

citizens in the exchange of ideas benefits our society. When the legal system can be so manipulated that one can use it to intimidate and silence people that are telling the truth, we have a problem.

Without federal legislation, plaintiffs are able to "forum shop" so they can choose a state where Anti-SLAPP legislation has not passed yet or has a very narrow focus and tie a speaker up in court for years – effectively silencing them (and others) in the process. Think about the intimidation factor the bully has on all those observing the fight. Because the claims at issue arise under the First Amendment right to free speech and right to petition, the federal legislation would permit the removal of a SLAPP case to federal court so a federal judge could apply the law and the forum shopping would cease. A consistent approach to the application of Anti-SLAPP laws in federal court is critical to serve the purpose of protecting one's exercise of their First Amendment rights from meritless claims, and nothing would satisfy that need more efficiently than passage of the SPEAK FREE Act.

In sum, this bill is a "win-win" and good government because (1) it promotes the constitutional rights of our citizens and encourages their continued participation in public debate, (2) it creates a mechanism to get rid of meritless lawsuits at the outset of the proceeding, and (3) it provides for a means to help alleviate some of the burden on our court system. Without laws like these in place, the bullies prevail, and the public stands to lose a tremendous tool for information and discourse.

Thank you for this opportunity to express our views regarding this very important legislation. I look forward to answering any questions you or other members of the subcommittee may have. I have several attachments to my statement, and I would respectfully request that these materials be included in the record.

Mr. FRANKS. I thank all the witnesses for their testimony. We will now proceed under the 5 minute rule with questions, and I will begin by recognizing myself for 5 minutes.

And Ms. Prather, I would like to begin with you. You mentioned that State laws, State anti-SLAPP laws, do not protect against Federal claims. I think, to paraphrase your testimony, you said it is limited only to the imagination and the fertile minds of the lawyers, which is a pretty broad spectrum.

Can you give us examples of SLAPP claims being filed in Federal courts? It is that something that is a ubiquitous practice, or is it something that is beginning now, or how is that proceeding?

Ms. PRATHER. Thank you, Mr. Chairman. It is something that is an increasing problem, to tell you the truth. And most of the time, not all the time, but most of the time you are looking at intellectual property claims.

Like Lanham Act claims, where people are saying, "This is a false designation of origin, or an unfair competition claim, when in reality it is a defamation claim dressed up like Lanham Act claim.

So you have things like, you know, doctors whose theories have been debunked, and are suing other doctors for debunking those theories, and then suing them under the Lanham Act to avoid State anti-SLAPP laws. You have situations like the City of Inglewood, where a politician is not terribly enamored by the way in which his image has been depicted on YouTube, based on video that was from open meetings.

And because there is, you know, really no claim for defamation for accurately portraying videos of an open meeting, instead, the claim becomes a copyright claim, an infringement claim, because the city owns the copyright to the video of the open meeting.

Similar situations where you have individuals who are of substantial means, who may not like still photos that have been posted online about them. We have got a case, the *Katz v. Chevaldina* case, in which a Miami Heat minority investor and commercial real estate tycoon sued a disgruntled former tenant who had put some photos online that had been taken from a news article, and he made some comments about the ill treatment that they had received.

Instead of suing that individual for defamation, Katz went and purchased the rights to the photos, and then sued for copyright infringement instead. This happens fairly frequently. Civil RICO is another area in which there has been a significant amount of Federal claim to avoid to anti-SLAPP law protections.

Mr. FRANKS. Well, thank you. Your testimony is a strong indication of how fertile sometimes those minds really are. Mr. Schur, in your experience, what elements of State anti-SLAPP laws act as to deterrents to claims filed primarily to intimidate? I mean, I know Yelp users essentially sometimes are intimidated related to their reviews. Can you speak to the SPEAK FREE Act? Would it have a deterrent effect?

Mr. SCHUR. Excuse me, I believe so. I think that any strong anti-SLAPP law has essentially four main components, which are all present in the SPEAK FREE Act. A sufficiently broad scope of protected speech to encompass all the types of claims, which is really, as has been mentioned, only limited to the fertile mind of the law-

yers bringing them. Requirement that the plaintiff have facts before they enter the courtroom, to prove up the merit of their claims.

An attorneys' fees provision, so that the person who prevails on their anti-SLAPP motion can be made whole following those initial proceedings, As well as an interlocutory appeal process to make sure that a detrimental decision can be corrected on appeal so that the speech is not chilled by the continuation of a lawsuit that is meritlessly challenging free speech.

Mr. FRANKS. Well, thank you. And Mr. Brown, speaking of the interlocutory appeal provision in the SPEAK FREE Act, can you express your opinion on the importance of that, or the significance of it one way or the other?

Mr. BROWN. Sure, of course. Sorry, thank you. Of course. The interlocutory appeal provision is crucial for a couple of reasons.

One, as Professor Reinert noted—you know, to me and to those of us supporting this legislation—it is very important to conceive of the rights that anti-SLAPP laws create as being substantive in nature, that they are akin to the immunities that are accorded to government officials when they are sued, for example, under Section 1983, and those officials have the right to take an interlocutory review.

And the whole point of the interlocutory review provision is because these rights are akin to an immunity from suit, unless you have the chance to get in front of an appellate court prior to trial. Then the right is effectively denied. And so the interlocutory provision is essential to the overall architecture of the substantive rights.

And in this area of First Amendment law, there is an additional reason why interlocutory review is very crucial. And I know this Committee has a submission from George Freeman, who is the executive director of the Media Law Research Center. And they have for years done a lot of empirical work on what happens when adverse decisions from a trial court go up to an appeals court for review. And those numbers are rather astonishing in this area of First Amendment law.

The Committee will see that through the decades, close to 70 percent of these adverse decisions from below get reviewed or overturned one way or another on appeal. And so in the First Amendment area, there is this additional reason why interlocutory appeal is so important, because of the role that Federal—excuse me, that appellate court judges have played in making sure that First Amendment rights are protected at the trial court stage. Thank you.

Mr. FRANKS. Well, thank you all very much, and I will now yield to the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman, and I thank each of the witnesses for being here. I know you are not here for the pay but—I continue to have concerns anytime it may appear that we are usurping State government authority. I think we have got diversity, that we have got clear interest.

But someone that has been very involved in this legislation is my friend from Texas, Mr. Farenthold. And I will continue to study the bill, and seek out answers to my concern, but I would like to yield the rest of my time to Mr. Farenthold.

Mr. FARENTHOLD. Thank you, Mr. Gohmert, and I want to thank our witnesses for being here as well. And Ms. Prather, you are a fellow Texan. Can you tell me a little bit about how the law has worked in Texas? I mean, what was the timeframe and expense involved in defending a lawsuit before and after the anti-SLAPP statute was enacted in Texas?

Ms. PRATHER. Thank you, Congressman Farenthold. The statistics say that an average defamation-type lawsuit in Texas would last about 6 years, prior to the passage of anti-SLAPP. Now, we are looking at months, rather than years. It is a significant difference when you are dealing with a meritless claim. Obviously, if there is a meritorious claim, that claim goes forward. But if it is a meritless claim, it unburdens the judicial system by getting rid of the meritless claims in a swift manner.

Mr. FARENTHOLD. Let's talk about that for a second. Some of the critics of this say, "All right, what do you do when somebody has actually come after you with something that is untrue?" Let's say this whole Congress thing does not work out for me, and I decide to open Blake's Bistro.

To me, it is pretty clear that if I sued somebody for saying, "Your restaurant sucks," that would be their opinion, and it would be protected speech, and that would be a meritless lawsuit. But if somebody would come up and say, "Oh," you know, "Blake's served me a chicken-fried steak with a roach right in the middle of the cream gravy," that is a statement of fact; and if it is not true, I still want to have a way to deal with that through litigation.

Can you assure me that this legislation would still protect me from my roach liar?

Ms. PRATHER. Absolutely. I mean, there is nothing in this law, or in this bill, that prevents a meritorious claim from going forward. I think a number of the examples that have been given on the other side are hypothetical examples. There has not been cited a single meritorious case that was not allowed to go forward as a result of any sort of an anti-SLAPP law. You simply have to get over the initial hurdle, which you should have done before you filed the lawsuit, of being able to establish the facts that you are likely to be able to succeed on the merits.

Mr. FARENTHOLD. And so let me go back and talk of practical application. Because a lot of this is really amplified by the online community, and most online services that do reviews—I mean, Yelp comes to mind as a leader in that, as does Glassdoor, Trip Advisor, even the reviews on Amazon—to me, it seems a common feature among those that the opportunity for a business that feels like they have been lied about, or has a different opinion about a review, to post something themselves providing an alternative way for them to be heard as well, without going through a lawsuit.

Yet, you have got big companies that say, "We do not want anything," or even small businesses saying, "We do not want anything about us. We are going to go after him." Can you talk a little bit about what other avenues besides a lawsuit are available to somebody who feels like his or her business has been abused online?

Mr. SCHUR. Sure. I mean, as the Supreme Court said almost 90 years ago, if there is speech that you do not like, the remedy for that is more speech, not enforced silence. At Yelp, we are firm be-

lievers in that, which is why we allow businesses, free of charge, to respond to any review, and that appears directly adjacent to the original review.

We certainly never recommend litigation as a substitute for customer service. If you have one or two reviews, probably nobody is focusing on it as much as you, the business owner. If you have multiple critical reviews, more than that, then maybe you need to take a hard look at your business, and see if maybe somebody is pointing something out to you. In the case where someone does really feel the need to press litigation, certainly that is their right, but the case should have merit. Any case should have merit before you walk through the courtroom door, and the SPEAK FREE Act does nothing to prevent cases of merit from moving forward.

Mr. FARENTHOLD. All right. And finally, Mr. Reinert, I didn't want to—oh, I am sorry, I am out of time. If we get a second round, I will come back to you; I apologize. And I see I am out of time, and I yield back.

Mr. FRANKS. I thank the gentleman that is giving the Chairman a hint that he would like a second round. And so with that, I think we will go ahead and do that. And, Mr. Gohmert, did you have questions? I will yield to the gentleman from Texas first.

Mr.GOHMERT. Thank you. I would just like to ask one question before I yield. You know, I have seen the concern that without anti-SLAPP laws in Federal court, it could lead to forum shopping. But if forum fits, I mean, is there is anything wrong with choosing the best forum for your lawsuit?

Mr. REINERT. If I could answer that, Mr. Gohmert.

Mr. GOHMERT. Sure.

Mr. REINERT. Right, that is the principle of federalism; that is the principle of concurrent jurisdiction; and that is the idea, which is that States get to experiment with the substantive laws that they think are best.

And so when I hear both Ms. Prather and Mr. Brown say that this is about Erie—remember, Erie doctrine is about the Rules of Decision Act, and what does the Rules of Decision Act say? The Rules of Decision Act says State substantive law should govern. That is not what this statute does. So, if that is the argument, I am confused. I mean, normally when there is a circuit split about an Erie question, the Supreme Court resolves it.

Mr. GOHMERT. I want to yield the rest of my time to Mr. Farenthold. Thank you.

Mr. FARENTHOLD. Thank you, and I do not want to seem like I am ignoring your concerns that you raised, about third parties, for instance being able to jump in. But, you know, let's suppose I have posted on a semi-anonymous site like, you know, Glassdoor. I do not know if you are familiar with this, an employee can post reviews of employers anonymously to the public, but Glassdoor knows who they are. So if a plaintiff were to sue Glassdoor to try to get my personal information, should I not have a right to go in there and try to stop that from being disclosed? I guess my jumping in immediately discloses who I am——

Mr. REINERT. No, no. Well, thank you, Representative Farenthold. I mean, I think that the answer is yes. The question

is, does Federal court have a jurisdiction over that proceeding? And the answer to that question is no.

I mean, Ms. Prather talked about the ABA supporting litigation like this. If you look at the legislation—if you look at the legislation the ABA has supported, it had no provision that allowed people to remove a case to Federal court because their personal identifying information was sought. So——

Mr. FARENTHOLD. But part of the thought behind this is to promote free speech, the First Amendment being actually a purely Federal creation. Should I not have access to Federal courts to defend my First Amendment right to speech, and is this not just a way of granting that access at a potentially lower cost, lower threshold?

Mr. REINERT. Representative Farenthold, whether you should or should not, I do not know if it is a question that I am equipped to answer. I can say the Constitution does not permit jurisdiction over that. The issue can be raised in State court. State courts are bound to follow the Federal Constitution.

If State courts are not respecting the Federal Constitution, that is a problem to be resolved through traditional means of review. So it is not that you do not have a claim; it is the question "Does the Federal court have jurisdiction over it?" And the answer, flatly, is no.

Mr. FARENTHOLD. Well, I think I am going to disagree with you on that as, you know, a defender of the First Amendment. But I certainly will agree to disagree with you. I know better than to get into an argument with a law professor. I remember quite a few of those from many years ago in law school; you never tended to win those, especially when you are a recovering attorney now sitting in Congress.

Ms. Prather, did you want to talk a little bit more about why you do think it is appropriate for these to be available in Federal court? I will let you argue with the law professor.

Ms. PRATHER. And I would like to bring up two points on this, and perhaps Mr. Schur can speak to the issue of statements being made by Yelp customers that obviously transcend State lines. And you know, the fact of the matter is, it goes back to First Amendment rights should be equal to all citizens, no matter where they live, and no matter what claims are filed against them.

With regard to the ABA's statement as well, I want to also address that point that the professor brought up. The ABA statement is attached to my written testimony; it speaks for itself. The characterization was not correct with regard to the ABA's statement.

But generally speaking, we have got a problem, and you all are the only ones that can fix that problem. And the problem is, is that you have got people out there that are going around and abusing people's First Amendment rights, and doing so in a creative fashion by using the Federal court system to avoid First Amendment protection.

Mr. FARENTHOLD. Thank you very much, and I do look forward to this legislation moving forward to stop this type of cyber-bullying. And I yield back.

Mr. FRANKS. Well, I am going to direct my question to Mr. Schur, and ask you to elaborate a little bit related to some of the constitu-

tional questions. You know, this is the Constitution Subcommittee, and sometimes we avail ourselves of either trying to read it or defend it. And if you could give us your perspective on it, and why you believe that this is certainly something that would be constitutionally allowed, and beyond that, if it would be appropriate.

Mr. SCHUR. Thank you very much, Chairman Franks, for the question. Fortunately, we live in a country where the First Amendment applies with equal force in every State. Unfortunately, we live in a country where SLAPPs can be filed in every State.

Now, in the example that I gave earlier, with a Yelp reviewer writing a review of a restaurant or anything, really, it is not simply people in that State, or in that community that are reading those reviews. I looked up reviews from California to find out where I was going to stay here in D.C., where I am going to go to dinner. This is literally interstate commerce, if anything else is. So I would be shocked if there was no basis for Congress to regulate this particular subject matter.

Mr. REINERT. Mr. Chairman, I hate to breach etiquette, and if it is, please forgive me. Can I make an observation?

Mr. FRANKS. Sure.

Mr. REINERT. There are two separate questions here. There is the question of Article III jurisdiction, and there is the question of Congress's authority. I happen to agree with Mr. Schur, that with respect to some of these issues with respect to Yelp user reviews, they would fall within interstate commerce, and therefore would be within the Congress' ability to regulate, but that is separate from Article III. Under Article III, Congress cannot expand the jurisdiction of the Federal courts. Yes, the First Amendment applies throughout the land, and we rely on State courts to apply it and Federal courts to apply it. That is the principle of concurrent jurisdiction, so.

Mr. GOHMERT. You do not think under Article III, section 2, Congress can limit the jurisdiction of Federal courts?

Mr. REINERT. Congress can certainly limit the jurisdiction of Federal courts. They cannot expand it beyond the bounds of Article III, section 2, which is what you do when you allow removal, either based on the motion to quash, or over non-diverse State claims.

Could you add a provision like the Federal officer defense provision, in which you have removal when a Federal officer raises a Federal defense? Yeah, maybe you could do that. But that is not what this legislation does.

And there are lots of issues that come up in State court in which defendants are raising constitutional issues. We count on State courts, we trust State courts—there is a long principle in this country of trusting State courts to adjudicate those. And the question is "Why should it be any different here?"

Mr. FRANKS. Well, I am going to take Mr. Farenthold's advice, and try to demur from debating law professors, and refer if I could to Mr. Schur. Would you have any response to Mr. Reinert?

Mr. SCHUR. Thank you very much, Chairman Franks. Again, we are here to talk about free speech, which is guaranteed by the Constitution. It is certainly a Federal issue, in that people be allowed to speak their views online, and that not be subject to meritless

cases. So I fully believe that Congress has a right, and in fact should be regulating in this area.

Mr. FRANKS. Finally, Ms. Prather, your name was taken in vain a few times. Did you have sufficient opportunity to respond?

Ms. PRATHER. I do believe that I have, Mr. Chairman. The one thing that I would encourage you all to do is look at the fact that there is a patchwork here, and there are holes that need to be filled, and Congress is the only vehicle that can close the loopholes that exist. And I applaud you all again for considering this legislation. Thank you.

Mr. FRANKS. Well, on that note, I want to thank you all for your very compelling testimony, and this concludes today's hearing. And I certainly thank the audience and the witnesses for attending.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses, or additional materials for the record. And I would thank the witnesses and thank the Members, and again, the audience, and this hearing is adjourned.

[Whereupon, at 2 p.m., the Subcommittee was adjourned subject to the call of the Chair.]

APPENDIX

Material Submitted for the Hearing Record

Prepared Statement of Jeremy B. Rosen, Partner, Horvitz & Levy LLP

Written testimony of Jeremy B. Rosen in support of HR 2304

I. INTRODUCTION

I write in support of H.R. 2304, the SPEAK FREE Act of 2015, and in response to the prepared statement of Professor Alexander Reinert.

By way of background, I am a partner at Horvitz & Levy LLP, the largest appellate law firm in California.[1] I have litigated more than 50 appeals under California's anti-SLAPP statute on behalf of both plaintiffs and defendants. Thus, I have substantial experience advocating both for and against application of the anti-SLAPP statute. As such, I have developed an extremely broad perspective about the benefits and drawbacks of the statute. While no statute is perfect, California's anti-SLAPP law provides a very important safeguard that protects the right of ordinary citizens to petition their government and to speak their minds without fear of being dragged into lengthy and expensive litigation by the more powerful and wealthier interests that they seek to challenge. Without the SPEAK FREE Act, millions of Americans who live in states without such protection will continue to face the Hobson's choice of remaining silent or risking ruin from litigation. As explained in greater detail below, the fundamental problem with Professor Reinert's argument is that it lacks any grounding in the realities of anti-SLAPP litigation. The supposed problems he identifies simply do not exist.

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[1] I am also Vice-President of the Public Participation Project (PPP), a non-profit organization that seeks to protect the right of petition nationwide by promoting state and federal anti-SLAPP legislation. My testimony here is my own and does not necessarily represent the opinion of either Horvitz & Levy or the PPP.

II. THE NEED FOR A FEDERAL ANTI-SLAPP LAW

California's experience demonstrates the need for nationwide anti-SLAPP protection. Westlaw data show there were 585 anti-SLAPP appeals decided by California courts between fiscal years 2010 and 2014. Of those, 316 were appeals from orders granting anti-SLAPP motions and 269 were appeals from orders that denied anti-SLAPP motions in their entirety. Appellate courts completely reversed the orders in 71 of these 269 appeals from anti-SLAPP denials, for a 26% reversal rate (a rate vastly higher than the usual appellate reversal rate). The numbers of anti-SLAPP motions granted by trial courts and reversals of trial court denials of anti-SLAPP motions starkly demonstrate that, every year in California alone, hundreds of SLAPP suits are filed with the sole purpose of seeking to stifle and punish the exercise of the right of petition and free speech.

Two of my recent clients help illustrate the critical need for anti-SLAPP protection. Francine Eisenrod is a retired public school teacher who owns a small home in the San Fernando Valley. A developer wanted to tear down her neighbor's single family home and replace it with multiple condominiums. Ms. Eisenrod exercised her right to object to this proposed development through various levels of the planning approval process. In retaliation, the developer sued her for supposedly interfering with the development. Without the anti-SLAPP statute, Ms. Eisenrod would have faced a lengthy and expensive legal proceeding. Using the anti-SLAPP statute, Ms. Eisenrod was able to settle the lawsuit quickly and reasonably.

Marcy Winograd is a special education teacher and a local community activist. She objected to the mistreatment of animals at a local pony ride and petting zoo and organized a petition campaign that ultimately led to the closing of the pony ride and petting zoo. In response, the pony ride/petting zoo operator sued Ms. Winograd for defamation, contending she was not entitled to publicize her opinion that the operator improperly treated the animals in her care. Again, without the anti-SLAPP statute resulting in a dismissal of the lawsuit, Ms. Winograd could have faced financial ruin fighting the operator's baseless lawsuit.

There are many Eisenrods and Winograds outside California who are not protected by an anti-SLAPP law. They deserve to be equally free to petition their government and speak their mind. The SPEAK FREE Act will help ensure that they can do so.

III. PROFESSOR REINERT'S PARADE OF HORRIBLES HAS NOTHING TO DO WITH THE SPEAK FREE ACT

Professor Reinert describes at length numerous cases which he fears would be subject to the SPEAK FREE Act. In particular, Professor Reinert focuses on what types of cases would fit under section 4201, which defines a SLAPP suit covered by the law. The problem with his parade of horribles is that, even if such cases might fit the SLAPP definition in section 4201 (which many would not), they surely would pass muster under section 4202 and therefore survive a motion to dismiss.

Section 4202 notably provides that, even where a lawsuit meets the definition under section 4201, the plaintiff's complaint survives if the plaintiff can show his or her case can "succeed on the merits." Professor Reinert briefly discusses this significant limitation and relies on pleading cases under *Iqbal* and *Twombly* to contend that section 4202 does not provide protection to plaintiffs. But the SPEAK FREE Act is not a pleading motion. The plaintiff has access to discovery if needed and is able to and should present evidence showing the potential merit of his or her claims. As with a summary judgment motion, if the plaintiff raises a genuine dispute of material fact, the claim survives to go to trial. There is thus no risk of the kind of abuse that Professor Reinert speculates will occur. Claims with minimal merit will survive the motion. Only those with no merit whatsoever—that plainly are nothing more than improper attempts to attack the right of petition or free speech—will be struck under this statute. And, if a lawsuit has no merit, why shouldn't it be dismissed as soon as possible, especially when it targets the defendant's right to engage in free speech and petitioning activity?

Furthermore, entire categories of lawsuits (including many in the parade of horribles identified by Professor Reinert) are not subject to a motion to strike under the Act, even if they are meritless. In particular, lawsuits relating to commercial speech or that include public interest claims are absolutely excluded from the statute's ambit. Professor Reinert acknowledges these limits but asserts they are meaningless. Again, he ignores the plain text of the statute, which broadly carves out many of the types of cases Professor Reinert is concerned about.

Finally, Professor Reinert complains about cases where the anti-SLAPP statute was invoked that, in his view, improperly apply the First Amendment to defeat civil rights claims. But this criticism does not address anti-SLAPP statutes. Rather, it identifies a question of the substantive First Amendment jurisprudence developed by certain courts. Whether this line of cases is right or wrong is a question of substantive law that is separate from the procedural protections of the SPEAK FREE Act, since courts with those substantive views of the First Amendment will apply them to dismiss civil rights claims even if a motion to strike under the Act is not at issue (for instance, in summary judgment motions or during trial). Thus, this line of attack is a red herring having nothing to do with the question at hand.

IV. CALIFORNIA'S EXAMPLE PROVES THAT THE ANTI-SLAPP STATUTE PROVIDES MUCH NEEDED PROTECTION AND IS NOT SYSTEMATICALLY MISUSED

Professor Reinert cites to a few critics of California's anti-SLAPP statute in an effort to suggest that the SPEAK FREE Act would be similarly problematic. To respond, it is important to focus on the actual facts, instead of the broad assertions that those critics make without any support. The actual data shows that California's anti-SLAPP statute is working to protect free speech and petition rights and is not being systematically abused. The SPEAK FREE Act would similarly provide benefits without any significant problems.

In 1992, California's Legislature "enacted the anti-SLAPP law in order to address the 'disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'"[2] The statute seeks to "'provid[e] a fast and inexpensive unmasking and dismissal'" of such lawsuits.[3] It has succeeded: thousands of defendants have invoked the anti-SLAPP law to dismiss meritless lawsuits targeting their exercise of First Amendment rights.

California's law began a trend, with many other states following California's lead to enact their own anti-SLAPP statutes.[4] As one commentator recently explained, "this is not a red or blue state issue. It is a speech issue that transcends both [political] parties" and goes to "the heart of [American] patriotism."[5]

It is important to look at the actual data in California regarding how its anti-SLAPP statute has operated in order to see that anti-SLAPP filings have not inundated the court system. The Judicial Council of California maintains data on anti-SLAPP court filings, which are available upon request. The data demonstrate that anti-SLAPP motions are little more than a tiny fraction of trial courts' civil dockets.

For example, between fiscal years 2010 and 2014, parties filed a total of 2,051 anti-SLAPP motions in California trial courts, or roughly 410 anti-SLAPP motions per year on average. Given the 5,006,580 total civil filings in California over that same period, these 2,051 motions constitute only about 0.041% of total civil filings.[6]

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[2] *People ex rel. Fire Ins. Exchange v. Anapol*, 211 Cal. App. 4th 809, 821 (2012).

[3] *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1415 (2001).

[4] Prather, The Texas Citizens Participation Act — 5 Years Later (June 16, 2016) Law360.

[5] *Id.*

[6] See Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2015) Superior Courts Data for Figures 3-16, p. 70 (hereafter 2015 Court Statistics Report).

Such data show that no systematic abuse of the anti-SLAPP statute is occurring. A comparison of anti-SLAPP motions to summary judgment motions in California is also telling because an anti-SLAPP motion operates "like a motion for summary judgment in reverse."[7] "[C]ourts routinely render thousands of summary judgment motions annually"[8] —which far exceeds the few hundred anti-SLAPP motions filed on average every year in California. That fewer anti-SLAPP motions are filed annually than their summary judgment counterparts corroborates the absence of systematic abuse of California's anti-SLAPP statute.

Similarly, there is no abuse of the right to appeal in California anti-SLAPP cases. From fiscal years 2010 to 2014, California's appellate courts decided between 105 and 123 appeals per year from orders granting or denying anti-SLAPP motions. (This number consists of both published and unpublished opinions that affirmed or reversed such an order in whole or in part.) California's appellate courts issued written opinions in 585 anti-SLAPP appeals between fiscal years 2010 and 2014, out of a total of 48,403 appeals disposed of by written opinion in that same time period.[9] Thus, anti-SLAPP opinions by the California appellate courts during that time period constituted roughly 1.209% of the total appellate opinions issued by those courts. Hardly a crisis.

Furthermore, Westlaw data confirm that California's anti-SLAPP statute does not systematically enable meritless appeals from orders denying anti-SLAPP motions. Of the 585 anti-SLAPP appeals decided in California between fiscal years 2010 and 2014, only 269 were from orders that denied anti-SLAPP motions in their entirety. These 269 appeals were a mere 0.55%—less than one percent—of the

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[7] *Comstock v. Aber*, 212 Cal. App. 4th 931, 947 (2012).

[8] Mullenix, The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little, 43 Loy. U. Chi. L.J. 561, 566 (2012).

[9] 2015 Court Statistics Report, *supra*, Courts of Appeal Data for Figures 22-27, p. 67; Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2012) Courts of Appeal Data for Figures 22-27, p. 70 (hereafter 2012 Court Statistics Report).

48,403 appeals disposed of by written opinion during that time period. California appellate courts completely reversed the orders in 71 of these 269 appeals, for a 26% reversal rate. The rate is often higher in certain years. For example, in fiscal year 2012, California appellate courts decided 64 appeals from orders denying anti-SLAPP motions in their entirety, and they completely reversed 21 of those orders—a reversal rate of roughly 33%. These reversal rates are markedly higher than the general reversal rate in California of 9% to 10% during this same period.[10] Thus, the data show that defendants often need the right of immediate appeal to vindicate the policy of early termination of meritless SLAPP suits because trial courts too often erroneously deny anti-SLAPP motions.

In sum, there is no evidence that California's anti-SLAPP law has generated an explosion of abusive motions or appeals. Given this actual data, there is absolutely no basis for the claimed assertion that the SPEAK FREE Act will somehow overload the federal courts.

V. CONGRESS PLAINLY HAS THE AUTHORITY TO PASS THE SPEAK FREE ACT

Finally, Professor Reinert argues that Congress somehow lacks the authority to pass the SPEAK FREE Act. He is wrong. Congress has the authority to decide what cases the federal courts have jurisdiction to consider, as long as it stays within the bounds of Article III of the Constitution.[11]

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[10] See 2015 Court Statistics Report, *supra*, Courts of Appeal Figures 22-27, p. 26; 2012 Court Statistics Report, *supra*, Courts of Appeal Figures 22-27, p. 27.

[11] See *Bowles v. Russell*, 551 U.S. 205, 212-213 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider"); see also *United States v. Denedo*, 129 S. Ct. 2213, 2221 (2009) ("Assuming no constraints or limitations grounded in the Constitution are implicated, it is for Congress to determine the subject-matter jurisdiction of federal courts"); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983) ("This

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Under Article III, "[t]he judicial power shall extend to all Cases, in Law and equity, arising under this Constitution . . . ."[12] "The controlling decision on the scope of Article III 'arising under' jurisdiction is Chief Justice Marshall's opinion for the Court" in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). There, the Supreme Court held that "'[i]t is a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or the laws of the United States, and sustained by the opposite construction.'"[13] In other words, Article III's "'arising under'" jurisdiction "may extend to all cases in which a federal question is 'an ingredient' of the action."[14] Accordingly, the constitutional issue is whether proposed 28 U.S.C. § 4206 satisfies such standards.

The Constitution's First Amendment protects the right to "freedom of speech" and the right "to petition the government for a redress of grievances."[15] The right to petition protected by the First Amendment includes the right to commence, and to defend against, litigation.[16] The right of petition extends to other official proceedings too.[17]

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Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution").

[12] U.S. Const., art. III, § 2, cl. 1.

[13] *Verlinden*, 461 U.S. at 492 (quoting *Osborn*, 461 U.S. (9 Wheat.) at 822).

[14] *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (quoting *Osborn*, 461 U.S. (9 Wheat.) at 823).

[15] U.S. Const., amdt. 1.

[16] *See, e.g., Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. '[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.'").

[17] *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972) ("Certainly, the right to petition extends to all

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Proposed section 4206(a) vests federal courts with removal jurisdiction over claims covered by proposed section 4201. In short, section 4201 covers claims arising in whole or in part from two categories of activities protected by the First Amendment—i.e., free speech and petitioning activities.

The protection afforded by the constitutional right to free speech and the right to petition under the First Amendment is substantial.

"The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits . . . ."[18] For example, if a plaintiff brings a state tort claim against a defendant whose gravamen is the injurious falsehood of the defendant's statement, and the plaintiff is a public figure or public official or the defendant's statements are about a matter of public concern, the constitutional protections provided by the First Amendment add significant substantive elements that the plaintiff must prove to succeed on the tort claim.[19] The protection afforded to the right to petition by the First Amendment is even greater: The First Amendment "ordinarily immunizes petitioning activity."[20]

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departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.").

[18] *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

[19] *See, e.g., id.* at 1215-16, 1219; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771-77 (1986); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502-13 (1984); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-42 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 730-33 (1968).

[20] *Soukup v. Law Offices of Herbert Hafif*, 139 P.3d 30, 49 (Cal. 2006) (absent "'a patent lack of merit, an action protected under the First Amendment by the right of petition cannot be the basis for litigation'"); *accord, People ex rel. Gallegos v. Pacific Lumber Co.*, 70 Cal. Rptr. 3d 501, 513 (Cal. Ct. App. 2008) (constitutional right to petition "preclude[s] virtually all civil liability for a defendant's petitioning activities before not just courts, but also before

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In short, all of the claims covered by proposed section 4206(a) are based on either free speech or petitioning activities protected by the First Amendment, and the constitutional protections afforded by the First Amendment impose significant barriers to claims based on activities involving the exercise of these rights, either in the form of additional elements a plaintiff must prove or a defense that defeats the claims. Accordingly, all the claims covered by section 4206(a) readily fall within Article III's "arising under" jurisdiction—and Congress may therefore vest federal courts with jurisdiction to hear such claims—because the Constitution may either defeat these claims or at a minimum provide an ingredient of such claims.[21]

(...continued)
administrative and other governmental agencies"); *Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guarantee Ass'n*, 39 Cal. Rptr. 3d 43, 53-54 (Cal. Ct. App. 2006) ("'[t]hose who petition the government for redress of grievances are generally immune from antitrust liability'" and this immunity has been extended by the Supreme Court so that it "applies to 'virtually any tort'"); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080 n.4 (8th Cir. 1999) ("the First Amendment generally immunizes the act of filing a lawsuit from tort liability"); *Ludwig v. Superior Court*, 43 Cal. Rptr. 2d 350, 360 n.17 (Cal. Ct. App. 1995) (constitutional law ""bars litigation arising from injuries received as a consequence of First Amendment petitioning activity . . ., regardless of the underlying cause of action asserted by the plaintiffs"", and ""[t]o hold otherwise would effectively chill the defendants' First Amendment rights"").

[21] *See Merrell Dow*, 478 U.S. at 807 (Article III's "'arising under'" jurisdiction "may extend to all cases in which a federal question is 'an ingredient' of the action"); *Verlinden,* 461 U.S. at 492 ("'[i]t is a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or the laws United States, and sustained by the opposite construction'"). Congress has the constitutional authority under Article III to pass a statute like proposed 28 U.S.C. § 4206 that vests federal courts with jurisdiction to hear claims arising out of free speech and petitioning activities to which the Constitution's First Amendment is a defense. *Mesa v. California*, 489 U.S. 121, 129, 133-34 (1989) (federal officer removal under 28 U.S.C. § 1442(a)(1) "must be predicated on the allegation of a colorable federal defense," a conclusion based on "an unbroken line of [Supreme] Court[] decisions extending back nearly a century and a quarter"); *id.* at 136-37 (a removal statute—for example, the federal officer removal statute—can "overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged"); *id.* (while the federal officer removal statute, as "a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal

(continued...)

VI. CONCLUSION

Congress has a unique opportunity to pass bipartisan legislation designed to protect the fundamental rights of free speech and petition. The arguments against the bill are speculative and simply do not provide a reasoned basis to oppose it. I urge Congress to pass the SPEAK FREE Act without delay.

(...continued)
officer is a defendant, . . . cannot independently support Art. III 'arising under' jurisdiction," "the raising of a federal question" in the form of a federal defense "in the officer's removal petition . . . constitutes the federal law under which the action against the federal officer arises for Article III's [jurisdictional] purposes" and the officer removal statute is therefore "constitutional[]").

Prepared Statement of the Motion Picture Association of America, Inc.

Motion Picture Association of America, Inc.

Submission for the Record

to the

Committee on the Judiciary

Subcommittee on the Constitution and Civil Justice

Regarding the hearing "Examining H.R. 2304, the SPEAK FREE Act"

June 22, 2016

Throughout its nearly 100-year history, the Motion Picture Association of America, Inc. ("MPAA") and its members[1] have proudly fought for the freedom of creators to tell the stories they want to tell, and of audiences to watch what they want to watch. But while the Supreme Court recognized in 1952 that motion pictures are "a significant medium for the communication of ideas"[2] and thus merit protection under the First Amendment, the fight against threats to filmmakers' speech is not yet won. The MPAA's members frequently face meritless lawsuits objecting to the content of movies or television programs. Such suits can be expensive, time-consuming, and burdensome to defend, even where the court ultimately determines that the lawsuit was barred by the First Amendment or otherwise lacked merit. A federal anti-SLAPP statute would provide the MPAA's members with a tool for disposing of such lawsuits quickly and efficiently, and for that reason, the MPAA agrees that it is worth exploring whether Congress should enact such a statute. For the reasons discussed below, however, the MPAA takes no position on the current draft of H.R. 2304, and urges Congress to proceed cautiously, and to carefully examine the implications of a federal bill before committing to any particular approach.

Anti-SLAPP statutes serve to lessen the burden imposed by meritless lawsuits challenging the exercise of free speech rights. These statutes, currently on the books in 28 states (plus the District of

[1] Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, University City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

[2] *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

Columbia and Guam) provide a means for defendants sued for exercising their First Amendment rights on issues of public concern to have claims against them adjudicated quickly and efficiently, and – where the lawsuit is found to be lacking in merit – to recover their attorneys' fees from plaintiffs who file unmeritorious suits.

The MPAA's members, as well as other media, entertainment, and journalism entities, routinely invoke anti-SLAPP statutes to dispose of meritless claims targeting free speech. For example, California's anti-SLAPP statute[4] has been used to dispose of speech-targeting claims involving:

- A joke told by Jay Leno on *The Tonight Show*[5];
- The portrayal of a soldier in the Oscar-award-winning film *The Hurt Locker*[6];
- A line of dialogue in the film *American Hustle*[7];
- A claim for defamation and invasion of privacy by a person who had been convicted of accessory after the fact involving a murder, over his portrayal in a documentary[8]; and
- Jokes on a talk radio show about a reality TV show contestant.[9]

The MPAA has sought new or improved anti-SLAPP legislation across the country, particularly in states where our members engage in a large volume of production, including Florida (which strengthened its anti-SLAPP statute[11] in 2015), Georgia (which also passed strong amendments to its statute[13] in 2016), and New York, where efforts to update and strengthen its anti-SLAPP statute are ongoing.

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[4] Cal. Civ. Proc. Code §425.16.

[5] *Drake v. Leno*, 34 Med.L.Rptr. 2510 (San Francisco Co. Sup. Ct. 2006).

[6] *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016).

[7] *Brodeur v. Atlas Entm't, Inc.*, No. B263379, 2016 WL 3244871 (Cal. Ct. App. June 6, 2016) (unpublished).

[8] *Gates v. Discovery Communications*, 34 Cal.4th 679 (Cal. Sup. Ct. 2004).

[9] *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798 (2002).

[11] *See* Fla. Stat. Ann. § 768.295.

[13] *See* Ga. Code Ann. § 9-11-11.1 (amended by 2016 Georgia Laws Act 420 (H.B. 513)).

The 28 state (and two other U.S. jurisdictions) anti-SLAPP statutes do not, however, provide a complete solution to the problem of unmeritorious lawsuits targeting free speech. First, these statutes vary significantly, and some are quite narrow in scope. For example, the existing New York statute[14] applies only to lawsuits brought by those seeking government permits, and is thus rarely of use to the MPAA's members. Second, twenty states do not have anti-SLAPP statutes at all, sometimes leaving defendants sued in those states over their speech without an effective means of resolving those lawsuits quickly and efficiently. And third, the federal courts are split on the issue whether state anti-SLAPP statutes (or even specific provisions within them) apply when state claims are adjudicated in federal court.[15] A federal anti-SLAPP statute would provide a means for anyone sued over the exercise of their First Amendment rights to have such claims adjudicated quickly, no matter the state, or whether such suit is heard in state or federal court.

However, enacting a federal anti-SLAPP statute is a complex undertaking with far-reaching implications, and as currently drafted, H.R. 2304 includes certain provisions that should be reconsidered. First, H.R. 2304 would vastly expand the scope of claims against which an anti-SLAPP motion could be brought. State anti-SLAPP statutes apply only to state claims, typically defamation and invasion of privacy; federal claims are not subject to state anti-SLAPP statutes.[16] H.R. 2304 would, for the first time, make the anti-SLAPP procedure available to contest federal claims, including those under copyright law, an exclusively federal claim.[17] This raises considerable concern for the MPAA's members. As the Subcommittee is aware, copyright is the lifeblood of the motion picture and television industries, and, where necessary, the MPAA's members vigorously enforce their rights in federal court. The MPAA is

[14] N.Y. Civ. Rights Law § 76-a.

[15] *Compare U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971 (9th Cir. 1999) (California anti-SLAPP statute generally applies in federal court), *with Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 845–847 (9th Cir. 2001) (discovery stay provisions of California statute ***do not*** apply in federal court) and *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (District of Columbia anti-SLAPP statute does not apply in federal court).

[16] *See Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010).

[17] *See* 17 U.S.C. §301(a); 28 U.S.C. §1338.

concerned that defendants in federal anti-piracy suits could use the procedures established by H.R. 2304 to raise weak First Amendment arguments that nevertheless would present significant hurdles for MPAA members seeking to protect their content from piracy. In this context, H.R. 2304 could impair MPAA members' ability enforce their rights under copyright law. We thus urge the Subcommittee to examine whether there are ways to craft the scope of the statute to protect free speech while avoiding interference with legitimate intellectual property enforcement. The MPAA is committed to working with the Committee and bill proponents to address this issue in a tailored fashion that does not harm the laudable overall goals of the bill, especially its benefits for filmmakers and newsgatherers.

Another area of concern is the volume of cases that H.R. 2304 would bring into federal court. Under Section 4206 of the bill, any state claim within the scope of the statute – no matter how small – could be removed to federal court. So, for example, if a plaintiff brought a defamation claim against a defendant in state court, but sought only $100 in damages, that lawsuit would be removable to federal court under H.R. 2304. That creates the possibility of a flood of relatively minor state-law cases into federal courts, further burdening already over-burdened federal judges and court staff. It is notable that where state-law claims may be heard by federal courts under their diversity jurisdiction, Congress has limited that jurisdiction to claims seeking more than $75,000.[18] We urge the Subcommittee to examine whether a potential federal anti-SLAPP statute should include a similar limit.

Finally, as currently drafted, the bill would leave defendants facing claims against certain First Amendment-protected speech without the benefits of the anti-SLAPP procedure. Specifically, a "matter of public concern" in Section 4208(1) is defined as a limited, specifically enumerated set of issues that may not cover all of the issues of public interest addressed in the MPAA members' First Amendment-protected works. We thus urge the Subcommittee to adopt a broader scope of claims that would be subject to an anti-SLAPP motion, to include claims involving (in words borrowed from the California statute)

[18] 28 U.S.C. §1332(a).

"any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[20]

The MPAA thanks the Subcommittee for its interest in the issue, and looks forward to working with the Subcommittee to achieve consensus on a federal anti-SLAPP bill that protects the First Amendment rights of filmmakers, while respecting their ability to enforce their intellectual property rights in federal court.

[20] *See* Cal. Civ. Proc. Code §425.16(e)(4); *see also Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (Cal. Ct. App. 2008) ("'an issue of public interest' … is any issue in which the public is interested. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.").

Response to Questions for the Record from Aaron Schur, Senior Director of Litigation, Yelp Inc.

VIA EMAIL & U.S. MAIL

August 10, 2016

Bob Goodlatte, Chairman, House Committee on the Judiciary
Trent Franks, Chairman, Constitution and Civil Justice Subcommittee
362 Ford House Office Building
Washington, DC 20002

Re: Supplemental testimony of Aaron Schur, Senior Director of Litigation, Yelp Inc.

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to appear before this Subcommittee on June 22, 2016 to testify in favor of the SPEAK FREE Act, and for the additional questions for the record that you have posed to me. The following are my responses to those questions.

Questions for the record from Representative Steve Cohen:

1. **In your view, would it be possible to strike a better legislative balance between protecting against SLAPP suits, on the one hand, and ensuring access to courts for those with potentially meritorious claims, on the other, or must Congress simply choose between doing one or the other?**

Congress need not choose between protecting against SLAPP suits and allowing access to potentially meritorious claims. Anti-SLAPP laws, including the SPEAK FREE Act, already achieve this important balance. The SPEAK FREE Act allows meritorious cases to move forward by ensuring that claimants with facts supporting a prima facie case will have their cases heard. Similarly, in the rare cases where such facts are only in the possession of the other party, the SPEAK FREE Act allows a court to permit specified discovery upon a showing of good cause.

There are no examples—not a single one—of any meritorious case that was prematurely ended by an anti-SLAPP law. Indeed, a recent analysis of California's anti-SLAPP law determined that the law works precisely as intended in stopping meritless claims, and allowing claims with merit to move forward (and does so without having a meaningful impact on the caseload of the court system).[1] Nor does Professor Reinhart present any evidence to the contrary. I note that in Professor Reinhart's prepared remarks, he did make the assertion that "there is no evidence to suggest that the heightened procedural barriers imposed by H.R. 2304 will be effective at

[1] Felix Shafir, Jeremy B. Rosen and David Moreshead, *California's Anti-SLAPP Law Is Not Systematically Abused* (published June 30, 2016) available at http://www.law360.com/articles/812761/california-s-anti-slapp-law-is-not-systematically-abused

filtering meritless cases out of court and keeping meritorious cases in." Professor Reinhart's remarks, however, focus almost entirely on the types of claims that may be subject to anti-SLAPP laws—which as discussed at the hearing is necessarily broad, as any claim may be misused in a SLAPP. Professor Reinhart, however, does not focus sufficiently on the fact that simply because a claim is within the scope of an anti-SLAPP law, does not mean it will be dismissed. Indeed, as long as claimants have facts to support their claims—information that litigants should have at their disposal before their attorney enters the courthouse—they will prevail in withstanding anti-SLAPP challenges.

2. To your knowledge, are there any empirical studies regarding the use of lawsuits that target users of review websites based on their reviews?

Yelp is unaware of any studies focusing on lawsuits against online reviewers, although Yelp has ample experience with, and frequently reads media reports about, such lawsuits. Moreover, as noted in my previous response there is robust data confirming the efficacy of anti-SLAPP laws generally. It is also worth noting that anti-SLAPP laws do not merely aid with the speedy resolution of lawsuits—with a mandatory fee provision, they also encourage attorneys to take cases to defend speech that they might not otherwise take on, as well as deter businesses from bringing shoddy cases in the first place.[2]

Notwithstanding that it has not been a focus of research, it is Yelp's experience that businesses frequently target consumers with legal actions in retaliation for expressing their views in online reviews. In my original written testimony, for example, I highlighted several real world examples of the threats that Yelp reviewers had recently faced. Yelp receives word of these sorts of threats on a regular basis, and has received many more such complaints from users since the hearing. These are not mere anecdotes—for these consumers these are real legal threats that unjustly force them to choose between their constitutional right as Americans to express their opinions, and the financial risk of a lawsuit, even if meritless.[3]

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[2] As a recent example, a Texas student sued by her former personal injury attorney was a able to secure *pro bono* counsel to file an anti-SLAPP motion, in part due to the robust Texas anti-SLAPP law that allows for the recovery of attorneys' fees. Megan Flynn, *Student Sued by Law Firm for Bad Facebook Review Asks Judge to Dismiss Case*, Houston Press (published July 29, 2016), available at http://www.houstonpress.com/news/student-sued-by-law-firm-for-bad-facebook-review-asks-judge-to-dismiss-case-8614075 ("Houston attorney Michael Fleming, however, thought the case was bogus almost immediately after seeing media reports about it . . . and thought it was nothing but a bully's attempt to silence unfavorable criticism on the Internet . . . Fleming is asking that [plaintiff] pay $50,000 in damages plus attorney's fees, as Fleming is representing [defendant reviewer] pro bono.").

By contrast, recent lawsuits brought by a dentist in New York, which has no strong anti-SLAPP law, have resulted in repeated removals of the online criticisms by patients apparently without the means to fight court battles or lawyers incentivized monetarily to take the cases. Barbara Ross, *Manhattan dentist sues five patients in four years over negative web reviews* (published July 26, 2016), available at http://www.nydailynews.com/new-york/manhattan/manhattan-dentist-sues-5-patients-4-years-bad-reviews-article-1.2726895 (The dentist "settled with two of them who had complained about the expense of going to Dayani . . . Dayani backed off when both patients pulled their comments from his Yelp page. The first patient also agreed to pay off his balance of $445 and to never again say anything bad about the doctor on the internet.").

[3] As a way to make consumers aware of a business's propensity for bringing legal actions before they decide to spend their money, Yelp has recently experimented with providing online notifications about businesses that make

I also highlighted in my written remarks that TripAdvisor—a peer review site focused on travel-related businesses—has stated that about 2,500 of their users in 2015 reported wanting to remove a review in response to harassment from businesses. As I noted previously, this number is certainly less than the actual number, as TripAdvisor relied solely on self-reporting to obtain that figure. Similarly, Glassdoor, a website allowing employees to review employers, has received more than 250 legal demand letters concerning users that have expressed opinions through that forum over the past year, though the number of demand letters sent to Glassdoor's users as opposed to Glassdoor itself is undoubtedly significantly higher. Yelp itself is working to create features that allow users to better report to us when they face legal threats in response to posting Yelp reviews, and in time hopes to be able to use this information to provide better guidance to consumers intimidated merely for detailing their experiences with businesses.

Questions for the record from Representative Trent Franks:

1. **Would a Federal Anti-SLAPP statute help protect the rights of individuals engaging in anonymous free speech or would such individuals be required to reveal their identities in order to file an Anti-SLAPP motion?**

Yes, the SPEAK FREE Act contains provisions intended to protect the constitutional right to speak anonymously. The First Amendment protects the right to speak anonymously (including the right to use a pseudonym). *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases and others have confirmed the important role played by anonymous speech in our country, from the publications of *Common Sense* and *The Federalist Papers* at the dawn of our nation, to the present day.

Addressing the explosion of anonymous speech with the advent of the Internet, many courts have set out rules to protect against the identification of anonymous Internet speakers. The leading decision on this subject is *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), which established a standard that became a model followed or adapted by courts throughout the country. Elements of this standard are woven into the SPEAK FREE Act, which requires that the subpoenaing party have sufficient facts to make an "evidentiary showing that the claim is likely to succeed on the merits of each and every element of the claim." This forces parties to ensure that they have facts supporting their claims prior to using the federal court system to unmask online speakers. This is especially important as the identification of an anonymous speaker is a form of relief itself, as once a speaker is named he or she abruptly loses the First Amendment right to speak anonymously, and may become the subject of extrajudicial harassment by the target of his or her original criticism.

Recognizing this important First Amendment right, federal courts also allow anonymous speakers that are the subjects of subpoenas seeking their identification to proceed anonymously in litigating motions to quash. *E.g.*, *Highfields Capital Management v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005) (granting motion to quash brought by anonymous individual); *USA Techs., Inc.*

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questionable legal threats or file abusive legal actions. *See* Rosalie Chan, *Yelp Is Now Marking Businesses That Sue Reviewers*, Time (published July 26, 2016), available at http://time.com/4422796/yelp-consumer-alert-lawsuit/.

v. Doe, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (same). Nothing in the SPEAK FREE Act changes this, and those targeted for their speech retain the right to anonymously make motions to quash subpoenas seeking to identify them.

2. Would you like to supplement your testimony with any additional information?

I would like to address Professor Reinhart's argument, articulated in his written submission, that certain cases in California that were dismissed under California's anti-SLAPP law were "important civil rights claims." The examples Professor Reinhart focuses on are meritless cases that clogged the courts and provided no benefit to the public. For example, Professor Reinhart casts *Hansen v. Ca. Dept. of Corrections & Rehabilitation*, 171 Cal.App.4th 1537 (Cal. Ct. App. 2008) as a case involving a "whistleblower retaliation claim" and a "retaliatory discharge claim." What he fails to mention is that the California Court of Appeal found that the plaintiff in that case "failed to establish that his claims had even minimal merit" and that he was not actually a "whistleblower" under California law. The plaintiff, Hansen, was a state-employed instructor in California's Department of Corrections and Rehabilitation. Hansen was investigated by the Department for potential criminal activities including sexual activity with inmates. During the investigation, Hansen resigned and when the investigation continued, Hansen sued. He claimed that the mere continuation of the investigation into his conduct constituted a retaliatory action against him for supposed complaints he had in the past about his employer. When faced with an anti-SLAPP motion, Hansen offered no facts to support his claims, and so his lawsuit was dismissed. Far from a meritorious "civil rights" case, the Hansen case shows how anti-SLAPP laws can quickly dispose of meritless cases that would otherwise clog the legal system and potentially cause more damage to the public—like interfering with a government investigation into potential criminal conduct.

Professor Reinhart also holds up *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414 (9th Cir. 2014) as a "most striking" decision on an "important civil rights claim." Again, the facts tell a different story. In 2010, Congress passed the Twenty-First Century Communications and Video Accessibility Act, which required the FCC to revise its regulations on closed captioning of online video programs. Before those rules were released, the plaintiff impatiently demanded that CNN.com add closed captioning immediately. When CNN.com stated it already offered text-based services and would comply with whatever eventual FCC rule emerged, the plaintiff sued in federal court asserting state law claims (six months later, the FCC announced its rules). CNN filed an anti-SLAPP motion that was denied by the District Court, which held that the asserted claims did not fall within California's anti-SLAPP statute. In a unanimous decision, however, a Ninth Circuit panel reversed, finding the anti-SLAPP law did embrace the action, and that the plaintiff's claim under California's civil rights statute, the Unruh Act, was "unsubstantiated" and "lack[ed] even the minimal merit necessary to withstand CNN's anti-SLAPP challenge." On the remaining state law claim, the Court certified a critical question concerning its application to the California Supreme Court, which announced it would issue a decision. Rather than face that decision, the plaintiff settled with CNN. Again, far from a meritorious case, this case involved another plaintiff that brought an unneeded, meritless case that tied up the courts while rules governing the underlying issue were already being formulated.

These examples show that supposed valuable cases found to be subject to California's anti-SLAPP law and highlighted by Professor Reinhart are simply meritless cases that benefited no one except the lawyers involved. They also demonstrate that meritless cases can take the form of any type of claim, making it critical that anti-SLAPP laws such as the SPEAK FREE Act be broad enough to encompass all types of claims that may be used in attempts to usurp the free speech rights of the public.[4] Professor Reinhart provides no facts showing any legitimate civil rights claim would be stifled or meaningfully delayed by the SPEAK FREE Act,[5] and indeed, anti-SLAPP laws may crystallize the issues in such cases sooner allowing meritorious cases to move forward while halting meritless cases before extensive time and money is spent on them.

Regards,

Aaron Schur
Senior Director of Litigation
Yelp Inc.
140 New Montgomery Street, 9th Floor
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[4] The California Supreme Court again recently recognized the broad application of California's anti-SLAPP law. *Baral v. Schmitt*, Case No. S225090 (Cal. Aug. 1, 2016) ("[A]nti-SLAPP procedures are designed to shield a defendant's constitutionally protected conduct from the undue burden of frivolous litigation. It follows, then, that courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity.").

[5] The attorneys' fees provision of the SPEAK FREE Act discourages the use of anti-SLAPP motions (and baseless appeals from their denials) as a way to delay a case. Specifically, section 4207(b) states that "if a court finds that a motion to dismiss under section 4202, a motion to quash under section 4205, or a notice of removal under section 4206 is frivolous or is solely intended to cause unnecessary delay, the court shall award litigation costs, expert witness fees, and reasonable attorneys fees to the party that responded to the motion or notice." Further, as noted by the study I previously referenced, in California "data confirms that the anti-SLAPP statute does not systematically enable meritless appeals from orders denying anti-SLAPP motions."

Response to Questions for the Record from Bruce D. Brown, Executive Director, The Reporters Committee for Freedom of the Press

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

July 13, 2016

Bruce Brown
Reporters Committee for Freedom of the Press
1156 15th Street NW
Suite 1250
Washington, DC 20005-1779

Dear Mr. Brown,

The Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice held a hearing on "Examining H.R. 2304, the SPEAK FREE Act" on Wednesday, June 22, 2016 at 1:00 p.m. in room 2226 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Committee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers by Wednesday, August 10, 2016 to John Coleman at john.coleman@mail.house.gov or 362 Ford House Office Building, Washington, DC, 20002. If you have any further questions or concerns, please contact John Coleman on my staff at 202-225-2825.

Thank you again for your participation in the hearing.

Sincerely,

Bob Goodlatte
Chairman

Enclosure

Questions for the record from Representative Trent Franks:

1. Would you like to supplement your testimony with any additional information?

Supplemental Testimony of Bruce D. Brown
Executive Director
The Reporters Committee for Freedom of the Press

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

H.R. 2304, the SPEAK FREE Act

August 10, 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. I was honored to appear before this Committee on June 22, 2016 to testify in favor of the SPEAK FREE Act. I submit the following testimony to supplement the record regarding congressional authority under the Commerce Clause and subject matter jurisdiction for removal to federal court under Article III.

I. *Congress is authorized to enact the SPEAK FREE Act under the Commerce Clause of the U.S. Constitution.*

H.R. 2304 is a valid exercise of Congress' enumerated powers under the Commerce Clause of the U.S. Constitution.[1] Congress has the authority to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and economic activities that "substantially impact" interstate commerce.[2] This authority also extends to purely intrastate activity that is not itself "commercial" but affects interstate commerce in the aggregate.[3] Only a "rational basis" must exist for concluding the activity affects interstate commerce.[4]

There is no doubt that both traditional news media and Internet sites engage in commerce as they publish and promote speech. News organizations and Internet news sites must pay for the means of distribution, and they have developed a variety of business models for doing that. While the First Amendment restrains Congress' ability to regulate content, the commercial nature of the publishing industry gives Congress the authority under the Commerce Clause to regulate burdensome litigation that obstructs the interstate transmission of communications. By providing a uniform mechanism to dismiss SLAPPs brought against speakers addressing an official proceeding or a matter of public concern, Congress is providing a means of curbing abusive lawsuits and helping to ensure the free flow of debate on public issues across the nation.

H.R. 2304 regulates activities that "substantially affect" interstate commerce. National publication of news has always raised questions related to the application of laws across state borders, but speech on the Internet has exponentially increased attention to those issues, as it has rendered traditional barriers to transmission of speech obsolete.

For example, a Florida federal court recently dismissed a SLAPP filed by a doctor living in California against a doctor residing in Connecticut after the Connecticut doctor published an

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[1] U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
[2] *See generally* U.S. Congressional Research Service, "The Power to Regulate Commerce: Limits on Congressional Power," (RL32844, May 16, 2014), by Kenneth R. Thomas. *See also United States v. Lopez*, 514 U.S. 549 (1995).
[3] *Gonzales v. Raich*, 545 U.S. 1, 50 (2005).
[4] *Id.* at 32 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.").

article on a scholarly, science-based medicine website discussing the California doctor's allegedly unproven techniques in treating patients with Alzheimer's disease.[5] The plaintiff appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit, claiming the trial court improperly applied the California anti-SLAPP statute in federal court.[6] This is the type of meritless lawsuit H.R. 2304 intends to limit. The defendant doctor's online article informs patients from other states who are considering the rare Alzheimer's treatment about its supposedly unproven scientific support, thus potentially affecting their decision-making over whether to opt for the procedure. Congress has the authority under the Commerce Clause to enact a law allowing the dismissal of such a suit – the appeal of which is still pending – because of the interstate nature of the speech at issue and its effect on interstate commerce.

H.R. 2304 also is on solid ground as a statute that would regulate intrastate communications that affect interstate commerce when aggregated together. In *Gonzales v. Raich*, the U.S. Supreme Court ruled that the Commerce Clause's authority includes the power to prohibit local cultivation and use of marijuana because the local activity was part of an economic "class of activities" that substantially affects interstate commerce, even if an individual's actions alone did not affect such commerce.[7] The Court found that Congress has the authority to regulate an entire class of activities if it "decides that the 'total incidence' of a practice poses a threat to a national market."[8] Here, filing meritless lawsuits against speakers — even if relating to *intrastate* speech — poses a substantial threat in the aggregate to *interstate* commerce. While the First Amendment obviously shields speech across the whole country, protections for speakers from SLAPP suits vary state by state because of the absence of a federal anti-SLAPP law. H.R. 2304 advances the objective of a nationwide speech marketplace by reducing exposure to frivolous litigation designed to curb expression.

Because H.R. 2304 regulates activities that substantially affect interstate commerce as well as intrastate activities that affect interstate commerce in the aggregate, the legislation comports with Congress' enumerated power under the Commerce Clause.

II. *Congress is authorized to include a broad removal provision in the SPEAK FREE Act under Article III of the U.S. Constitution.*

Article III of the U.S. Constitution extends the "judicial power" of federal courts to "all Cases, in Law and equity, *arising under this Constitution* . . . ."[9] A defendant may properly remove a case from state to federal court if the federal court has federal subject-matter

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[5] *Tobinick v. Novella*, No. 9:14-CV-80781 (order granting defendant's special motion to strike) (S.D. Fla. 2015). *See* Steven Novella, *Enbrel for Stroke and Alzheimer's*, Science-Based Medicine (May 8, 2013), https://www.sciencebasedmedicine.org/enbrel-for-stroke-and-alzheimers/.

[6] *Tobinick v. Novella*, No. 15-14889 (11th Cir.) (judgment not yet rendered). The Reporters Committee filed an *amicus brief* in support of Novella on May 31, 2016 arguing the trial court properly dismissed the state claims under the California anti-SLAPP statute.

[7] *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

[8] *Id.*

[9] U.S. Const. art. III, § 2, cl. 1 (emphasis added).

jurisdiction over the action under Article III.[10] Although parties often rely on the federal question statute to remove cases from state to federal court, the U.S. Supreme Court has recognized that "Article III's 'arising under' jurisdiction is broader than federal question jurisdiction under § 1331."[11] Accordingly, Congress can provide for cases to proceed in federal court so long as the enabling law comports with Article III. In defining the precise limits of Article III, the U.S. Supreme Court has found that "'[i]t is a sufficient foundation for jurisdiction, that the title or right set up by the party, may be *defeated* by one construction of the constitution or the laws of the United States, and sustained by the opposite construction.'"[12]

For example, the federal officer removal statute vests federal subject-matter jurisdiction over cases in which a federal officer is a defendant and the officer has a federal defense, such as absolute or qualified immunity.[13] The Supreme Court has held that this law is constitutional under Article III because "the raising of a federal question" in the form of a federal defense "in the officer's removal petition . . . constitutes the federal law under which the action against the federal officer arises for Article III's purposes."[14]

Similarly, H.R. 2304 constitutionally permits the removal of actions to federal court under section 4206(a)(1) when a federal question — namely, the application of First Amendment rights and defenses — will be raised in the action. This comports with the U.S. Supreme Court's limitations regarding Art. III because a SLAPP "may be defeated" by a First Amendment defense. For instance, a defendant subject to a defamation suit could utilize the removal provision and raise a number of First Amendment defenses, such as lack of actual malice, absence of actual injury, and failure to prove falsity.[15]

H.R. 2304's removal provision is constitutionally sound as written. Section 4206(a)(1) states:

> [A] civil action in a State court that raises a claim described in section 4202(a) may be removed to the district court of the United States for the judicial district and division embracing the place where the civil action is pending. The grounds for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

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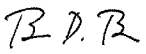
[10] 28 U.S.C. § 1441.
[11] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).
[12] *Id.* at 492 (quoting *Osborn v. Bank of the United States*, 9 Wheat. 738, 822 (1824)).
[13] 28 U.S.C. § 1442(a)(1).
[14] *Mesa v. California*, 489 U.S. 121, 129, 133-34 (1989) (finding that the Federal Officer Removal statute can "overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged" because the law is "predicated on the allegation of a colorable federal defense.").
[15] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring public officials to prove a false statement was made with actual malice before recovering defamation damages); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974) (requiring proof of actual harm); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776 (1986) (requiring plaintiffs to bear the burden of showing falsity).

The plain language of the statute indicates that a defendant must demonstrate proper grounds for removal in a petition for removal, if those grounds are not apparent in the complaint. Although it is not explicit in the text of H.R. 2304, it follows that proper grounds for removal include a First Amendment defense to claims raised in the complaint. The lack of a specific reference to First Amendment or other federal question defenses does not jeopardize the statute. In H.R. 2304, Congress merely provides an avenue for a defendant to remove the case to federal court if a First Amendment defense is available. Under the doctrine of constitutional avoidance, courts would interpret the statute in a way that avoids questions of its constitutionality and thus would construe the statute's language as only allowing removal when such a First Amendment defense is presented.[16]

However, this Subcommittee could consider a modest modification of H.R. 2304's removal language. Section 4206(a)(1) could be amended to state the following: "The grounds for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal *by asserting that the civil action may be defeated by a defense arising under the First Amendment.*" Although this amendment is not necessary to preserve the removal provision's constitutional validity, it may further illuminate the intent of Congress.

For the additional reasons identified in this supplemental testimony, I support the passage of H.R. 2304.

Yours very truly,



Bruce D. Brown

[16] When assessing the reading of a challenged statute, the doctrine of constitutional avoidance requires courts to "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

Response to Questions for the Record from Alexander A. Reinert, Professor of Law, Benjamin N. Cardozo School of Law

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July 29, 2016

The Honorable Bob Goodlatte
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The Honorable Trent Franks
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The Honorable John Conyers
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RE: Questions for the Record, H.R. 2014

Dear Chairman Goodlatte, Chairman Franks, Ranking Member Conyers, and Ranking Member Cohen:

The following are my responses to the questions for the record submitted to the Subcommittee on Constitution and Civil Justice, with respect to my June 22, 2016 testimony concerning the above-referenced legislation.

Question 1: What has been the impact of the Texas Citizens Participation Act on civil litigation in Texas state courts, including in terms of the kinds of cases impacted and the effect of interlocutory appeals on litigants? What lessons can the Subcommittee draw from Texas's experience?

Response to Question 1:

To my knowledge, there are no published studies regarding Texas' Anti-SLAPP statute, Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001 et seq., also known as the Texas Citizens Participation Act ("TCPA"). To address this gap in knowledge, I conducted a study of the decisions in Texas courts concerning application of the TCPA. My methodology was straightforward: I attempted to identify every court decision in Texas interpreting the TCPA that appeared on Westlaw from 2012 until the present.[1] I then coded each of these decisions for several unique variables. My preliminary conclusions are that (1) the TCPA is being used for many different kinds of lawsuits, including many that no one would consider true "SLAPP" suits; and (2) that the provision for interlocutory appeal is resulting in delayed justice in a large proportion of cases in which the TCPA is invoked. These conclusions raise additional concerns about the harmful costs that would be imposed on litigants and courts should H.R. 2304 be enacted into law.

The cohort of opinions I identified included almost every state appellate decision between 2012 and the present, plus fewer than a handful of federal cases. No state trial court decisions were coded because they are not available on Westlaw. I coded a total of 83 unique opinions. My description of the results follows.

First, I examined what percentage of the state court appeals involved true SLAPP suits (as that term was defined by those who originally identified the SLAPP phenomenon, Penelope Canan and George Pring). Canan and Pring, whose research is cited by supporters of anti-SLAPP laws, were precise about their definition, requiring that a SLAPP suit be (1) a civil complaint or counterclaim, (2) filed against nongovernment individuals or organizations, (3) because of their communications to government (government bodies, officials, or the electorate), (4) on a substantive issue of some public interest or concern. *See* George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT LAW. REV. 937, 947 (1992). The goal for Pring and Canan was to ensure that their definition protected "any peaceful, legal attempt to promote or discourage governmental action at all governmental levels and all governmental branches, including the electorate." Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385, 387 (1988). Applying this definition, of the 83 cases in the cohort, almost half, about 47%, would not be considered true SLAPP suits.

Second, the cases in the cohort do not reflect the traditional story told about anti-SLAPP statutes, in which proponents argue that such laws are necessary to protect individuals engaged in public discourse from being subjected to frivolous suits by corporate interests bent on restricting free speech. On this account, because individuals

[1] The TCPA was signed into law in June 2011. Although I may not have identified each and every appellate decision regarding the TCPA, my understanding is that every Texas appellate opinion is reported in Westlaw. Texas trial court decisions, by contrast, are not reported on Westlaw.

generally have far fewer resources to defend against a suit, anti-SLAPP laws are necessary to even the playing field and prevent the chilling of free speech. But about one-quarter of the parties taking advantage of Texas' anti-SLAPP law were corporations, and they moved to dismiss claims by individuals about 75% of the time. And although two-thirds of those invoking the protection of Texas' anti-SLAPP law were individuals, they were more likely to seek to dismiss claims filed by other individuals (doing so 60% of the time) rather than claims by corporations (subjected to special motions to dismiss by individuals 30% of the time). In other words, the application of Texas' anti-SLAPP laws is not consistent with the story proponents tell – indeed, most of the time it is being used against individual plaintiffs who are seeking to access the courts.

Finally, and perhaps most troubling, is what the data show about the impact of providing an interlocutory appeal when a special motion to dismiss a lawsuit is denied. I calculated this by looking at how appellate courts resolved cases in which the trial court had denied a special motion to dismiss. I coded a total of 58 opinions that involved an appeal from a denial of a motion to dismiss. The denial was affirmed in full almost half of the time (25 out of 58, or 43% of the time). When one includes appeals in which the denial was affirmed in part, or in which the appeal was dismissed (leaving the trial court's denial in place), there were a total of 38 cases (65% of the cases) in which the case returned to the trial court because the denial remained intact at least in part. When one considers the cases according to whether they are true SLAPP suits or not, the impact of the interlocutory appeal in non-SLAPP suits is stark. In those cases, the case returned to the trial court 71% of the time because the denial was either affirmed in full, in part, or the appeal was dismissed.

In other words, the effect of the interlocutory appeal was to delay justice in a substantial portion of the cases studied. If the trial court denied the special motion to dismiss, and the defendant appealed that denial, the most likely outcome was that the case would return to the trial court for the case to proceed. In other words, most of the time, the interlocutory appeal functions to add expense and delay to plaintiffs who are pursuing legitimate claims. It is very hard to justify imposing this cost on the broad scale contemplated by H.R. 2304 given the lack of any systematic evidence supporting a need for the legislation.

Finally, I will note that one of the witnesses testifying in favor of H.R. 2304, Laura Prather, stated that, while a defamation case would take on average six years to complete prior to the passage of the TCPA, now "we are looking at months, rather than years." Transcript at 42. Ms. Prather cited no source for this contention, and I could find none despite conducting a relatively exhaustive search. Although I was able to examine case disposition statistics from the Texas state court web-site, they do not appear to code for defamation-only suits, and in any event do not suggest the radical shift in case disposition time suggested by Ms. Prather. The only source I could find related to the question was promotional material from Ms. Prather's law firm, in which the following contention was made: "According to studies, the average time for a defamation case to be resolved was **four years**, prior to passage of anti-SLAPP laws. With the passage of the Texas Anti-SLAPP statute, Haynes and Boone has been able to get cases dismissed as quickly as **67 days**." *See* Haynes & Boone LLP, *Five Years of Anti-SLAPP in Texas, 2011-2016*, at 9, available at http://www.haynesboone.com/news-and-events/news/publications

/2016/06/23/antislapp-5-years (emphasis in original). Of course neither Ms. Prather's testimony at the Subcommittee's hearing nor her law firm's promotional material constitutes data or a report of any data. It may well be that the average time to resolve defamation suits in Texas has decreased with passage of the anti-SLAPP law, and that Ms. Prather's description of the data is correct, but that is far from establishing that the TCPA is effectively and fairly intervening in the supposed problem of SLAPP suits.

Question 2: Is H.R. 2304 comparable to the California anti-SLAPP statute? What has been the effect of that statute on civil litigants in California state courts? What lessons can the Subcommittee draw from California's experience?

Response to Question 2:

H.R 2304 is broader than California's Anti-SLAPP statute in many ways. First, California defines a SLAPP suit more narrowly than does H.R. 2304. Under California law, anti-SLAPP procedures may be brought only where the plaintiff's cause of action arises from an act "in furtherance of the person's right to petition or free speech under the United States Constitution or the California Constitution in connection with a public issue. . . ." Cal. Civ. Proc. Code § 425.16(b)(1). The California law further defines the language in Section 425.16(b)(1) to include "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right or petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e). Thus to be embraced by California's anti-SLAPP law, the cause of action must arise from statements that further constitutional interests (the right to petition and right to free speech) and that are made to governmental entities, in official proceedings, or in connection with a public issue or an issue of public interest. H.R. 2304, by contrast, applies much more broadly, because (1) it does not require that a cause of action relate to statements that further constitutional interests;[2] and (2) it applies to causes of actions that arise out of expression related to "a good, product, or service in the marketplace," which may or may not involve statements considered to be in connection with a public issue or an issue of public interest.

Second, not only is H.R 2304's definition of a SLAPP suit broader than California's, but California's law is more careful about protecting the rights of plaintiffs with legitimate claims. When a defendant in a SLAPP suit files a special motion to strike, the plaintiff need only show that there is a "probability that the plaintiff will prevail." Cal. Civ. Proc. Code § 425.16(b)(1). California's courts have interpreted this standard as requiring only that a plaintiff show that her claim "lacks even minimal merit" to avoid being stricken as a SLAPP. *Navellier v. Sletten*, 29 Cal. 4th 82, 89, 52 P.3d 703, 708 (Cal. 2002); *see also Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 740–41, 74 P.3d 737, 745 (Cal. 2003) ("Thus, as we repeatedly have observed, the Legislature's detailed

[2] Indeed, H.R. 2304 could burden claimants who seek to establish liability for speech that is unprotected by the First Amendment, such as child pornography, obscenity, true threats, and the like.

anti-SLAPP scheme 'ensur[es] that claims with the requisite minimal merit may proceed.'") (*quoting Navellier*, *supra*). Under H.R. 2304, however, a plaintiff must demonstrate that a claim is "likely to succeed on the merits." H.R. 2304 §2(a) (proposed 28 U.S.C. § 4202(a)). This language has a well-established meaning in federal law, because it is used when parties seek affirmative relief from a court before the case has been finally adjudicated – thus, in the context of preliminary injunctions or stayed, the "likelihood of success on the merits" standard is a way for a court to decide whether to provide a provisional remedy while the case proceeds to a final resolution. H.R. 2304's use of this strong medicine at the pleading stage is a procedural misfit, because it essentially will terminate meritorious suits early on, simply because a judge believes that a plaintiff is unlikely to succeed, before there has been formal discovery and therefore before a plaintiff has been given an opportunity to obtain additional information from the defendant. In other words, it encourages premature dismissals in the absence of complete information. California's law has been interpreted to avoid this same procedural mistake.

California's law is different in a third important way. H.R. 2304's "special motion to quash," H.R. 2304 §2(a) (proposed 28 U.S.C. § 4205), gives nonparties the ability to hijack a case simply because one party seeks identifying information about the nonparty in discovery. There is no similar provision in California law, and for good reason. To the extent that nonparties have privacy concerns, courts and parties can protect those interests through standard confidentiality agreements. But if a plaintiff with a valid claim seeks relevant information from another party, the fact that the information might include identifying information about a nonparty is of no moment. If the disclosure of the nonparty's identifying information poses constitutional concerns, which will be rare, then the nonparty (or the party form whom disclosure is sought) may have grounds for relief; but there is no good reason for giving a nonparty the ability to insist, as H.R. 2304 does, that before a plaintiff receives relevant discovery she must show that her claim "is likely to succeed on the merits of each and every element of the claim." H.R. 2304 §2(a) (proposed 28 U.S.C. § 4205).

To my knowledge, there has been no empirical study of the impact of California's anti-SLAPP law in California state courts. Although I intend to begin conducting such a study soon, it will take at least a year to complete. In the meantime, close observers of California's laws, state court judges, have offered at least anecdotal reasons to be cautious about extending anti-SLAPP legislation to the federal courts. The following are just a sample of the statements of exasperation that California's judiciary has expressed about the anti-SLAPP law:

> Another appeal in an anti-SLAPP case. Another appeal by a defendant whose anti-SLAPP motion failed below. Another appeal that, assuming it has no merit, will result in an inordinate delay of the plaintiff's case and cause him to incur more unnecessary attorney fees. And no merit it has.
>
> *Moriarty v. Laramar Management Corp.*, Cal App., First App. Dist., No. No A137608 (Jan. 29, 2014) (unpub. op.); available at: http://www.courts.ca.gov/opinions/nonpub/A137608.PDF.
>
> It is now almost five years since plaintiff filed his lawsuit, and trial is not yet in sight. Such delay hardly seems defensible, particularly when it is due in no small part to nonmeritorious appeals by defendants who lost anti-SLAPP motions, the

> first appeal voluntarily dismissed after languishing for a long period and this appeal rejected as utterly without merit. As we said, something is wrong with this picture, and we hope the Legislature will see fit to change it.
>
> *Grewal v. Jammu*, 191 Cal.App.4th 977, 994 (Cal. Ct. App. 2011).
>
> We cannot help but observe the increasing frequency with which anti-SLAPP motions are brought, imposing an added burden on opposing parties as well as the courts. While a special motion to strike is an appropriate screening mechanism to eliminate meritless litigation at an early stage, such motions should only be brought when they fit within the parameters of [the California Anti-SLAPP statute].
>
> *Moore v. Shaw*, 116 Cal.App.4th 182, 200 n.11 (Cal. Ct. App. 2004).

In terms of the lessons the Subcommittee might draw, the foremost one would be caution until further study can be conducted and until there is actual evidence, as opposed to anecdotes, of the need for legislation of this sort. Moreover, I think the Subcommittee should take note of the fact that, even though California's law has a narrower scope than does H.R. 2304, it still has been applied broadly to all sorts of claims, including fraud claims, employment discrimination claims, and other important civil rights claims. *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414 (9th Cir. 2014) (applying anti-SLAPP statute to lawsuit filed by disability rights organization); *Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002) (applying anti-SLAPP law to fraud claim); *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-CV-03522-WHO, 2015 WL 5071977, at *1 (N.D. Cal. Aug. 27, 2015) (addressing discovery in context of anti-SLAPP motion filed against claim brought by a non-profit, professional association of abortion providers who claimed that defendants "issued allegedly misleading videotapes of NAF members that they had obtained by false pretenses."); *Hunter v. CBS Broadcasting Inc.*, 221 Cal. App. 4th 1510 (Cal. Ct. App. 2013) (applying anti-SLAPP law to gender- and age-discrimination claim because television station's First Amendment interests were implicated by how it chose to create television programming and therefore whom it chose to hire to deliver programming); *Hansen v. Ca. Dept. of Corrections & Rehabilitation*, 171 Cal.App.4th 1537, 1545–46 (Cal. Ct. App. 2008) (finding a retaliatory discharge claim subject to an anti-SLAPP motion).

Question 3: How is H.R. 2304 different from typical state anti-SLAPP laws and what would be H.R. 2304's effect on state anti-SLAPP laws if enacted?

Response to Question 3:

H.R. 2304 appears to be broader and more intrusive than almost every other anti-SLAPP statute of which I am aware. As I described above, California's anti-SLAPP law has a narrower reach than H.R. 2304 and also imposes less of a burden on the plaintiff to defeat a special motion to dismiss. Of the other states that have enacted anti-SLAPP legislation, the following states also define a SLAPP suit more narrowly than does H.R. 2304: Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Mexico, New York, Nevada, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah,

Vermont, and Washington.[3] Almost all of these states limit anti-SLAPP laws to claims based on some kind of communication with a governmental entity or in an official proceeding, which is much more consistent with the original definition of a SLAPP suit. Of the states that have enacted anti-SLAPP laws, only Texas defines a SLAPP suit similarly to H.R. 2304, although one should note that Texas narrows the reach of its anti-SLAPP law by exempting causes of action for "bodily injury, wrongful death, or survival." *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.010(c). I also note that Washington, D.C. has enacted a law that defines a SLAPP suit in the same way as H.R. 2304.

In terms of the burden placed on a plaintiff when an anti-SLAPP motion is made, the states are more varied. Many states do not ask as much of a plaintiff as does H.R. 2304, either by not providing for a special motion to dismiss at all or by requiring that the plaintiff meet a lower threshold to survive the motion: Arkansas, Delaware, Georgia Hawaii, Indiana, Maryland, Minnesota, Missouri, Nebraska, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Utah. A few states (along with D.C.) are more similar to H.R. 2304, by essentially asking that the plaintiff show a likelihood of success on the merits: Louisiana, Nevada, and Washington. But one should note that Washington's statute was declared unconstitutional precisely because it asked too much of the plaintiff at such an early stage of the litigation, suggesting a similar fate will befall H.R. 2304 if it is enacted as it now stands. *Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015); *see also Colt v. Freedom Comm., Inc.*, 1 Cal. Rptr. 3d 245, 249-50 (Cal. Ct. App. 2003) (noting that, for purposes of California's anti-SLAPP statute, judge may not weigh evidence without violating right to a jury trial). Finally, a handful of states are not easily compared to H.R. 304 in terms of the plaintiff's burden, because they provide their protection through an immunity doctrine that hinges on multiple variables that I will not parse here: Arizona, Florida, Illinois, Maine, Massachusetts, and Vermont.

Finally, the states also have taken various approaches to issues like discovery, interlocutory appeal, and the provision of attorneys' fees. I will not detail those here, except to say that, with respect to these types of provisions, none of the states appears to offer more protection to defendants than does H.R. 2304 and many of them are similar. Only Washington, D.C. has a provision comparable to H.R. 2304 in terms of the motion to quash.

This survey of state laws leads me to a few conclusions. First, if H.R. 2304 is enacted, the most likely impact will be that it will displace all existing state law of which I am aware. No rational defendant would choose to remain in state court if that party could take advantage of H.R. 2304, and H.R. 2304's removal provisions provide for removal in a wide range of cases (beyond the reach of Article III, as my written testimony detailed). Thus, H.R. 2304 would interfere with the sovereignty of every state -- the 22 states that

[3] As I noted in my initial testimony, Minnesota's SLAPP law was found unconstitutional by a federal court and Washington's law was declared unconstitutional by the Washington Supreme Court. *See Unity Healthcare, Inc. v. Cty. of Hennepin*, 308 F.R.D. 537, 549 (D. Minn. 2015) (holding that Minnesota's anti-SLAPP statute could not be applied in federal court because it violated Seventh Amendment to resolve factual disputes); *Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015) (finding that Washington anti-SLAPP statute violated state right to trial by jury by requiring trial judges to adjudicate factual questions in nonfrivolous cases).

have decided not to enact anti-SLAPP legislation and the 28 states that have balanced the important interests at stake in these kinds of cases and decided to enact legislation that is less burdensome on plaintiffs and courts than is H.R. 2304. Anyone who suggests that H.R. 2304 is a way to ensure that state anti-SLAPP legislation is applied in diversity cases pending in federal court fundamentally misunderstands basic procedural law.

There is a second, and perhaps more troublesome possibility, caused by the provision of H.R. 2304 which states that it does not preempt State laws that offer greater protection to SLAPP defendants. *See* H.R. 2304 § 2(c). This could raise many thorny interpretive questions. For example, consider a State like Maine. Its definition of a SLAPP suit is narrower than H.R. 2304's, because it is linked to the right to petition. Me. Rev. Stat. Ann. tit. 14 § 556. It is hard to say, however, whether Maine's motion to dismiss procedure is more or less protective of a SLAPP defendant, because the plaintiff has to show that the movant's exercise of her right to petition "was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury" to the plaintiff. *Id.* Moreover, Maine gives discretion to award attorneys' fees to the SLAPP defendant who successfully moves to dismiss, which is arguably less protective than H.R. 2304's mandatory award, but Maine does not provide the plaintiff who successfully defeats a SLAPP motion with the opportunity to recover attorneys' fees, which is arguably less protective than H.R. 2304. In applying H.R. 2304's direction not to preempt state law that is more protective, should a federal court mix and match different parts of H.R. 2304 with Maine's anti-SLAPP law, or try to decide, overall, which one is more or less protective? If there were any reason to think that having a federal anti-SLAPP law solved a real problem, perhaps it would be worth it to create these difficult interpretive questions. But, as I have emphasized, I have seen no evidence yet of any need for this legislation.

Question 4: To your knowledge, have there been any empirical studies regarding the nationwide prevalence of SLAPP suits as classically defined by Professors Pring and Canan, including the prevalence of such suits in Federal court asserting Federal claims? Similarly, to your knowledge, are there any empirical studies regarding the use of lawsuits that target users of review websites based on their reviews?

Response to Question 4:

I am aware of no studies that have examined the nationwide prevalence of lawsuits that fit within Pring and Canan's definition of a SLAPP suit. And Pring and Canan's research is insufficient on its own to establish that data – indeed, they identified fewer than 300 SLAPP suits over a period of many decades. hardly evidence of a groundswell of such suits. Nor am I aware of any studies of lawsuits that target users of consumer websites who post negative reviews about a company. Any such study would, of course, be difficult in any event because presumably some user reviews are false and actionable under applicable law, and it would be difficult for any study to determine which claims are valid and which are frivolous.

In any event, Yelp's own testimony before this Subcommittee suggests that the problem is isolated at most. In its written testimony before the Subcommittee, Yelp said that more than 50 million reviews have been posted on its website in the past two years. Of those reviews, Yelp stated that about 10 million are negative in some way, which comes out to about 14,000 negative reviews a day. Yet, in that same testimony, Yelp

could only identify three instances in one month in which users complained that a business brought up potential litigation in response to a negative review. Three potentially troubling incidents out of a total of 14,000 negative reviews hardly constitutes evidence of a systemic problem. I presume that Yelp would have been forthcoming had it obtained additional evidence of the scope of the problem, but it all redounds to sparse anecdotal support, suggesting that H.R. 2304 is a solution in search of a problem.

Question 5: Some of your fellow witnesses testified that H.R. 2304's scope necessarily had to be broad because artful lawyers could simply disguise a SLAPP claim as, for example, a copyright or trademark infringement, whistleblower, civil rights or constitutional claim. What is your response?

Response to Question 5:

To my knowledge, none of my fellow witnesses provided any empirical evidence to support the claim that litigants, in an attempt to evade state anti-SLAPP laws, have taken to filing federal law claims that would otherwise have been brought as state law claims. But even if such evidence were provided, I am not sure that it would establish anything problematic. First, we must consider the fact that, unless federal law preempts state law, every good lawyer will consider pleading as many causes of action, federal or state, as are justified by the facts. That some state law claims can also be pleaded as federal law claims does not establish that there is a problem with SLAPP suits. Second, it may be that plaintiffs with meritorious state law claims have started to consider pleading their claims as federal law claims as well to avoid state anti-SLAPP. But again, this does not establish that there is a problem with SLAPP suits that requires federal intervention – it might, indeed, suggest just the opposite because plaintiffs with valid claims may be trying to avoid state anti-SLAPP laws precisely because of the undue burden they place on claimants.

Moreover, the fundamental problem with the testimony of my fellow witnesses is that they basically ask this Subcommittee to assume that, because a plaintiff is pleading both state law claims and, say, federal civil rights claims, by definition plaintiffs are filing meritless SLAPP claims. There is simply no support for this proposition. Congress has carefully crafted a legislative framework that incentivizes and supports civil rights claims, precisely because of the historic importance of such claims and the role that courts have taken in enforcing constitutional rights. H.R. 2304 threatens to upend that careful balance.

Now, if it had been established to some degree of confidence that the claims targeted by H.R. 2304 are a serious problem, both in terms of their prevalence and in terms of their impact on public life, then one might be justified in trying to ensure that such suits are given close scrutiny when they are filed under federal law. But this does not support the intrusive and counter-intuitive features of H.R. 2304; it simply means that there might be grounds for some kind of federal intervention. I would respectfully suggest that there are many other problems in our civil justice system that likely deserve more of the Subcommittee's attention (barriers on recovering attorneys' fees for successful civil rights plaintiffs; recent changes to federal pleading standards that make it more difficult for meritorious claims to advance to discovery, and the like.) and for which there is much more evidence of a problem to be solved.

Question 6: Some of your fellow witnesses suggested that anyone with a potentially meritorious claim had little to fear from H.R. 2304. What is your response?

Response to Question 6:

I do not know how my fellow witnesses could make that assertion with such casual confidence. After all, H.R. 2304, by its terms, asks a plaintiff to establish, at the beginning of litigation, that her claim is likely to succeed on the merits, H.R. 2304 §2(a) (proposed 28 U.S.C. § 4202(a)), a much higher standard than merely showing that the claim is "potentially meritorious." Federal courts generally only use the likelihood of success on the merits standard when determining whether to grant so-called provisional remedies – stays, preliminary injunctions, etc. – a context very different from that implicated in H.R. 2304. In the area of provisional remedies, a court is seeking to determine whether to temporarily alter or maintain the status quo until a final adjudication can be completed. By definition, it contemplates future proceedings at which formal and accurate fact-finding can be completed. Moreover, even at such a provisional stage, courts almost always have some sort of factual record on which to base their decision.

H.R. 2304, by contrast contemplates courts assessing likelihood of success as a way of pretermitting a plaintiff's claim, at a time when the court has access to no evidentiary record at all, resulting in a dismissal of a case on grounds never before contemplated under the Federal Rules of Civil Procedure. Because such a proceeding is literally unknown to modern federal procedure, the fact that my fellow witnesses assured the Subcommittee that it would not affect meritorious claims is more in the nature of wishful thinking than forthright analysis.

Instead, all available evidence suggests that H.R. 2304 would pose a substantial barrier to litigants with meritorious claims. First, although there is no other example of such a high barrier being imposed at such an early stage of litigation, there are examples of analogous burdens being imposed on plaintiffs: heightened pleading standards. Although heightened pleading standards have been introduced over time through legislation like the Private Securities Litigation Reform Act and through judicial fiat as in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), there is no evidence that increasing the burden on plaintiffs at the pleading stage actually results in higher quality or more meritorious cases. *See generally* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (providing empirical evidence suggesting that heightened pleading standards do not provide a better filter for weeding out meritless cases); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2120 (2015) (reporting data suggesting that pleading standards imposed by *Iqbal* and *Twombly* have not effectively filtered cases based on their underlying merit; Searle Civil Justice Institute, *Measuring The Effects of a Heightened Pleading Standard Under Twombly and Iqbal* vii (Oct. 2013) (finding no significantly significant difference in summary judgment outcomes in employment discrimination cases after comparing pre-Twombly and post-Iqbal cases, while finding a modest improvement in quality in contracts cases). As I have argued in my own scholarship, it is unrealistic to expect federal courts to engage in reliable merits determination at such an early stage of the case, absent discovery or some adversarial testing of evidence. *See generally* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767 (2014).

This problem is heightened by the fact that H.R. 2304 does a poor job of explaining exactly what a judge is to do at the special motion to dismiss stage. If the standard is intended to permit judges to weigh evidence at this stage, it will present Seventh Amendment concerns, which may be enough on their own to render doubtful the constitutionality of H.R. 2304. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (explaining that on summary judgment "the judge must ask ... not whether ... the evidence unmistakably favors one side or the other but whether a fairminded jury could return a verdict for the plaintiff on the evidence presented"); *id.* at 255 ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether . . . . ruling on a motion for summary judgment or for a directed verdict."); *Unity Healthcare, Inc. v. Cty. of Hennepin*, 308 F.R.D. 537, 549 (D. Minn. 2015) (holding that Minnesota's anti-SLAPP statute could not be applied in federal court because it violated Seventh Amendment to resolve factual disputes); *cf. Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015) (finding that Washington anti-SLAPP statute violated state right to trial by jury by requiring trial judges to adjudicate factual questions in nonfrivolous cases); *Colt v. Freedom Comm., Inc.*, 1 Cal. Rptr. 3d 245, 249-50 (Cal. Ct. App. 2003) (noting that, for purposes of California's anti-SLAPP statute, judge may not weigh evidence without violating right to a jury trial).

If H.R. 2304 is not intended to permit judges to exercise a jury's function, it is unclear how judges are expected to resolve "special" motions to dismiss. It is possible, I suppose, that the goal is to impose a heightened pleading standard. This might overcome the Seventh Amendment concerns, but as explained above would pose the real risk of prematurely dismissing viable claims.

Nor is H.R. 2304 consistent with the federal summary judgment standard – after all, a plaintiff confronting a motion for summary judgment need only show that a reasonable jury "could" find for her, not that a jury is "likely" to find for her. *See Anderson*, 477 U.S. at 252. H.R. 2304 does not even clarify what role pleadings, affidavits, and discovery should play in resolving the novel motion to dismiss. It tells courts that they "may consider" discovery and that courts "shall consider the pleadings and affidavits stating the facts on which the liability or defense is based." H.R. 2304 §2(a) (proposed 28 U.S.C. § 4202(g)). But it is unclear if this means that, in the absence of discovery, a court is to take all allegations in a complaint to be true, or if a court may make its own factual determinations even in the absence of discovery. And if there is discovery available, a court is not told how it should consider the discovery, contrary to the well-established rules governing Fed. R. Civ. P. 56.

So at best H.R. 2304 heightens the standard for a plaintiff to proceed post-discovery and at worst the legislation heightens the standard for a plaintiff to proceed pre-discovery. In all events, if it calls upon federal judges to resolve issues constitutionally committed to the jury, it violates the Seventh Amendment and will almost certainly interfere with valid claims. Even if it only changes the pleading standard, it will have a substantial impact on meritorious claims.

Moreover, even if a court denies a special motion to dismiss (therefore signaling that the judge believes the plaintiff has a meritorious claim), the defendant will be able to bring an interlocutory appeal. As the Texas experience demonstrates, this will result in further delay and costs for plaintiffs with valid claims, perhaps making it too expensive for

them to continue. Therefore, even for plaintiffs who are able to survive the special motion to dismiss, it is sophistry to claim that their ability to prosecute their claim is not harmed by H.R. 2304.

Question 7: How do state courts address First Amendment arguments raised by defendants or non-parties in civil cases?

Response to Question 7:

State courts address First Amendment issues the same way that federal courts do: by considering the arguments and resolving the First Amendment claims. The Supremacy Clause, U.S. Const., art. IV, cl. 2, imposes on state courts an affirmative obligation, equal to that of federal courts, to enforce the Constitution. The First Amendment applies in full in state court and state court judges are sworn and bound to uphold the federal constitution. There is no evidence that they have failed to do so in the kinds of cases that appear to be of concern to H.R. 2304's proponents. There is a long history of federal courts recognizing state court authority over constitutional questions, precisely because of the assumption that state courts are perfectly capable of interpreting and applying federal constitutional law. As the Supreme Court said in 1962:

> We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962); *see also Blythe v. Hinckley*, 173 U.S. 501, 508, 19 S. Ct. 497, 500, 43 L. Ed. 783 (1899) (confirming concurrent state court jurisdiction over federal issue "for the constitution, laws, and treaties of the United States are as much a part of the laws of every state as its own local laws and constitution.").

If state courts are systematically misinterpreting federal constitutional law, the Supreme Court has jurisdiction and authority to step in and set them straight. Notably, H.R. 2304 is not limited to claims in which federal constitutional issues are at stake, so even if there was a concern about state court amenability to considering such constitutional claims, H.R. 2304 goes far beyond addressing those concerns.

Question 8: During the hearing, you discussed both concurrent jurisdiction and Article III jurisdiction. Can you elaborate on the difference between the two and explain their significance in evaluating H.R. 2304?

Response to Question 8:

Article III limits the jurisdiction of federal courts to specific enumerated categories. Congress has the power to create lower courts and vest them with jurisdiction over these enumerated categories, but Congress cannot give them more jurisdiction than Article III provides. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1980). This is so even when Congress is legislating pursuant to a constitutionally delegated function. Congress cannot override Article III.

Concurrent jurisdiction reflects the principle at stake in Question 7, above – namely that unless Congress or the Constitution says so, state courts have concurrent jurisdiction over federal law. They are considered to be as competent and solicitous of federal law as federal courts, and except for the Supreme Court, a federal court has no greater say over the meaning of federal law than does a state court. Indeed, except for a brief period of time between 1801 and 1802 from the First Judiciary Act of 1789 until 1875, lower federal courts did not even hear the vast majority of claims founded in federal law. During this time, federal courts heard mostly diversity cases (and claims based on a few other narrow categories of federal law), and state courts had the bulk of the responsibility for interpreting and applying federal law, subject to the Supreme Court's intervention.

Thus, under the principle of concurrent jurisdiction, we presume that state courts are competent and available to address federal legal issues including federal constitutional claims. And under the principles of Article III, Congress cannot expand federal jurisdiction beyond the categories contained in Article III. To do so in the way that H.R. 2304 does is to sanction a serious intrusion on state sovereignty. H.R. 2304, through its removal provision, takes cases founded on state law away from state courts. Article III permits this intrusion on state sovereignty in a limited set of circumstances: where there is diversity jurisdiction or where some important federal interest is presented in the state law dispute. H.R. 2304 does not require that either condition be present before a case is brought to federal court. Thus, it is both an indication of disrespect of state courts and an unconstitutional transfer of power to federal courts.

Question 9: During the hearing, you raised concern about the bill's provision allowing removal by non-parties. Beyond that provision's potential unconstitutionality, can you provide a concrete example or illustration of why this provision might be problematic?

Response to Question 9:

Imagine that a plaintiff has brought a false arrest claim against a number of police officers who the plaintiff alleges lied to magistrate about the basis for probable cause for an arrest. As in many similar cases, a plaintiff will not always know at the outset of litigation the exact identity of every officer involved. A plaintiff will seek discovery from the municipality who employs the officer to verify each officer's identity and, if necessary, amend the complaint to add additional responsible defendants.

Such a claim would fall within H.R. 2304's broad reach. And the special motion to quash would permit the unnamed unidentified officer to impose a significant barrier to the success of plaintiff's claim without ever appearing or formally intervening. Even if the plaintiff were ultimately successful in overcoming the special motion to quash, by the time the party obtains the relevant identifying information, her claim against the nonparty may be barred by the statute of limitations. And if the case were pending in state court, where both parties wanted to proceed, H.R. 2304 would permit the officer to displace the wishes of all the parties and bring the entire case to federal court, even though the officer is not even a party to the suit.

The basic problem, which is illustrated in the above example but could be demonstrated in numerous other ways, is that giving the ability of nonparties to file a special motion to quash and to remove the case to federal court allows nonparties to

accomplish multiple ends. First, it may allow nonparties who have caused wrongdoing to evade liability altogether by delaying discovery until after the statute of limitations has passed. This on its own is troubling, but in addition, by permitting removal to a federal court, the special motion to quash procedure also interferes with important principles of litigant autonomy. In general, the parties are given control over the forum in which their dispute is adjudicated, but the removal provision for the special motion to quash upends those rights.

Question 10: Some of the opponents of H.R. 2304 suggest that there may be a way forward legislatively so long as the bill is revised to address certain concerns. In your view, would it be possible to strike a better legislative balance between protecting against SLAPP suits, on the one hand, and ensuring access to courts for those with potentially meritorious claims, on the other, or is it a "zero-sum" situation where any move to legislate against SLAPP suits necessarily harms those with potentially meritorious claims?

Response to Question 10:

It is possible to construct a statute that would be consistent with constitutional requirements. First, the statute would have to link removal to a party imposing a federal defense of some kind, likely rooted in the First Amendment. This would permit removal based on "arising under" jurisdiction. Second, the statute would have to delete the provision that permits nonparties to remove the entire case to federal court. Third, the statute would have to delete the requirement that a plaintiff demonstrate a likelihood of success on the merits in order to proceed to discovery. Finally, the statute would have to be enacted pursuant to delegated Congressional authority. In my view, the most likely candidate would be Congress's power to regulate interstate commerce, but the statute would have to be amended to ensure that it only reached claims that "substantially affect" interstate commerce. If all of these modifications were made, I believe it would eliminate the constitutional difficulties with the statute.

In addition, I would suggest that several other provisions, while perhaps not raising constitutional concerns, be deleted or revised. The legislation's provision for interlocutory appeal should be deleted, because it will add expense and delay for meritorious claimants while also increasing the backlog in the federal courts of appeals. Defendants on claims covered by H.R. 2304 will receive enough protection without the addition of a right to an immediate appeal. Similarly, the provision on attorneys' fees should be discretionary, and there should be a presumption against an award of fees of a plaintiff voluntarily withdraws or dismisses her claim. This is consistent with Federal Rule of Civil Procedure 11, which gives attorneys and litigants a "safe harbor" before sanctions are imposed. Finally, the "public interest" exception is far too narrow, as my written testimony alluded to. I would be happy to work with proponents of the legislation on drafting an exception with an appropriate scope, but at a minimum it should include civil rights and allied claims brought on behalf of individuals for damages or injunctive relief.

The question remains whether the game is worth the candle. I have seen no evidence that the kinds of suits targeted by H.R. 2304 are a problem, nor that state courts are unable to address any problems that arise. Therefore, even if Congress has authority to pass a statute like H.R. 2304, one must be wary of unintended consequences from passing federal anti-SLAPP legislation, especially in light of the lack of any empirical evidence of an existing problem.

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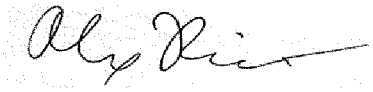
I wish to thank Chairman Goodlatte once again for inviting me to testify regarding these important issues. I remain willing to be of future service to the Committee and Subcommittee's work while this legislation remains under consideration.

Respectfully submitted,



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* Affiliation provided for identification purposes only. All views expressed are my own and are not to be attributed to the Benjamin N. Cardozo School of Law or Yeshiva University.

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