June 20, 2016

Dear Chairman Goodlatte and Ranking Member Conyers:

Strategic lawsuits against public participation, or "SLAPP suits," are suits brought for the purpose of silencing or intimidating critics. SLAPP suits chill free speech and public debate by targeting speech on issues of public interest. The defendants in these cases are speakers such as whistleblowers, consumers who critique products online, and members of the media. To protect individuals and entities from being retaliated against by baseless suits intended to punish or deter speech, several states have enacted laws anti-SLAPP statutes providing a mechanism for early dismissal of such cases. We have strongly supported the adoption of such state statutes.

H.R. 2304, the SPEAK FREE Act, whose lead sponsor is Representative Blake Farenthold (R-Tex.), proposes a federal response to the problem of SLAPP suits, but the bill suffers from serious shortcomings. Foremost, the bill unnecessarily, and we think unconstitutionally, federalizes state-law claims, allowing defendants to delay litigation by dragging wholly state-law claims into federal court. It also fails to except certain defendants (government defendants and intervenors) from the scope of the bill, potentially enabling those defendants to use the bill inappropriately to delay and deter litigation. In addition, the drafting of the commercial exception does not seem to encompass—but should—securities, antitrust, whistleblower, or employment litigation. That exception as drafted also seems to unduly restrict its scope, perhaps inadvertently. And the bill includes in the definition of "public interest claim" an element that both is unnecessary and will inevitably become a focal point for dispute. As the bill is now drafted, the undersigned organizations strongly oppose it.

First, the bill would allow a defendant to remove a case to federal court for the purpose of litigating a special motion to dismiss (§ 4206). We strongly oppose the removal provision, which would require parties to adjudicate in federal court state-law claims for which there is no current basis for federal-court jurisdiction. In the absence of diversity jurisdiction, allowing cases that allege solely state-law claims to be removed to federal court deprives state courts of jurisdiction over claims they should properly hear. It also pushes state cases to federal courts, placing new burdens on the federal judiciary. As a matter of efficiency and respect for states and state courts, and in light of the serious Article III concerns raised by the removal provision, § 4206 should be removed from the bill.

To begin with, the purpose of the removal is not to enable adjudication in a neutral forum (as is the rationale for removal based on diversity jurisdiction) or to allow the federal courts to adjudicate issues of federal law (as is the rationale for removal based on federal-question jurisdiction), but 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 rationale for making the federal courts the forum for adjudicating issues of state law is elusive, and the provision is unwise. There is no

reason to think state courts are unable or unwilling to provide protections against SLAPPs. Indeed, states have pioneered anti-SLAPP laws, and their courts have vigorously applied them. This bill, however, would allow defendants to remove cases to assert SLAPP defenses even from courts in states that have anti-SLAPP statutes and apply them conscientiously—an outcome that further undermines the removal provision.

Relatedly, the remand subsection of the removal provision (§4206(a)(3)) is unreasonably limited. Under the provision, after an order denying a special motion to dismiss became final, the case would be remanded to the state court for litigation of the action. However, the remand provision makes no mention of remanding if the special motion to strike is granted as to one claim, but other claims remain in the case. Where a plaintiff has alleged three state-law causes of action, and one is dismissed under § 4202 but two are not, there is no justification for forcing the plaintiff to litigate the two surviving state-law claims in federal court. The remand provision, if retained, should therefore be revised to make clear that, after an order on a special motion to dismiss becomes final (including for purposes of appeal), any and all remaining claims will be remanded to the state court for litigation. (Of course, if the removal provision (§ 4206(a)(1) & (2)) were omitted from the bill, the remand provision would be eliminated as well, because without removal there is no need to address remand.)

The remand provision highlights the imprudence of authorizing removal for these state-law suits. Section 4206 sets up a back-and-forth between state and federal court that is inefficient and sure to cause unnecessary delay in the adjudication of cases. It contemplates a diversion to federal district court of six months or more, potentially followed by an appeal to a federal court of appeals—where no time limits are specified and where appeals typically take far longer than a year from filing to decision. Further, unlike cases removed to federal court based on federal question jurisdiction, where dismissal of the federal claim may later result in remand to the state court of any remaining state-law claims, the back and forth here is for the purpose of enabling a *federal* court to consider the merits of *state*-law claims. Indeed, under the procedures in this bill, it is quite likely that in some cases the federal court would certify a state-law question to the state's high court, asking the state court to weigh in on how the federal court should answer the state-law question that the bill pushed into federal court. This possibility, which would cause even lengthier delay, also highlights the flaw of crafting a bill to encourage federal courts to resolve wholly state-law claims, where diversity jurisdiction is lacking.

The removal provision (including the limited remand provision) also raises serious constitutional concerns. The jurisdiction of the federal courts is limited by Article III, which gives federal courts jurisdiction over cases "arising" under the Constitution and the laws of the United States (U.S. Const., Art. III, § 2, cl. 1) 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). The U.S. Supreme Court "cases firmly establish that 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). Thus, "a

pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases … cannot independently support Art. III 'arising under' jurisdiction." *Mesa v. California*, 489 U.S. 121, 136 (1989) (discussing 28 U.S.C. § 1442(a)); *see Verlinden*, 461 U.S. at 493 (upholding federal jurisdiction under Foreign Sovereign Immunities Act because "a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Article III"); *Federal Home Loan Mortgage Corporation v. Shaffer*, 72 F.Supp.3d 1265, 1272 (N.D. Ala. 2014) ("Congress is 'deemed' to know that it cannot amend or ignore the Constitution and cannot give federal courts jurisdiction over controversies of every kind, and between all parties."). Here, unlike in *Verlinden*, the grant of jurisdiction in H.R. 2304 lacks any substantive federal component, but instead allows a federal court to decide purely state-law issues about the merits of state-law claims. Even if framed as a "substantive" federal right to have a state-law claim dismissed if the plaintiff is unlikely to prevail on state-law grounds, that dubious federal question would fall far short of the kinds of questions that Congress—and the courts—has ordinarily considered sufficient to satisfy Article III's grant of jurisdiction to cases "arising under" federal law.

Second, § 4202(b), which provides exceptions, should be amended to state that neither a government body, government agency, nor a government official who is sued for speech made in his official capacity or under color of law may file a special motion to dismiss.

Third, the bill should state that a party who intervenes as a defendant cannot make such a motion. An intervenor-defendant, having voluntarily entered into the case, cannot reasonably claim that the suit was filed to chill its speech.

Fourth, the bill should specify that a special motion to dismiss is not available in securities, antitrust, whistleblower (such as claims under the False Claims Act) or employment litigation. For example, securities fraud litigation against BP has arisen from BP's statements to the government about how much oil was leaking from its drilling platform before the Deepwater Horizon explosion. 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). Both examples arguably arise from expressions made in connection with an official proceeding or about a matter of public concern, and neither fall seem to within the bill's exceptions.

Fifth, the commercial speech exception in §4202(b)(2) should be amended, because paragraph (2)(B) is confusing and seems to unduly narrow the exception. It is confusing in that it refers to "a commercial transaction in which the intended audience is an actual or potential buyer or customer," but a "commercial transaction" has no "audience." It is unduly narrow because limiting the exception to statements as to which the "intended audience is an actual or potential buyer or customer" seems to make elements of subparagraph (A) meaningless. Specifically, if

the customer must be the intended audience for the speech or expression, then the part of (A) that makes the special motion to dismiss inapplicable to representations "made for the purpose of obtaining approval for, promoting, or securing sales" of goods or services may never come into play: The statement made to "obtain approval" will never be made to a customer, but to a regulator. And in the context of drug sales, promotional statements are often made to physicians, not to the consumer. We think that the awkward wording of (2)(B) and the awkward fit between (2)(A) and (2)(B) may have resulted from taking language some from a provision of the California anti-SLAPP law, Cal. Civil Code § 425.17, but omitting other language needed to make it work. We suggest using the California's model in full on this point. We therefore suggest the following revised language for subparagraph (B):

> (B) the intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer; or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation.

As this comment reflects, we believe that the provision entitled "Commercial Speech" is not appropriately limited to commercial speech (speech that proposes a commercial transaction), but at a range of speech and conduct by commercial actors (including speech made to regulators).

Finally, the bill's definition of "public interest claim" (§ 4208(3)) is either overly narrow or unhelpfully vague. Under § 4202(b)(3), a "public interest claim" cannot be the subject of a successful special motion to dismiss. Section 4208(3) defines public interest claim, limiting the term, among other ways, to claims "where private enforcement is necessary" (§4208(3)(B)). Paragraph B should be eliminated. This paragraph will lead to litigation over the meaning of "necessary," because claims that satisfy the other elements of the definition will often be claims that state attorneys general have the authority to bring. Yet attorneys general lack the resources and time (or political will) to pursue every legitimate case. *See* Public Citizen, *Private Actions, Public Enforcement: Private Litigation Aids Public Enforcement of Consumer Protection Laws* 5-7 (Sept. 2013). Where the attorney general has authority but does not file a claim, the plaintiff may reasonably argue that private enforcement is "necessary," while the defendant may argue that private enforcement is not "necessary" because the case is within the power of the attorney general to bring. Moreover, beyond the fact that paragraph B will lead to disputes over what is "necessary," the restriction is not needed as an element of the definition of "public interest claim." The other four paragraphs in the definition adequately cabin the term, and a claim that meets those four paragraphs is properly deemed a "public interest claim."

In sum, H.R. 2304, the SPEAK FREE Act, as currently drafted, does not display adequate respect for state courts and the interest of states in having their own courts adjudicate wholly state-law matters Indeed, § 4206 raises a significant constitutional concern. In addition, changes are needed to provide that government defendants and intervenor defendants are not covered by the bill, to expand the exceptions in §4202(b), and to make the definition of "public interest

claim" workable. If not amended in the important ways discussed above, the bill should be rejected by your Committee.

Thank you.

Sincerely,

Homeowners Against Deficient Dwellings
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
Public Citizen
Workplace Fairness