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## Examining H.R. 2304, The "Speak Free Act"

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Prepared Statement of Alexander A. Reinert

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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,<sup>1</sup> 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.<sup>2</sup> 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*

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> In the civil rights context,

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<sup>3</sup> 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 111<sup>th</sup> 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.<sup>4</sup>

### **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").

<sup>4</sup> 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.<sup>5</sup>

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.*<sup>6</sup>

*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*

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<sup>5</sup> 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>.

<sup>6</sup> *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.*<sup>7</sup>

*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].*<sup>8</sup>

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.<sup>9</sup>

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

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<sup>7</sup> *Grewal v. Jammu*, 191 Cal.App.4th 977, 994 (Cal. Ct. App. 2011).

<sup>8</sup> *Moore v. Shaw*, 116 Cal.App.4th 182, 200 n.11 (Cal. Ct. App. 2004).

<sup>9</sup> 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.<sup>10</sup> *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

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<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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

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<sup>11</sup> *See* Beatty, *supra* note 3.

<sup>12</sup> 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 pretermining 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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

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<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> 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."<sup>16</sup> 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).<sup>17</sup> 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

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<sup>16</sup> For example, H.R. 2304 § 4206(a)(2) exempts from coverage third-party claims and "cross-claims" brought by "defendants." The reason for 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.

<sup>17</sup> 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.