June 20, 2016

The Honorable Bob Goodlatte Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr. Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: Groups Oppose H.R.2304, The "Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015" or SPEAK FREE Act

Dear Chairman Goodlatte and Ranking Member Conyers:

Strategic lawsuits against public participation, or "SLAPP suits," are lawsuits typically brought by companies for the sole purpose of silencing or intimidating critics. Defendants in these cases can range from individual whistleblowers to large media companies. Many believe there is a need for policy solutions that better protect entities who exercise their First Amendment rights without risking baseless legal intimidation. However, H.R.2304, whose lead sponsor is Representative Blake Farenthold (R-Tex.), is not that solution. This legislation is so overbroad that it creates the potential for extreme harm to the very under-resourced entities and whistleblowers that its proponents claim they want to protect. The undersigned organizations strongly oppose this bill.

The bill's definition of "SLAPP" is any 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." Arguably, this could apply to almost every civil case filed in state court since nearly every lawsuit arises out of some sort of "written or oral statement or expression or conduct that arises from such expression." This overly-broad definition could be easily exploited by corporate miscreants and used against those trying to hold them accountable, including whistleblowers.

There are limited exceptions to this definition but they are narrowly drawn and fail to cover most cases of concern. For example, there is a "public interest claim" exception to this bill. However, only claims brought "solely on behalf of the general public" and "if successful, enforces an important right affecting the public interest and confers a significant benefit on the general public," among other criteria, qualify. The "commercial speech" exception, using extremely convoluted language, seems aimed at speech surrounding sales transactions. While helpful in some contexts, clearly these exceptions would exclude most cases of concern. For example, the Volkswagon diesel car litigation involves claims made to the government about emissions standards. Securities fraud litigation against BP involves claims BP made about how much oil was leaking before the Deepwater Horizon explosion. Both would count as expressions made in

connection with an official proceeding or about a matter of public concern, and neither fall within the bill's exceptions. (See attachment for examples of cases that would be covered by this bill.)

Even the few cases that would arguably fit within these narrow exceptions will experience significant costs and waste of limited resources as their case would be removed to federal court and subject to interlocutory appeal. This will cause many meritorious plaintiffs to have a lengthy, expensive detour through the federal court system before truly having their day in state court.

The bill raises additional concerns. Tort cases covered by the SPEAK FREE Act are typically state cases brought under state law. Allowing these cases to be removed to federal court deprives state courts of jurisdiction over claims they should properly hear, and places new unreasonable burdens on the federal judiciary. The bill creates additional special federal rules and procedures, which many of our organizations have opposed in every other civil justice context. This includes mandatory sanctions, which are contrary to Rule 11 of the Federal Rules of Civil Procedure, and fee–shifting proposals that are against public policy.

In sum, the SPEAK FREE Act is as likely to be used as a weapon against civil rights plaintiffs, whistleblowers and other public interest entities, as it is to protect them. The legislation should be rejected by Congress.

Thank you.

Very sincerely,

Alliance for Justice
American Association for Justice
Center for Justice & Democracy
Committee to Support the Antitrust Laws
Consumer Action
Consumers for Auto Reliability and Safety
Earthjustice
National Association of Shareholder and Consumer Attorneys (NASCAT)
National Consumers League
National Employment Lawyers Association

ATTACHMENT

The following case scenarios demonstrate how the SPEAK FREE Act could be used against public interest entities:

- A class of employees sues a large employer for gender discrimination, arguing that the employer lied to the Equal Employment Opportunity Commission (EEOC) in their position statement, and that the false submission shows malice or a reckless disregard for federally protected rights. That position statement is protected speech under this Act since it arises from a statement that was made "in connection with an official proceeding" (i.e. the EEOC). The employer could use the SPEAK FREE Act to try to dismiss the case against them. The class would then have to show at this early stage in litigation that they are likely to succeed on the merits, an extraordinarily high and inappropriate burden since the class has not had the benefit of discovery. The case could be dismissed and the class liable for ruinous defense fees solely for making this argument.

- A whistleblower brings a claim under the False Claims Act alleging that a pharmaceutical company made fraudulent statements to the Food and Drug Administration (FDA) about the safety of their drug during the drug approval process. The company's statements to the FDA meet the definition of "statement or other expression that is made in connection with an official proceeding." To survive a motion to dismiss the plaintiff whistleblower would have to show that they could win on the merits without having had the opportunity for discovery. Even if the plaintiff whistleblower wins at this preliminary stage, the defendant then has a right to an immediate interlocutory appeal, which will stall the case for another couple years. If the defendant fails in their appeal, and thus the plaintiff whistleblower is finally able to move forward with the case, the special provisions of the Act have already caused significant delay and expense for the whistleblower.

- A brand pharmaceutical company lies to the patent office to obtain a patent that is then used to block generic competition and thus keep charging monopoly prices, or it files a sham and baseless patent lawsuit against its generic competitors simply to delay its entry into the market so that monopoly prices can still be charged. By doing so, that brand-name manufacturer has illegally extended its monopoly and overcharged everyone who buys the drug. This conduct is a violation of the antitrust laws of the U.S. and most states. But under the SPEAK FREE Act, the brand manufacturer could insulate itself from an antitrust suit by consumers or purchasers by claiming that lying to the patent office or the bringing of an objectively bogus patent suit is protected as "conduct in furtherance of expression" and "made in connection with an official proceeding." By providing this potential defense in these important antitrust cases, the SPEAK FREE Act could, in essence, eliminate the sham litigation exception that currently exists under the Noerr-Pennington doctrine, insulate companies from claims of procuring a patent through fraud (Walker Process claims), or both. These important consumer claims may not be properly excepted from any of the narrow carve outs under the SPEAK FREE Act.