Congress of the United States
House of Representatives
Washington, D.C. 20515

Anna G. Eshoo
Eighteenth District
California

June 22, 2016

The Honorable Trent Franks, Chairman
Subcommittee on the Constitution and Civil Justice
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Steve Cohen, Ranking Member
Subcommittee on the Constitution and Civil Justice
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Franks and Ranking Member Cohen,

I write in strong support of H.R. 2304, the *SPEAK FREE Act*, and I thank you for holding a legislative hearing to examine this important legislation. I joined with my colleague Congressman Blake Farenthold to introduce this bill because I believe it is critically necessary to protect free and open communication on the internet and other platforms. The internet provides countless new opportunities for public expression, but the open forum of the internet is threatened by lawsuits to silence speech.

Many people are not aware that they can be sued for leaving an unflattering review online, for publishing an unpopular Op-Ed, or for sharing their opinion at a public meeting. These lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPPs), typically have no merit but can be very effective at silencing criticism. When given the option between retracting their comments or facing costly litigation to defend their First Amendment rights, most individuals choose to silence themselves.

It's difficult to quantify the full extent of the harm caused by SLAPPs because they can take many different forms and often go unreported. However, it is clear that as public engagement continues to expand and evolve online, the filing of these lawsuits will increase. According to TripAdvisor, in 2015 approximately 2,500 of their users reported that they had removed a review after being threatened by the business they had reviewed. Thousands more users likely removed reviews without reporting the businesses' threats to TripAdvisor.

In 28 states and the District of Columbia, individuals are protected from these frivolous lawsuits through a special motion in court that allows SLAPPs to be dismissed at an early stage in the proceedings. My home state of California's landmark anti-SLAPP statute was first passed in 1992 and has served as a model for other state laws as well as the *SPEAK FREE Act*. But in federal courts and the 22 states that do not have an anti-SLAPP law, the threat of costly litigation can still be used as a powerful check on free speech. Even when strong state laws are in place, creative lawyers can file suit in federal court or states where no such protection exists.

This is why federal anti-SLAPP legislation such as the *SPEAK FREE Act* is so important. A federal law will ensure that residents of all states can defend themselves from SLAPP suits by having their anti-SLAPP motion heard in federal court. This will prevent forum shopping and will ensure that all Americans' Frist Amendment rights are protected against frivolous lawsuits that are intended to silence them.

I'm pleased that the Subcommittee is considering this important legislation, and I hope it will move forward to markup and passage. Thank you again for your consideration of this bill.

Most gratefully,

Anna G. Eshoo

Anna G. Eshoo
Member of Congress

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

Internet Association

June 22, 2016

The Honorable Trent Franks
Chairman
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

RE: Hearing on "Examining H.R. 2304, the SPEAK FREE Act."

Dear Chairman Franks and Ranking Member Cohen:

The Internet Association commends you for holding today's hearing on the "Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts (SPEAK FREE) Act of 2015." This legislation will provide robust and necessary federal protection for consumers across the country threatened by meritless lawsuits that attempt to censor online speech.

The Internet Association works to advance policies that foster innovation, promote economic growth, and empower people through the free and open Internet.[1] The internet creates unprecedented benefits for society, and as the voice of the world's leading internet companies, we ensure stakeholders understand these benefits. Internet platforms have democratized the way we travel, shop, and make decisions about everyday products and services. By empowering users to make informed decisions about how and where they spend their money, billions of dollars per year of value is created through the so-called "consumer surplus."[2] The core American value of protecting free speech is fundamental to the ability of platforms to enable consumers to derive transparent and valuable information online. Threats to online expression, including by strategic lawsuits against public participations (or SLAPPS), undermine our platforms' ability to operate effective forums for user discourse and must be prevented.

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[1] The Internet Association's members include Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snapchat, Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga.

[2] Hal Varian, The value of the Internet now and in the future, The Economist (Mar. 10, 2013, 3:49PM), http://www.economist.com/blogs/freeexchange/2013/03/technology-1; Shane Greenstein, Measuring consumer surplus online, The Economist (Mar. 11, 2013, 3:20PM), http://www.economist.com/blogs/freeexchange/2013/03/technology-2.

Internet Association

The Internet provides users with unique platforms for expressing opinions on important issues and to search to find quality goods and services. From the more than 320 million user reviews on TripAdvisor, to the 100 million local reviews on Yelp, and product reviews on Amazon, online expression helps consumers search and make informed decisions. It also helps good businesses by injecting transparency into the market by providing valuable information that consumers have come to expect and rely upon.

Unfortunately, SLAPPs work to inculcate a culture of censorship throughout the U.S. economy and in social discourse. Legal threats that challenge user speech put individual citizens in a difficult position: the financial risk of defending legitimate expression is too high for most Americans. These cases are incredibly burdensome, both in terms of time and money. The average SLAPP case lasts 40 months, and the average claim of damages is a staggering $9.1 million. The mere threat of these lawsuits may be enough to silence online speech and force user censorship, exploiting our legal system to intimidate innocent consumers.

While a limited number of states have passed laws to stem the tide of meritless lawsuits filed for the sole purpose of stifling public debate, it is time that we address the issue on a federal level. The critical right to free speech as Americans – including online reviews and comments from customers – should not be curtailed.

The SPEAK FREE Act would resolve this problem by putting in place a nationwide, uniform structure to oversee SLAPP suits. The bill would create expedited procedure to end these lawsuits early on, providing individuals a robust tool to fight back against attempts to censor speech. In addition, the SPEAK FREE Act contains fee-shifting provisions so that individuals who win an anti-SLAPP case are not forced to pay the copious legal fees that arise from having to defend themselves.

We urge you to support the SPEAK FREE Act and look forward to working with you to advance this critical legislation.

Respectfully Submitted,

Michael Beckerman
President & CEO

CC: The Honorable Bob Goodlatte, Chairman, Committee on the Judiciary
The Honorable John Conyers, Ranking Member, Committee on the Judiciary

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

June 20, 2016

The Honorable Trent Franks, Chairman
The Honorable Steve Cohen, Ranking Member
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Franks and Ranking Member Cohen:

Consumers Union, the policy and advocacy division of Consumer Reports, urges you not to move forward with H.R. 2304, the Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015.

We share many of the concerns voiced by proponents of this legislation. We agree that citizens seeking to voice their opinions should not be subjected to the kinds of intimidating and abusive legal actions described by proponents.

But we believe the legislation needs further careful examination. If a federal statute is ultimately determined to have merit – as opposed to leaving the issue for state law to continue addressing – the bill should be revised significantly to better clarify its scope, so that it does not inadvertently become yet another weapon of intimidation that can be turned on the very kinds of people in need of protection from intimidation.

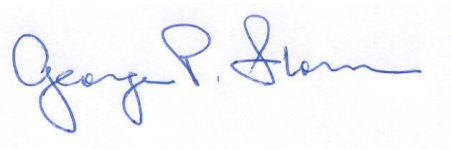
As the bill is written, we are concerned that its purpose could be turned on its head. An individual or small entity who is confronting hostile, well-financed, powerful forces that are seeking to sabotage its lawful activities on behalf of underserved consumers, for example, and who seeks to protect itself and its lawful activities in the courts, could be deemed to have filed a SLAPP suit, and the hostile, well-financed, powerful forces could be deemed to be victims, and then could recover legal expenses that would bankrupt the individual or small entity. That would be the exact opposite of a just result.

The bill contains a number of provisions that are unclear as to their scope or their operation, which we are concerned could lead to these and other unintended and unjust consequences.

Aside from these significant drafting issues, we also are concerned that bringing all these cases into the federal courts, even where they are based entirely on state law claims and defenses, could disrupt and undermine progress on efforts to address the problem of abusive SLAPP suits in the state courts. This threshold question also needs to be carefully considered.

For the reasons outlined above, we urge you not to move forward on this legislation.

Respectfully,



George P. Slover
Senior Policy Counsel
Consumers Union

cc: Members, House Judiciary Committee

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.