Supplemental Testimony of Bruce D. Brown
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U.S. House of Representatives Judiciary Committee
Subcommittee on the Constitution and Civil Justice

H.R. 2304, the SPEAK FREE Act

August 10, 2016

Mr. Chairman and Members of the Subcommittee:

I am Bruce D. Brown, the Executive Director of the Reporters Committee for Freedom of the Press, a nonprofit organization that has been defending the First Amendment rights of journalists since 1970. I was honored to appear before this Committee on June 22, 2016 to testify in favor of the SPEAK FREE Act. I submit the following testimony to supplement the record regarding congressional authority under the Commerce Clause and subject matter jurisdiction for removal to federal court under Article III.

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

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

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

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

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

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[1] U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[2] *See generally* U.S. Congressional Research Service, "The Power to Regulate Commerce: Limits on Congressional Power," (RL32844, May 16, 2014), by Kenneth R. Thomas. *See also United States v. Lopez*, 514 U.S. 549 (1995).

[3] *Gonzales v. Raich*, 545 U.S. 1, 50 (2005).

[4] *Id.* at 32 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.").

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

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

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

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

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

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

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

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

[8] *Id.*

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

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

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

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

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

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

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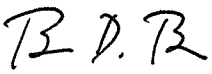
[10] 28 U.S.C. § 1441.
[11] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).
[12] *Id.* at 492 (quoting *Osborn v. Bank of the United States*, 9 Wheat. 738, 822 (1824)).
[13] 28 U.S.C. § 1442(a)(1).
[14] *Mesa v. California*, 489 U.S. 121, 129, 133-34 (1989) (finding that the Federal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

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

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

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

Yours very truly,



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