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## SLAPPED FOR RAISING QUESTIONS ABOUT FRAUD

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### INTRODUCTION

In 2009, Angelique Smith and other parents of students at Agora Cyber Charter School began questioning in online forums whether a school official was illegally diverting education funds. The response she received – a defamation suit seeking \$300,000 in damages – should shock and offend.<sup>1</sup>

Filed by school official Dorothy June Brown, the complaint charged that the parents’ online comments “give the clear but false impression that Dr. Brown is corrupt, incompetent, and possibly criminal.”

But Smith and the other parents weren’t the only ones troubled by Brown’s work as a charter-school official. In 2012, the U.S. Attorney’s Office in Philadelphia charged Brown “with defrauding three charter schools of more than \$6.5 million between 2007 and April 2011.”<sup>2</sup> Despite the charges against Brown, which stemmed from an investigation by the

FBI and U.S. Department of Education, Smith testified before the Pennsylvania Legislature in 2014 that none of the FBI agents she met with “spoke up on [her] behalf” as she faced Brown’s lawsuit.

We may never know the particular facts regarding Brown’s conduct as a school official – a jury acquitted her of six of the counts, deadlocked on 54 others and the remaining charges were later dismissed due to Brown’s dementia. But the case underscores the need for strong protections against SLAPPs (strategic lawsuit against public participation), an insidious form of litigation that threatens citizens’ rights to free expression.

Brown’s retributive suit against Smith is a textbook example of a SLAPP, a lawsuit designed to keep citizens from speaking up about matters of public concern. Often couched as legitimate defamation actions, SLAPP litigation uses the court system as a club to silence and intimidate. Given the timing of the FBI investigation and ensuing indictment against Brown, it’s reasonable to infer that she filed the lawsuits to silence potentially damaging questions.<sup>3</sup>

While Brown ultimately escaped prosecution by virtue of her incompetence to stand trial, Smith and other parents named in Brown’s defamation suit are left to sort out the wreckage in their personal lives, reputations and finances. In 2014, Smith testified in front of the Pennsylvania Legislature in support of S.B. 1095, legislation intended to afford greater protections to the victims of SLAPPs.<sup>4</sup>

Anti-SLAPP laws do not derail legitimate defamation actions. Knowingly spreading false statements about a business or individual shouldn’t be protected, regardless of the forum. But that wasn’t the case with Angelique Smith, the other Agora Cyber Charter School parents or any number of other SLAPP targets across the country.

### ANTI-SLAPP LAWS IN THE STATES

The costs, both in time and money, required to respond to litigation shouldn’t be a tool to force silence and avoid transparency or used to intimidate citizens from expressing themselves freely. This is true whether the speech in question is honest reviews of goods or services, questions about public officials or even a stinging critique from an online blogger. Some form of anti-SLAPP law to protect against this practice currently is on the books in 28 states and the District of Columbia. These laws vary significantly from state to state,<sup>5</sup> but many contain common elements.

Many craft an “off ramp” in the litigation before the costly discovery process begins to allow defendants to make the case that a particular suit constitutes a SLAPP.<sup>6</sup> Texas’

Citizens Participation Act,<sup>7</sup> for example, suspends discovery altogether until the court addresses an anti-SLAPP motion. Other versions provide for fines, attorney’s fees and other costs to be assessed to the plaintiff if the defendant prevails on his or her anti-SLAPP motion. Some states – such as California, Delaware and Hawaii – provide for a “SLAPPBack” cause of action that enables the target of a SLAPP suit to seek damages related to the frivolous action.<sup>8</sup>

Most state anti-SLAPP laws focus on preserving the right of citizens to petition the government and engage the political process, protecting free speech (such as genuine opinion) and improving transparency and accountability for issues of public importance and interest.

**TABLE I: STATE ANTI-SLAPP LAWS**

State	Anti-SLAPP protections	Web link
AZ	Arizona Revised Statutes §§ 12-751 – 12-752 (2006)	<a href="http://www.azleg.state.az.us/FormatDocument.asp?inDoc=ars/12/00752.htm&amp;Title=12&amp;DocType=ARS">http://www.azleg.state.az.us/FormatDocument.asp?inDoc=ars/12/00752.htm&amp;Title=12&amp;DocType=ARS</a>
AR	Arkansas Code Annotated §§16-63-501 – 16-63-508 (2005)	<a href="http://law.justia.com/codes/arkansas/2010/title-16/subtitle-5/chapter-63/subchapter-5/">http://law.justia.com/codes/arkansas/2010/title-16/subtitle-5/chapter-63/subchapter-5/</a>
CA	California Civil Procedure Code § 425.16 (as amended 2009);	<a href="http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-16/">http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-16/</a>
DE	Delaware Code Annotated Title 10, §§ 8136 – 8138 (1992)	<a href="http://delcode.delaware.gov/title10/c081/index.shtml">http://delcode.delaware.gov/title10/c081/index.shtml</a>
DC	Anti-SLAPP Act of 2010 (Law 18-351) on Dec. 7, 2010.	<a href="http://www.dcregs.dc.gov/Gateway/NoticeHome.aspx?noticeid=1036947">http://www.dcregs.dc.gov/Gateway/NoticeHome.aspx?noticeid=1036947</a>
FL	Florida Statutes §§ 768.295 (2000) & 720.304 (2000)	<a href="http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&amp;Search_String=&amp;URL=0700-0799/0768/Sections/0768.295.html">http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&amp;Search_String=&amp;URL=0700-0799/0768/Sections/0768.295.html</a>
GA	Georgia Code Annotated § 9-11-11.1 (1996)	<a href="http://law.justia.com/georgia/codes/9/9-11-11.1.html">http://law.justia.com/georgia/codes/9/9-11-11.1.html</a>
HI	Hawaii Revised Statutes § 634F-1 – 634F-4 (2002)	<a href="http://www.capitol.hawaii.gov/hrscurrent/Vol13_Ch0601-0676/HRS0634F/HRS_0634F-0002.htm">http://www.capitol.hawaii.gov/hrscurrent/Vol13_Ch0601-0676/HRS0634F/HRS_0634F-0002.htm</a>
IL	735 Illinois Comprehensive Statutes 110/1 – 110/99 (2007)	<a href="http://www.ilga.gov/LEGISLATION/ILCS/ilcs3.asp?ActID=2937&amp;ChapAct=735%26nbsp%3BILCS%26nbsp%3B110%2F&amp;ChapterID=56&amp;ChapterName=CIVIL+PROCEDURE&amp;ActName=Citizen+Participation+Act">http://www.ilga.gov/LEGISLATION/ILCS/ilcs3.asp?ActID=2937&amp;ChapAct=735%26nbsp%3BILCS%26nbsp%3B110%2F&amp;ChapterID=56&amp;ChapterName=CIVIL+PROCEDURE&amp;ActName=Citizen+Participation+Act</a>
IN	Indiana Code § 34-7-1 et seq. (1998)	<a href="http://www.in.gov/legislative/ic/code/title34/ar7/ch7.html">http://www.in.gov/legislative/ic/code/title34/ar7/ch7.html</a>
LA	Louisiana Code of Civil Procedure Annotated Article 971 (1999)	<a href="http://www.legis.state.la.us/lss/lss.asp?doc=112314">http://www.legis.state.la.us/lss/lss.asp?doc=112314</a>
ME	Maine Revised Statutes Annotated Title 14 § 556 (1995)	<a href="http://www.mainelegislature.org/legis/statutes/14/title14sec556.html">http://www.mainelegislature.org/legis/statutes/14/title14sec556.html</a>

MD	Marland Code Annotated Courts and Judicial Procedure § 5-807 (2004)	<a href="http://mlis.state.md.us/asp/statutes_respond.asp?article=gj&amp;section=5-807&amp;Extension=HTML">http://mlis.state.md.us/asp/statutes_respond.asp?article=gj&amp;section=5-807&amp;Extension=HTML</a>
MA	Massachusetts General Laws Annotated Chapter 231 § 59H (1994)	<a href="http://www.malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter231/Section59H">http://www.malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter231/Section59H</a>
MN	Minnesota Statutes §§ 554.01 – 554.05 (1994)	<a href="https://www.revisor.mn.gov/statutes/?id=554">https://www.revisor.mn.gov/statutes/?id=554</a>
MO	Missouri Revised Statutes § 537.528(2004)	<a href="http://www.moga.mo.gov/statutes/c500-599/5370000528.htm">http://www.moga.mo.gov/statutes/c500-599/5370000528.htm</a>
NE	Nebraska Revised Statutes §§25-21,241 – 25-21,246 (1994)	<a href="http://uniweb.legislature.ne.gov/laws/statutes.php?statute=s2521243000">http://uniweb.legislature.ne.gov/laws/statutes.php?statute=s2521243000</a>
NV	Nevada Revised Statutes §§ 41.635 – 41.670 (1993)	<a href="http://www.leg.state.nv.us/nrs/nrs-041.html#NRS041Sec670">http://www.leg.state.nv.us/nrs/nrs-041.html#NRS041Sec670</a>
NM	New Mexico Statutes §§ 38-2-9.1 – 38-2-9.2 (2001)	<a href="http://law.justia.com/codes/new-mexico/2006/nmrc/jd_38-2-91-e381.html">http://law.justia.com/codes/new-mexico/2006/nmrc/jd_38-2-91-e381.html</a>
NY	New York Civil Practice Law and Rules 70-a & 76-a (2008); N.Y.C.P.L.R. 3211	<a href="http://public.leginfo.state.ny.us/LAWS-SEAF.cgi?QUERYTYPE=LAWS+&amp;QUERYDATA=\$\$CVP3211\$\$@TXCVPOR3211+&amp;LIST=LAW+&amp;BROWSER=+&amp;TOKEN=21818318+&amp;TARGET=VIEW">http://public.leginfo.state.ny.us/LAWS-SEAF.cgi?QUERYTYPE=LAWS+&amp;QUERYDATA=\$\$CVP3211\$\$@TXCVPOR3211+&amp;LIST=LAW+&amp;BROWSER=+&amp;TOKEN=21818318+&amp;TARGET=VIEW</a>
OK	H.B. 2366, the Oklahoma Citizens Participation Act (2014)	<a href="http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2366&amp;Session=1400">http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2366&amp;Session=1400</a>
OR	Oregon Revised Statutes §§ 31.150 et seq. (2001)	<a href="http://www.leg.state.or.us/ors/031.html">http://www.leg.state.or.us/ors/031.html</a>
PA	27 Pennsylvania Consolidated Statutes § 7707 & §§ 8301 – 8303. (2000)	<a href="http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/27/00.083..HTM">http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/27/00.083..HTM</a>
RI	Rhode Island General Laws §§ 9-33-1 – 9-33-4 (1995)	<a href="http://www.rilin.state.ri.us/Statutes/TITLE9/9-33/9-33-2.HTM">http://www.rilin.state.ri.us/Statutes/TITLE9/9-33/9-33-2.HTM</a>
TN	Tennessee Code Annotated §§ 4-21-1001 -21-1004 (1997)	<a href="http://www.state.tn.us/humanrights/THRC_related_statutes.pdf">http://www.state.tn.us/humanrights/THRC_related_statutes.pdf</a>
TX	The Citizens Participation Act (HB 2973)	<a href="http://slappedintexas.com/citizen-participation-act/">http://slappedintexas.com/citizen-participation-act/</a>
UT	Utah Code Annotated §§ 78B-6-1401 – 1405 (2001)	<a href="http://le.utah.gov/-code/TITLE78B/hm/78B06_140300.htm">http://le.utah.gov/-code/TITLE78B/hm/78B06_140300.htm</a>
VT	12 Vermont Statutes Annotated § 1041	<a href="http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=12&amp;Chapter=027&amp;Section=01041">http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=12&amp;Chapter=027&amp;Section=01041</a>
WA	Washington Revised CODE §§ RCW 4.24.500-525 (2010)	<a href="http://apps.leg.wa.gov/RCW/default.aspx?cite=4.24.500">http://apps.leg.wa.gov/RCW/default.aspx?cite=4.24.500</a>

SOURCE: Public Participation Project

## ANTI-SLAPP RULES IN FEDERAL COURT

The patchwork of state laws with varying provisions is healthy evidence of federalism in action, but those protections may be insufficient if and when a defamation action moves to federal court. As a general rule, substantive state laws apply in federal court, while state rules of civil

procedure do not. Certain exceptions apply to that norm but federal courts around the country struggle to decipher whether to apply anti-SLAPP provisions.

Judge Brett Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit spoke to the issue in the 2015 decision *Abbas v. Schanzer*:

The first issue before the Court is whether a federal court exercising diversity jurisdiction may apply the D.C. AntiSLAPP Act's special motion to dismiss provision. The answer is no. Federal Rules of Civil Procedure 12 and 56 establish the standards for granting pre-trial judgment to defendants in cases in federal court. A federal court must apply those Federal Rules instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision.<sup>9</sup>

Unfortunately, Judge Kavanaugh's binary application of the "substance versus procedure" distinction fails to account for the substantive effect which anti-SLAPP procedural rules have on the ultimate disposition of SLAPP cases. Since the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*, federal courts hearing a case because of diversity jurisdiction (that is, one in which some or all of the parties are citizens of different states or of foreign countries) must apply substantive state law in a manner that discourages forum shopping and prevents the unequal enforcement of the law.<sup>10</sup>

Judge Kavanaugh's approach in *Abbas* has the opposite effect. The finding would encourage SLAPP plaintiffs who want to circumvent state anti-SLAPP laws to file cases in ways that would ensure they are heard in federal court, where the state law would not apply. Not only does Judge Kavanaugh's approach promote forum shopping, it erodes equal enforcement of the law. Defendants in federal court, who likely would be able dispose quickly of the illegitimate lawsuits filed against them under their state's anti-SLAPP law, are denied that substantive protection because of a strategic legal move by SLAPP plaintiffs.

Some other federal courts do already apply state anti-SLAPP laws and have recognized the substantive importance of the procedural protection they provide. California federal courts, for example, have consistently applied the substantial anti-SLAPP protections afforded under the state's code. However, that application may be in jeopardy. In their separate concurrences with the 9th U.S. Court of Appeals' 2013 decision in *Makaeff v. Trump University*, both Judge Richard A. Paez and Chief Judge Alex Kozinski expressed views that suggested prior decisions by the circuit, which includes California, that applied anti-SLAPP statutes in federal court should be reconsidered.<sup>11</sup> Kozinski wrote: "this is the beginning and the end of the analysis. Having determined that the

state rule is quintessentially procedural, I would conclude it has no application in federal court."<sup>12</sup>

State anti-SLAPP laws unquestionably afford procedural protections. However, those procedural protections exist only because there is no expressly *substantive* nonprocedural way to protect people from getting SLAPPED.

## THE CASE FOR A FEDERAL ANTI-SLAPP RULE

Given growing uncertainty about the application of state anti-SLAPP laws in federal court, policymakers have a few potential paths forward. One option is to add provisions to the Federal Rules of Civil Procedure that provide anti-SLAPP protection. A version of this idea is embodied in H.R.2304, the Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts (SPEAK FREE) Act of 2015, which was introduced in May 2015 by U.S. Rep. Blake Farenthold, R-Texas.<sup>13</sup>

Adopting a federal rule would benefit defendants in states without anti-SLAPP laws, while simultaneously clarifying whether existing state anti-SLAPP protections have force in federal court. While that path offers a better conclusion than the emerging judicial trend, some concerns about the *Erie* framework remain. Plaintiffs might be able to choose tactically between a state anti-SLAPP law and the federal version in determining when, where and how to file suit.

Anti-SLAPP laws differ across the states and it's not clear that having one formulaic federal policy is preferable. Federalism works quite well as a policy-making tool precisely because states are able to learn from the successes and failures of similar laws in other states. In fact, we have a well-established judicial process in federal court to decide the application of substantive – and often conflicting – state laws.

While policy changes to combat SLAPPs are welcome, they should recognize the substantive impact of anti-SLAPP laws, embody our time-honored principles of federalism and preserve the well-established "choice of laws" process in federal court. One option to accomplish each of those three objectives would be to require federal courts to apply state anti-SLAPP laws as substantive state law, rather than matters of procedure. By clarifying that state anti-SLAPP laws are indeed substantive law, Congress would cause relatively little policy disruption and address concerns that existing anti-SLAPP protections evaporate in federal court. However, applying state anti-SLAPP law in federal court would not extend protection to defendants in states without anti-SLAPP laws.

## CONCLUSION

We all have an interest to promote free speech and free exchange, especially when it comes to speech about public officials, public interests or issues of public importance. Defamation shouldn't be taken lightly, but state anti-SLAPP laws already balance concerns of the damage caused by false accusations against the harm of litigation that serves no purpose but to silence critics and undermine transparency.

Should federal courts increasingly decide that state anti-SLAPP protections are mere procedural rules inapplicable in a federal forum, Congress must act. Whether it's the SPEAK FREE Act or a rejoinder to federal courts to apply state anti-SLAPP laws, our policymakers should ensure that citizens aren't subject to abusive lawsuits designed to perpetuate silence, rather than remedy harm.

## ABOUT THE AUTHORS

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## ENDNOTES

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4. Angelique Smith, "SLAPP Suit Testimony Senate Bill 1095," Pennsylvania Senate, April 24, 2014. <https://assets.documentcloud.org/documents/1175283/angelique-smith-testimony.txt>
5. Public Participation Project, "State Anti-SLAPP Laws," accessed Feb. 24, 2016. <http://www.anti-slapp.org/your-states-free-speech-protection/>
6. *State of Texas Civil Practice and Remedies Code, Title 2, Subtitle B, Chapter 27*, accessed Feb. 24, 2016. <http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.27.htm>; See, e.g. "Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action. (b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause. (c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss."
7. *Ibid.*
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