

# Washington Law Review

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Volume 95 | Number 3

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10-1-2020

## Erie SLAPP Back

Jack B. Harrison

Northern Kentucky University - Salmon P. Chase College of Law, [harrisonj4@nku.edu](mailto:harrisonj4@nku.edu)

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### Recommended Citation

Jack B. Harrison, *Erie SLAPP Back*, 95 Wash. L. Rev. 1253 (2020).

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## ERIE SLAPP BACK

Jack B. Harrison\*

*Abstract:* Dozens of states have enacted anti-Strategic Lawsuits Against Public Participation (SLAPP) laws to counter SLAPP suits, or lawsuits filed to silence a defendant who has spoken out against a plaintiff. The primary goal of a SLAPP suit is not to win on the merits, but rather to discourage the defendant from exercising their right to free speech by threatening excessively expensive litigation. State anti-SLAPP laws provide for special motions to dismiss, discovery limitations, and fee shifting, all designed to allow a defendant to expeditiously dispose of the SLAPP suit before engaging in costly discovery.

This Article discusses the development of state anti-SLAPP laws and the evolution of the *Erie* doctrine through the *Shady Grove* decision, ultimately examining how lower courts have struggled to make sense of *Shady Grove* in the context of state anti-SLAPP special motions to dismiss. This Article then discusses the various theoretical solutions that have been offered for this dilemma, concluding that the conflict between state anti-SLAPP laws and the Federal Rules of Civil Procedure is unavoidable and irreconcilable under the Rules Enabling Act and *Erie* and its progeny. Based on this analysis, this Article concludes that federal courts sitting in diversity cannot apply state anti-SLAPP laws. The only mechanism for accomplishing the specifically defined purpose of state anti-SLAPP laws in federal court is for the Congress to adopt a federal anti-SLAPP law that would supplement the operation of the Federal Rules of Civil Procedure.

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\* © 2020, Jack B. Harrison. All rights reserved. Professor of Law and Director, Center for Excellence in Advocacy at the Salmon P. Chase College of Law at Northern Kentucky University. JD, University of Cincinnati College of Law; STB, MA, with honors, St. Mary’s Seminary and University; BA, cum laude, University of Tennessee at Chattanooga. The Author thanks his faculty colleagues at the Salmon P. Chase College of Law for their suggestions and insights during the development of this Article and his research assistant, Brendan Sullivan, for his smart, tireless, and valuable work on this Article. The Author also thanks Paul Brownell for his constant support, encouragement, and presence. The Author alone is responsible for any errors and for the content of the Article.

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## INTRODUCTION

To say that Trump University shared President Trump’s magnetic capacity for unwanted attention during its brief, sordid lifetime would be an understatement. Certainly, the New York State Education Department seemed drawn to it in 2005 to warn the company that it could not legally call itself a university.<sup>1</sup> And then came the allegations of deception, unfair

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1. John Cassidy, *Trump University: It’s Worse Than You Think*, NEW YORKER (June 2, 2016), <https://www.newyorker.com/news/john-cassidy/trump-university-its-worse-than-you-think> [<https://perma.cc/H6MH-J4LF>].

business practices, and fraud.<sup>2</sup> But while the organization's short lifespan riddled with fraud and deceit might seem little more to the casual onlooker than *caveat emptor*, it offers a unique perspective into the newest issue plaguing federal litigators—attempting to apply anti-SLAPP statutes in federal court. This issue requires context, and the case of Trump University deserves an autopsy.

Trump University was founded in 2004 by the eponymous Donald Trump and its president, Michael Sexton, as a program that offers real estate and investing coaching.<sup>3</sup> Its mission was to “train, educate and mentor entrepreneurs on achieving financial independence through real estate investing.”<sup>4</sup> Advertising prominently featured Trump, who collaborated with the organization on several books.<sup>5</sup> In particular, the organization, through Sexton, promised that it would not be like other organizations that “try to sell help alone, without the proven expertise to back it up, and just when you begin to realize that the advice you paid for is unproven and ineffective—they try to sell you more expensive products. They hook you on promises and never deliver.”<sup>6</sup>

Immediately, the organization drew public attention and criticism from commentators who lambasted Trump University's business practices.<sup>7</sup> Calling Trump University a “scam[,]” critics pulled no punches in claiming that the organization sold overpriced workshops to ignorant customers.<sup>8</sup> Some of these critics pointed to steep fees as proof of Trump University's dishonest motivation. And they found it suspicious that Trump University targeted students who struggled from the sub-prime mortgage crisis.<sup>9</sup> This was not enough to deter Tarla Makaeff, who first paid the \$1,495 fee for a three-day seminar in August 2008, followed by

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2. See *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 260 (9th Cir. 2013); *People v. Trump Entrepreneur Initiative LLC*, 26 N.Y.S.3d 66, 69 (2016).

3. See *Trump*, 26 N.Y.S.3d at 67.

4. *Makaeff*, 715 F.3d at 258.

5. *Id.* at 259 (citing FED. R. EVID. 201; *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010)) (taking judicial notice of Trump's collaborations with the University on books and articles).

6. *Id.* (citing Michael Sexton, *Foreword* to TRUMP UNIVERSITY WEALTH BUILDING 101: YOUR FIRST 90 DAYS ON THE PATH TO PROSPERITY, at ix (Donald J. Trump ed., 2007)).

7. *Id.* (citing David Lazarus, *Trump Spins in Foreclosure Game*, L.A. TIMES (Sep. 16, 2014), <https://www.latimes.com/business/la-fi-lazarus12dec12-column.html> [<https://perma.cc/NY5V-NG6G>]) (“[Q]uestion[ing] Trump University's business practices in the larger context of the subprime mortgage crisis.”).

8. *Id.* (citing complaints about Trump University on Internet message boards).

9. Lazarus, *supra* note 7.

a \$34,995 payment for the “Trump Gold Elite Program.”<sup>10</sup>

What does the “Trump Gold Elite Program” consist of? Allegedly, this program gave valuable insight for subscribers to go to Trulia.com to find real estate properties and the IRS website to learn about taxes.<sup>11</sup> The real estate sales techniques taught at seminars were nothing spectacular—“buy low, and sell high” and similar advice featured a hefty price tag.<sup>12</sup> Moreover, customers alleged that the videos included with the program were five-years-old, contained information that customers could find for free over the Internet, and provided students with allegedly ineffectual mentors who were notoriously unresponsive.<sup>13</sup>

Critics thought this caliber of product was unbecoming of the Trump brand.<sup>14</sup> And meanwhile, Makaeff became worried about her increasingly bleak financial condition after paying for various programs.<sup>15</sup> Upon contacting a Trump University representative, she found out she was ineligible for a refund.<sup>16</sup> After spending a year with the program and attempting to reconcile her grievances with it through the University’s free “mentoring” services, Makaeff’s stance shifted dramatically.<sup>17</sup>

She wrote letters to the Better Business Bureau accusing Trump and the University of a series of fraudulent and deceptive business practices.<sup>18</sup> Inevitably, this led to a large class action suit brought against Trump

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10. *Makaeff*, 715 F.3d at 260.

11. See Jim Zaroli, *Trump University Customer: ‘Gold Elite’ Program Nothing But Fool’s Gold*, NAT’L PUB. RADIO (June 6, 2016), <https://www.npr.org/2016/06/06/480948631/trump-university-customer-gold-elite-program-nothing-but-fools-gold> [https://perma.cc/WXG5-A89V]; see also Ian Tuttle, *Yes, Trump University Was a Massive Scam*, NAT’L REV. (Feb. 26, 2016), <https://www.nationalreview.com/corner/trump-university-scam/> [https://perma.cc/6JK8-8A4M].

12. Lazarus, *supra* note 7.

13. See Terry Spencer, *Ex-Trump University Students Wants the President’s Apology*, ASSOCIATED PRESS NEWS (Mar. 29, 2017), <https://www.apnews.com/c5ce93f7f21d4c589a0b71293fa75b49> [https://perma.cc/MWT2-VNMM].

14. Lazarus, *supra* note 7.

15. *Makaeff*, 715 F.3d at 260.

16. *Id.*

17. *Id.*

18. *Id.* The court describes these letters in the following manner:

In both letters, Makaeff asserted that Trump University engaged in “fraudulent business practices,” “deceptive business practices,” “illegal predatory high pressure closing tactics,” “personal financial information fraud,” “illegal bait and switch,” “brainwashing scheme[s],” “outright fraud,” “grand larceny,” “identity theft,” “unsolicited taking of personal credit and trickery into [sic] opening credit cards,” “fraudulent business practices utilized for illegal material gain,” “felonious teachings,” “neurolinguistic programming and high pressure sales tactics based on the psychology of scarcity,” “unethical tactics,” “a gargantuan amount of misleading, fraudulent, and predatory behavior,” and business practices that are “criminal.”

*Id.*

University for its allegedly deceptive practices.<sup>19</sup> But Trump University brought a counterclaim, alleging defamation based upon Makaeff's letters to the Better Business Bureau and other Internet posts.<sup>20</sup> Makaeff responded with a motion to strike under California's anti-SLAPP statute, which would have not only removed the claim, but required Trump to pay Makaeff's attorneys' fees if he lost.<sup>21</sup> This raised an interminable civil procedural question, from which the Ninth Circuit found no escape—under the *Erie* doctrine, does a state anti-SLAPP statute apply in federal court?

This question is the focus of this Article. Why does this matter and how might the answer to that question impact litigation? Under the *Erie* doctrine a federal court sitting in diversity is to apply state substantive law to the state law claim in front of it and apply federal procedural law. Yet, state anti-SLAPP statutes allow a defendant to file a “special motion to strike” to dismiss an action before trial. This process appears to be fundamentally procedural and to answer the same procedural question regarding the sufficiency of a claim as Rules 12 and 56 of the Federal Rules of Civil Procedure. The critical difference between the two is that state anti-SLAPP statutes impose a burden on both parties that is greater than that imposed by the federal rules.

In *Makaeff v. Trump University, LLC*,<sup>22</sup> for example, if the California anti-SLAPP statute is applied, the moving defendant (in this case, Makaeff as counterclaim defendant) must first make a prima facie showing that the plaintiff's (in this case, Trump as the counterclaim plaintiff) suit arises from an act in furtherance of the defendant's constitutional right to free speech.<sup>23</sup> Once the moving defendant meets this burden, then the burden shifts to the nonmoving plaintiff “to establish a reasonable probability that it will prevail on its claim in order for that claim to survive dismissal.”<sup>24</sup> In contrast, under Rules 12 or 56, to survive dismissal, the nonmoving party is only required to show that an issue of material fact exists that raises a jury question.<sup>25</sup> The end result under these two procedural mechanisms could be very different, which highlights the *Erie* problem in this matter.

This Article will describe the importance of preserving crucial First

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19. *Id.*

20. *Id.*

21. *Id.* at 260, 274.

22. 715 F.3d 254 (9th Cir. 2013).

23. *Id.* at 261.

24. *Id.*

25. *See* Klocke v. Watson, 936 F.3d 240, 245–46 (5th Cir. 2019).

Amendment values and analyze the legal uncertainty surrounding the applicability of anti-SLAPP statutes in federal court under the *Erie* doctrine in light of the currently existing circuit split. As most first-year civil procedure students learn, the Supreme Court, in *Erie Railroad Co. v. Tompkins*<sup>26</sup> and the cases that follow it, established that a federal court sitting in diversity is to apply state substantive law and federal procedural rules.<sup>27</sup> However, following the Supreme Court's decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,<sup>28</sup> it is unclear whether state statutes that create anti-SLAPP special motions to dismiss should apply in federal courts sitting in diversity.

Part I introduces the conflict between preserving First Amendment rights under anti-SLAPP statutes and the *Erie* doctrine and describes the difficulty courts have had in providing a clear analytical path. Part II discusses what anti-SLAPP statutes are, how they work, and why they are beneficial to citizens seeking to exercise their First Amendment rights of expression. Part III discusses the history and development of the *Erie* doctrine, leading to the current uncertainty about the application of anti-SLAPP statutes in federal court. Part IV provides a review of the current circuit split on whether state anti-SLAPP statutes can apply in federal courts. Part V argues that, based on Supreme Court precedent, anti-SLAPP statutes should not apply in a federal court sitting in diversity as a procedural matter and offers some possible solutions to this dilemma, including the adoption of federal legislation.

## I. THE RISE OF THE SLAPP AND THE ANTI-SLAPP

The history of anti-SLAPP statutes is notable for the rapidity with which they emerged as a prominent feature of state practice. The term "SLAPP" can be traced back to an article written by Professors Penelope Canan and George Pring.<sup>29</sup> Canan and Pring conducted studies to chart the phenomenon of parties filing suits in order to stymie individuals' petitioning activities and noted that courts were starting to acknowledge SLAPP suits' prevalence.<sup>30</sup> Through their studies, they found that such

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26. 304 U.S. 64 (1938).

27. *Id.* at 79–80.

28. 559 U.S. 393 (2010).

29. George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation (SLAPPs): An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937, 962 (1992).

30. *Id.* at 943 ("The cost to society in terms of the threat to our liberty and freedom is beyond calculation . . . . To prohibit robust debate on these questions would deprive society of the benefit of its collective thinking and . . . destroy the free exchange of ideas which is the adhesive of our

suits were becoming commonplace in 1992, the date of the article, as mechanisms to dissuade political involvement.<sup>31</sup> Professors Canan and Pring provided the following definition of a SLAPP claim: “1. [a] civil complaint or counterclaim, 2. filed against nongovernment individuals or organizations, 3. because of their communications to government (government bodies, officials, or the electorate), 4. on a substantive issue of some public interest or concern.”<sup>32</sup> The subject matter of these claims generally focused on defamation, business torts, and constitutional issues, while hovering around such public issues as civil rights, environmental protection, and criticism of public officials.<sup>33</sup> Furthermore, such suits often contain unreasonably high damage claims.<sup>34</sup>

Professors Canan and Pring sought to enable attorneys and politically active citizens to identify the “warning signals” of a SLAPP, in order to take the necessary measures to halt the progress of a SLAPP suit in its tracks.<sup>35</sup> While acknowledging that both the motion to dismiss and summary judgment are the foremost mechanisms to banish a SLAPP suit, Canan and Pring hoped to have more legislatures adopt some version of an anti-SLAPP statute.<sup>36</sup>

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democracy.” (quoting *Webb v. Fury*, 282 S.E.2d 28, 43 (W. Va. 1981), *overruled by Harris v. Adkins*, 432 S.E.2d 549 (W. Va. 1993))).

31. *Id.* at 944 (noting that, despite that “the vast majority ultimately are dismissed,” the essential purpose of “‘public participation’ in government” is frustrated (citing *Whitney v. California*, 274 U.S. 357, 375–76 (1926) (Brandeis, J., concurring), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969))).

32. *Id.* at 946–47 (citing Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC’Y REV. 385, 387 (1988)).

33. *Id.* at 947; *see also* Andrew L. Roth, Note, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L. REV. 741, 741 (2016) (noticing courts are now applying anti-SLAPP laws in Internet defamation cases).

34. *See* Katelyn E. Saner, Note, *Getting Slapp-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 DUKE L.J. 781, 788 (2013) (citing Victor J. Cosentino, Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 404 (1993); James E. Grossberg & Dee Lord, *California’s Anti-SLAPP Statute*, 13 COMM’NS L. 3, 4 (1995)).

35. Pring & Canan, *supra* note 29, at 950 (noting that the “target” of a SLAPP suit should take steps to characterize the suit in a way that is as politically charged as possible to “invok[e] the protection of the Petition Clause [and to remind] the court that there is another, better forum in which the dispute can be resolved”).

36. *Id.* at 959 (stating that, “If public participation in government . . . is to be encouraged, it will take adoption of legislation that (1) protects the full range of public advocacy, (2) before all branches and levels of government, (3) discourages the filing of SLAPPs, and (4) provides effective summary adjudications for those that are filed”).



A. *Anti-SLAPP Foundations in the Petition Clause*

With their groundbreaking article, Canan and Pring encouraged states to pass anti-SLAPP statutes or at least extend relevant precedent. The Colorado Supreme Court in *Protect Our Mountain Environment, Inc. v. District Court (POME)*<sup>37</sup> took the latter route, extending an antitrust doctrine based in the Petition Clause to hold that a SLAPP statute violated the First Amendment.<sup>38</sup> Later, numerous states enacted anti-SLAPP statutes, drawing on similar principles.<sup>39</sup>

Some scholars have suggested that upholding activity protected under the Petition Clause was a concept that had previously been emphasized under the *Noerr-Pennington* doctrine.<sup>40</sup> The *Noerr-Pennington* doctrine arose out of two Supreme Court cases that held that antitrust laws are not applicable when competitors assemble to petition legislators.<sup>41</sup> Courts recognize a “sham” exception to the doctrine.<sup>42</sup> The doctrine would not protect competitors from antitrust liability where they brought multiple suits against a competitor under the guise of petitioning, but, in actuality, served as “an attempt to interfere directly with the business relationships of a competitor.”<sup>43</sup> While the doctrine applies only to antitrust legislation, the doctrine’s stalwart defense of freedom to assemble parallels the two step process utilized in the current anti-SLAPP decisions in dismissing a claim.<sup>44</sup> Although the *Noerr-Pennington* doctrine may have provided some inspiration, the factors commonly utilized in anti-SLAPP legislation

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37. 677 P.2d 1361 (Colo. 1984).

38. *Id.* at 1370; *see also* Pring & Canan, *supra* note 29, at 951.

39. Pring & Canan, *supra* note 29, at 959–60 (noting that bills in New York, California, and Washington had already or were in the process of adopting promising anti-SLAPP statutes).

40. Colin Quinlan, Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 372–77 (2014); *see also* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 855 (2010).

41. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 674–75 (1965); *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961); *see also* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* § 10:21 (2017–2018 ed. 2017).

42. *Noerr*, 365 U.S. at 144.

43. *Id.*

44. *Select Portfolio Servicing v. Valentino*, 875 F. Supp. 2d 975, 988 (N.D. Cal. 2012) (“The first part of the anti-SLAPP inquiry is substantially the same as the inquiry into whether the *Noerr-Pennington* doctrine applies.” (citing *Kearney v. Foley and Lardner*, 553 F. Supp. 2d 1178, 1181 n.3 (S.D. Cal. 2008))); *see also* *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001); *LoBiondo v. Schwartz*, 970 A.2d 1007, 1020 (N.J. 2009) (“[T]he majority of the [state anti-SLAPP] statutes find their roots in the United States Supreme Court’s *Noerr-Pennington* doctrine, creating immunity that protects actions that fall within the parameters of the redress of one’s grievances to the government.”).

were first set out in *POME*.<sup>45</sup>

There, the Colorado State Supreme Court dealt with an environmental group's defense against a multimillion dollar lawsuit by a developer against the group for opposing land development.<sup>46</sup> Noting a trend for courts to apply the *Noerr-Pennington* doctrine in recent cases, the court found that the right to petition was something that included unhindered access to the courts.<sup>47</sup> For the Colorado Supreme Court, this view was reflected in countless decisions protecting First Amendment petitioning activity from liability.<sup>48</sup> Noting that the sham exception's application in antitrust suits depends upon whether the claim is to harass, the Colorado Supreme Court extended the exception to protect legitimate petitioning activity targeted by as little as "a single lawsuit lacking any reasonable basis in fact or law and brought primarily to harass or to improperly deter another's legitimate activities."<sup>49</sup>

The court sought to uphold petitioning activity and acknowledged that suits without merit filed against citizens can "have a significant chilling effect on the exercise of their First Amendment right to petition the courts for redress of grievances."<sup>50</sup> Laying the ground for anti-SLAPP statutes soon to follow, the court found that when a defendant files a motion to dismiss on the grounds that their claim is an illegitimate attempt to impede upon the defendant's constitutional right to petition, the plaintiff must show that their claim is not illegitimate.<sup>51</sup> If the plaintiff failed to meet this burden, the court would then treat such a motion to dismiss "as one for summary judgment," to be judged by a stricter standard than a typical motion to dismiss.<sup>52</sup> The court described the following burden shifting

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45. *Protect Our Mountain Env't, Inc. v. Dist. Ct.*, 677 P.2d 1361 (Colo. 1984); *see also* Pring & Canan, *supra* note 29, at 951.

46. *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1362.

47. *Id.* at 1365 ("[T]he Court, drawing on the *Noerr-Pennington* doctrine, clearly recognized that the right to petition the government for redress of grievances necessarily includes the right of access to the courts." (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983))).

48. *Id.* at 1365–66 (citing *Anchorage Joint Venture v. Anchorage Condo. Ass'n*, 670 P.2d 1249 (Colo. App. 1983)).

49. *Id.* at 1367 (noting that "[a] repetitious pattern of baseless litigation, in other words, is not necessary for application of the sham exception" (citing *MCI Commc'ns Corp v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1153–55 (7th Cir. 1983))).

50. *Id.* at 1368 (citing Note, *Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 MICH. L. REV. 106, 110–11 (1975)).

51. *Id.*; *see, e.g., In re Foster*, 253 P.3d 1244, 1251 (Colo. 2011) (requiring heightened standard under *POME* framework).

52. *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1369 (citing COLO. R. CIV. P. § 12(b)); *see also*

analysis that courts should conduct in the wake of a potential SLAPP suit:

[T]he plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.<sup>53</sup>

The court then concluded that such a standard would need to be applied in the immediate case and that a motion to dismiss against the developers ought to be treated as one for summary judgment.<sup>54</sup> Pring and Canan felt that the Colorado Supreme Court had adopted a workable system for adequately dismantling SLAPP claims.<sup>55</sup>

#### B. *Anti-SLAPP Statutes*

Washington State crafted one of the first anti-SLAPP statutes,<sup>56</sup> which emerged in the wake of publicized litigation between homeowners and a real estate development company over its reported tax violations.<sup>57</sup> Over time, the statute changed, but generally kept the same procedural mechanisms and purpose in preventing challenges to free speech.<sup>58</sup> However, the Washington Supreme Court struck down section 4.24.525 of the Revised Code of Washington, one of its anti-SLAPP statutes, as

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Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013) (acknowledging California's anti-SLAPP law shifts substantive burden). *But see* Los Lobos Renewable Power, LLC v. Americulture, LLC, 885 F.3d 659, 670 (10th Cir. 2018) (noting that New Mexico's anti-SLAPP statute "does not alter the rules of decision by which a court will adjudicate the merits of the complaint").

53. *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1369 (noting that following this standard would not only root out meritless SLAPP claims, but would "permit those truly aggrieved by abuse of these processes to vindicate their own legal rights").

54. *Id.* at 1370.

55. *See* Pring & Canan, *supra* note 29, at 953 ("The *POME* test is a 'cure' well worth adopting in other jurisdictions.").

56. *See* WASH. REV. CODE § 4.24.510 (2019).

57. *See* Pring & Canan, *supra* note 29, at 959 n.53 (discussing the roots of the Washington anti-SLAPP statute in the case of Robert John Real Estate Co. v. Hill, No. 87-2-01696-3 (Wash. Super. Ct. Clark Cnty. July 14, 1987)).

58. *See* Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495 (2012).

unconstitutional.<sup>59</sup> In particular, the Court took issue with the burden shifting effect that the statute has upon a plaintiff to prove that their case is legitimate and has a likelihood of success upon “clear and convincing evidence” in response to the special motion to strike.<sup>60</sup> The Court found this to be antithetical with the plaintiff’s right to a jury trial.<sup>61</sup>

California created its own statute, and Professors Pring and Canan noted in 1992 that the state had adopted “the most comprehensive anti-SLAPP act to date.”<sup>62</sup> Currently, twenty-seven states and Guam have some form of anti-SLAPP legislation in place.<sup>63</sup> While these anti-SLAPP statutes vary in their strength and scope, all share the common tenet in providing the court with the ability to “determine whether the defendant’s activity falls within the scope of the state’s listing of protected activities triggering the statute’s coverage.”<sup>64</sup>

While Pring and Canan, along with *POME*, offered a definite list of characteristics that anti-SLAPP statute legislation should incorporate,

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59. See *Davis v. Cox*, 183 Wash. 2d 269, 296, 351 P.3d 862, 875 (2015), *abrogated on other grounds by* *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 191 Wash. 2d 392, 423 P.3d 223 (2018); see also *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 635 (Minn. 2017) (finding Minnesota’s anti-SLAPP statute to be an unconstitutional erosion of state constitutional right for a trial by jury).

60. See *Davis*, 183 Wash. 2d at 293, 351 P.3d at 873 (taking issue with the fact that the statute requires a probability of success at trial beyond what is appropriate under Washington’s summary judgment standard because “the genuineness of a [claim] does not turn on whether it succeeds” (quoting *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002))).

61. *Id.*

62. Pring & Canan, *supra* note 29, at 960 n.55 (citing CAL. CIV. PROC. CODE § 425.16 (West 1992)); see also *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, C.J., concurring).

63. The following states and territories have enacted the following anti-SLAPP legislation: ARIZ. REV. STAT. ANN. §§ 12-751 to 12-752 (2019); ARK. CODE ANN. §§ 16-63-501 to 16-63-508 (West 2019); CAL. CIV. PROC. CODE § 425.16 (West 2020); D.C. CODE §§ 16-5501 to 16-5505 (2001); DEL. CODE ANN. tit. 10 §§ 8136–8138 (West 2019); FLA. STAT. ANN. § 768.295 (2019); GA. CODE ANN. § 9-11-11.1 (West 2019); HAW. REV. STAT. ANN. §§ 634F-1 to 63F-4 (West 2008); IND. CODE ANN. §§ 34-7-7-1 to 34-7-7-10 (West 2019); LA. CODE CIV. PROC. ANN. art. 971 (2019); MD. CODE ANN. CTS. & JUD. PROC. § 5-807 (West 2011); MO. REV. STAT. § 537.528 (2016); ME. REV. STAT. ANN. tit. 14, § 556 (West 2019); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000); MINN. STAT. ANN. §§ 554.01, 554.03-554.05 (West 2019); NEB. REV. STAT. §§ 25-21, 241 to 246 (2016); NEV. REV. STAT. ANN. § 41.640 to 41.670 (West 2019); N.M. STAT. ANN. §§ 38-2-9.1 and 9.2 (West 2019); N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2019); OKLA. STAT. tit. 12, § 1443.1 (Supp. 2015); OR. REV. STAT. ANN. § 31.150 (West 2019); 27 PA. STAT. AND CONS. STAT ANN. §§ 27-83-8301 to 8305 (West 2019); R.I. GEN. LAWS ANN. §§ 9-33-1 to 9-33-4 (West 2019); TENN. CODE ANN. §§ 4-21-1001 to 4-21-1003 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001-27.011 (West 2020); UTAH CODE ANN. §§ 78B-6-1402 to 1405 (West 2019); VT. STAT. ANN. § 1041 (West 2019); 7 GUAM CODE ANN. § 17101-17109 (2020). See also 2 RODNEY SMOLLA, LAW OF DEFAMATION § 9:109 n.1 (2d ed. 2018).

64. SMOLLA, *supra* note 63, § 9:109.

current statutes vary.<sup>65</sup> For example, Pennsylvania's statute narrowly requires that the SLAPP be in regards to petitioning activities "relating to enforcement or implementation of an environmental law or regulation."<sup>66</sup> In stark contrast, California's statute subjects any suit filed in accordance with a person's "furtherance of the person's right of petition or free speech" to a "special motion to strike," unless the SLAPP filer meets a heightened evidentiary burden to show the claim's legitimacy.<sup>67</sup> Although the scope of each SLAPP statute will vary from state to state, the statutes share some common tenets.<sup>68</sup> The special motions to dismiss are the core of these statutes, designed to extinguish a SLAPP suit before it has the chance to be litigated.<sup>69</sup> Such motions are held to a "summary-judgment-like procedure."<sup>70</sup> Unlike a Rule 12 or 56 motion, however, discovery is stayed, with the burden shifting first to the defendant to show that the suit arose to deter them from their legitimate petitioning activity, with the burden then shifting back to the plaintiff to show that the elements of his claim are supported by evidence.<sup>71</sup>

When these suits take place in federal court, it is ultimately a question of whether, under the *Erie* doctrine, these motions are applicable at all since Rules 12 and 56 seem to encompass the same procedural function as state anti-SLAPP statutes.<sup>72</sup>

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65. Canan and Pring discussed the *POME* elements and noted the following requirements for an anti-SLAPP statute:

Procedural requirements - Every motion to dismiss based on the Petition Clause 1. Is to be fast-tracked for summary judgment. 2. Has the burden of proof shifted from the movant-target to the filer of the lawsuit. 3. Is to have a "heightened standard" of review (strict scrutiny) applied. Substantive requirements - Filer must prove that target's petitioning activity: 1. Was "devoid of reasonable factual support" or "lacked any cognizable basis in law," and 2. Had as its "primary purpose" "harass[ment]" or "some other improper objective," and 3. Did [it] "adversely affect a legal interest" of filers.

Pring & Canan, *supra* note 29, at 952 (citing *Protect Our Mountain Env't, Inc. v. Dist. Ct.*, 677 P.2d 1361, 1369 (Colo. 1984)).

66. 27 P.A. STAT. AND CONS. STAT. ANN. § 8302 (West 2019); *see also* FLA. STAT. ANN. § 768.295 (2019) (making remedy only available to those being sued by a "governmental entity").

67. CAL. CIV. PROC. CODE § 425.16 (West 2020).

68. Saner, *supra* note 34, at 793, n.82 (citations omitted) (noting that "[t]he scope of anti-SLAPP laws, however, varies substantially among states").

69. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(b) (West 2020).

70. *Taus v. Loftus*, 151 P.3d 1185, 1205 (Cal. 2007).

71. *See* Saner, *supra* note 34, at 792–93 (noting that a plaintiff who survives the special motion to strike might still be subject to a Rule 12 or 56 motion). *But see* 735 ILL. COMP. STAT. ANN. 110/20(b) (West 2019) (permitting a plaintiff to make a limited discovery request despite discovery being halted by the special motion to dismiss).

72. *See generally* Joshua P. Zoffer, Note, *An Avoidance Canon for Erie: Using Federalism to Resolve Shady Grove's Conflicts Analysis Problem*, 128 YALE L.J. 482 (2018); Aaron Smith, Note, *SLAPP Fight*, 68 ALA. L. REV. 303 (2016); Laura Lee Prather & Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH L. REV. 725 (2015);

## II. THE *ERIE* PROBLEM

While the traditionally accepted facts of *Erie* have recently been challenged by Professor Brian Frye, the basic facts have been presented to generations of first-year law students.<sup>73</sup> What happened to Harry James Tompkins on the evening of July 17, 1934 is both a quaint and tragic story. The facts seem almost ordinary, certainly not the type of story that would lead to the creation of a far reaching and revolutionary legal doctrine.<sup>74</sup> Yet, that is exactly what happened.

According to Tompkins, his injury occurred as he walked along a footpath beside the tracks located in Pennsylvania. He claimed he had been struck by an open door swinging from one of the cars on a freight train operated by the Erie Railroad Company.<sup>75</sup> The train that injured Tompkins was the Ashley Special No. 2499, a freight train operated by

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Benjamin Ernst, Note, *Fighting SLAPPs in Federal Court: Erie, the Rules Enabling Act, and the Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. REV. 1181 (2015); Caleb P. Lund, *It's Time to SLAPP Back: Why California's Anti-SLAPP Statute Should Not Apply in Federal Court*, 44 SW. L. REV. 97 (2014); Quinlan, *supra* note 40, at 367; Saner, *supra* note 34, at 792–93.

73. Brian Frye, *The Ballad of Harry James Tompkins*, 52 AKRON L. REV. 531 (2018); *see also* Bob Rizzi, *Erie Memoirs Reveal Drama, Tragedy*, 63 HARV. L. REC. 2 (1976) (while this article is wildly inaccurate in almost every respect, it includes excerpts from Aaron L. Danzig's unpublished memoirs); Irving Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011 (1978) (relying on communications with Bernard Nemeroff and others, as well as a wide range of primary and secondary sources); *Celebrating The Erie Railroad Company v. Tompkins Project*, 97 LUZERNE LEGAL REG. 1 (2007), <https://docplayer.net/4106463-Published-weekly-by-the-wilkes-barre-law-library-association.html> [<https://perma.cc/LKB8-JP36>] (relying on secondary sources and local legend); Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics and Social Change Reshape the Law*, in CIVIL PROCEDURE STORIES 21 (Kevin M. Clermont ed., 2d ed. 2008) (collecting information from a wide range of primary and secondary sources).

74. As Frye describes these facts:

At about 2:30 a.m. on Friday, July 27, 1934, William Colwell of Hughestown, Pennsylvania was awakened by two young men banging on his front door. When he went downstairs, they told him that someone had been run over by a train. Colwell looked out his side window. In the moonlight, he saw someone lying on the ground near the railroad tracks. He went back upstairs and told his wife that there had been an accident. She told him “not to go out, that them fellows was crazy,” but he dressed and went out to help anyway.

Colwell's house was at the stub-end of Hughes Street, where it ran into the railroad tracks. When he reached the tracks, he discovered his neighbor Harry James Tompkins, about 6 or 10 feet south of Hughes Street. Tompkins had a deep gash on his right temple, and his severed right arm was in between the tracks. Colwell told the young men to go to Mrs. Rentford's house down the street and call an ambulance. After calling the ambulance, they disappeared. Colwell also yelled to his neighbor, Aloysius Thomas McHale, who dressed and came out to help. Colwell and McHale stayed with Tompkins until the ambulance arrived at about 2:45 a.m. and took him to Pittston Hospital.

Frye, *supra* note 73, at 532–33 (citing Transcript of Record at 115, 86–87, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1937) (No. 367)).

75. *Erie*, 304 U.S. at 69.

the Erie Railroad Company.<sup>76</sup> Tompkins regained consciousness following the accident in the hospital receiving room.<sup>77</sup> In treating him, the hospital doctors sedated him, treated the wound on his face, and amputated the remainder of his right arm.<sup>78</sup> As a result of the accident, Tompkins spent about three weeks in the hospital. While in the hospital, he developed an infection in his shoulder, leading to the development of an abscess. Eventually, the wound healed.<sup>79</sup> However, Tompkins continued to experience persistent phantom limb pain in his missing fingers.<sup>80</sup> Tompkins's surgery cost about \$350, with the hospital stay costing about \$89.<sup>81</sup>

Tompkins then filed a diversity action against Erie in federal court, presumably because the relevant federal common law was more favorable to him than the Pennsylvania rule. The key legal issue was the standard of care that the railroad Erie owed to Mr. Tompkins.<sup>82</sup> The railroad argued that liability was governed by Pennsylvania law, which would treat Tompkins as a trespasser who could recover only if Erie acted with wanton or willful negligence (not mere negligence).<sup>83</sup> Tompkins, on the other hand, asserted that a federal court was not bound by the decisions of the Pennsylvania Supreme Court and was free to apply federal common law, which would not require Tompkins to show wanton or willful negligence in order to establish liability.<sup>84</sup> The district court ruled for

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76. Frye, *supra* note 73, at 533.

77. *Id.*

78. *Id.* Tompkins testified that the doctors amputated the socket. "A. They took my arm right out of the socket. Q. You have no stub or anything? A. Or no socket; they took the socket too." *Id.* However, the doctors actually performed a "shoulder disarticulation," removing the entire humerus at the socket." *Id.* at 533 n.5 (citing Transcript of Record, *supra* note 74, at 31–32).

79. *Id.* at 533.

80. *Id.* (citing Transcript of Record, *supra* note 74, at 31–32).

81. *Id.* (citing Transcript of Record, *supra* note 74, at 16).

82. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 70–71 (1938).

83. *Id.* at 70.

84. *Id.*; see also Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 255–58 (2008). The position advanced by Tompkins was based upon a Supreme Court case nearly a century earlier, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842). *Id.* According to *Swift*, federal courts exercising jurisdiction on the ground of diversity of citizenship were not required to apply the unwritten substantive law of the State as declared by its highest court. *Swift*, 41 U.S. (16 Pet.) at 18–19. In *Swift*, the Court concluded that federal courts may "exercise an independent judgment as to what the common law of the State is—or should be." *Erie*, 304 U.S. at 71 (citing *Swift*, 41 U.S. (16 Pet.) at 18–19). The doctrine announced by the Court in *Swift* was an interpretation of section 34 of the Judiciary Act of 1789 (Rules of Decision Act). Steinman, *supra*, at 255. The Act provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the

Tompkins on this issue, and he ultimately garnered a \$30,000 verdict.<sup>85</sup>

While Tompkins won at trial and on appeal, the Supreme Court reversed, holding that federal courts sitting in diversity must apply state substantive law.<sup>86</sup> The Court's decision "was completely unheralded and unexpected."<sup>87</sup> For almost a century, the Court had followed its opinion in *Swift v. Tyson*,<sup>88</sup> holding that federal courts sitting in diversity should apply "general" common law, which gradually became "federal" common law.<sup>89</sup> However, after *Erie*, "federal general common law" was no more.<sup>90</sup>

In his opinion for the Court, Justice Brandeis criticized *Swift* on several grounds. First, Brandeis asserted that in *Swift*, the Court had misinterpreted congressional intention when it adopted the Rules of Decision Act.<sup>91</sup> Relying on the work of Charles Warren, a legal historian, Brandeis concluded that the legislative history of the Rules of Decision Act indicated that Congress intended for federal courts to follow rules of decision set forth by state courts as well as state legislatures.<sup>92</sup> Additionally, Brandeis was concerned about the potential consequences of *Swift*.<sup>93</sup> Specifically, he worried that parties' substantive rights would be dependent upon whether the case was adjudicated in state court or federal court, preventing "uniformity in the administration of the law of the state."<sup>94</sup> Justice Brandeis was particularly concerned by the ease with which parties could manipulate the judicial system to obtain the benefits of the federal common law.<sup>95</sup>

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United States, in cases where they apply." *Erie*, 304 U.S. at 71 (quoting the statute then-codified at 28 U.S.C. § 725). In *Swift*, the Court concluded that:

[T]he Rules of Decision Act required federal courts to follow only "the positive statutes of the state," [but] did not require federal courts to follow decisions by state courts on "questions of a more general nature," or issues for which state courts simply "ascertain, upon general reasoning and legal analogies . . . what is the just rule furnished by the principles of commercial law to govern the case."

Steinman, *supra*, at 256 (quoting *Swift*, 41 U.S. (16 Pet.) at 18–19).

85. *Erie*, 304 U.S. at 70.

86. *Id.* at 71–80.

87. Robert L. Stearns, *Erie Railroad Versus Tompkins: One Year After*, 12 ROCKY MOUNTAIN L. REV. 1, 1 (1939); *see also* Frye, *supra* note 73, at 533 (noting that, despite the surprising outcome, the *Erie* decision was "immediately" heralded as "significant[t]").

88. 41 U.S. (16 Pet.) 1 (1842).

89. *Erie*, 304 U.S. at 71–78.

90. *Id.* at 78 ("There is no federal general common law.").

91. *Id.* at 71.

92. *Id.* at 72–73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

93. *Id.* at 74–75.

94. *Id.* at 75.

95. *Id.* at 73. Justice Brandeis offered the example of *Black & White Taxicab & Transfer Co. v.*



Even after offering these critiques, Brandeis concluded that they were insufficient to justify overruling *Swift*, given that its interpretation of the Rules of Decision Act had been widely applied and relied upon for almost a century.<sup>96</sup> However, he asserted that *Swift*, beyond its statutory infirmities, was “an unconstitutional assumption of powers by the Courts of the United States,”<sup>97</sup> stating:

Except in matters governed by the Federal Constitution or by [A]cts of Congress, the law to be applied in any case is the law of the [S]tate. And whether the law of the [S]tate shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a [S]tate . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.<sup>98</sup>

As a result, the Court held that in this case, a federal court must apply Pennsylvania’s liability standard to determine Tompkins’s claim, even if that standard was articulated by the state’s judiciary acting as a common law court.<sup>99</sup> The *Swift* doctrine, which had allowed federal courts to do otherwise, “invaded rights which in our opinion are reserved by the Constitution to the several States.”<sup>100</sup>

### B. *Years of Developing Maturity: From Erie to Shady Grove*

In the decades following the decision in *Erie*, the Court faced several cases that developed the *Erie* doctrine as we understand it now. In *Guaranty Trust Co. of New York v. York*,<sup>101</sup> the Court was faced with the question of whether the federal court should apply the New York statute of limitation.<sup>102</sup> In its decision, the Court reaffirmed the principle that

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*Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), where a Kentucky corporation reincorporated in Tennessee in order to manufacture diversity jurisdiction and thereby enforce in federal court a contract that would be void under the common law of Kentucky. *Erie*, 304 U.S. at 73–74. Brandeis pointed out that individual (non-corporate) litigants could manipulate diversity jurisdiction as well. *Id.* at 76 (“[I]ndividual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule.”).

96. *Erie*, 304 U.S. at 73–77.

97. *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

98. *Id.* at 78.

99. *Id.* at 80.

100. *Id.*; see also Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 996–97 (2011).

101. 326 U.S. 99 (1945).

102. *Id.* at 100–01.

federal courts enforce state substantive rights, but had no obligation to apply state procedural rules.<sup>103</sup> In his opinion for the Court, Justice Frankfurter addressed the inadequacy of the distinction between substance and procedure in determining what law should be applied in a particular situation.<sup>104</sup> He indicated that the appropriate governing principle was that a federal court could disregard a state law that “concerns merely the manner and the means by which a right to recover . . . is enforced.”<sup>105</sup> However, Frankfurter concluded that a federal court must follow state law where it significantly affects the result of the litigation.<sup>106</sup> *Guaranty Trust* was seen as establishing an “outcome-determinative” test for *Erie* analysis.<sup>107</sup>

However, in *Byrd v. Blue Ridge Rural Electric Cooperative*,<sup>108</sup> the Court held that federal courts must follow the federal practice of allowing juries to determine issues of fact.<sup>109</sup> The case involved the question of whether a federal court must follow South Carolina’s requirement that a judge (not a jury) determine if a defendant is exempt from liability under South Carolina’s Workmen’s Compensation Act.<sup>110</sup> In writing for the Court, Justice Brennan indicated that the *Erie* analysis was far more complex than the simple “outcome determinative” test that had been articulated in *Guaranty Trust*.<sup>111</sup> According to Brennan, *Erie* required federal courts to “respect the definition of state-created rights and obligations by the state courts,” as well as state rules that are “bound up with” state law substantive rights and obligations.<sup>112</sup> Brennan agreed with the reasoning in *Guaranty Trust* that where state law provides the “form and mode” for litigating and determining state substantive rights, *Erie* requires federal courts to consider whether the failure to apply that state law would have a substantial impact on the substantive outcome.<sup>113</sup> However, Brennan asserted that this impact on the outcome must be measured against the fact that “[t]he federal system is an independent

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103. *Id.* at 107–10.

104. *Id.* at 108.

105. *Id.* at 109.

106. *Id.*

107. Steinman, *supra* note 84, at 259.

108. 356 U.S. 525 (1958).

109. *Id.* at 540.

110. *Id.* at 533–34.

111. *Id.* at 539.

112. *Id.* at 535.

113. *Id.* at 536–37.

system for administering justice.”<sup>114</sup>

The Court articulated the most significant and unified development in the methodology addressing the *Erie* problem in 1965 in *Hanna v. Plumer*.<sup>115</sup> In *Hanna*, the Court faced a potential conflict between a state law that required in-hand delivery on the executor or administrator of an estate and the application of Rule 4 of the Federal Rules of Civil Procedure, which allowed methods of service in addition to in-hand delivery.<sup>116</sup> In determining that the federal courts were not bound by the state law service of process methods, the Court adopted a bifurcated approach to the analysis of *Erie* questions.

In writing for the Court, Chief Justice Warren asserted that in situations where there was not a federal rule specifically concerned with the issue covered by state law (the “unguided” *Erie* context) the court’s analysis must focus on “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws” in determining whether to apply state or federal law.<sup>117</sup> However, where the issue at hand is specifically covered by a federal rule (the “guided” *Erie* context), the Court stated that a federal court must apply that federal rule unless the rule violates either the Rules Enabling Act (REA),<sup>118</sup> the statutory authority for the federal rules, or the U.S. Constitution.<sup>119</sup> Under the REA, the Court is authorized to promulgate “general rules” prescribing the “practice and procedure” of the district courts of the United States in civil actions.<sup>120</sup> However, the REA states that those general rules “shall not abridge, enlarge or modify any substantive right.”<sup>121</sup>

Following *Hanna*, the analysis of an *Erie* issue has basically remained the same, in that the federal court looks first to see if there is a conflict between the federal rule and state law. Where a conflict exists, the federal court must apply the federal rule if it is determined to be valid under the

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114. *Id.* at 537.

115. 380 U.S. 460, 461 (1965); *see also* Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 428 (1996) (calling *Hanna* a “pathmarking case”).

116. *Hanna*, 380 U.S. at 461.

117. *Id.* at 468.

118. 28 U.S.C. § 2072.

119. *Hanna*, 380 U.S. at 471.

120. 28 U.S.C. § 2072(a).

121. § 2072(b). Interestingly, several commentators criticized the outcome of *Hanna* in the years following the decision. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718–20 (1974); John C. McCoid II, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 901–03 (1965); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1687 (1974).

Constitution and the REA. Where there is no conflict between the federal rule and state law, the federal court is to weigh the federal policies of the federal rule against the twin concerns of *Erie*, the “discouragement of forum-shopping and avoidance of inequitable administration of the laws,” in determining whether to apply state or federal law.<sup>122</sup> Following *Hanna*, the existence or absence of a conflict is often the ultimate disputed question in the *Erie* analysis.

For example, in *Walker v. Armco Steel Corp.*,<sup>123</sup> the Court was faced with a decision to apply a state law, which deemed an action commenced for purposes of its statutes of limitation when service was made, or Rule 3 of the Federal Rules of Civil Procedure, which deemed an action commenced when the complaint is filed.<sup>124</sup> Here, the Court framed the issue as whether “the scope of the Federal Rule in fact is sufficiently broad to control the issue.”<sup>125</sup> In answering that question, the Court held that the two provisions “can exist side by side . . . each controlling its own intended sphere of coverage without conflict.”<sup>126</sup> According to the Court’s analysis, Rule 3 “governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.”<sup>127</sup> The state law, by contrast, was a “statement of a substantive decision . . . that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations.”<sup>128</sup>

Conversely, in *Burlington Northern Railroad Co. v. Woods*,<sup>129</sup> the Court addressed a potential conflict between a state law, which mandated a 10% penalty on any money judgment affirmed on appeal and Rule 38 of the Federal Rules of Appellate Procedure, which permitted appellate judges to impose penalties on “frivolous” appeals.<sup>130</sup> In analyzing the *Erie* question, the Court asserted that federal rules could be “sufficiently broad” either by causing a “direct collision” with the state law or by

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122. *Hanna*, 380 U.S. at 468. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 747 (1980); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415–16 (2010).

123. 446 U.S. 740 (1980).

124. *Id.* at 741.

125. *Id.* at 749–50.

126. *Id.* at 752.

127. *Id.* at 751.

128. *Id.*

129. 480 U.S. 1 (1987).

130. *Id.* at 3–4 (first citing ALA. CODE § 12-22-72 (1986); and then citing FED. R. APP. P. 38).

“control[ling] the issue,” “leaving no room” for the state law to operate.<sup>131</sup> In *Burlington Northern*, the Court concluded that the federal rule’s “discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama’s affirmance penalty statute,”<sup>132</sup> and that the federal rule’s purposes were also “sufficiently coextensive” with the state law’s purposes “to indicate that the Rule occupies the statute’s field of operation.”<sup>133</sup>

### C. Shady Grove: *A Mature Doctrine?*

As discussed above, federal courts sitting in diversity have struggled to determine whether state or federal law should apply for over a century. While it is well established that a federal court sitting in diversity applies state substantive law and federal procedural rules, the line between substance and procedure continues to confound courts.<sup>134</sup>

Most recently, the Supreme Court again struggled with this question in *Shady Grove Orthopedic Associates, Professional Ass’n v. Allstate Insurance Co.*,<sup>135</sup> where the Court faced a potential conflict between Rule 23 of the Federal Rules of Civil Procedure and a New York statute.<sup>136</sup> The conflict in *Shady Grove* arose out of a New York state law that

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131. *Id.* at 4–5 (first citing *Walker*, 446 U.S. at 749–50, 750 n.9; and then citing *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965)).

132. *Id.* at 7.

133. *Id.*

134. See Suzanna Sherry, *Normalizing Erie*, 69 VAND. L. REV. 1161, 1227 (2016); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1970 (2011) (“[S]tatutory interpretation methodology might be understood as a set of rules that provides courts with a reasoning process.”); Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1059–63 (2011) (explaining how Justice Stevens distinguished *Sibbach* and arguing that he was correct, further illustrating the contrasting positions taken by various interpreters of *Erie*); Jeffrey W. Stempel, *Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 AKRON L. REV. 907, 916–17 (2011) (illustrating Justice Scalia’s “formalist” approach and contrasting it with Justice Ginsburg’s “unnecessary . . . judicial reflection over the importance to a particular law to the state”); Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1136 (2011) (“Likewise, precise guidance has been lacking for both the ‘twin aims’ standard that governs unguided Erie choices and the REA’s substantive-rights provision that governs the validity of a Federal Rule.”); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 25–26 (2010) (noting the “incentive for restrained interpretation” of the Federal Rules to avoid overstepping the boundaries of federal lawmaking authority); Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 34 (2010) (pointing to the Court’s lack of “a coherent theory of when federal and state rules collide”).

135. 559 U.S. 393, 396–97 (2010).

136. *Id.*

prohibited “class actions in suits seeking penalties or statutory minimum damages.”<sup>137</sup> Shady Grove asserted that Allstate Insurance owed unpaid statutory interest to itself and a class of others similarly situated.<sup>138</sup> If the New York state law applied, then any consideration of statutory interest for the members of the class was barred.<sup>139</sup> If this were the case, then Shady Grove’s claim would fail to meet the amount in controversy requirement for federal diversity jurisdiction.<sup>140</sup> However, if Rule 23 of the Federal Rules of Civil Procedure applied, then there would be no bar on the federal court having diversity jurisdiction over the class action based on statutory interest.<sup>141</sup> In short, if the New York law controlled the suit, then Shady Grove’s claim would not be able to proceed as a class action; but if the New York law did not control, then a federal court could have jurisdiction over the matter under Rule 23.<sup>142</sup> The Court held that Rule 23, rather than the New York statute, applied, though it split somewhat in its reasoning.<sup>143</sup>

In rejecting the assertion that the New York statute should be applied because of the substantive rights it protects, the Court noted that “[a] Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).”<sup>144</sup> The Court found support in precedent that established that if a federal rule was valid under

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137. *Id.* at 396; N.Y. C.P.L.R. 901(b) (McKinney 2006) (“Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.”).

138. *Shady Grove*, 559 U.S. at 397.

139. *Id.*

140. *Id.*

141. *See* FED. R. CIV. P. 23; *Shady Grove*, 559 U.S. at 398–99.

142. *Shady Grove*, 559 U.S. at 398–99; *see also* N.Y. C.P.L.R. 901(b) (McKinney 2006).

143. *See Shady Grove*, 559 U.S. at 398.

144. *Id.* at 409. The court noted the following:

The petitioner says the phrase [“substantive rights” in the Rules Enabling Act] connotes more; that by its use Congress intended that in regulating procedure this Court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination. In a number such an order is authorized by statute or rule. . . . The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation. . . . If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure.

*Id.* at 409–10 (alterations in original) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14 (1941)).

the limits set forth in the REA, then it was constitutional.<sup>145</sup> The majority found that appealing to the substantive nature of the statutes confounded the issue.<sup>146</sup> Furthermore, requiring judges to laboriously pore over state legislative records to determine the intention behind the statute would most likely prove to be inefficient and unrewarding.<sup>147</sup>

### 1. *Justice Scalia's Expansive Approach*

Writing for the Court in Parts I and II-A of the opinion, Justice Scalia first determined that the state law and federal rule conflicted and that the federal rule should be applied because it “really regulates procedure.”<sup>148</sup> In determining whether a state law and a federal rule are in conflict,<sup>149</sup> Scalia indicated that a conflict exists where the reach of the federal rule is sufficiently broad, where the text of the federal rule “leaves no room for special exemptions based on the function or purpose of a particular state rule.”<sup>150</sup> Scalia defined the question before the Court as whether the lawsuit could proceed as a class action.<sup>151</sup> Under Rule 23, the answer was “yes.”<sup>152</sup> Under the New York law, the answer was “no.”<sup>153</sup> Based on this analysis, Scalia concluded that both the federal rule and the state law “undeniably” sought to “answer the same question,” making it impossible

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145. *Id.* at 410 (“[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.” (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965))).

146. *See id.* at 404 (“The dissent’s approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce ‘confusion worse confounded.’” (quoting *Sibbach*, 312 U.S. at 14)).

147. *Id.* The court notes:

[D]istrict courts would have to discern, in every diversity case, the purpose behind any putatively pre-empted state procedural rule, even if its text squarely conflicts with federal law. That task will often prove arduous. Many laws further more than one aim, and the aim of others may be impossible to discern.

*Id.* But see Mark DeForrest, *Taming a Dragon: Legislative History in Legal Analysis*, 39 U. DAYTON L. REV. 37, 49 (2013) (finding that the Internet has made legislative history more available, which makes it more relevant when interpreting a statute).

148. *Shady Grove*, 559 U.S. at 411 (quoting *Sibbach*, 312 U.S. at 14).

149. *Id.* at 398–406.

150. *Id.* at 421 (Stevens, J., concurring in part and concurring in the judgment) (Justice Stevens’s concurrence succinctly phrased this inquiry as whether the “scope of the federal rule is ‘sufficiently broad’ to ‘control the issue’ before the court, ‘thereby leaving no room for the operation’ of seemingly conflicting state law” (first quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987); and then quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50, 750 n.9 (1980))).

151. *Id.* at 398.

152. *Id.*

153. *Id.*

for them to operate alongside each other.<sup>154</sup>

After concluding that a conflict existed, Scalia, writing for a plurality of the Court in Parts II-B through II-D, turned to the question of whether the federal rule was a valid exercise of the federal rulemaking power under the REA.<sup>155</sup> Under the REA, the Court is given “the power to prescribe general [federal] rules of practice and procedure,”<sup>156</sup> but those federal rules “shall not abridge, enlarge or modify any substantive right.”<sup>157</sup> According to Scalia, a federal rule is valid under the REA so long as it “really regulates procedure.”<sup>158</sup>

Under Scalia’s analysis, the substantive characteristic or purpose of the state law “makes no difference.”<sup>159</sup> Even where, as in *Shady Grove*, the state law has the practical effect of limiting or expanding the party’s rights and remedies, the state law “regulate[s] only the process for enforcing those rights” and not the substantive rights themselves.<sup>160</sup> For Scalia, the importance of this approach was in the ease of administration and the resulting uniformity.<sup>161</sup> He argued that this was true, even though it is “hard to square” the application with the language of the REA.<sup>162</sup> Thus, Scalia concluded that Rule 23 really regulates the procedure of class actions and thus is valid under the REA.<sup>163</sup>

## 2. Justice Stevens’s Narrow Conflict Avoidance Approach

While Justice Stevens concurred with Scalia’s conclusion, he disagreed with his analysis and the breadth of his conclusion.<sup>164</sup> Joining a portion of

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154. *Id.* at 401.

155. *Id.* at 409.

156. 28 U.S.C. § 2072(a).

157. *Id.* § 2072(b).

158. *Shady Grove*, 559 U.S. at 410 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

159. *Id.* at 409 (emphasis omitted).

160. *Id.* at 407.

161. *See id.* at 413 (noting that this procedural test was “driven by the very real concern that Federal Rules which vary from State to State would be chaos” (citing *Sibbach*, 312 U.S. at 14)).

162. *Id.*

163. *See id.* at 408–09 (implying that FRCP 23, which here turns ten thousand five-hundred dollar claims into a single five-million dollar claim, does not substantially affect the plaintiffs’ remedies and thus “really regulates procedure”); *see also* Mark P. Gaber, *Maintaining Uniform Federal Rules: Why the Shady Grove Plurality Was Right*, 44 AKRON L. REV. 979, 984–91 (2011) (recognizing the inherent conflict between the New York law and Rule 23 in *Shady Grove* and framing the issue within Justice Scalia’s point of view).

164. *Shady Grove*, 559 U.S. at 431–36 (Stevens, J., concurring in part and concurring in the judgment). In determining whether any opinion would be controlling in this situation, subsequent courts would look to the decision of the Court in *Marks v. United States*, 430 U.S. 188 (1977), for guidance. In *Marks*, the Court addressed the question of how to count the votes of the justices to



Scalia's opinion, Stevens agreed that the New York law conflicts with Rule 23.<sup>165</sup> He also agreed with Scalia that Rule 23 was a valid exercise of rulemaking authority under the REA.<sup>166</sup> What Stevens rejected was Scalia's "really regulates procedure" approach, arguing that the approach was unfaithful to the text of the REA.<sup>167</sup> For Stevens, the "bar for finding an [REA] problem is a high one,"<sup>168</sup> requiring more than a "mere possibility that a federal rule would alter a state-created right."<sup>169</sup>

For Stevens, a valid exercise of federal rulemaking meant that the federal rule could not displace a state law that is procedural but is "so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right."<sup>170</sup> Unlike Scalia's approach, Stevens argued that the proper analysis must look beyond the federal rule itself to the substantive and extrinsic policy reasons behind the state

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decide who won a Supreme Court case and on what rationale when there is a plurality opinion and no clear holding from the Court. *Id.* at 193. The Court offered a rule to guide lower courts in answering that question: when no single opinion is supported by a majority of the Court, the holding of the Court rests in the opinion decided on the narrowest grounds. *Id.* The rule stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by the Members who concurred in the judgment on the narrowest grounds.'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

However, regarding Stevens's opinion in *Shady Grove*, *Marks* appears inapplicable. As then Judge Kavanaugh asserted in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015), the correct method of applying *Marks* is to identify the logical middle ground between the concurrence and the dissent when no single position garners the support of five members of the Court. *Id.* at 1337. See generally *Marks*, 430 U.S. 188. Cf. *United States v. Duvall*, 740 F.3d 604, 609–11 (D.C. Cir. 2013) (Kavanaugh, J., concurring). Kavanaugh applied this analysis to Stevens's opinion in *Shady Grove* to determine whether the appropriate test for whether a given federal rule was a valid exercise of rulemaking under the REA was the approach adopted by Scalia ("really regulates procedure") or the approach adopted by Stevens (determining whether the state law is "so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right."). *Abbas*, 783 F.3d at 1337; *Shady Grove*, 559 U.S. at 1452. In answering this question in *Abbas*, Kavanaugh asserted that because "four Justices adopted one formulation[;] one Justice adopted a different formulation[;] . . . [a]nd four Justices did not address the question," no controlling opinion emerged from *Shady Grove* under *Marks*. In the face of this "unresolved 4-1 disagreement," Kavanaugh concluded that the appropriate thing for a court to do "in these particular circumstances, is to follow the Supreme Court's pre-existing precedent in *Sibbach*," holding that the governing test under the REA was whether the rule in question "really regulates procedure." Kavanaugh concluded that "[u]nless and until the Supreme Court overrules or narrows its decision in *Sibbach*, that case remains good law and is binding on lower courts." *Abbas*, 783 F.3d at 1336–37.

165. *Shady Grove*, 559 U.S. at 416 (Stevens, J., concurring in part and concurring in the judgment).

166. *Id.* at 431–36.

167. *Id.* at 424–25.

168. *Id.* at 432.

169. *Id.*

170. *Id.* at 423.

law.<sup>171</sup> Under Stevens’s approach, the role of the federal court is to determine “whether the state law actually is part of a State’s framework of substantive rights or remedies.”<sup>172</sup> If it is, then the federal rule is valid only where it does not intrude into those substantive rights.<sup>173</sup> In *Shady Grove*, Stevens concluded that Rule 23 did not intrude on state substantive rights, in that the New York law is not “so bound up with [a] state-created right or remedy.”<sup>174</sup> Therefore, according to Stevens, Rule 23 is a valid exercise of rulemaking authority and should be applied in lieu of the New York statute.<sup>175</sup>

### 3. Justice Ginsburg’s Intersectional Conflict Avoidance Approach

Justice Ginsburg dissented, asserting that the New York state law should apply both because it furthers the equality of litigants and because no conflict exists between the state law and the federal rule.<sup>176</sup> Ginsburg agreed with Scalia and Stevens that the first question the court must address is whether the federal rule leaves no room for the operation of the state law.<sup>177</sup> However, unlike the approaches urged by Scalia and Stevens, Ginsburg inserted a basic threshold question. She argued that the initial question should be whether a conflict between the state law and federal rule is “really necessary.”<sup>178</sup> According to Ginsburg, a court should approach questions like those raised in *Shady Grove* with a “vigilant[] read[ing] [of] the Federal Rules to avoid conflict with state laws.”<sup>179</sup> By employing this approach, Ginsburg argued that often such a conflict is

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171. *See id.* at 429–36 (outlining the legislative history and possible interpretations of the New York law).

172. *Id.* at 419 (Stevens, J., concurring in part and concurring in the judgment). *But see* Gaber, *supra* note 163, at 995 (suggesting Justice Stevens’s position is misguided where he “could not come up with a relevant procedural state law that is so interwoven with a state’s substantive law” to justify his position).

173. *Shady Grove*, 559 U.S. at 424–25 (citations omitted) (criticizing Justice Scalia for ignoring “the balance that Congress struck between uniform rules of federal procedure and respect for a State’s construction of its own rights and remedies” and the “separation-of-powers presumption, and federalism presumption, that counsel against judicially created rules displacing state substantive law”).

174. *Id.* at 420.

175. *See id.* at 432 (“It is . . . hard to see how [the New York law] could be understood as a rule that, though procedural in form, serves the function of defining New York’s rights or remedies.”).

176. *Id.* at 445–51 (Ginsburg, J., dissenting).

177. *Id.* at 439.

178. *Id.* at 437 (citing Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959)).

179. *Id.* at 439.

simply unnecessary.<sup>180</sup> In reviewing the text of the federal rule and the purpose and legislative history of the New York law,<sup>181</sup> Justice Ginsburg concluded that Rule 23 and the New York law serve different goals.<sup>182</sup> On one hand, Rule 23 addresses certification of class actions.<sup>183</sup> On the other hand, the New York law focuses on remedies, specifically statutory-damages caps.<sup>184</sup>

To avoid conflict, Justice Ginsburg moved away from the traditional REA analysis towards the alternative unguided *Erie* analysis articulated in *Hanna*.<sup>185</sup> Employing an unguided *Erie* analysis should force a court to look closely to determine if the state law is inseparably connected with an underlying substantive state right. According to Ginsburg, an affirmative answer to that question strongly supports applying the state law.<sup>186</sup> On the other hand, if the application of state law would alter or disrupt an essential characteristic of the federal court system, then this disruption strongly supports applying the federal rule or practice.<sup>187</sup> Ginsburg also stressed the importance of the twin aims of *Erie* in this analysis, in that

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180. *See id.* at 442 (“In sum, both before and after *Hanna*, the above-described decisions show, federal courts have been cautioned by this Court to ‘interpre[t] the Federal Rules . . . with sensitivity to important state interests’ . . . and a will ‘to avoid conflict with important state regulatory policies.’” (quoting *Gasperini v. Ctr. for Humans, Inc.*, 518 U.S. 415, 427 n.7, 438 n.22 (1996))).

181. *See id.* at 437–39, 443, 448 n.7 (criticizing the plurality’s interpretation of Rule 23 as “mechanical,” “insensitive,” and “relentless”).

182. *Id.* at 447 (“Rule 23 describes a method of enforcing a claim for relief, while [the New York law] defines the dimensions of the claim itself.”); *id.* at 446 (“The Court . . . finds conflict where none is necessary.”).

183. *Id.* at 447.

184. *Id.*

185. The phrase “relatively unguided *Erie* choice” is drawn from *Hanna*. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). In *Hanna*, the Court stressed that when there is no federal rule or statute on point, “the typical, relatively unguided *Erie* choice” controls. *Id.* Justice Stevens’s concurring opinion in *Shady Grove* also briefly addressed this relatively unguided approach. *Shady Grove*, 559 U.S. at 416 (Stevens, J., concurring in part and concurring in the judgment). However, Justice Ginsburg went into much detail about this approach in *Shady Grove* but did not use the phrase “relatively unguided” to describe her framework. *Id.* at 452–58 (Ginsburg, J., dissenting) (“[S]tatutes qualify as ‘substantive’ for *Erie* purposes even when they have ‘procedural’ thrusts as well.” (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555 (1949))).

186. *See Shady Grove*, 559 U.S. at 457–58 (Ginsburg, J., dissenting) (“We have long recognized the impropriety of displacing, in a diversity action, state-law limitations on state-created remedies.” (citing *Woods*, 337 U.S. at 538)).

187. *See id.* at 439 (“In our prior decisions in point, many of them not mentioned in the Court’s opinion, we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest.”); *see also* *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958) (concluding that the constitutional right to a jury trial and the corresponding federal policy was an essential characteristic of the federal court system that outweighed a South Carolina law requiring a judge to decide whether an employer was immune from liability).

the federal rule should apply only when it (1) will not lead to forum shopping and (2) avoids the inequitable administration of justice.<sup>188</sup>

In her analysis, Ginsburg emphasized “sensitivity to important state interests”<sup>189</sup> and deference to state regulatory interests.<sup>190</sup> Regarding the specific issue raised in *Shady Grove*, Ginsburg concluded that New York had a strong interest in prohibiting statutory damages in class actions and that the New York law was inseparably intertwined with important state rights, making application of the New York law appropriate.<sup>191</sup>

#### D. *After Shady Grove, Then What?*

The opinions in *Shady Grove* left many important questions unanswered. For example, when a court decides whether the federal rule is “‘sufficiently broad’ to ‘control the issue’ before the court,” how broadly is the court to frame the issue and construe the federal rule at issue?<sup>192</sup> Also, are courts to focus on the guided REA analysis, as required under Scalia’s approach, or employ the unguided analysis asserted by Ginsburg? Further, in determining whether a federal rule really regulates procedure, should the focus in Scalia’s REA analysis be the text of the REA itself? Finally, how is a court to determine whether or not a state law is “so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right”?<sup>193</sup>

This lack of clarity over the appropriate approach to an *Erie* analysis has led to inconsistent application in federal courts, even when addressing primarily the same issue.<sup>194</sup> Courts faced with *Erie* questions have, at

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188. See *Shady Grove*, 559 U.S. at 438–39 (Ginsburg, J., dissenting) (emphasizing that federal courts must “apply state law when failure to do so would invite forum-shopping and yield markedly disparate litigation outcomes”).

189. *Id.* at 442 (quoting *Gasperini v. Ctr. for Humans, Inc.*, 518 U.S. 415, 427 n.7 (1996)).

190. See *id.* at 438–43 (listing past decisions in which the Supreme Court deferred to state interests); see also Michael S. Green, *The Erie Doctrine: A Flowchart*, 52 AKRON L. REV. 215, 243 (2018) (acknowledging that Justice Ginsburg’s approach “has the benefit of showing respect for state and foreign regulatory interests, but it greatly increases the administrative burden on federal courts”).

191. See *Shady Grove*, 559 U.S. at 452–58.

192. *Id.* at 421 (Stevens, J., concurring in part and concurring in the judgment) (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987)).

193. *Id.* at 423.

194. See Jack E. Pace III & Rachel J. Feldman, *From Shady to Dark: One Year Later, Shady Grove’s Meaning Remains Unclear*, 25 ANTITRUST 75, 78–80 (2011) (summarizing how lower courts have reached different conclusions in cases involving similar facts). Compare *Van Dyke v. Retzlaff*, No. 4:18-CV-247, 2018 WL 4261193, at \*2–3 (E.D. Tex. July 24, 2018) (refusing to apply Texas anti-SLAPP law in federal court in defamation case), *aff’d*, 781 F. App’x. 368 (5th Cir. 2019), with *Floyd v. Aalaei*, No. 4:15CV525-RC-DDB, 2016 WL 11472821, at \*3 (E.D. Tex. Apr. 28, 2016) (applying Texas anti-SLAPP law in federal court in defamation case).

times, concluded that a conflict exists between state law and federal rules and have followed Justice Scalia's "really regulates procedure" approach.<sup>195</sup> On the other hand, other courts faced with similar *Erie* questions have followed Justice Stevens's approach, seeking to determine whether the state law at issue was "so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right."<sup>196</sup> Still others have followed Justice Ginsburg's relatively unguided approach and avoided finding conflict by conducting a "vigilant[] read[ing] [of] the Federal Rules to avoid conflict with state laws."<sup>197</sup>

### III. THE APPLICATION OF THE *ERIE* DOCTRINE TO ANTI-SLAPP STATUTES

This Part examines how federal courts of appeals have sought to make sense of *Shady Grove* in the context of state anti-SLAPP laws. What we have seen is that federal courts of appeals, when faced with the same basic legal question and with a nearly identical state law, have adopted different approaches, coming to varying and inconsistent conclusions.<sup>198</sup> John Hart Ely, in describing the analytical struggle by courts to determine the boundary between procedure and substance, asserts that a procedural rule

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195. *Shady Grove*, 559 U.S. at 410. *See, e.g.*, *Jones v. UPS, Inc.*, 674 F.3d 1187, 1206 (10th Cir. 2012) (finding conflict and examining the purposes of the federal rule); *Durmishi v. Nat'l Cas. Co.*, 720 F. Supp. 2d 862, 876–77 (E.D. Mich. 2010) (same); *see also O'Gara v. Binkley*, 384 F. Supp. 3d 674, 684 (N.D. Tex. 2019) (quoting *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015)) (finding that Texas anti-SLAPP law did not apply in federal defamation claim); *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1051–53 (N.D. Ill. 2013), *aff'd*, 791 F.3d 729 (7th Cir. 2015) (finding that anti-SLAPP law did not apply in federal court where its "'substantive purpose . . . makes no difference' for the purposes of determining whether the law is in conflict with the Federal Rules" (emphasis omitted) (quoting *Shady Grove*, 559 U.S. at 409)).

196. *Shady Grove*, 559 U.S. at 423. *See, e.g.*, *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983–85 (10th Cir. 2010) (finding conflict and examining the purposes of the state law); *In re Estate of C.A. v. Grier*, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010) (same); *Steinmetz v. Coyle & Caron, Inc.*, No.: 15-cv-13594-DJC, 2016 WL 4074135, at \*3 (D. Mass. July 29, 2016) (same).

197. *Shady Grove*, 559 U.S. at 439. *See, e.g.*, *All Plaintiffs v. All Defendants*, 645 F.3d 329, 335–37 (5th Cir. 2011) (finding no conflict); *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1278–80 (10th Cir. 2011) (same).

198. For example, in *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729 (7th Cir. 2015), Judge Easterbrook delayed deciding whether Washington's anti-SLAPP provision applied in federal court in a defamation case between Intercon Solutions, a recycling company, and Basel Action Network, a company Intercon hired to certify it as an environmentally friendly organization. *Id.* at 732. When the Washington Supreme Court struck down Washington's anti-SLAPP provision, Easterbrook decided that the statute's applicability was no longer worth mentioning, despite the district court's detailed attack on anti-SLAPP statutes' application in federal court. *Id.* at 731–32; *Intercon Sols.*, 969 F. Supp. 2d at 1041–49.

is “one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes” while a substantive rule “or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.”<sup>199</sup>

Some have argued that anti-SLAPP statutes are bound up in substantive rights in the same manner that Justice Stevens and Justice Ginsburg may have envisioned.<sup>200</sup> Nonetheless, under *Shady Grove*, the crux of the issue is whether the procedural mechanism of the SLAPP statute covers the same procedural ground as Rules 12 and 56.<sup>201</sup> In particular, a Rule 56 motion for summary judgment “applies generally,” which would include the scope of the anti-SLAPP motion to dismiss.<sup>202</sup> Furthermore, there is seemingly no reading of the statutes and the rules possible to avoid a collision.<sup>203</sup> Still, a common argument in support of applying anti-SLAPP

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199. Ely, *supra* note 121, at 724–25. As Ely notes:

We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure. But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all. And they are the terms the Enabling Act uses. We have, I think, some moderately clear notion of what a procedural rule is—one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes. Thus, one way of doing things may be chosen over another because it is thought to be more likely to get at the truth, or better calculated to give the parties a fair opportunity to present their sides of the story, or because, and this may point quite the other way, it is a means of promoting the efficiency of the process. Or the protection of the process may proceed at wholesale, as by keeping the size of the docket at a level consistent with giving those cases that are heard the attention they deserve. The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.

*Id.*

200. *See Shady Grove*, 559 U.S. at 428 n.13 (Stevens, J., concurring in part and concurring in the judgment) (citing *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); *Guar. Tr. v. York*, 326 U.S. 99, 108 (1945) (“Put another way, even if a federal rule in most cases ‘really regulates procedure,’ it does not ‘really regulat[e] procedure’ when it displaces those rare state rules that, although ‘procedural’ in the ordinary sense of the term, operate to define the rights and remedies available in a case. This is so because what is procedural in one context may be substantive in another.” (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)); *see also* *Godin v. Schencks*, 629 F.3d 79, 87–88 (1st Cir. 2010).

201. *See Shady Grove*, 559 U.S. at 410 (“[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule.”); *see also* Tyler J. Kimberly, Note, *A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts*, 65 CASE W. RES. L. REV. 1201, 1231 (2015).

202. Kimberly, *supra* note 201, at 1233 (finding that “because summary judgment applies generally, it must also apply to specific cases where anti-SLAPP statutes protect a defendant’s right to petition”).

203. *See* Smith, *supra* note 72, at 321 (finding that the Rules and anti-SLAPP statutes share the same “subject matter” and the heightened burden in anti-SLAPP statutes makes it incompatible with the rules); *see also* *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (“But

statutes in federal court is that the interest of the state is the protection of the right to speak, unlike the purpose of Rule 12 and 56 motions, which seem purely procedural.<sup>204</sup>

In reply, some courts have found that anti-SLAPP statutes, while cloaked in substantive language, “merely provide[] a procedural mechanism for vindicating existing rights.”<sup>205</sup> These state statutes cover the same ground and answer the same questions as the federal rules and therefore ought to be treated as conflicting. Unless there is some legitimate challenge to the breadth of the REA’s authority, the rules should apply rather than the state statute,<sup>206</sup> allowing the purpose of the state statutes to be appropriately served by Rule 12 and Rule 56.<sup>207</sup>

Where, as Ely correctly asserts, a substantive rule is defined as granting a right “for one or more nonprocedural reasons, for some purpose . . . not having to do with the fairness or efficiency of the litigation process,” it becomes apparent that the anti-SLAPP statutes’ existence interferes with the ability of the federal procedural rules to maintain federal courts as a fair place devoid of wasteful suits.<sup>208</sup> The federal rules arguably remain the best mechanism for maintaining this fairness in federal courts. The alternative would be to allow state legislatures to strip from the federal court and Congress of the ability to govern procedure in federal courts, causing unnecessary difficulty by “forcing federal courts to assess the substantive or procedural character of countless state rules that may

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Federal Rules of Civil Procedure 12 and 56 ‘answer the same question’ about the circumstances under which a court must dismiss a case before trial. And those Federal Rules answer the question differently: They do not require a plaintiff to show a likelihood of success on the merits.”); *Klocke v. Watson*, 936 F.3d 240, 246 (5th Cir. 2019).

204. See *Shady Grove*, 559 U.S. at 447–48 (Ginsburg, J., dissenting) (citing Ely, *supra* note 121, at 722); Lisa Litwiller, *A SLAPP in the Face: Why Principles of Federalism Suggest That Federal District Courts Should Stop Turning the Other Cheek*, 1 J. CT. INNOVATION 67, 91 (2008) (finding that the statutes’ purposes are to protect a defendant’s petitioning activity from being deterred by the expense of discovery); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999).

205. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring) (noting that “the California Supreme Court has characterized [its anti-SLAPP statute] as a ‘procedural device to screen out meritless claims’” (quoting *Kibler v. N. Inyo Cnty. Loc. Hosp. Dist.*, 138 P.3d 193, 198 (Cal. 2006))); see also *Klocke*, 936 F.3d at 248.

206. See *Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965); see also ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 343–45 (6th ed. 2012).

207. See *Abbas*, 783 F.3d at 1338–40 (dismissing plaintiffs’ claims with prejudice under Rule 12(b)(6), thereby having the same effect on the case as would applying the anti-SLAPP statute minus the fee-shifting provision); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1349–57 (11th Cir. 2018).

208. Ely, *supra* note 121, at 725.

conflict with a single Federal Rule.”<sup>209</sup>

A. *Circuits Applying Anti-SLAPP Motions in Federal Court*

1. *United States Court of Appeals for the Ninth Circuit*

Well before the Supreme Court’s decision in *Shady Grove*, the Ninth Circuit resolved this question in 1999 in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*<sup>210</sup> However, while the Ninth Circuit continued to apply state anti-SLAPP statutes in federal court after *Shady Grove*, a recent case suggests that *Shady Grove* has cast some doubt on *Newsham*’s holding.

In *Newsham*, plaintiffs, acting in *qui tam*<sup>211</sup> on behalf of the United States, sued Lockheed Missiles & Space Co. (LMSC) for allegedly filing false claims to the United States government to recover for excessive non-labor productive costs.<sup>212</sup> Plaintiffs were former employees of Lockheed and charged the company with inflating their contract hours by including time spent on employees’ personal and nonproductive activities in violation of the False Claims Act (FCA).<sup>213</sup> In response, LMSC filed numerous counterclaims alleging that the realtors breached their duties of good faith and fiduciary obligations.<sup>214</sup>

The court first addressed the history of the anti-SLAPP statute in California, section 425.16 of the California Code of Civil Procedure, noting that it was enacted in order to protect those exercising their First Amendment rights from malicious suits.<sup>215</sup> The statute provides a special motion to strike a SLAPP claim, similar in function to a Rule 12 motion under the Federal Rules of Civil Procedure, yet the statute was enacted to

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209. *Shady Grove*, 559 U.S. at 415 (Scalia, J.) (plurality opinion); see also John B. Oakley, *Illuminating Shady Grove: A General Approach to Solving Erie Problems*, 44 CREIGHTON L. REV. 79, 87–88 (2010) (finding that an approach which measures the substantive right upheld by a state procedural rule that is in conflict with a federal rule would undermine the purpose of having universal Federal Rules of Civil Procedure).

210. 190 F.3d 963, 967 (9th Cir. 1999).

211. *Qui tam* proceedings are ones brought under a statute which allows a private citizen to sue for a recovery, part of which the government receives. *Qui Tam Action*, BLACK’S LAW DICTIONARY (10th ed. 2014).

212. *Newsham*, 190 F.3d at 963.

213. *Id.* at 966; see also 31 U.S.C. §§ 3729, 3730(b)(1).

214. *Newsham*, 190 F.3d at 967. The court in *Newsham* entertained the issue of retroactively applying an amended version of FCA to issues that arose prior to its amendment. *Id.* However, this Article will solely address the issues pertaining to the anti-SLAPP statute.

215. *Id.* at 970 (citing *Wilcox v. Superior Ct.*, 33 Cal. Rptr. 2d 446 (1994), *disapproved of by* *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002)).



provide enhanced protection of free speech and the right to petition.<sup>216</sup> A court faced with applying the anti-SLAPP statute looks to the pleadings, shifting the burden to the SLAPP plaintiff, who is required to show that his or her claim has a “reasonable probability” to prevail.<sup>217</sup> Next, the court noted that the anti-SLAPP statute provides for an award of attorney’s fees following the granting of an anti-SLAPP motion.<sup>218</sup> The court indicated that “the California legislature looked for procedural and substantive remedies for the prompt exposure, dismissal, and discouragement of SLAPP suits.”<sup>219</sup>

In addition, the court discussed procedurally how the district court had handled the counterclaims, first dismissing them in 1991 under the *qui tam* statute, but subsequently reinstating them in 1994.<sup>220</sup> Upon reinstatement and subsequent motions by plaintiffs for dismissal under Federal Rule of Civil Procedure 12(b)(6) and the anti-SLAPP statute, the district court found that the statute conflicted with the procedural authority of Rule 8, Rule 12(f), and Rule 56 and denied the recovery of attorney’s fees.<sup>221</sup>

In contrast to the district court’s decision, the Ninth Circuit in *Newsham* disagreed with the contention that the anti-SLAPP provision would directly collide with Rules 8, 12, and 56.<sup>222</sup> The court considered two sections of the anti-SLAPP statute: the motion to strike and the provision for awarding attorney’s fees.<sup>223</sup> Reflecting on both the dichotomy of substantive and procedural law and *Erie*’s test for state law applicability in federal court, Kozinski declared that “the distinction between substance and procedure is not always clear-cut.”<sup>224</sup> In his view, many close cases

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216. *Id.* at 971 (citing CAL. CIV. PROC. CODE § 425.16(b)(1) (West 1999)).

217. *Id.* (first citing CAL. CIV. PROC. CODE § 425.16(e); and then citing *Wilcox*, 33 Cal. Rptr. 2d at 452).

218. *Id.* (first citing CAL. CIV. PROC. CODE § 425.16(c); and then citing *Robertson v. Rodriguez*, 42 Cal. Rptr. 2d 464 (1995)).

219. *Id.*

220. *Id.* at 972.

221. *Id.*

222. *Id.* (first citing *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); and then citing *Olympic Sports Prods., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910, 914 (9th Cir. 1985)).

223. *Id.*

224. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, C.J., concurring) (first citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); and then citing *Gasperini v. Ctr. for Humans.*, 518 U.S. 415, 428 (1996)). *But see* *Gaber, supra* note 163, at 993 (arguing that “it is almost impossible to conceive of a state law that would ever be found to be ‘sufficiently interwoven’ with the state’s definition of substantive rights, yet at the same time ‘ordinarily procedural’ in form such that a court would ever reach the need to *apply* [Justice Stevens’s test in *Shady Grove*] in the first place” (emphasis in original)).

“call for a more nuanced analysis.”<sup>225</sup> For example, Kozinski noted, *Walker v. Armco Steel Corp.* addressed a conflict between an Oklahoma statute of limitation requirement that a civil action began when a summons was served on a defendant and the Rule 3 requirement that a civil suit begins when a complaint is filed.<sup>226</sup> There, the Supreme Court held that the two rules “could coexist peaceably in their respective spheres,” since the state rule dealt with finding if “the action was brought within the statute of limitations,” while Rule 3 measured the time “applicable to the litigation.”<sup>227</sup> Unlike *Walker*, where the conflict was between a state substantive law and a federal procedural one, Kozinski concluded that the California anti-SLAPP statute was a procedural rule without a basis for application in federal court.<sup>228</sup>

The mistake of *Newsham*, according to Kozinski, was that the court erred in finding that the rule was substantive and then analyzing the potential conflict it had with the federal rules, when the statute was simply procedural.<sup>229</sup> In particular, the statute’s special motion to strike indicated that the statute “deal[t] only with the conduct of the lawsuit.”<sup>230</sup> Applying *Erie*, Kozinski states that the discussion begins and ends with Congress’s intent that the Federal Rules of Civil Procedure shall be applied in federal court.<sup>231</sup> Kozinski states that *Newsham*’s ruling disrupted the delicate process envisioned by the federal rule drafters since it included a myriad of contrary procedures far outside of the confines of the federal procedural rules.<sup>232</sup> The concurrence continuously notes that where a party gets past the preliminary phase, the federal rules permit dismissal only after a fair period of discovery.<sup>233</sup> But the anti-SLAPP statute overrides this

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225. *Makaeff*, 715 F.3d at 272 (Kozinski, C.J., concurring).

226. *Id.* at 272–73 (citing *Walker*, 446 U.S. at 750–51).

227. *Id.* at 273.

228. *Id.*

229. *Id.* (“The anti-SLAPP statute creates no substantive rights; it merely provides a special procedural mechanism for vindicating existing rights.”); *see also* *Carbone v. Cable News Network, Inc.*, No. 1:16-CV-1720-ODE, 2017 WL 5244176, at \*4 (N.D. Ga. Feb. 15, 2017) (quoting *Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring)).

230. *Makaeff*, 715 F.3d at 273 (Kozinski, C.J., concurring) (“[I]ts only purpose is the swift termination of certain lawsuits the legislators believed to be unduly burdensome. It is codified in the state code of civil procedure and the California Supreme Court has characterized it as a ‘procedural device to screen out meritless claims.’” (quoting *Kibler v. N. Inyo Cnty. Loc. Hosp. Dist.*, 138 P.3d 193, 198 (Cal. 2006))).

231. *Id.* (first citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); and then citing 28 U.S.C. § 2072).

232. *Id.* at 274 (first citing *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); and then citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)).

233. *Id.* (first citing FED. R. CIV. P. 26, 29–37, 56; then citing *Anderson v. Liberty Lobby, Inc.*, 477

procedural requirement through an early discovery system.<sup>234</sup>

Turning to the Ninth Circuit's ruling in *Metabolife International, Inc. v. Wornick*<sup>235</sup> that the statute's specified discovery portion did not apply in federal court, Kozinski declared that the anti-SLAPP statute was now neutered.<sup>236</sup> Since the defendant invoking the statute no longer had the "quick and painless exit from the litigation" purposefully granted by the legislators enacting the statute, Kozinski argued that both of the purposes of the federal rules and the statute were frustrated.<sup>237</sup>

More recently, the Ninth Circuit revisited this issue in *Planned Parenthood Federation of America v. Center for Medical Progress*.<sup>238</sup> In both *Metabolife* and *Makaeff*, discussed earlier, the court had noted that the analysis of whether the California anti-SLAPP statute should be applied in federal court had been inconsistent, in that portions of the statute had been held to apply while other portions did not.<sup>239</sup> In *Planned Parenthood*, the court sought to clarify the standards applicable to state law anti-SLAPP motions in federal court, rather than simply overrule *Newsham*.<sup>240</sup> In *Planned Parenthood*, the plaintiff alleged that the defendants had used fraudulent means to enter the plaintiff's conferences and obtain meetings with the organization's staff to create false and misleading videos.<sup>241</sup> The defendants filed a motion to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6) and a special motion to strike the complaint under California's anti-SLAPP statute, section 425.16 of the

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U.S. 242, 250 n.5 (1986); and then citing 10B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2740 (3d ed. 2012)).

234. *Id.*; see also *Cuba v. Pylant*, 814 F.3d 701, 719–20 (5th Cir. 2016) (Graves, J., dissenting) (recognizing that the Texas anti-SLAPP statute conflicts with Federal Rules 12 and 56 because of their enhanced discovery procedures).

235. 264 F.3d 832 (9th Cir. 2001).

236. *Makaeff*, 715 F.3d at 274–75 (Kozinski, C.J., concurring) (citing *Metabolife*, 264 F.3d at 845).

237. *Id.* at 275 ("From the federal perspective, *Metabolife* left in place quite a bit of disruption: the burden on the plaintiffs to show that they have not merely a triable issue of fact, but a reasonable probability of success; enhanced sanctions for bringing a weak claim; and the cost, disruption and delay inherent in a right to interlocutory appeal—created by state law, rather than by Congress. I find it passing strange that state legislatures have now displaced Congress as the delimiters of our jurisdiction."); see also *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1045–46 (N.D. Ill. 2013) (citing *Proceedings of the Advisory Committee on Rules for Civil Procedure*, 88th Cong. 153 (1946), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV03-1946-min-Vol1.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV03-1946-min-Vol1.pdf) [<https://perma.cc/5WPN-ZDKF>] ("[S]tatement by Advisory Committee Chairman William D. Mitchell: mandatory language in Rule 12(d) was inserted in the amendment 'because we don't want a judge deciding a case on affidavits other than in Rule 56.'"), *aff'd*, 791 F.3d 729 (7th Cir. 2015)).

238. 890 F.3d 828 (9th Cir. 2018).

239. *Id.* at 833–35 (majority opinion); *id.* at 835–36 (Gould, J., concurring).

240. *Id.* at 832–35 (majority opinion).

241. *Id.* at 831.

California Code of Civil Procedure.<sup>242</sup> According to the state statute, where a defendant can show that the lawsuit targets protected activity, the plaintiff must show a “reasonable probability” of prevailing on its claims.<sup>243</sup> Defendants can attack either the legal sufficiency of the complaint or present evidence demonstrating why the plaintiff cannot prevail.<sup>244</sup>

In *Planned Parenthood*, the district court denied the defendants’ anti-SLAPP motion, concluding that because the arguments made by the defendants under Rule 12 were identical to those made in the anti-SLAPP motion, the court only needed to assess the sufficiency of the plaintiff’s complaint under Rule 12.<sup>245</sup> When the defendants then supported their motion by raising factual defenses, the court held that the questions of fact precluded dismissal.<sup>246</sup>

On appeal, the Ninth Circuit affirmed the decision below and clarified the applicable standards for anti-SLAPP motions in federal courts, holding that where an anti-SLAPP motion attacks the legal sufficiency of the plaintiff’s complaint, a court is to evaluate the motion using the standard under Rule 12 and Rule 8.<sup>247</sup> On the other hand, according to the court, where a defendant’s motion attacks the factual sufficiency of the claim, “then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted.”<sup>248</sup> The court indicated that given the apparent inconsistencies between California’s anti-SLAPP statute and the federal rules, a contrary reading “would lead to the stark collision of the state rules of procedure with the governing Federal Rules.”<sup>249</sup> The court rejected the defendant’s argument that the operation of the state anti-SLAPP statute requires a plaintiff to present evidence, holding that “if the defendants have urged only insufficiency of pleadings, then the plaintiff can properly respond merely by showing sufficiency of pleadings, and there’s no requirement for a plaintiff to submit evidence to oppose contrary evidence that was never presented by the defendants.”<sup>250</sup>

Two judges, Judge Gould and Judge Murguia, joined in a separate concurrence addressing the larger issue of the use of anti-SLAPP statutes in federal court and the basis for an interlocutory appeal under the

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242. *Id.*

243. *Id.* at 833.

244. *Id.* at 833–34.

245. *Id.* at 832.

246. *Id.*

247. *Id.* at 833.

248. *Id.*

249. *Id.* at 834.

250. *Id.*

collateral order doctrine.<sup>251</sup> In their view, denial of an anti-SLAPP motion does not qualify as a collateral order because instead of resolving claims separate from the merits, “it in fact requires the court to directly assess the merits of Plaintiffs’ complaint.”<sup>252</sup> In their concurrence, Gould and Murguia did not explicitly encourage the Ninth Circuit to reconsider its prior decision in *Newsham* applying anti-SLAPP statutes in federal court, but the judges did note that “one of the primary drivers for allowing this practice to continue—prevention of a circuit split—has occurred despite our best efforts.”<sup>253</sup>

## 2. *United States Court of Appeals for the First Circuit*

The First Circuit addressed *Shady Grove*’s impact on SLAPP statutes in federal courts in *Godin v. Schencks*.<sup>254</sup> Relying on Stevens’s concurrence, the court followed the procedural mechanisms of a state SLAPP statute.<sup>255</sup> In *Godin*, the First Circuit followed the logic of the Ninth Circuit in *Newsham*.<sup>256</sup> The court agreed with the finding of the Ninth Circuit that rather than concluding that Rules 12 and 56 are in conflict with a state anti-SLAPP, a court could find that Rules 12 and 56 “can exist side by side” with a state anti-SLAPP statute, “each controlling its own intended sphere of coverage without conflict.”<sup>257</sup>

*Godin* concerned an action by an elementary school principal who made a § 1983 claim after being fired as a result of complaints that she was abusive towards her students.<sup>258</sup> After investigating the plaintiff’s conduct, the school terminated her employment contract prematurely, which prompted her lawsuit.<sup>259</sup> In addition to her § 1983 claim, she asserted claims for defamation and interference with contractual

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251. *Id.* at 835 (Gould, J., concurring).

252. *Id.* at 836.

253. *Id.* On November 21, 2018, the Center for Medical Progress filed a petition for certiorari, asking the Supreme Court to resolve the split between the Circuit Courts of Appeals on the issue of whether state anti-SLAPP statutes should apply in a federal court sitting in diversity. Petition for Writ of Certiorari, *Ctr. For Med. Progress v. Planned Parenthood Fed’n of Am.*, \_\_ U.S. \_\_, 139 S. Ct. 1446 (2019) (No. 18-696). On April 1, 2019, the Supreme Court denied certiorari in this case, thus again leaving the current circuit split in place. *Ctr. For Med. Progress*, \_\_ U.S. \_\_, 139 S. Ct. 1446 (2019).

254. 629 F.3d 79 (1st Cir. 2010).

255. *Id.* at 87–88.

256. *Id.* at 91.

257. *Id.* at 89–91 (citing *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999)).

258. *Id.* at 80–81.

259. *Id.* at 81.

relationships against individual defendants in the suit.<sup>260</sup> In response, the individual defendants filed a special motion to dismiss the individual claims under Maine's anti-SLAPP statute, which the court noted, "creates a special process by which a defendant may move to dismiss any claim that arises from the defendant's exercise of the right of petition under either the United States Constitution or the Constitution of Maine."<sup>261</sup> The First Circuit then elaborated on the procedural structure of the statute, where after the moving party files their statutory claim, the burden shifts to the non-moving party to show that the moving party caused the non-moving party injury, and that the moving party's motion has no "reasonable factual support or any arguable basis in law."<sup>262</sup>

Notably, a court analyzing the statutory claim views the evidence in favor of the moving party.<sup>263</sup> The district court denied the motion much like the district court in *Newsham*, concluding that the statute at hand directly contradicted the federal rules.<sup>264</sup> Furthermore, the district court found support for this conclusion by first noting that the district courts in Massachusetts had also concluded that the special motions to dismiss did not apply in federal court.<sup>265</sup> While the district court acknowledged that compelling arguments can be made both ways as to whether the statutes applied in federal court, it noted two ways in which the statute conflicted with the Federal Rules of Civil Procedure.<sup>266</sup> First, the special motion to dismiss triggers a burden shift. Second, when reviewing the special motion to dismiss, the court does not make inferences in favor of the non-moving party.<sup>267</sup> The district court concluded that the operation of Rule 12(d) was at odds with the statutory requirement, in that it forced "the court to freeform read and weigh the conflicting declarations, something a federal court would not do in the context of ruling on a motion to dismiss a state law interference with advantageous relations or

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260. *Id.*

261. *Id.* at 82 (quoting ME. REV. STAT. ANN. tit. 14, § 556 (West 2009)).

262. *Id.*

263. *Id.* ("Evidence considered in reviewing a special motion to dismiss should be viewed 'in the light most favorable to the moving party because the responding party bears the burden of proof when the statute applies.'" (quoting *Morse Bros., Inc. v. Webster*, 2001 ME 70, ¶ 18, 772 A.2d 842, 849)).

264. *Id.*

265. *Godin v. Sch. Union 134*, No. 09-77-B-W, 2009 WL 1686910, at \*4 (D. Me. June 16, 2009) ("To the extent that the anti-SLAPP statute imposes additional procedures in certain kinds of litigation in state court, it does not trump Fed. R. Civ. P. 12(b)(6).") (quoting *Baker v. Coxe*, 940 F. Supp. 409, 417 (D. Mass. 1996)).

266. *Id.* at \*5.

267. *Id.*

defamation claim.”<sup>268</sup> In essence, the district court found that the requirement under the anti-SLAPP statute that the court consider evidence outside of the pleadings conflicted with Rule 12, while the requirement of making inferences in favor of the moving party conflicted with Rule 56.<sup>269</sup>

After reviewing the actions of the district court, the First Circuit addressed some preliminary issues of subject matter jurisdiction and the collateral order doctrine, which are not the focus of this paper.<sup>270</sup> Turning to the issue of the anti-SLAPP statute’s applicability in federal court, the court began by noting that the lines between substantive law and procedural law are often “difficult to distinguish.”<sup>271</sup> Framing the issue as “whether Federal Rules of Civil Procedure 12(b)(6) and 56 preclude application of Section 556 in federal court,” the court, citing *Shady Grove*, declared that the question of applicability in federal court requires the court to “ask if the federal rule is ‘sufficiently broad to control the issue before the court.’”<sup>272</sup> If so, the federal rule will “be given effect despite the existence of competing state law.”<sup>273</sup> The court concluded that Federal Rules 12 and 56 do not control the issues contemplated under section 556 of the Maine statute.<sup>274</sup> Further, the court concluded that the twin aims of *Erie*—avoiding forum shopping and the unequal administration of the law—are better met by enforcing the statute in federal court.<sup>275</sup>

In discussing *Shady Grove*, the First Circuit relied upon Justice Stevens’s concurrence stating that “whether a Federal Rule is valid under the Rules Enabling Act depends not on the Federal Rule alone, but also on the nature of the state rule it seeks to displace.”<sup>276</sup> For the court, this meant that because the lines between procedure and substance are, at times, indistinguishable, state substantive rights are to be handled delicately when found embedded in a state procedural mechanism that mirrors a federal rule; and all attempts to reconcile the two must be

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268. *Id.* (“[U]nder Federal Rule of Civil Procedure 12(b)(6), we recount the facts alleged in the amended complaint and draw all plausible inferences in favor of the [plaintiff/]appellant.” (quoting *Gonzalez Figueroa v. J.C. Penney P.R., Inc.*, 568 F.3d 313, 316 (1st Cir. 2009))).

269. *Id.*

270. *Godin v. Schencks*, 629 F.3d 79, 83–84 (1st Cir. 2010).

271. *Id.* at 86 (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 419 (2010) (Stevens, J., concurring)).

272. *Id.* (quoting *Shady Grove*, 559 U.S. at 422 (Stevens, J., concurring)).

273. *Id.* at 86 n.12 (first citing 28 U.S.C. § 2072(a); and then citing *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 18 (1st Cir. 1991)).

274. *Id.*

275. *Id.* at 86–87 (first citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); and then citing *Shady Grove*, 559 U.S. at 398).

276. *Id.* at 87 (quoting *Shady Grove*, 559 U.S. at 423–24 (Stevens, J., concurring)).

followed.<sup>277</sup> The court determined that Rules 12(b)(6) and 56 “are not so broad as to cover the issues within the scope of Section 556.”<sup>278</sup> First, the court showed that section 556 was designed to handle the special procedure of eliminating SLAPP suits, whereas Rules 12 and 56 are for general dismissals.<sup>279</sup> The existence of both Maine’s own “procedural . . . equivalents” of Rules 12 and 56 as well as the statute’s intent to defend constitutional petitioning rights served as the First Circuit’s evidence of the statute’s broad scope.<sup>280</sup>

In the court’s view, Rule 12(b)(6) tests the “sufficiency of the complaint,”<sup>281</sup> while section 556 dismisses due to the infringement of “the defendant’s protected petitioning conduct.”<sup>282</sup> Comparably, the court found Rule 56 lacked “the fact-finder’s evaluation of material factual disputes” possessed by the statute.<sup>283</sup> The First Circuit determined that the shifting burden of proof to the alleged SLAPP filer was substantive in nature, along with the allocation of attorney’s fees.<sup>284</sup> The court acknowledged the “differences in the mechanics” between section 556 and the federal rules, but determined that section 556 defines the scope of a state-created right to freely petition.<sup>285</sup> To hold otherwise would violate the REA by altering a substantive right, in the First Circuit’s eyes.<sup>286</sup> In reply to the plaintiff’s contention that section 556 forces a ruling without taking discovery, unlike Rule 56, the court held that discovery could, in fact, be heard upon a good cause order.<sup>287</sup> The court concluded that the burden placed on a nonmovant under Rule 56(d) to show essential facts to justify its opposition is synonymous with the Maine statute.<sup>288</sup>

The court further held that the existence of the Private Securities

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277. *Id.* at 87–88 (quoting *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring)).

278. *Id.* at 88.

279. *Id.*

280. *Id.* (citing ME. R. CIV. P. 12, 56).

281. *Id.* at 89 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)).

282. *Id.*

283. *Id.*

284. *Id.* at 89 n.15 (citing *Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del Caribe, Inc.*, 145 F.3d 463, 478 (1st Cir. 1998)).

285. *Id.* at 89–90 (“Because Section 556 is ‘so intertwined with a state right or remedy that it functions to define the scope of the state-created right,’ it cannot be displaced by Rule 12(b)(6) or Rule 56.” (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring))); *see also, e.g.*, *Quinlan*, *supra* note 40, at 401–02 (arguing that most of the procedural components of anti-SLAPP statutes are, in fact, substantive).

286. *Godin*, 629 F.3d at 90.

287. *Id.* (citing ME. REV. STAT. ANN. tit. 14, § 556 (West 2009)).

288. *Id.* (citing FED. R. CIV. P. 56(d)).



Litigation Reform Act of 1995,<sup>289</sup> which created a higher standard of pleading in order to deter abusive litigation in the world of securities, serves as evidence that Congress “did not intend to preclude special rules designed to make it more difficult to bring certain types of actions where state law defines the cause of action.”<sup>290</sup> Ultimately, the First Circuit concluded that to not apply section 556 in federal court would dismantle the twin aims of *Erie*—to discourage forum shopping and an inequitable administration of the laws.<sup>291</sup> In the court’s opinion, to deny application of the statute in federal court would unfairly sway the outcome of the case in such a manner that it would be grossly different from the result in a Maine state court applying the statute.<sup>292</sup> Likewise, to not apply section 556 would allow SLAPP filers to file in federal court in order to avoid the statute’s bite altogether.<sup>293</sup>

*B. Circuits Not Applying Anti-SLAPP Motions in Federal Court*

*1. United States Court of Appeals for the D.C. Circuit*

The D.C. Circuit and the Tenth Circuit stand in stark opposition to some of their sister circuits. In *Abbas v. Foreign Policy Group, LLC*,<sup>294</sup> the D.C. Circuit held that Rules 12 and 56 were to be applied over a D.C. anti-SLAPP statute.<sup>295</sup> Plaintiff Yasser Abbas sued the Foreign Policy Group for defamation over magazine commentary suggesting that plaintiff and his brother, sons of the Palestinian president, were profiting off of corruption at the expense of Palestinian citizens.<sup>296</sup> The defendants moved to dismiss under Rule 12(b)(6) as well as the anti-SLAPP

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289. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

290. *Godin*, 629 F.3d at 91 (“[T]here is no indication that Rules . . . 12 and 56 were intended to ‘occupy the field’ with respect to pretrial procedures aimed at weeding out meritless claims.” (quoting *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999))). *But see* *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) (“Congress’s decision to enact a heightened pleading standard for a small subset of [securities] cases does not change the fact that Rules 12 and 56 otherwise ‘apply generally.’” (quoting *Shady Grove*, 559 U.S. at 400)).

291. *Godin*, 629 F.3d at 91 (quoting *Com. Union Ins. Co. v. Walsbrook Ins. Co.*, 41 F.3d 764, 773 (1st Cir. 1994)).

292. *Id.* at 91–92.

293. *Id.* at 92.

294. 783 F.3d 1328 (D.C. Cir. 2015).

295. *Id.* at 1337.

296. *Abbas v. Foreign Pol’y Grp., LLC*, 975 F. Supp. 2d 1, 6 (D.D.C. 2013) (remarking that Abbas has filed or threatened to file defamation suits “[a]s public scrutiny over his business and political activity has increased”).

statute.<sup>297</sup> The D.C. District Court began with a similar analysis to the courts in *Newsham* and *Godin*, analyzing the purpose for which the D.C. legislature enacted the statute, concluding that it was enacted to serve as a weapon against those who seek to disrupt free speech through unnecessary litigation.<sup>298</sup> The district court echoed the court's rationale in *Godin*, holding that Rules 12 and 56 were not broad enough to "control the particular issues under [the anti-SLAPP statute] before the district court."<sup>299</sup> Furthermore, the district court cited to its own decisions which had upheld "the applicability of state Anti-SLAPP legislation in federal courts."<sup>300</sup>

On appeal, the D.C. Circuit, in an opinion written by then-Judge Kavanaugh, began by acknowledging the free speech interest that the statute was designed to protect, noting that a defendant may file a special motion to dismiss if the defendant can make a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest."<sup>301</sup> Kavanaugh stated that under *Shady Grove*, a federal court exercising diversity jurisdiction would not apply the statute since it answers the same question as Federal Rules 12 and 56, yet the statute additionally requires that the plaintiff show "a likelihood of success on the merits."<sup>302</sup> According to the court, the statute sets up "an additional hurdle a plaintiff must jump over to get to trial," which contrasts with the standard for granting a 12(b)(6) motion under *Bell Atlantic Corp. v. Twombly*<sup>303</sup>—a plaintiff must "alleg[e] facts sufficient to state a claim that is plausible on its face."<sup>304</sup> Next, Kavanaugh interrogated

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297. *Abbas*, 783 F.3d at 1333.

298. *Abbas*, 975 F. Supp. 2d at 8–9 (quoting D.C. CODE § 16-5502(a)–(b) (2001)).

299. *Id.* at 10 (quoting *Godin*, 629 F.3d at 86).

300. *Id.* (first citing *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 254–55 (D.D.C. 2013) (explaining that the D.C. District Court would follow the rationale of the circuit courts in *Godin* and *Newsham*); then citing *Farah v. Esquire Mag., Inc.*, 863 F. Supp. 2d 29, 38–39 (D.D.C. 2012) (holding that blog post satirizing "birther" movement was an expression of a view sufficient to encompass public interest, so it was protected as a substantive right); and then citing *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012) (holding that legislative commentary indicated that the D.C. anti-SLAPP Act was designed to incorporate substantive rights into a procedural mechanism for disposing of SLAPPs)). *But see* *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 102 (D.D.C. 2012) (holding that the D.C. anti-SLAPP Act "squarely attempts to answer the same question that Rules 12 and 56 cover and, therefore, cannot be applied in a federal court sitting in diversity").

301. *Abbas*, 783 F.3d at 1332 (quoting D.C. CODE § 16-5502(b) (2001)).

302. *Id.* at 1333–34 (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398–99 (2010)).

303. 550 U.S. 544 (2007).

304. *Abbas*, 783 F.3d at 1334 (citing *Twombly*, 550 U.S. 544, 570 (2007)); *see also* *Unity Healthcare, Inc. v. City of Hennepin*, 308 F.R.D. 537, 540–42 (D. Minn. 2015) (noting Minnesota's anti-SLAPP statute conflicts directly with Federal Rules 12 and 56 and abrogates the Seventh

four of the defendant's arguments for why the statute must be applied.<sup>305</sup>

First, the court found that where the statute imposed a higher bar for success than the federal rule it mirrors, the application of the statute stood in stark opposition to the purpose of the federal rules.<sup>306</sup> In reply to the defendant's argument that the statute gives a substantive "right not found in the Federal Rules—a form of qualified immunity shielding participants in public debate from tort liability," the court stated that qualified immunity alone does not tell the court what to do procedurally, as is the case with the D.C. statute.<sup>307</sup> As in *Godin*, the defendant articulated that the Private Securities Litigation Reform Act of 1995 modified the pleading standards applicable in certain categories of securities cases.<sup>308</sup> The court found that this is distinct, because Congress has the power to create an exception to the federal rules for these limited cases, which are irrelevant to the general application of the federal rules in civil suits.<sup>309</sup> Finally, the court outright rejected the decisions in *Godin* and *Newsham* as "ultimately not persuasive."<sup>310</sup> The court stated that unless it were shown that the rules were unconstitutional or violated the REA in some way, they would govern diversity cases in federal court.<sup>311</sup> Since *Hanna*, this question has been at the core of analysis determining the application of federal rules in federal court where a conflict with a state rule or practice exists.<sup>312</sup>

In conclusion, the court then followed the plurality opinion of *Shady Grove* and determined that because Rules 12 and 56 "really regulate[] procedure," they are valid under the REA.<sup>313</sup> Ultimately, the court found that Abbas's claim failed to meet the requirement under 12(b)(6) and must be dismissed with prejudice.<sup>314</sup>

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Amendment right to a jury trial).

305. *Abbas*, 783 F.3d at 1334–36.

306. *Id.* at 1334–35.

307. *Id.* at 1335 (citing *Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. Ct. App. 2014)).

308. *Id.* (citing Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737).

309. *Id.* (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010)).

310. *Id.* at 1335–36 (first citing *Godin v. Schencks*, 629 F.3d 79, 81, 92 (1st Cir. 2010); then citing *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999); and then citing *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring)).

311. *Id.* at 1336–37, 1336 n.4.

312. *Id.* at 1336–37.

313. *Id.* at 1337 (citing *Shady Grove*, 559 U.S. at 404).

314. *Id.* at 1339–40.

## 2. *United States Court of Appeals for the Tenth Circuit*

The Tenth Circuit concluded in *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*<sup>315</sup> that a New Mexico anti-SLAPP statute was not applicable in federal court.<sup>316</sup> In a claim for breach of contract concerning an agreement to manage the parties' continuing and co-existing use of a shared geothermal resource on federally leased land, the defendants brought a special motion to dismiss under the state statute.<sup>317</sup> The defendants asserted that the statute was designed to protect the substantive right of New Mexicans to be able to speak freely without the chilling effect of litigious suits designed to stifle their participation.<sup>318</sup> The district court promptly rejected the defendant's interpretation of the aims of *Shady Grove*, noting that a federal court sitting in diversity will not apply a state law or rule when a federal rule answers the same question as the rule and does not violate the REA.<sup>319</sup>

The district court looked to the decisions of *Godin* and *Newsham*, but found them wanting, especially due to Judge Kozinski's later interpretation of the anti-SLAPP statute in *Makaeff*.<sup>320</sup> In particular, the court emphasized the reasoning of the District Court for the Northern District of Illinois, which found that the anti-SLAPP special motion to dismiss elevated a plaintiff's burden beyond that normally required by a motion under Rules 12 or 56.<sup>321</sup> The district court followed the reasoning of the plurality opinion in *Shady Grove*, concluding that "[s]traightforward application of the two-prong Shady Grove analysis

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315. 885 F.3d 659 (10th Cir. 2018).

316. *Id.* at 673.

317. *Id.* at 661–62.

318. *Id.* at 662 (citing N.M. STAT. ANN. § 38-2-9.2 (West 2019); N.M. STAT. ANN. § 38-2-9.1 (West 2019)).

319. *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, No. 15-CV-0547-MV-LAM, 2016 WL 8254920, at \*3 (D.N.M. Feb. 17, 2016) (quoting *Abbas*, 783 F.3d at 1334).

320. *Id.* at \*3 ("Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof." (quoting *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring))).

321. *Id.* at \*3 ("Applying the *Shady Grove* framework, the court carefully explained that 'by placing a higher procedural burden on the plaintiff than is required to survive a motion for summary judgment under Rule 56, Section 525 conflicts with Rule 12(d) and Rule 56 by restricting a plaintiff's procedural right to maintain [an action] established by the federal rules and therefore cannot be applied by a federal court sitting in diversity.'" (quoting *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1048 (N.D. Ill. 2013))); *see also* *Lampo Grp., LLC v. Paffrath*, No. 18-cv-01402, 2019 WL 3305143, at \*3–4 (M.D. Tenn. July 23, 2019) (applying California law) (noting that California's anti-SLAPP statute conflicted with Federal Rules 12 and 56 and that these federal rules did not conflict with the Rules Enabling Act).

makes patent that the Federal Rules of Civil Procedure, not New Mexico's anti-SLAPP statute, govern the instant case."<sup>322</sup>

On appeal, the Tenth Circuit restated the *Erie* requirement that federal courts "appl[y] state substantive law—those rights and remedies that bear upon the outcome of the suit—and federal procedural law—the processes or modes for enforcing those substantive rights and remedies."<sup>323</sup> Noting, as the D.C. Circuit did, that the line between substantive and procedural law is blurry, the court concluded that the statute's language revealed it as merely "a *procedural* mechanism designed to expedite the disposal of frivolous lawsuits aimed at threatening free speech rights."<sup>324</sup> The court found evidence for this conclusion in the text of the statute itself, noting that "[a]ll [the statute] demands is expedited procedures designed to promptly identify and dispose of such lawsuits" and that the statute "sets forth no rule(s) of substantive law."<sup>325</sup>

To further support the proposition that the anti-SLAPP statute is a procedural mechanism, the court cited *Cordova v. Cline*,<sup>326</sup> a case where the New Mexico Supreme Court specifically declared that the New Mexico anti-SLAPP statute afforded a procedural shield.<sup>327</sup> The New Mexico Supreme Court in *Cordova* distinguished the substantive protections the parties would seek from the procedural mechanism of the statute.<sup>328</sup> Despite acknowledging that the statute might defend substantive rights, the Tenth Circuit held that these rights are "located *entirely* outside the four corners of the anti-SLAPP statute."<sup>329</sup> In essence, the court found that no indication of a "rule of substantive law" was to be discerned in the language of the statute. Rather, the statute featured a section that operated "as a procedural fee-shifting device . . . to vindicate First Amendment rights threatened by a kind of 'unwarranted or specious'

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322. *Los Lobos*, 2016 WL 8254920, at \*4.

323. *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 668 (10th Cir. 2018) (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

324. *Id.* at 668–69.

325. *Id.* at 669.

326. 396 P.3d 159, 162 (N.M. 2017).

327. *Los Lobos*, 885 F.3d at 669 ("The state supreme court held the association members were 'entitled to the *procedural* protections of the New Mexico [anti-SLAPP] statute.' But to resolve the case on the merits, the court relied on a substantive immunity defense *entirely separate* from the anti-SLAPP statute." (emphasis in original) (quoting *Cordova*, 396 P.3d at 162)).

328. *Cordova*, 396 P.3d at 166–67 ("While the [a]nti-SLAPP statute provides the procedural protections Petitioners require, the *Noerr-Pennington* doctrine is the mechanism that offers Petitioners the substantive First Amendment protections they seek." (emphasis in original)).

329. *Los Lobos*, 885 F.3d at 670 (first citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); and then citing *Cuba v. Pylant*, 814 F.3d 701, 719 (5th Cir. 2016) (Graves, J., dissenting)).

litigation.”<sup>330</sup> Notably, the court found that the statute “provides for an ‘expedited appeal’ from a trial court’s ruling, or failure to rule, on a ‘special’ motion.”<sup>331</sup>

Further citing *Cordova*, the court stated that the New Mexico Supreme Court did not “suggest the ‘expedited process’ mandated by subsection A of § 38-2-9.1 constitutes a substantive defense to a SLAPP suit” but rather reflected the New Mexico legislature’s desire to allow for a kind of interlocutory appeal “to thwart retaliatory lawsuits that abused the judicial process and threatened to chill free speech.”<sup>332</sup> The court concluded that the defendant’s insistence that the statute offers an immunity from suit was misguided.<sup>333</sup> The court briefly discussed the twin aims of *Erie*, concluding that ignoring the statute would not be outcome determinative nor eclipse a state substantive right.<sup>334</sup> The court, however, offered a warning that despite the statute not being applied in federal court, “litigants and lawyers who seek to circumvent application of the New Mexico anti-SLAPP statute by filing a baseless SLAPP lawsuit in federal district court are in for a rude awakening.”<sup>335</sup>

### 3. *United States Court of Appeals for the Eleventh Circuit*

The Eleventh Circuit adopted a similar approach to the Tenth Circuit in *Carbone v. Cable News Network, Inc. (CNN)*,<sup>336</sup> where it held that Georgia’s anti-SLAPP statute did not apply in federal court.<sup>337</sup> The

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330. *Id.* at 671 (quoting N.M. STAT. ANN. § 38-2-9.1 (West 2019)).

331. *Id.* (quoting N.M. STAT. ANN. § 38-2-9.1(C) (West 2019)).

332. *Id.* at 671–72 (citing *Cordova*, 396 P.3d at 165).

333. *Id.* at 672–73. As the court notes:

As the astute reader recognizes by now, the New Mexico anti-SLAPP statute does not exempt a party subject to an alleged SLAPP suit from liability. Because absolutely nothing in the language of the anti-SLAPP statute exempts from liability under any circumstance one who has violated the law while petitioning a governmental body, the statute cannot constitute a grant of immunity. The “right not to stand trial” is not, as Defendants suggest, a substantive defense in the form of immunity itself. Such right is an entitlement *dependent* upon an exemption from liability, an exemption that under a plain reading of the New Mexico anti-SLAPP statute does not appear therein.

*Id.* at 672.

334. *Id.* at 673 n.8 (citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

335. *Id.* On July 16, 2016, AmeriCulture filed a petition for certiorari, asking the Supreme Court to resolve the split between the Circuit Courts of Appeals on the issue of whether state anti-SLAPP statutes should apply in a federal court sitting in diversity. Petition for Writ of Certiorari, *AmeriCulture, Inc. v. Los Lobos Renewable Power, LLC*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 591 (2018) (No. 18-89). On December 3, 2018, the Supreme Court denied certiorari in this case, thus leaving the current circuit split in place. *Los Lobos*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 591 (2018).

336. 910 F.3d 1345 (11th Cir. 2018).

337. *Id.* at 1357.

defendant, CNN, sought to use Georgia's anti-SLAPP laws to strike down a complaint against it for "allegedly defamatory news reports" made stating that the mortality rate for infants undergoing heart surgery in the plaintiff's hospital was higher than the national average by using a false comparison between the mortality rates of open-heart surgery versus that of closed-heart surgery.<sup>338</sup> In the alternative, CNN sought to dismiss the case under Rule 12(b)(6), giving rise to the choice of law that continues to evade courts today.<sup>339</sup>

The district court held that neither Rule 12(b)(6) nor the Georgia anti-SLAPP provision were appropriate. The complaint stated grounds for relief under Rule 12(b)(6), and the Georgia anti-SLAPP law conflicted with the procedural mechanism of Rule 12(b)(6).<sup>340</sup> In particular, the district court noted that the statute "essentially creates a Rule 12(b)(6) 'plus' standard for cases with a First Amendment nexus."<sup>341</sup> The district court succinctly noted that where Rule 12(b)(6) requires "'plausibility' on the face of the complaint," the Georgia statute "requires a probability of prevailing."<sup>342</sup> The district court noted support for its decision in recent opinions of Judge Kozinski, which ran counter to the court's decision in *Newsham*.<sup>343</sup>

On appeal, the court began its analysis by noting that "[a] federal court exercising diversity jurisdiction will not apply a state statute if a Federal Rule of Civil Procedure 'answers the question in dispute.'"<sup>344</sup> The court held that the essential question was whether plaintiff Carbone's complaint stated a claim for relief, which is accounted for in Rules 8, 12, and 56 when all are taken together.<sup>345</sup> First, the court noted that the standard for dismissal under Rules 8 and 12, whether or not the claim on its face was "plausible," was in conflict with the anti-SLAPP requirement.<sup>346</sup> The

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338. *Id.* at 1347–48.

339. *Id.* at 1348.

340. *Id.*

341. *Carbone v. Cable News Network, Inc.*, No. 16-CV-1720, 2017 WL 5244176, at \*3 (N.D. Ga. Feb. 14, 2017).

342. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

343. *Id.* at \*4 ("Furthermore, in recent years, Judge Kozinski and several of his colleagues have challenged the wisdom of the Ninth Circuit's continued tolerance for anti-SLAPP statutes gives that their 'probability' standard 'directly conflicts with Federal Rule 12, which provides a one-size-fits-all test for evaluating claims at the pleading stage' pursuant to the 'plausib[ility]' standard." (quoting *Travelers Cas. Ins. Co. v. Hirsh*, 831 F.3d 1179, 1183 (2016) (Kozinski, J., concurring))).

344. *Carbone*, 910 F.3d at 1349 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010)).

345. *Id.* at 1350.

346. *Id.* (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)).

Georgia law stated that the complaint must provide a “probability” that the plaintiff shall prevail on their claim.<sup>347</sup> Furthermore, the Georgia statute’s requirement of definite probability of success at trial and the evidentiary burden this requirement carried conflicted with the comparatively meager standard of Rule 56 requiring that there is a genuine, triable issue of fact.<sup>348</sup>

Ultimately, the court found that the statute would abrogate the ability of the plaintiff to proceed into the discovery stage, which is normally granted by satisfying the requirements of Rules 8 and 12.<sup>349</sup> By comparison, the statute’s requirement creates a higher bar for the plaintiff by imposing a higher evidentiary requirement at an earlier stage in the litigation process.<sup>350</sup> CNN relied on *Cohen v. Beneficial Industrial Loan Corp.*,<sup>351</sup> a case where the Supreme Court found no conflict between a New Jersey statute requiring certain plaintiff shareholders to provide a bond for cost security and Federal Rule 23, which required a stockbroker to verify as such by oath before continuing with his case.<sup>352</sup> However, the court distinguished *Cohen*, noting that the New Jersey statute did not strip away any rights created by Rule 23, unlike the situation at hand.<sup>353</sup> CNN also argued that the Georgia statute existed in a separate sphere of law designed to protect free speech and therefore should not be superseded by the Federal Rules. But the court concluded that the function of the Federal Rules and the statute was too sufficiently similar to allow the statute into a diversity action.<sup>354</sup>

The court rejected CNN’s argument that the statute merely defined state substantive rights. The court instead held that the state statute provided an expedited procedural device through which a defendant can escape liability due to its heightened standard.<sup>355</sup> The Eleventh Circuit found the reasoning of the District Court of Columbia persuasive in deciding that Rules 12 and 56 asked the same procedural question as the anti-SLAPP law, providing a different—outcome-determinative—

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347. *Id.* (quoting GA. CODE. ANN. § 9-11-11.1 (West 2018)).

348. *Id.* at 1351 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

349. *Id.* at 1353; *see also* *Nixon v. Haag*, No. 1:08-cv-00648-LJM-JMS, 2009 WL 2026343, at \*3–4 (S.D. Ind. July 7, 2009) (citing *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965)) (finding that federal rules of discovery superseded discovery-staying portion of Indiana’s anti-SLAPP statute).

350. *Carbone*, 910 F.3d at 1353.

351. 337 U.S. 541 (1949).

352. *Carbone*, 910 F.3d at 1354 (citing *Cohen*, 337 U.S. 541).

353. *Id.* (citing *Cohen*, 337 U.S. at 557).

354. *Id.*

355. *Id.* at 1355.



standard for dismissal.<sup>356</sup> Ultimately, the court determined that the only way the federal rules would be inadequate in this situation would be if they failed to comply with the REA and the “congressional powers over the . . . federal courts.”<sup>357</sup> The court concluded by noting that the rules in question did not contradict the REA nor congressional power vested in the courts.<sup>358</sup>

#### 4. *United States Court of Appeals for the Fifth Circuit*

More recently, the Fifth Circuit sailed into the treacherous waters of *Erie* when it decided *Klocke v. Watson*.<sup>359</sup> The case arose from the defamation claims against Watson and the University of Texas at Arlington brought by Klocke, as administrator of his son Thomas’s estate.<sup>360</sup> Allegedly, Watson spread false rumors regarding homophobic harassment involving Thomas, leading the University to refuse Thomas permission to graduate, all of which tragically concluded in Thomas’s suicide.<sup>361</sup> Watson moved to dismiss Klocke’s claims under the Texas Citizens Participation Act (TCPA), “a type of [a]nti-SLAPP statute.”<sup>362</sup>

The district court found Klocke’s failure to “respond[] to the substance of Watson’s motion” to be fatal to the claim.<sup>363</sup> Under the district court’s analysis, Klocke’s argument “that the Fifth Circuit has ‘declined to hold that the TCPA applies in federal court’” was not made in the twenty-one-day window required by local rules.<sup>364</sup> Ultimately, the district court granted Watson’s motion to dismiss and awarded costs without ever

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356. *Id.* at 1356 (“[A]n anti-SLAPP statute with a probability requirement ‘establishes the circumstances under which a court must dismiss a plaintiff’s claim before trial—namely, when the court concludes that the plaintiff does not have a likelihood of success on the merits.’” (quoting *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015))).

357. *Id.* (“[The Georgia anti-SLAPP statute] ‘cannot apply in diversity suits’ unless Rules 8, 12, and 56 are ‘ultra vires’ because they fall beyond the scope of the power delegated in the REA or congressional powers over the operation of the federal courts.” (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010))).

358. *Id.* at 1357. *But see, e.g.*, Quinlan, *supra* note 40, at 403 (citing John A. Lynch, Jr., *Federal Procedure and Erie: Saving State Litigation Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 326 n.279 (2008)) (entertaining the possibility that Congress amend the Rules Enabling Act to “exempt state litigation reform from preemption,” thereby permitting anti-SLAPP statutes to apply in federal court).

359. 936 F.3d 240 (5th Cir. 2019).

360. *Id.* at 242.

361. *Id.* at 243.

362. *Id.* at 242 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West 2019)).

363. *Klocke v. Univ. of Tex.*, No. 4:17-CV-285-A, 2017 WL 6767393, at \*1–2 (N.D. Tex. July 25, 2017).

364. *Id.*

actually addressing Klocke's argument that the anti-SLAPP motion did not apply in federal court.<sup>365</sup> On appeal, the Fifth Circuit, while acknowledging that it had previously "passed several times on deciding whether, or to what extent, the TCPA applies in federal court," ultimately decided that the statute would not apply in federal court.<sup>366</sup>

First, the court described the statute's "burden-shifting framework," resulting in the dismissal of claims unless "show[n] 'by a preponderance of the evidence' that the action is based on the movant's exercise of the listed rights."<sup>367</sup> Assessing the statute, the court agreed with the D.C. Circuit that "[a] federal court exercising diversity jurisdiction should not apply a state law or rule if (1) a Federal Rule of Civil Procedure 'answer[s] the same question' as the state law or rule and (2) the Federal Rule does not violate the [REA]."<sup>368</sup> The court found that, in particular, "Rules 12 and 56, which govern dismissal and summary judgment motions, respectively, answer the same question as the anti-SLAPP statute: what are the circumstances under which a court must dismiss a case before trial?"<sup>369</sup> Finding the TCPA to be analogous to the D.C. anti-SLAPP statute, the Fifth Circuit decided that the TCPA set up too high of "an additional hurdle a plaintiff must jump over to get to trial."<sup>370</sup>

The court reflected on the analysis of *Shady Grove*, indicating that where a state statute "answered the same question . . . but the state [statute] imposed additional requirements that [the Federal Rules] did not," the state statute will not apply.<sup>371</sup> The court explained that stating the statutes "answer the same question" means that both statutes "specif[y] requirements for a case to proceed at the same stage of litigation."<sup>372</sup> The court concluded that Rule 12 only requires a court to dismiss a case where, "accepting all well-pleaded factual allegations as true, the complaint does

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365. *Id. Compare id.*, with *Sw. Airlines Co. v. Roundpipe, LLC*, 375 F. Supp. 3d 687, 700–01 (N.D. Tex. Mar. 22, 2019) (citing *Cuba v. Pylant*, 814 F.3d 701, 719–20 (5th Cir. 2016) (Graves, J., dissenting)) (deciding that an anti-SLAPP motion did not apply in federal court where it directly conflicted with Federal Rules of Civil Procedure 12 and 56).

366. *Klocke*, 936 F.3d at 244–49.

366. *Id.* at 244 (citing CIV. PRAC. & REM. § 27.003(a)).

367. *Id.* (citing CIV. PRAC. & REM. §§ 27.005–.009).

368. *Id.* at 245 (quoting *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015)).

369. *Id.* (quoting *Abbas*, 783 F.3d at 1333–34).

370. *Id.* (quoting *Abbas*, 783 F.3d at 1334); *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (applying Nevada's anti-SLAPP statute in federal court because of its substantive protections); *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999).

371. *Klocke*, 936 F.3d at 245 (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)).

372. *Id.*

not state a plausible claim for relief.”<sup>373</sup> As for Rule 56, the Fifth Circuit contends that “[t]he party resisting summary judgment succeeds simply by showing that a material fact issue exists and requires trial by a factfinder.”<sup>374</sup>

On the other hand, the TCPA’s standard directly conflicts with the federal rules where “the court must determine ‘by a preponderance of the evidence’ whether the action relates to a party’s exercise of First Amendment rights.”<sup>375</sup> Notably, a plaintiff must show “clear and specific evidence” as to “each element of his claim,” which must be “unambiguous, sure, or free from doubt.”<sup>376</sup> “Finally, the court must determine ‘by a preponderance of the evidence’ if the defendant can establish a valid defense to the plaintiff’s claim,” which the court determined ultimately put the statute in direct conflict with the federal rules.<sup>377</sup>

The court next addressed Watson’s counterargument “that a plaintiff’s requirement to] show probable success ‘does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function,’”<sup>378</sup> and that “the federal rules impose only minimum procedural requirements and state rules may build upon them.”<sup>379</sup> Recognizing a similar provision in the TCPA, the court found Watson’s arguments unavailing where “the test of whether a conflict between the Federal Rules and a state statute exists is not whether it is logically possible for a court to comply with the requirements of both, but whether the Federal Rules in question are ‘sufficiently broad to control the issue before the court.’”<sup>380</sup> Next, where the Rules “provide a comprehensive framework governing pretrial dismissal and judgment,” the court found “no room for any other device for determining whether a valid claim supported by sufficient evidence [will] avoid pretrial dismissal.”<sup>381</sup> The court further emphasized the practical difficulties that the district court faced when it applied the TCPA

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373. *Id.* at 246 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)).

374. *Id.* (citing FED. R. CIV. P. 56(a)).

375. *Id.* at 245 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)(1)–(3) (West 2019)).

376. *Id.* at 246 (quoting CIV. PRAC. & REM. § 27.005(c)); *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015)).

377. *Id.* at 246 (quoting CIV. PRAC. & REM. § 27.005(d)).

378. *Id.* (quoting *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010)).

379. *Id.* at 247.

380. *Id.* at 247 (quoting *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1355 (11th Cir. 2018)).

381. *Id.* (quoting *Carbone*, 910 F.3d at 1351); *see also id.* at 247 n.6 (acknowledging that “because the TCPA does not apply in federal court, the district court erred by awarding fees and sanctions pursuant to it”).

in federal court where Klocke’s case was dismissed without reference to Rule 12(b)(6), particularly where the Fifth Circuit has “grappled with the overlap between the TCPA and the Federal Rules” in the past.<sup>382</sup>

Still, the Fifth Circuit confronted “the statute’s expressed purpose to safeguard the exercise of protected First Amendment rights,” but found that the statute still “creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights.”<sup>383</sup> Concluding with the final step in resolving conflicts against the federal rules, the court addressed “whether Rules 12 and 56 are ‘a valid exercise of Congress’s rulemaking authority’ under the Rules Enabling Act.”<sup>384</sup> For the court, Rules 12 and 56 are valid because “they define the procedures for determining whether a claim is alleged in a sufficient manner in a complaint and whether there is a genuine dispute of material fact sufficient to warrant a trial,” and the Rules only pertain to “the process of enforcing litigants’ rights and not the rights themselves, and thus really regulate procedure.”<sup>385</sup>

The Fifth Circuit found no conflict between its prior rulings interpreting a similar Louisiana statute when “the comparable conflict between the Federal Rules and Louisiana law is less obvious.”<sup>386</sup> Furthermore, these prior rulings “did not have the benefit of the Supreme Court’s compelling decision in *Shady Grove*.”<sup>387</sup>

Twenty-four of the thirty-one anti-SLAPP jurisdictions have included provisions calling for some form of expedited consideration of anti-SLAPP motions.<sup>388</sup> As outlined above, three circuits have determined that

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382. *Id.* (first citing *Cuba v. Pylant*, 814 F.3d 701 (5th Cir. 2016); and then citing *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009)).

383. *Id.* (quoting *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring)).

384. *Id.* at 247–48 (quoting *All Plaintiffs v. All Defendants*, 645 F.3d 329, 333 (5th Cir. 2011)).

385. *Id.* at 248 (quoting *Carbone*, 910 F.3d at 1357).

386. *Id.* at 248–29 (“[A] non-movant’s burden in opposing [motion to strike under the Louisiana anti-SLAPP statute] is the same as that of a non-movant opposing summary judgment under Rule 56.” (quoting *Block v. Tanenhaus*, 815 F.3d 218, 221 (5th Cir. 2016))).

387. *Id.*

388. See ARIZ. REV. STAT. ANN. § 12-752(A) (2019); ARK. CODE ANN. § 16-63-507(a)(2) (West 2019); CAL. CIV. PROC. CODE § 425.16(f) (West 2020); CONN. GEN. STAT. § 52-196a(e) (2020); D.C. CODE § 16-5502(c) (2001); FLA. STAT. ANN. § 768.295(4) (West 2019); GA. CODE ANN. § 9-11-11.1(d) (West 2019); HAW. REV. STAT. ANN. § 634F-2(1) (West 2008); 735 ILL. COMP. STAT. ANN. 110/20(a) (West 2019); IND. CODE ANN. § 34-7-7-9(a)(2) (West 2019); KAN. STAT. ANN. § 60-5320(d), (f) (West Supp. 2019); LA. CODE CIV. PROC. ANN. art. 971(C)(3) (2019); ME. REV. STAT. ANN. tit. 14, § 556 (West 2019); MD. CODE ANN., CTS. & JUD. PROC. § 5-807(d)(1) (West 2011); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000); MO. REV. STAT. § 537.528(1) (2016); NEB. REV. STAT. § 25-21245 (2016); NEV. REV. STAT. ANN. § 41.660(3)(f) (West 2019); N.M. STAT. ANN. § 38-2-9.1(A) (West 2019); OKLA. STAT. tit. 12, § 1433(A)–(C) (Supp. 2015); OR. REV. STAT. ANN.

these expedited motions to dismiss provisions harmonize (or can be harmonized) with the Federal Rules of Civil Procedure and should apply in federal court. Four circuits have determined they are inapplicable in federal court. Because these state anti-SLAPP statutes are frequently used in federal courts, it has become critical that this conflict be resolved.

5. *United States Court of Appeals for the Second Circuit*

Recently, the Second Circuit decided *La Liberte v. Reid*<sup>389</sup>: an explosive defamation suit that implicated California’s anti-SLAPP statute.<sup>390</sup> Two years ago, Roslyn La Liberte was photographed at a city council meeting to discuss immigration in Simi Valley, California so that it appeared that she was angrily yelling at a Hispanic teenager.<sup>391</sup> Joy Reid, MSNBC media personality, retweeted a photograph with a caption that alleged that La Liberte shouted that the teenager was a “dirty Mexican” and that she opposed the teenager’s defense of immigrants at the meeting.<sup>392</sup> Later, Reid posted the same photograph twice on her Instagram page, with a caption alleging that La Liberte attended the meeting “in her MAGA hat and screamed, ‘You are going to be the first deported’ . . . ‘dirty Mexican!’”<sup>393</sup> While Reid later publicly recanted once the teenager in question clarified that La Liberte never yelled at him, La Liberte sued Reid for defamation.<sup>394</sup>

The district court dismissed the suit, under both Rule 12(b)(6) and California’s anti-SLAPP statute.<sup>395</sup> The court stated that La Liberte “fail[ed] to establish ‘a probability that the plaintiff will prevail’” as required under California’s statute.<sup>396</sup>

On appeal, the Second Circuit found that the California statute was inapplicable. It recognized that the statute was a purely procedural mechanism that conflicted with the Federal Rules, despite its purpose to

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§ 31.152(1) (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.004(a), 27.007(b) (West 2020); UTAH CODE ANN. § 78B-6-1404(1)(b) (West 2019); VT. STAT. ANN. tit. 12, § 1041(d) (West 2019).

389. 966 F.3d 79 (2d Cir. 2020).

390. *Id.* at 83.

391. *Id.* at 84.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.* at 83 (quoting CAL. CIV. PROC. CODE § 425.16(b)(1), (c)(1) (West 2020)). The district court also found that La Liberte was a limited purpose public figure, who did not plead actual malice nor show how the post was more than mere opinion. *Id.*

prevent chilling free speech.<sup>397</sup> And despite this, the Second Circuit found that where a conflict existed between a state procedural mechanism and a federal rule and where the federal rule at issue was not invalid under the REA, the Federal Rules must be applied.<sup>398</sup> Since the California anti-SLAPP statute erected a higher burden for a plaintiff than Rules 12 and 56, it was inapplicable in federal court.<sup>399</sup>

The Second Circuit first addressed the anti-SLAPP statute's purpose and content.<sup>400</sup> It noted that the statute establishes a higher burden of proof for a plaintiff to avoid dismissal to "decrease the 'chilling effect'" of certain defamation suits.<sup>401</sup> Uniquely, the California statute allowed a "special motion to strike" a defamation claim related to a defendant's free speech activity and impose attorney's fees on the losing plaintiff.<sup>402</sup>

The Second Circuit focused on the statute's distinct burden-shifting provision and looked to its own precedent for support.<sup>403</sup> A defendant first makes "a threshold showing" that the "cause of action" comes from their exercise of free speech.<sup>404</sup> And if the defendant succeeds, the plaintiff must then prove that they have a "probability of prevailing on the claim," using "pleadings" or any "supporting or opposing affidavits."<sup>405</sup> Finally, the court acknowledged other circuits and found that its own precedent on anti-SLAPP statutes in federal court was inapplicable to the case at hand.<sup>406</sup>

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397. *Id.* at 86–87.

398. *Id.* at 88.

399. *Id.*

400. *Id.* at 87.

401. *Id.* at 85 (quoting *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015)).

402. *Id.* (first quoting CAL. CIV. PROC. CODE § 425.16(b)(1), (f) (West 2020); and then quoting *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1159 (2004)).

403. *Id.* at 86.

404. *Id.* (quoting *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685, 694 (Cal. 2002)).

405. *Id.*

406. *Id.* at 86 n.3 (first citing *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019); then citing *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018); then citing *Abbas*, 783 F.3d at 1335; then citing *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014); then citing *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 157 (2d Cir. 2013); then citing *Godin v. Schencks*, 629 F.3d 79, 86–87 (1st Cir. 2010); and then citing *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999)). The Second Circuit clarified why it "vacated" a court's denial of the Californian special motion-to-strike in *Liberty Synergistics v. Microflo Limited*, 718 F.3d 138, 157 (2d Cir. 2013). *La Liberte*, 966 F.3d at 86 n.3. Unlike the case before the court, *Liberty*'s only question concerned applying California's motion on transfer to another federal court. *Id.* (citing *Liberty Synergistics*, 718 F.3d at 143). In fact, the court later clarified in a subsequent case that it never addressed "whether California's anti-SLAPP statute is applicable in federal court." *Id.* (quoting *Liberty Synergistics v. Microflo Ltd.*, 637 Fed. App'x 33, 34, 34 n.1 (2d Cir. 2016)). The Second Circuit also distinguished another case applying Nevada's anti-SLAPP

The court proceeded to determine if the statute's motion to strike met *Shady Grove's* test; did it "answer the same question" as a Federal Rule?<sup>407</sup> For the Second Circuit, the motion to strike passed (or failed, depending on the perspective) the test because it "answer[ed] the same question as Federal Rules 12 and 56."<sup>408</sup> Considering the heightened burden for a plaintiff to prove probability of success under the California statute, the Second Circuit noted that this plainly contradicted Rule 12(b)(6)'s "plausibil[ity]" standard.<sup>409</sup> And the statute contradicted Rule 56's command to "identify[] any genuine dispute of material fact," by subjecting plaintiffs to show "that a reasonable jury would find in [their] favor."<sup>410</sup>

After pointing out the Ninth Circuit's inconsistent position on anti-SLAPP motions in recent years,<sup>411</sup> the Second Circuit dismissed policy arguments that the motion's goal to protect free speech could "supplement[] . . . the Federal Rules."<sup>412</sup> The court declared that the "policy judgments" in the Federal Rules were "sufficient" protection.<sup>413</sup>

Finally, the Second Circuit upheld Rules 12 and 56 under the REA and refused to apply the attorney's fees provision.<sup>414</sup> Like "every challenge to the Federal Rules" that the Supreme Court had faced previously, the Second Circuit found that Rules 12 and 56 "really regulate[] procedure."<sup>415</sup> Because these rules "affect[] only the process of enforcing litigants' rights and not the rights themselves," the Second Circuit upheld

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statute—*Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014). *La Liberté*, 966 F.3d at 86 n.3. However, Nevada's statute contained no heightened burden of proof for a plaintiff to succeed without discovery, unlike California's statute. *Adelson v. Harris*, 973 F. Supp. 2d 467, 493, 493 n.21 (S.D.N.Y. 2013). Rather, it was a substantive statute without the same procedural mechanism that may interfere with the FRCP. *La Liberté*, 966 F.3d at 86 n.3 (quoting *Adelson*, 973 F. Supp. 2d at 493 n.21).

407. *La Liberté*, 966 F.3d at 88 (quoting *Abbas*, 783 F.3d at 1333).

408. *Id.* at 87.

409. *Id.* (first quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); and then quoting *Carbone*, 910 F.3d at 1353).

410. *Id.* (first quoting FED. R. CIV. P. 56(a); and then quoting *Carbone*, 910 F.3d at 1353).

411. *Id.* at 87 n.4 (citing *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski, C.J., Paez, J., and Bea, J., dissenting from denial of rehearing en banc)).

412. *Id.* at 88 (quoting Brief for the Reps. Comm. for Freedom of the Press & 21 Media Orgs. as Amici Curiae Supporting Defendant-Appellee at 22, *La Liberté v. Reid*, 966 F.3d 79 (2d Cir. 2020) (No. 19-3574)).

413. *Id.* (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 401 (2010)).

414. *Id.*

415. *Id.* (first quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); and then quoting *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1336 (D.C. Cir. 2015)).

Rules 12 and 56 under the REA.<sup>416</sup> And since the attorney's fees provision was not separate from the anti-SLAPP motion to strike, the Second Circuit foreclosed them from Reid.<sup>417</sup>

#### IV. SHOULD STATE ANTI-SLAPP LAWS APPLY IN FEDERAL COURT?

##### A. *Is Conflict Avoidance the Proper Approach Under Erie and its Progeny?*

At root, state anti-SLAPP statutes impermissibly conflict with valid federal rules created under the Rules Enabling Act. Therefore, under the *Erie* doctrine as developed by the Supreme Court, state anti-SLAPP statutes should not apply in federal diversity cases as a procedural matter. While the First Amendment rights that are protected by state anti-SLAPP statutes are both important and significant, equally so are the federalism interests embedded in the *Erie* doctrine.<sup>418</sup>

As Suzanna Sherry has pointed out, the *Erie* problem is, fundamentally, a question regarding federalism and preemption.<sup>419</sup> From *Erie* forward the Supreme Court has asserted that “in the absence of a federal directive to the contrary federal courts must always follow state substantive law.”<sup>420</sup> This conclusion rested on an assumption, made explicit in *Hanna*, that “the judiciary lacked power to protect unarticulated federal interests.”<sup>421</sup> Where Congress has expressly identified and codified the federal interest, either through statute or through the approval of federal rules, “federal courts should apply the (codified) federal rule.”<sup>422</sup>

In determining whether state anti-SLAPP statutes should apply in federal court, we are faced with a situation where Congress, through the Federal Rules of Civil Procedure, has seemingly codified the federal

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416. *Id.* (quoting *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1357 (11th Cir. 2018)).

417. *Id.* at 88, 89.

418. *See Sibbach*, 312 U.S. at 13–14.

419. Sherry, *supra* note 134, at 1161, 1185–87.

420. *Id.* at 1186–87.

421. *Id.*

422. *Id.*; *see also* Allan Erbsen, *Erie's Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 635–37 (2013); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 35–36 (2012); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1413–14 (2001); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1792–95 (1997); Martin H. Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959, 969 (1980).



interest in defining the mechanisms by which a case may be dismissed. If that is true, then the conflict between state anti-SLAPP statutes and Rules 12 and 56 of the Federal Rules of Civil Procedure seems apparent on its face.

However, before examining that issue, it seems appropriate to examine several competing approaches that have been offered to address this apparent conflict. Two conflict avoidance approaches are offered in *Shady Grove*—Justice Stevens’s concurrence and Justice Ginsburg’s dissent.<sup>423</sup> Both approaches require a highly subjective analysis on the part of a court. The approaches of both Justice Stevens and Justice Ginsburg require a court to determine the subjective intent of the federal rule, the state law, or both. Such an approach would ultimately undermine the uniformity and consistency sought by the application of the *Erie* doctrine.<sup>424</sup>

For Justice Stevens, under the guided REA analysis set forth in *Hanna*, the federal rule at issue could not displace a state law that is procedural yet is “so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right.”<sup>425</sup> For Stevens, proper analysis by a court requires looking beyond the mere existence of the federal rule itself to the substantive and extrinsic policy reasons behind the state law.<sup>426</sup> Under Stevens’s approach, the role of the federal court is to determine “whether the state law actually is part of a State’s framework of substantive rights or remedies.”<sup>427</sup> If it is, then the federal rule is valid only where it does not intrude into those substantive rights.<sup>428</sup> However,

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423. See discussion *supra* section III.C. A number of academic commentators have written on the need for a unifying approach for assessing *Erie* conflicts. See Zoffer, *supra* note 72, at 530–31; Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1239 (1999); Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What’s Wrong with Recent Erie Decisions*, 92 VA. L. REV. 707, 708 (2006); Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in Erie Cases*, 44 AKRON L. REV. 1067, 1068 (2011); Roosevelt, *supra* note 422, at 2; Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1135–36 (2011); Jeffrey W. Stempel, *Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 AKRON L. REV. 907, 916–17 (2011); Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 187, 190–93 (2013).

424. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

425. *Id.* at 423; see also discussion *supra* section III.C.2.

426. See *Shady Grove*, 559 U.S. at 429–36 (outlining the legislative history and possible interpretations of the New York law).

427. *Id.* at 419 (citations omitted).

428. See *id.* at 424–25 (criticizing Justice Scalia for ignoring “the balance that Congress struck between uniform rules of federal procedure and respect for a State’s construction of its own rights and remedies” and the “separation-of-powers presumption, and federalism presumption, that counsel

the approach advocated by Stevens is simply inconsistent with prior decisions of the Court, notably *Hanna* and *Sibbach v. Wilson & Co.*,<sup>429</sup> holding that so long as a federal rule truly regulates procedure, the conflicting state law must give way to the federal rule.<sup>430</sup> Additionally, Stevens's approach would require an analysis by a federal judge of "whether the state law actually is part of a State's framework of substantive rights or remedies," an analysis that necessarily would be highly subjective.<sup>431</sup> Stevens recognized this dilemma, admitting that "there are costs involved in attempting to discover the true nature of a state procedural rule."<sup>432</sup> As one scholar notes, "[w]hen 'a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies,' the facial operation of the statute (procedural) purposefully differs from its intended effect (substantive), making intent especially hard to evaluate."<sup>433</sup> For Stevens, a state procedural law could only be considered substantive in situations where "little doubt" existed as to its purpose.<sup>434</sup>

While also articulating a conflict avoidance approach to address situations where a court was faced with a potential conflict between a federal rule and a state law, Justice Ginsburg followed a very different path than that followed by Justice Stevens. She agreed that the first question a court must address in this situation is whether the federal rule leaves no room for the operation of the state law.<sup>435</sup> However, she inserted an initial threshold question into the analysis—whether a conflict between the state law and federal rule is "really necessary?"<sup>436</sup> In answering this question, a court should "vigilantly read the Federal Rules to avoid conflict with state laws."<sup>437</sup> The primary problem raised by Ginsburg's approach is one of subjectivity, not unlike Stevens's approach. Yet here, the potential subjectivity is even greater, in that Ginsburg's approach

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against judicially created rules displacing state substantive law" (citations omitted)).

429. 312 U.S. 1 (1941).

430. *Shady Grove*, 559 U.S. at 427–28 (Stevens, J., concurring in part and concurring in the judgment); see also *Ides*, *supra* note 134, at 1059–63 (analyzing Justice Stevens's attempt to distinguish *Sibbach*); *Ely*, *supra* note 121, at 697.

431. *Shady Grove*, 559 U.S. at 420–32 (Stevens, J., concurring in part and concurring in the judgment).

432. *Id.* at 432.

433. Zoffer, *supra* note 72, at 530–31.

434. *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring in part and concurring in the judgment).

435. *Id.* at 439 (Ginsburg, J., dissenting) (citing Traynor, *supra* note 178); see also discussion *supra* section III.C.3.

436. *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting).

437. *Id.* at 439.

requires the court to carefully assess the substantive intent of both the federal rule and the state law to determine the appropriate scope of the interpretation of the rule.<sup>438</sup>

The subjectivity necessarily present in conflict avoidance approaches undermines the uniformity that should be sought in applying the *Erie* doctrine and leads to the inequitable administration of justice, thus violating one of the twin aims of *Erie*. Additionally, contrary to the arguments put forth by Stevens, Ginsburg and others in support of a conflict avoidance methodology to address these thorny questions, conflict avoidance depends upon some evaluation of the presence of ambiguity in the application of federal rules and state laws, thereby making the approach more complicated to apply.<sup>439</sup>

*B. Applying a Traditional Guided Erie REA Approach to State Anti-SLAPP Laws*

As seen in the cases discussed above, the question of whether a state

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438. *See id.* at 442–52.

439. In discussing the role of judges in interpreting statutes, Justice Kavanaugh provides helpful guidance in how this problem of ambiguity and subjectivity should be addressed by courts:

But in most statutory cases, the issue is one of interpretation. To assist the interpretive process, judges over time have devised many semantic and substantive canons of construction—what we might refer to collectively as the interpretive rules of the road. To make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them *in advance* as we can. Doing so would make the rules more predictable in application. In other words, if we could achieve more agreement ahead of time on the rules of the road, there would be many fewer disputed calls in actual cases. That in turn would be enormously beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary.

With that objective in mind, I will advance one overarching argument in this Book Review. A number of canons of statutory interpretation depend on an initial evaluation of whether the statutory text is clear or ambiguous. But because it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity. Instead, courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons. Once they have discerned the best reading of the text in that way, they can depart from that baseline if required to do so by any relevant substantive canons—for example, the absurdity doctrine.

To be clear, I fully appreciate that disputed calls will always arise in statutory interpretation. Figuring out the best reading of the statute is not always an easy task. I am not a modern-day Yogi Berra, who once purportedly said that there would be no more close calls if we just moved first base.

But the current situation in statutory interpretation, as I see it, is more akin to a situation where umpires can, at least on some pitches, largely define their own strike zones. My solution is to define the strike zone in advance much more precisely so that each umpire is operating within the same guidelines. If we do that, we will need to worry less about who the umpire is when the next pitch is thrown.

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (citing ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 13–14 (Amy Gutmann ed., 1997)) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

anti-SLAPP statute applies in federal court turns almost exclusively on whether there is a direct collision between Rules 12 and 56 of the Federal Rules of Civil Procedure and state anti-SLAPP laws. In applying the *Erie* doctrine, as explained by the Court from *Hanna* through *Shady Grove*, determining whether a conflict exists requires an exploration of the procedural scope of the anti-SLAPP statute alongside the procedural scope of the federal rules, in this case, Rules 12 and 56. If this exploration leads to the conclusion that the anti-SLAPP statute answers the same procedural question as the federal rules and abridges the procedural operation of the federal rule, then a direct conflict exists between the two.<sup>440</sup>

Here, while state anti-SLAPP statutes are designed to protect certain substantive free speech rights, their operation is almost wholly procedural.<sup>441</sup> As discussed above, the primary procedural operations of state anti-SLAPP statutes include an expedited process for the dismissal of frivolous claims, the consideration of pleadings and affidavits in determining whether to grant the motion and dismiss the case, and a pause in discovery pending the resolution of the anti-SLAPP motion.

In this case, Rules 12 and 56 provide a process whereby a court can determine whether a case has merit and should continue toward trial or be dismissed. Likewise, state anti-SLAPP statutes provide a means by which a court can dismiss a claim because it lacks merit, resulting in the case not proceeding toward trial. Both the federal rules and the anti-SLAPP statute answer the same question: whether a court should dismiss a claim pursuant to a pretrial motion.

The real difference between these two mechanisms is the standard by which the court is to determine whether dismissal is required. Under Rules 12 and 56, where a party is able to show (1) that the claim asserted in their complaint is plausible on its face or (2) that the evidentiary record that has been developed offers a genuine dispute of material fact, then the claim of that party survives dismissal and may continue toward trial. In contrast, under state anti-SLAPP statutes, a party is required to show some version of “likelihood of success on the merits,” a much higher standard than that required by the federal rules to survive dismissal and continue

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440. See discussion *supra* Part III.

441. Consistent with *Shady Grove* and canons of statutory construction, courts should generally not undertake an inquiry into the underlying purpose of the state law and, concomitantly, any substantive rights supposedly protected by a state law. In other words, in evaluating the scope of the anti-SLAPP statute a court should look only to its procedural functions in determining whether the scope of the anti-SLAPP statute is the same as the scope of a federal rule.

toward trial.<sup>442</sup> According to then-Judge Kavanaugh in his opinion in *Abbas*, this difference matters:

Under the Federal Rules, a plaintiff is generally entitled to trial if he or she meets the Rules 12 and 56 standards to overcome a motion to dismiss or for summary judgment. But the D.C. Anti-SLAPP Act nullifies that entitlement in certain cases. Under the D.C. Anti-SLAPP Act, the plaintiff is *not* able to get to trial just by meeting those Rules 12 and 56 standards. The D.C. Anti-SLAPP Act, in other words, conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial.<sup>443</sup>

Based on this, it seems that no legitimate construction or interpretation of Rules 12 and 56 exists that will not create a direct conflict with state anti-SLAPP laws.

This conclusion is consistent with the decision in *Shady Grove*, where the Court concluded that a state statute that interfered with and conflicted with the mechanism for class actions under Rule 23 had to give way to the federal rule. This was true under *Erie* and its progeny, even though the result would be that the matter could be pursued as a class action in federal court, a prospect that could not have occurred in state court. As Justice Scalia wrote:

We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. That is unacceptable when it comes as the consequence of judge-made rules created to fill supposed “gaps” in positive federal law. For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, “state law must govern because there can be no other law.” But divergence from state law, with the attendant consequence of forum shopping, is the inevitable

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442. One commentator has compared this conflict with that presented in *Shady Grove*:

This clear procedural conflict is similar to the conflict in *Shady Grove*. There, Federal Rule 23 was construed to be categorical: if a party met the prerequisites, then the party could maintain a class action. The state law in *Shady Grove*, the majority reasoned, kept claims meeting the Federal Rules’ requirements from “coming into existence at all.” The state law in *Shady Grove* that added a damages-related requirement for maintaining a class action thus had no room to operate alongside the federal rule, which had no damages-related requirement. Conversely, the state anti-SLAPP statutes make claims meeting the Federal Rules’ requirements disappear. A plaintiff who legitimately meets the FRCP’s standard to survive a dispositive motion has to meet a different standard when challenged by the state law. Accordingly, state anti-SLAPP statutes that increase the pleading or evidentiary requirements for proceeding with a claim have no room to operate alongside the relevant federal rules.

Smith, *supra* note 72, at 322.

443. *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (citing D.C. CODE § 16-5504 (2001)).

(indeed, one might say the intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a different course if filed in federal instead of state court. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to “disembowel either the Constitution’s grant of power over federal procedure” or Congress’s exercise of it.<sup>444</sup>

Where a federal rule and a state law are in conflict, as in the case of state anti-SLAPP statutes, the federal rule applies if the rule is constitutional and complies with the REA.<sup>445</sup> Under this analysis, the constitutional question is fairly straightforward, in that a Rule is constitutionally valid if it “regulates matters which can reasonably be classified as procedural.”<sup>446</sup> In the situation involving the conflict with state anti-SLAPP statutes, it is hard to conclude anything other than that Rules 12 and 56 are procedural, in that they govern the procedural processes to challenge the sufficiency of a claim and the standards by which a court assesses such a challenge.

Regarding the REA analysis, a federal rule is valid under the statute so long as it does not “not abridge, enlarge or modify any substantive right.”<sup>447</sup> Drawing from *Sibbach*, Justice Scalia presented this question accordingly:

[T]he Rule must “really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” The test is not whether the rule affects a litigant’s substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only “the manner and the means” by which the litigants’ rights are “enforced,” it is valid; if it alters “the rules of decision by which [the] court will adjudicate [those] rights,” it is not.<sup>448</sup>

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444. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415–16 (2010) (citations omitted).

445. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (citations omitted) (“When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.”).

446. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987).

447. 28 U.S.C. § 2072(b).

448. *Shady Grove*, 559 U.S. at 407 (alterations in original) (citations omitted) (first quoting *Sibbach*

Applying this test to Rules 12 and 56, it seems without question that these rules define and govern the procedural matters of whether a lawsuit meets the pleading or evidentiary standards required to survive a motion to dismiss or motion for summary judgment.<sup>449</sup>

## CONCLUSION

In short, state anti-SLAPP statutes impermissibly conflict with the federal rules and applying the federal rules in their place does not violate the Rules Enabling Act.<sup>450</sup> Therefore, under the *Erie* doctrine as developed by the Supreme Court, state anti-SLAPP statutes should not apply in federal diversity cases as a procedural matter. However, as a matter of normative policy, this may be an unfortunate result.

While the First Amendment rights that are protected by state anti-SLAPP statutes are societally important and constitutionally significant, so are the federalism interests embedded in the *Erie* doctrine.<sup>451</sup> The First Amendment protections afforded the target of a SLAPP suit do not ebb and flow based on the existence of a state anti-SLAPP statute, in that state anti-SLAPP statutes do not create or eliminate any substantive rights.<sup>452</sup> All the existence of the anti-SLAPP offers to the individual or entity facing a SLAPP suit is greater procedural ease in invoking the substantive protections already afforded by the First Amendment. However, the Court has long recognized that federal procedural mechanisms embedded in the federal rules inevitably affect state substantive rights by their procedural operation.<sup>453</sup>

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v. *Wilson & Co.*, 312 U.S. 1, 14 (1941), and then quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

449. See discussion *supra* Part III.

450. The Supreme Court has had two opportunities over the last two years to resolve the current circuit split described in this Article. However, the Court denied petitions for certiorari in both *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659 (10th Cir. 2018), and *Planned Parenthood Federation of America v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018).

451. See *Sibbach*, 312 U.S. at 13–14.

452. See *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, J., concurring) (noting that the anti-SLAPP statute “merely provides a procedural mechanism for vindicating existing rights”).

453. See *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965) (rejecting an argument that a federal rule “must cease to function whenever it alters the mode of enforcing” substantive rights (first citing *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445–46 (1946); and then citing *Iovino v. Waterson*, 274 F.2d 41, 46 (2d Cir. 1959)); see also *Shady Grove*, 559 U.S. at 431–32 (Stevens, J., concurring in part and concurring the judgment) (explaining that the Rules Enabling Act inquiry is “not always a simple one” because almost any rule of procedure can be said to have substantive effects (citing 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4508 (2d. ed. 1996))).

Essentially, the federal rules involve textual interpretation.<sup>454</sup> Absent Congressional action or some language in the text of the rule itself, state law cannot limit the federal rule. In performing this textual analysis, the scope of the state statute is to be read solely in terms of its procedural functions, while ignoring any substantive interpretation of the statute that might exist. The Federal Rules of Civil Procedure protect important procedural rights of litigants that cannot be displaced by a conflicting state law.<sup>455</sup>

It may be true that if federal courts conclude that state anti-SLAPP statutes are not applicable in federal court, person or entities seeking to exercise their First Amendment rights may be disadvantaged. Yet, the judicial branch is not the proper federal locus to secure First Amendment procedural protections. The legislative branch is the appropriate place for providing these procedural protections through the adoption of a federal anti-SLAPP statute.

Several members of Congress have previously introduced and supported the passage of a federal anti-SLAPP bill.<sup>456</sup> Similar to state anti-SLAPP statutes, the bill would allow the defendant in a SLAPP suit to first offer a prima facie showing that their challenged speech falls within coverage of the First Amendment. Once this showing is made, the burden would then shift to the plaintiff to show that their claim is “likely to succeed on the merits.”<sup>457</sup> If the plaintiff fails to meet their burden, the claim would be dismissed. Similar to state anti-SLAPP statutes, the federal proposal would suspend discovery, allowing it only where the court concluded that a limited amount was needed to address the issues raised in the motion to dismiss.<sup>458</sup> The proposed federal bill also would allow interlocutory appeal of decisions on anti-SLAPP motions<sup>459</sup> and

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454. Orin Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111, 111 (2012).

455. *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1048 (N.D. Ill. 2013).

456. *See, e.g.*, Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015, H.R. 2304, 114th Cong. (2015). The bill originally included bipartisan support, with three Republicans and two Democrats serving as the original cosponsors. By October 1, 2016, thirty-two total representatives (twenty Democrats, twelve Republicans) had cosponsored the bill. *See Cosponsors: H.R. 2304—114th Congress (2015-2016)*, LIBR. OF CONG., <https://www.congress.gov/bill/114thcongress/house-bill/2304/cosponsors> [<https://perma.cc/6ZCP-WTLC>]. Action on this legislation seems to have been stymied during the Trump administration.

457. H.R. 2304 § 4202(a). Although this standard also heightens the standard found in Federal Rule 12, Congress has the authority to do so.

458. *Id.* § 4203.

459. *Id.* § 4204.



award attorneys' fees to successful defendants in SLAPP suits.<sup>460</sup> The proposed legislation would also alter the federal removal process to provide a mechanism under which a case could be removed from state court to federal court in situations where the speech at issue falls within the intended zone of protection of the statute.<sup>461</sup>

While the result of such legislation, if adopted, would be to impose the anti-SLAPP procedural protections on the approximately fifteen states that currently have no anti-SLAPP statute, the benefits of a federal statute would be to provide uniform protections for First Amendment rights and address the significant federalism issues that are present in the current judicial piecemeal approach. The important competing interests identified in this Article require a legislative solution that would provide consistent procedural protections for individuals and entities when they exercise their First Amendment rights, regardless of whether that occurs in state or federal court.

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460. *Id.* § 4207.

461. *Id.* § 4206.