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ARTICLES

THE LAST LECTURE: STATE ANTI-SLAPP STATUTES AND THE FEDERAL COURTS

CHARLES W. ADAMS[†] & MBILIKE M. MWAFULIRWA^{††}

INTRODUCTION

An old proverb says that “when the student is ready[,] the teacher appears.”¹ In this collaborative effort, a civil procedure law professor has partnered with his former student to address one of the most challenging topics to confront the federal courts in recent times: whether state anti-SLAPP statutes conflict with the Federal Rules of Civil Procedure.² The acronym “SLAPP” stands for “Strategic Lawsuits Against Public Participation.”³ Anti-SLAPP statutes are a spate of state legislation of recent vintage, designed “to give more breathing space for free speech about contentious public issues” and to “try to decrease the ‘chilling effect’ of certain kinds of libel litigation and other speech-restrictive litigation.”⁴ The most stringent anti-SLAPP statutes serve strong measures to accomplish their goals: an accelerated dismissal procedure soon after suit is filed; a complete stay of discovery; the plaintiff must, at the pleading stage, come forward with evidence to establish her *prima facie*

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¹ YOGI RAMACHARAKA, FOURTEEN LESSONS IN YOGI PHILOSOPHY AND ORIENTAL OCCULTISM 271 (1911).

² *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1239 (10th Cir. 2020) (“[T]he federal-law issue of whether to apply anti-SLAPP statutes like the OCPA in federal court is a *challenging one and has divided the circuits.*” (emphasis added)); *Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015) (whether anti-SLAPP statutes conflict with Rule 12(d), and with other features of the Federal Rules of Civil Procedure, has produced disagreement among federal appellate judges).

³ *See, e.g., La Liberte v. Reid*, 966 F.3d 79, 83 (2d Cir. 2020).

⁴ *Abbas v. Foreign Poly Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (quoting EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 118 (Robert C. Clark et al. eds., 5th ed. 2014)).

trial burden; mandatory attorney's fees and costs to the prevailing defendant; and an immediate appeal if the trial court denies the dismissal motion.⁵

By their design and effect, however, anti-SLAPP statutes operate differently than the governing rules in federal courts: the Federal Rules of Civil Procedure. Ordinarily, under the Federal Rules of Civil Procedure, a plaintiff need not marshal evidence at the pleading stage, just a statement of facts showing her entitlement to relief.⁶ Discovery is generally available.⁷ Summary judgment only tests whether there are factual disputes warranting a trial, and the trial court does not weigh any evidence.⁸ There is generally no immediate right to appeal a denial of a motion to dismiss or a summary judgment.⁹ And unless a prevailing party can point to an independent source—like a statute or contract—tied to the claim at issue, there is generally no right to attorney's fees for a prevailing party.¹⁰

When professor and student last explored this question in law school in 2011, the relationship between anti-SLAPP statutes and the Federal Rules of Civil was largely academic. At the time, only three circuit courts had addressed the issue—the First, Fifth, and Ninth Circuits—and all had reached the same conclusion: the two sets of laws could co-exist.¹¹ Thus, in our civil

⁵ *Id.*; see also *Intercon Sols.*, 791 F.3d at 731.

⁶ See FED. R. CIV. P. 8(a)(2), 12(b)(6); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009).

⁷ See FED. R. CIV. P. 26(a).

⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); see also FED. R. CIV. P. 56.

⁹ *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501, 506 (2015) (citing 28 U.S.C. § 1291) (“An order granting a motion for summary judgment is final [for appeal purposes]; an order denying [summary judgment] is not.”); see generally *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (order denying motion to dismiss is not appealable); see also *Yousef v. Reno*, 254 F.3d 1214, 1217 (10th Cir. 2001) (in general, only final decisions of district courts are appealable).

¹⁰ See *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010) (the “American Rule,” under which each party pays her own attorney regardless of which party prevails, is “[o]ur basic point of reference”) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983)); cf. *Horowitz v. 148 S. Emerson Assocs.*, 888 F.3d 13, 25–26, 26 n.6 (2d Cir. 2018) (generally, “attorneys’ fees are available . . . only if the underlying cause of action itself allows for attorneys’ fees.” (emphasis added)).

¹¹ *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (applying California’s anti-SLAPP statute); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169, 183 (5th Cir. 2009) (applying Louisiana’s anti-SLAPP statute); *Godin v. Schencks*, 629 F.3d 79, 86–87, 91 (1st Cir. 2010) (adopting the Ninth Circuit’s reasoning).

procedure class in 2011, this topic was largely abstract and only applied to a few federal courts.

That is not so today. Multiple states have since passed anti-SLAPP statutes,¹² and several federal courts have had a chance to weigh-in on their application. What result? The federal appellate courts have badly split on whether anti-SLAPPs (and their unique early dismissal regimes) can co-exist with the Federal Rules of Civil Procedure. Some, like the First and the Ninth Circuits, hold that they can co-exist;¹³ while a different

¹² See, e.g., ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (2006); ARK. CODE ANN. §§ 16-63-501 to -508 (West 2005); CAL. CIV. PROC. CODE §§ 425.16 (West 2015); see *La Liberte v. Reid*, 966 F.3d 79, 88–89 (2d Cir. 2020) (held inapplicable in federal court); but see *Newsham*, 190 F.3d at 973 (applying same anti-SLAPP statute in federal court); COL. REV. STAT. ANN. § 13-20-1101 (West 2019); CONN. GEN. STAT. ANN. § 52-196a (West 2019); D.C. CODE ANN. § 16-5502(b) (West 2012), (held inapplicable in federal court); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015); DEL. CODE ANN. tit. 10, §§ 8136 to 8138; FLA. STAT. ANN. §§ 768.295, 720.304 (West 2015, 2010); GA. CODE ANN. §§ 9-11-11.1 (West 2016) (held inapplicable in federal court); *Carbone v. Cable News Network*, 910 F.3d 1345, 1347 (11th Cir. 2018); HAW. REV. STAT. ANN. §§ 634F-1 to -4; 735 ILL. COMP. STAT. ANN. 110/1 to /99 (West 2007); IND. CODE ANN. §§ 34-7-7-1 to -10 (West 2021); KAN. STAT. ANN. § 60-5320 (West 2012); LA. CODE CIV. PROC. ANN. art. 971 (held applicable in federal court), *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009); ME. REV. STAT. ANN. tit. 14 § 556 (West 2012); MD. CODE ANN. CTS. & JUD. PROC. § 5-807 (West 2010); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2021); MINN. STAT. ANN. § 554.02 (West 2021) (invalidated on constitutional grounds), *Leiendecker v. Asian Women United of Minn.*, 895 N.W. 2d 623, 635–36 (Minn. 2017); MO. ANN. STAT. § 537.528 (West 2012); NEB. REV. STAT. ANN. §§ 25-21,241 to ,246 (West 2021); NEV. REV. STAT. ANN. §§ 41.660 (West 2015) (held applicable in federal court); *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014); N.M. STAT. ANN. §§ 38-2-9.1 to .2 (West 2021) (held inapplicable in federal court); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 661 (10th Cir. 2018); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2021); OKLA. STAT. ANN. tit. 12, §§ 1430 to 1440 (West 2017) (judicially revised); *Krimbill v. Talarico*, 417 P.3d 1240, 1246 (Okla. Civ. App. 2017); OR. REV. STAT. ANN. §§ 31.150 to .152 (West 2010); 27 PA. STAT. AND CONS. STAT. ANN. §§ 7707, 8301 to 8305 (West 2001); 9 R.I. GEN. LAWS ANN. §§ 9-33-1 to -4 (West 2021); TENN. CODE ANN. §§ 4-21-1003 (West 1997); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003, 27.005 to .007 (West 2019) (held inapplicable in federal court); *Klocke v. Watson*, 936 F.3d 240, 244 (5th Cir. 2019); UTAH CODE ANN. §§ 78B-6-1403 to -1405 (West 2008); VT. STAT. ANN. tit. 12, § 1041 (West 2021); WASH. REV. CODE ANN. §§ 4.24.510 to .525 (West 2021) (held unconstitutional in *Davis v. Cox*, 351 P.3d 862, 871–74 (Wash. 2015)), *abrogated on other grounds* by *Maytown Sand and Gravel, LLC v. Thurston Cnty.*, 423 P.3d 223, 247–48 (Wash. 2018). See also Jack B. Harrison, *Erie Slapp Back*, 95 WASH. L. REV. 1253, 1263 n.63 (2020); accord MEDIA LAW RESOURCE CENTER: ANTI-SLAPP COMMITTEE, <https://medialaw.org/committee/anti-slapp-committee/> (last visited Feb. 21, 2022) (collecting state laws and case law).

¹³ *Newsham*, 190 F.3d at 973; *Godin*, 629 F.3d at 86–87.

complement—the Second, Fifth, Tenth, Eleventh, and the D.C. Circuits—all hold they cannot.¹⁴ This is the lay of the land.

Few cases better highlight the complexity that anti-SLAPP statutes have wrought on the federal courts than *Clifford v. Trump*.¹⁵ *Clifford* is a defamation action brought by adult entertainer Stephanie Clifford, known under the alias “Stormy Daniels,” against President Donald J. Trump.¹⁶ According to her complaint, Ms. Daniels “began an intimate relationship with Mr. Trump in the summer of 2006.”¹⁷ The complaint alleged that after Ms. Daniels agreed to an interview with *In Touch* Magazine about her alleged affair with Mr. Trump in 2011, a stranger threatened her and her infant daughter.¹⁸ The complaint alleged that a man confronted Ms. Daniels in a parking lot telling her, “Leave Trump alone. Forget the story.”¹⁹ According to the complaint, the man then said, “That’s a beautiful little girl. It’d be a shame if something happened to her mom.”²⁰ Ms. Daniels understood the man’s statements to amount to direct threats. That experience, Ms. Daniels’ complaint alleged, left her shaken.²¹

Ms. Daniels released a sketch of her alleged assailant to the press, but the next day—as her complaint alleged—President Trump accused her of lying.²² Tweeting to millions of his followers, the president claimed²³:

¹⁴ See *La Liberte*, 966 F.3d at 87–88; *Abbas*, 783 F.3d at 1333; *Carbone*, 910 F.3d at 1349–50; *Klocke*, 936 F.3d at 245–46; *Los Lobos*, 885 F.3d at 673 (holding that New Mexico’s anti-SLAPP statute is inapplicable).

¹⁵ See generally 339 F. Supp. 3d 915 (C.D. Cal. 2018).

¹⁶ See *id.* at 919.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Complaint at ¶ 8, *Clifford*, 339 F. Supp. 3d 915 (C.D. Cal. 2018) (No. 18-cv-06893).

²⁰ *Id.* ¶¶ 8–11.

²¹ *Id.* ¶ 10.

²² *Clifford*, 339 F. Supp. 3d at 919.

²³ *Id.*; See also Aaron Blake, *Trump’s First Tweet about Stormy Daniels Makes No Sense—and He May Even Regret It*, WASH. POST (Apr. 18, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/04/18/trumps-first-tweet-about-stormy-daniels-makes-no-sense-and-he-may-regret-it/>.



After seeing the president's tweet, Ms. Daniels filed defamation claims against the president in the Southern District of New York.²⁴ At the time, Attorney Michael Avenatti represented Ms. Daniels. Her complaint alleged that the president was still a New York resident, while Ms. Daniels was, at the time, a Texas resident.²⁵ President Trump moved in a combined motion to transfer venue or to stay or dismiss the case. The president argued that he and Ms. Daniels had other pending litigation in the U.S. District Court for the Central District of California,²⁶ which had been removed from state court on diversity of citizenship jurisdictional grounds.²⁷ Meanwhile, before the Southern District of New York could rule on the president's motions, the parties stipulated to a transfer to the Central District of California.²⁸ Thus, Daniel's defamation claims, together with the declaratory judgment case in the Central District of California, ended up before U.S. District Judge S. James Otero.²⁹

²⁴ *Clifford*, 339 F. Supp. 3d at 919, 920.

²⁵ *Id.* at 920.

²⁶ *Id.*

²⁷ *See, e.g.*, *Clifford v. Davidson*, No. 18-cv-05052, 2018 WL 3701961, at *1–2 (C.D. Cal. Aug. 2, 2018) (recounting some of the parties' litigation before the same judge).

²⁸ *Clifford*, 339 F. Supp. 3d at 920.

²⁹ *Id.*

After the transfer of the case to the Central District of California, the president moved to dismiss the case based on the Texas Anti-SLAPP statute (“TCPA”).³⁰ President Trump claimed that his statements were protected opinion, or merely hyperbole. Thus, he argued, Ms. Daniel’s lawsuit sought to punish him for his protected speech. Ms. Daniels countered by arguing that the TCPA did not apply in federal court. Alternatively, because the president’s statements were provably false, Ms. Daniels argued, they were actionable under longstanding law.³¹ The court ultimately ruled for President Trump. Applying the test from the Restatement (Second) of Conflict of Laws §150, the court ruled that Ms. Daniels’ Texas domicile was controlling.³² The court then held that the TCPA applied.³³ Employing an abbreviated analysis, the district court assumed that the TCPA is functionally the same as the California anti-SLAPP statute.³⁴ The court applied the Ninth Circuit’s established California anti-SLAPP precedents and dismissed.³⁵ The court then awarded Mr. Trump nearly \$300,000.00 in fees, costs, and sanctions based on the TCPA.³⁶

After the attorney’s fee and sanctions award against Ms. Daniels, and following a breakdown in the attorney-client relationship with Mr. Avenatti, she decided to replace him with a different attorney: Clark Brewster. Ms. Daniels retained the firm of Brewster & De Angelis to represent her.³⁷ Although Mr. Avenatti filed the notice of appeal to the Ninth Circuit of Appeals and the opening brief,³⁸ Brewster & De Angelis filed the reply brief,³⁹ and has continued to represent Ms. Daniels since then.

³⁰ *Id.*

³¹ *Id.* at 925–27.

³² *Id.* at 921–22 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 150 (AM. L. INST. 1971)).

³³ *Clifford*, 339 F. Supp. 3d at 921–22.

³⁴ *Id.* at 921 & n.1.

³⁵ *Id.* at 922 (citing *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833–34 (9th Cir. 2018)).

³⁶ *See generally Clifford v. Trump*, No. CV 18-06893-SJO, 2018 WL 6519029 (C.D. Cal. Dec. 11, 2018).

³⁷ Co-author Mbilike M. Mwafurirwa is also an attorney with the Brewster & De Angelis law firm, who practices appellate law and complex civil litigation.

³⁸ Appellant’s Opening Brief, *Clifford v. Trump*, 818 F. App’x 746 (9th Cir. 2020) (No. 18-56351).

³⁹ Appellant’s Reply Brief, *Clifford v. Trump*, 818 F. App’x 746 (9th Cir. 2020) (No. 18-56351).

While the Ninth Circuit appeal was pending, the Fifth Circuit issued its long-awaited opinion in *Klocke v. Watson*.⁴⁰ The Fifth Circuit held that the TCPA is inapplicable in federal court in diversity cases.⁴¹ Ms. Daniels filed a Federal Rule of Appellate Procedure 28(j) letter brief with the Ninth Circuit informing it of the Fifth Circuit's decision and asking it to adopt that same position.⁴² In fact, Ms. Daniels filed two letters impressing that point on the Ninth Circuit.⁴³

The Ninth Circuit affirmed, however.⁴⁴ The panel—without an elaborate analysis—held that the TCPA is functionally the same as the California anti-SLAPP statute.⁴⁵ While aware that the Fifth Circuit had held that the TCPA conflicts with the Federal Rules of Civil Procedure, the Ninth Circuit panel believed that it was, essentially, powerless to overturn circuit precedent.⁴⁶ Thus, it applied Ninth Circuit precedent to the TCPA. So, the Ninth Circuit split with the Fifth Circuit on the applicability of the TCPA in a diversity jurisdiction case. Were it not for the venue transfer and the choice of law rules, *Clifford v. Trump* would likely have been litigated in either the Second or Fifth Circuit and there never would have been a circuit-split. Moreover, as the congressionally designated federal appellate court over Texas, the Fifth Circuit has primary oversight over Texas law appeals in diversity jurisdiction cases.⁴⁷ Thus, it is the exception that the Ninth Circuit hears Texas law diversity jurisdiction cases.

⁴⁰ See generally *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019).

⁴¹ *Id.* at 249.

⁴² A Rule 28(j) letter allows a party to provide supplemental authority to a federal appellate court after the moving briefs have already been filed. As relevant, that provision provides: “If pertinent and significant authorities come to a party’s attention after the party’s brief has been filed--or after oral argument but before decision--a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations.” FED. R. APP. P. 28(j).

⁴³ See generally Letter from Clark Brewster, Partner, Brewster & De Angelis, P.L.L.C., to Molly Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit (Aug. 26, 2019) (on file with authors); Letter from Clark Brewster, Partner, Brewster & De Angelis, P.L.L.C., to Molly Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit (Jan. 22, 2019) (on file with authors).

⁴⁴ *Clifford v. Trump*, 818 F. App’x 746, 747 (9th Cir. 2020).

⁴⁵ *Id.* at 746–47.

⁴⁶ *Id.* at 747 (“We are bound to follow our own precedent, which requires us to apply the TCPA.”).

⁴⁷ *Id.*

On the merits, the Ninth Circuit panel—while acknowledging that one of Trump's two statements could be proven true—held that the context of the publication made it clear that it was protected opinion.⁴⁸ The panel accordingly affirmed.⁴⁹ Ms. Daniels moved for rehearing en banc, but the Ninth Circuit denied her motion.⁵⁰ Ms. Daniels then petitioned for certiorari with the United States Supreme Court.⁵¹ The question presented in the petition was whether “the TCPA appl[ies] in Federal Court diversity jurisdiction cases under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)?”⁵² But the Court denied certiorari.⁵³ Thus, the question remains open.⁵⁴

Against that background, this article aims to contribute four ideas to the existing body of literature on the rich subject of the interaction between state anti-SLAPP statutes and the Federal Rules of Civil Procedure.

First, this article explores the Supreme Court's framework for determining whether state law applies in diversity jurisdiction cases after *Shady Grove Orthopedics Associates, P.A. v. Allstate Insurance Co.* (“*Shady Grove*”).⁵⁵ That analysis concludes that some federal courts have misread *Shady Grove*. We contend that, properly understood, the Supreme Court's majority opinion formulation in *Shady Grove* leaves little room for most quintessential anti-SLAPP statutes to apply in federal court.

Second, we delve into the preemption debate: do the Federal Rules of Civil Procedure, especially Rules 12 and 56, preempt state law dismissal laws under traditional federal preemption principles?⁵⁶ We contend they do. The Fifth and Eleventh

⁴⁸ *Id.* at 750.

⁴⁹ *Id.* at 751.

⁵⁰ *Id.*

⁵¹ See generally Petition for Writ of Certiorari, Clifford v. Trump, 818 F. App'x 746 (9th Cir. 2020) (No. 20-602).

⁵² *Id.* at i.

⁵³ Clifford v. Trump, No. 18-56351, 2021 WL 666398 (U.S. Feb. 22, 2021).

⁵⁴ United States v. Carver, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case.”).

⁵⁵ 559 U.S. 393 (2010).

⁵⁶ See, e.g., Suzanna Sherry, *Normalizing Erie*, 69 VAND. L. REV. 1161, 1227–28 (2016) (hereinafter *Sherry I*) (urging use of revised *Erie* doctrine based on implied preemption that would determine whether there was a sufficiently strong federal interest in applying a Federal Rule uniformly to warrant displacing state law); Suzanna Sherry, *A Pox on Both Your Houses: Why the Court Can't Fix the Erie Doctrine*, 10 J.L. ECON. & POL'Y 173, 191 (2013) (hereinafter *Sherry II*) (“[N]ew

Circuits made that argument when rejecting anti-SLAPP laws. But we go further: we contend that a recent Supreme Court case makes it clear that field preemption principles apply to the Federal Rules of Civil Procedure. When field preemption applies in a given area, there is no room for complementary state law.

Third, for those federal courts that apply anti-SLAPP statutes, we address the analytical framework for resolving inter-circuit conflicts that arise from applying those statutes. We will use *Clifford v. Trump* as a case study.⁵⁷ That case presents this complex inter-circuit problem framed this way: Two circuit courts, one (the Ninth Circuit) has held that anti-SLAPPs apply in federal court and the other (the Fifth Circuit) holds they do not. If because of choice-of-law rules, the Ninth Circuit has to consider whether to apply the very anti-SLAPP statute the Fifth Circuit has rejected (but which Ninth Circuit precedent favors), how should the Ninth Circuit rule and why? We suggest an analytical framework that accounts for the role of comity.

Fourth, for those federal courts that apply anti-SLAPP statutes, we consider whether those early dismissal procedures apply to claims that arise under federal law. The answer to this question, we conclude, is no. Federalism and Supremacy Clause concerns make this a no contest.

This paper addresses these issues in this order: Part I delves into the history and essential features of anti-SLAPP statutes, addressing the various formulations with a focus on the California and Texas anti-SLAPP statutes. Part II addresses the ground rules in federal court on the applicability of state law, focusing on the Supreme Court cases developing its *Erie Railroad v. Tompkins*⁵⁸ (“*Erie*”) jurisprudence. Part III analyzes the

Erie’ doctrine should look like implied preemption of the ‘purposes-and-objectives’ type”); Allan Erbsen, *A Unified Approach to Erie Analysis for Federal Statutes, Rules, and Common Law*, 10 U.C. IRVINE L. REV. 1101, 1120 (2020) (“Asking whether a federal rule has priority over a conflicting state rule is equivalent to asking whether the federal rule preempts the state rule.”); Jack B. Harrison, *Erie SLAPP Back*, 95 WASH. L. REV. 1253, 1307 (2020) (“[T]he *Erie* problem is, fundamentally, a question regarding federalism and preemption.”). *But see* William James Seidleck, *Anti-SLAPP Statutes and the Federal Rules: Why Preemption Analysis Shows They Should Apply in Federal Diversity Suits*, 166 U. PA. L. REV. 547, 559 (2018) (“Although the Court does not explicitly apply preemption jurisprudence to questions regarding the scope of Federal Rules, its confusing array of cases makes more sense when viewed through a preemption prism.”).

⁵⁷ See *Clifford v. Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018).

⁵⁸ 304 U.S. 64 (1938).

Supreme Court's fragmented opinion in *Shady Grove* and what it adds to modern *Erie* jurisprudence. Part IV explores the various interpretations of *Shady Grove* in the federal appellate courts in relation to anti-SLAPP statutes. Part V critiques the Ninth Circuit's established (and what seems like the Tenth Circuit's emerging) permissive views on anti-SLAPP statutes in diversity jurisdiction cases. Part VI considers the inter-circuit conflicts that anti-SLAPP statutes may pose. Part VII considers whether anti-SLAPP statutes (in the jurisdictions that apply them) should apply to federal causes of action.

I. THE HISTORY AND ESSENTIAL FEATURES OF ANTI-SLAPP STATUTES

A. *The First Amendment's Petition Clause: The Wellspring of Anti-SLAPP Statutes?*

Proponents of anti-SLAPP statutes contend that these statutes embolden this country's strong First Amendment values of free speech and the right to petition.⁵⁹ The First Amendment, the U.S. Supreme Court has held, immunizes from penalty the people's right to petition for redress, speak freely and protest about matters of public concern.⁶⁰

Specific to filing lawsuits, the Supreme Court has held that filing a lawsuit is protected First Amendment activity.⁶¹ The

⁵⁹ See George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937, 945–48 (1992); see also generally *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964) (noting that in this country, "[i]t is a prized American privilege to speak one's mind."); *Bose Corp. v. Cons. Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984) (freedom to speak our minds, the U.S. Supreme Court has noted, "is essential to the common quest for truth and the vitality of society as a whole."); *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.").

⁶⁰ See *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (First Amendment immunizes against state tort liability for intentional infliction of emotional distress stemming from offensive speech during a protest about a "matter of public concern"); see also *Sullivan*, 376 U.S. at 269, 279–80 (to give free speech breathing room, the Court engrafted an actual malice requirement on public officials suing for defamation).

⁶¹ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (citations omitted) ("[T]he right to petition extends to all departments of the Government [and t]he right of access to the courts is . . . but one aspect of the right of petition.").

Court outlined the parameters of that Petition Clause immunity in two seminal anti-trust cases: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*⁶² and *United Mine Workers of America v. Pennington*.⁶³ In *Noerr*, the Supreme Court confronted this question: whether a complainant could assert a Sherman Act⁶⁴ conspiracy claim based on evidence consisting only of competitors' lawful petitioning activities before public officials.⁶⁵ In a resounding reaffirmation of First Amendment values, the Court rejected that claim, holding that the Petition Clause could not tolerate a claim based on lawful petitioning activity—*i.e.*, seeking to persuade the government to change the law.⁶⁶ To be clear, the First Amendment did not permit the courts to become instruments for frustrating legitimate petitioning activity.⁶⁷

If there were any doubts about the scope of *Noerr*'s principle, the follow-on case eliminated them. In *Pennington*, another anti-trust case, the Supreme Court addressed whether to limit the *Noerr* doctrine only to petitioning conduct that was unaccompanied by a purpose or intent to further a conspiracy to violate the anti-trust statutes.⁶⁸ The Court rejected that narrow reading of *Noerr*, instead holding that “*Noerr* shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose*.”⁶⁹ The Court has continued to apply the *Noerr-Pennington* doctrine mostly in the anti-trust field.⁷⁰ Later Supreme Court cases have extended petitioning immunity to other contexts.⁷¹ The Court has also applied the doctrine to labor and commercial disputes.⁷² Following the Supreme Court's lead, lower courts have also extended

⁶² 365 U.S. 127, 137–38 (1961).

⁶³ 381 U.S. 657, 670 (1965).

⁶⁴ Sherman Antitrust Act, 15 U.S.C. §§ 1–7.

⁶⁵ See *Noerr*, 365 U.S. at 139.

⁶⁶ *Id.* at 136, 139–40.

⁶⁷ *Id.* at 145.

⁶⁸ See *Pennington*, 381 U.S. at 669–70.

⁶⁹ *Id.* at 670 (emphases added).

⁷⁰ See, e.g., *Allied Tube & Cond. Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988); *FTC v. Sup. Ct. Trial Laws. Ass'n*, 493 U.S. 411, 424–25 (1990); *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 379–80 (1991).

⁷¹ *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (citations omitted).

⁷² *Id.*; *Bill Johnson's Rest. Inc. v. NLRB*, 461 U.S. 731, 747 (1983); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972) (applied to petitioning activity that used the courts to advocate for resolution of commercial dispute).

petitioning immunity to varied legal contexts.⁷³ But even petitioning activity has its limits. The Supreme Court has, for example, held that while the right to petition is protected, the right to commit defamation with impunity is not.⁷⁴ The same holds true with litigation—the Court recognizes an exception for sham litigation activities.⁷⁵ While the First Amendment does not permit the courts to become instruments for frustrating legitimate petitioning activity, the Court recognizes an exception for sham litigation activities.⁷⁶ The Court applies a two-pronged sham test: (1) the petitioning activity must be “objectively baseless” that no reasonable litigant could realistically prevail on those claims; and (2) the fact-finder should also find that the subjective motivation for the challenged activity was improper.⁷⁷

B. *The Essential Features of Anti-SLAPP Statutes*

1. A Brief History of Anti-SLAPP Statutes and Their Core Features

With the history of petitioning immunity outlined, we begin our analysis of the essential features of anti-SLAPPs. Drawing inspiration from the *Noerr-Pennington* doctrine and the Petition Clause, several states passed anti-SLAPP statutes—that have summary dismissal procedures—to discourage lawsuits that penalize legitimate petitioning activity and freedom of expression.⁷⁸ Anti-SLAPP statutes come in different stripes. The most stringent kind, those that are the focus of this article, generally have these four features:

⁷³ *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367–68 (5th Cir. 1983) (*Noerr-Pennington* protects concerted threats of litigation); *Barq's Inc. v. Barq's Bev., Inc.*, 677 F. Supp. 449, 452–53 (E.D. La. 1987) (applying to prelitigation enforcement of trademark litigation); *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (*Noerr-Pennington* doctrine “applies equally in all contexts”); *Cardtoons, L.C. v. Maj. League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000) (en banc) (“[W]e do not question the application of the right to petition outside of antitrust . . .”).

⁷⁴ See *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (“The right to petition is guaranteed; the right to commit libel with impunity is not.”).

⁷⁵ *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

⁷⁶ *Id.*; see also *Bill Johnson's Rest.*, 461 U.S. at 743; *Citizens United v. FEC*, 558 U.S. 310, 326 (2010) (“Courts, too, are bound by the First Amendment.”).

⁷⁷ See *Pro. Real Estate Inv. Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993).

⁷⁸ See Pring et al., *supra* note 59, at 959–61.

- An expedited special motion to dismiss or strike in which a judge has power to consider conflicting evidence and determine whether a plaintiff has met her prima facie (trial-like) burden with clear evidence;⁷⁹
- A blanket discovery ban during the special motion to dismiss or strike's pendency, unless a judge permits limited discovery;⁸⁰
- An expedited interlocutory appeal if the trial court denies the defendant's motion to dismiss or strike or fails to rule within the statutory prescribed time;⁸¹ and
- Attorney's fees, costs, and sanctions if the court sustains the defense motion to dismiss or strike.⁸²

To trigger anti-SLAPP statutes, the movant must first show that the plaintiff's claim relates to her exercise of free speech, right to petition or association. The right of free speech encompasses communications made in connection with a matter of public concern.⁸³ A matter of public concern touches on matters about public health and safety and so on.⁸⁴ If a defendant satisfies his initial burden of showing that the lawsuit relates to protected rights, the law then looks to the plaintiff to respond. The plaintiff must produce prima facie evidence in support of her claims.⁸⁵ Texas imposes an additional step if the plaintiff meets her burden of producing evidence in support of her claims: the defendant has to prove that a defense applies.⁸⁶

2. Judicial construction of the California anti-SLAPP law

Although the California and Texas anti-SLAPP statutes share core features, they also have important differences,⁸⁷ which

⁷⁹ See CAL. CIV. PROC. CODE § 425.16 (b)(1) (West 2021); TEX. CIV. PRAC. & REM. § 27.003(a)–(b) (West 2021).

⁸⁰ TEX. CIV. PRAC. & REM. §§ 27.003(c) & 27.006(b); CAL. CIV. PROC. CODE § 425.16(g).

⁸¹ CAL. CIV. PROC. CODE § 425.16(i); TEX. CIV. PRAC. & REM. § 27.008(b).

⁸² See TEX. CIV. PRAC. & REM. § 27.009(a)(1); CAL. CIV. PROC. CODE § 425.16(c)(1).

⁸³ See CAL. CIV. PROC. CODE § 425.16(e); TEX. CIV. PRAC. & REM. § 27.001(3).

⁸⁴ See TEX. CIV. PRAC. & REM. § 27.001(7); CAL. CIV. PROC. CODE § 425.16(e).

⁸⁵ See CAL. CIV. PROC. CODE § 425.16(b)(1); TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

⁸⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d); see also *Exxon Mobil Pipeline Co. v. Coleman*, 512 S.W. 3d 895, 898–99 (Tex. 2018).

⁸⁷ See, e.g., *Metabolic Rsch., Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012) (“[D]eeper inspection has persuaded us that, while all of the [anti-SLAPP] statutes have common elements, there are significant differences as well, so that each state’s statutory scheme must be evaluated separately.”).

can make all the difference, particularly when we consider the judicial gloss that has been added to them. For example, unlike Texas, California—mindful of its constitutional commitment to the right to a jury trial on disputed factual questions—has judicially interpreted its anti-SLAPP statute to *function like* an expedited summary judgment.⁸⁸

The California judicial glosses are not without their own jurisprudential challenges, and two particular challenges come to mind. To begin with, when read literally, the California statute envisions that trial courts must consider conflicting evidence and make a determination whether it meets the necessary evaluative threshold.⁸⁹ But as noted, the California Supreme Court has interpreted the statute to prevent that outcome by judicially creating a *summary judgment-like procedure*. Consider the obvious problem with that solution: At a time when judges of all political stripes all seem to agree that “we’re all textualists now,”⁹⁰ this atextual solution from the California Supreme Court is itself open to scrutiny. After all, when a statute is clear, the court’s interpretative work is done and the clear text controls.⁹¹

⁸⁸ See CAL. CONST. art. 1, §16 (“Trial by jury is an inviolate right and shall be secured to all . . .”) (West, Westlaw with urgency legislation through 2021 Reg. Sess.); *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016) (noting that California courts must not weigh the evidence during an anti-SLAPP motion to strike); see also *Oasis W. Realty LLC v. Goldman*, 250 P.3d 1115, 1120 (Cal. 2011) (California courts should “accept as true the evidence favorable to the plaintiff . . . and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff” (citation omitted)). While it is true that California courts have declared that “[a]n anti-SLAPP suit motion is not a substitute for a demurrer or summary judgment motion,” *Lam v. Ngo*, 111 Cal. Rptr. 2d 582, 597 n.12 (Ct. App. 2001), that is not to say the anti-SLAPP motion, when properly triggered, does not serve the same ends as a demurrer or summary judgment, see *EHM Prod., Inc. v. Starline Tours of Hollywood, Inc.*, 1 F.4th 1164, 1174–75, n.3 (9th Cir. 2021) (applying California law).

⁸⁹ See CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2021).

⁹⁰ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring) (citations omitted) (“Today it is even said that we judges are, to one degree or another, ‘all textualists now.’”); see also Judge Diarmuid F. O’Scannlain, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304 (2017) (quoting Justice Kagan during her lecture at Harvard Law School saying, “[W]e’re all textualists now”); WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 81 (2016) (“We are all textualists. That means that a judge must relate all sources of and arguments about statutory interpretation to a text . . .”).

⁹¹ *Weiss v. City of Del Mar*, 252 Cal. Rptr. 3d 424, 428 (Ct. App. 2019) (citations omitted) (“If the statutory text ‘is unambiguous and provides a clear answer, we need go no further.’”).

Not even the constitutional avoidance canon—when used as an interpretative aid—can overcome the power of clear text.⁹² Thus, from a textualist view, there is a plausible argument that the California Supreme Court has abandoned its traditional interpretative role.⁹³

The second challenge posed by judicially revising anti-SLAPP statutes stems from the practice’s potential for unintended consequences. As noted, California has interpreted its anti-SLAPP statute to function like summary judgment motions of sorts. But what remains unclear is how the California anti-SLAPP statute’s evaluative standards—“probability that the plaintiff will prevail”—square with traditional summary judgment standards.⁹⁴ To be clear, under traditional summary judgment standards, when there are material factual disputes, the case warrants a trial.⁹⁵ Does that rule also control in the anti-SLAPP context?⁹⁶

California has offered clarity on how its anti-SLAPP burden-shifting framework works. California courts—besides adopting summary judgment-like standards for the California anti-SLAPP

⁹² See, e.g., *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (noting that constitutional avoidance “is a tool for choosing between competing plausible interpretations of a statutory text”).

⁹³ *Doe v. City of Los Angeles*, 169 P.3d 559, 567 (Cal. 2007) (“Our office . . . ‘is simply to ascertain and declare’ what is in the relevant statutes, ‘not to insert what has been omitted, or to omit what has been inserted.’” (alteration in original)). *But see* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting) (“[T]he good textualist *is not a literalist.*” (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (Amy Gutmann, ed. 1997) (emphasis added))).

⁹⁴ See CAL. CIV. PROC. CODE § 425.16(b)(1).

⁹⁵ See CAL. CIV. PROC. CODE § 437c. Although we use the phrase “traditional summary judgment standards,” we allude only to this: material factual disputes warrant a trial. We offer this clarification because beyond that there is little else that is traditional about California’s summary judgment standards; in a word, they differ from those in the federal system. See, e.g., *Aguilar v. Atl. Richfield Co.*, 24 P.3d 493, 508 (Cal. 2001) (making clear that California’s summary judgment standards differ from those of the federal courts). For example, pointing out gaps in the non-movant’s evidence—a theory that warrants summary judgment in federal court—does not in California. The movant must still meet its burden with evidence showing why it prevails before a non-movant has to respond. See *id.* at 510, 513; *cf.* *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). California has a 75-day notice period for summary judgments, something the Federal Rules do not espouse. Compare CAL. CIV. PROC. CODE § 437c(a), with FED. R. CIV. P. 56. Beyond briefly flagging and discussing this issue, this article does not attempt an exhaustive analysis.

⁹⁶ See *Todd v. Lovecraft*, No. 19-cv-01751, 2020 WL 60199, at *8–9 (N.D. Cal. Jan. 6, 2020) (outlining concerns).

statute—have gone one step further.⁹⁷ Although the California anti-SLAPP statute also requires initial evidence showing its applicability,⁹⁸ the burden on a plaintiff to overcome the statute's dismissal motion "is not high."⁹⁹ California courts do not weigh evidence or make credibility determinations.¹⁰⁰ The California Supreme Court has held that the anti-SLAPP standard of review requires a plaintiff to come forward with evidence that could sustain a judgment for her at trial.¹⁰¹ The plaintiff must also, at this rebuttal stage, overcome any affirmative defenses properly raised and supported by defendant.¹⁰² In turn, California courts accept as true all of plaintiff's evidence.¹⁰³ Thus, the California anti-SLAPP framework is much like that for judgment as a matter of law in federal court or a directed verdict in a state court.¹⁰⁴

3. The Differences Between the California and Texas Anti-SLAPP Statutes

While the California anti-SLAPP statute operates like a summary judgment of sorts, the Texas statute does not. Thus, the California and Texas anti-SLAPP statutes are not functionally the same for two main reasons.

First, the differences begin with the burden shifting frameworks. California's burden shifting framework only has two steps: (1) the defendant must show that the lawsuit relates

⁹⁷ See CAL. CIV. PROC. CODE § 425.16(b)(1).

⁹⁸ *Wilcox v. Sup. Ct.*, 33 Cal. Rptr. 2d 446, 451 (Ct. App. 1994), *abrogated on other grounds by* *Equilon Enters. v. Cons. Cause, Inc.*, 52 P.3d 685, 694 n.5 (Cal. 2002).

⁹⁹ *Overstock.com v. Gradient Analytics, Inc.*, 61 Cal. Rptr. 3d 29, 38 (Ct. App. 2007).

¹⁰⁰ *Wilcox*, 33 Cal. Rptr. 2d at 454.

¹⁰¹ See *Navellier v. Sletten*, 52 P.3d 703, 708 (Cal. 2002); *Mindys Cosms., Inc. v. Dakar*, 611 F.3d 590, 598–99 (9th Cir. 2010) (applying California law); *id.* (A plaintiff must "state and substantiate a legally sufficient claim" (quoting *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 740 n.8 (Cal. 2003)).

¹⁰² *Flatley v. Mauro*, 139 P.3d 2, 17 (Cal. 2006). Even though the anti-SLAPP statute "places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense." *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 35 Cal. Rptr. 3d 31, 44 (Ct. App. 2005).

¹⁰³ *Overstock.com*, 61 Cal. Rptr. 3d at 38.

¹⁰⁴ See *generally* *Lib. Mut. Fire Ins. Co. v. Woolman*, 913 F.3d 977, 983–84 (10th Cir. 2019) (articulating federal standards for motion for judgment as a matter of law); *accord* *Rinsky v. Cushman & Wakefield, Inc.*, 918 F.3d 8, 26 (1st Cir. 2019); *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 640–41 (Ct. App. 2001).

to protected activity—free speech or petitioning about a public issue in a public forum; (2) then the burden shifts to the plaintiff to establish the prima facie elements of her claim or her probability of success on the merits.¹⁰⁵ This burden, as noted, requires a plaintiff to provide evidence (that if a fact-finder were to credit) would overcome any affirmative defenses.¹⁰⁶ The Texas anti-SLAPP law is different. It *potentially* has a third step: the first two are like California’s, but, in addition, Texas has a *contingent tiebreaker* third step.¹⁰⁷ That third step allows a defendant to prevail if she can show that a valid defense applies.¹⁰⁸ Thus, even in the wake of conflicting factual presentations (at step one and two of the burden shifting framework), the defendant can still carry the day by simply showing that she has a defense that applies.¹⁰⁹ The existence of the affirmative defense at step three allows the trial court to become the tiebreaker. Perhaps recognizing problems with this approach, the Texas Legislature amended its anti-SLAPP statute in fall 2019: now, if a defendant shows (as a matter of law) that a defense applies, then she should win.¹¹⁰ But it is not clear that this amendment will be functionally better than the old one. To be sure, when does a defendant establish a defense as a matter of law? In the summary judgment context, for example, Texas courts have held that a defendant does so when she has conclusively proved all the elements of the defense, “leaving no material questions of fact.”¹¹¹ Indeed, this invites a follow-up inquiry: If there is a conflicting evidentiary presentation from the plaintiff at step two of the burden shifting framework, then logically—unless a defendant accepts the plaintiff’s version of facts or attacks the admissibility of the evidence in support—it is hard to imagine a defendant satisfying his defense with no material factual questions at issue. So, it seems that, despite the

¹⁰⁵ See *Flatley*, 139 P.3d at 11.

¹⁰⁶ See *id.*

¹⁰⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d) (West 2022).

¹⁰⁸ *Id.*

¹⁰⁹ See *Exxon Mobil Pipeline Co. v. Coleman*, 512 S.W. 3d 895, 898–99 (Tex. 2018).

¹¹⁰ Compare TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d) (West 2022), with TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West 2013).

¹¹¹ See, e.g., *Garza v. Williams Bros. Const. Co.*, 879 S.W. 2d 290, 294 (Tex. App. 1994) (“When a defendant moves for summary judgment on an affirmative defense, he has the burden to conclusively prove all the essential elements of its defense as a matter of law, leaving no issues of material fact.” (emphasis added)).

amendment, Texas judges might still have to resolve disputed material questions of fact.

California's approach at the last step—where courts consider a plaintiff's evidence—is remarkably different. Under California's anti-SLAPP burden-shifting framework, the courts accept the plaintiff's evidence at the second step of the analysis as true.¹¹² Neither the Texas anti-SLAPP statute nor Texas case law, however, offer a similar presumption to a plaintiff. When a California court compares the plaintiff's evidence at step two with the defendant's initial evidence at step one, the court will deny anti-SLAPP motions if it determines that a jury could render a verdict for the plaintiff—if it credited her evidence.¹¹³ In that sense, the burden at step two is the same as that of a non-movant in a summary judgment—that is, to show material factual disputes.¹¹⁴

Second, the quantum of evidence required from a plaintiff under the Texas and California anti-SLAPP statutes is different. Under the California statute, a plaintiff's burden “is not high.”¹¹⁵ Courts have held that the California statute only requires a “minimum level of legal sufficiency and triability.”¹¹⁶ This is a contrast to the Texas anti-SLAPP statute. Under the Texas anti-SLAPP statute, at step two of the analysis, plaintiff must adduce “clear and specific evidence” in support of her case.¹¹⁷ The Supreme Court of Texas has interpreted this to mean that, at this stage, the burden on plaintiff is no greater than what she must meet at trial.¹¹⁸ Thus, in California the plaintiff faces a summary judgment like standard, while in Texas she faces a trial-like burden at the pretrial stages, without the benefits of discovery.¹¹⁹

¹¹² *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002).

¹¹³ *Wilcox v. Sup. Ct.*, 27 Cal. App. 4th 809, 819 (App. Ct. 1994).

¹¹⁴ *Navellier v. Sletten*, 106 Cal. App. 4th 763, 768 (App. Ct. 2003) (“[P]laintiffs’ burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment.”).

¹¹⁵ *Overstock.com v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 699 (App. Ct. 2007).

¹¹⁶ *Mindys Cosms., Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) (internal quotations omitted) (applying California law).

¹¹⁷ TEX. CIV. PRAC. & REM. CODE ANN. §27.005(c) (West 2022).

¹¹⁸ *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015).

¹¹⁹ *Compare ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1010 (App. Ct. 2001) *with In re Lipsky*, 460 S.W. 3d at 591. The scope of the commercial transaction exemption is also different between the two statutes. *See NCDR, L.L.C.*

II. THE GROUND RULES IN DIVERSITY JURISDICTION CASES

A. *The Erie Rule and Its Landmark Supreme Court Refinements*

The great rule every law student eventually learns in law school is that in diversity jurisdiction cases, a federal court applies state substantive law and federal procedural rules.¹²⁰ That is the *Erie* rule.¹²¹ But that simple rule has, over time, fostered confusion and a steady stream of U.S. Supreme Court precedent seeking to clarify its parameters.

The Supreme Court did not pull the *Erie* rule out of thin air. Rather, the Court was merely following congressional statutory dictates. To be clear, the Rules Enabling Act—the statutory source of the Supreme Court’s rulemaking authority—only authorizes it to promulgate “rules of practice and procedure” applicable in federal courts.¹²² Congress imposed an important limitation on the Court’s rulemaking power: those rules should “not abridge, enlarge or modify any substantive right.”¹²³ The reason for the substantive law limitation is that in that area, federalism concerns come into play.¹²⁴ Indeed, under longstanding federalism principles, when matters of state substantive law are at issue, state interests take precedence unless unique federal interests need vindication.¹²⁵ To that end, in the Rules of Decision Act,¹²⁶ Congress instructed federal courts to apply the “laws of the several states” in cases other than

v. *Mauze & Bagby*, P.L.L.C., 745 F.3d 742, 754–55 (5th Cir. 2014) (applying Texas law) (discussing differences between California and Texas’ commercial exemptions).

¹²⁰ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹²¹ *Id.* The Supreme Court has also held that there is no general federal common law. *Id.* Still, the Court has, in recent times, tempered this holding: most recently, the Court confirmed there still exist “limited areas . . . in which federal [courts] may appropriately craft the rule of decision.” *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 717 (2020). The rule of decision in those federal common law cases, federal courts have held, are a form of “statutory interpretation” that looks to “congressional silence” in codified text as license to develop rules to protect “uniquely federal interests.” *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 965 n.3 (10th Cir. 2019).

¹²² *See* 28 U.S.C. § 2072(a) (West 2022).

¹²³ *Id.* § 2072(b).

¹²⁴ Arthur Miller, § 4509 *The Erie Doctrine, Rules Enabling Act, and Federal Rules of Civil Procedure—The “Substantive Rights” Limitation*, in *FEDERAL PRACTICE AND PROCEDURE* (Charles Wright & Arthur Miller, eds., 3d ed.), Westlaw (database updated 2021).

¹²⁵ *See id.*

¹²⁶ 28 U.S.C. § 1652.

federal question jurisdiction cases.¹²⁷ That, in turn, makes the dichotomy between substantive and procedural law all the more important. How should federal courts tell them apart?

The first important Supreme Court case to attempt to address that question was a 1941 case, *Sibbach v. Wilson & Co.*¹²⁸ *Sibbach* was a humdrum personal injury action in which the defendant moved the federal court to order plaintiff to submit to a medical examination under Fed. R. Civ. P. 35. After plaintiff ignored the order for medical examination, the federal court held plaintiff in contempt and imposed sanctions under Fed. R. Civ. P. 37.¹²⁹ Plaintiff appealed.¹³⁰ The question presented was whether Fed. R. Civ. P. 35 and 37 were valid exercises of the Supreme Court's rulemaking power within the limits of the Rules Enabling Act.¹³¹ That statute, recall, limits the Supreme Court's rulemaking powers to rules of procedure.¹³² The Court held that the rules were valid procedural rules.¹³³ The Court held so because procedural rules regulate "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."¹³⁴ But the question remained: which laws only regulate the procedure for vindicating the remedy?

Four years later, the U.S. Supreme Court addressed that question in *Guaranty Trust Co. v. York*.¹³⁵ In that case, the Supreme Court had to decide whether a diversity jurisdiction equity lawsuit was subject to a state's statute of limitations for similar suits under the common law.¹³⁶ The federal court of appeals had declined to apply the state law limitations period, but the Supreme Court ultimately reversed.¹³⁷ The Court introduced into the legal lexicon the outcome determination test—that is, whether a given state law affected the result of litigation so that if a federal court ignored it, the outcome would

¹²⁷ *Id.*

¹²⁸ 312 U.S. 1, 9–10 (1941).

¹²⁹ *Id.* at 7.

¹³⁰ *Id.*

¹³¹ *Id.* at 9–10.

¹³² See 28 U.S.C. § 2072(a)–(b).

¹³³ *Sibbach*, 312 U.S. at 14.

¹³⁴ *Id.*

¹³⁵ 326 U.S. 99, 99–100 (1945).

¹³⁶ *Id.* at 100–01.

¹³⁷ *Id.* at 109–12.

be different to that in state court for the same case.¹³⁸ If the outcome would change, then a federal court had to apply the state law.¹³⁹

The next important case was *Byrd v. Blue Ridge Rural Electric Coop.*¹⁴⁰ That case significantly tempered *Guaranty Trust's* outcome determination test,¹⁴¹ especially when there are countervailing federal interests at stake.¹⁴² In *Byrd*, the Supreme Court held that in the *Erie* context, federal courts should not apply state law that conflicts with overriding federal interests, such as the right to trial by jury for disputed factual questions.¹⁴³ *Byrd* presented a question about the appropriate factfinder in a diversity jurisdiction personal injury action.¹⁴⁴ South Carolina law at the time required that a judge, not a jury, determine whether a defendant's affirmative defense of worker's compensation immunity applied, even in the wake of disputed factual questions.¹⁴⁵ The appellate court endorsed the state law's approach, but the Supreme Court reversed.¹⁴⁶ The Court reasoned that despite South Carolina's important policy goals for switching the factfinder from jury to judge on that question, those considerations had to yield to the Seventh Amendment of the U.S. Constitution's assignment of disputed factual questions to a jury.¹⁴⁷ In short, *Byrd* held that the outcome determination test must yield when important federal interests are at stake.¹⁴⁸

The Supreme Court reined in the outcome determination test even more in *Hanna v. Plumer*.¹⁴⁹ In *Hanna*, a personal injury case that raised a conflict between federal and state service of process rules, the Supreme Court held that *Erie* doctrine was inapplicable to the Federal Rules of Civil Procedure.¹⁵⁰ The

¹³⁸ *Id.* at 109.

¹³⁹ *Id.* at 109–10.

¹⁴⁰ 356 U.S. 525 (1958).

¹⁴¹ 326 U.S. 99, 109 (1945).

¹⁴² *Byrd*, 356 U.S. at 536–38.

¹⁴³ *Id.* at 535.

¹⁴⁴ *Id.* at 527–28.

¹⁴⁵ *Id.* at 531.

¹⁴⁶ *Id.* at 530–31.

¹⁴⁷ *Id.* at 537–38.

¹⁴⁸ *Id.* at 538–40.

¹⁴⁹ 380 U.S. 460 (1965).

¹⁵⁰ *Id.* at 469–70 (“*Erie R. Co. v. Tompkins* [does not] constitute[] the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to void a Federal Rule.”).

Court clarified that federal courts should not mechanically apply the “[o]utcome-determination” test to conflicts between state law and federal procedural rules;¹⁵¹ instead, courts should be guided by “the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”¹⁵² Even then, the Court was quick to point out that when a federal rule speaks to the issue at hand, and there is “direct collision” between federal rules and state law,¹⁵³ a federal court need not wade into the “relatively unguided Erie [c]hoice.”¹⁵⁴ The federal court must apply the federal rule unless the rule is invalid.¹⁵⁵

B. The Honorable Mentions: The Erie Supreme Court Cases We Should Never Overlook

Simple rules are not always easy to apply. The *Erie* rule—with its federal procedural rules and state substantive law monikers—has proven that. Besides the landmark Supreme Court cases highlighted *supra*, the Court has decided other lesser known, but no less worthy, cases on the *Erie* rule. We highlight those cases below.

The first case is *Walker v. Armco Steel Corp.*¹⁵⁶ That case considered whether, in a diversity jurisdiction case, an action is “commenced” for purposes of a state statute of limitations when the plaintiff filed the complaint or served the defendant with process, as the applicable state law required.¹⁵⁷ There, the Court distinguished *Hanna*, a case that found “a ‘direct collision’ between” a state law’s requirement of “in-hand service” of process and Fed. R. Civ. P. 4(d)(1), which authorized substituted service of process at the defendant’s residence.¹⁵⁸ *Hanna* held that state law had to yield.¹⁵⁹ In *Walker*, in contrast, the Court found no direct collision between Fed. R. Civ. P. 3 and Oklahoma law.¹⁶⁰ Rule 3 provided that a party commenced a civil action “by filing a

¹⁵¹ *Id.* at 466.

¹⁵² *Id.* at 468.

¹⁵³ *Id.* at 472.

¹⁵⁴ *Id.* at 471.

¹⁵⁵ *Id.*

¹⁵⁶ *See generally* 446 U.S. 740 (1980).

¹⁵⁷ *Id.* at 742–43.

¹⁵⁸ *Id.* at 749.

¹⁵⁹ *Hanna*, 380 U.S. at 471.

¹⁶⁰ *Walker*, 446 U.S. at 752.

complaint with the court.”¹⁶¹ On the other hand, under Oklahoma law, a party commenced an action only when she filed a complaint within the limitations period and served a defendant within sixty days.¹⁶²

The Supreme Court, applying the plain meaning of Rule 3, held that it was not as broad as the losing party contended.¹⁶³ The Court found no textual support for Rule 3 tolling a state statute of limitations or displacing state law.¹⁶⁴ Instead, the Court found that Rule 3 and the state law targeted different concerns: Rule 3 governed when the “timing requirements” of the Rules of Civil Procedure began, but not the running of state statutes of limitations.¹⁶⁵ State law instead addressed when the statute of limitations ran and stopped.¹⁶⁶ Thus, the Court held—while injecting a new dimension into its evolving *Erie* jurisprudence—that when a federal and state procedural rule could co-exist, there was no direct conflict, and that state law applied.¹⁶⁷

Burlington Northern Railroad Co. v. Woods,¹⁶⁸ the next notable *Erie* decision, went in the opposite direction. The Court found a direct conflict between a Federal Rule and a state statute.¹⁶⁹ In *Woods*, after affirming a judgment for the plaintiffs in a diversity personal injury action, the Eleventh Circuit imposed a 10% penalty on the defendant based on an Alabama statute.¹⁷⁰ That statute mandated a categorical 10% penalty whenever an appellate court affirmed a judgment that the courts had stayed after the posting of a supersedeas bond.¹⁷¹ The

¹⁶¹ See FED. R. CIV. P. 3.

¹⁶² *Walker*, 446 U.S. at 742–43.

¹⁶³ *Id.* at 750, 750 n.9 (rejecting any suggestion “that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a ‘direct collision’ with state law. *The Federal Rules should be given their plain meaning.* If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.” (emphases added)).

¹⁶⁴ *Id.* at 750–51.

¹⁶⁵ *Id.* at 751.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 752–53.

¹⁶⁸ 480 U.S. 1 (1987).

¹⁶⁹ *Id.* at 7.

¹⁷⁰ See *id.* at 3.

¹⁷¹ As relevant, the Alabama statute provided:

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the

Supreme Court reversed because Federal Rule of Appellate Procedure 38¹⁷² controlled, and it allowed an appellate court to award damages only if it determined, in its discretion, that the appeal was frivolous.¹⁷³ In other words, the conflict was that the federal rule applied a “case-by-case approach,” while the Alabama statute imposed a categorical 10% penalty on all frivolous appeals.¹⁷⁴ The Court found that the state rule hindered Fed. R. App. P. 38 because it “preclude[d the] exercise of discretion within [the] scope of [its] operation.”¹⁷⁵

Citing *Walker v. Armco Steel*, the Supreme Court outlined a clear framework for addressing *Erie* questions.¹⁷⁶ The framework was this:

The initial step is to determine whether, when fairly construed, the scope of Federal Rule 38 is “sufficiently broad” to cause a “direct collision” with the state law or, implicitly, to “control the issue” before the court, thereby leaving no room for the operation of that law. . . . The Rule must then be applied if it represents a valid exercise of Congress’ rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act, 28 U.S.C. § 2072.¹⁷⁷

Reiterating its key *Erie* principles and its holding in *Hanna*, the Court made it clear that “[r]ules regulating matters indisputably procedural are *a priori* constitutional.”¹⁷⁸ That is because the Rules Enabling Act authorizes the Court to promulgate “rules of practice and procedure” applicable in federal courts.¹⁷⁹

But what of rules that fall within the uncertain boundary between procedure and substance? After all, as noted, in the Rules Enabling Act, Congress imposed an important limitation

judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court

Woods, 480 U.S. at 3 (citing ALA. CODE § 12-22-72 (1986)).

¹⁷² FED. R. APP. P. 38 provides: “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”

¹⁷³ *Woods*, 480 U.S. at 4, 7.

¹⁷⁴ *Id.* at 8.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 4–5.

¹⁷⁷ *Id.* (citations omitted).

¹⁷⁸ *Id.* at 5.

¹⁷⁹ *See* 28 U.S.C. § 2072.

on the Supreme Court's rulemaking power: those rules should "not abridge, enlarge or modify any substantive right."¹⁸⁰ *Woods* had an answer to that question. The Court held that federal rules that regulate matters that fall "within the uncertain area between substance and procedure" and that can be classed as either are constitutional and valid.¹⁸¹

The Court reached that conclusion for two reasons. *First*, the Court made clear that federal rules that only incidentally affect substantive rights are valid because they comply with its congressionally granted rulemaking authority.¹⁸² Congress authorized the Court to promulgate uniform rules for practice and procedure in the federal courts that are "necessary to maintain the integrity of that system."¹⁸³ Thus, if "necessary" federal procedural rules only incidentally affect substantive rights, they are still valid because they honor the congressional grant of rulemaking authority.¹⁸⁴ In the same vein, the Supreme Court also determined that Rule 38 was within the permissible scope of its congressional rulemaking authority because as a procedural rule, *it only affected the process of enforcing the rights of parties*, rather than the rights themselves.¹⁸⁵ *Second*, the multiple layers of review—by the Advisory Committee, the Judicial Conference of the United States, the Supreme Court itself, and Congress—together clothe the rules with a presumption of constitutional and enacting validity.¹⁸⁶

In the next notable case, the Supreme Court found no direct conflict between a Federal Rule of Civil Procedure and state law. That case was *Gasperini v. Center for Humanities, Inc.*¹⁸⁷ *Gasperini* involved a New York statute that empowered state appellate courts to reexamine, in the first instance, jury verdicts for excessiveness.¹⁸⁸ This standard differs from what happens in federal courts, where trial (rather than appellate) courts review verdicts for excessiveness and may order new trials if the verdict

¹⁸⁰ *Id.* § 2072(b).

¹⁸¹ *Woods*, 480 U.S. at 5.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 5–6.

¹⁸⁵ *Id.* at 8.

¹⁸⁶ *Id.* at 6.

¹⁸⁷ *See Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 419 (1996).

¹⁸⁸ *Id.* at 418.

is against the weight of the evidence.¹⁸⁹ The Supreme Court, however, found no direct collision between the state rule and the Federal Rules of Civil Procedure because Rule 59 does not specify a particular standard for reviewing jury verdicts.¹⁹⁰ Thus, the Court held, the New York statute should be applied in diversity jurisdiction cases in the federal courts to avoid differences in outcome between the state and federal courts.¹⁹¹

Gasperini is also notable for three other reasons. *First*, in seeking to distinguish between state procedural and substantive laws, the Court held that laws that reassign decision-making authority from one body to another (in that case a trial court to an appellate court) are procedural.¹⁹² Thus, under longstanding *Erie* principles, that procedural element of the New York law had to yield. Although the Court acknowledged that its *Guaranty Trust* outcome determination test often required that federal courts apply state law to prevent a disparity of outcomes between the two forums, the Court reiterated its holding in *Byrd*.¹⁹³ In *Byrd*, the Supreme Court held that the outcome determination test was not controlling in the wake of countervailing federal interests.¹⁹⁴

The countervailing federal interests in *Gasperini* came courtesy of the U.S. Constitution's Seventh Amendment Reexamination Clause.¹⁹⁵ That clause prevents the reexamination of jury verdicts except in line with longstanding common law standards for granting new trials.¹⁹⁶ Because New York law would have required the appellate court to usurp the trial court's role in examining excessive verdicts, to become a court of first view (not review),¹⁹⁷ that framework conflicted with

¹⁸⁹ *Id.* at 433.

¹⁹⁰ *Id.* at 435–36.

¹⁹¹ *Id.* at 430–31.

¹⁹² *Id.* at 426.

¹⁹³ *See Gasperini*, 518 U.S. at 431–32.

¹⁹⁴ *Id.*

¹⁹⁵ *See* U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*” (emphases added)).

¹⁹⁶ *Id.*

¹⁹⁷ *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2056 (2019) (“As we have said many times before, we are a court of ‘review,’ not of ‘first view.’”).

the Seventh Amendment.¹⁹⁸ For that reason, the Court held, federal trial courts should apply the material deviation standard in reviewing verdicts for excessiveness in the first instance, subject to appellate court review for abuse of discretion.¹⁹⁹

Gasperini is also notable for a *second* reason. The case highlights how a given state law may have both substantive and procedural elements, and if so, the federal courts might follow state law for the substantive aspects and federal law for the procedural aspects.²⁰⁰ This point, however, should not be read out of context untethered from the Court's other rulings on laws that have both procedural and substantive elements. To that end, the reader should recall, for example, the Court's ruling in *Burlington Northern Railroad Co. v. Woods*.²⁰¹ In that case, the Court made clear that a federal procedural rule that has both procedural and substantive elements is valid and should control (over a contrary state law) in federal court.²⁰² That outcome generally holds true, however, under either of two circumstances: (1) if the state law directly conflicts with the text or mode of operation of a federal rule; or (2) there is a countervailing federal interest that requires vindication, so the federal court must temper a contrary state law.²⁰³

Third, *Gasperini* is also notable because it represented the resurgence of the *Erie* outcome determination test. That test made its way into *Erie* lexicon in *Guaranty Trust*.²⁰⁴ But, as noted, a series of Supreme Court cases beginning with *Hanna* tempered the outcome determination test, preferring instead to probe *Erie* requirements through the prism of the collision test.²⁰⁵ And *Byrd* also added the primacy of the countervailing federal interest.²⁰⁶ But as the dissenting opinions in *Gasperini* made clear, a majority of the Court appeared to return the law to a time when the outcome determination test was the sole controlling criterion.²⁰⁷

¹⁹⁸ *Gasperini*, 518 U.S. at 434–36.

¹⁹⁹ *Id.* at 438.

²⁰⁰ *Id.* at 435–38.

²⁰¹ *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6–8 (1987).

²⁰² *Id.* at 4–7.

²⁰³ *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535–38 (1958); *see also Gasperini*, 518 U.S. at 435–38.

²⁰⁴ *See Guar. Tr. Co. v. York*, 326 U.S. 99, 109–12 (1945).

²⁰⁵ *See Hanna v. Plummer*, 380 U.S. 460, 466–67 (1965).

²⁰⁶ *See Byrd*, 356 U.S. at 537–38.

²⁰⁷ *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 465 (Scalia, J., dissenting).

The Supreme Court then interpreted Federal Rule of Civil Procedure 41(b) narrowly in *Semtek International, Inc. v. Lockheed Martin Corp.*²⁰⁸ But was the Court overruling *Walker* and *Burlington sub silencio* by interpreting a federal rule narrowly? Recall, *Walker* and *Burlington* both rejected the idea that a federal court should interpret a federal rule narrowly; instead, the Court has held that federal courts should give the rules their ordinary meaning.²⁰⁹ At first glance it would appear that the Court was in fact sanctioning a categorical approach of interpreting federal rules narrowly.²¹⁰ But on deeper inspection, it was not. In later cases, the Court explained that it *never sanctioned* a categorical rule that federal courts should interpret the federal rules narrowly.²¹¹ Rather, the Court *only interpreted federal rules narrowly* in *Semtek*, *Walker* (and other similar cases) because the rule at issue was ambiguous—*i.e.*, susceptible to more than one meaning.²¹²

With that clarification, we more fully unpack *Semtek*. The case arose out of an involuntary dismissal of a diversity action in a federal court in California because California's two-year statute of limitations barred the claim.²¹³ After the dismissal and hoping to get around the statute of limitations issue, the plaintiff refiled the same action in a federal court in Maryland to benefit from Maryland's three-year statute of limitations.²¹⁴ The issue was whether Rule 41(b) precluded this new filing in Maryland.²¹⁵ Although Rule 41(b) states that unless the trial court orders

²⁰⁸ 531 U.S. 497, 503–04 (2001).

²⁰⁹ *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (rejecting any suggestion “that the Federal Rules of Civil Procedure *are to be narrowly construed in order to avoid a ‘direct collision’ with state law. The Federal Rules should be given their plain meaning.*” (emphases added)); *see also Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4 (1987) (explaining that a federal court should “fairly construe[]” a federal rule).

²¹⁰ In fairness to the reader, that would probably have been a plausible reading of *Semtek*, as just three years before, the Court had read other federal rules narrowly. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845 (1999) (applying “limiting construction” to Fed. R. Civ. P. 23 to avoid “potential conflict with the Rules Enabling Act”); *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997).

²¹¹ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 405–06 & n.7 (2010).

²¹² *Id.*

²¹³ *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 499–500 (2001).

²¹⁴ *Id.*

²¹⁵ *Id.* at 500–01.

otherwise, an involuntary dismissal “operates as an adjudication upon the merits,” the Supreme Court read Rule 41(b) narrowly.²¹⁶ The Court held that Rule 41(b) only barred plaintiff from refileing the case in the original California federal court, but it did not bar refileing in another state with a longer statute of limitations, such as Maryland.²¹⁷

The twin aims of the *Erie* doctrine—discouragement of forum-shopping and avoidance of inequitable administration of the laws—greatly influenced the Court’s decision.²¹⁸ To be clear, the Supreme Court reasoned that if California’s substantive law of claim preclusion permitted the refileing of an action in other jurisdictions after a dismissal, on statute of limitations grounds, in a California court, then a federal court sitting in diversity should follow suit.²¹⁹ Otherwise, for a federal court to reach a different outcome than California’s state courts on this purely state law issue would violate the *Erie* doctrine’s federalism principles.²²⁰ In other words, for a federal court to bar a claim that state law allowed could be an interference with substantive state law rights, which the Rules Enabling Act forbids.²²¹

Thus, the Court ruled that interpreting Rule 41(b) narrowly was necessary to avoid affecting the plaintiff’s substantive rights.²²² In passing, the Court also made clear that “federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.”²²³ But in diversity jurisdiction actions, with no overriding federal interests at issue, forum state law should determine the claim preclusive effect of a Rule 41(b) dismissal.²²⁴

Together, these Supreme Court *Erie* decisions represent the amalgamation of decades long evolving judicial philosophy on the proper balance of competing federal and state legal interests. The federal courts—in diversity jurisdiction cases—have served

²¹⁶ *Semtek*, 531 U.S. at 501–02.

²¹⁷ *Id.* at 506.

²¹⁸ *Id.* at 508–09.

²¹⁹ *Id.* at 504.

²²⁰ *Id.*

²²¹ *Id.* at 503–04 (“[I]f California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court’s extinguishment of that right (through Rule 41(b)’s mandated claim-preclusive effect of its judgment) would seem to violate [the Rules Enabling Act].”).

²²² *Id.* at 503.

²²³ *Id.* at 508.

²²⁴ *Id.* at 509.

as the test lab for these evolving judicial philosophies. From Justice Brandeis' groundbreaking *Erie* decision²²⁵ itself to Justice Frankfurter's outcome determination test in *Guaranty Trust*²²⁶ and Chief Justice Warren's *Hanna* direct collision test,²²⁷ the *Erie* doctrine has evolved time and again. To that list add *Byrd*, which added a federal dimension to the traditionally state-law laser-focused *Erie* analysis: if state law interferes with a countervailing federal interest, like the Seventh Amendment, it must yield.²²⁸ By the time Justice Marshall added his two unanimous opinions in *Walker* and *Woods* in the 1980s, the *Erie* test had evolved even further, leading some to suggest that it could accommodate parallel state law, so long as it could co-exist with a federal rule, without affecting its area of operation.²²⁹

In short, leading into the spring of 2010, the process for determining whether to apply state or federal law was straightforward. If there was a direct collision between a Federal Rule of Civil Procedure and a state law, the Federal Rule would govern as long as it was valid.²³⁰ On the other hand, if there was no direct collision, the state law would govern,²³¹ as long as there were no overriding federal interests that precluded application of state law.²³² But if no federal rule or statute specifically governed the issue, then the *Erie* doctrine required federal courts to apply state law if to refuse to do so would invite forum-shopping and create disparate litigation outcomes in federal and state court.²³³ Things, however, were about to change dramatically during the 2009 Supreme Court Term.

²²⁵ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

²²⁶ *Guar. Tr. Co. v. York*, 326 U.S. 99, 109–12 (1945).

²²⁷ *Hanna v. Plummer*, 380 U.S. 460, 467–70 (1965).

²²⁸ *Byrd v. Blue Ridge Rural Elec. Coop.* 356 U.S. 525, 535–38 (1958).

²²⁹ We highlight this co-existence test injected in the *Erie* framework by *Walker* and *Woods* because, as we later show, some federal appellate courts have relied on those decisions to hold that state anti-SLAPP statutes can co-exist alongside parallel federal procedural law. See, e.g., *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999); see also *Godin v. Schenks*, 629 F.3d 79, 86–87 (1st Cir. 2010).

²³⁰ See *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–8 (1987); *Hanna*, 380 U.S. at 467–70.

²³¹ *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–51 (1980).

²³² See *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (referring to the federal common law); *Gasperini v. Ctr. for Humans, Inc.*, 518 U.S. 415, 435, 437–48 (1996) (Seventh Amendment reexamination clause); *Byrd*, 356 U.S. at 537–39 (Seventh Amendment preservation clause).

²³³ See *Hanna*, 380 U.S. at 468; *Gasperini*, 518 U.S. at 428.

III. SHADY GROVE : AN *ERIE* TURNING POINT

During the 2009 Term, the U.S. Supreme Court decided *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*,²³⁴ a seminal case on the *Erie* rule. *Shady Grove* produced a majority opinion, a plurality, a separate concurrence and a “dissenting opinion.” We address each.

A. *Majority Opinion*

In *Shady Grove*, the Supreme Court addressed a conflict between Fed. R. Civ. P. 23’s permissive class action framework and New York’s more restrictive parallel state law.²³⁵ New York state law precluded class actions for cases that only sought penalties or statutory minimum damages.²³⁶ But under Fed. R. Civ. P. 23, a federal court could entertain and certify those kinds of lawsuits.²³⁷ The question presented was whether, in a diversity jurisdiction case, a federal court should have applied the restrictive state law or Fed. R. Civ. P. 23’s permissive class action rules.²³⁸ To answer the question presented, the Supreme Court outlined a two-pronged test: A federal rule governs when it (1) “answer[s] the same question” as the state law, and (2) it is not “*ultra vires*.”²³⁹ Applying that test, the Court held that the state law was inapplicable in diversity cases.²⁴⁰ On the first prong of its test, the Court held that the state law and Rule 23 answered the same question: under what circumstances may “a class action . . . proceed for a given suit.”²⁴¹ But on the second prong—whether Rule 23 was *ultra vires*—the Court had no majority.

B. *Plurality Opinion*

On the second prong of its analysis focusing on the validity of Rule 23, a Justice Scalia-led-plurality held that Fed. R. Civ. P. 23 was valid.²⁴² Focusing on the command of the Rules Enabling

²³⁴ 559 U.S. 393 (2010).

²³⁵ *Id.* at 396.

²³⁶ *Id.*

²³⁷ *Id.* at 397.

²³⁸ *Id.* at 396.

²³⁹ *Id.* at 399.

²⁴⁰ *Id.* at 399–401.

²⁴¹ *Id.* at 401.

²⁴² *Id.* at 399–400.

Act, the plurality outlined that Congress has undoubted power to supplant state law and prescribe housekeeping rules for the federal courts.²⁴³ As long as those prescribed rules rationally fall within the classification of “procedure,” under longstanding precedent, those rules are valid.²⁴⁴ That is why, the plurality reasoned, that the Court had rejected every challenge to the Federal Rules of Civil Procedure.²⁴⁵ The plurality was fixated with the particular label (whether procedural or substantive) that a given *state law* had; after all, the Rules Enabling Act—the overarching consideration in that analysis—focused on *whether the federal rule* was procedural or substantive.²⁴⁶ In other words, the validity of a federal rule depends on whether it really regulates procedure.²⁴⁷ Based on that understanding, the plurality reasoned that Rule 23 was merely a claim processing rule that did not abridge or alter substantive rights.²⁴⁸ As a result, under longstanding Supreme Court precedents, Rule 23 was within the province of the Rules Enabling Act. Thus, it was valid.²⁴⁹

C. Justice Stevens' Partial Concurring Opinion

Justice Stevens concurred only to the judgment on this second issue: whether Rule 23 was *ultra vires*.²⁵⁰ Although Justice Stevens also eventually agreed that Rule 23 was not *ultra vires*, he did so for different reasons.²⁵¹ Contrary to the plurality that focused on whether Rule 23 was procedural, Justice Stevens instead focused on whether the state law it displaced was really procedural.²⁵² Like the plurality, Justice Stevens also was wary of labels.²⁵³ To him, however, the label alone was not the sole controlling criterion. Instead, if a so-called procedural law was “so bound up with” or “intertwined with” a state law remedy, so that it defines the scope of that remedy, then federal courts are

²⁴³ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 406–07 (2010) (plurality opinion, Part B).

²⁴⁴ *Id.* at 406.

²⁴⁵ *Id.* at 406–08.

²⁴⁶ *Id.* at 410–12.

²⁴⁷ *Id.* at 406–07 (plurality opinion, Part B).

²⁴⁸ *Id.* at 408.

²⁴⁹ *Id.* at 409–10.

²⁵⁰ *Id.* at 416–17 (Stevens, J., concurring in part and concurring in judgment).

²⁵¹ *Id.* at 426–27.

²⁵² *Id.* at 431–32.

²⁵³ *Id.* at 424–26.

not free to ignore such a state rule.²⁵⁴ The challenge, however, and even Justice Stevens acknowledged, was to come up with a functional test that would distinguish between those procedural rules that merely regulated procedure and those that also affected the remedy.²⁵⁵

To this concern, Justice Stevens' opinion tried to formulate a workable test. To begin with, Justice Stevens contended that, under his test, "the bar for finding an Enabling Act problem is a high one."²⁵⁶ Applying that high bar in *Shady Grove*, Justice Stevens concluded that Rule 23 was valid because the state law at issue was a procedural law in the ordinary sense.²⁵⁷ According to Justice Stevens, the law was procedural because it was not a part of state remedies and applied "to claims based on federal law or the law of any other State."²⁵⁸ Thus understood, Justice Stevens contended, it was hard to imagine that state law being one that "defin[ed] New York's rights or remedies."²⁵⁹ The converse of that reasoning being that if a state law was limited in its application to specific claims (rather than any claim generally), then under Justice Stevens' test, it is perhaps part of that specific claim or right.²⁶⁰

D. Justice Ginsburg's "Dissenting" Opinion²⁶¹

Together with three other justices, Justice Ginsburg dissented in *Shady Grove*. From her perspective, the Court had

²⁵⁴ *Id.* at 420–23, 429.

²⁵⁵ *Id.* at 433–34. On this score, the plurality strongly disagreed with Justice Stevens. In the plurality's view, most (if not all) rules that govern procedure also affect the remedy. *See id.* at 412 n.10 (plurality opinion). In the end, the plurality was concerned that the concurrence's test would allow state law to add varied glosses on the federal rules (depending on the geographical source of the rule) simply because the state procedural rule was intertwined with a remedy or state right. *Id.* at 413 n.11.

²⁵⁶ *Id.* at 432 (Stevens, J., concurring in part and concurring in judgment).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 432.

²⁶⁰ *See id.*

²⁶¹ We have placed Justice Ginsburg's dissenting opinion in quotations because, as we later show, at least five justices joined portions of her opinion, arguably making it a majority on some issues. *Id.* at 421 n.5; *see e.g.*, *Borden v. United States*, 141 S. Ct. 1817, 1829 n.6 (2021) (plurality opinion) (aggregating four-justice plurality together with separate concurrence to achieve five-justice majority for reversal); *id.* at 1838 n.3 (Kavanaugh, J., dissenting) (engaging in similar vote aggregating exercise). We address Justice Ginsburg's dissenting opinion more fully later in this section.

radically departed from its previous course where it interpreted the Federal Rules of Civil Procedure with “sensitivity to . . . important state regulatory policies.”²⁶² On this point, Justice Stevens partially agreed with Justice Ginsburg and the three other justices—also making a five-vote majority.²⁶³ Begin with the obvious: under what circumstances should a federal court read a federal rule narrowly? Justice Stevens, agreeing with Justice Ginsburg and three other justices to form a majority, stated that a federal court should avoid reading a federal rule broadly—but with sensitivity to state interests—“if the *text permits*.”²⁶⁴ But when does a text permit? Justice Stevens disagreed with Justice Ginsburg that federal courts should “contort[]” federal rules, as a matter of course, “absent congressional authorization to do so, to accommodate state policy goals.”²⁶⁵ So not as a matter of course. But when? Look again at the Justice Scalia-authored majority opinion, where Justice Stevens supplied the fifth (majority) vote. The answer is that a federal court should read a federal rule “with sensitivity to important state interests” only when dealing with “*an ambiguous Federal Rule* to avoid ‘substantial variations [in outcomes] between state and federal litigation.’”²⁶⁶

In sum, absent ambiguity in a federal rule or specific congressional authorization, a federal court should not contort a *clear* federal rule, as a matter of course.²⁶⁷ Thus, in suggesting a categorical rule of *always* contorting a federal rule to accommodate important state interests, Justice Ginsburg wrote for the dissenters.²⁶⁸

²⁶² *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting).

²⁶³ *Id.*; see *id.* at 421 n.5 (Stevens, J., concurring in part and concurring in judgment).

²⁶⁴ *Id.* at 421 n.5 (Stevens, J., concurring in part and concurring in judgment) (alteration in original) (emphasis added) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38 (1988) (Scalia, J., dissenting)); *id.* at 439 (Ginsburg, J., dissenting) (emphasis added) (quoting *Stewart*, 487 U.S. at 38 (Scalia, J., dissenting)).

²⁶⁵ *Shady Grove*, 559 U.S. at 421 n.5 (Stevens, J., concurring in part and concurring in judgment).

²⁶⁶ *Id.* at 405 n.7 (emphasis added) (quoting *id.* at 442 (Ginsburg, J., dissenting)); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001).

²⁶⁷ See *Shady Grove*, 559 U.S. at 405 n.7.; see also *id.* at 421 n.5 (Stevens, J., concurring in part and concurring in judgment); *id.* at 431 (“Simply because a rule should be read in light of federalism concerns, it does not follow that courts may rewrite the rule.”).

²⁶⁸ See *id.* at 437 (Ginsburg, J., dissenting).

Based on her dissenting view that federal courts should read federal rules narrowly to accommodate important state interests, Justice Ginsberg contended that Rule 23 and state law did not conflict.²⁶⁹ To put it differently, even if a clear federal rule controlled an issue, Justice Ginsburg would have read the federal rule narrowly to accommodate state law.²⁷⁰ Based on that understanding, Justice Ginsburg contended that Rule 23 laid out standards for “enforcing a claim for relief,” while, in contrast, state law merely defined the “dimensions of the claim itself.”²⁷¹ Thus, the two laws targeted different inquiries and could co-exist.²⁷² Justice Ginsburg then applied the traditional *Erie* considerations that seek to guard against dissonance of outcomes in federal and state courts and proscribe forum-shopping.²⁷³

Justice Ginsburg rejected the petitioner’s characterization of the state law as merely procedural.²⁷⁴ In her view, the New York law was the functional equivalent of state damage limitation law.²⁷⁵ Under longstanding *Erie* precedents, damage-limiting aspects of state law apply in diversity jurisdiction cases.²⁷⁶

IV. DIFFERENT SHADES OF GROVE: *SHADY GROVE* IN THE VARIED CIRCUITS

Most courts that have considered *Shady Grove* agree that it was a seminal case in the development of the *Erie* doctrine.²⁷⁷ But those courts cannot seem to agree on is what exactly *Shady Grove* changed.²⁷⁸ Below, we consider how the federal courts of appeals have interpreted *Shady Grove* and how they have applied it especially in relation to anti-SLAPP statutes.

²⁶⁹ *Id.* at 446–47.

²⁷⁰ *See id.* at 438–43.

²⁷¹ *Id.* at 447.

²⁷² *See id.* at 447–50.

²⁷³ *See id.* at 452–53.

²⁷⁴ *See id.* at 456–57.

²⁷⁵ *See id.* at 457.

²⁷⁶ *See id.* at 456–58.

²⁷⁷ *See generally id.* at 397–406; *id.* at 442–43 (Ginsburg, J., dissenting) (noting that *Shady Grove* had departed from longstanding *Erie* precedents). *See also, e.g.*, *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1181 (9th Cir. 2013) (Wardlaw & Callahan, JJ., concurring) (*Shady Grove* “framed the ‘direct collision’ inquiry in a new way” (emphasis added)).

²⁷⁸ *See* Sydney Buckley, *Getting SLAPP Happy: Why the U.S. District Court for the District of Kansas Should Adopt the Ninth Circuit’s Approach When Applying Kansas Anti-SLAPP Law*, 68 U. KAN. L. REV. 791, 803–04 (2020); *see also* Harrison, *supra* note 12, at 1279–80.

A. *The D.C. Circuit, Followed by the Second, Fifth, and Eleventh Circuits All Read Shady Grove to Preclude Most Anti-SLAPP Statutes*

Then-Judge Kavanaugh led the way unpacking *Shady Grove*'s full implications on anti-SLAPP statutes in *Abbas v. Foreign Policy Group*.²⁷⁹ In *Abbas*, the D.C. Circuit confronted the District of Columbia's version of an anti-SLAPP statute in a defamation lawsuit.²⁸⁰ Like many statutes highlighted thus far, the D.C. anti-SLAPP law also provided an early motion to dismiss evaluated based on a trial-like standard, withheld discovery from plaintiff, provided for an immediate appeal if the court denied the dismissal motion, and awarded a prevailing defendant attorney's fees and costs.²⁸¹ The question for the D.C. Circuit was whether this state statute—as written—conflicted with Federal Rules of Civil Procedure 12 and 56.²⁸²

The D.C. Circuit concluded that under the majority opinion in *Shady Grove*, the state anti-SLAPP statute was inapplicable in federal court.²⁸³ The appellate court noted first that *Shady Grove* had reframed the *Erie* analysis: a federal court should disregard a state procedural law if it (1) “answer[s] the same question” as a Federal Rule of Civil Procedure; and (2) the federal rule is not ultra vires of the Rules Enabling Act.²⁸⁴ To determine whether the two laws answered the same question, the D.C. Circuit construed Federal Rules 12 and 56 as setting standards for when a federal court “must dismiss a case before trial.”²⁸⁵ The critical point for the appellate court was that the D.C. anti-SLAPP statute imposed a likelihood of success standard, different from Rule 12's lesser requirement for a plaintiff to plead plausible facts and Rule 56's disputed material factual questions standards.²⁸⁶ Under either federal rule, a plaintiff who satisfied

²⁷⁹ *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1331–32 (D.C. Cir. 2015).

²⁸⁰ *Id.*

²⁸¹ D.C. CODE ANN. § 16-5502(b) (West 2001) (providing for special motion to dismiss); *id.* § 16-5502(c) (discovery stayed during pendency of special motion to dismiss); *id.* § 16-5504(a) (costs of litigation including attorney's fees for prevailing party).

²⁸² *Abbas*, 783 F.3d at 1333–35.

²⁸³ *Id.* at 1334.

²⁸⁴ *Id.* at 1333 (alteration in original) (quoting *Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393, 398–99 (2010)).

²⁸⁵ *Id.* at 1333–34.

²⁸⁶ *Id.*

those minimal standards could proceed to a trial.²⁸⁷ Not so with the anti-SLAPP statute, and thus the anti-SLAPP statute was inapplicable.²⁸⁸ Because the anti-SLAPP statute was inapplicable, so were its attendant attorney's fees, costs, and sanctions provisions.²⁸⁹

Taking its cue from the D.C. Circuit, the Eleventh Circuit held in *Carbone v. Cable News Network, Inc.*, that *Shady Grove* precludes Georgia's anti-SLAPP statute in federal court.²⁹⁰ In *Carbone*, another defamation case, the Eleventh Circuit had to consider whether Georgia's anti-SLAPP motion to strike could apply in a diversity jurisdiction case.²⁹¹ The Plaintiff sued CNN claiming that it had published defamatory stories against him.²⁹² In response, CNN moved to strike the complaint under the Georgia anti-SLAPP statute and, alternatively, to dismiss it based on Fed. R. Civ. P. 12(b)(6).²⁹³ The district court denied the state anti-SLAPP motion, holding that it conflicted with Rule 12(b)(6).²⁹⁴ The court then denied the Rule 12(b)(6) motion because the complaint was factually sufficient.²⁹⁵ CNN filed an interlocutory appeal relying on the state anti-SLAPP statute.²⁹⁶ The Eleventh Circuit affirmed.²⁹⁷ The appellate court held that the Georgia anti-SLAPP motion to strike conflicted with Fed. R. Civ. P. 8, 12, and 56.²⁹⁸ Applying *Shady Grove*, the Eleventh Circuit held that, between them, Rule 8, 12, and 56 set out the terms under which a federal court should dismiss a case pretrial.²⁹⁹ Because the anti-SLAPP statute sought to answer the same question as Rules 12 and 56—*i.e.*, when a federal court should dismiss a case pretrial—it conflicted with the Federal Rules of Civil Procedure.³⁰⁰ The Eleventh Circuit also held that the anti-SLAPP statute's evaluative standards conflicted with

²⁸⁷ *Id.* at 1334.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1337 n.5.

²⁹⁰ *Carbone v. Cable News Network*, 910 F.3d 1345, 1356–57 (11th Cir. 2018).

²⁹¹ *Id.* at 1349.

²⁹² *Id.* at 1347.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 1348.

²⁹⁶ *Id.* at 1347.

²⁹⁷ *Id.* at 1347.

²⁹⁸ *Id.* at 1349–50.

²⁹⁹ *Id.* at 1351–53.

³⁰⁰ *Id.* at 1350.

those of the federal rules.³⁰¹ To be clear, the combined effect of Rule 8 and 12(b)(6) is that a federal court should not dismiss a complaint when it states plausible facts.³⁰² But with the anti-SLAPP statute, allegations alone are not enough to avoid dismissal: the non-movant must establish a trial-like standard *prima facie* case *at the pleading stage*, without discovery.³⁰³

Finally, the Eleventh Circuit also found that the anti-SLAPP statute was not like a traditional Rule 56 summary judgment. Under a traditional Rule 56 summary judgment, the existence of disputed factual questions on favorable law is enough to secure a trial.³⁰⁴ Not with the anti-SLAPP statute—the existence of disputed factual questions is the beginning and not the end of the analysis, and only evidence of a *prima facie* case will suffice.³⁰⁵ The Eleventh Circuit found this framework incompatible with the federal rules.³⁰⁶

Applying the *Shady Grove* majority framework, the Fifth Circuit also held in *Klocke v. Watson* that the TCPA—the Texas anti-SLAPP statute—was inapplicable in federal court.³⁰⁷ Like the D.C. Circuit and Eleventh Circuit before it, the Fifth Circuit also applied the *Shady Grove* majority framework—*i.e.*, does the state law answer the same question as the Federal Rules of Civil Procedure?³⁰⁸ Adding its own spin to the test, the Fifth Circuit framed the issue this way: Does the TCPA answer the same question as the federal rules, that is, does it also lay out when a federal court should dismiss a case pretrial?³⁰⁹ The Fifth Circuit held that the two laws answered the same question of when a federal court should dismiss a case pretrial.³¹⁰ With the benefit of that answer, the appellate court then considered whether the Federal Rules of Civil Procedure 12 and 56 were valid exercises of delegated congressional power.³¹¹

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 1350–51.

³⁰⁴ *Id.* at 1351–52.

³⁰⁵ *Id.* at 1351.

³⁰⁶ *Id.* at 1351–52.

³⁰⁷ 936 F.3d 240, 245 (5th Cir. 2019).

³⁰⁸ *Id.* at 244–49.

³⁰⁹ *Id.* at 245.

³¹⁰ *Id.*

³¹¹ *Id.* at 247–48.

The Fifth Circuit ultimately upheld the validity of those Federal Rules of Civil Procedure.³¹² *First*, it applied the *Burlington Northern Railroad Co. v. Woods* presumption of constitutional validity of the federal rules.³¹³ *Second*, the Fifth Circuit, following the D.C. Circuit's lead, applied *Sibbach v. Wilson & Co.*'s principle that states that rules that only govern "the process of enforcing litigants' rights and not the rights themselves."³¹⁴ Finally, because the anti-SLAPP law was inapplicable, so were its attendant attorney's fees, costs, and sanctions provisions.³¹⁵

The Second Circuit also held in *La Liberte v. Reid*³¹⁶ that California's anti-SLAPP statute is inapplicable in federal court.³¹⁷ In *La Liberte*, plaintiff sued a tv news personality for defamation on social media.³¹⁸ Plaintiff had spoken at a city council meeting in opposition to California's immigration sanctuary-state law.³¹⁹ Following the city council meeting, an activist posted a picture online of plaintiff with an open mouth standing next to a minority teenager.³²⁰ Defendant Reid retweeted the photo *at least* twice: on one occasion, she attributed racist remarks to plaintiff.³²¹ On another occasion, defendant juxtaposed plaintiff's photo with that of a 1957 photo of a white woman "screaming execrations at a Black child trying to go to school."³²² Plaintiff alleged that defendant defamed her and sued in the U.S. Eastern District of New York.³²³

Defendant moved to dismiss. Defendant filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss, as well as an anti-SLAPP motion to strike based on California law.³²⁴ The district court dismissed

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 248.

³¹⁵ *Id.* at 247 n.6.

³¹⁶ 966 F.3d 79 (2d Cir. 2020).

³¹⁷ *Id.* at 88.

³¹⁸ *Id.* at 83.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at 85. Federal diversity courts in New York apply New York conflict of laws rules to defamation claims. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) ("The conflict of laws rules to be applied by the federal court in [a diversity of citizenship case] must conform to those prevailing in [the] state courts [where the federal court sits]."). New York's conflict of laws rules provide that, for

the complaint and struck it also under the California anti-SLAPP statute. The district court then awarded attorney's fees and sanctions. Plaintiff appealed to the Second Circuit.³²⁵

The Second Circuit reversed. The appellate court held that the California anti-SLAPP statute was inapplicable in federal court because it conflicted with the Federal Rules of Civil Procedure 12 and 56.³²⁶ Following the lead of its sister-circuits, the Second Circuit applied *Shady Grove's* controlling test: whether the anti-SLAPP statute's pretrial dismissal provisions answer the same question as the Federal Rules of Civil Procedure.³²⁷ The court held that they did.³²⁸ Thus, under *Shady Grove*, there was a conflict.³²⁹ The court began its analysis with noting that the California courts had construed the anti-SLAPP statute as being no more than a procedural device to ferret out meritless claims.³³⁰ Then, the appellate court considered its sister-circuit rulings, some for and some against applying anti-SLAPP statutes.³³¹ But in looking at the Supreme Court's controlling *Erie* test—i.e., *Shady Grove's* answer-the-same-question test—the Second Circuit sided with the D.C., Fifth, and Eleventh Circuits.³³²

In the Second Circuit's view, the anti-SLAPP statute gives a different answer from the Federal Rules of Civil Procedure on when a federal court should dismiss a case pretrial. Beginning with Fed. R. Civ. P. 12(b)(6) and Supreme Court precedent, the Second Circuit reasoned that when a complaint pleads plausible facts showing that the pleader is entitled to relief, that is enough to survive a dismissal.³³³ There is no probability standard.³³⁴

multistate defamation cases where a defamatory tweet posted on the world-wide internet is a multi-state tort, the plaintiff's domicile is controlling for choice-of-law purposes. See *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 545 (2d Cir. 1999); accord RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 (AM. L. INST. 1971). Thus, for a California plaintiff like *La Liberte* suing based on a multi-state defamatory tweet, the law of her domicile is controlling and would govern in federal court. See *Lee*, 166 F.3d at 545.

³²⁵ *La Liberte*, 966 F.3d at 83.

³²⁶ *Id.* at 87–88.

³²⁷ *Id.* at 87.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 85.

³³¹ *Id.* at 86–87.

³³² *Id.* at 87–88.

³³³ *Id.* at 88–89.

³³⁴ *Id.* at 87.

Yet, the anti-SLAPP statute in contrast requires that a complaint meet its requirements or face dismissal and gauges compliance using a probability standard.³³⁵ Moreover, unlike Fed. R. Civ. P. 56, which guarantees a non-movant a trial when there are material factual disputes and the possibility of prevailing on the merits, the anti-SLAPP statute, in contrast, imposes a different standard.³³⁶ That statute requires a non-movant to show that she would *likely* (not possibly) succeed at trial.³³⁷ Thus, the two laws answered the same question differently. Under *Shady Grove*, as the two laws conflicted, the federal rules controlled.³³⁸

The Second Circuit also held that the Federal Rules of Civil Procedure were valid.³³⁹ In that court's view, although the Supreme Court had time and again upheld the validity of the federal rules, it had no problem conducting an independent analysis.³⁴⁰ The court held that the anti-SLAPP provisions were procedural because they only regulated the procedure for vindicating litigants' rights.³⁴¹ Thus, under longstanding Supreme Court precedent, those laws were procedural—i.e., the proper domain of the Federal Rules of Civil Procedure.³⁴² As a result, the Federal Rules of Civil Procedure did not abrogate substantive laws.³⁴³ Finally, because the anti-SLAPP statute was inapplicable in federal court, its attendant attorneys' fees and costs could not apply because they hinge on a court granting a dismissal motion using the anti-SLAPP provisions.³⁴⁴

B. The Tenth Circuit's Evolving Understanding of Shady Grove and the Resulting Complexity

The Tenth Circuit has—like many of its sister circuits—also held that New Mexico's anti-SLAPP statute is inapplicable in federal court.³⁴⁵ Although the Tenth Circuit adheres to the

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.* at 88.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 87.

³⁴⁴ *Id.* at 88–89.

³⁴⁵ *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018).

majority position, it takes a different route to get there.³⁴⁶ Rather than applying the majority opinion in *Shady Grove*, the Tenth Circuit instead applies Justice Stevens' concurrence as the controlling opinion.³⁴⁷ That view—that treats a separate concurrence as controlling in place of a majority opinion³⁴⁸—represents an inapt reading of *Shady Grove*. And even under the *Marks v. United States* framework,³⁴⁹ which treats the narrowest concurring opinion as controlling when the Supreme Court is fragmented,³⁵⁰ Justice Stevens' opinion does not represent the narrowest holding in *Shady Grove*.

This section begins with looking at the Tenth Circuit's evolving understanding of *Shady Grove* and then considering whether the Tenth Circuit is correct in holding that Justice Stevens' separate concurrence in *Shady Grove* is controlling. Finally, we consider how the Tenth Circuit has so far resolved anti-SLAPP questions.

1. The Tenth Circuit's Evolving Understanding of *Shady Grove*

In life, as in law, asking the wrong question almost always leads to the wrong conclusion.³⁵¹ That has proven true with the Tenth Circuit's interpretation of *Shady Grove*. Begin with the obvious question: does *Shady Grove* not have a majority opinion?³⁵² In *Garman v. Campbell County School District No. 1*,³⁵³ the Tenth Circuit's first precedential opinion interpreting *Shady Grove*, the court determined that *Shady Grove* had no majority opinion.³⁵⁴ Instead, the Tenth Circuit concluded *Shady Grove* only had a plurality opinion, followed by a concurrence.³⁵⁵ That, in turn, led the court to ask itself (in cursory fashion) what

³⁴⁶ *Id.* at 668.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ 430 U.S. 188, 193–94 (1977).

³⁵⁰ *Id.* at 193.

³⁵¹ *See generally* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 140 S. Ct. 2082, 2090 (2020) (Breyer, J., dissenting) (“The Court, in my view, asks the wrong question and gives the wrong answer.”).

³⁵² That would seem the most natural place to start because, after all, concurrences and dissents have no legal force in the wake of a controlling majority opinion. *See, e.g.*, Georgia v. Public.Resource.Org., 140 S. Ct. 1498, 1511 (2020) (explaining that, generally, “concurrences and dissents . . . carry no legal force”).

³⁵³ *See generally* 630 F.3d 977 (10th Cir. 2010).

³⁵⁴ *Id.* at 983 n.6 (noting only plurality and concurrence).

³⁵⁵ *Id.*

was the narrowest concurring opinion under the *Marks* rule, which would represent the controlling opinion.³⁵⁶ On closer inspection, however, the Tenth Circuit short-changed *Shady Grove*, which, as noted, generated a controlling majority opinion, a plurality, a concurrence, and another 5-justice majority from Justice Ginsburg's dissent.³⁵⁷ Asking the wrong question led the Tenth Circuit to the wrong answer: that Justice Stevens' concurrence is controlling.³⁵⁸

From then on, the Tenth Circuit has merely perpetuated the error. In a shining example of the rule that one panel cannot overrule another, even in the face of obvious error,³⁵⁹ the Tenth Circuit confirmed in *James River Insurance v. Rapid Funding LLC*,³⁶⁰ that Justice Stevens' *Shady Grove* concurrence was the controlling rule in the circuit.³⁶¹

But there are signs that the Tenth Circuit has retreated from its near unquestioned embrace of Justice Stevens' concurrence. Beginning with *Racher v. Westlake Nursing Home Ltd.*,³⁶² a case about state law damage caps under Oklahoma law, the Tenth Circuit held that the Supreme Court's decision in *Shady Grove* is the controlling *Erie* analysis.³⁶³ But by referring to *Shady Grove*, it was unclear whether the Tenth Circuit was referencing the majority, plurality opinion, or Justice Stevens' concurrence. The next case, *Barnett v. Hall, Estill, Hardwick, Gable, Golden, Nelson, P.C.*,³⁶⁴ cleared away some of that uncertainty.³⁶⁵ The Tenth Circuit acknowledged, for the first time in a precedential opinion, that *Shady Grove* had a majority

³⁵⁶ *Id.* We note that the Tenth Circuit gave thrift attention to the *Marks* rule and its attendant analysis. *See id.* That rule counsels courts to look to the concurring opinion that concurred on the narrowest grounds. *See, e.g., id.* Was Justice Stevens' opinion concurring on the narrowest ground? The Tenth Circuit, as we note, has never issued a meaningful analysis to that question. Because that question is critical to the applicability of anti-SLAPP statutes, we will tackle that issue *infra*. *See* discussion *infra* Section IV.B.2.

³⁵⁷ *See* *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 395, 396–406 (2010); *id.* at 406–16 (Scalia, J., plurality opinion); *id.* at 416–36 (Stevens, J., concurring); *id.* at 436–59 (Ginsburg, J., dissenting).

³⁵⁸ *See Garman*, 630 F.3d at 983 n.6.

³⁵⁹ *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

³⁶⁰ *See generally* 658 F.3d 1207 (10th Cir. 2011).

³⁶¹ *Id.* at 1217.

³⁶² 871 F.3d 1152 (10th Cir. 2017).

³⁶³ *Id.* at 1162.

³⁶⁴ 956 F.3d 1228 (10th Cir. 2020).

³⁶⁵ *Id.* at 1237.

opinion, joined by Justice Stevens, that held that “a valid Federal Rule prevails over state law if the Federal Rule ‘answers the same question as the state law or rule.’”³⁶⁶

The Tenth Circuit’s most notable acceptance of *Shady Grove*’s majority opinion came in *Stender v. Archstone-Smith Operating Trust*.³⁶⁷ In *Stender*, the appellate court had to decide whether Colorado’s costs statute—which was broader than what Fed. R. Civ. P. 54 allows—applied in federal court.³⁶⁸ After noting the limited nature of Fed. R. Civ. P. 54—the federal costs rule—the appellate court turned to the ultimate question: whether the state law applied in federal court.³⁶⁹ The court held that it did not.³⁷⁰ In reaching this conclusion, the Tenth Circuit applied *Shady Grove*’s majority opinion,³⁷¹ and in the process acknowledged that *Shady Grove* contained a controlling majority opinion, as well as a plurality, and a concurrence.³⁷²

In the end, the court applied both the majority opinion and Justice Stevens’ concurrence. Turning first to the majority opinion, the Tenth Circuit considered whether both Rule 54 and Colorado’s costs provision answered the same question.³⁷³ The court had no difficulty holding that the two laws did answer the same question about a prevailing party’s permissible recoverable costs.³⁷⁴ The court held that the two laws answered the same question differently: federal law allowed fewer items as costs, while Colorado law permitted more.³⁷⁵ Thus, under *Shady Grove*’s majority opinion, the state law was inapplicable.³⁷⁶

But the court also applied Justice Stevens’ concurrence because, as noted, Tenth Circuit precedent holds that separate opinion controlling.³⁷⁷ In *Stender*, however, the Tenth Circuit found that both the *Shady Grove* majority and concurrence led to the same conclusion: that the state costs statute was

³⁶⁶ *Id.*

³⁶⁷ 958 F.3d 938, 940 (10th Cir. 2020).

³⁶⁸ *Id.* at 940–42.

³⁶⁹ *Id.* at 941–43.

³⁷⁰ *Id.* at 945.

³⁷¹ *Id.* at 945–46.

³⁷² *Id.* at 943.

³⁷³ *Id.* at 945–46.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 946–47.

inapplicable.³⁷⁸ To begin with, the court noted that nothing about the state costs statute showed that it was a part of Colorado’s “judgment about the scope of state-created rights or remedies.”³⁷⁹ In fact, the cost statute was of general application and applied to all claims, even those based on federal law.³⁸⁰ In *Shady Grove*, Justice Stevens’ concurrence stated that generally applicable state laws do not reflect a judgment about the scope of a given remedy.³⁸¹ The Tenth Circuit, however, suggested in dicta that the result “might” have been different under Justice Stevens’ concurrence if the state law only targeted specific areas of law.³⁸² But the court declined to determine whether Justice Stevens concurred on the narrowest grounds.³⁸³

2. Is Justice Stevens’ Concurrence in *Shady Grove* the Controlling Opinion?

The Tenth Circuit has held that Justice Stevens’ partial concurrence in *Shady Grove* is controlling.³⁸⁴ Is that correct? We contend that it is not. That question has added importance now because the Tenth Circuit has embraced both the *Shady Grove* majority and Justice Stevens’ concurrence, which in a given situation (especially because of the different iterations of anti-SLAPPs statutes that exist³⁸⁵), could lead to different outcomes.³⁸⁶

Under the *Marks* rule, if a splintered Supreme Court decides an issue without amassing five majority votes, the controlling opinion is that of the “[m]embers who concurred in the judgments on the narrowest grounds.”³⁸⁷ The most straightforward

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 947.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 946–47 (citing *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 423, 432 (2010) (Stevens, J., concurring)).

³⁸² *Id.* at 947.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ See *Metabolic Rsch., Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012) (“[D]eeper inspection has persuaded us that, while all of the [anti-SLAPP] statutes have common elements, there are significant differences as well, so that each state’s statutory scheme must be evaluated separately.”).

³⁸⁶ See, e.g., *La Liberte v. Reid*, 966 F.3d 79, 86 n.3 (2d Cir. 2020) (collecting cases and showing different outcomes reached, in part, because the anti-SLAPP statutes at issue were different with distinct effects); see generally *Stender*, 958 F.3d at 945–47.

³⁸⁷ *Marks v. United States*, 430 U.S. 188, 193 (1977) (citations omitted).

applications of the *Marks* rule are when a concurring opinion is a logical subset of a broader plurality opinion.³⁸⁸ But what then is the rule when the Court splinters into a 4-1-4 split? In other words, what is the controlling rule when a concurrence goes beyond the scope of the plurality—in that it embraces a broader view than the plurality of the Court—and also the dissent? On this score, “*Marks* is problematic.”³⁸⁹ That is because to apply the *Marks* rule in that situation would give a single opinion—that does not even enjoy majority approval—unmerited precedential prominence.³⁹⁰ Even the Tenth Circuit does not apply the *Marks* rule when the “plurality and concurring opinions take distinct approaches” and, in reality, the opinions supporting the judgment “are mutually exclusive.”³⁹¹

It is clear that *Shady Grove* must be subject to a complex *Marks* rule analysis. In *Shady Grove*, Justice Stevens joined the plurality, forming a majority, in holding that when a state rule answers the same question as a federal rule, state law must yield if the federal law is valid.³⁹² But Justice Stevens split with the plurality on whether Federal Rule 23 was valid and consistent with the Rules Enabling Act.³⁹³

On the second prong of the analysis, Justice Stevens sought to limit the reach of the Court’s decision in *Sibbach v. Wilson*.³⁹⁴ *Sibbach* held that, under the Rules Enabling Act, those federal rules that regulated procedure in diversity jurisdiction cases are valid.³⁹⁵ In *Shady Grove*, however, Justice Stevens sought to qualify *Sibbach* whenever a federal rule affected the substantive aspects of a state law, and in doing so, created a disparity in outcomes between state and federal courts.³⁹⁶ The plurality strongly disagreed with Justice Stevens on this point; it refused to accept Justice Stevens’ intended course because it would have

³⁸⁸ *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006).

³⁸⁹ *King*, 950 F.2d at 781–82.

³⁹⁰ *Id.*

³⁹¹ *Carrizales-Toledo*, 454 F.3d at 1151.

³⁹² *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 418 (2010) (Stevens, J., concurring).

³⁹³ *Id.* at 432.

³⁹⁴ *Id.* at 427–28; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

³⁹⁵ *Sibbach*, 312 U.S. at 14.

³⁹⁶ *Shady Grove*, 559 U.S. at 427–28 (Stevens, J., concurring in part and concurring in judgment).

effectively rolled back *Sibbach*.³⁹⁷ Understood in that sense, Justice Stevens' approach went further than the plurality in that it would have effectively overruled, in part, or qualified a governing *Erie* precedent.³⁹⁸

Under these circumstances, Justice Stevens' concurrence does not represent controlling law under the *Marks* rule. As Justice Stevens' concurrence does not represent the middle ground of the dissent, which did not address the issue, and the plurality, which held that Justice Stevens went further than it did in seeking to qualify controlling precedent, *Marks* does not make Justice Stevens' separate opinion controlling law.³⁹⁹ Indeed, even Tenth Circuit precedent would seem to suggest that, under these circumstances, Justice Stevens' concurrence should not become controlling law.⁴⁰⁰ Writing extra-judicially, a slate of prominent federal judges—including then-Judges Gorsuch and Kavanaugh and Tenth Circuit Judge Hartz—have also agreed that Justice Stevens' separate concurrence in *Shady Grove* is not controlling law.⁴⁰¹

3. The Tenth Circuit's Take on Anti-SLAPPs: New Mexico's Anti-SLAPP Law

The Tenth Circuit has fully addressed anti-SLAPP statutes only once in a published opinion. In *Los Lobos Renewable Power, LLC v. Americulture, Inc.*,⁴⁰² the Tenth Circuit examined whether the New Mexico anti-SLAPP statute applied in federal court in diversity jurisdiction cases.⁴⁰³ Before addressing that issue, the Tenth Circuit considered whether it had jurisdiction to entertain an interlocutory appeal from an order denying the anti-SLAPP motion.⁴⁰⁴ The court ruled that it had jurisdiction under the

³⁹⁷ *Id.* at 412 (plurality opinion).

³⁹⁸ *Id.*

³⁹⁹ *See Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1336–37 (D.C. Cir. 2015).

⁴⁰⁰ *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (Tenth Circuit does not apply the *Marks* rule when the “plurality and concurring opinions take distinct approaches”).

⁴⁰¹ *See* BRYAN A. GARNER, NEIL M. GORSUCH & BRETT M. KAVANAUGH ET AL., *THE LAW OF JUDICIAL PRECEDENT* 586 (2016) (then-Judge Kavanaugh was correct that Justice Stevens's separate opinion in *Shady Grove* did not overrule *Sabbach*).

⁴⁰² 885 F.3d 659 (10th Cir. 2018).

⁴⁰³ *Id.* at 668.

⁴⁰⁴ *Id.* at 664.

collateral order doctrine.⁴⁰⁵ In the appellate court's view, the district court's order declining to apply the anti-SLAPP statute satisfied all the requirements for the collateral order doctrine.⁴⁰⁶ The district court's refusal to apply the statute was final: the court was not going to revisit the issue.⁴⁰⁷ The question—whether the anti-SLAPP statute applied in federal court—was distinct from the merits of the case.⁴⁰⁸ Finally, because the anti-SLAPP statute's stated purpose was to expedite the dismissal of baseless litigation, a post-litigation remedy would have been inadequate to accomplish the law's goal.⁴⁰⁹ Only an immediate collateral appeal would suffice.⁴¹⁰

Next the Tenth Circuit held that the anti-SLAPP statute did not apply in federal court.⁴¹¹ The court applied the longstanding *Erie* rule: federal courts apply state substantive rules but not state procedural law.⁴¹² Emphasizing the clear wording of the state statute, the court found that the law merely provided expedited procedures for dismissing baseless lawsuits.⁴¹³ The law did not affect the remedy.⁴¹⁴ The New Mexico Supreme Court had also read the statute that way.⁴¹⁵ Finally, turning to the attorney's fees and costs provision, the Tenth Circuit took a different path from other circuits. Building on its conclusion that the anti-SLAPP statute was procedural, the court viewed the anti-SLAPP statute's attorney's fees and costs provisions (against both plaintiffs and defendants) through the same lens.⁴¹⁶ Since the costs and attorney's fees provisions were in the "sanctions" portion of the statute, the court held that they targeted defendants who filed frivolous motions.⁴¹⁷ Given this context, the Tenth Circuit reasoned, there was no reason to read the other fee

⁴⁰⁵ *Id.* at 668.

⁴⁰⁶ *Id.* at 664–65, 668.

⁴⁰⁷ *Id.* at 666–68.

⁴⁰⁸ *Id.* at 665–66.

⁴⁰⁹ *Id.* at 667, 669, 671–72.

⁴¹⁰ *Id.* at 664–68.

⁴¹¹ *Id.* at 673.

⁴¹² *Id.* at 668.

⁴¹³ *Id.* at 668–69.

⁴¹⁴ *Id.* at 673.

⁴¹⁵ *Id.* at 669–70.

⁴¹⁶ *Id.* at 670–71.

⁴¹⁷ *Id.*

provision that awarded attorney's fees and costs against plaintiffs differently.⁴¹⁸

C. *The First and Ninth Circuits Uphold Anti-SLAPPs and a Significant Number of Ninth Circuit Judges Read Shady Grove Narrowly*

The Ninth Circuit led the way in holding that anti-SLAPP statutes apply in federal court.⁴¹⁹ While acknowledging that the California anti-SLAPP statute—like Federal Rules 12 and 56—also provides streamlined procedures for pretrial dismissal of a case, the court, though, applied the Supreme Court's opinion in *Walker*⁴²⁰ and held that the two sets of laws could co-exist because they operated in separate spheres.⁴²¹ The Ninth Circuit has since taken this co-existence logic further, holding that under the collateral order doctrine, it could entertain interlocutory appeals on anti-SLAPP appeals.⁴²² The First Circuit has adopted that reasoning.⁴²³

Even though the Ninth Circuit had, at first, applied the California anti-SLAPP's provisions that precluded discovery, the court eventually did an about-face.⁴²⁴ The court found that to apply those procedures would conflict with Federal Rule 56.⁴²⁵ Generally, Rule 56 contemplates that a non-movant may have to respond to an evidence based dispositive motion only after having a chance to discover responsive evidence from the movant.⁴²⁶

Noting concerns about the reach of anti-SLAPP statutes, the Ninth Circuit has substantially revised its anti-SLAPP jurisprudence on dispositive motions.⁴²⁷ The Ninth Circuit distinguished between two kinds of anti-SLAPP motions: (1) those non-evidentiary motions that only challenge the

⁴¹⁸ *Id.* at 671.

⁴¹⁹ *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999).

⁴²⁰ *Walker v. Armco Steel Corp.*, 446 U.S. 740, 741, 744 (1980).

⁴²¹ *Newsham*, 190 F.3d at 972.

⁴²² *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 831 (9th Cir. 2018).

⁴²³ *See Godin v. Schencks*, 629 F.3d 79, 86–91 (1st Cir. 2010).

⁴²⁴ *Planned Parenthood*, 890 F.3d at 834.

⁴²⁵ *Id.*

⁴²⁶ *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“[T]he plain language of [Fed. R. Civ. P.] Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery . . .”).

⁴²⁷ *Planned Parenthood*, 890 F.3d at 834.

allegations in a complaint; and (2) evidentiary motions that seek dismissal.⁴²⁸ The Ninth Circuit held that a federal court should apply the same standards as Federal Rule 12 for motions that challenge the sufficiency of allegations in a complaint,⁴²⁹ but if a movant presents an evidence-based motion, the Federal Rule 56 standards apply, and discovery must be allowed so that the responding party has a chance to supplement its evidence before the trial court rules on the motion.⁴³⁰

V. SHOULD ANTI-SLAPP STATUTES APPLY IN FEDERAL COURT IN DIVERSITY JURISDICTION CASES? CRITIQUING THE NINTH AND TENTH CIRCUITS' PERMISSIVE ANTI-SLAPP LAW VIEWS

As noted, the Ninth Circuit has interpreted the California anti-SLAPP statute's clear terms to function like a summary judgment depending on whether a motion to strike under the statute challenges either the legal or factual sufficiency of a claim.⁴³¹ The Ninth Circuit has also taken upon itself—rather than following the rulings of the California state courts—to interpret the California anti-SLAPP statute to mirror the standards for Federal Rules 12 and 56.⁴³² And yet, the Supreme Court in *Shady Grove* made it clear that rules that govern summary judgments and pleadings are “ostensibly procedural.”⁴³³ In diversity jurisdiction cases, federal courts apply federal procedural rules and state substantive law.⁴³⁴ And when the Federal Rules of Civil Procedure answer the same question as the state law—as Rule 12 and 56 do about pretrial dismissal of civil cases—the Federal Rules control.⁴³⁵ Thus, as both the anti-SLAPPs and Federal Rules 12 and 56 target the same ends, in the same way, the Federal Rule should control.

The Tenth Circuit has, in similar vein, suggested in *Barnett v. Hall* that *if a state law mirrors the functionality and scope of a Federal Rule of Civil Procedure, then perhaps the state law could*

⁴²⁸ *Id.* at 833–34.

⁴²⁹ *Id.* at 834.

⁴³⁰ *Id.*

⁴³¹ *See id.* at 834 (quoting *Z.F. v. Ripon Unified Sch. Dist.*, 482 F. App'x 239, 240 (9th Cir. 2012)).

⁴³² *See id.* at 833–34.

⁴³³ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010).

⁴³⁴ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

⁴³⁵ *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *Shady Grove*, 559 U.S. at 399–401.

apply.⁴³⁶ In making that observation, the Tenth Circuit was addressing the Oklahoma Citizens' Participation Act, Oklahoma's anti-SLAPP statute.⁴³⁷ That statute, courts have held, is functionally identical to the Texas anti-SLAPP statute under consideration here.⁴³⁸ Thus, this article's anti-SLAPP analysis in this section should also have some bearing on the Oklahoma anti-SLAPP law.⁴³⁹

If *Barnett* is anything to go by, both the Ninth and Tenth Circuits have expressed permissive views for anti-SLAPP statutes that mirror the Federal Rules of Civil Procedure.⁴⁴⁰ But the Ninth Circuit has gone further: it has adopted that position and applied anti-SLAPP laws to mirror Federal Rules 12 and 56.⁴⁴¹ We contend that those permissive views are flawed and are foreclosed by Supreme Court precedent.

A. *Common Problems with the Ninth and Tenth Circuit's Anti-SLAPP Law Permissive Views*

Begin with the obvious limitation with the Tenth Circuit's observation in *Barnett*: the panel's off-hand observation was not essential to its holding.⁴⁴² Under established rules on judicial precedent, that view from the panel was simply dicta.⁴⁴³ Dicta is

⁴³⁶ See *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1238 n.4 (2020).

⁴³⁷ *Id.* at 1237–38.

⁴³⁸ *Krimbill v. Talarico*, 417 P.3d 1240, 1244 (Okla. Civ. App. 2017) (“Oklahoma’s Act, which became effective in 2014, mirrors that of the Texas Citizens’ Participation Act . . .”).

⁴³⁹ For the reader interested in a fuller and more specific discussion of the Oklahoma anti-SLAPP statute, we would direct that person elsewhere. See, e.g., Mbilike M. Mwafulirwa, *Second Time’s A Charm: The Oklahoma Citizens’ Participation Act’s Applicability in Federal Court*, 89 OKLA. BAR J. 24 (2018); see also Mbilike M. Mwafulirwa, *Suing on Shifting Sands: The Oklahoma Constitution, Retroactive Legislation and the Scramble for Clarity*, 88 OKLA. BAR J. 935 (2017).

⁴⁴⁰ See *Barnett*, 956 F.3d at 1237–38; *Planned Parenthood Fed. of Am., Inc. v. Cntr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

⁴⁴¹ *Planned Parenthood*, 890 F.3d at 834.

⁴⁴² *Barnett*, 956 F.3d at 1237–39; see also *Merrifield v. Bd. Cnty. Comm’rs*, 654 F.3d 1073, 1084 (10th Cir. 2011) (“It is elementary that an opinion is not binding precedent on an issue it did not address.”).

⁴⁴³ *In re Tuttle*, 291 F.3d 1238, 1242 (10th Cir. 2002) (“[D]icta are ‘statements and comments in an opinion that concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand.’” (citing *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir 1995)).

not binding.⁴⁴⁴ But even if it were not dicta, on deeper inspection, both the Ninth and Tenth Circuit's positions are suspect for three reasons.

First, the Supreme Court in *Shady Grove* already rejected a similar so-called co-existence argument. In her dissent in *Shady Grove*, Justice Ginsburg suggested that Fed. R. Civ. P. 23 and state law could co-exist.⁴⁴⁵ According to that view, Rule 23 only addressed the criteria for determining certification, while state law resolved which claims were eligible for class treatment.⁴⁴⁶ But the *Shady Grove* majority rejected that view.⁴⁴⁷ *Shady Grove* reasoned that the purported distinction was artificial since, at bottom, both laws spoke to when a federal court should certify a case for class treatment.⁴⁴⁸ As both state and federal law answered the same question—class certification—state law was inapplicable.⁴⁴⁹ That rationale applies with equal force to Federal Rules 12 and 56 when compared to parallel anti-SLAPP dismissal procedures. Both laws answer the same question: when a court should dismiss a case pretrial, and they both do so “by winnowing claims and defenses in the course of litigation, just like Rules 12 and 56.”⁴⁵⁰

Second, drawing from preemption principles, there seems no room for state law glosses on the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure 8 through 56 represent an integrated program of rules that govern civil cases in their pretrial posture.⁴⁵¹ Together with the judicial glosses that the Supreme Court has placed on those Federal Rules,⁴⁵² which have become a part of those Rules,⁴⁵³ and as the Tenth Circuit has also recognized, it is “very much debatable”

⁴⁴⁴ *Bates v. Dep't of Corr.*, 81 F.3d 1008, 1011 (10th Cir. 1996) (“[A] panel of this Court . . . is not bound by a prior panel's dicta.” (emphasis omitted)).

⁴⁴⁵ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 446–47 (2010) (Ginsburg, J., dissenting).

⁴⁴⁶ *Id.*

⁴⁴⁷ *Shady Grove*, 559 U.S. at 399–401.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Carbone*, 910 F.3d at 1354 (second emphasis added) (emphasis omitted).

⁴⁵¹ See *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

⁴⁵² See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009) (pleading rules); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–52 (1986) (summary judgments).

⁴⁵³ As soon as the U.S. Supreme Court adopted those authoritative constructions of the scope and mode of operation of the Federal Rules of Civil Procedure, just as any federal law, those constructions became “part of the [legal] scheme” of those rules. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

that the Federal Rules do not “cover all the bases . . . leaving little room” for anything else.⁴⁵⁴ Indeed, the phrase “leaving little room” for anything else is cue for federal law preemption.⁴⁵⁵ The Supreme Court in *Shady Grove* intimated as much, when it framed its *Erie* direct collision/answer-the-same question analyses in terms of federal preemption.⁴⁵⁶

Federal courts recognize three forms of preemption: express, field, and conflict preemption.⁴⁵⁷ Express preemption occurs when Congress enacts specific legislation that withdraws a subject within its legislative competence from states.⁴⁵⁸ Field preemption, on the other hand, arises when federal law occupies a sphere of federal regulatory competence, and there is a reasonable inference that Congress has “left no room” for state law gloss.⁴⁵⁹ That is particularly the case when Congress has determined that a given area within its regulatory competence should be subject to federal rules.⁴⁶⁰ That is also true when the law at issue is validly enacted secondary legislation.⁴⁶¹ Thus, when Congress delegates rulemaking authority in a given area, federal courts then ask whether the resulting secondary law “evidence[s] a desire to occupy [the] field.”⁴⁶² To that end, federal courts consider the degree of pervasiveness of those rules in a given area “or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude . . . state law.’”⁴⁶³

Finally, conflict preemption exists when it is either impossible to comply with both state and federal law or when state law obstructs accomplishment of federal purposes.⁴⁶⁴ Put simply, conflict preemption occurs when state law interferes with

⁴⁵⁴ *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d at 673 n.8.

⁴⁵⁵ *See generally id.*; *see infra* text accompanying note 457.

⁴⁵⁶ *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010).

⁴⁵⁷ *Russo v. Ballard Med. Prods.*, 550 F.3d 1004, 1011 (10th Cir. 2008).

⁴⁵⁸ *Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1129 (10th Cir. 2007).

⁴⁵⁹ *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (citing *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

⁴⁶⁰ *Arizona v. United States*, 567 U.S. 387, 399 (2012).

⁴⁶¹ *See Fid. Fed. Sav. & Loan Ass’n*, 458 U.S. at 153 (holding that in the context of field preemption, “[f]ederal regulations have no less pre-emptive effect than federal statutes.”).

⁴⁶² *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 149 (1986).

⁴⁶³ *Arizona*, 567 U.S. at 399 (first alternation in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁴⁶⁴ *Id.* at 399–400.

federal policies or goals.⁴⁶⁵ The line between field preemption and conflict preemption is a fine one: the Supreme Court has stated that the two analyses often bleed into each other and that “field pre-emption may be understood as a species of conflict pre-emption.”⁴⁶⁶ The “‘purpose of Congress is the ultimate touchstone’ in every pre-emption case.”⁴⁶⁷ As the Supreme Court has stated, when a state law falls within a field where Congress has called for uniform national standards, state law conflicts with federal law.⁴⁶⁸

Third, what *Shady Grove* seemed only to suggest, a recent Supreme Court case appears to confirm: that the Federal Rules of Civil Procedure *preempt their field of operation*.⁴⁶⁹ The Supremacy Clause provides that federal law is the “[S]upreme Law of the Land,”⁴⁷⁰ and Federal Rules of Civil Procedure “have the same status as any other federal law under the Supremacy Clause.”⁴⁷¹ During the 2019 Term, a six-justice majority made clear that the Federal Rules of Civil Procedure are among the class of federal laws that preempt their field of operation.⁴⁷² Perhaps others might dismiss the six-justice majority’s position as mere dicta, but as far as the federal courts of appeal are concerned, that should not make much of a difference because they consider themselves (particularly the Tenth Circuit), “bound by Supreme Court dicta” as much as an actual holding.⁴⁷³ And as *Hanna* recognized, through the Federal Rules of Civil Procedure, Congress and the Supreme Court intended that there should be national uniformity of standards in federal courts on the

⁴⁶⁵ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

⁴⁶⁶ *Eng. v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990).

⁴⁶⁷ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)).

⁴⁶⁸ *Eng.*, 496 U.S. at 79 n.5; *see also Arizona*, 567 U.S. at 399.

⁴⁶⁹ *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1905–06 (2019).

⁴⁷⁰ U.S. CONST. art. VI, cl. 2.

⁴⁷¹ *Gallivan v. United States*, 943 F.3d 291, 295 (6th Cir. 2019).

⁴⁷² *See Va. Uranium, Inc.*, 139 S. Ct. at 1905 (citing *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010)); *accord id.* at 1909 (Ginsburg, Kagan, and Sotomayor, JJ., concurring) (agreeing with lead opinion on that issue).

⁴⁷³ *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (acknowledging the Tenth Circuit is “bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings”); *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (“Supreme Court dicta ‘have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold’; accordingly, we do ‘not blandly shrug them off’ because they were not a holding.” (emphases added)).

applicable procedure.⁴⁷⁴ A motion to dismiss a complaint in federal court in Los Angeles, California, for example, should operate the same way in a federal court in Tulsa, Oklahoma.⁴⁷⁵ Uniformity of interest in applying the Federal Rules is so important that when an applicable procedural rule controls an issue, it displaces a parallel state law on the same subject.⁴⁷⁶ Against that background, and as multiple federal appellate courts have recognized, Federal Rules of Civil Procedure 8, 12, and 56 occupy the field of pretrial dismissal in federal court.⁴⁷⁷

Alternatively, and as the Supreme Court has held, when a state law frustrates uniform federal standards in a given area, field preemption occurs.⁴⁷⁸ To permit state law to add a gloss to the Federal Rules, and in doing so, inject dissonance in the application of federal pretrial dismissal rules, would frustrate Congress's design for uniformity.⁴⁷⁹ When field preemption applies, as it does with Federal Rules of Civil Procedure,⁴⁸⁰ there is no room for parallel state law.⁴⁸¹

*B. Does the Provision for Attorney's Fees That Is Tied to the Anti-SLAPP Motion Alter the Analysis?*⁴⁸²

Attorney's Fees awarded under the anti-SLAPP statutes are procedural for purpose of the *Erie* doctrine.⁴⁸³ There are three

⁴⁷⁴ *Hanna v. Plumer*, 380 U.S. 460, 471–73 (1965).

⁴⁷⁵ *See* FED. R. CIV. P. 12; *see also e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁴⁷⁶ *See Hanna*, 380 U.S. at 471–73.

⁴⁷⁷ *See Klocke v. Watson*, 936 F.3d 240, 247 (5th Cir. 2019); *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015); *La Liberte v. Reid*, 966 F.3d 79, 87 (2d Cir. 2020); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 n.8 (10th Cir. 2018).

⁴⁷⁸ *See Arizona v. United States*, 567 U.S. 387, 399 (2012).

⁴⁷⁹ *See generally Hanna*, 380 U.S. at 471–73.

⁴⁸⁰ *See Va. Uranium, Inc., v. Warren*, 139 S. Ct. 1894, 1905 (2019) (Gorsuch, Kavanaugh, & Thomas, JJ.) (lead opinion) (Federal Rules of Civil Procedure preempt their field of operation); *id.* at 1909 (Ginsburg, Kagan, & Sotomayor, JJ., concurring) (agreeing with lead opinion on that issue). *See also generally Klocke*, 936 F.3d at 247; *Abbas*, 783 F.3d at 1333.

⁴⁸¹ *See Arizona*, 567 U.S. at 399, 401 (explaining that when field preemption applies, “even complementary state regulation is impermissible.”).

⁴⁸² Because, as noted, the Fifth Circuit has held that the Texas anti-SLAPP statute is inapplicable in federal court, we will heavily focus on the California statute in this portion of the analysis that applies (and only discuss the TCPA where necessary).

⁴⁸³ Federal law already governs the award of costs in federal court. *Henkel v. Chicago, St. P., M. & O. Ry. Co.*, 284 U.S. 444, 447 (1932). Federal law also governs

reaosns for this conclusion. *First*, there are two kinds of attorney's fee awards for *Erie* purposes: substantive and procedural fees.⁴⁸⁴ Federal courts apply substantive fees in diversity jurisdiction cases.⁴⁸⁵ "Substantive fees are part and parcel of the *cause of action*" that is being litigated.⁴⁸⁶ A cause of action, in turn, is generally a "legal theory of a lawsuit."⁴⁸⁷ This matters because the California (or even the Texas) anti-SLAPP statute does not tie the attorney's fees award to a *specific legal theory*, like a bad faith claim; instead, it ties the attorney's fees award to the anti-SLAPP *dispositive motion*.⁴⁸⁸ In other words, if a movant prevailed on a defamation cause of action under Federal Rule 12(b)(6), for example, a California or Texas court would not award that party attorney's fees for its success.⁴⁸⁹ As a result, the attorney's fees are not part and parcel of the claim,⁴⁹⁰ but are part of the motion under the anti-SLAPP statute.⁴⁹¹ Thus, the attorney's fees are not substantive for *Erie* purposes—whose fees must be tied to a specific cause of action—to qualify as a substantive part of state law.⁴⁹²

Second, according to courts in Texas and California, the attorney's fees provisions in the TCPA and the Cakifornia anti-SLAPP statute's aim to penalize those who abuse the judicial

the award of sanctions. *See generally* Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (finding federal courts have inherent power to impose attorney fees and expenses as sanctions against a party). That only leaves the attorney's fees up for analysis.

⁴⁸⁴ Scottsdale Ins. Co. v. Tolliver, 636 F.3d 1273, 1279 (10th Cir. 2011).

⁴⁸⁵ *Id.*

⁴⁸⁶ Chieftain Royalty Co. v. Enervest Energy Inst. Fund. XIII-A, LLP, 888 F.3d 455, 460 (10th Cir. 2017) (emphasis added).

⁴⁸⁷ *Cause of Action*, BLACK'S LAW DICTIONARY 275 (11th ed. 2019).

⁴⁸⁸ *See* La Liberte v. Reid, 966 F.3d 79, 88–89 (2d Cir. 2020) (the California anti-SLAPP law "awards attorneys' fees *only* to 'a prevailing defendant *on a special motion to strike*.'"); *see also generally* Klocke v. Watson, 936 F.3d 240, 247 & n.6 (5th Cir. 2019) (the TCPA also only ties attorney's fees to a dispositive motion under the anti-SLAPP statute)

⁴⁸⁹ *See* Century Sur. Co. v. Prince, 782 F. App'x 553, 558 (9th Cir. 2019) (no attorney's fees for non-anti-SLAPP motions); River Oaks L–M Inc. v. Vinton–Duarte, 469 S.W.3d 213, 234 (Tex. App. 2015) ("Attorney's fees are not recoverable on [a] defamation claim."); *see also, e.g.*, Meadows v. Wal-Mart Stores, Inc., 21 P.3d 48, 54 (Okla. 2001) (applying Oklahoma law and declining to award fees in defamation claim).

⁴⁹⁰ *Chieftain*, 888 F.3d at 461 ("[W]hen state law provides for the recovery of an attorney's fee as part of the claim being asserted . . . the federal court should permit an award of a fee." (quoting CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2669 10 (5th ed. 2019)).

⁴⁹¹ *See* CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2021).

⁴⁹² *Chieftain*, 888 F.3d at 460.

system with meritless suit.⁴⁹³ Generally, attorney’s fees that punish litigants for abusive litigation or tactics are procedural for *Erie* purposes.⁴⁹⁴ Even under longstanding U.S. Supreme Court precedent, attorney’s fees that “sanction for conduct which abuses the judicial process” are generally procedural matters.⁴⁹⁵ That is exactly the conduct that the anti-SLAPP targets: it punishes those who file meritless lawsuits solely to silence critics.⁴⁹⁶ In other words, the fees target those who abuse the judicial system.

Third, building on the conclusion that the California and Texas anti-SLAPP statutes’ attorney’s fees target those who abuse the judicial system, then those fees would be inapplicable in federal court on preemption grounds. As noted, field preemption applies to the Federal Rules of Civil Procedure.⁴⁹⁷ The anti-SLAPP fees do not target *a specific cause of action*—instead, the California and Texas Legislatures tied them to a summary judgment-like dispositive motion.⁴⁹⁸ The *Shady Grove*

⁴⁹³ See *Whisenhunt v. Lippincott*, 416 S.W.3d 689, 696 (Tex. App. 2013) (“The TCPA . . . seeks to punish or deter, through the assessment of attorney’s fees and sanctions, those who abuse . . . tort action[s] to silence others.”), *rev’d on other grounds*, 462 S.W.3d 507 (Tex. 2015); *Equilon Enter. v. Consumer Cause, Inc.*, 52 P.3d 685, 691–92 (Cal. 2002) (California anti-SLAPP statute’s attorney’s fee-shifting provisions do not “inappropriately punish plaintiffs” for filing baseless litigation); *Metabolife Int’l, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1221 (S.D. Cal. 2002) (“Thus, to deter such chilling, ‘a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.’” (emphasis omitted) (quoting CAL. CIV. PROC. CODE § 425.16(c))).

⁴⁹⁴ See *Chieftain*, 888 F.3d at 460 (clarifying that for *Erie* purposes, “procedural fees are those that are ‘generally based on a litigant’s bad faith conduct in litigation.’”); see also *Banner Bank v. Smith*, 25 F.4th 782, 790 (10th Cir. 2022) (holding that a statute whose “primary focus is on a claim’s merit and a litigant’s bad faith” is procedural for *Erie* purposes and need not be applied in federal diversity jurisdiction cases).

⁴⁹⁵ See *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 137 S. Ct. 1178, 1186 (2017) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991)); *contrast with Chambers*, 501 U.S. at 52 (explaining that attorney’s fees were substantive when a “state statute mandated that in *actions* to enforce an insurance policy” the prevailing party could recover fees (emphasis added)).

⁴⁹⁶ *E.g.*, *Metabolife*, 213 F. Supp. 2d at 1221 (quoting CAL. CIV. PROC. CODE § 425.16(c)); see also, *e.g.*, *Whisenhunt*, 416 S.W.3d at 696.

⁴⁹⁷ See *Va. Uranium, Inc., v. Warren*, 139 S. Ct. 1894, 1905 (2019) (Gorsuch, Kavanaugh, & Thomas, JJ.) (lead opinion) (Federal Rules of Civil Procedure preempt their field of operation); *id.* at 1909 (Ginsburg, Kagan, & Sotomayor, JJ., concurring) (agreeing with lead opinion on that issue).

⁴⁹⁸ See CAL. CIV. PROC. CODE § 425.16(c)(1); *La Liberté v. Reid*, 966 F.3d 79, 85–87 (2d Cir. 2020); *Klocke v. Watson*, 936 F.3d 240, 247 n.6 (5th Cir. 2019); *cf.* *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1337 n.5 (D.C. Cir. 2015) (stating that

majority opinion was clear that rules on summary judgments and the like are “procedural” for *Erie* purposes.⁴⁹⁹ Understood in that sense, the TCPA motion and the California special motion to strike (and its attendant fees) exist as parallel procedural mechanisms for disposing of meritless civil cases pretrial.⁵⁰⁰ Generally, when the Federal Rules occupy the field and set uniform procedural rules governing pretrial litigation and dismissal in federal court—as Congress did with the existing federal dispositive motion rules—complimentary state laws that inject dissonance must yield.⁵⁰¹ Indeed, the Supreme Court has recognized that a federal court in diversity cases need not apply state attorney’s fees law, if to do so would “run counter to a valid federal statute or rule of court.”⁵⁰²

The Court’s analysis in *Burlington Northern R.R. Co. v. Woods*⁵⁰³ is instructive here. In *Woods*, the Court rejected a parallel state law regime that awarded a prevailing party a categorical ten percent monetary exaction to “penalize” those who filed meritless and abusive appeals.⁵⁰⁴ The Court rejected the state rule because there was already a federal rule—Federal Rule of Appellate Procedure 38—that addressed that issue.⁵⁰⁵ That Federal Rule, in contrast to the state rule, applied on a

anti-SLAPPs generally do “not purport to make attorney’s fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)”.

⁴⁹⁹ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010).

⁵⁰⁰ *See Soukup v. L. Offs. of Herbert Hafif*, 139 P.3d 30, 43 (Cal. 2006) (“*The anti-SLAPP statute is a procedural statute, the purpose of which is to screen out meritless claims.*” (emphasis added)); *In re Lipsky*, 460 S.W.3d 579, 586, 590 (Tex. 2015) (same with Texas anti-SLAPP statute); *see also generally Klocke*, 936 F.3d at 244–49; *La Liberte*, 966 F.3d at 85–88.

⁵⁰¹ *See Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (explaining that Congress enacted the Federal Rules of Civil Procedure to promote an important federal interest—i.e., to ensure uniformity of proceedings in federal court); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5–7 (state law must yield if it affects the mode of operation of a controlling federal rule); *see generally Arizona v. United States*, 567 U.S. 387, 399, 401 (2012) (holding that when field preemption applies, “even complementary state regulation is impermissible”).

⁵⁰² *Alyeska Pipeline Servs. Co. v. Wilderness Soc.*, 421 U.S. 240, 259 n.31 (1975). The Supreme Court later clarified in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) that *Alyeska* only requires federal courts to apply state “fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees.” *Id.* at 34.

⁵⁰³ 480 U.S. 1, 5–7 (1987).

⁵⁰⁴ *Id.* at 4–7.

⁵⁰⁵ *Id.* at 5–8.

“case-by-case” basis.⁵⁰⁶ To have applied the categorical state monetary exaction rule, under those circumstances, would have frustrated Congress’ intended mode of operation of a controlling federal rule.⁵⁰⁷ In addition, superimposing a categorical state monetary exaction on the federal rules would likely have frustrated a countervailing federal interest: the uniform application of a controlling federal rule across the country.⁵⁰⁸ Thus, the state law was inapplicable. In the same way, the anti-SLAPP statutes’ categorical abusive and meritless litigation fee-shifting regime would similarly interfere with Fed. R. Civ. P. 11 and a federal court’s inherent power to punish such conduct on a case-by-case.⁵⁰⁹ Moreover, applying those unique state anti-SLAPP fees rules would likely also inject dissonance in federal procedural practice.

Finally, as the critical aspect of the anti-SLAPP law—its dispositive motion—is inapplicable, then so are its attendant discovery moratorium, burden-shifting frameworks, and expedited appeal provisions.⁵¹⁰

C. Does the Burden-Shifting Framework That Is Tied to the Anti-SLAPP Motion Make the Statutes Substantive for Erie Purposes?

We contend that the burden-shifting framework of the anti-SLAPP statutes does not affect the burden of proof in federal diversity actions.⁵¹¹ Ordinarily, in diversity jurisdiction cases, the burden of proof is a substantive part of state law and applies in federal court.⁵¹² The Supreme Court has, however, tied substantive burdens of proof to “a *claim*.”⁵¹³ Generally, in the

⁵⁰⁶ *Id.*

⁵⁰⁷ *See id.*

⁵⁰⁸ *See generally id.* at 4–6; *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (explaining that Congress enacted the Federal Rules of Civil Procedure to promote an important federal interest—*i.e.*, to ensure uniformity of proceedings in federal court).

⁵⁰⁹ *See generally* *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 n.8 (10th Cir. 2018); *cf. Banner Bank v. Smith*, 25 F.4th 782, 790 (10th Cir. 2022) (“[A] rival [state] regime for bad-faith fee-shifting” conflicted with Fed. R. Civ. P. 11 and a federal court’s “inherent power to punish” abusive litigation conduct”).

⁵¹⁰ *See generally* *Klocke v. Watson*, 936 F.3d 240, 244–49 (5th Cir. 2019); *La Liberte v. Reid*, 966 F.3d 79, 85–88 (2d Cir. 2020).

⁵¹¹ *See Klocke*, 936 F.3d at 245.

⁵¹² *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, 571 U.S. 191, 199 (2014).

⁵¹³ *Raleigh v. Illinois Dep’t of Rev.*, 530 U.S. 15, 20–21 (2000) (emphasis added).

litigation context, a claim is the same thing as a cause of action—that is, a legal theory for securing a remedy.⁵¹⁴ Put together, the burden of proof is substantive for *Erie* purposes when it *is part and parcel of a cause of action*.⁵¹⁵ This matters as to both the California and Texas anti-SLAPP statutes because the shifting burdens of proof in those statutes are tied to *their dispositive motion frameworks*, not to any particular *cause of action or claim*.⁵¹⁶ To test the above thesis, consider, for example, a typical defamation claim attacked with a standard state law summary judgment. For a claim attacked outside the strictures of the California or Texas anti-SLAPP law, the anti-SLAPP burden-shifting framework does not apply.⁵¹⁷ Accordingly, the burden-shifting frameworks are tied to procedural aspects of state law. Which a federal court should ignore under *Erie*.⁵¹⁸

D. Even If Considered on Their Own Terms, the Other Key Features of Anti-SLAPP Statutes like the Compressed Pretrial Timeframe, Discovery Moratorium or Expedited Appeal Provisions Should Not Apply in Federal Court

Most anti-SLAPP statutes have compressed pretrial timeframes to foster early dismissal of SLAPP lawsuits.⁵¹⁹ But on closer inspection, and when considered within *Shady Grove's* analytical framework, those anti-SLAPP compressed timeframes

⁵¹⁴ *Claim*, BLACK'S LAW DICTIONARY 311 (11th ed. 2019).

⁵¹⁵ See, e.g., *Raleigh*, 530 U.S. at 2021 (noting that the burden of proof is substantive when it is tied to a claim or cause of action); see also, *Claim*, BLACK'S LAW DICTIONARY 311 (11th ed. 2019).

⁵¹⁶ See *Klocke*, 936 F.3d at 247 n.6 (“[T]he burden-shifting [is tied to the] early dismissal framework.”); *Manzari v. Ass’n Newspapers Ltd.*, 830 F.3d 881, 886–87 (9th Cir. 2016) (“California’s anti-SLAPP statute provides a burden-shifting mechanism to weed out ‘lawsuits that ‘masquerade as ordinary lawsuits’ but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so.’”); *Kim v. R Consulting & Sales, Inc.*, 281 Cal. Rptr. 3d 918, 923 (Ct. App. 2021) (“A court conducts a two-step analysis when ruling on a special motion to strike under the anti-SLAPP statutory framework.”).

⁵¹⁷ See generally *La Liberte v. Reid*, 966 F.3d 79, 85–89 (2d. Cir. 2020) (commenting on California’s anti-SLAPP statute); *Klocke*, 936 F.3d at 245–47 (commenting on Texas’s anti-SLAPP provisions).

⁵¹⁸ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938); see also *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010) (noting that “rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence” and the like are “ostensibly addressed to procedure” for *Erie* purposes).

⁵¹⁹ See, e.g., CAL. CIV. PROC. CODE § 425.16 (b)(1) (West 2015); see also, e.g., TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(a) & (b) (West 2019).

are likely incompatible with the Federal Rules of Civil Procedure. This is because Fed. R. Civ. P. 16 empowers a federal court to set a timetable for all aspects of federal civil litigation, paying particular regard to the needs of a given case.⁵²⁰ The case scheduling deadlines under Rule 16 are *case-specific*,⁵²¹ while both the California and Texas anti-SLAPP statutes conflict with the design of the Federal Rule by imposing a *categorical* abbreviated timeframe when it applies.⁵²² The Supreme Court has found that a federal and state rule were in conflict when the categorical aspects of a state rule interfered with a case-by-case approach of a parallel federal rule.⁵²³ That is why even the Ninth Circuit—the federal court that has spearheaded applying anti-SLAPP statutes—has held that the California anti-SLAPP statute’s compressed timeframe features “fundamentally collide with federal courts’ rules of procedure.”⁵²⁴

Consider next the discovery-blocking features of anti-SLAPP laws—those fare no better than anti-SLAPP statutes’ compressed timeframes. The Federal Rules authorize a court to allow a non-moving party facing an evidence-based dispositive motion more time to secure evidence through discovery before being kicked out of court.⁵²⁵ The California anti-SLAPP statute, however, makes no similar accommodation: when a movant files an anti-SLAPP dispositive motion, the statute withholds all discovery tools, unless the court grants a limited exception.⁵²⁶ That framework conflicts with the federal design.⁵²⁷ Again, noting these concerns, the Ninth Circuit has disavowed the anti-SLAPP law’s discovery-blocking features.⁵²⁸

Finally, most quintessential anti-SLAPP statutes’ interlocutory appeal provisions should not apply in federal court for two reasons. *First*, Congress (rather than any state) sets the

⁵²⁰ FED. R. CIV. P. 16(b); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 n.8 (10th Cir. 2018).

⁵²¹ *See Los Lobos*, 885 F.3d at 673 n.8.

⁵²² *See* CAL. CIV. PROC. CODE § 425.16(f).

⁵²³ *See Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5–7; *see also Los Lobos*, 885 F.3d at 673 n.8.

⁵²⁴ *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016).

⁵²⁵ *See* FED. R. CIV. P. 56(d).

⁵²⁶ CAL. CIV. PROC. CODE § 425.16(g) (West 2015).

⁵²⁷ *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001).

⁵²⁸ *Id.* (“[T]he discovery-limiting aspects of [this anti-SLAPP law] collide with the discovery-allowing aspects of Rule 56”).

appellate jurisdiction of the federal courts.⁵²⁹ *Second*, for the limited categories of interlocutory orders that the U.S. Supreme Court permits immediate appeals, the order should satisfy three elements: (1) the order must be “conclusive”; (2) the order should resolve the conclusive issue “separate from the merits”; and (3) the question should be effectively unreviewable after final judgment.⁵³⁰

While the Tenth Circuit permitted an interlocutory appeal from the denial of an anti-SLAPP motion to address a first impression legal question, the court’s rationale in *Los Lobos* forecloses anti-SLAPP interlocutory appeals as a matter of course.⁵³¹ As the Tenth Circuit explained in *Los Lobos*, there are two kinds of denials of anti-SLAPP motions. The first kind relates to a denial of relief of a motion filed under a state’s anti-SLAPP statute, where the district court considers the statute in relation to the case-specific facts or evidence.⁵³² The second kind of denial is one that refuses to apply a given anti-SLAPP statute “at all.”⁵³³ The first denial stems from the district court considering the merits (or lack thereof) of an anti-SLAPP motion and ruling.⁵³⁴ But in the second anti-SLAPP motion denial, the district court only answers an abstract legal question—with no regard to the case-specific facts or evidence—*i.e.*, whether a state anti-SLAPP statute should apply in a diversity case.⁵³⁵

The second kind of denial—that is separate from the merits—falls within the collateral order doctrine, while the first kind of denial (based on the merits) does not.⁵³⁶ Gauged against this analytical framework, the Tenth Circuit’s appellate jurisdiction was straightforward in *Los Lobos* because the appeal involved the second kind of denial under the New Mexico anti-SLAPP law, which did not require an analysis of the case-specific

⁵²⁹ See *Hertz Corp. v. Friend*, 559 U.S. 77, 84 (2010) (“Congress . . . determine[s] the scope of the federal courts’ jurisdiction.”); see also *Williams v. York*, 891 F.3d 701, 706 (8th Cir. 2018) (“Only Congress may determine [our] subject-matter jurisdiction.” (alteration in original) (quoting *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017))).

⁵³⁰ *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867–68 (1994).

⁵³¹ See *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 665–66 (10th Cir. 2018).

⁵³² *Id.* at 665.

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ *Id.*

⁵³⁶ *Id.*

facts or evidence.⁵³⁷ Put simply, the order on appeal was separate from the merits of the case.⁵³⁸ The Second Circuit has also adopted a similar analytical framework.⁵³⁹ Measured by these standards, one would expect that the similarly worded provisions for automatic appellate review in the California anti-SLAPP statute,⁵⁴⁰ for example, would also not satisfy all the elements of the collateral order doctrine.⁵⁴¹ But under the First and Ninth Circuit's reading, an order denying an anti-SLAPP motion does satisfy the collateral order doctrine.⁵⁴²

In any event, as shown, a proper application of *Shady Grove's* analytical framework should ordinarily lead to one conclusion about the California anti-SLAPP statute (and others like it): it should not apply in diversity jurisdiction cases.

E. Additional Problems Unique to the Ninth Circuit's Approach

The Ninth Circuit's silver-bullet for anti-SLAPPs also has its own unique problems. The Ninth Circuit has contorted unambiguous state anti-SLAPP laws to mirror and function like Federal Rules of Civil Procedure 12 and 56.⁵⁴³ Five problems with this solution come to mind, and we address each below.

First, the Ninth Circuit's solution offends federalism. The Ninth Circuit's solution, as noted, imagines a federal court

⁵³⁷ *Id.* at 665–66.

⁵³⁸ *Id.*

⁵³⁹ *Ernst v. Carrigan*, 814 F.3d 116, 119 (2d Cir. 2016) (rejecting interlocutory appeal from denial of Vermont anti-SLAPP motion); *contrast with* *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146–48 (2d Cir. 2013) (applying California anti-SLAPP statute and entertaining collateral appeal from denial of anti-SLAPP motion). *But see* *La Liberte v. Reid*, 966 F.3d 79, 85–89 (holding California anti-SLAPP statute inapplicable in federal court).

⁵⁴⁰ *See* CAL. CIV. PROC. CODE § 425.16(i) (West 2015).

⁵⁴¹ *See* *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 835–38 (9th Cir. 2018) (Gould, J., concurring); *see also* *Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1186 (9th Cir. 2016) (Gould, J., concurring).

⁵⁴² *DC Comics v. Pac. Pic. Corp.*, 706 F.3d 1009, 1015–16 (9th Cir. 2013); *Schwern v. Plunkett*, 845 F.3d 1241, 1244 (9th Cir. 2017) (permitting an interlocutory appeal from a denial of a motion to dismiss under the Oregon anti-SLAPP statute); *Franchini v. Inv.'s Bus. Daily, Inc.*, 981 F.3d 1, 8 n.6 (1st Cir. 2020) (finding that “more persuasive authority from other circuits also permits interlocutory appeals in these circumstances.”). While the First Circuit noted that the Tenth Circuit had permitted an appeal of a denial of an anti-SLAPP motion in *Los Lobos*, it glossed over the distinction that *Los Lobos* drew between an order that denies applying a state statute at all and one that denies relief on the merits. The former is appealable, while the latter is not. *See Los Lobos*, 885 F.3d at 665.

⁵⁴³ *See Planned Parenthood*, 890 F.3d at 834–35.

contorting a clear state statute to conform to the federal court's vision for ideal policy.⁵⁴⁴ The California and Texas anti-SLAPPs (all of which the Ninth Circuit has applied) require an evidence-based motion to trigger their protections.⁵⁴⁵ But, as noted, in *Planned Parenthood v. Ctr. For Med. Progress*, the Ninth Circuit has removed this clear requirement permitting instead no-evidence anti-SLAPP motions.⁵⁴⁶ The problem with that solution is that the Supreme Court has repeatedly told federal courts that when "the words of [a] statute are unambiguous, the 'judicial inquiry is complete.'"⁵⁴⁷ More so in the *Erie* context: the Supreme Court has made clear that when a state supreme court has spoken on an issue of state law, its pronouncement is generally binding on a federal court sitting in diversity.⁵⁴⁸ Indeed, in *Shady Grove*, the Court rejected that federal courts can rewrite unambiguous state law to avoid a collision with a federal rule.⁵⁴⁹ Instead, the Supreme Court gives the federal rules their plain meaning.⁵⁵⁰

The Ninth Circuit and a majority of its judges have, however, suggested that *Walker v. Armco Steel Corp.*,⁵⁵¹ supports reading the federal rules narrowly to accommodate anti-SLAPP laws.⁵⁵² To begin with, the Supreme Court in *Walker* rejected the

⁵⁴⁴ *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring) (noting that the Ninth Circuit's judicial revision of the anti-SLAPP laws "diminished some of the tension between the state and federal schemes, but at the expense of depriving the state scheme of its key feature: giving defendants a quick and painless exit from the litigation. *What we're left with after [the Ninth Circuit's judicial revisions] is a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed.*" (emphases added)).

⁵⁴⁵ *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015); *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 138 P.3d 193, 197–98 (Cal. 2006).

⁵⁴⁶ *Planned Parenthood*, 890 F.3d at 834.

⁵⁴⁷ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (quoting *Conn. Nat. Bank v. Germain* 503 U.S. 249, 254 (1992)).

⁵⁴⁸ *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) ("[In diversity cases, T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts . . .").

⁵⁴⁹ See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 390, 403–04 (2010) (rejecting revising state laws to avoid a potential conflict with a Federal Rule; instead, the Court confined itself to "the law the Legislature *did* enact").

⁵⁵⁰ *Id.* at 403–04; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (applying "the plain language of [Fed. R. Civ. P.] Rule 56(c)").

⁵⁵¹ See generally *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

⁵⁵² See *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999) (suggesting that *Walker* supports reading Fed. R. Civ. P. 12 and 56 narrowly and as not covering the same ground as anti-SLAPP law); accord

notion of reading an applicable federal rule narrowly.⁵⁵³ In fact, in *Walker*, the Supreme Court held that there was no direct conflict between Fed. R. Civ. P. 3—which addresses how a litigant commences a civil action in federal court—and state law that addressed when a litigant satisfied state statute of limitations requirements.⁵⁵⁴ Then the Court explained, the two rules *targeted distinct questions*, especially since Rule 3 says nothing about statutes of limitations.⁵⁵⁵ In contrast, Fed. R. Civ. P. 12 and 56 and the anti-SLAPP statutes ultimately seek to control the same issue: pretrial dismissal of a civil lawsuit.⁵⁵⁶ And the California anti-SLAPP law (and others like it) accomplishes its goals “by *winning claims and defenses* in the course of litigation, *just like Rules 12 and 56*.”⁵⁵⁷ In other words, the state and federal laws serve the same function and accomplish their goals in the same way because the two answer the same question. Under *Shady Grove* and *Hanna*, when a federal rule and state law answer the same question, the federal rule controls.⁵⁵⁸

Second, the reasoning in *Cohen v. Beneficial Industrial Loan Corp.*⁵⁵⁹ cannot be used to compel federal courts to apply anti-SLAPP statutes in diversity cases. The Ninth Circuit believes that *Cohen* compels it to apply anti-SLAPP statutes.⁵⁶⁰ *Cohen* upheld a state law that required plaintiffs in shareholder derivative suits to post bonds before commencing suit.⁵⁶¹ The

Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., dissenting from the denial of rehearing en banc).

⁵⁵³ See *Walker*, 446 U.S. at 750 n.9 (“This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed . . .”); *Shady Grove*, 559 U.S. at 403 n.6.

⁵⁵⁴ See *Walker*, 446 U.S. at 750–51.

⁵⁵⁵ *Id.* at 750.

⁵⁵⁶ *Newsham*, 190 F.3d at 972 (stating that the anti-SLAPP statute is geared to “the expeditious weeding out of meritless claims before trial”); *In re Lipsky*, 460 S.W.3d 579, 586, 590 (Tex. 2015) (same with Texas anti-SLAPP statute); *Kibler v. N. Inyo Cnty. Loc. Hosp. Dist.*, 138 P.3d 193, 197–98 (Cal. 2006) (California’s anti-SLAPP statute serves similar purpose).

⁵⁵⁷ *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1354 (11th Cir. 2018) (second emphasis added) (emphasis omitted).

⁵⁵⁸ *Shady Grove*, 559 U.S. at 399–401; *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965).

⁵⁵⁹ See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 554–57 (1949).

⁵⁶⁰ See *Newsham*, 190 F.3d at 971–73 (relying on *Cohen*); see also *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1183 (9th Cir. 2013) (Wardlaw, J., concurring) (relying on *Cohen* to justify applying anti-SLAPP law).

⁵⁶¹ *Cohen*, 337 U.S. at 544–45, 557.

Supreme Court upheld the state law, in part, because it did not conflict with former Fed. R. Civ. P. 23 (now Rule 23.1).⁵⁶² And the Court also upheld the state bond law to ensure uniformity of outcomes in federal and state court; the Court applied the outcome determinative test.⁵⁶³ Together, those reasons compelled the Supreme Court to apply state law.⁵⁶⁴ But *Cohen* cannot save anti-SLAPP statutes. To begin, *Cohen* is a pre-*Hanna* precedent. That matters because since *Hanna*, the Supreme Court has held that the outcome determination test that undergirded *Cohen* is no longer the sole criterion in *Erie* cases.⁵⁶⁵ Instead, the Court made clear that it only applied state law in *Cohen* (and other similar cases) of the pre-*Hanna* era because “there [was] no Federal Rule which covered the point in dispute, [so] *Erie* commanded the enforcement of state law.”⁵⁶⁶ But here since Fed. R. Civ. P. 12 and 56 and state anti-SLAPP laws serve the same function of pretrial dismissal of meritless civil cases and both accomplish their goals in the same way, the federal rules control.⁵⁶⁷ As a result, *Cohen* would not control under these circumstances.⁵⁶⁸

Third, the Ninth Circuit’s anti-SLAPP statute friendly views are incorrect because they ignore the Federal Rules of Civil Procedure’s field preemption effects,⁵⁶⁹ particularly with the pretrial dismissal rules.⁵⁷⁰ Thus, when field preemption applies, “*even complementary state regulation is impermissible.*”⁵⁷¹ In the context of pretrial dismissals and case management, Fed. R. Civ. P. 8, 11, 12, 16, 26 and 56 appear to cover all the bases.⁵⁷² Thus,

⁵⁶² *Id.* at 556.

⁵⁶³ *Id.* at 555–56.

⁵⁶⁴ *Id.* at 557.

⁵⁶⁵ *Hanna v. Plumer*, 380 U.S. 460, 466–67 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958).

⁵⁶⁶ *Hanna*, 380 U.S. at 470.

⁵⁶⁷ *See Shady Grove Orthopedic Assocs., v. Allstate Ins. Co.*, 559 U.S. 393, 399–401 (2010); *Hanna*, 380 U.S. at 471–73.

⁵⁶⁸ *See Hanna*, 380 U.S. at 470–72.

⁵⁶⁹ *See Va. Uranium, Inc., v. Warren*, 139 S. Ct. 1894, 1905 (2019) (Gorsuch, Kavanaugh, and Thomas, JJ.) (lead opinion); *id.* at 1909 (Ginsburg, Kagan, and Sotomayor, JJ., concurring) (agreeing with lead opinion on that issue).

⁵⁷⁰ *See generally* *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019); *See also* *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1333–34 (D.C. Cir. 2015); *La Liberte v. Reid*, 966 F.3d 79, 85–88 (2d Cir. 2020).

⁵⁷¹ *See Arizona v. United States*, 567 U.S. 387, 401 (2012) (emphases added).

⁵⁷² *See Los Lobos Renewable Power v. Americulture, Inc.*, 885 F.3d 659, 673 n.8 (10th Cir. 2018); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2013)

to apply the anti-SLAPP law would eviscerate a countervailing federal interest in the uniform application of the Federal Rules of Civil Procedure.⁵⁷³ Indeed, superimposing state procedural requirements radically transforms the Federal Rules of Civil Procedure into something neither the Supreme Court nor Congress approved.⁵⁷⁴ Unlike California's anti-SLAPP laws, the Federal Rules of Civil Procedure do not impose categorical attorney's fees or sanctions on losing parties.⁵⁷⁵ In fact, when setting the quantum of the awards, for example, federal courts also factor in whether an affected party can pay the exactions at issue.⁵⁷⁶ Most anti-SLAPP laws do not.⁵⁷⁷

Those categorical aspects of the anti-SLAPP laws conflict with Supreme Court precedent and they are procedural features that federal courts should ignore. Consider first the categorical aspects. As noted, the Supreme Court encountered categorical aspects of state law in *Woods* and laid down broad principles that inform this analysis.⁵⁷⁸ In *Woods*, the Court rejected a state law that imposed a categorical 10% penalty on judgments when the federal analog of that rule applied a "case-by-case approach."⁵⁷⁹ In the same way, the anti-SLAPP law's categorical features on fees and sanctions conflict with the Federal Rules of Civil Procedure's case-by-case approach to awarding monetary exactions against a losing party.⁵⁸⁰ Thus, federal courts should ignore those features.⁵⁸¹

(Kozinski, J., concurring) (Fed. R. Civ. P. 12 and 56 form "an integrated program" for determining whether to grant pre-trial judgment in cases in federal court); *accord Makaeff*, 736 F.3d at 1188 (Watford, J., dissenting from denial of rehearing en banc).

⁵⁷³ See generally *Hanna*, 380 U.S. at 472–73 (explaining that Congress enacted the Federal Rules of Civil Procedure to promote an important federal interest—i.e., to ensure uniformity of proceedings in federal court).

⁵⁷⁴ *Makaeff*, 736 F.3d at 1188 (Watford, J., dissenting from denial of rehearing en banc).

⁵⁷⁵ See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1336 (4th ed. 2021) (whether to impose sanctions in the form of attorney's fees or costs is discretionary on the federal courts).

⁵⁷⁶ See *Gaskell v. Weir*, 10 F.3d 626, 629 (9th Cir. 1993) (collecting cases on sanctions); *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 (1968) (attorney's fees).

⁵⁷⁷ See, e.g., *Sullivan v. Abraham*, 488 S.W. 3d 294, 299 (Tex. 2016).

⁵⁷⁸ *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–8 (1987).

⁵⁷⁹ *Id.* at 4, 7–8.

⁵⁸⁰ *Gaskell*, 10 F.3d at 629 (sanctions); *Newman*, 390 U.S. at 402 (attorney's fees).

⁵⁸¹ Cf. *Woods*, 480 U.S. at 4–8 (categorical aspects of state law that run counter to case-by-case features of analogous federal law were inapplicable).

Generally, the Supreme Court has sanctioned contorting state law in the *Erie* context only when two conditions are met: (1) there is no controlling federal rule,⁵⁸² and (2) the at-issue state law, if applied as is, would adversely affect a countervailing federal interest.⁵⁸³ When, as in this context, where Fed. R. Civ. P. 12 and 56—just like the anti-SLAPP statutes—target pretrial dismissal of meritless civil lawsuits, there is no need to “wade into *Erie*’s murky waters” or to artificially contract state law.⁵⁸⁴ A federal court should apply the federal rule and ignore the state law.⁵⁸⁵

Fourth, the Ninth Circuit’s watered-down anti-SLAPP framework creates more problems than it solves. The Ninth Circuit’s saving interpretation still leaves significant conflicts between state law and the federal rules unaddressed. Take Fed. R. Civ. P. 56, for example. That rule requires a trial when there are material factual disputes and the law could afford relief to the non-movant.⁵⁸⁶ But, as noted, with anti-SLAPPs, the existence of material factual disputes alone does not ensure a trial; the non-movant must still show “clear and specific evidence,” or “probability” of success, as the case might be.⁵⁸⁷ What remains unclear under the Ninth Circuit’s approach, however, is how a federal court should resolve the clear conflict between Rule 56 standards (disputed material facts warrant trial) and judicially revised anti-SLAPPs (that impose a trial-like burden). Has the Ninth Circuit done away with Rule 56 standards, or has it done away with the anti-SLAPP’s framework altogether and adopted Rule 56 standards in its stead? The court has not given clear answers.⁵⁸⁸

⁵⁸² See generally *Hanna v. Plumer*, 380 U.S. 460, 469–72 (1965). *Hanna* makes clear that if there is a valid controlling federal rule it displaces state law on the same issue. *Id.*

⁵⁸³ See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535–38 (1958); *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 436–38 (1996).

⁵⁸⁴ See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 559, 398–401 (2010).

⁵⁸⁵ See *Hanna*, 380 U.S. at 469–71.

⁵⁸⁶ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

⁵⁸⁷ See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a), (b) (West 2019); *id.* § 27.005(b), (c) (“clear and specific evidence”); CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015) (“probability” that the plaintiff will prevail on the claim).

⁵⁸⁸ See *Todd v. Lovcruft*, No. 19-cv-01751, 2020 WL 60199, at *8 n.7 (N.D. Cal., Jan. 1, 2020).

Fifth, the Ninth Circuit's approach promotes forum-shopping. Initially, the Ninth Circuit decided to apply anti-SLAPP statutes to prevent forum-shopping between state and federal courts.⁵⁸⁹ But the Ninth Circuit's interpretative device in *Planned Parenthood* undermines that goal. A plaintiff has extra motivation to file her defamation lawsuit in federal court rather than state court because, at the sufficiency stage in the Ninth Circuit, she need not adduce evidence, even though the anti-SLAPP laws require it.⁵⁹⁰ And there is even more motivation for a plaintiff to file a defamation lawsuit in the Fifth or Second Circuit, rather than the Ninth Circuit, because the former do not apply anti-SLAPP statutes, while the latter does.⁵⁹¹

VI. *CLIFFORD V. TRUMP*: A CASE STUDY ON COMITY

In *Clifford v. Trump*,⁵⁹² the Ninth Circuit split with the Fifth Circuit on the applicability of anti-SLAPP statutes, specifically the TCPA.⁵⁹³ But for venue transfer and choice of law rules, *Clifford v. Trump* would likely have been litigated in the Fifth Circuit, and there never would have been a circuit split. As the congressionally designated federal appellate court over Texas, the Fifth Circuit has primary oversight over Texas law appeals in diversity jurisdiction cases.⁵⁹⁴ Thus, it is the exception that the Ninth Circuit hears Texas law diversity jurisdiction cases.

That, in turn, invites the question that is the subject of the analysis in this section: what role does (or should) sister-circuit comity play in diversity jurisdiction cases? In the federal court system, comity is a "principle . . . of paramount importance."⁵⁹⁵ Comity governs relations between "courts of the same sovereign"

⁵⁸⁹ *Id.*; see also *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999).

⁵⁹⁰ *In re Lipsky*, 460 S.W.3d 579, 586 (2015) (requiring evidence to support TCPA motion); but see *Planned Parenthood v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

⁵⁹¹ See *In re Gawker Media LLC*, 571 B.R. 612, 628 (Bankr. S.D.N.Y. 2017) (noting that "the failure to apply the anti-SLAPP law would encourage forum shopping"); see also generally *Lockheed*, 190 F.3d at 973 (also outlining potential for forum-shopping if a federal court did not apply anti-SLAPP statute).

⁵⁹² 818 F. App'x 746 (9th Cir. 2020).

⁵⁹³ *Id.* at 747.

⁵⁹⁴ See 28 U.S.C. § 41 (placing Texas within the Fifth Circuit).

⁵⁹⁵ *Church of Scientology Cal. v. U.S. Dep't Army*, 611 F.2d 738, 750 (9th Cir. 1979), *overruled on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016).

and those of “different sovereigns.”⁵⁹⁶ As a result, comity applies between state and federal or tribal courts,⁵⁹⁷ American and foreign courts.⁵⁹⁸ At its core, the doctrine serves to spare the federal courts from the “embarrassment” of contradictory judgments and duplication of efforts.⁵⁹⁹ So comity also serves to prevent forum-shopping among litigants, especially if the litigation involves a common question.⁶⁰⁰ For that reason, the U.S. Supreme Court has sanctioned various strands of comity principles, which find their modern expression in most abstention doctrines like the “first to file rule.”⁶⁰¹

But the doctrine of comity is broader than concurrent jurisdiction over related cases. Indeed, the concept also seeks to prevent federal courts from interfering with each other’s business.⁶⁰² We have particularly seen this principle at play, for example, when federal injunctions in one circuit have obvious effects in another circuit.⁶⁰³ On this score, the Ninth Circuit probably explained it best:

*Principles of comity require that, once a sister circuit has spoken to an issue, that pronouncement is the law of that geographical area. Courts in the Ninth Circuit should not grant relief that would cause substantial interference with the established judicial pronouncements of sister circuits. To hold otherwise would create tension between circuits and would encourage forum shopping.*⁶⁰⁴

⁵⁹⁶ *Ulmet v. United States*, 888 F.2d 1028, 1031 (4th Cir. 1989).

⁵⁹⁷ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

⁵⁹⁸ See *Mujica v. AirScan Inc.*, 771 F.3d 580, 597–600 (9th Cir. 2014) (outlining principles of international comity); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997) (international comity is an abstention doctrine that “counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.”).

⁵⁹⁹ See *Church of Scientology*, 611 F.2d at 750.

⁶⁰⁰ See *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900) (explaining that comity should “secur[e] uniformity of decision . . . and discourag[e] repeated litigation of the same question”).

⁶⁰¹ *Colo. River*, 424 U.S. at 817 (“As between federal district courts, . . . the general principle is to avoid duplicative litigation.”).

⁶⁰² *In re Naranjo*, 768 F.3d 332, 348 (4th Cir. 2014) (“The doctrine of comity instructs federal judges to avoid ‘stepping on each other’s toes when parallel suits are pending in different courts.’”).

⁶⁰³ *Id.*

⁶⁰⁴ *United States v. AMC Ent., Inc.*, 549 F.3d 760, 773 (9th Cir. 2008) (emphasis added).

Beyond the injunction context, comity considerations also are central to the way federal courts of appeals develop the law in diversity jurisdiction cases. The Second Circuit, for example, in a diversity jurisdiction case involving Tennessee law chose to defer to the views of the Sixth Circuit—the federal appellate court that mainly oversees that state.⁶⁰⁵ Indeed, applying that same comity rationale, the Federal Circuit, for instance, applies regional circuit law to non-patent law issues to avoid disturbing the law of those regional circuits.⁶⁰⁶

Against that background, one view suggests that the Ninth Circuit in *Clifford* should have deferred to the Fifth Circuit on the Texas anti-SLAPP statute. Just as the Second Circuit deferred to the Sixth Circuit over Tennessee law, and the Federal Circuit defers to regional circuits on regional circuit law, the Ninth Circuit should have also deferred to the Fifth Circuit on a Texas statute.⁶⁰⁷ After all, the Fifth Circuit has primary responsibility over Texas diversity jurisdiction cases.⁶⁰⁸ And for that reason, it follows by implication, that the effect of the Texas anti-SLAPP statute is more notable in the Fifth Circuit than any other circuit.⁶⁰⁹ Based on this view, for the Ninth Circuit to issue a contrary ruling comes at a grave cost: it invites forum-shopping (the very thing comity seeks to avoid) and injects the specter of conflicting precedent for other federal courts that have to address the TCPA's applicability in diversity jurisdiction cases.⁶¹⁰

But comity is not a talismanic card. The federal courts have discretion whether to honor comity considerations.⁶¹¹ And the comity considerations are not without their critics. In the years since the Second Circuit decided to defer to the views of the Sixth Circuit on Tennessee law, an impressive complement of federal appellate judges (including two current U.S. Supreme Court justices, Justices Gorsuch and Kavanaugh) have poured cold

⁶⁰⁵ *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283–84 (2d Cir. 1981).

⁶⁰⁶ *Biodex Corp. v. Loredan Biomed.*, 946 F.2d 850, 856 (Fed. Cir. 1991).

⁶⁰⁷ See *Factors Etc.*, 652 F.2d at 283–84.

⁶⁰⁸ See 28 U.S.C. § 41 (placing Texas within the Fifth Circuit); *id.* § 1332 (diversity jurisdiction).

⁶⁰⁹ See generally text accompanying *supra* notes 592–595.

⁶¹⁰ See generally *Church of Scientology Cal. v. U.S. Dep't Army*, 611 F.2d 738, 750 (9th Cir. 1979); see also generally *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999).

⁶¹¹ See *Hawthorne Sav. F.S.B. v. Reliance Ins. Co.*, 421 F.3d 835, 852 (9th Cir. 2005).

water on the decision in extra-judicial writings.⁶¹² For one, federal courts now can directly certify questions of state law to state supreme courts to get authoritative views on state law.⁶¹³ And the U.S. Supreme Court has never endorsed a categorical rule for non-home-state-federal-courts to defer to the state law pronouncements by home-state-federal-courts.⁶¹⁴ Perhaps that is why some federal courts—when asked to consider comity considerations in the context of anti-SLAPP litigation—have flat-out declined.⁶¹⁵ Against this background, perhaps the Ninth Circuit did not in fact abuse its discretion. To this, the reader can add that the U.S. Supreme Court has an interest in having an issue percolate among the lower courts (even if state law is involved, especially if there is a federal interest at stake) before granting certiorari.⁶¹⁶

In short, comity is an important consideration for federal courts when developing state law in diversity jurisdiction cases. But like most other discretionary judicial tools, its use and importance varies depending on the circumstances at issue.

VII. THE FEDERAL DIMENSIONS OF ANTI-SLAPP STATUTES

Suppose a plaintiff asserts a § 1983⁶¹⁷ or Title VII⁶¹⁸ discrimination claim alongside a state law defamation claim

⁶¹² See BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT § 73 614–16 (2016).

⁶¹³ *Id.*; *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

⁶¹⁴ See *Mast, Foss & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (“Comity is not a rule of law, but one of practice, convenience, and expediency.”).

⁶¹⁵ See *La Liberte v. Reid*, 966 F.3d at 79, 86–87 (2020) (The Second Circuit declined to defer to Ninth Circuit on the applicability of anti-SLAPP statutes in diversity jurisdiction case on California law based on principles of comity); *but see Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d, 138, 148 (2013) (Second Circuit deferred to Ninth Circuit’s reading of California anti-SLAPP statute).

⁶¹⁶ See *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting); *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., respecting the denial of certiorari) (“The legal question Calvert presents is complex and would benefit from further percolation in the lower courts prior to this Court granting review.”); *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) (“Respectfully, it seems to me at least reasonably possible that the crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.”).

⁶¹⁷ 42 U.S.C. § 1983.

⁶¹⁸ See generally Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (codified as 42 U.S.C. §§ 2000e, *et seq.*)

(that is traditionally subject to most anti-SLAPP motions). The key question in this section is this: do anti-SLAPP statutes apply to claims that arise under federal law? By their design and broad wording, anti-SLAPP statutes apply to all claims that implicate matters of public concern.⁶¹⁹ So could a defendant rely on a state anti-SLAPP law to seek dismissal of a federal claim? As we show, however, federal law claims are cut from a different cloth: federalism and Supremacy Clause considerations color those claims. Based on those considerations, the short end of the matter is that the consensus of the federal courts is that anti-SLAPP statutes do not apply to federal claims.

A. *The Federalism Considerations—First Principles*

For those federal courts that apply anti-SLAPP statutes, they do so (1) in diversity jurisdiction cases,⁶²⁰ and (2) because they claim the Supreme Court's decision in *Erie Railway Co. v. Tompkins*,⁶²¹ requires it.⁶²² *Erie*, however, is “deeply rooted in notions of federalism.”⁶²³ Those notions of federalism limit the federal government to its sphere of legislative and regulatory competence, while also giving states ample breathing room to do the same within their domains.⁶²⁴ So on purely state law issues, state law ordinarily takes precedence.⁶²⁵ And *Erie* merely commandeers federal courts to hold true to that idea, especially if state law is at issue.⁶²⁶ But when federal law—in the form of congressional acts or the U.S. Constitution—is at issue, *Erie* no longer has a commandeering effect.⁶²⁷ The *Erie* rule does not apply to federal laws.⁶²⁸ In other words, a respect for federalism

⁶¹⁹ See, e.g., *supra* notes 78–86.

⁶²⁰ Thomas Williams, *Survey of Federal Courts of Appeals Cases Addressing Applicability of Anti-SLAPP Statutes in Federal Court*, HAYNES BOONE (Oct. 21, 2019), <https://www.haynesboone.com/news/publications/survey-of-federal-courts-of-appeals-cases-addressing-applicability-of-anti-slapp-statutes>.

⁶²¹ See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁶²² See *Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999); *Godin v. Schencks*, 629 F.3d 79, 86–87 (1st Cir. 2010).

⁶²³ *Boyle v. United Tech. Corp.*, 487 U.S. 500, 517 (1988) (Brennan, J., dissenting); see also *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

⁶²⁴ See *Bond v. United States*, 564 U.S. 211, 221 (2011).

⁶²⁵ See *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940).

⁶²⁶ *Erie*, 304 U.S. at 78–79.

⁶²⁷ *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 877 (10th Cir. 2006) (“[C]ongressional acts and the Federal Constitution fall outside [the] scope” of *Erie*).

⁶²⁸ *Id.*

also envisions that state law should not encroach on federal law's sphere of competence or alter its mode of operation.⁶²⁹

In short, when federal law is at issue, a federal court need not apply state law to those claims because of *Erie*. As shown, *Erie* does not apply to federal claims.

B. Supremacy Clause Considerations

The federalism conclusion above bleeds into the supremacy clause analysis here. The U.S. Constitution makes federal law supreme over state law.⁶³⁰ For the Supremacy Clause, federal law mainly consists of the U.S. Constitution, congressional statutes, treaties,⁶³¹ federal regulations and rules,⁶³² as well as the Supreme Court's binding judicial pronouncements construing federal law.⁶³³ And when federal law creates a cause of action, state law cannot alter its mode of operation or immunize certain elements that federal law penalizes.⁶³⁴ Thus, for example, the Supreme Court has held that in the context of 42 U.S.C. §1983, state law cannot immunize conduct that federal statute and decisional law penalizes.⁶³⁵ Likewise, in the Title VII context, for example, the Supreme Court engrafted a burden-shifting framework to claims that rely on circumstantial evidence to make out a prima facie case for trial.⁶³⁶ That framework is different in important ways from the prima facie scheme that some anti-SLAPP statutes require.⁶³⁷ Indeed, once the Supreme Court lays down an interpretation of the commands of a federal rule or statute, state law cannot add a gloss or deviate from that design or immunize actionable conduct.⁶³⁸

⁶²⁹ Cf. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987) (state law was inapplicable when it sought to alter the mode of operation of a parallel federal rule); *Bond*, 564 U.S. at 221 (federalism confines each sovereign—federal and state—within its own sphere of competence).

⁶³⁰ U.S. CONST. art. VI, cl. 2.

⁶³¹ *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (Constitution, federal statutes, treaties).

⁶³² *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (federal regulations and rules).

⁶³³ See *James v. City of Boise*, 136 S. Ct. 685, 686–87 (2016).

⁶³⁴ *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980).

⁶³⁵ *Id.*

⁶³⁶ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

⁶³⁷ See, e.g., *supra* text accompanying notes 78–86 (Texas anti-SLAPP statute).

⁶³⁸ See *James*, 136 S. Ct. at 686–87; see also *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (besides Supreme Court holdings, the Court's modes of analysis are

Applying a similar framework to the one outlined above, an impressive complement of federal courts has held that state anti-SLAPP laws are inapplicable to federal claims. Their reasons for doing so have ranged from concerns that anti-SLAPP statutes might immunize certain speech that is actionable under the federal anti-discrimination laws or that those who apply state laws might frustrate the mode of operation of those Federal Rules.⁶³⁹

CONCLUSION

The last lecture is now at an end. There are four main takeaways. *First*, anti-SLAPP statutes are unique state statutes that target important ends. In most states, the application of anti-SLAPP laws is a straightforward proposition. In Texas and California, for example, the state courts have developed a wellspring of anti-SLAPP jurisprudence. The application of anti-SLAPP statutes in those jurisdictions is well laid-out.

Second, there is a well-developed conflict between the several federal (appellate and district courts) on what to do with anti-SLAPP statutes. An increasing majority of courts seem inclined to hold that anti-SLAPP statutes conflict with the Federal Rules of Civil Procedure and are therefore inapplicable in diversity jurisdiction cases. When those courts consider the *Shady Grove* majority framework, there is little room for complementary or contradictory state anti-SLAPP dismissal laws. But a steady number, in minority, taking a leaf from the First and Ninth Circuits, seem to find that there is room for both the federal rules and state anti-SLAPPs. Those courts, we contend, have either ignored *Shady Grove* or misunderstood it. That, in turn, leads to this important related point: The anti-SLAPP issue has percolated long enough in the lower courts. The time has come for the Supreme Court to weigh in with an authoritative answer on this question: do state anti-SLAPP laws apply in diversity jurisdiction cases?

also binding); *accord* FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 767 (7th Cir. 2019).

⁶³⁹ See, e.g., *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010) (“[A]nti-SLAPP statute does not apply to federal law causes of action.”); *In re Bah*, 321 B.R. 41, 46 (B.A.P. 9th Cir. 2005); *Dr.’s Data Inc. v. sBarrett*, No. 10-C-03795, 2011 WL 5903508, at *2 (N.D. Ill. Nov. 22, 2011); *Jenkins v. Miller*, No. 2:12-cv-184, 2017 WL 4402431, at *30 (D. Vt. Sept. 29, 2017); *Mathiew v. Subsea 7 (US) LLC*, No. 4:17-CV-3140, 2018 WL 1515264, at *8 (S.D. Tex. Mar. 9, 2018).

Third, the circuit splits on anti-SLAPP statutes test the federal court's commitment to comity. Ordinarily, the federal courts should avoid inconsistent pronouncements, especially when there is room to avoid them. It is one thing for different federal courts, considering different state laws, to reach different outcomes. But it is quite another for those courts to split on the same state laws, especially when there are tools (like certification of state law questions) that help clarify state law. What is more, in appropriate cases, comity could help promote judicial economy, prevent inconsistent results, and forum-shopping, especially when a prior federal court decision is not palpably wrong.

Fourth, state anti-SLAPP statutes are inapplicable to federal law claims. The Supremacy Clause makes this a no-contest. When Congress or the federal courts establish the parameters and the mode of operation of a federal rule, generally, state law that seeks to disrupt that design faces a high bar to survive preemption. And the *Erie* rule that is the basis for applying anti-SLAPP laws in the first-place targets state laws, not federal rules. Together, those two concepts limit state anti-SLAPP laws to state law in those federal courts that apply them.