

## Boston College Law Review

---

Volume 56 | Issue 3

Article 9

---


5-20-2015

# Fighting SLAPPS in Federal Court: Erie, the Rules Enabling Act, and the Application of State anti-SLAPP Laws in Federal Diversity Actions

Benjamin Ernst

*Boston College Law School*, [benjamin.ernst@bc.edu](mailto:benjamin.ernst@bc.edu)

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Civil Procedure Commons](#), [Jurisdiction Commons](#), [State and Local Government Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Benjamin Ernst, *Fighting SLAPPS in Federal Court: Erie, the Rules Enabling Act, and the Application of State anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C.L. Rev. 1181 (2015), <http://lawdigitalcommons.bc.edu/bclr/vol56/iss3/9>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# FIGHTING SLAPPS IN FEDERAL COURT: *ERIE*, THE RULES ENABLING ACT, AND THE APPLICATION OF STATE ANTI-SLAPP LAWS IN FEDERAL DIVERSITY ACTIONS

**Abstract:** Legislatures across the United States have passed laws to combat strategic lawsuits against public participation (“SLAPPs”)—suits brought solely to harass a party that has exercised protected speech or petitioning activity. Federal courts exercising diversity jurisdiction have struggled to determine whether these nominally procedural laws—particularly their hallmark special motions to dismiss—apply outside of state courts. A proper reading of the Federal Rules of Civil Procedure reveals that these laws may operate harmoniously alongside the federal system, and the twin aims articulated in the U.S. Supreme Court’s decision in *Erie Railroad Co. v. Tompkins* favor application of anti-SLAPP laws in federal fora. Furthermore, even if the laws and the Rules directly conflict, it would violate the Rules Enabling Act to apply the Federal Rule in preemption of the state anti-SLAPP statute.

## INTRODUCTION

In 1989, the CBS program *60 Minutes* aired a segment exposing the harmful effects of the chemical alar, often used in apple growing.<sup>1</sup> Following the *60 Minutes* report, apple growers’ profits dwindled, and a group of Washington State apple growing companies filed a disparagement and defamation suit against the show.<sup>2</sup> Despite the factual accuracy of the *60 Minutes* account and the baseless character of the apple growers’ claims, the case took almost four years to wade through pre-trial litigation before being dismissed on summary judgment.<sup>3</sup>

Like *60 Minutes*, Sausalito, California resident John M. Moses was also haled to court for activity in connection with an issue of public interest: in 1995 Moses was sued by his landlord after reporting code violations to his

---

<sup>1</sup> See James Warren, *CBS-TV’s Apple Scare Is Costly to Growers*, CHI. TRIB., May 11, 1989, available at [http://articles.chicagotribune.com/1989-05-11/news/8904110892\\_1\\_alar-international-apple-institute-cancer-causing-agent](http://articles.chicagotribune.com/1989-05-11/news/8904110892_1_alar-international-apple-institute-cancer-causing-agent), archived at <http://perma.cc/H7SY-32TW> (describing the *60 Minutes* segment and the reaction of apple growers); see also *Auvil v. CBS 60 Minutes*, 67 F.3d 816, 818 (9th Cir. 1995) (discussing the television segment and sustaining the district court’s dismissal of the apple growers’ product disparagement action against CBS).

<sup>2</sup> See *Auvil*, 67 F.3d at 819. The episode reported that alar was the “most potent cancer-causing agent in our food supply” and stated that children were most at risk. *Id.* at 820.

<sup>3</sup> See *id.* at 818.

city's government concerning the building in which he lived.<sup>4</sup> Also like the *60 Minutes* case, the claims against Moses were meritless.<sup>5</sup> In contrast, however, the case against Moses was dismissed within six months.<sup>6</sup>

The difference in duration lies in the availability of a state anti-SLAPP statute.<sup>7</sup> A strategic lawsuit against public participation—or SLAPP—is brought not with the goal of securing a judgment but rather to intimidate, harass, and burden a defendant's speech or petitioning.<sup>8</sup> Lawsuits like those brought against *60 Minutes* and Moses are prototypical SLAPPs.<sup>9</sup> The SLAPPing party seeks not to secure a favorable judgment, but rather to engage in a retaliatory legal battle to stifle speech and mire a defendant in costly litigation.<sup>10</sup> Such suits, by definition, are meritless.<sup>11</sup>

Defending even a meritless lawsuit, however, can be highly expensive, time-consuming, and oppressive.<sup>12</sup> Legislatures of twenty-seven states, the

<sup>4</sup> See *Ketchum v. Moses*, 17 P.3d 735, 738 (Cal. 2001). Another tenant testified that after Moses reported hazardous living conditions to the Sausalito fire and building departments, the landlord “referred to Moses as a ‘troublemaker’ and stated that he would ‘get [him] into court’ and ‘keep him there.’” See *id.* (alteration in original).

<sup>5</sup> See *id.* (noting that although the landlord alleged that Moses had made false complaints to local government agencies in an effort to “harass, annoy, and inflict emotional distress on him,” several government officials submitted declarations that Moses’s reports instigated inspections that revealed numerous code violations in the building).

<sup>6</sup> See *id.*

<sup>7</sup> See CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2015); *Ketchum*, 17 P.3d at 737.

<sup>8</sup> See George W. Pring & Penelope Canan, “Strategic Lawsuits Against Public Participation” (“SLAPPs”): *An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 938 (1992) (discussing SLAPPs and the “very disturbing trend” posed by increased filings of such suits); see also 22 KATHLEEN L. DAERR-BANNON, CAUSES OF ACTION 322 (2d ed. 2003) (discussing the purpose of SLAPPs).

<sup>9</sup> See Pring & Canan, *supra* note 8, at 944.

<sup>10</sup> See *id.*; see also Richard J. Yurko & Shannon C. Choy, *Reconciling the Anti-SLAPP Statute with Abuse of Process and Other Litigation-Based Torts*, 51 BOS. B.J., Mar./Apr. 2007, at 15, 15 (describing the goals of a SLAPP suit).

<sup>11</sup> See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970 (9th Cir. 1999) (“The hallmark of a SLAPP suit is that it lacks merit . . .”). SLAPP plaintiffs are typically large corporations or powerful persons; SLAPP defendants comprise a wide variety of individuals and businesses, such as journalists, environmental activists, *qui tam* informers, and community organizers. See, e.g., *Hilton v. Hallmark Cards*, 599 F.3d 894, 899 (9th Cir. 2010) (discussing a SLAPP alleging misappropriation of publicity filed by a celebrity against a greeting card company who had used her likeness in a card); *Newsham*, 190 F.3d at 967 (concerning a SLAPP alleging business torts filed against *qui tam* informants in a False Claims Act action); *Benoit v. Frederickson*, 908 N.E.2d 714, 716 (Mass. 2009) (discussing a SLAPP alleging the filing of a false police report brought by an assailant against rape victim).

<sup>12</sup> See KRISTEN RASMUSSEN, SLAPP STICK: FIGHTING FRIVOLOUS LAWSUITS AGAINST JOURNALISTS 1, 4 (2011) (describing SLAPPs as “costly and time-consuming” suits that can result in “a mountain of attorney fees” for defendants); Laura R. Handman et al., *The D.C. Anti-SLAPP Act at Two Years Old: Erie Issues and Interlocutory Appeal Take Center Stage*, 29 COMM. LAW., June 2013, at 15, 19, available at <http://www.medialawmonitor.com/2013/06/the-d-c-anti-slapp-act-at-two-years-old-erie-issues-and-interlocutory-appeal-take-center-stage/>, archived at <http://perma.cc/K2>

District of Columbia, and Guam have enacted anti-SLAPP statutes to protect citizens from these frivolous lawsuits.<sup>13</sup> The goal of these statutes is manifestly substantive: to shield defendants who engage in protected speech and petitioning activity from abusive litigation.<sup>14</sup> The mechanism for enforcing these goals, however, is procedural: the statutes achieve this objective primarily through a special motion to dismiss, which defendants may utilize to quickly extricate themselves from frivolous suits.<sup>15</sup> Moses filed such a motion, and swiftly put his landlord's harassing lawsuit behind him.<sup>16</sup> *60 Minutes* was not so lucky.<sup>17</sup>

When a SLAPP is brought in a federal court sitting in diversity and the controlling state law features an anti-SLAPP statute, the court must decide whether it will apply.<sup>18</sup> Federal courts sitting in diversity apply federal procedural law and state substantive law.<sup>19</sup> Because anti-SLAPP laws achieve their

---

R9-B43W (discussing the cost-saving benefits of the stayed discovery provision in the D.C. anti-SLAPP law).

<sup>13</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2015); D.C. CODE § 16-5501-5505 (2001 & Supp. 2014); ME. REV. STAT. ANN. tit. 14, § 556 (Supp. 2014); 7 GUAM CODE ANN. § 17102(a)(5) (2012). See generally RASMUSSEN, *supra* note 12 (providing a comprehensive guide to the anti-SLAPP laws of twenty-seven states); *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection>, archived at <http://perma.cc/6VX9-BPH8> (last visited May 14, 2015) (providing a listing of states' anti-SLAPP laws).

<sup>14</sup> See, e.g., ARK. CODE ANN. § 16-63-502(2) (2005) (finding and declaring that “[t]he valid exercise of the constitutional rights of freedom of speech and the right to petition government for a redress of grievances should not be chilled through abuse of the judicial process”); CAL. CIV. PROC. CODE § 425.16(a) (finding and declaring that the California anti-SLAPP law be enacted to address the chilling effect of frivolous lawsuits on “the valid exercise of the constitutional rights of freedom of speech and petition”); TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2015) (declaring that the purpose of Texas anti-SLAPP law is to “safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government”).

<sup>15</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (providing a special motion to dismiss); D.C. CODE § 16-5502 (same); ME. REV. STAT. ANN. tit. 14, § 556 (same). See generally DAERR-BANNON, *supra* note 8, at 322 (describing the procedural mechanisms employed by anti-SLAPP statutes).

<sup>16</sup> See *Ketchum*, 17 P.3d at 738.

<sup>17</sup> See *Auvil*, 67 F.3d at 818. Washington State, whose substantive law controlled in the case against *60 Minutes*, did not have an anti-SLAPP statute in 1990 when the case was filed. *Cf. id.* Twenty years later, in 2010, Washington enacted an anti-SLAPP law. See 2010 Wash. Legis. Serv. Ch. 118 (S.S.B. 6395) (West) (codified at WASH. REV. CODE. § 4.24.525 (2014)).

<sup>18</sup> See, e.g., *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) (considering whether Maine's anti-SLAPP statute applied in federal diversity action); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168–69 (5th Cir. 2009) (considering whether Louisiana's anti-SLAPP statute applied in federal diversity action); *Newsham*, 190 F.3d at 973 (considering whether California's anti-SLAPP statute applied in federal diversity action).

<sup>19</sup> See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 417 (2010) (Stevens, J., concurring) (“It is a long-recognized principle that federal courts sitting in diversity apply state substantive law and federal procedural law.” (internal quotation marks omitted)); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (“Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.”); *Hanna v. Plumer*, 380 U.S. 460, 466 (1965) (“[F]ederal courts are to apply state substantive law and fed-

substantive goals through a special motion procedure that may conflict with the Federal Rules of Civil Procedure, courts have struggled to determine whether the laws should apply in the federal setting.<sup>20</sup> Three U.S. Courts of Appeals have held that these statutes can be given effect in federal diversity actions.<sup>21</sup> In Circuits where the issue has not reached the appellate level, however, lower courts have come to conflicting conclusions.<sup>22</sup> Further complicating matters, judges in the Ninth Circuit have recently questioned that Circuit's settled precedent holding that special motions to dismiss under anti-SLAPP statutes would apply in diversity.<sup>23</sup>

This Note argues that because anti-SLAPP laws do not conflict with the Federal Rules, and because displacing the laws in a given case would violate the Rules Enabling Act of 1934 ("REA"), the statutes should be given effect in federal fora.<sup>24</sup> Part I examines states' responses to the phenomenon of SLAPP litigation and provides an overview of the *Erie* doctrine, highlighting two im-

eral procedural law."); *Guar. Trust Co. v. York*, 326 U.S. 99, 112 (1945) ("The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States.").

<sup>20</sup> See *Godin*, 629 F.3d at 81; *Henry*, 566 F.3d at 164; *Newsham*, 190 F.3d at 973; see also Lori Potter & W. Cory Haller, *SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation*, 45 ENVTL. L. REP. 10,136, 10,138 (2015) (noting that because of anti-SLAPP laws' "hybrid nature (part substantive, part procedural)," federal courts sitting in diversity have struggled to determine whether they apply in federal court); Michael C. Denison, *SLAPP Happy: Courts Continued to Refine the Reach of the Anti-SLAPP Law in Numerous Decisions in 2010*, 34 L.A. LAW., June 2011, at 25–26 (discussing courts in the Ninth Circuit's treatment of anti-SLAPP issues); Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 853 (2010) (arguing that the potential unavailability of anti-SLAPP protection in federal court undermines certainty in anti-SLAPP protection and harms litigants); Colin Quinlan, Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 370 (2014) (arguing that anti-SLAPP statutes should be applied in federal court).

<sup>21</sup> See *Godin*, 629 F.3d at 81 (giving effect to anti-SLAPP law in First Circuit); *Henry*, 566 F.3d at 168–69 (giving effect to anti-SLAPP law in Fifth Circuit); *Newsham*, 190 F.3d at 973 (giving effect to anti-SLAPP law in Ninth Circuit). The Second Circuit has also approved of this approach, though with less force. See *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (noting that application of certain components of Nevada anti-SLAPP law by a federal district court "seem . . . unproblematic," but further stating that other portions of statute "may present a closer question").

<sup>22</sup> Compare *Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1041 (N.D. Ill. 2013) (finding that an anti-SLAPP law did not apply in diversity because the special motion procedure directly conflicted with a valid Federal Rule), with *Trudeau v. ConsumerAffairs.com, Inc.*, No. 10-7193, 2011 WL 3898041, at \*5 (N.D. Ill. Sept. 6, 2011) (finding that an anti-SLAPP law applied in diversity because the special motion procedure did not directly conflict with a Federal Rule and applying state statute would lead to the equitable administration of the law and reduce the risk of forum-shopping).

<sup>23</sup> See *Makaeff v. Trump Univ., LLC (Makaeff II)*, 736 F.3d 1180, 1188 (9th Cir. 2013) (reh'g denied en banc) (Watford, J., dissenting) ("California's anti-SLAPP statute impermissibly supplements the Federal Rules' criteria for pre-trial dismissal of an action."); *Makaeff v. Trump Univ., LLC (Makaeff I)*, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, C.J., concurring) ("*News-ham* is wrong and should be reconsidered.").

<sup>24</sup> See *infra* notes 162–222 and accompanying text.

portant areas that remain unresolved.<sup>25</sup> Part II examines the differing conclusions courts have reached when deciding whether to apply state anti-SLAPP laws in federal courts exercising diversity jurisdiction.<sup>26</sup> Finally, Part III argues that courts should favor applying anti-SLAPP statutes in federal courts and offers two analytical bases for this stance: either these laws do not conflict with a properly moderate reading of the Federal Rules, or, if a direct conflict is found in a given case, supplanting the state law would violate the REA.<sup>27</sup>

## I. STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION: STATE LEGISLATURES STRIKE BACK

Although a majority of states have enacted anti-SLAPP legislation,<sup>28</sup> whether these laws will be applied in federal court when jurisdiction is based on the parties diversity of citizenship remains unsettled.<sup>29</sup> This Part explains anti-SLAPP legislation generally and then explores the analyses federal courts employ when deciding whether the laws apply.<sup>30</sup> Section A explores the reasoning behind, justification for, and mechanics of state anti-SLAPP legislation.<sup>31</sup> Section B introduces the *Erie* doctrine, which federal courts apply when resolving state-versus-federal choice of law questions.<sup>32</sup> Section C then examines the threshold inquiry of the *Erie* doctrine, explaining the impacts of both broad and narrow readings of the Federal Rules of Civil Procedure.<sup>33</sup> Finally, Section D discusses the two views of how to read the REA, which gives the U.S. Supreme Court the power to prescribe procedural rules for the federal courts so long as they neither abridge, enlarge, or modify substantive rights.<sup>34</sup>

---

<sup>25</sup> See *infra* notes 28–108 and accompanying text.

<sup>26</sup> See *infra* notes 109–161 and accompanying text.

<sup>27</sup> See *infra* notes 162–222 and accompanying text.

<sup>28</sup> See *State Anti-SLAPP Laws*, *supra* note 13 (showing that twenty-seven states, the District of Columbia, and Guam have all passed anti-SLAPP legislation).

<sup>29</sup> Compare *Godin*, 629 F.3d at 81 (holding that an anti-SLAPP statute applied in diversity case), with *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 88 (D.D.C. 2012) (finding that an anti-SLAPP statute did not apply in diversity case).

<sup>30</sup> See *infra* notes 35–108 and accompanying text.

<sup>31</sup> See *infra* notes 35–55 and accompanying text.

<sup>32</sup> See *infra* notes 56–63 and accompanying text.

<sup>33</sup> See *infra* notes 64–89 and accompanying text.

<sup>34</sup> See *infra* notes 90–108 and accompanying text.

*A. The Legislative Response to SLAPPs: Throwing Meritless Claims out of Court*

Although SLAPPs are not a new phenomenon, their use is on the rise.<sup>35</sup> In the past thirty years, legislatures throughout the United States passed anti-SLAPP statutes in response to an increase in harassing lawsuits brought to muzzle the voices of citizens.<sup>36</sup> Such abusive lawsuits, legislatures noted, had a chilling effect on public speech and participation in matters of public concern.<sup>37</sup> Legislatures found that encouraging participation in matters of public significance, free from the threat of meritless lawsuits, is a strong public interest.<sup>38</sup>

The importance of effective anti-SLAPP laws is highlighted by the lack of protections available through other common law and statutory solutions to the problem of SLAPPs.<sup>39</sup> Where state anti-SLAPP protections are absent, litigants have inadequate protections against meritless lawsuits that target speech and petitioning activity.<sup>40</sup> First, although Rule 11 of the Federal Rules of Civil Procedure (and its state analogues) may provide sanctions against parties bringing frivolous suits, such sanctions do not save a SLAPP defendant from the burden of extensive court proceedings.<sup>41</sup> Second, although vic-

---

<sup>35</sup> See CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2015) (noting a “disturbing increase in [SLAPP] lawsuits”); 7 GUAM CODE ANN. § 17102(a)(5) (2012) (noting that “the number of SLAPPs has increased significantly over the past thirty (30) years”).

<sup>36</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16 (California’s anti-SLAPP law); D.C. CODE §§ 16-5501 to -5505 (2001 & Supp. 2014) (District of Columbia’s anti-SLAPP law); ME. REV. STAT. ANN. tit. 14, § 556 (Supp. 2014) (Maine’s anti-SLAPP law).

<sup>37</sup> See, e.g., ARK. CODE ANN. § 16-63-502(2) (2005) (noting that SLAPPs cause speech and petitioning to be “chilled through abuse of the judicial process”); CAL. CIV. PROC. CODE § 425.16(a) (noting that SLAPPs are “brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances”); TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2015) (declaring that the purpose of the anti-SLAPP law is to “safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government”).

<sup>38</sup> See ARK. CODE ANN. § 16-63-502(2); CAL. CIV. PROC. CODE § 425.16(a); TEX. CIV. PRAC. & REM. CODE ANN. § 27.002.

<sup>39</sup> See John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 416 (1993); Yurko & Choy, *supra* note 10, at 15.

<sup>40</sup> See Barker, *supra* note 39, at 416 (“[E]xisting provisions in professional ethical codes and sanction provisions . . . do not adequately deter SLAPPs. These provisions provide standards and enforcement proceedings that are lax and are not SLAPP-specific.”). Despite the legislative efforts of many states, several states have yet to pass anti-SLAPP legislation. See Burton Rubin, *Virginia, Stop Getting Slapped*, JEFFERSON POL’Y J. (Jan. 2, 2014), <http://www.jeffersonpolicyjournal.com/?p=4228>, archived at <http://perma.cc/A4YR-ZQMG> (decrying the lack of anti-SLAPP protection in Virginia); See generally Barylak, *supra* note 20 (detailing deficiencies remaining in anti-SLAPP protection).

<sup>41</sup> See FED. R. CIV. P. 11; see also Barker, *supra* note 39, at 416 (discussing the availability of Rule 11 sanctions in the SLAPP context); Marc J. Randazza, *Nevada’s New Anti-SLAPP Law: The Silver State Sets the Gold Standard*, NEV. LAW., Oct. 2013, at 10, 10 (noting that Rule 11 sanc-

tims of a SLAPP can countersue, claiming against the opposing party for litigation-based torts such as malicious prosecution or abuse of process, this option further mires the defendant in costly litigation.<sup>42</sup> Finally, federal common-law immunity under the petition clause of the First Amendment may be a viable defense for those SLAPPED for covered petitioning activity, but this protection neither extends as broadly as many anti-SLAPP laws nor offers as quick an exit from harassing suits.<sup>43</sup>

Anti-SLAPP jurisdictions have addressed the shortcomings of common law and statutory solutions to the problem of SLAPPs by providing additional protections to defendants subjected to meritless suits.<sup>44</sup> Anti-SLAPP laws focus on the swift and efficient dismissal of frivolous lawsuits against protected activity and emphasize subjecting the SLAPPED party to as little time in court as possible.<sup>45</sup> These statutes thus force plaintiffs to take a harder look at litigation by both deterring meritless claims and hastening their resolution, thereby keeping such suits from taking up time and financial resources from those who lawfully exercise their First Amendment rights to free speech and petitioning.<sup>46</sup>

A special motion to strike procedure is the cornerstone of anti-SLAPP legislation.<sup>47</sup> The special motion allows defendants to move to strike a claim if it is based on an action involving protected speech or petitioning activity.<sup>48</sup>

tions are inadequate to deter SLAPPs because “such sanctions are rare, and [are] no impediment to a creative litigator’s tools”).

<sup>42</sup> See Barker, *supra* note 39, at 431–39 (discussing “SLAPP-backs”—countersuits or counterclaims that a SLAPP defendant may file against the plaintiff—but remarking that “[w]hile they may allow vindication, a SLAPP-back victory may be too little, too late”).

<sup>43</sup> See *id.* at 425–29 (discussing the constitutional protection of petitioning activity, which may insulate a defendant from suit, as an effective weapon against SLAPPs, but also noting that this remedy only covers limited activities).

<sup>44</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2015) (California’s anti-SLAPP law); D.C. CODE §§ 16-5501 to -5505 (2001 & Supp. 2014) (District of Columbia’s anti-SLAPP law); ME. REV. STAT. ANN. tit. 14, § 556 (Supp. 2014) (Maine’s anti-SLAPP law).

<sup>45</sup> See Barker, *supra* note 39, at 450 (“The single, most pivotal benefit that statutory solutions to the SLAPP problem offer is a very early resolution of the claim.”).

<sup>46</sup> ARK. CODE ANN. § 16-63-502(2) (2005); CAL. CIV. PROC. CODE § 425.16(a); TEX. CIV. PROC. & REM. CODE ANN. § 27.002 (West 2015); see also Potter & Haller, *supra* note 20, at 10,137 (noting that anti-SLAPP laws “have a common purpose: preventing, or hastening the disposition of, litigation targeted at protected petitioning activities”).

<sup>47</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (providing a special motion to dismiss); D.C. CODE § 16-5502 (same); ME. REV. STAT. ANN. tit. 14, § 556 (same); see also RASMUSSEN, *supra* note 12, at 3 (detailing the special motion provision of each state’s anti-SLAPP statute). For the purposes of analyzing the *Erie* issue, this Note focuses primarily on the special motion to dismiss procedure. See generally Katelyn E. Saner, Note, *Getting SLAPP-ed in Federal Court After Shady Grove*, 63 DUKE L.J. 781 (2013) (analyzing the applicability of anti-SLAPP laws in federal diversity actions while focusing on the special motion to dismiss procedure).

<sup>48</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (providing a special motion to dismiss); D.C. CODE § 16-5502 (same). ME. REV. STAT. ANN. tit. 14, § 556 (same).



In bringing a special motion to strike, a defendant usually need only show that the claim is based on an action involving public participation, petitioning, or free speech covered by the statute.<sup>49</sup> If this burden is met, the motion will be granted unless the plaintiff can establish that they are likely to prevail on their claim.<sup>50</sup>

Anti-SLAPP laws provide a streamlined process for courts to resolve special motions to strike, reducing the burden in terms of time and costs for a SLAPP defendant.<sup>51</sup> Many statutes provide that hearings on special motions be conducted expeditiously and decisions rendered swiftly.<sup>52</sup> Furthermore, many anti-SLAPP laws stay discovery until the resolution of a special motion to strike, absent cause for limited targeted discovery at the court's discretion.<sup>53</sup> Many statutes expressly provide for expedited appeal from a trial court's order on a special motion to strike.<sup>54</sup> Finally, some anti-SLAPP laws shift litiga-

<sup>49</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (noting that the defendant must show a claim based on "any act . . . in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue"); D.C. CODE § 16-5502(a) (providing that the defendant must show a claim based on "an act in furtherance of the right of advocacy on issues of public interest"); HAW. REV. STAT. ANN. § 634F-1 (LexisNexis 2012) (noting that the defendant must show a claim based on "oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding"); ME. REV. STAT. ANN. tit. 14, § 556 (providing that the defendant must show a claim based on the "right of petition under the Constitution of the United States or the Constitution of Maine").

<sup>50</sup> See CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2015); D.C. CODE § 16-5502; ME. REV. STAT. ANN. tit. 14, § 556. Statutes vary with respect to the burdens placed on the nonmoving party to prevail on a special motion to dismiss. See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (describing how the SLAPP plaintiff bears burden to show probability that they will prevail on claim); D.C. CODE § 16-5502(b) (listing that the SLAPP plaintiff bears burden to show claim is likely to succeed on the merits); ME. REV. STAT. ANN. tit. 14, § 556 (outlining how the SLAPP plaintiff bears burden to show that the defendant's "exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that [defendant's] acts caused actual injury").

<sup>51</sup> See CAL. CIV. PROC. CODE § 425.16(f); D.C. CODE § 16-5502(d); WASH. REV. CODE § 4.24.525(5)(a) (2014).

<sup>52</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(f) (requiring that the special motion to dismiss be heard "not more than 30 days after the service of the motion"); D.C. CODE § 16-5502(d) (providing that courts hold expedited hearings on special motions to dismiss and issue rulings "as soon as practicable"); WASH. REV. CODE § 4.24.525(5)(a) (providing that hearings on special motions to strike are held within thirty days of service and that a decision is rendered no later than seven days after hearing).

<sup>53</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(g) ("All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section."); ME. REV. STAT. ANN. tit. 14, § 556 (providing the same with substantially similar language); WASH. REV. CODE § 4.24.525(5)(c) (same).

<sup>54</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(i) ("An order granting or denying a special motion to strike shall be appealable [immediately] . . ."); HAW. REV. STAT. ANN. § 634F-2(2) ("The moving party shall have a right . . . [t]o an immediate appeal from a court order denying the motion . . ."); TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(b) (West 2015) ("An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss . . .").

tion costs to the plaintiff if the suit is dismissed; attorney's fees may be awarded to the prevailing party, and some states' laws provide for additional statutory damages.<sup>55</sup>

### B. The Erie Doctrine: A Short Review

In 1938, in *Erie Railroad Co. v. Tompkins*, the U.S. Supreme Court held that federal courts sitting in diversity apply state substantive law rather than "federal general common law."<sup>56</sup> As the cases after *Erie* established, federal courts exercising diversity jurisdiction apply state substantive law, and procedure is governed by the Federal Rules of Civil Procedure.<sup>57</sup> The distinction between substance and procedure is problematically elusive, however, and courts continue to struggle to draw a line between the two.<sup>58</sup>

Courts confronting an *Erie* question perform a multi-step analysis to resolve the issue.<sup>59</sup> First, the court determines to what extent the state law intrudes upon an area covered by the Federal Rules.<sup>60</sup> If there is a "direct colli-

---

<sup>55</sup> See CAL. CIV. PROC. CODE § 425.16(c)(2) (providing attorney's fees to the prevailing party on a special motion to strike); WASH. REV. CODE § 4.24.525(6)(a)(ii) (providing statutory damages of ten thousand dollars to prevailing party on a special motion to strike); 7 GUAM CODE ANN. § 17106(g) (2012) (providing the SLAPP defendant prevailing on a motion to strike attorney's fees and litigation costs as well as "such additional sanctions upon the responding party, its attorneys or law firms as [the court] determines will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated").

<sup>56</sup> 304 U.S. 64, 78 (1938). The *Erie* Court's decision overruled the U.S. Supreme Court's prior case of *Swift v. Tyson*, under which federal courts sitting in diversity developed and applied their own body of jurisprudence with respect to state laws, instead of following a state's development of those laws. See *id.* at 80; *Swift v. Tyson*, 41 U.S. 1, 9 (1842).

<sup>57</sup> See *Gasperini*, 518 U.S. at 427 ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."); *Hanna*, 380 U.S. at 465 ("[F]ederal courts are to apply state substantive law and federal procedural law."); *Guar. Trust*, 326 U.S. at 112 ("The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States.").

<sup>58</sup> See *Shady Grove*, 559 U.S. at 416 (Stevens, J., concurring) (considering whether New York law limiting class action suits was substantive or procedural); *Gasperini*, 518 U.S. at 426 (considering whether New York law governing excessiveness in compensation awards was substantive or procedural); see also *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744 (1980) (characterizing the issue as one that has "troubled this Court for many years"); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (characterizing the substance-procedure dichotomy of *Erie* jurisprudence as "a subject of endless discussion"); *Erie*, 304 U.S. at 92 (Reed, J., concurring) ("The line between procedural and substantive law is hazy . . ."); *United States v. Poland*, 562 F.3d 35, 40 (1st Cir. 2009) (characterizing the distinction as "an enduring conundrum").

<sup>59</sup> See *Hanna*, 380 U.S. at 461–62.

<sup>60</sup> See *Walker*, 446 U.S. at 749–50; see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 34 (1988) (Scalia, J., dissenting) ("When a litigant asserts that state law conflicts with a federal procedural statute or formal Rule of Procedure, a court's first task is to determine whether the disputed point in question in fact falls within the scope of the federal statute or Rule.").

sion” between state law and a Federal Rule, the Federal Rule applies,<sup>61</sup> so long as it valid under the REA.<sup>62</sup> If, however, the Federal Rule is not so broad as to cover the area in question, then the court must make the “relatively unguided *Erie* choice” and decide whether applying the state law serves *Erie*’s “twin aims”: preventing litigants from forum-shopping in hopes of securing a more favorable body of law for their case, and preventing the inequitable administration of justice that might occur if state and federal courts applied different substantive law in similar cases.<sup>63</sup>

### C. *Two Approaches to the Threshold Inquiry: Broad Versus Narrow Readings of the Federal Rules*

Because the path of the *Erie* analysis turns on whether or not the state law and a Federal Rule are in direct conflict, characterizing the breadth of the Federal Rule is crucial.<sup>64</sup> The appropriate way to frame this conflict, however, remains an unresolved issue.<sup>65</sup>

<sup>61</sup> See, e.g., *Hanna*, 380 U.S. at 461–62, 472 (holding that Federal Rule of Civil Procedure 4(d)(1) applied in a diversity suit because it was in “direct collision” with similar state law); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 5 (1941). A slightly nuanced version of this threshold question has been posed by the more recent *Erie* decisions, framing the inquiry as whether a Federal Rule is “sufficiently broad to control the issue before the court.” See *Shady Grove*, 559 U.S. at 421 (Stevens, J., concurring); *Stewart*, 487 U.S. at 26 (1988) (quoting *Walker*, 446 U.S. at 749–50); see also *Godin*, 629 F.3d at 86 (following this approach).

<sup>62</sup> See 28 U.S.C. § 2072 (a)–(b) (2012). The validity of the Rule depends on whether it comports with the REA, which provides the Supreme Court with the power to create housekeeping rules so long as they relate to practice and procedure and do “not abridge, enlarge or modify any substantive right.” See *id.*; see also *infra* notes 90–108 (discussing the REA in greater depth). In a “direct collision” scenario, a presumption favors applying the Federal Rule over the competing state law, because the Federal Rules are “presumptive[ly] valid.” See *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6 (1987) (citing *Hanna*, 380 U.S. at 471); STEPHEN N. SUBRIN ET AL., *CIVIL PROCEDURE: DOCTRINE, PRACTICE, & CONTEXT* 953 (4th ed. 2012). This presumptive validity derives from the fact that “the Advisory Committee, the Judicial Conference, and [the U.S. Supreme] Court” study and approve the Federal Rules, and the “statutory requirement that the Rule be reported to Congress for a period of review before taking effect.” See *Burlington*, 480 U.S. at 6. Indeed, the Supreme Court has never invalidated a Federal Rule for overstepping the bounds of the REA. See *Shady Grove*, 559 U.S. at 407 (plurality opinion) (observing that the Court has “rejected every statutory challenge to a Federal Rule that has come before [it]”).

<sup>63</sup> See *Hanna*, 380 U.S. at 471. In this instance, a presumption favors applying the state law because application of the Federal Rule most often frustrates these dual goals. See SUBRIN ET AL., *supra* note 62, at 953; see also *Gasperini*, 518 U.S. at 426–27 (finding no direct conflict and applying the state rule because doing so best served the twin aims of *Erie*).

<sup>64</sup> See *Walker*, 446 U.S. at 749 (holding that “[t]he first question . . . [is] whether the scope of the Federal Rule in fact is sufficiently broad to control the issue,” and further noting that “it is only if that question is answered affirmatively” that a court should proceed to examine the validity of the Federal Rule). Compare *Shady Grove*, 559 U.S. at 399, 407 (employing a broad interpretation of a Federal Rule, which lead to a direct conflict and necessitated an REA analysis), with *Gasperini*, 518 U.S. at 437 (interpreting the Federal Rule narrowly, which did not lead to a direct conflict and the court performed an unguided *Erie* analysis).

<sup>65</sup> Compare *Shady Grove*, 559 U.S. at 399 (interpreting the Federal Rule broadly), with *id.* at 446 (Ginsburg, J., dissenting) (arguing that the Federal Rule should be interpreted moderately).

When a court construes a Federal Rule as occupying the entire field to which a competing state law is addressed, the two laws are usually found to be in conflict and the *Erie* analysis shifts to determining the validity of the Federal Rule.<sup>66</sup> For example, in 1965, in *Hanna v. Plumer*, the U.S. Supreme Court considered whether service of process in a diversity suit governed by Massachusetts law was prescribed by Federal Rule of Civil Procedure 4(d)(1) or by the state rule that would have applied had the action been filed in state court.<sup>67</sup> There, the Court found that direct conflict between the two laws was “unavoidable”: the Massachusetts rule required in-hand service, whereas the Federal Rule “implicitly, but with unmistakable clarity” stated that such service was not required.<sup>68</sup> In this way, the Court held that Federal Rule of Civil Procedure 4(d)(1) controlled the entire issue, leaving no room for the state law to operate, and then proceeded to apply the Federal Rule after determining it to be valid.<sup>69</sup>

Similarly, in 2010, a plurality of the U.S. Supreme Court broadly framed a Federal Rule in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*<sup>70</sup> There, the Court considered whether a New York tort reform law, which would have barred the plaintiff’s suit from proceeding as a class action, controlled in a federal diversity case or was displaced by Federal Rule of Civil Procedure 23.<sup>71</sup> The plurality read Federal Rule of Civil Procedure 23 broadly as providing a “one-size-fits-all formula” for deciding whether or not a class action could be maintained.<sup>72</sup> Determining that Rule 23 covered this entire field, the plurality concluded that this left no room for the New York law to operate.<sup>73</sup> In this way, the Court construed the New York law and the

---

<sup>66</sup> See, e.g., *Shady Grove*, 559 U.S. at 399 (finding direct conflict between the Federal Rule and New York law); *Gasperini*, 518 U.S. at 468 (Scalia, J., dissenting) (arguing that the Seventh Amendment and the New York law were in direct conflict); *Hanna*, 380 U.S. at 470 (finding a direct conflict between Federal Rule and Massachusetts law).

<sup>67</sup> See 380 U.S. at 470. In *Hanna*, the plaintiff had served her complaint and summons by leaving copies with the defendant’s wife. See *id.* at 461. Although this method complied with the Federal Rule, it was not sufficient under the Massachusetts law that required in-hand service. See *id.* at 462–63. Thus, if the Federal Rule controlled, plaintiff’s suit could continue, but if the state law controlled, the suit had to be dismissed. See *id.*

<sup>68</sup> See *id.* at 470.

<sup>69</sup> See *id.* at 464, 470.

<sup>70</sup> See 559 U.S. at 399 (holding that Federal Rule 23 “provides a one-size-fits-all formula for deciding the class-action question,” and therefore section 901(b) New York Civil Practice and Rules Law (governing class certification) was in direct conflict).

<sup>71</sup> See *id.* at 397, 398.

<sup>72</sup> See *id.* at 398.

<sup>73</sup> See *id.* at 399 (“Because [the New York law] attempts to answer the same question—*i.e.*, it states that [plaintiff’s] suit ‘may not be maintained as a class action’ because of the relief it seeks—it cannot apply in diversity suits unless Rule 23 is ultra vires.”).

Federal Rule as being in direct conflict and held it appropriate to apply the Federal Rule, again after determining it to be valid.<sup>74</sup>

Alternatively, many of the U.S. Supreme Court's *Erie* decisions have narrowly interpreted the Federal Rules of Civil Procedure and found that they were not in conflict with a competing state law.<sup>75</sup> For instance, in 1949, in *Cohen v. Beneficial Industries Loan Corp.*, the U.S. Supreme Court took this approach.<sup>76</sup> In *Cohen*, plaintiffs brought a stockholder's derivative suit in federal court against a diverse defendant.<sup>77</sup> The substantive law in the case was that of New Jersey, which had enacted legislation making such claims more difficult to maintain in an attempt to curb wantonly brought derivative actions.<sup>78</sup> The *Cohen* Court was faced with determining whether these state laws could, under *Erie*, be applied in the diversity action before it.<sup>79</sup> In concluding that the state law should indeed be applied, the Court narrowly interpreted Federal Rule of Civil Procedure 23, which prescribed the prerequisites for maintaining such an action.<sup>80</sup> The Court concluded that the Federal Rule did not occupy the entire field in question before the court, avoided a direct conflict, and allowed the state rule to operate harmoniously alongside the Federal Rules.<sup>81</sup>

---

<sup>74</sup> See *id.*

<sup>75</sup> See, e.g., *Gasperini*, 518 U.S. at 417 (narrowly interpreting Federal Rule of Civil Procedure 59(a) to allow for a federal court accommodation of state law that imposed more rigorous standards for reviewing potentially excessive jury verdicts); *Walker*, 446 U.S. at 750–51 (narrowly interpreting Rule 3 of the Federal Rules of Civil Procedure so that it did not displace a competing state law and frustrate substantial state policy interests); *Cohen*, 337 U.S. at 543 (narrowly interpreting Federal Rule of Civil Procedure 23 so that it did not conflict with a competing state law with heightened requirements for pursuing stockholder's derivative actions). The term "narrow" here is not meant to suggest an artificially circumscribed interpretation of a Federal Rule. See *Walker*, 446 U.S. at 750 n.9 (noting that the Federal Rules of Civil Procedure should not be "narrowly construed in order to avoid a 'direct collision' with state law," but instead, the "[r]ules should be given their plain meaning"). Rather, a "narrow" interpretation means adopting a less expansive reading when an equally plausible broader reading exists. See *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting) (counseling against "relentlessly" reading Federal Rules in an expansive manner). Indeed, the advocates of a "narrow" interpretation in a given case are likely to maintain that this interpretation is the correct reading of the rule. See *id.* at 446 (contending that the appropriate approach is to "read Federal Rules *moderately*" and discouraging "stretching a rule to cover every situation it could conceivably reach" (emphasis added)).

<sup>76</sup> See 337 U.S. at 555; see also *Shady Grove*, 559 U.S. at 440 (Ginsburg, J., dissenting) (using the *Cohen* Court's decision to inform an analysis of the proper reading of the breadth of Federal Rule 23).

<sup>77</sup> See *Cohen*, 337 U.S. at 543.

<sup>78</sup> See *id.* at 544 n.1, 545.

<sup>79</sup> See *id.* at 543.

<sup>80</sup> See *id.* at 556. Federal Rule of Civil Procedure 23.1 now governs derivative actions. See FED. R. CIV. P. 23.1.

<sup>81</sup> See *Cohen*, 337 U.S. at 556–57. The Court's narrow interpretation took cognizance of the important state concerns undergirding the law, recognizing that "in enacting the statute the New Jersey legislature was concerned with something more than improving the process by which law-

Similarly, in 1980, in *Walker v. Armco Steel Corp.*, the U.S. Supreme Court construed Rule 3 of the Federal Rules of Civil Procedure narrowly when considering whether, in a federal diversity case, Rule 3 or state law should determine when an action is commenced for the purposes of tolling the state statute of limitations.<sup>82</sup> Although Rule 3 plainly addresses when an action is commenced, the *Walker* Court read the Rule narrowly and held that it did not concern whether a state statute of limitations could be tolled, nor was it broad enough to displace state tolling rules.<sup>83</sup> Instead, the Court held that the Federal Rule and the state law could “exist side by side, . . . each controlling its own intended sphere of coverage without conflict.”<sup>84</sup> Importantly, the Court’s narrow reading of Rule 3 was prompted by its recognition that the state rule was a “substantive decision” that service of process on a defendant was an “integral part” of the policies embodied by the state’s statute of limitations.<sup>85</sup>

More recently, Justice Ruth Bader Ginsburg’s dissenting opinion in *Shady Grove* vigorously defended a narrow reading of the Federal Rules of Civil Procedure.<sup>86</sup> Disagreeing with the plurality’s broad framing of Rule 23 of the Federal Rules of Civil Procedure, Justice Ginsburg would have interpreted the Rule “with awareness of, and sensitivity to, important state regulatory policies” and found no direct collision with state law.<sup>87</sup> This approach, Justice Ginsburg argued, “avoid[s] immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any counter-

---

suits are conducted.” John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 729 (1974); see *Cohen*, 337 U.S. at 543.

<sup>82</sup> See 446 U.S. at 742. The relevant state law in *Walker* provided that, for purposes of whether a statute of limitations would be tolled, the date on which an action was commenced was the date process was served. See *id.* at 742–43. By contrast, Rule 3 of the Federal Rules of Civil Procedure provides that an action is commenced upon filing a complaint with the court. See *id.* at 743; see also FED. R. CIV. P. 3. The plaintiff in *Walker* had filed his complaint within the state’s statute of limitations, but had not served summons on the defendant until after the limitations period. See *Walker*, 446 U.S. at 742. Thus, if Rule 3 was “sufficiently broad to control the issue,” the case could go forward, but if not, it would be dismissed. See *id.* at 742–43, 749.

<sup>83</sup> See *Walker*, 446 U.S. at 750–51.

<sup>84</sup> See *id.* at 752. Rule 3, the Court held, governed the date from which various timing requirements of the Federal Rules begin to run, but state law separately controlled when an action was commenced for the purposes of state statutes of limitations and tolling. See *id.* at 751.

<sup>85</sup> See *id.* at 751. As such, the Court considered the state service rule to be “part and parcel of the statute of limitations,” and narrowly interpreted Rule 3 so as to not “replace such policy determinations found in state law.” See *id.* at 752 (concluding that because the state statute of limitations “establishes a deadline after which the defendant may legitimately have peace of mind . . . [and] also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim,” the state’s requirement of in-hand service promoted these policies and was therefore “an integral part of the statute of limitations” (internal quotation marks omitted)).

<sup>86</sup> See *Shady Grove*, 559 U.S. at 436–59 (Ginsburg, J., dissenting).

<sup>87</sup> See *id.* at 437.

vailing federal interest.”<sup>88</sup> The narrow approach, in this way, suggests that a court interpreting the Federal Rules of Civil Procedure should do so with an “awareness of legitimate state interests.”<sup>89</sup>

#### *D. Two Views of the Rules Enabling Act: Facial Invalidity Versus As-Applied Challenges*

As noted above, if a Federal Rule “directly collides” with a state law, the *Erie* analysis shifts to examining the Federal Rule, which will apply unless the Rule violates the REA by abridging, enlarging, or modifying a substantive right.<sup>90</sup> An open question remains whether validity under the REA means merely *facial* validity, or whether an otherwise valid rule might violate the REA as applied in a given case.<sup>91</sup> Put another way, the question is whether a court should consider the Rule in isolation—simply determining whether it “really regulates procedure”<sup>92</sup>—or in a case-specific context, scrutinizing the

<sup>88</sup> See *id.* at 439. Avoiding overbroad interpretations of the Federal Rules also prevents “significant disuniformity between state and federal courts.” See *Stewart*, 487 U.S. at 37–38 (Scalia, J., dissenting). In *Stewart*, Justice Antonin Scalia wrote that because it was “at best . . . ambiguous” whether the federal law at issue conflicted with state law, the Court should have interpreted the federal law narrowly. See *id.* at 38.

<sup>89</sup> See *Shady Grove*, 559 U.S. at 441 (Ginsburg, J., dissenting) (quoting RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 593 (6th ed. 2009)). Put another way, when determining whether a Federal Rule is narrow enough to allow for the side-by-side operation of a state law, a court might take cognizance of state prerogatives by asking “if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.” *Hanna*, 380 U.S. at 475 & n.2 (Harlan, J., concurring) (noting that *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 536–40 (1958), “indicated that state procedures would apply if the State had manifested a particularly strong interest in their employment”). If the state rule would so affect “human conduct,” it is likely procedural for the purposes of *Erie* and should not be displaced by a Federal Rule. See *id.*

<sup>90</sup> See 28 U.S.C. § 2072 (2012) (granting the Supreme Court the power to prescribe rules of practice and procedure for federal courts so long as “[s]uch rules [do] not abridge, enlarge or modify any substantive right”).

<sup>91</sup> See Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 52 (2010) (“[R]easonable minds can differ about what the standard for the validity of a Federal Rule under the Enabling Act should be . . .”); Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1050 (2011) (examining the debate in *Shady Grove* between Justices Scalia and John Paul Stevens over whether a Federal Rule’s validity under the REA should be assessed facially or as applied); Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1194 (2011) (discussing the merits of as-applied REA challenges); see also Donald L. Doernberg, “*The Tempest*”: *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*: *The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1187 (2011) (examining the differences between a Federal Rule’s facial versus as-applied validity under the REA through the lens of *Shady Grove*).

<sup>92</sup> *Sibbach*, 312 U.S. at 14.

Rule for validity “as-applied” to the facts of the case.<sup>93</sup> Facial challenges to the Federal Rules are almost surely doomed to falter, as this would imply that the Supreme Court and Congress each failed to recognize that a Rule transgressed the boundaries of the REA.<sup>94</sup> As-applied challenges, however, suggest that although a Federal Rule might be generally valid, it could run afoul of the REA in certain case-specific applications.<sup>95</sup>

In 1941, in *Sibbach v. Wilson & Co.*, the U.S. Supreme Court held that a Federal Rule was valid so long as it “really regulates procedure.”<sup>96</sup> This approach to the REA implies that when a Federal Rule “really regulates procedure,” it neither abridges, enlarges, nor modifies a substantive right.<sup>97</sup> The *Sibbach* approach analyzes the rule itself, not the rule as applied in a certain case.<sup>98</sup> When a Federal Rule is tested for facial validity under *Sibbach’s* approach to the REA, it is presumptively valid; never before has a Federal Rule failed this test.<sup>99</sup>

In contrast to the *Sibbach* approach, another possible interpretation of the REA contemplates that a Federal Rule may run afoul of the REA in some circumstances but not in others.<sup>100</sup> The “as-applied” approach begins with a different interpretation of the REA’s proscription against abridging, enlarging,

<sup>93</sup> See Struve, *supra* note 91, at 1182 (contrasting the *Sibbach* “really regulates procedure” interpretation of the REA with a different view that “permits questions of a rule’s effect on substantive rights . . . in the context of concrete cases”).

<sup>94</sup> See *Burlington*, 480 U.S. at 6; 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4509, at 271–72 (2d ed. 1996); *infra* note 99 and accompanying text (discussing the presumptive validity of the Federal Rules).

<sup>95</sup> See *Ides*, *supra* note 91, at 1044–55 (noting that as-applied challenges consider the “effect of applying the [Federal] rule in a particular context”).

<sup>96</sup> See *Sibbach*, 312 U.S. at 14.

<sup>97</sup> See *Shady Grove*, 559 U.S. at 409; see also *3M Co.*, 842 F. Supp. 2d at 88 (adhering to the “really regulates procedure” approach when considering validity of Rules 12 and 56 of the Federal Rules of Civil Procedure in the context of the District of Columbia’s conflicting anti-SLAPP statute).

<sup>98</sup> See *Shady Grove*, 559 U.S. at 416 (“A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).”); *Ides*, *supra* note 91, at 1045 (noting that, under the *Sibbach* approach as exemplified in Justice Scalia’s opinion in *Shady Grove*, “[t]he focus of this analysis is on the rule itself—in other words, on what the text of the rule literally provides”); see also *Stewart*, 487 U.S. at 39 (Scalia, J., dissenting) (contending that the proper test for validity under the REA is “whether Congress or the rulemakers have trespassed beyond the wide latitude given them to determine that a matter is procedural”).

<sup>99</sup> See *Burlington*, 480 U.S. at 6 (citing *Hanna*, 380 U.S. at 471) (noting that the Federal Rules have a “presumptive validity”); 19 WRIGHT ET AL., *supra* note 94, at 271–72. *But see* Burbank & Wolff, *supra* note 91, at 42 (arguing that the Court’s “failure to find a violation of the Enabling Act has frequently been made possible through Federal Rule interpretations that were restrained” and further contending that cases in which the Court has narrowly read the Federal Rules “reflect implicit acknowledgment of the inadequacy of *Sibbach*” and its approach to the REA).

<sup>100</sup> See *Shady Grove*, 559 U.S. at 422, 424–25 (Stevens, J., concurring in part and concurring in the judgment); *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983–85 (10th Cir. 2010); *Ides*, *supra* note 91, at 1044–55.



or modifying substantive rights.<sup>101</sup> Whereas the former analysis focuses on the Federal Rule when determining validity under the REA, the as-applied approach focuses more on the potentially abridged, enlarged, or modified substantive right.<sup>102</sup>

This interpretation takes a more rigorous view of the REA's prohibition against altering substantive rights and assumes that "federal rules cannot displace a State's definition of its own rights or remedies" under any circumstance.<sup>103</sup> Under this approach, the Federal Rule is examined alongside the state law.<sup>104</sup> This does not mean, of course, that every procedural state law with nominal substantive effects will render a competing Federal Rule invalid under the REA.<sup>105</sup> The crucial question under this approach is whether the state statute "actually is part of a State's framework of substantive rights or remedies."<sup>106</sup> This functional approach to determining the content of the state law is important because "a 'state procedural rule' . . . may exist 'to influence substantive outcomes, and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy.'"<sup>107</sup> State laws of this character might pose REA problems for any Federal Rule that might displace them.<sup>108</sup>

---

<sup>101</sup> See *Shady Grove*, 559 U.S. at 422, 424–25; Ides, *supra* note 91, at 1050.

<sup>102</sup> Compare *Shady Grove*, 559 U.S. at 428 (plurality opinion) (adopting the *Sibbach* approach to the REA), with *id.* at 424–25 (Stevens, J., concurring in part and concurring in the judgment) (interpreting the REA as allowing for a Federal Rule to be invalid as applied where the displaced state law is "sufficiently intertwined with a state right or remedy").

<sup>103</sup> See *id.* at 418 (Stevens, J., concurring in part and concurring in the judgment). In Justice Stevens' words, under this approach a Federal Rule does not "really regulat[e] procedure when it displaces those rare state rules that, although 'procedural' in the ordinary sense of the term, operate to define the rights and remedies available in a case." *Id.* at 428 n.13 (alteration in original) (quoting *Sibbach*, 312 U.S. at 14) (internal quotation marks omitted).

<sup>104</sup> See *id.* at 419 (noting that this approach "requires careful interpretation of the state and federal provisions at issue"); see also Ides, *supra* note 91, at 1055 (noting that under the as-applied approach, whether the state law at issue is procedural—and therefore preempted by the Federal Rule—or substantive is an important question).

<sup>105</sup> See *Shady Grove*, 559 U.S. at 418 (Stevens, J., concurring in part and concurring in the judgment).

<sup>106</sup> See *id.* at 419.

<sup>107</sup> See *id.* at 420 (quoting *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995)). Importantly, "[s]uch laws, for example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim." See *id.*

<sup>108</sup> See *id.* Justice Stevens recognized that, under the as-applied approach, "when a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice." See *id.* In such a situation, a Federal Rule in direct conflict with a state law would violate the REA if it were applied instead of the state law. See *id.*

## II. THE *ERIE* SAGA MEETS SLAPP: THE APPLICATION OF THE *ERIE* DOCTRINE TO ANTI-SLAPP LAWS IN FEDERAL COURTS

With state legislatures increasingly enacting anti-SLAPP statutes and with the continued opaqueness that is the *Erie* doctrine, federal courts have inevitably come to different conclusions when considering whether these state laws apply in diversity actions.<sup>109</sup> Although three U.S. Courts of Appeals have held that certain provisions of state anti-SLAPP laws may apply in federal diversity actions, other courts have reached the opposite conclusion.<sup>110</sup> The most common battleground centers upon the conflicts between an anti-SLAPP law's special motion to dismiss procedure and Federal Rules of Civil Procedure 12 and 56.<sup>111</sup> The special motion procedures of anti-SLAPP laws potentially conflict with these rules because they allow motions

---

<sup>109</sup> Compare *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) (holding that an anti-SLAPP statute applied in diversity case), with *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 88 (D.D.C. 2012) (finding that an anti-SLAPP statute did not apply in diversity case). The unsettled nature of the law even in the U.S. Courts of Appeals that have addressed the issue springs from these decisions' restriction to a specific state's anti-SLAPP law and a provision of that law. See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (considering only the application of the special motion procedure of California's anti-SLAPP law). Illustrative of the unsettled state of the law is the fact that two Ninth Circuit decisions hold there is appellate jurisdiction over an order denying an anti-SLAPP motion to dismiss, whereas one does not. See *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 (9th Cir. 2010) (jurisdiction); *Englert v. MacDonell*, 551 F.3d 1099, 1102 (9th Cir. 2009) (no jurisdiction); *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003) (jurisdiction). See generally *Barylak*, *supra* note 20 (discussing uncertain application of anti-SLAPP laws in federal diversity actions).

<sup>110</sup> Compare *Godin*, 629 F.3d at 81 (holding that the special motion to dismiss procedure of Maine's anti-SLAPP law applied in federal diversity action), *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009) (coming to the same conclusion with respect to Louisiana's anti-SLAPP law), and *Newsham*, 190 F.3d at 973 (holding same with respect to California law), with *Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1049 (N.D. Ill. 2013) (finding that Washington state's anti-SLAPP law did not apply in diversity action), and *3M Co.*, 842 F. Supp. 2d at 120 (finding that the District of Columbia's anti-SLAPP statute did not apply in diversity action). See also *Makaeff v. Trump Univ., LLC (Makaeff II)*, 736 F.3d 1180 (9th Cir. 2013) (reh'g denied en banc) (Watford, J., dissenting) (contending that California's anti-SLAPP statute should not apply in diversity despite Ninth Circuit precedent to the contrary); *Makaeff v. Trump Univ., LLC (Makaeff I)*, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, C.J., concurring) (contending that California's anti-SLAPP statute should not apply in diversity, despite following the Ninth Circuit's precedent establishing that the statute does apply).

<sup>111</sup> See *Godin*, 629 F.3d at 92 (analyzing the potential conflict between state anti-SLAPP statutes and Federal Rules 12(b)(6) and 56); *3M Co.*, 842 F. Supp. 2d at 101 (same); see also John A. Lynch, Jr., *Federal Procedure and Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 320 (2008) (surveying courts' different conclusions on the *Erie* issue in anti-SLAPP cases and noting that "[t]he main reason for the different outcomes is the inclination, or not, of the court to find a conflict with the Federal Rules"); Quinlan, *supra* note 20, at 401 (discussing conflict between anti-SLAPP laws and Rule 56). Federal Rule of Civil Procedure 12(b)(6) provides that a party may make a motion to dismiss an action for failure to state a claim. See FED. R. CIV. P. 12(b)(6). Federal Rule of Civil Procedure 56 governs the procedure of summary judgment, providing that a movant shall prevail if there is no genuine dispute as to any material fact. See *id.* R. 56.

to strike where the defendant can show that the statute protects his or her conduct and the plaintiff fails to establish a likelihood of success on the merits.<sup>112</sup>

This Part examines how courts have come to differing conclusions as to whether state anti-SLAPP statutes apply in federal court.<sup>113</sup> Section A discusses instances where courts have allowed for state anti-SLAPP statutes to have force in federal court due to a narrow reading of the Federal Rules of Civil Procedure.<sup>114</sup> Section B then explores instances where courts have reached the opposite conclusion by reading the Federal Rules more broadly, thereby precluding application of the state anti-SLAPP laws.<sup>115</sup> Section B also discusses how courts that have found a direct conflict have upheld the Federal Rules' validity under the Rules Enabling Act ("REA") without considering whether a Rule might be invalid as applied.<sup>116</sup>

### *A. Avoiding Conflict: A Narrow Reading Allows Anti-SLAPP Statutes to Be Used in Diversity Suits*

Courts that have read Rules 12 and 56 of the Federal Rules of Civil Procedure narrowly have concluded that the Rules did not conflict with state anti-SLAPP laws.<sup>117</sup> Those courts then found that the twin aims of *Erie* favored

<sup>112</sup> Compare CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2015) (requiring that a court grant a special motion to dismiss if the claim "aris[es] from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" and the plaintiff fails to show a probability of succeeding on the claim's merits), D.C. CODE § 16-5502(b) (2001 & Supp. 2014) (providing that a special motion to dismiss be granted where the defendant "makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest . . . unless the responding party demonstrates that the claim is likely to succeed on the merits"), and ME. REV. STAT. ANN. tit. 14, § 556 (Supp. 2014) (providing that a special motion to dismiss will lie where a claim is based on the defendant's exercise of his or her "right of petition under the Constitution of the United States or the Constitution of Maine" and the plaintiff fails to rebut this defense), with FED. R. CIV. P. 12(b)(6) (providing that a defendant may move to dismiss for "failure to state a claim upon which relief can be granted"), and FED. R. CIV. P. 56(a) (providing that summary judgment be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). See generally DAERR-BANNON, *supra* note 8 (further describing the special motion to dismiss procedures employed by anti-SLAPP statutes).

<sup>113</sup> See *infra* notes 117–161 and accompanying text.

<sup>114</sup> See *infra* notes 117–133 and accompanying text.

<sup>115</sup> See *infra* notes 134–142, 147–161 and accompanying text.

<sup>116</sup> See *infra* notes 143–146 and accompanying text.

<sup>117</sup> See, e.g., *Godin* 629 F.3d at 81 (holding that Federal Rules 12(b)(6) and 56 are not "sufficiently broad" to control issues addressed by Maine's anti-SLAPP statute); *Newsham*, 190 F.3d at 973 (holding that the Federal Rules and California's anti-SLAPP statute "can exist side by side . . . each controlling its own intended sphere of coverage without conflict" (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)); *Trudeau v. ConsumerAffairs.com, Inc.*, No. 10-7193, 2011 WL 3898041, at \*5 (N.D. Ill. Sept. 6, 2011) (finding that anti-SLAPP law applied in diversity because of a special motion procedure did not directly conflict with Federal Rule).

applying the state laws.<sup>118</sup> This has been the most popular approach to date, with three U.S. Courts of Appeals clearly adopting this interpretation.<sup>119</sup>

For example, in 1999, in *U.S. ex rel. Newsham v. Lockheed Missiles & Space, Co.*, the U.S. Court of Appeals for the Ninth Circuit held that the special motion to strike procedure featured in California's anti-SLAPP statute applied in federal diversity suits.<sup>120</sup> The Ninth Circuit began its *Erie* analysis by considering whether application of the California statute would result in a direct collision with the Federal Rules.<sup>121</sup> The court concluded that although Federal Rules 12 and 56 served similar purposes to the provisions of the anti-SLAPP statute, the two procedures could operate harmoniously side by side without conflict.<sup>122</sup> Moving to the relatively unguided *Erie* choice, the court noted that the state statute articulated important substantive interests.<sup>123</sup> The court determined that applying the anti-SLAPP statute best served the twin aims of *Erie* by discouraging forum shopping and better reflecting an equitable administration of justice.<sup>124</sup>

Similarly, in 2010, in *Godin v. Schnecks*, the U.S. Court of Appeals for the First Circuit held that Maine's anti-SLAPP statute applies in federal diversity cases.<sup>125</sup> The court also began by considering the threshold inquiry of whether Federal Rules 12 and 56 were sufficiently broad to control the issue

---

<sup>118</sup> See *Godin*, 629 F.3d at 89 (holding that applying Maine anti-SLAPP law in diversity case best serves *Erie's* aims); *Newsham*, 190 F.3d at 973 (holding the same with regard to California's anti-SLAPP law).

<sup>119</sup> See *Godin*, 629 F.3d at 81; *Henry*, 566 F.3d at 168–69; *Newsham*, 190 F.3d at 973; see also *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (noting application of anti-SLAPP law in diversity “seem[ed] . . . unproblematic”).

<sup>120</sup> See 190 F.3d at 973. In *Newsham*, defendants in a False Claims Act case counterclaimed against the *qui tam* plaintiffs alleging breach of fiduciary obligations and loyalty, breach of contract, and breach of the implied covenant of good faith. See *id.* The plaintiffs moved to strike the counterclaims and recover attorney's fees based on California's anti-SLAPP statute. See *id.* The Ninth Circuit addressed the applicability of both the special motion and attorney's fees provisions in a diversity action. See *id.* The court did not consider other aspects of the California anti-SLAPP statute. See *id.* at 972 n.11 (“Accordingly, we express no opinion regarding the applicability of any other [anti-SLAPP] provisions . . . in federal court.”).

<sup>121</sup> See *id.* at 972.

<sup>122</sup> See *id.* The court reasoned that because a litigant could bring a special motion to strike under the state statute, and if unsuccessful, could bring a motion to dismiss or a motion for summary judgment as provided by the Federal Rules, there was no direct conflict. See *id.*

<sup>123</sup> See *id.* at 973 (quoting CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2015)) (noting that the purpose of California's anti-SLAPP statute is to protect “the constitutional rights of freedom of speech and petition for redress of grievances”).

<sup>124</sup> See *id.*

<sup>125</sup> See 629 F.3d at 81. In *Godin*, the plaintiff—a schoolteacher—had been terminated after other school employees had complained about her conduct towards students. See *id.* The plaintiff brought suit in federal court, suing the school and also bringing state law claims against the individual employees alleging interference with advantageous contractual relations and defamation. See *id.* The individual defendants moved to dismiss the claims under Maine's anti-SLAPP statute. See *id.* at 81–82.

before the court, namely whether or not the claims should be dismissed.<sup>126</sup> The court held that the Federal Rules and the Maine statute did not attempt to answer the same questions or address the same subject, and therefore the Federal Rules were not so broad as to control the issue.<sup>127</sup> Finally, like in *Newsham*, the *Godin* Court found application of the anti-SLAPP statute in federal cases best served the twin goals of *Erie*.<sup>128</sup>

The Second and Fifth Circuits also approve of the application of state anti-SLAPP laws in diversity, though their decisions are less clear than *Newsham* and *Godin*.<sup>129</sup> In 2009, in *Henry v. Lake Charles American Press, L.L.C.*, the U.S. Court of Appeals for the Fifth Circuit held, without discussion, that Louisiana's anti-SLAPP law applied in a federal diversity case.<sup>130</sup> The court then proceeded to examine whether the district court's denial of the defendant's special motion to dismiss under the anti-SLAPP law was immediately appealable under the collateral order doctrine, ultimately concluding that it was.<sup>131</sup> Similarly, in 2014, in *Adelson v. Harris*, the U.S. Court of Appeals for the Second Circuit held that application of the immunity and fee-shifting pro-

---

<sup>126</sup> See *id.* at 88.

<sup>127</sup> See *id.* With respect to Rule 12(b)(6), the court held that although that Rule provided a mechanism to test the complaint's legal sufficiently, the Maine anti-SLAPP statute's special motion procedure provided a mechanism to test the complaint's ability to overcome the special rules created to protect qualified petitioning activities from lawsuits. See *id.* at 87–88. The court held that the procedure provided in Maine's statute did not seek to displace the Federal Rule or render it functionless because it only applied to a certain category of cases. See *id.* (categorizing the Maine statute as a “supplemental and substantive rule to provide added protections, beyond those in Rule[] 12”) With respect to Rule 56, the court similarly reasoned that the Federal Rule did not control the same area as the Maine statute because the latter required the fact-finder to evaluate material factual disputes. See *id.* at 89.

<sup>128</sup> See *id.* at 89. Like the Court in *Godin* and *Newsham*, district courts within the D.C. Circuit have found that provisions of the anti-SLAPP statute may apply in federal diversity actions. See *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013); *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013); *Farah v. Esquire Magazine, Inc. (Farah I)*, 863 F. Supp. 2d 29, 36 n.10 (D.D.C. 2012), *aff'd*, 736 F.3d 528 (D.C. 2013). Each of these cases has adopted the view that the anti-SLAPP laws do not squarely conflict with Federal Rules of Civil Procedure. See, e.g., *Abbas*, 975 F. Supp. 2d at 10–11 (surveying the *Godin*, *Newsham*, and *Henry* decisions and stating that, “this Court is persuaded by those Circuits that have held that [anti-SLAPP] statutes do apply in federal court”); *Boley*, 950 F. Supp. 2d at 255 (citing *Godin*, *Newsham*, and *Henry*, and stating that, “[f]inding these cases persuasive, the Court adopts their reasoning”); *Farah I*, 863 F. Supp. 2d at 36 n.10 (comparing *3M Co.* with *Godin*, *Henry*, *Newsham* and *Sherrod v. Breitbart (Sherrod I)*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012), *aff'd*, 720 F.3d 932 (D.C. Cir. 2013), and ultimately “find[ing] this latter view persuasive”).

<sup>129</sup> Compare *Godin* 629 F.3d at 89 (explaining at length the court's basis for applying state anti-SLAPP law in diversity), and *Newsham*, 190 F.3d at 973 (same), with *Adelson*, 774 F.3d at 809 (discussing briefly why anti-SLAPP law applied in diversity but not relying on this component of the opinion for disposition of the case), and *Henry*, 566 F.3d at 169 (summarily holding that state anti-SLAPP law governed in the diversity case).

<sup>130</sup> See 566 F.3d at 169 (“Louisiana law, including the nominally-procedural [Louisiana anti-SLAPP statute] governs this diversity case.”).

<sup>131</sup> See *id.* at 183.

visions of Nevada's anti-SLAPP law, and entertainment by a federal district court of a special motion to dismiss under the statute, was "unproblematic."<sup>132</sup> The Second Circuit concluded that the anti-SLAPP law "[did] not squarely conflict with a valid federal rule" and was substantive, for *Erie* purposes, because applying it in diversity cases would discourage forum shopping and avoid inequity.<sup>133</sup>

*B. Incompatible: A Broad Reading Creates a Direct Conflict Between State Anti-SLAPP Laws and the Federal Rules of Civil Procedure*

In contrast to a narrow reading of the Federal Rules of Civil Procedure, courts that have read the Federal Rules broadly have found a direct conflict with state anti-SLAPP laws.<sup>134</sup> In performing the REA analysis, each of these courts has subscribed to the view that a Federal Rule is valid so long as, on its face, it does not transgress the REA.<sup>135</sup> Although no U.S. Court of Appeals decision has adopted a broad reading of the Federal Rules in this context to date,<sup>136</sup> federal district courts in the D.C. and Seventh Circuits have held that state anti-SLAPP statutes conflict with the Federal Rules and may not be applied in diversity cases.<sup>137</sup> Furthermore, two judges from the Ninth Circuit recently argued in concurring opinions that *Newsham* was incorrectly decided and should be overturned.<sup>138</sup>

Courts finding that anti-SLAPP laws do not apply in federal court have found that these laws directly collide with valid Federal Rules of Civil Proce-

<sup>132</sup> See 774 F.3d at 809.

<sup>133</sup> See *id.* In reaching this conclusion, the Second Circuit noted that "[m]any courts have held that these statutes . . . are to be applied federally." *Id.* (citing *Godin*, 629 F.3d at 91–92; *Henry*, 566 F.3d at 168–69; *Newsham*, 190 F.3d at 972–73).

<sup>134</sup> See *Intercon Solutions*, 969 F. Supp. 2d at 1052 (finding that Washington's anti-SLAPP statute did not apply in federal diversity case); *3M Co.*, 842 F. Supp. 2d at 96 (holding that the District of Columbia's anti-SLAPP law does not apply in diversity).

<sup>135</sup> See *Intercon Solutions*, 969 F. Supp. 2d at 1050–51 (rejecting the contention that "'a serious question might be raised under the Rules Enabling Act' if 'Rules 12(b)(6) and 56 were thought to preempt application' of the anti-SLAPP provisions at issue" (quoting *Godin*, 629 F.3d at 90)); *3M Co.*, 842 F. Supp. 2d at 110 (analyzing the validity of Federal Rules 12 and 56 under the facial-challenges-only approach).

<sup>136</sup> *But see* *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1355 (11th Cir. 2014). In 2014, in *Royalty Network, Inc. v. Harris*, the U.S. Court of Appeals for the Eleventh Circuit held that the verification requirement of Georgia's anti-SLAPP law conflicted with Federal Rule of Civil Procedure 11 and could not be applied in diversity suits. See GA. CODE ANN. § 9-11-11.1(b) (2014); *Royalty Network*, 756 F.3d at 1355. Unlike the other cases in this Part, *Royalty Network* did not examine the state anti-SLAPP law's special motion to dismiss procedure, and instead only considered the verification requirement that mandated plaintiffs meet heightened verification requirements for suits that might impede free speech or petitioning activity. See *Royalty Network*, 756 F.3d at 1355.

<sup>137</sup> See *Intercon Solutions*, 969 F. Supp. 2d at 1052; *3M Co.*, 842 F. Supp. 2d at 88.

<sup>138</sup> See *Makaeff I*, 715 F.3d at 273 (Kozinski, C.J., concurring); *id.* at 275 (Paez, J., concurring).

ture.<sup>139</sup> For example, in 2012, in *3M Co. v. Boulter*, the U.S. District Court for the District of Columbia found that the D.C. anti-SLAPP statute and the Federal Rules were in direct conflict.<sup>140</sup> The D.C. Circuit, for its part, has twice declined to decide whether the D.C. anti-SLAPP statute should be applied in federal diversity cases.<sup>141</sup> Similarly, in 2013, in *Intercon Solutions, Inc. v. Basel Action Network*, the U.S. District Court for the Northern District of Illinois found that the Washington state anti-SLAPP Act's special motion procedure conflicted with Rules 12 and 56 of the Federal Rules of Civil Procedure and could not be applied in a diversity action.<sup>142</sup>

Courts, finding a direct collision between anti-SLAPP laws and the Federal Rules, have held that the Rules are valid and applied them because, on their face, they neither abridge, enlarge, nor modify any state created rights.<sup>143</sup> Thus, in *3M Co.*, the Court found no REA problem with Rules 12 and 56 of the Federal Rules of Civil Procedure displacing the D.C. anti-SLAPP statute, noting that the Rules enjoy "presumptive validity."<sup>144</sup> Similarly, in *Intercon Solutions*, the court rejected the idea that the validity of Rules 12 and 56, as applied to displace the Washington state anti-SLAPP statute at issue in the case, was "a serious question."<sup>145</sup> These cases have failed, however, to consider whether Rule 12(b)(6) might abridge a state created right as applied in the specific context of an anti-SLAPP case.<sup>146</sup>

<sup>139</sup> See *id.* (majority opinion); *Intercon Solutions*, 969 F. Supp. 2d at 1052; *3M Co.*, 842 F. Supp. 2d at 88.

<sup>140</sup> See 842 F. Supp. 2d at 88; see also Handman et al., *supra* note 12, at 17 (discussing the *3M Co.* decision).

<sup>141</sup> See generally *Sherrod v. Breitbart (Sherrod II)*, 720 F.3d 932 (D.C. Cir. 2013) (declining to decide whether anti-SLAPP statutes apply in diversity cases); *Farah v. Esquire Magazine (Farah II)*, 736 F.3d 528 (D.C. Cir. 2013) (same).

<sup>142</sup> See 969 F. Supp. 2d at 1051 ("Rules 12 and 56 answer the questions in dispute.").

<sup>143</sup> See *id.* ("The fact that application of Rules 12 and 56 affects parties' substantive rights does lead those rules to run afoul of the Rules Enabling Act."); *3M Co.*, 842 F. Supp. 2d at 88 ("Given the procedural characteristics of Rule 12(d) and Rule 56, they fall squarely within the proper scope of the Rules Enabling Act.").

<sup>144</sup> See *3M Co.*, 842 F. Supp. 2d at 110 (rejecting the possibility of as-applied REA challenges and adopting the view that "challenges to the Federal Rules can succeed 'only if the Advisory Committee, [the Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses . . . the terms of the Enabling Act'" (alteration in original) (quoting *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 552 (1991))).

<sup>145</sup> See *Intercon Solutions*, 969 F. Supp. 2d at 1051 (quoting *Godin*, 629 F.3d at 90).

<sup>146</sup> See Ely, *supra* note 81, at 722 (arguing that the REA's interpretation must take account of "the character of the state provision that enforcement of the Federal Rule in question will supplant, in particular to whether the state provision embodies a substantive policy or represents only a procedural disagreement with the federal rulemakers"); cf. *Intercon Solutions*, 969 F. Supp. 2d at 1051 (rejecting the contention that a Federal Rule displacing an anti-SLAPP law in diversity case was problematic under REA); *3M Co.*, 842 F. Supp. 2d at 88 (finding that, based on the "presumptive validity of the Federal Rules of Civil Procedure . . . Rules 12 and 56 do not abridge, enlarge or modify any substantive right in violation of the Rules Enabling Act").

The strongest critique of applying anti-SLAPP statutes in federal diversity actions comes, perhaps surprisingly, from a group of Ninth Circuit judges.<sup>147</sup> In 2013, in *Makaeff v. Trump University, LLC*, two concurring opinions by judges of the U.S. Court of Appeals for the Ninth Circuit contended that California's anti-SLAPP law should not apply in federal courts.<sup>148</sup> They condemned the Ninth Circuit's *Newsham* case,<sup>149</sup> urged for an en banc review of *Makaeff*, and declared that application of state anti-SLAPP statutes in the federal forum has created a mess.<sup>150</sup>

The judges in *Makaeff* disagreed with *Newsham* on two grounds.<sup>151</sup> First, they argued that *Newsham* engaged in its *Erie* analysis before first determining whether California's anti-SLAPP statute was procedural or substantive.<sup>152</sup> On its face, they argued, the law is merely procedural, despite its substantive goals.<sup>153</sup> Therefore, because the procedural rules of federal courts are not to be supplanted by those of the states in a federal diversity action, they would hold California's anti-SLAPP inapplicable in a federal forum.<sup>154</sup>

Second, the judges contended that, even assuming California's anti-SLAPP statute is substantive, *Newsham* incorrectly held that the law should be given effect in federal courts.<sup>155</sup> They highlighted the importance of a uniform scheme of federal rules and the disruption caused by a federal court applying "exotic state procedural rules."<sup>156</sup> The suggestion seems to be that the advantages for equitable administration of justice and reduction of forum shopping offered by applying the anti-SLAPP statute in federal court are outweighed by the countervailing federal interest in a uniform system of federal

<sup>147</sup> See *Makaeff II*, 736 F.3d at 1180 (Watford, J., dissenting, joined by Kozinski, C.J., Paez & Bea, J.J.) (reh'g denied en banc); *Makaeff I*, 715 F.3d at 272 (Kozinski, C.J., concurring).

<sup>148</sup> See *Makaeff I*, 715 F.3d at 272 (Kozinski, C.J., concurring); *id.* at 275 (Paez, J., concurring).

<sup>149</sup> See *id.* at 275 (Kozinski, C.J., concurring) ("*Newsham* was a big mistake.").

<sup>150</sup> See *Makaeff II*, 736 F.3d at 1180 (reh'g denied en banc); *id.* at 1180 (Wardlaw & Callahan, J.J., concurring in the denial of rehearing en banc); *id.* at 1188 (Watford, J., dissenting from the denial of rehearing en banc). The Ninth Circuit ultimately declined to rehear the case en banc with judges on both sides of the issue filing concurring and dissenting opinions. See *id.* at 1180.

<sup>151</sup> See *Makaeff I*, 715 F.3d at 272 (Kozinski, C.J., concurring); *id.* at 275 (Paez, J., concurring).

<sup>152</sup> See *id.* at 272 (Kozinski, C.J., concurring).

<sup>153</sup> See *id.* at 273. Chief Judge Alex Kozinski argues that the California anti-SLAPP law creates no substantive rights but rather provides a procedural vehicle for vindicating existing rights. See *id.*

<sup>154</sup> See *id.* at 274.

<sup>155</sup> See *id.* ("*Newsham* is wrong even on its own terms.").

<sup>156</sup> See *id.* This argument suggests that a state law should be subordinated to a conflicting federal practice if it is essential to the character of federal litigation. See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 528 (1958). In *Byrd*, the U.S. Supreme Court found that the federal policy of a jury deciding an employee's status in a particular action, undergirded by the significant federal policy implications and the Seventh Amendment, trumped a conflicting state law giving the decision to the trial judge. See *id.*



procedure.<sup>157</sup> As Chief Judge Alex Kozinski wrote, “[t]he California anti-SLAPP statute cuts an ugly gash through [the] orderly process” of federal litigation, primarily because the special motion procedure distorts the established methods for pretrial dismissal of unmeritorious claims.<sup>158</sup>

The Ninth Circuit’s discord is important because it’s landmark opinion in *Newsham* was the first Circuit opinion to hold that anti-SLAPP laws could apply in federal diversity actions.<sup>159</sup> It has been cited approvingly by nearly every court eager to apply anti-SLAPP legislation in a federal diversity action.<sup>160</sup> Now, as anti-SLAPP laws move more prominently into the public eye, a leading federal judge has argued that the current trend of applying them in federal courts is a mistake.<sup>161</sup>

---

<sup>157</sup> See *Makaeff I*, 715 F.3d at 272 (Kozinski, C.J., concurring).

<sup>158</sup> See *id.* Among the federal courts to have found that a state’s anti-SLAPP laws do not apply in a federal diversity action, no decision has invoked this reasoning. See *Intercon Solutions*, 969 F. Supp. 2d at 1051 (finding anti-SLAPP law directly collided with Federal Rule and that Rule was valid under the REA); *3M Co.*, 842 F. Supp. 2d at 110 (same).

<sup>159</sup> See *Newsham*, 190 F.3d at 973.

<sup>160</sup> See *Adleson*, 774 F.3d at 809; *Godin*, 629 F.3d at 81; *Henry*, 566 F.3d at 169; *Williams v. Cordillera Commc’ns, Inc.*, No. 2:13-CV-124, 2014 WL 2611746, at \*2 n.2 (S.D. Tex. June 11, 2014); *Forris v. Rauf*, 39 F. Supp. 3d 45, 52 (D.D.C. 2014); *Sherrod I*, 843 F. Supp. 2d at 85; *Trudeau*, 2011 WL 3898041, at \*5.

<sup>161</sup> See *Makaeff I*, 715 F.3d at 272 (Kozinski, C.J., concurring). Before the D.C. Circuit decided *Sherrod II*, one commentator suggested that the Court might be influenced by Chief Judge Kozinski’s opinion in *Makeeff I*, which was issued just prior to the D.C. Circuit hearing that case. See Eric David, *Kozinski Concurrence Questions Anti-SLAPP Application*, DIGITAL MEDIA & DATA PRIVACY L. BLOG (Apr. 24, 2013), <http://www.newsroomlawblog.com/2013/04/articles/anti-slapp-statutes/kozinski-concurrence-questions-antislapp-application>, archived at <http://perma.cc/K2F7-BYRS> (noting that “Judge Kozinski is an influential jurist across the country” and opining that his concurrence in *Makeeff I* may have been written to “send a message to the D.C. Circuit”). See generally *Sherrod II*, 720 F.3d 932 (D.C. Cir. 2013) (declining to answer the question of whether D.C.’s anti-SLAPP law could be applied in federal diversity cases). Furthermore, months after *Sherrod II*, the D.C. Circuit again declined to answer the *Erie* question of whether D.C.’s law applied in diversity. See *Farah II*, 736 F.3d at 531 (upholding the district court’s dismissal of claims pursuant to Federal Rule 12(b)(6) and therefore not reaching the *Erie* issue). *Farah II* was another case in which commentators had expected the court to resolve the issue. See Leslie Machado, *DC Circuit Affirms Denial of Anti-SLAPP Motion in Sherrod v. Breitbart on Timeliness Grounds*, LECLAIRRYAN (June 26, 2013), <http://dcslapplaw.com/2013/06/26/dc-circuit-affirms-denial-of-anti-slapp-motion-in-sherrod-v-breitbart-on-timeliness-grounds/>, archived at <http://perma.cc/YK7S-TBHL> (opining that because the *Sherrod II* court did not resolve the *Erie* question, the “issue will likely be decided by *Farah v. Esquire*”); Leslie Machado, *Will Farah v. Esquire Appeal Resolve “Erie” Question?*, LECLAIRRYAN (Mar. 4, 2013), <http://dcslapplaw.com/2013/03/04/will-farah-v-esquire-appeal-resolve-erie-question/>, archived at <http://perma.cc/47GA-KWAC> (opining that *Farah II* “could resolve whether the DC anti-SLAPP statute applies in federal court”).

### III. SLAPPING DOWN CASES IN FEDERAL COURT, TOO: THE *ERIE* DOCTRINE AND THE RULES ENABLING ACT REQUIRE APPLICATION OF ANTI-SLAPP STATUTES IN FEDERAL COURTS

Since 1938, when the U.S. Supreme Court ruled in *Erie Railroad Co. v. Tompkins*, federal courts deciding whether or not state law applies in federal diversity suits have had to grapple with the distinction between substance and procedure, the strictures of the Rules Enabling Act (“REA”), and the balancing of the twin aims of *Erie*—elimination of forum-shopping and the equitable administration of laws.<sup>162</sup> With the rise of anti-SLAPP legislation—laws that vindicate substantive goals through arguably procedural mechanisms—courts are split as to whether or not such laws apply.<sup>163</sup> This Part argues that proper construction of both the *Erie* doctrine and the REA command the application of state anti-SLAPP laws in federal diversity actions.<sup>164</sup> Section A first argues that courts should interpret the potentially conflicting Federal Rules narrowly to avoid a direct collision with state anti-SLAPP laws.<sup>165</sup> Section B then suggests that, even under a broad reading of the Federal Rules, a proper interpretation of the REA leads to the conclusion that state anti-SLAPP laws should apply in diversity suits based on an as-applied analysis.<sup>166</sup>

#### *A. Everything in Moderation: A Narrow Reading of the Potentially Conflicting Federal Rules Is the Proper Method for the First Step of the Erie Analysis*

When a federal court is tasked with determining whether to apply a state anti-SLAPP law in a diversity case and begins its analysis by considering whether a Federal Rule completely covers the issue before the court, it should interpret that Federal Rule narrowly for two reasons.<sup>167</sup> First, a moderate, conflict-avoiding characterization of the Federal Rules is appropriate when

---

<sup>162</sup> See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (plurality opinion); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Guar. Trust Co. v. York*, 326 U.S. 99, 112 (1945); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>163</sup> Compare *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) (holding that an anti-SLAPP statute applied in a diversity case), with *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 88 (D.D.C. 2012) (finding that an anti-SLAPP statute did not apply in a diversity case).

<sup>164</sup> See *infra* notes 167–222 and accompanying text.

<sup>165</sup> See *infra* notes 167–194 and accompanying text.

<sup>166</sup> See *infra* notes 195–222 and accompanying text.

<sup>167</sup> See *infra* notes 168–176 and accompanying text (arguing in favor of this approach). *But see* *Saner*, *supra* note 47, at 810–11 (arguing that the appropriate methodology is to read the Federal Rules broadly, thus implicating a direct conflict and directing judicial inquiry toward the validity of the Federal Rules under the REA).

important state policy interests undergird a competing state law.<sup>168</sup> Anti-SLAPP laws embody a legitimate, substantial state interest in protecting citizens from abusive litigation when citizens exercise their right to free speech.<sup>169</sup> These laws are part of significant litigation reform schemes undertaken by states.<sup>170</sup> They are not merely arbitrary procedural rules with collateral substantive effects.<sup>171</sup> Additionally, the policies behind these reforms—protection of citizens’ First Amendment rights and guaranteeing freedom from burdensome, unmeritorious lawsuits—are compelling.<sup>172</sup> In this way, anti-SLAPP state-versus-federal choice of law questions present a strong candidate for an interpretive approach sensitive to state interests.<sup>173</sup>

---

<sup>168</sup> See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750–52 (1980) (holding that Federal Rule 3 was not in conflict with Oklahoma’s state law governing in-person service of process, because to find a conflict would frustrate state interests); see FALLON ET AL., *supra* note 89, at 593 (stating that the Supreme Court has recognized “that federal rules be interpreted by the courts applying them, and that the process of interpretation can and should reflect an awareness of legitimate state interests”); see also *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting) (contending that the *Shady Grove* plurality had read Federal Rule 23 too broadly given the substantive interests expressed by the New York statute).

<sup>169</sup> See, e.g., ARK. CODE ANN. § 16-63-502(2) (2005) (finding and declaring that “[t]he valid exercise of the constitutional rights of freedom of speech and the right to petition government for a redress of grievances should not be chilled through abuse of the judicial process”); CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2015) (finding and declaring that the California anti-SLAPP law be enacted to address the chilling effect of frivolous lawsuits on “the valid exercise of the constitutional rights of freedom of speech and petition”); TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2015) (declaring that the purpose of the state’s anti-SLAPP law is to “safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government”).

<sup>170</sup> See, e.g., ARK. CODE ANN. §§ 16-63-504 to -507 (imposing a verification requirement and creating a motion to strike procedure to achieve policy goals); CAL. CIV. PROC. CODE § 425.16 (using a special motion to dismiss, expedited review, immediate appealability, and cost shifting measures to achieve policy goals); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (same).

<sup>171</sup> Cf. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (noting that most procedural rules affect a litigant’s substantive rights in some fashion). Anti-SLAPP laws are the antithesis of the sort of procedural rules with de minimis substantive impact considered by the U.S. Supreme Court in *Sibbach v. Wilson & Co.* See *infra* notes 211–218 (arguing that anti-SLAPP laws confer and define state-created rights).

<sup>172</sup> See CAL. CIV. PROC. CODE § 425.16(a) (finding and declaring that the California’s anti-SLAPP law be enacted to address the chilling effect of frivolous lawsuits on the valid exercise of the constitutional rights of freedom of speech and petition). Mindfulness of these policies comports with one scholar’s argument that although “[i]t would be a mistake” to conclude that all “state ‘doorclosing’ rules generally should be treated as substantive” and therefore applicable in a federal diversity case, “the nature of the state mandate thus enforced, and more specifically the concerns that gave rise to it, must be carefully scrutinized.” See Ely, *supra* note 81, at 772–73.

<sup>173</sup> Compare *Shady Grove*, 559 U.S. at 437 (involving a state rule regulating the maintenance of certain types of class actions), with *Godin*, 629 F.3d at 81 (involving a comprehensive scheme of anti-SLAPP legislation aiming to curb abuse of the judicial process to chill the exercise of constitutionally protected free speech).

Second, reading the Federal Rules narrowly avoids a direct conflict with the state law and allows courts to consider the twin aims of *Erie*.<sup>174</sup> Here, too, the court is free to consider any countervailing federal interest in declining to apply the state statute.<sup>175</sup> A narrow reading of the Federal Rules allows the court to properly engage in this analysis and give the state's laws fair consideration.<sup>176</sup>

The U.S. Supreme Court's 1949 decision *Cohen v. Beneficial Industries Loan Corp.* is illustrative here.<sup>177</sup> In *Cohen*, the Court adopted a moderate reading of the Federal Rules when considering whether a conflict existed with a state litigation reform law that supplemented plaintiffs' requirements for class action claims.<sup>178</sup> Just as the New Jersey statute in *Cohen* made it more difficult for plaintiffs to maintain a type of action the state legislature believed was being abused, so too do anti-SLAPP laws make it more difficult to bring claims that state lawmakers believe chill protected speech and petitioning activity.<sup>179</sup> Furthermore, just as the *Cohen* court resisted reading Rule 23 as the exclusive repository for the requirements of maintaining a derivative action, so too should federal courts resist interpreting Rules 12 and 56 of the Federal Rule of Civil Procedure as the sole arbiters of when a suit may be dismissed or a claim resolved on the pleadings.<sup>180</sup>

When a court is faced with determining whether a state's anti-SLAPP statute's special motion to strike provision is applicable in a diversity case,

---

<sup>174</sup> See *Shady Grove*, 559 U.S. at 398 (plurality opinion) (noting that a court does not consider the twin aims of *Erie* unless the "federal rule is inapplicable or invalid"). But see *Saner*, *supra* note 47, at 807, 810–11 (arguing that courts should interpret the Federal Rules broadly so as to focus the *Erie* problem analysis on a Rule's validity under the REA rather than a court's determination as to whether applying the state law would serve *Erie*'s twin aims).

<sup>175</sup> See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958) (considering the federal interest of maintaining jury trials as being integral to the character of federal litigation).

<sup>176</sup> See *Shady Grove*, 559 U.S. at 443 (Ginsburg, J., dissenting) ("[I]n the adjudication of diversity cases, state interests—whether advanced in a statute . . . or a procedural rule . . . —warrant our respectful consideration.").

<sup>177</sup> Compare *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 543 (1949) (concerning whether a state tort reform statute aimed at shifting costs of meritless derivative suits would apply in federal court), with *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (concerning whether a state's anti-SLAPP law aimed at curbing meritless lawsuits targeting free speech and petitioning activity would apply in federal court).

<sup>178</sup> See *Cohen*, 337 U.S. at 544 n.1 (reading Federal Rule 23 moderately in the face of a potential conflict with a New Jersey statute, which placed the burden of costs on losing plaintiffs in shareholder derivative actions).

<sup>179</sup> See *id.* (considering New Jersey's class-action reform statute); *Godin*, 629 F.3d at 81 (examining Maine's anti-SLAPP law).

<sup>180</sup> See *Cohen*, 337 U.S. at 69; *Godin*, 629 F.3d at 86 (holding that Federal Rule 12(b)(6) and Maine's anti-SLAPP law's motion to strike procedure could coexist). Such an interpretation of Rule 12(b)(6) is fair and would not require courts to "rewrite the rule." See *Shady Grove*, 559 U.S. at 431 (Stevens, J., concurring) (contending that Justice Ruth Bader Ginsburg's dissenting opinion in *Shady Grove* unreasonably contorted the Federal Rule in question to avoid a conflict with state law).

the court should frame the issue before it as whether the case should be dismissed for bringing a claim involving protected speech activity that the plaintiff has not shown a likelihood of prevailing upon.<sup>181</sup> Neither Rule 12(b)(6) nor Rule 56(a) of the Federal Rules of Civil Procedure is so broad as to leave no room for the operation of the state law in this area.<sup>182</sup> Rule 12(b)(6) provides a mechanism for dismissing a complaint for failure to state a claim.<sup>183</sup> Although anti-SLAPP legislation mirrors the mechanism in Rule 12(b)(6) in that it concerns the dismissal of a claim, this similarity does not mean there is no room for the operation of the anti-SLAPP special motion.<sup>184</sup> Indeed, the two laws can operate side by side.<sup>185</sup> Similarly, Federal Rule of Civil Procedure 56 concerns when a claim may be decided summarily, but it is not so broad as to leave no room for the burdens anti-SLAPP laws place on plaintiffs that bring putatively harassing, unmeritorious suits.<sup>186</sup>

There being no direct conflict, the court must then determine whether applying the state law will reduce forum shopping and promote equitable administration of the law.<sup>187</sup> The answer to both of these inquiries is a resounding yes.<sup>188</sup> If a SLAPP plaintiff could avoid state measures to curtail this malicious practice by instead suing in a federal forum, the plaintiff would have incentive to file in federal court.<sup>189</sup> And if a SLAPP defendant could have an unmeritorious suit swiftly dismissed in a state court but not in a federal set-

---

<sup>181</sup> See *Godin*, 629 F.3d at 88 (holding that Maine's anti-SLAPP law and Federal Rules 12 and 56 "are addressed to different (but related) subject-matters" and can co-exist without direct conflict).

<sup>182</sup> See *id.* (holding that the Federal Rules were not so broad as to control the field that Maine's anti-SLAPP laws addressed); *Newsham*, 190 F.3d at 972 (finding that the Federal Rules could operate harmoniously alongside California's anti-SLAPP law in a federal diversity case); see also *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (noting that applying an anti-SLAPP law in diversity "seem[ed] . . . unproblematic" because the law did not "squarely conflict" with the Federal Rules).

<sup>183</sup> FED. R. CIV. P. 12(b)(6).

<sup>184</sup> See *Godin*, 629 F.3d at 88 ("Rule 12(b)(6) serves to provide a mechanism to test the sufficiency of the complaint . . . [The Maine anti-SLAPP law], by contrast, provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis . . ."); see also *Walker*, 446 U.S. at 750 (reading Federal Rule of Civil Procedure 3 moderately and thereby finding room for the operation of Oklahoma state law); *Cohen*, 337 U.S. at 543 (moderately construing Federal Rule 23 and allowing for the side-by-side operation of state law).

<sup>185</sup> See *Godin*, 629 F.3d at 88 (holding that Maine's anti-SLAPP law did not conflict with the Federal Rules); see also *Walker*, 446 U.S. at 750; *Cohen*, 337 U.S. at 543.

<sup>186</sup> See FED. R. CIV. P. 56(a) ("[A] court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *Godin*, 629 F.3d at 89 (noting that Federal Rule 56 "cannot be said to control" the burden-shifting scheme of Maine's anti-SLAPP law).

<sup>187</sup> See *Hanna*, 380 U.S. at 471; *Erie*, 304 U.S. at 75.

<sup>188</sup> See *Godin*, 629 F.3d at 91–92 (finding that applying Maine's anti-SLAPP law in a federal diversity case best served the twin aims of *Erie*); *Newsham*, 190 F.3d at 970 (concluding that the twin aims of *Erie* favored applying California's anti-SLAPP law in diversity).

<sup>189</sup> See *Godin*, 629 F.3d at 91–92; *Newsham*, 190 F.3d at 973.

ting, then there would be unequal administration of the laws as between the two forums.<sup>190</sup>

Finally, the court can consider the countervailing federal interest in declining to apply the state statute.<sup>191</sup> Leaving Federal Rule of Civil Procedure 12 as the sole vehicle for dismissing a complaint prior to discovery would advance the interest of having a predictable, uniform federal rules of procedure.<sup>192</sup> It would be misguided to suggest, however, that this benefit outweighs giving effect to a reasoned, policy-driven, non-conflicting state rule whose application would reduce forum-shopping and promote equal administration of the laws.<sup>193</sup> Thus, the appropriate reading of the Federal Rule is a narrow, moderate one, and the appropriate outcome is application of the special motion to strike procedure in a diversity action.<sup>194</sup>

### *B. The Right Reading of the REA: Federal Rules Are Invalid as Applied if They Would Displace State Anti-SLAPP Laws*

Even if a court finds that a state anti-SLAPP law directly conflicts with a Federal Rule of Civil Procedure, and therefore proceeds to engage in the REA analysis, the court should still favor applying the state law.<sup>195</sup> Courts should

---

<sup>190</sup> See *Godin*, 629 F.3d at 91–92; *Newsham*, 190 F.3d at 973.

<sup>191</sup> See *Byrd*, 356 U.S. at 525 (considering the presence of a “strong federal policy” favoring resolution of factual issues by a jury as a factor in the *Erie* analysis); Struve, *supra* note 91, at 1227 (noting that, under *Byrd*, courts may balance the interests between a strong federal policy for a particular procedure and the competing state procedure when engaging in the *Erie* analysis); see also Paula G. Curry, Note, *Expanding Federal Interests and Diminished Plaintiff Rights: The Government Contractor Defense*, 31 B.C. L. REV. 337, 337–38 (1990) (noting that, under *Erie*, “in diversity actions a federal court must apply the law of the state in which it sits, unless an overriding federal concern displaces state law”).

<sup>192</sup> See *Makaeff v. Trump Univ., LLC (Makaeff I)*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring) (arguing that incorporating anti-SLAPP motion to strike procedures into federal courts disrupts the orderly operation of the Federal Rules); see also Struve, *supra* note 91, at 1215–19 (noting that application of state law procedures in preemption of the Federal Rules risks uncertainty for litigants and disuniformity in the federal court system).

<sup>193</sup> See *Newsham*, 190 F.3d at 973 (holding that there are no “federal interests that would be undermined” by applying California’s anti-SLAPP law’s special motion to dismiss procedure in a diversity case, noting that, “[o]n the other hand, . . . California has articulated the important, substantive state interests,” therefore concluding that the twin aims of *Erie* favored applying state law); see also *Godin*, 629 F.3d at 91–92 (holding that applying Maine’s anti-SLAPP law in diversity cases best served the twin aims of *Erie*, because failing to apply these laws would beget “inequitable administration of justice” and “the incentives for forum shopping would be strong”).

<sup>194</sup> See *Godin*, 629 F.3d at 91–92 (holding that neither Federal Rule of Civil Procedure 12 nor Rule 56 was broad enough to control the issues within the scope of Maine’s anti-SLAPP statute); *Newsham*, 190 F.3d at 972–73 (holding that California’s anti-SLAPP special motion to dismiss procedure did not directly collide with the Federal Rules of Civil Procedure and applied in diversity case).

<sup>195</sup> See *Godin*, 629 F.3d at 89–90 (noting that if Federal Rules of Civil Procedure 12(b)(6) or 56 were to preempt application of Maine’s anti-SLAPP law in a federal diversity action, “a serious question might be raised under the Rules Enabling Act”).

interpret the REA as allowing for as-applied challenges to the validity of a Federal Rule and reject the “really regulates procedure” approach articulated by the U.S. Supreme Court’s 1941 decision in *Sibbach v. Wilson & Co.*, which pays insufficient attention to the REA’s prohibition on altering substantive rights.<sup>196</sup> Under this interpretation, because anti-SLAPP laws confer substantive rights, if a facially valid Federal Rule were to preempt these laws, it would impermissibly abridge those rights in violation of the REA.<sup>197</sup> The result, therefore, is that state anti-SLAPP legislation should apply in federal diversity cases even when a court finds these laws to directly conflict with the Federal Rules.<sup>198</sup>

*Sibbach*’s “really regulates procedure” interpretation of the REA is misguided because whether a Federal Rule abridges, enlarges, or modifies a substantive right cannot be determined without reference to the substantive right itself.<sup>199</sup> The Federal Rules do not operate in a vacuum and neither can an analysis of their validity under the REA.<sup>200</sup> The *Sibbach* approach, by failing to take seriously the REA’s limit on the Federal Rules altering substantive rights, leaves the abridge-enlarge-modify proscription with dull teeth: few, if any, purely procedural rules on their face purport to tamper with substantive

---

<sup>196</sup> See *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring); *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (rejecting the defendant’s broad interpretation of a Federal Rule because, if adopted, it “would arguably violate the jurisdictional limitation of the Rules Enabling Act”); Order of Jan. 21, 1963, 374 U.S. 865, 870 (1963) (statement of Black & Douglas, J.J.) (contemplating as-applied challenges to a Federal Rule’s validity under the REA); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 981 (1998) (criticizing the view that a facially procedural rule satisfies the REA and arguing that “the REA’s substantive-rights proviso should not today be read as surplusage”); Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 271–72 (2008) (noting that “the Supreme Court has suggested on a number of occasions that certain Federal Rules would violate the substantive-rights provision if interpreted in a particular way”).

<sup>197</sup> Cf. *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring) (noting that a Federal Rule would violate the REA if it displaced a state procedural rule that was “so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy”); Order of Jan. 21, 1963, 374 U.S. at 870 (statement of Black & Douglas, J.J.) (observing that the Federal Rules “as applied in given situations might have to be declared invalid”).

<sup>198</sup> Cf. *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring) (advancing an interpretation of the REA which allows for as-applied challenges to the validity of a Federal Rule); *Godin*, 629 F.3d at 90 (noting that if the Federal Rules were read to directly conflict with Maine’s anti-SLAPP statute, “a serious question might be raised under the Rules Enabling Act”).

<sup>199</sup> See *Ides*, *supra* note 91, at 1061 (arguing that Justice John Paul Stevens’ rejection of the *Sibbach* approach in *Shady Grove* was correct). Justice Antonin Scalia’s opinion in *Shady Grove*, which advocates for a reading of the REA as only permitting facial challenges to a Federal Rule’s validity, admits that such an approach “is hard to square with [the REA’s] terms.” See *Shady Grove*, 559 U.S. at 413.

<sup>200</sup> See Doernberg, *supra* note 91, at 1173 (arguing that the REA’s proscription against abridging, enlarging, or modifying substantive rights “commands attention to the sovereign that created the supposed substantive right”).

rights.<sup>201</sup> Furthermore, this approach fails to give life to the crucial federalism and separation of powers principles embodied in the REA.<sup>202</sup> A Federal Rule that transgresses the bounds of the power conferred by the REA should give way to the state law it would displace.<sup>203</sup>

The better view of the REA is that a Federal Rule may be invalid as applied if it would supplant a state law that, although nominally procedural, is “so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy.”<sup>204</sup> This approach not only avoids the pitfalls of the *Sibbach* “really regulates procedure” view, but also better allows for a sensitivity to the important state interests that may be embedded in those laws the Federal Rules might displace.<sup>205</sup> Much like the “narrow” mode of interpreting the breadth of a Federal Rule, the as-applied view of the REA permits the court to consider the substantive thrust of seemingly procedural state laws.<sup>206</sup>

---

<sup>201</sup> See *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring); Saner, *supra* note 47, at 814 (arguing that the *Sibbach* really-regulates-procedure interpretation of the REA “ignores the REA’s limitation that federal rules ‘not abridge, enlarge or modify any substantive right’” (citation omitted)). *Sibbach*’s statement that the appropriate scope of the REA analysis is “whether a rule really regulates procedure,” even if accepted, is not fatal to the as-applied approach, because the Court in *Sibbach* was faced with a facial challenge to the constitutionality of Federal Rule of Civil Procedure 35 and had no occasion to consider an as-applied review. See *Sibbach*, 312 U.S. at 14; Ides, *supra* note 91, at 1061–62. For an in-depth discussion of why *Sibbach* does not foreclose the possibility of as-applied challenges under the REA, see Ides, *supra* note 91, at 1055–59. Furthermore, it should be noted that *Sibbach* is not unassailable. See Ely, *supra* note 81, at 719 (criticizing *Sibbach* and commenting that “the possibility that a Rule could fairly be labeled procedural and at the same time abridge or modify substantive rights was one the Court was unwilling to accept; by its lights, either a Rule was procedural or it affected substantive rights”).

<sup>202</sup> See *Hanna*, 380 U.S. at 476 (Harlan, J., concurring) (noting that the *Erie* decision, and by implication the REA, represent “modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems”).

<sup>203</sup> See *id.* Notably, in 1963, in *Order of Jan. 21, 1963*, U.S. Supreme Court Justices Hugo Black and William O. Douglas contemplated the availability of as-applied review under the REA, noting that the Federal Rules “as applied in given situations might have to be declared invalid.” See 374 U.S. at 870 (statement of Black & Douglas, JJ.).

<sup>204</sup> *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring).

<sup>205</sup> See *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 984–85 (10th Cir. 2010) (considering state policy interests when deciding whether Federal Rule 8(a)(1) offended the REA as applied in a case where it displaced a conflicting state law).

<sup>206</sup> See *Shady Grove*, 559 U.S. at 428 (Stevens, J., concurring) (recognizing the validity of as-applied challenges to the Federal Rules under the REA and then considering the substantive aspects and policy implications of the New York state law at issue in that case). There are admitted downsides to the view that the REA contemplates Federal Rules as being invalid as applied. See Ides, *supra* note 91, at 1064–66. This approach requires a more strenuous judicial inquiry and does not have the convenience of a bright-line test. See *id.* (discussing these two policy-based objections to the as-applied approach). The *Sibbach* “really regulates procedure” approach, however, sacrifices important state prerogatives and undermines federalism goals. See *id.* On balance, therefore, the as-applied approach is superior. See *id.* (arguing in favor of an interpretation of the REA that permits as-applied challenges to the validity of a Federal Rule).



Furthermore, the broader context of state litigation reform movements counsels in favor of the as-applied approach.<sup>207</sup> State legislatures are sometimes forced to enact substantive law through procedural mechanisms in the realm of litigation reform, and anti-SLAPP statutes are a prime example.<sup>208</sup> Because of this phenomenon, recognizing as-applied challenges to the validity of the REA also helps to serve the twin aims of *Erie*, two policy tropes not traditionally part of the REA analysis.<sup>209</sup> If litigants may escape legitimate state litigation reform efforts by seeking refuge in a federal court, forum shopping and inequitable administration of the laws will abound.<sup>210</sup>

Because state anti-SLAPP statutes confer and embody a host of substantive rights, application of a Federal Rule in preemption of these laws violates the REA.<sup>211</sup> At a minimum, state anti-SLAPP laws grant substantive rights to the defendant of a SLAPP suit by empowering him or her to fend off frivolous claims if they are based on protected activity.<sup>212</sup> First, the special motion to strike procedure grants a substantive right because, in many statutes, it alters the elements each side must prove to prevail.<sup>213</sup> Indeed, anti-SLAPP laws

---

<sup>207</sup> See, e.g., *Shady Grove*, 559 U.S. at 416 (plurality opinion) (examining validity of a Federal Rule of Civil Procedure under the REA in the context of a competing state law that was the product of a state litigation reform effort); *Godin*, 629 F.3d at 86 (same).

<sup>208</sup> See, e.g., ARK. CODE ANN. § 16-63-502(2) (2005) (enacting an anti-SLAPP statute to protect speech and petition from being “chilled through abuse of the judicial process”); CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2015) (enacting an anti-SLAPP law to address the chilling effect of frivolous lawsuits on “the valid exercise of the constitutional rights of freedom of speech and petition”); TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2015) (enacting an anti-SLAPP law to “safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government”).

<sup>209</sup> See *Shady Grove*, 559 U.S. at 398 (citing *Hanna*, 380 U.S. at 469–71) (noting that the state-versus-federal choice of law analysis does not proceed to consideration of *Erie*’s twin aims if a court finds a direct conflict between a state law and a Federal Rule).

<sup>210</sup> See *id.* at 420 (Stevens, J., concurring) (“When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice.”); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533, (1949) (“Since th[e] cause of action is created by local law, the measure of it is to be found only in local law. . . . Where local law qualifies or abridges it, the federal court must follow suit.”).

<sup>211</sup> See *Shady Grove*, 559 U.S. at 416 (Stevens, J., concurring) (considering whether the New York state law at issue was substantive or merely procedural).

<sup>212</sup> See *Forras v. Rauf*, 39 F. Supp. 3d 45, 53 (D.D.C. 2014) (finding that the D.C. “[a]nti-SLAPP Act empowers defendants with the substantive right to fend off SLAPP lawsuits”); see also *Godin*, 629 F.3d at 89 (concluding that Maine’s anti-SLAPP law is substantive); *Batzel v. Smith*, 333 F.3d 1018, 1025–26 (9th Cir. 2003) (concluding that California’s anti-SLAPP statute is substantive); *Sherrod v. Breitbart* (*Sherrod I*), 843 F. Supp. 2d 83, 85 (D.D.C. 2012) (concluding that D.C.’s anti-SLAPP statute is substantive). But see *Makaeff I*, 715 F.3d at 273 (Kozinski, C.J., concurring) (“The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights.”).

<sup>213</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (providing that SLAPP plaintiffs bear the burden to show probability that they will prevail on claim); D.C. CODE § 16-5502(b) (2001 & Supp. 2014) (providing that SLAPP plaintiffs bear the burden to show their claim is likely to suc-

grant a substantive right by the very act of providing litigants with this special motion procedure.<sup>214</sup> This right is often characterized as immunity from suit and operates as an affirmative defense.<sup>215</sup> Second, the substantive thrust of the statutes is evident in the rights they embody and reinforce: constitutionally protected speech and petitioning activities.<sup>216</sup> The nominally procedural form of the statute is not so important as compared to whether the state law “actually is part of a State’s framework of substantive rights.”<sup>217</sup> In this way, anti-SLAPP laws are so bound-up with the state’s substantive speech and petitioning protections that they define the scope of these rights.<sup>218</sup>

When a court finds that Rule 12 or 56 of the Federal Rules of Civil Procedure is so broad as to directly collide with a state anti-SLAPP law and then refuses to apply the state statute, the Federal Rule abridges a substantive right and violates the REA.<sup>219</sup> This is because, when a state enacts an anti-SLAPP statute, it both creates new substantive rights and embodies existing protec-

---

ceed on the merits); ME. REV. STAT. ANN. tit. 14, § 556 (Supp. 2014) (providing that SLAPP plaintiffs bear the burden to show that defendant’s “exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that [defendant’s] acts caused actual injury”); *cf. Garman*, 630 F.3d at 984–85 (holding that the Wyoming Governmental Claims Act’s heightened jurisdictional pleading requirement was substantive for the purposes of *Erie* because it altered whether or not a suit could proceed).

<sup>214</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (providing a special motion to dismiss); D.C. CODE § 16-5502 (same); ME. REV. STAT. ANN. tit. 14, § 556 (same).

<sup>215</sup> See *Batzel*, 333 F.3d at 1025–26 (noting that California’s anti-SLAPP act grants substantive immunity from suit for qualified movants). Affirmative defenses and immunities are state-created rights and are substantive for *Erie* purposes. See *id.* (holding that the California anti-SLAPP law was substantive for *Erie* purposes because its protections constituted an immunity from suit); see also *Erie*, 304 U.S. at 78 (holding that, in a federal diversity case, “the law to be applied . . . is the law of the land”).

<sup>216</sup> See *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring) (noting that a Federal Rule would violate the REA if it displaced a state procedural rule that was “so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy”); *cf. Quinlan*, *supra* note 20, at 399–400 (arguing that because anti-SLAPP statutes protect First Amendment rights, they should apply in federal diversity actions).

<sup>217</sup> See *Shady Grove*, 559 U.S. at 419 (Stevens, J., concurring). In fact, the procedural form of anti-SLAPP laws is of little consequence because, “[i]n our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take.” *Id.* at 420. Where, as is the case with anti-SLAPP laws, “a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice.” *Id.*

<sup>218</sup> See *id.* at 420. Justice Stevens highlights as examples “rules that make it significantly more difficult to bring or prove a claim.” See *id.* (citing *Cohen*, 337 U.S. at 555) (noting that a state requirement that plaintiffs post bond before suing was substantive and applied in federal diversity cases); see also *Guar. Trust*, 326 U.S. at 110 (holding that a state’s statute of limitations was substantive and applied in federal diversity cases).

<sup>219</sup> See *Godin*, 629 F.3d at 90 (noting that if Federal Rule 12(b)(6) was thought to preempt application of anti-SLAPP laws, “a serious question might be raised under the Rules Enabling Act”); *cf. Garman*, 630 F.3d at 984–85 (holding that Federal Rule 8(1)(a), governing pleading of jurisdiction, violated the REA as applied in a case where it would displace the Wyoming Governmental Claims Act’s heightened pleading requirement).

tions.<sup>220</sup> By denying a party the exercise of those rights and protections, a Federal Rule would be invalid as applied if it would exclude the special motion procedure.<sup>221</sup> Because a court cannot apply an invalid Federal Rule, the state's law must control in this situation.<sup>222</sup>

### CONCLUSION

Twenty-eight states, the District of Columbia, and Guam have responded in bold fashion to an increase in meritless lawsuits brought to stifle public speech and petitioning by passing anti-SLAPP laws. Because these laws achieve their substantive ends—protecting First Amendment rights and freeing innocent parties from frivolous lawsuits—with procedural devices, their application in federal diversity cases provokes a classic *Erie* problem. In tackling the question of whether a federal court entertaining diversity jurisdiction should apply state anti-SLAPP procedures, courts across the nation have sounded off in disharmony. The best approach is to moderately interpret those Federal Rules that might be found to conflict with state anti-SLAPP laws. By reading the Federal Rules in moderation, a direct conflict with state law may be avoided and the two sets of laws may operate harmoniously. At this point in the analysis, a court's examination of the twin aims of *Erie*—reduction in forum-shopping and equitable administration of the laws—commands that state anti-SLAPP laws be applied in diversity. Furthermore, even where courts find an unavoidable conflict between the Federal Rules and state anti-SLAPP laws, a proper reading of the Rules Enabling Act allows for as-applied challenges to the validity of those Rules. Application of Federal Rules 12(b)(6) and 56(a) in preemption of state anti-SLAPP laws would abridge and modify the state rights created by these statutes, thereby transgressing the bounds of the REA. For this reason, whether the Federal Rules directly conflict with state laws or operate har-

---

<sup>220</sup> See *Godin*, 629 F.3d at 88 (concluding that Maine's anti-SLAPP law creates substantive rights); *Sherrod I*, 843 F. Supp. 2d at 85 (concluding that the D.C.'s anti-SLAPP statute is substantive).

<sup>221</sup> See *Godin*, 629 F.3d at 90 (noting that "a serious question might be raised under the Rules Enabling Act" if the Federal Rules were to displace application of Maine's anti-SLAPP law in the diversity case); cf. *Garman*, 630 F.3d at 984–85 (holding that a Federal Rule was invalid as applied in a case where it would have displaced a state law imposing a heightened pleading requirement); see also Struve, *supra* note 91, at 1239 (arguing for an interpretation of the REA as permitting as-applied challenges to the validity of a Federal Rule "to ensure that the federal rules . . . do not impinge on substantive rights").

<sup>222</sup> See *Godin*, 629 F.3d at 90; see also 28 U.S.C. § 2072(b) (2012) (declaring the Federal Rules of Civil Procedure invalid if they "abridge, enlarge or modify any substantive right"); *Shady Grove*, 559 U.S. at 398 (plurality opinion) (citing *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987); *Hanna*, 380 U.S. at 463–64) (holding that a Federal Rule, even if answering a question in dispute, does not govern in federal diversity case if it "exceeds statutory authorization or Congress's rulemaking power").

moniously beside them, anti-SLAPP laws must be applied in diversity cases to keep innocent parties from being “SLAPPed” silly.

BENJAMIN ERNST

