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Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law, 2021; B.A., Villanova University, 2018. I would like to thank Professor Mark Rienzi for his guidance, the staff and editors of the *Catholic University Law Review* for their work on this paper, and my parents, Bob and Donna, for their support.

(ANTI)-SLAPP HAPPY IN FEDERAL COURT?: THE APPLICABILITY OF STATE ANTI-SLAPP STATUTES IN FEDERAL COURT AND THE NEED FOR FEDERAL PROTECTION AGAINST SLAPPS

Caitlin E. Daday⁺

During the summer of 2018, Florida citizen Thomas Lloyd's beloved pet poodle, Rembrandt, died an untimely death after DeLand Animal Hospital delayed an essential surgery.¹ Subsequently, Mr. Lloyd posted what he thought was a "simple" and "honest review" of the animal hospital on Yelp.² Following his post, DeLand Animal Hospital and one of its veterinarians sued him, accusing him of defamation and requiring him to spend \$26,000 in legal bills—over \$6,000 more than his annual Social Security income.³

Mr. Lloyd's experience with expensive but meritless litigation is not unique. Meritless lawsuits that are designed to intimidate and punish people for speaking out are unfortunately becoming increasingly common.⁴ These suits, known as Strategic Lawsuits Against Public Participation, or SLAPP suits,⁵ are meritless lawsuits filed not with the primary purpose of winning;⁶ rather, the plaintiff's objective is to chill the defendant's speech.⁷ Unlike conventional lawsuits,

⁺ J.D., The Catholic University of America, Columbus School of Law, 2021; B.A., Villanova University, 2018. I would like to thank Professor Mark Rienzi for his guidance, the staff and editors of the *Catholic University Law Review* for their work on this paper, and my parents, Bob and Donna, for their support.

1. *Posting a Negative Review Online Can Get You Sued*, CBS NEWS: CBS THIS MORNING (July 22, 2019, 7:39 AM), <https://www.cbsnews.com/news/posting-a-negative-review-online-can-get-you-sued/>; Frank Fernandez, *DeLand Animal Hospital Sues Dog-Owner, Claiming Defamation in Yelp Review*, THE DAYTONA BEACH NEWS-J. (Dec. 8, 2018, 7:27 AM), <https://www.news-journalonline.com/news/20181208/deland-animal-hospital-sues-dog-owner-claiming-defamation-in-yelp-review>.

2. *Posting a Negative Review Online Can Get You Sued*, *supra* note 1.

3. *Id.*

4. See Jeremiah A. Ho, *I'll Huff and I'll Puff—But Then You'll Blow My Case Away: Dealing with Dismissed and Bad-Faith Defendants Under California's Anti-SLAPP Statute*, 30 WHITTIER L. REV. 533, 551–52 (2009); *Posting a Negative Review Online Can Get You Sued*, *supra* note 1.

5. Professors George W. Pring and Penelope Canan conceived the acronym "SLAPP" in the late 1980s. See Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385, 386 (1988).

6. John C. Barker, *Common-Law and Statutory Solutions to the Problems of SLAPPs*, 26 LOY. L.A. L. REV. 395, 399 (1993).

7. Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 803–04 (2000).

which often seek to compensate a harm or correct a wrong,⁸ SLAPPs seek to use the cost and burdens of litigation to prevent citizens from exercising their First Amendment rights of speech and petition or to penalize them for doing so.⁹ SLAPPs often implicate the defendant's constitutional speech and petitioning rights and involve limited types of claims, such as defamation.¹⁰ They are dangerous because they punish "average citizens exercising their constitutional right[s]" with costly and time-consuming litigation.¹¹ As one New York judge wrote about SLAPPs, "[s]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."¹²

Because the filers¹³ of SLAPPs are not principally motivated by actually winning the lawsuit, "traditional safeguards" meant to protect targets from frivolous actions are unable to protect them from SLAPPs.¹⁴ As a result, as of January 2021, thirty states plus the District of Columbia and Guam have enacted what are known as anti-SLAPP statutes¹⁵ in an effort "to give more breathing

8. Victor J. Cosentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 402 (1991).

9. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 5–6 (1989). SLAPPs are frequently filed with at least one "of four motives: retaliation for successful opposition, discouraging future opposition, intimidation, and as a strategic tool in a political battle." Cosentino, *supra* note 8, at 402.

10. See Op. of the Justs., 641 A.2d 1012, 1014 (N.H. 1994); Thomas A. Waldman, Comment, *SLAPP Suits: Weaknesses in First Amendment Law and in the Court's Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 984 (1992). There are six typical categories of claims used in SLAPP suits, including: defamation, business torts, judicial-administrative torts, conspiracy, constitutional and civil rights violations, and other wrongs, such as nuisance or invasion of privacy. George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPs"): *An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 947 (1992).

11. Alice Glover & Marcus Jimison, *S.L.A.P.P. Suits: A First Amendment Issue and Beyond*, 21 N.C. CENT. L.J. 122, 122–23 (1995).

12. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992).

13. SLAPPs can be, and are frequently, brought as both claims and counterclaims. See Pring & Canan, *supra* note 10, at 946. For the sake of simplicity, this Comment refers to the party bringing the SLAPP suit as the "filer," and to the party against whom the SLAPP suit is brought as the "target."

14. *Wilcox v. Superior Ct.*, 33 Cal. Rptr. 2d 446, 450 (Ct. App. 1994). "Traditional safeguards" include suits for malicious prosecution or abuse of process and sanctions. *Id.*

15. Austin Vining & Sarah Matthews, *Introduction to Anti-SLAPP Laws*, Reporters Comm. for Freedom of the Press, <https://www.rcfp.org/introduction-anti-slapp-guide/#:~:text=As%20of%20January%202021%2C%2030,New%20York%2C%20Oklahoma%2C%20Oregon%2C> (last visited Apr. 7, 2021). These states include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Virginia. *Id.* Minnesota's and Washington's legislatures have also both enacted anti-SLAPP statutes. *Id.* However, each state's supreme court has found parts of each state's statute to be unconstitutional. See *id.*; *Leiendecker v. Asian Women United*, 895 N.W.2d 623 (Minn. 2017); *Davis v. Cox*, 351 P.3d 862 (Wash. 2015), *overruled in part on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 423 P.3d 223 (Wash. 2018).

space for free speech.”¹⁶ Anti-SLAPP statutes aim to prevent citizens from being dragged into court for exercising their First Amendment rights and engaging in public debate¹⁷ and are meant to “screen meritless claims pursued to chill one’s constitutional rights under the First Amendment.”¹⁸ Generally, these statutes attempt to protect these rights by ending SLAPP suits at an early stage in the litigation and helping the target avoid significant legal costs.¹⁹

Anti-SLAPP statutes vary from state to state, but they often contain similar features.²⁰ The most notable feature of anti-SLAPP statutes is what is often called the special motion to strike.²¹ The special motion gives targets the ability to summarily dismiss the action earlier than they would be able to with a typical summary judgment motion.²² The special motion can be heard before a summary judgment motion can even be filed and before discovery can be conducted.²³ Often, the special motion permits a judge to dismiss a suit unless the filer “has established that there is a probability that the [filer] will prevail on the claim.”²⁴ In order to establish a probability of success, “the [filer] must

16. *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015).

17. *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 967 (Cal. 2005) (quoting *People ex rel. Lockyer v. Brar*, 9 Cal. Rptr. 3d 844, 846 (Ct. App. 2004)).

18. *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 169 (5th Cir. 2009).

19. *Tate*, *supra* note 7, at 801.

20. For a comprehensive overview and listing of each state’s anti-SLAPP statute, see Thomas R. Burke, *Anti-SLAPP Litigation*, §§ 8.1–8.35, Westlaw (database last updated Sept. 2020). In an effort to increase uniformity across state anti-SLAPP laws, the Uniform Law Commission—the group responsible for creating the Uniform Commercial Code—recently adopted the Uniform Public Expression Protection Act (UPEPA). Laura Prather, *Anti-SLAPP Circuit Split Makes State Protections Uncertain*, Law360 (Aug. 27, 2020, 5:27 PM) <https://www-law360-com.cualaw.idm.oclc.org/articles/1304859/anti-slapp-circuit-split-makes-state-protections-uncertain>; see generally Unif. Pub. Expression Prot. Act (Unif. L. Comm’n 2020). UPEPA is intended to serve as a model for state anti-SLAPP statutes that provides broad First Amendment protections. Prather, *supra*. UPEPA strongly resembles the statutes of the states such as California that already have strong anti-SLAPP statutes in place. See Unif. Pub. Expression Prot. Act §§ 3–14 (Unif. L. Comm’n 2020). Cf. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015).

21. See CIV. PROC. § 425.16(b)(1); GA. CODE ANN. § 9-11-11.1(b)(1) (West 2016); LA. CODE CIV. PROC. ANN. art. 971(A)(1) (2012). Maine and the District of Columbia have a similar motion called a special motion to dismiss. See D.C. CODE § 16-5502(a) (2012); ME. REV. STAT. ANN. tit. 14, § 556 (West 2012). The Texas Citizens Participation Act (TCPA) also provides for a similar motion to dismiss. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2019).

22. Basil S. Shiber & Douglas M. Smith, *SLAPP Happy: An Analysis of California’s Anti-SLAPP (Strategic Lawsuits Against Public Participation) Statute*, 15 No. 2 Miller & Starr, Real Estate Newsalert 1, 2 (Nov. 2004).

23. *Id.*

24. CIV. PROC. § 425.16(b)(1). See also § 9-11-11.1; CIV. CODE PROC. art. 971(A)(1). In Texas, the filer must establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West 2019). In the District of Columbia, the filer must demonstrate “that the claim is likely to succeed on the merits.” § 16-5502(b). Under the Maine statute, the filer must show “that the [target’s] exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the [target’s] acts caused actual injury to the [filer].” Tit. 14, § 556.

demonstrate [that] the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”²⁵ In deciding on the motion, the court can typically consider the pleadings, as well as affidavits from both sides.²⁶ Most anti-SLAPP statutes also entitle prevailing targets to reasonable attorney’s fees and costs.²⁷ Typically, the special motion is filed in the early stages of the lawsuit, often within forty-five to ninety days of service,²⁸ and discovery is frequently stayed upon filing the motion.²⁹

In many states, state court defendants in a position similar to Mr. Lloyd can readily take advantage of their respective state’s anti-SLAPP statute to quickly dismiss SLAPPs. However, a question has arisen regarding whether such defendants can avail themselves of the protections of state anti-SLAPP statutes in federal court due to the statutes’ close alignment with Federal Rules of Civil Procedure (FRCP) 8, 12, and 56, because both purport to govern the pre-trial dismissal of claims.³⁰ This issue is significant because the inapplicability of state anti-SLAPP statutes in federal court requires targets to spend more time and money embroiled in frivolous litigation than they otherwise would in state court, and it encourages SLAPP filers to bring these suits in federal court so that they can more effectively achieve their goal of silencing the target.³¹

In this Comment, I will argue that state anti-SLAPP statutes should not apply in federal court because they answer the same question as Rules 8, 12, and 56. In doing so, I will examine the development of the Supreme Court’s jurisprudence where state statutes have conflicted with the Federal Rules and provide background on the circuit split over the applicability of state anti-SLAPP statutes in federal court. Then, I will discuss why state anti-SLAPP laws

25. *Wilcox v. Superior Ct.*, 33 Cal. Rptr. 2d 446, 454 (Ct. App. 1994). *See also* RCO Legal, P.S., Inc. v. Johnson, 820 S.E.2d 491, 498 n. 10 (Ga. Ct. App. 2018). Under the District of Columbia’s statute, to establish the likelihood of success on the merits, a filer must “present an evidentiary basis that would permit a reasonable, properly instructed jury to find in the [filer’s] favor.” *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1262 (D.C. 2016).

26. The affidavits must “stat[e] the facts upon which the liability or defense is based.” CIV. PROC. § 425.16(b)(2). *See also* § 9-11-11.1(b)(2); Civ. Code Proc. art. 971(A)(2); tit. 14, § 556.

27. *See* CIV. PROC. § 425.16(c)(1); D.C. CODE § 5504(a) (2012); § 9-11-11.1(b.1); CIV. CODE PROC. art. 971(B); tit. 14, § 556; TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(1) (West 2019).

28. In the District of Columbia, the special motion to dismiss may be filed within 45 days after service of the claim. § 16-5502(a). In California, Maine, and Texas, the special motion may be filed within 60 days of the service of the complaint. CIV. PROC. § 425.16(f); tit. 14, § 556; Civ. Prac. & Rem. § 27.003(b). Louisiana allows special motions to strike to be filed within ninety days of service. CIV. CODE PROC. art. 971(C)(1).

29. *See* CIV. PROC. § 425.16(g); § 16-5502(c)(1); § 9-11-11.1(d); CIV. CODE PROC. art. 971(D); tit. 14, § 556; Civ. Prac. & Rem. § 27.003(c).

30. *See generally* *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019); *Carbone v. CNN, Inc.*, 910 F.3d 1345 (11th Cir. 2018); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

31. *See Godin*, 629 F.3d at 91–92; *Newsham*, 190 F.3d at 973.

should not apply in federal courts exercising diversity jurisdiction. I will conclude by proposing two federal anti-SLAPP solutions: an amendment to the Federal Rules to heighten the pleading standard in SLAPP suits and a federal anti-SLAPP statute.

I. SUPREME COURT PRECEDENT AND THE CIRCUIT SPLIT

A. *The Supreme Court's Controlling Federal Rule Jurisprudence*

In diversity cases where the issue is whether a state or federal law should apply, a court may apply “the typical, relatively unguided *Erie* choice[,]”³² under which “federal courts sitting in diversity apply state substantive law and federal procedural law.”³³ However, in situations covered by the Federal Rules, courts will apply the relevant Rule, unless it is either invalid under the Rules Enabling Act³⁴ or unconstitutional.³⁵ Several federal appellate courts have not applied state anti-SLAPP statutes in federal diversity cases, concluding that the anti-SLAPP statutes conflict with Federal Rules 8, 12, and 56 because both the anti-SLAPP statutes and the Rules govern pre-trial dismissal of claims.³⁶ With respect to anti-SLAPP statutes, the question is whether or not they cover a situation already addressed by the Federal Rules. This section discusses the Supreme Court’s consideration of whether a state statute covers a situation addressed by the Federal Rules.

The Supreme Court first considered a state law conflicting with a Federal Rule in *Hanna v. Plumer*.³⁷ There, Massachusetts law required in-hand service to an executor of an estate, but FRCP 4 permitted various methods of service.³⁸ The Court first determined that “the clash [was] unavoidable” because the Federal Rules did not exclusively require in-hand service³⁹ and subsequently that FRCP 4 was valid because the manner of service “relates to the ‘practice and procedure of the district courts.’”⁴⁰ In so holding, the Court noted that “[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.”⁴¹

32. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

33. *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 427 (1996).

34. 28 U.S.C. § 2072 (2018).

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

36. See generally *Klocke v. Watson*, 936 F.3d 240, (5th Cir. 2019); *Carbone v. CNN, Inc.*, 910 F.3d 1345 (11th Cir. 2018); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015).

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

38. *Id.* at 461–62. FRCP 4(d)(1) permitted in-hand service as well as other methods. *Id.*

39. *Id.* at 470.

40. *Id.* at 464 (citing *Ins. Co. v. Bangs*, 103 U.S. 435, 439 (1880)).

41. *Id.* at 473–74.

The Court next discussed conflicts between state laws and the Federal Rules in *Walker v. Armco Steel Corp.*⁴² The Court reiterated that, where a Federal Rule applies, the proper test is “whether the Rule [i]s within the scope of the Rules Enabling Act.”⁴³ In doing so, the Court stated that “the *Hanna* analysis is premised on a ‘direct collision’ between the Federal Rule and the state law.”⁴⁴ Thus, the first question regarding any conflicting state laws and Federal Rules must be “whether the scope of the Federal Rule . . . is sufficiently broad to control the issue.”⁴⁵ *Walker* involved a conflict between a state law that deemed an action as commenced for statute of limitations purposes when the defendant was served and FRCP 3, which says that an action is commenced when it is filed.⁴⁶ The Court held that the rules could co-exist because each controls “its own intended sphere of coverage without conflict.”⁴⁷

In *Burlington Northern Railroad Co. v. Woods*, the Court wrestled with a state law that imposed a mandatory affirmance penalty on unsuccessful appeals and whether or not it conflicted with Federal Rules of Appellate Procedure 38, which affords federal appellate judges the discretion to award damages and costs to appellees who are victims of frivolous appeals.⁴⁸ In addressing the issue of whether Rule 38’s scope “[was] ‘sufficiently broad’ to cause a ‘direct collision’ with the state law,”⁴⁹ the Court determined that the Rule’s discretionary allowance of awards for frivolous appeals “unmistakably conflict[ed]” with the state’s mandatory affirmance penalty because the two rules’ “mode[s] of operation” were directly opposed to one another.⁵⁰ Further, the Court contended that the purposes of the rules were “sufficiently coextensive” so as to require the determination that the rules operated within the same sphere, precluding application of the state law in a federal diversity suit.⁵¹

Most recently, the Court addressed the issue of controlling Federal Rules in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*⁵² In that case the Court dealt with a state statute “which preclude[d] a suit to recover a ‘penalty’ from proceeding as a class action,” and considered whether that statute conflicted with FRCP 23, which governs the maintenance of class actions in

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

43. *Id.* at 748 (citing *Hanna*, 380 U.S. at 470–72).

44. *Id.* at 749.

45. *Id.*

46. *Id.* at 742–43.

47. *Id.* at 752.

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

49. *Id.* at 4–5 (quoting *Walker*, 446 U.S. at 749–50).

50. *Id.* at 7.

51. *Id.*

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

federal court.⁵³ A divided court ultimately held that Rule 23 was valid and controlled.⁵⁴

In the majority opinion, signed onto by five justices, Justice Scalia addressed “whether Rule 23 answers the question in dispute,” which was whether the suit could be maintained as a class action.⁵⁵ The majority agreed that the state law “attempt[ed] to answer the same question” as Rule 23 because it, like Rule 23, addressed when a suit could proceed as a class action.⁵⁶ Justice Scalia contended that, “even if [the state statute] aim[ed] to restrict the remedy a plaintiff can obtain, [it] achieve[d] that end by limiting a plaintiff’s power to maintain a class action.”⁵⁷ Thus, the majority held that Rule 23 must apply in federal diversity suits unless it was invalid.⁵⁸

Writing on behalf of four justices, Justice Scalia’s plurality opinion addressed the validity of Rule 23 under the Rules Enabling Act by asking whether the Rule “really regulat[es] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”⁵⁹ What matters is not whether or not the rule affects a party’s substantive rights, but rather what the rule regulates: “[i]f it governs only ‘the manner and the means’ by which the litigants’ rights are ‘enforced,’ it is valid; if it alters ‘the rules of decision by which [the] court will adjudicate [those] rights,’ it is not.”⁶⁰ In this case, while each rule did have some effect on the parties’ rights, they merely regulated the mechanism for enforcing them.⁶¹ In other words, the rules only served to regulate procedure and did not alter the parties’ rights, remedies, or the rules of decision.⁶² As a result, the plurality concluded that Rule 23 is valid under the Rules Enabling Act.⁶³

Justice Stevens joined the majority in holding that Rule 23 controlled in this situation and concurred in the judgment; however, he proposed a different test for determining validity under the Rules Enabling Act.⁶⁴ To him, the Federal Rules cannot “govern [if] the rule would displace a state law that is [generally] procedural . . . but is so intertwined with a state right or remedy that it functions

53. *Id.* at 397–98.

54. *Id.* at 399, 408, 410.

55. *Id.* at 398.

56. *Id.* at 399.

57. *Id.* at 403.

58. *Id.* at 399.

59. *Id.* at 407 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). This test derives from the Court’s holding in *Sibbach v. Wilson & Co.*, which addressed the validity of Federal Rules 35 and 37. *Sibbach*, 312 U.S. at 4.

60. *Shady Grove*, 559 U.S. at 407 (alteration in original) (quoting *Mississippi Publ’g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

61. *Id.* at 407–08.

62. *Id.*

63. *Id.* at 408.

64. *Id.* at 416–17, 419 (Stevens, J., concurring).

to define the scope of the state-created right.”⁶⁵ However, “[t]here must be little doubt” that the federal rule would affect a state-created right.⁶⁶ Here, because he determined that the text of the state statute applied to all claims based on any state’s law, it could not serve to alter the state’s rights or remedies.⁶⁷ Therefore, he agreed that Rule 23 was valid.⁶⁸

Justice Stevens also agreed with Justice Ginsburg’s dissent “that courts should ‘avoi[d] immoderate interpretations of the Federal Rules that would trench on state prerogatives,’ and should in some instances ‘interpre[t] the federal rules to avoid conflict with important state regulatory policies.’”⁶⁹ However, he did not agree with the dissent’s method.⁷⁰ The dissent contended that Rule 23 did not conflict with the state law because it governed the procedure for litigating class actions while the state law set the dimensions of the claim and limited the size of a monetary award.⁷¹ Justice Ginsburg believed that the real question was about the remedy and creation of the right to recover, which Rule 23 did not answer.⁷² Rather, Rule 23 only concerns “[t]he fair and efficient *conduct* of class litigation.”⁷³ Because the dissent did not see any conflict between Rule 23 and the state law, it analyzed the issue under the traditional *Erie* tests, concluding that the law was substantive and should have applied here.⁷⁴ Justice Ginsburg did not think that there was a conflict with the Federal Rules, so she did not weigh in on the appropriate test under the Rules Enabling Act.

B. The Circuit Split

Applying the Supreme Court’s precedent, the circuits have split on whether Rules 8, 12, and 56 sufficiently cover pre-trial dismissal of claims to make state anti-SLAPP statutes inapplicable in federal court. The First and Ninth Circuits have both applied state anti-SLAPP statutes in federal court.⁷⁵ Conversely, the Second, Fifth, Eleventh, and District of Columbia Circuits have all declined to apply state anti-SLAPP statutes.⁷⁶ This section addresses the split and the rationale behind the courts’ decisions.

65. *Id.* at 423.

66. *Id.* at 432.

67. *Id.*

68. *Id.* at 436.

69. *Id.* at 430 (alteration in original).

70. *Id.* at 430–31.

71. *Id.* at 446–47 (Ginsburg, J., dissenting).

72. *Id.* at 450.

73. *Id.* at 447.

74. *Id.* at 452–58.

75. *See generally* *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

76. *See generally* *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020); *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019); *Carbone v. CNN, Inc.*, 910 F.3d 1345 (11th Cir. 2018); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015). The Tenth Circuit has also held that New Mexico’s anti-SLAPP statute is inapplicable in federal court. *See Los Lobos Renewable Power, LLC v.*

1. (Anti)-SLAPP Happy in the Ninth and First Circuits

In 1999, prior to *Shady Grove*, the Ninth Circuit became the first federal appellate court to apply a state anti-SLAPP statute in federal court in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*⁷⁷ The court considered whether there was a “direct collision” between the California anti-SLAPP statute and Federal Rules 8, 12, and 56.⁷⁸ If a target was unsuccessful on a special motion to strike, he could still bring a Rule 12(b)(6) motion or a motion for summary judgment, so the court concluded that the anti-SLAPP statute and the Federal Rules could co-exist in their own spheres.⁷⁹ While the court admitted that the statute and the rules did have “similar purpose[s,]” the anti-SLAPP statute was intended to serve a purpose that the Federal Rules do not address—the protection of First Amendment rights.⁸⁰ Additionally, the court commented that plaintiffs would have a significant incentive to forum shop if it held that the anti-SLAPP statute did not apply.⁸¹ Thus, California’s anti-SLAPP statute applied in federal court.⁸²

Nearly two decades later, in *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, the Ninth Circuit re-considered the application of state anti-SLAPP statutes in federal courts.⁸³ While generally reaffirming *Newsham*, the court limited their application with an intent to eliminate conflict with the Federal Rules.⁸⁴ In doing so, the court held that “when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court

AmeriCulture, Inc., 885 F.3d 659 (10th Cir. 2018). The decision in that case turned on unique language in New Mexico’s anti-SLAPP statute, which permitted “a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis.” *Id.* at 663; *see also* N.M. STAT. ANN. § 38-2-9.1.A–C (LexisNexis 2020). Concluding that the plain language of the statute showed that it was purely procedural and set forth no substantive law, the court determined that the statute could not apply in federal court. *Los Lobos Renewable Power*, 885 F.3d at 668–673. Notably, the Supreme Court declined to grant certiorari and hear this case. *See AmeriCulture, Inc. v. Los Lobos Renewable Power, LLC*, 139 S. Ct. 591 (2018). Similarly, in *Intercon Solutions, Inc. v. Basel Action Network*, the Seventh Circuit was asked to review the district court’s determination that Washington’s anti-SLAPP statute’s special motion to strike conflicted with FRCP 12(d) and was therefore inapplicable in federal court. 791 F.3d 729, 731 (7th Cir. 2015). However, the Washington Supreme Court held the state’s anti-SLAPP statute unconstitutional, so while at least one court within the Seventh Circuit has found anti-SLAPP statutes inapplicable in federal court, the Seventh Circuit did not need to address the question itself. *Id.* at 731–32.

77. *See generally Newsham*, 190 F.3d 963.

78. *Id.* at 972.

79. *Id.*

80. *Id.* at 972–73.

81. *Id.* at 973. The court noted that a ruling that incentives filers to forum shop would work directly against the *Erie* Doctrine’s “twin aims.” *Id.*

82. *Id.* at 972–73.

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

84. *Id.* at 833–34.

should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated.”⁸⁵ Conversely, “when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply,” and “discovery must be allowed.”⁸⁶ By interpreting the anti-SLAPP statute to avoid collision with the Federal Rules, the court drastically limited the statute’s applicability in federal court.⁸⁷

Most recently, in the unpublished decision in *Clifford v. Trump*, the Ninth Circuit reaffirmed its holding in *Newsham* by applying the Texas Citizens Participation Act (TCPA), Texas’s anti-SLAPP statute, despite the Fifth Circuit’s refusal to do so.⁸⁸ Deciding that the TCPA was virtually identical to California’s anti-SLAPP statute, the court reasoned that it must apply its own precedent.⁸⁹ In this case, that meant following *Newsham* and applying the TCPA.⁹⁰

In addition to being the first circuit to apply anti-SLAPP statutes in federal court, the Ninth Circuit was also the first circuit in which judges began to question the applicability of the state statutes. First, in his concurrence in *Makaeff v. Trump University, LLC (Makaeff I)*, Judge Kozinski argued that *Newsham* was incorrectly decided and should be reconsidered because the anti-SLAPP statute was “quintessentially procedural,” did not create any substantive rights, and merely dealt with “the conduct of the lawsuit.”⁹¹ Further, the statute was so disruptive of the federal system that it “cut[] an ugly gash through th[e] orderly process.”⁹² Just months later, the Ninth Circuit denied a petition to rehear the case en banc in *Makaeff v. Trump University, LLC (Makaeff II)*.⁹³ In a dissent, Judge Watford, applying *Shady Grove*, concluded that the anti-SLAPP statute conflicted with Rules 12 and 56 because the “statute impermissibly supplements the Federal Rules’ criteria for pre-trial dismissal of an action.”⁹⁴ He argued that by “impos[ing] a probability requirement[,]” the anti-SLAPP

85. *Id.* at 834.

86. *Id.*; see also *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 845–46 (9th Cir. 2001). In *Metabolife International, Inc. v. Wornick*, the Ninth Circuit explained that district courts within the circuit had found that the discovery provision of the anti-SLAPP statute “directly collided” with Rule 56 because it limited discovery, while Rule 56 required discovery prior to judgment. *Id.* Those district courts had thus concluded that the discovery provision of the state statute could not apply in federal courts. *Id.*

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

88. *Clifford v. Trump*, No. 18-56351, 2020 U.S. App. LEXIS 24196, at *1–2 (9th Cir. July 31, 2020).

89. *Id.*

90. *Id.*

91. *Makaeff v. Trump Univ., LLC (Makaeff I)*, 715 F.3d 254, 272–73 (9th Cir. 2013) (Kozinski, J., concurring).

92. *Id.* at 274.

93. *Makaeff v. Trump Univ., LLC (Makaeff II)*, 736 F.3d 1180 (9th Cir. 2013).

94. *Id.* at 1188 (Watford, J., dissenting). Judges Kozinski, Paez, and Bea signed onto this dissent. *Id.*

statute not only conflicted with Rule 12's plausibility standard, but also "eviscerate[d]" Rule 56's requirements, greatly heightening both standards.⁹⁵

The First Circuit joined the Ninth Circuit in applying state anti-SLAPP statutes in *Godin v. Schencks*.⁹⁶ Following the Ninth Circuit's lead, the First Circuit concluded that *Erie*'s "twin aims" were best promoted by applying anti-SLAPP statutes in federal court.⁹⁷ Relying heavily on Justice Stevens's concurrence in *Shady Grove*, the court determined that Maine's anti-SLAPP statute was "so intertwined with a state right or remedy that it function[ed] to define the scope of the state-created right," and thus could not be superseded by the Federal Rules.⁹⁸ Rather than substituting the Federal Rules, the anti-SLAPP statute served as a "supplemental and substantive rule," giving targets additional protection—namely, a procedure to dismiss claims resting on the target's protected petitioning conduct.⁹⁹ Concluding that Federal Rules 12(b)(6) and 56 were not broad enough to control the same issues as Maine's anti-SLAPP statute, the court held that the anti-SLAPP statute applied in federal court.¹⁰⁰

2. *The District of Columbia, Eleventh, Fifth, and Second Circuits Slap Down State Anti-SLAPP Statutes*

In *Abbas v. Foreign Policy Group, LLC*, the D.C. Circuit became the first federal court of appeals to formally reject the application of state anti-SLAPP statutes.¹⁰¹ Applying *Shady Grove*, then-Judge Kavanaugh asked "if . . . a Federal Rule of Civil Procedure 'answer[ed] the same question' as the [anti-SLAPP statute,]" which was what circumstances required the court to dismiss the plaintiff's claim before it reached trial.¹⁰² He concluded that Rules 12 and 56 did answer the same question in a conflicting manner because they typically permit a plaintiff to proceed to trial if the plaintiff can satisfy each standard, whereas the anti-SLAPP statute "set[] up an additional hurdle a plaintiff must jump over to get to trial" by requiring "a plaintiff to show a likelihood of success on the merits."¹⁰³ Thus, he concluded that Rules 12 and 56 trumped the anti-SLAPP statute unless they were invalid under the Rules Enabling Act.¹⁰⁴ To test that validity, Judge Kavanaugh asked if the rule "really regulates

95. *Id.* at 1189.

96. *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010); *see also* *Steinmetz v. Coyle & Caron, Inc.*, 862 F.3d 128 (1st Cir. 2017) (applying Massachusetts's anti-SLAPP statute).

97. *Godin*, 629 F.3d at 87, 91.

98. *Id.* at 89 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring)).

99. *Id.* at 88–89.

100. *Id.* at 92.

101. *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015).

102. *Id.* at 1333–34.

103. *Id.* at 1334.

104. *Id.* at 1336.

procedure.”¹⁰⁵ Here, he easily concluded that Rules 12 and 56 are really procedural, and thus valid, because the Supreme Court stated in *Shady Grove* that “pleading standards and rules governing motions for summary judgment are procedural.”¹⁰⁶ As a result, federal courts in the D.C. Circuit cannot apply the District of Columbia’s anti-SLAPP statute in diversity cases.¹⁰⁷

The Eleventh Circuit joined the D.C. Circuit in rejecting the application of anti-SLAPP statutes in federal court three years later in *Carbone v. CNN, Inc.*¹⁰⁸ Determining that the relevant question was “whether [the] complaint state[d] a claim for relief supported by sufficient evidence to avoid pretrial dismissal[.]” the court concluded that the anti-SLAPP statute provided an answer that conflicted with that of Rules 8, 12, and 56.¹⁰⁹ Like Judge Kavanaugh, Judge Pryor noted that the anti-SLAPP statute’s pleading standard “differe[d] from Rules 8 and 12 by requiring” a probability of success¹¹⁰—a standard that the district court deemed “a Rule 12(b)(6) ‘plus’ standard for cases with a First Amendment nexus.”¹¹¹ Further, he determined that the state statute conflicted with Rule 56 by imposing a more stringent evidentiary burden while depriving plaintiffs of discovery.¹¹² While acknowledging that Congress has, in both FRCP 9(b) and the Private Securities Litigation Reform Act (PSLRA),¹¹³ “formulated additional requirements governing the sufficiency of a complaint,” he noted that “[t]he fact that Congress has created specific exceptions” to Rules 8, 12, and 56 indicates that they are the general rules, and state statutes cannot supersede them.¹¹⁴ He concluded that the Federal Rules “constitute an exhaustive set of requirements governing pretrial dismissal and entitlements to discovery and a trial on the merits,”¹¹⁵ and the anti-SLAPP statute allows defendants to easily avoid liability for certain protected conduct.¹¹⁶ Finally, he determined that the rules were valid under the Rules Enabling Act because they only affect the process of enforcing a party’s rights.¹¹⁷

105. *Id.* (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

106. *Id.* at 1337.

107. *Id.*

108. *Carbone v. CNN, Inc.*, 910 F.3d 1345 (11th Cir. 2018).

109. *Id.* at 1350.

110. *Id.*

111. *Id.* at 1348 (quoting *Carbone v. CNN, Inc.*, No. 1:16-CV-1720-ODE, 2017 U.S. Dist. LEXIS 216286, at *7 (N.D. Ga. Feb. 15, 2017)).

112. *Id.* at 1351.

113. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2018); Fed. R. Civ. P. 9(b).

114. *Carbone*, 910 F.3d at 1353 (alteration in original) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010)).

115. *Id.* at 1354.

116. *Id.* at 1355.

117. *Id.* at 1357.

Prior to August 2019, the Fifth Circuit applied state anti-SLAPP statutes in federal court on three occasions, each time with minimal discussion.¹¹⁸ However, in *Klocke v. Watson*, the court held that the TCPA cannot apply in federal court¹¹⁹ because it “answer[ed] the same question” as Rules 12 and 56.¹²⁰ Judge Jones determined that *Shady Grove* and *Abbas* both held that “a state rule conflicts with a federal procedural rule when it imposes additional procedural requirements not found in the federal rules.”¹²¹ Because the TCPA sets additional, higher standards under its burden-shifting framework, the court concluded that it conflicted with Rules 12 and 56 and thus cannot apply in federal court.¹²² The court concluded by stating that the Rules are valid “because they define the procedures for determining whether a claim is alleged in a sufficient manner in a complaint and whether there is a genuine dispute of material fact sufficient to warrant a trial.”¹²³ Accordingly, the Fifth Circuit does not apply the TCPA in federal diversity actions.¹²⁴

In July 2020, the Second Circuit became the most recent addition to the list of circuits declining to apply state anti-SLAPP laws in federal court in *La Liberte v. Reid*.¹²⁵ In *La Liberte*, the Second Circuit addressed the question of whether

118. See *Block v. Tanenhaus*, 815 F.3d 218, 221–22 (5th Cir. 2016) (applying Louisiana’s anti-SLAPP statute); *Cuba v. Pylant*, 814 F.3d 701, 711 (5th Cir. 2016) (applying the TCPA); *Henry v. Lake Charles Am. Press, LLC.*, 566 F.3d 164, 168–69 (5th Cir. 2009) (applying Louisiana’s anti-SLAPP statute).

119. *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019). Notably, the court did not overturn *Henry v. Lake Charles Am. Press, LLC.* See *id.* at 248–49. Rather, it distinguished Louisiana’s statute as a different state’s statute with a different standard. *Id.* The court contended that the conflict between Louisiana’s anti-SLAPP statute and the Federal Rules is less evident than that between the TCPA and the Federal Rules. *Id.* Additionally, *Henry* preceded *Shady Grove* and did not conduct an analysis of the conflict between the anti-SLAPP statute and the Federal Rules. *Id.* Accordingly, the court did not think it was bound by *Henry*. *Id.*

120. *Id.* at 245.

121. *Id.*

122. *Id.*

123. *Id.* at 248 (quoting *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1357 (11th Cir. 2018)).

124. *Id.* at 249.

125. *La Liberte v. Reid*, 966 F.3d 79, 83 (2d Cir. 2020). Previously, the Second Circuit had seemingly applied anti-SLAPP statutes. First, in *Liberty Synergistics Inc. v. Microflo Ltd.*, the court applied California’s anti-SLAPP statute without significant discussion. *Liberty Synergistics, Inc. v. Microflo Ltd.*, 718 F.3d 138, 143–44 (2d Cir. 2013). Then, a year later in *Adelson v. Harris*, the court “approved certain aspects of Nevada’s anti-SLAPP statute.” *La Liberte*, 966 F.3d at 86 n.3; see also *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014). However, in *La Liberte*, the court denied that it ever held anti-SLAPP statutes to be applicable in federal court. *La Liberte*, 966 F.3d at 86 n.3. With respect to *Liberty Synergistics*, the court said that that the only question was “whether the district court could entertain California’s special motion to strike notwithstanding that it was applying New York substantive law.” *Id.* In other words, it did not actually consider whether the anti-SLAPP statute could be applicable in federal court, and “a later decision in that case . . . ‘expressly declined’” to do so. *Id.* (quoting *Liberty Synergistics, Inc. v. Microflo Ltd.*, 637 F. App’x 33, 34 n.1 (2d Cir. 2016)). The court deemed *Adelson* inapplicable because Nevada’s anti-SLAPP statute differs significantly from California’s because it does not set forth a probability of success standard. *Id.*

California's anti-SLAPP statute applied in federal court.¹²⁶ Despite Ninth Circuit precedent, the court conducted its own analysis and determined that the statute impermissibly conflicted with the Federal Rules.¹²⁷ Agreeing with the D.C., Fifth, and Eleventh Circuits, Judge Jacobs reasoned that Rules 12 and 56 already address the question of under what circumstances "a court must dismiss a plaintiff's claim before trial."¹²⁸ Further, he noted that the Federal Rules specifically do not require a showing of probability at either the Rule 12(b)(6) or 56 stages.¹²⁹ Judge Jacobs further commented that the argument that anti-SLAPP statutes function as a supplement to the Federal Rules is a policy one; however, through Rules 12 and 56, the Federal Rules have already made the relevant policy judgment as to what standards parties should have to meet.¹³⁰ Thus, California's anti-SLAPP statute could not apply in the Second Circuit.¹³¹

II. ANTI-SLAPP STATUTES CANNOT APPLY IN FEDERAL COURT BECAUSE THEY ANSWER THE SAME QUESTION AS THE FEDERAL RULES AND ARE VALID UNDER THE RULES ENABLING ACT

Under *Shady Grove*, there are two steps in determining whether or not defendants in diverse federal litigation can use the protections afforded by state anti-SLAPP statutes.¹³² First, it must be determined whether or not state anti-SLAPP statutes answer the same question as Rules 8, 12, and 56.¹³³ If so, then the Federal Rules control, unless they are invalid under the Rules Enabling Act.¹³⁴ This section will argue that state anti-SLAPP statutes cannot apply in federal court, first by determining that they answer the same question as Rules 8, 12, and 56, and then by concluding that the Federal Rules are valid under the Rules Enabling Act.

A. *Shady Grove Step 1: Anti-SLAPP Statutes Answer the Same Question as Federal Rules 8, 12, and 56.*

Following the test delineated in *Shady Grove*, the first step in assessing whether a state statute conflicts with the Federal Rules is to determine whether or not the state law and the Federal Rules "attempt[] to answer the same question."¹³⁵ As the D.C., Eleventh, and Fifth Circuits have all held, state anti-

126. *La Liberte*, 966 F.3d at 83.

127. *Id.* at 83, 87.

128. *Id.* at 86–87 (quoting *Abbas v. Foreign Poly' Grp., LLC*, 783 F.3d 1328, 1333–34 (D.C. Cir. 2015)).

129. *Id.* at 87.

130. *Id.* at 88.

131. *Id.*

132. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

133. *Id.*

134. *Id.* at 398, 406–07.

135. *Id.* at 399.

SLAPP statutes and Federal Rules 8, 12, and 56 not only answer the same question, but they do so in conflicting ways.¹³⁶

Rules 8, 12, and 56 together answer the same question as the anti-SLAPP statutes: when must a court dismiss a claim before it goes to trial?¹³⁷ Rule 8 provides that a complaint must state a plausible claim for relief,¹³⁸ and if it does not, it must be dismissed under Rule 12(b)(6) for a failure to state a claim.¹³⁹ Rule 56 requires a court to “grant summary judgment if the movant shows that there is no genuine dispute as to any material fact.”¹⁴⁰ Thus, Rule 8 sets the standards for the sufficiency of a claim;¹⁴¹ Rule 12(b)(6) tests the sufficiency of the claim;¹⁴² and Rule 56 seeks to ensure that there are genuine issues to be tried.¹⁴³ Meanwhile, anti-SLAPP statutes enable defendants to dismiss claims arising from their exercise of First Amendment rights through a special motion to strike, unless the plaintiff can show a probability or likelihood of success on the merits.¹⁴⁴ These statutes do so with the purpose of quickly dismissing frivolous lawsuits that are intended to chill expression.¹⁴⁵

Anti-SLAPP statutes answer the same question as the Federal Rules by adding an extra requirement to get to trial.¹⁴⁶ The Federal Rules set up the hurdles that a plaintiff must overcome in order to get to trial in federal litigation.¹⁴⁷ Rules 8 and 12(b)(6) work to ensure that a plaintiff has adequately plead a claim for relief—hurdle number one.¹⁴⁸ Rule 56 then ensures that there are genuine issues that may be heard by a trier of fact—hurdle number two.¹⁴⁹ If these hurdles are satisfied, a plaintiff may generally proceed to trial.¹⁵⁰ However, anti-SLAPP

136. See *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019); *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

137. See *Carbone*, 910 F.3d at 1350; *Abbas*, 783 F.3d at 1333–34.

138. See FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

139. FED. R. CIV. P. 12(b)(6).

140. FED. R. CIV. P. 56(a).

141. *Carbone*, 910 F.3d at 1350.

142. *Id.*; 5B ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 1356 (3d ed. 2020).

143. 10A MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2712 (4th ed. 2020).

144. See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015).

145. See *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015); *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001); *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998); Robert T. Sherwin, *Evidence? We Don’t Need No Stinkin’ Evidence!: How Ambiguity in Some States’ Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431, 437 (2017).

146. See *Abbas*, 783 F.3d at 1333–34.

147. *Id.* at 1334.

148. *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018).

149. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986); see also *Carbone*, 910 F.3d at 1350; *Abbas*, 783 F.3d at 1334; *Makaeff v. Trump Univ., LLC (Makaeff II)*, 736 F.3d 1180, 1189 (9th Cir. 2013) (Watford, J., dissenting).

150. *Abbas*, 783 F.3d at 1334.

statutes effectively set up an additional hurdle by requiring a plaintiff to demonstrate a probability of success, while still leaving the opportunity to dismiss under Rules 12(b)(6) and 56.¹⁵¹ As a result, they answer the same question—when must a court dismiss a claim before trial—because they provide defendants sued for certain claims an extra way to dismiss a lawsuit before trial.¹⁵²

As with the rules at issue in *Shady Grove*, the Federal Rules and anti-SLAPP statutes answer the same question differently. Anti-SLAPP statutes typically require a showing of a probability of success;¹⁵³ however, Rule 8 specifically “does not impose a probability requirement at the pleading stage[,]” but rather only requires a showing of a *plausible* claim for relief.¹⁵⁴ In fact, “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’”¹⁵⁵ Further, while requiring that a plaintiff establish a likelihood of success, anti-SLAPP statutes stay discovery.¹⁵⁶ Conversely, while Rule 56 is intended “to isolate and dispose of factually unsupported claims or defenses,”¹⁵⁷ summary judgment is only warranted if there is no genuine dispute of material fact *after* an opportunity for discovery.¹⁵⁸ Thus, the anti-SLAPP statutes address the same question, yet provide a different answer.

The difference in answers is significant.¹⁵⁹ The Federal Rules must be read together,¹⁶⁰ and when done, Rules 8, 12, and 56 provide the boxes that must be checked to be entitled to trial.¹⁶¹ Anti-SLAPP statutes add an extra box to check off.¹⁶² Not only does a plaintiff’s claim have to be plausible, it has to be probable that they will succeed, and they must demonstrate that without discovery.¹⁶³ This extra requirement makes it harder for certain plaintiffs to get to trial purely

151. *Carbone*, 910 F.3d at 1350–51; *Abbas*, 783 F.3d at 1333–34; *Makaeff II*, 736 F.3d at 1189 (Watford, J., dissenting).

152. *Abbas*, 783 F.3d at 1333–34.

153. See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015).

154. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (emphasis added); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“The plausibility standard is not akin to a ‘probability requirement.’”).

155. *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

156. See, e.g., CIV. PROC. § 425.16(g).

157. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

158. See FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 250 n.5 (1986); *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018).

159. *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015).

160. *Nasser v. Isthmian Lines*, 331 F.2d 124, 127 (2d Cir. 1964).

161. *Abbas*, 783 F.3d at 1333–34; *Carbone*, 910 F.3d at 1350. A plaintiff first must state a plausible claim. FED. R. CIV. P. 8, 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Then, at the close of discovery, he must show that there is a genuine dispute of material fact. *Anderson*, 477 U.S. at 250 n.5; *Carbone*, 910 F.3d at 1350. If a plaintiff can check those two boxes, then he is “entitled to trial.” *Abbas*, 783 F.3d at 1334.

162. *Abbas*, 783 F.3d at 1334.

163. See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1), (g) (West 2015).

because of the nature of the claim.¹⁶⁴ In *Shady Grove*, the statute in question changed the standards for whether or not a certain type of suit could be maintained as a class action.¹⁶⁵ Similarly, anti-SLAPP statutes change the standards that certain plaintiffs must meet in order to be entitled to trial.¹⁶⁶ In *Burlington*, the state statute “mandate[ed] a test of sufficiency that the Rules reject”¹⁶⁷ by requiring an affirmance penalty on unsuccessful appeals as opposed to the discretionary award for frivolous appeals imposed by the Federal Rules.¹⁶⁸ Likewise, anti-SLAPP statutes require the courts to apply a stricter standard than the Federal Rules squarely reject.¹⁶⁹ The Ninth Circuit concluded that because a defendant who brings an unsuccessful motion to strike under the anti-SLAPP statute can still turn to Rules 12(b)(6) and 56, there is no conflict.¹⁷⁰ However, this argument directly acknowledges that the anti-SLAPP statutes add an extra requirement by saying that even if the claim can make it over that hurdle, it still has to make it over the other two to get to trial.¹⁷¹ Rather than showing that they answer separate questions, that argument only goes to show that anti-SLAPP statutes impose an additional burden on plaintiffs before reaching trial.¹⁷²

Further, the types of claims that anti-SLAPP statutes cover fall within the sphere of Rules 8, 12, and 56. The First and Ninth Circuits both concluded that anti-SLAPP statutes supplement the Federal Rules, and thus exist in their own separate sphere because anti-SLAPP statutes only pertain to a specific category of cases.¹⁷³ While it is correct that anti-SLAPP statutes do provide a supplemental mechanism for protecting defendants against certain types of claims,¹⁷⁴ they still exist within the sphere of the Federal Rules.¹⁷⁵ The Federal Rules cover all actions brought in the federal district courts, with minor exceptions.¹⁷⁶ Thus, they are general rules that apply to every type of claim brought in federal court.¹⁷⁷ Anti-SLAPP statutes cover just a small subset of

164. See *Abbas*, 783 F.3d at 1334.

165. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010).

166. See *Carbone*, 910 F.3d at 1351.

167. *Id.* at 1355 (citing *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987)); *Burlington*, 480 U.S. at 7.

168. *Burlington*, 480 U.S. at 7 (1987); see also *Carbone*, 910 F.3d at 1355.

169. See *Carbone*, 910 F.3d at 1350–51.

170. *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999).

171. See *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015).

172. See *id.*

173. *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010); *Newsham*, 190 F.3d at 973.

174. *Godin*, 629 F.3d at 88–89; *Newsham*, 190 F.3d at 973.

175. See *Abbas*, 783 F.3d at 1334.

176. FED. R. CIV. P. 1.

177. See *id.*

claims within the large sphere of claims that the Federal Rules apply to.¹⁷⁸ The state statute in *Shady Grove* similarly imposed additional requirements for certain types of class actions, while FRCP 23 applied to all types of class actions.¹⁷⁹ The Court deemed the state statute's method of following the Federal Rule for some claims but singling out certain ones with extra requirements impermissible.¹⁸⁰ Anti-SLAPP statutes operate in the same way as to Rules 8, 12, and 56.¹⁸¹ Together, the Federal Rules govern pre-trial dismissal for every type of claim brought in federal court; however, anti-SLAPP statutes single out certain claims and impose an additional requirement.¹⁸² As a result, their "supplement" to the Federal Rules impermissibly intrudes into the sphere of the Federal Rules.

Additionally, Congress has specifically taken certain types of claims and placed them outside the sphere of Rules 8, 12, and 56, but it has not done so for any of the claims that anti-SLAPP statutes typically cover.¹⁸³ For example, FRCP 9(b) imposes a heightened pleading standard for fraud claims.¹⁸⁴ Similarly, Congress heightened the pleading standard in private securities actions through the PSLRA.¹⁸⁵ However, only Congress may create exceptions to the Federal Rules.¹⁸⁶ The states cannot.¹⁸⁷ As a result, state anti-SLAPP statutes cannot create exceptions for typical SLAPP claims in federal court.

Anti-SLAPP statutes also cannot be read to avoid conflict with the Federal Rules. In *Planned Parenthood*, the Ninth Circuit purported to read California's anti-SLAPP statute in such a way so as to "prevent the collision" of the anti-SLAPP statute with the Federal Rules by reviewing the motion to strike "under different standards depending on the motion's basis."¹⁸⁸ While a majority of justices in *Shady Grove* agreed that courts should "interpre[t] the federal rules

178. See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015). Cf. FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . .").

179. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397, 400–01 (2010).

180. *Id.* at 400–01.

181. See, e.g., *Klocke v. Watson*, 936 F.3d 240, 245–46 (5th Cir. 2019); *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015).

182. *Klocke*, 936 F.3d at 245–46; *Carbone v. CNN, Inc.* 910 F.3d 1345, 1354–55 (11th Cir. 2018); *Abbas*, 783 F.3d at 1334; *Makaeff v. Trump Univ., LLC (Makaeff I)*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring).

183. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2)(A) (2018); FED. R. CIV. P. 9(b); see also *Carbone*, 910 F.3d at 1353; *Abbas*, 783 F.3d at 1335; *Godin v. Schencks*, 629 F.3d 79, 91 (1st Cir. 2010).

184. FED. R. CIV. P. 9(b).

185. See generally 15 U.S.C. § 78u-4.

186. See *Abbas*, 783 F.3d at 1335; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010).

187. *Abbas*, 783 F.3d at 1335; *Shady Grove*, 559 U.S. at 400.

188. *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833 (9th Cir. 2018).

to avoid conflict with important state regulatory policies,” courts cannot “rewrite the rule.”¹⁸⁹ The Ninth Circuit’s reading of the statute in *Planned Parenthood* does exactly that. Rather than applying the California anti-SLAPP statute’s probability standard,¹⁹⁰ the court decided that federal courts should apply either the Rule 12(b)(6) or Rule 56 standard depending on the motion’s basis, quite literally rewriting the law to not conflict.¹⁹¹ In doing so, the court illustrated the conflict between anti-SLAPP statutes and the Federal Rules and the fact that they cannot co-exist without directly colliding.¹⁹²

Anti-SLAPP statutes do not create substantive rights either. *Godin* and *Newsham* concluded that anti-SLAPP statutes create substantive rights that cannot be abridged by the Federal Rules.¹⁹³ However, a plain reading of the text of any anti-SLAPP statute does not support this proposition.¹⁹⁴ Rather than creating substantive rights, anti-SLAPP statutes merely provide extra protection to rights that already exist via a mechanism that allows defendants to dismiss

189. *Shady Grove*, 559 U.S. at 430–31 (Stevens, J., concurring).

190. See, e.g., CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015).

191. *Planned Parenthood*, 890 F.3d at 833.

192. *Id.* The defendants in *Abbas* similarly attempted to portray the D.C. anti-SLAPP statute’s special motion to dismiss as a functional equivalent of the summary judgment standard. *Abbas*, 783 F.3d at 1334. In dismissing this approach, Judge Kavanaugh wrote:

The main problem with the defendants’ theory is that it requires the Court to re-write the special motion to dismiss provision. Had the D.C. Council simply wanted to permit courts to award attorney’s fees to prevailing defendants in these kinds of defamation cases, it easily could have done so. But the D.C. Council instead enacted a new provision that answers the same question about the circumstances under which a court must grant pre-trial judgment to defendants. Moreover, the D.C. Court of Appeals has never interpreted the D.C. Anti-SLAPP Act’s likelihood of success standard to simply mirror the standards imposed by Federal Rules 12 and 56. Put simply, the D.C. Anti-SLAPP Act’s likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56.

Id. at 1334–35.

193. *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010) (quoting *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring)) (“Section 556 is ‘so intertwined with a state right or remedy that it functions to define the scope of the state-created right,’ it cannot be displaced by Rule 12(b)(6) or Rule 56.”); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999). But see *Klocke v. Watson*, 936 F.3d 240, 247 (5th Cir. 2019); *Abbas*, 783 F.3d at 1335; *Makaeff v. Trump Univ., LLC (Makaeff I)*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, J., concurring).

194. *Makaeff I*, 715 F.3d at 273 (Kozinski, J., concurring). As Judge Kozinski aptly stated:

The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights. The language of the statute is procedural: Its mainspring is a “special motion to strike”; it contains provisions limiting discovery; it provides for sanctions for parties who bring a non-meritorious suit or motion; the court’s ruling on the potential success of plaintiff’s claim is not ‘admissible in evidence at any later stage of the case’; and an order granting or denying the special motion is immediately appealable. The statute deals only with the conduct of the lawsuit; it creates no rights independent of existing litigation

Id. (quoting CIV. PROC. § 425.16).

certain types of claims more quickly.¹⁹⁵ The Federal Constitution, state constitutions, and state laws are the bases of these rights and claims—not the anti-SLAPP statutes.¹⁹⁶ Thus, state anti-SLAPP statutes, as purely procedural mechanisms intended to dismiss frivolous claims, do not create substantive rights and cannot supersede the Federal Rules.¹⁹⁷

In sum, state anti-SLAPP statutes answer the same question as Rules 8, 12, and 56 by governing pre-trial dismissal of certain types of claims. As a result, the Federal Rules should control, unless they are invalid under the Rules Enabling Act.¹⁹⁸

B. Shady Grove Step 2: Federal Rules 8, 12, and 56 are Valid Under the Rules Enabling Act

The second question is whether or not Rules 8, 12, and 56 are valid under the Rules Enabling Act. The Court in *Shady Grove* was divided over the appropriate test for validity under the Rules Enabling Act.¹⁹⁹ However, Rules 8, 12, and 56 are valid under the Rules Enabling Act using both Justice Scalia's and Justice Stevens's formulations.

Justice Scalia and the plurality applied the *Sibbach* rule—which asks whether the “rule really regulates procedure”²⁰⁰—to determine validity under the Rules Enabling Act.²⁰¹ The question under this test is whether Rules 8, 12, and 56 “really regulate procedure.”²⁰² As Judge Kavanaugh noted in *Abbas*, that question with respect to these three rules is relatively easy because a majority in *Shady Grove* expressly stated that pleading standards and rules governing summary judgment are “addressed to procedure.”²⁰³ Further, Rules 8, 12, and 56 do not function to curtail a defendant's rights;²⁰⁴ rather, “they alter only how the claims are processed.”²⁰⁵ Together, the Rules simply regulate what must be

195. See *Klocke*, 936 F.3d at 247; *Abbas*, 783 F.3d at 1335; *Makaeff I*, 715 F.3d at 273 (Kozinski, J., concurring).

196. See, e.g., *Makaeff I*, 775 F.3d at 273 (discussing substantive rights created under state laws).

197. *Klocke*, 936 F.3d at 247; *Abbas*, 783 F.3d at 1335; *Makaeff I*, 715 F.3d at 273 (Kozinski, J., concurring).

198. See *Shady Grove*, 559 U.S. at 406–10 (plurality opinion); *id.* at 417–18 (Stevens, J., concurring).

199. See *Shady Grove*, 559 U.S. at 406–10 (plurality opinion); *id.* at 417–32 (Stevens, J., concurring).

200. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

201. *Shady Grove*, 559 U.S. at 407. Judge Kavanaugh, likely correctly, concluded that *Sibbach* should continue to be the rule because *Shady Grove* did not actually overturn it. See *Abbas*, 783 F.3d at 1336–37.

202. *Sibbach*, 312 U.S. at 14; see also *Shady Grove*, 559 U.S. at 407; *Abbas*, 783 F.3d at 1336–37.

203. *Abbas*, 783 F.3d at 1337; *Shady Grove*, 559 U.S. at 404.

204. *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1357 (11th Cir. 2018).

205. *Shady Grove*, 559 U.S. at 408.

overcome to advance to trial—they do not create claims or rights, as discussed above.²⁰⁶ Accordingly, Rules 8, 12, and 56 “really regulate[] procedure” and are valid under the Rules Enabling Act pursuant to the plurality’s test.²⁰⁷

Rules 8, 12, and 56 are also valid under Justice Stevens’s test, which asks whether the state law “is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”²⁰⁸ As discussed above, the state anti-SLAPP statutes do not create substantive rights and merely exist to provide additional protection for rights found in the First Amendment, state constitutions, and state laws.²⁰⁹ The statutes do not define the scope of the rights so much as they provide a “protective mechanism” for them.²¹⁰ Similar to the statute in *Shady Grove*, which applied to claims based on any state’s law,²¹¹ anti-SLAPP statutes also operate to protect defendants based on the type of claim, not the specific state’s own law.²¹² As in *Shady Grove*, it is difficult to see how anti-SLAPP statutes could be “so intertwined with a state right” if they are not tied to the rights of a specific state but just to certain types of claims.²¹³ Thus, even under Justice Stevens’s test, Rules 8, 12, and 56 are valid under the Rules Enabling Act.

Because Rules 8, 12, and 56 are valid under both Justice Scalia’s and Justice Stevens’s tests, they are valid under the Rules Enabling Act. Consequently, because the Federal Rules are valid and govern pre-trial dismissal in federal court, anti-SLAPP statutes should not be applied in federal diversity cases.²¹⁴

III. AN AMENDMENT TO THE FEDERAL RULES OR A FEDERAL ANTI-SLAPP STATUTE WOULD ADEQUATELY PREVENT FORUM-SHOPPING, PROMOTE

206. *Carbone*, 910 F.3d at 1357.

207. *See* *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); *Shady Grove*, 559 U.S. at 407.

208. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring).

209. *Klocke v. Watson*, 936 F.3d 240, 247 (5th Cir. 2019); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015); *Makaeff v. Trump Univ., LLC (Makaeff I)*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, J., concurring).

210. *Klocke*, 936 F.3d at 247; *Abbas*, 783 F.3d at 1335; *Makaeff I*, 715 F.3d at 273 (Kozinski, J., concurring).

211. *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring).

212. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2015).

213. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring); *see, e.g.*, CIV. PROC. § 425.16.

214. While the special motions to strike are the most notable feature of anti-SLAPP statutes, another distinctive feature is an award of attorney’s fees to a defendant prevailing on a special motion to strike or dismiss. *See, e.g.*, CIV. PROC. § 425.16(c)(1). However, these provisions cannot apply in federal court either. Most state anti-SLAPP statutes only permit an award of attorney’s fees if the defendant prevails under that specific motion. *See, e.g., id.* As a result, because the award is dependent on the defendant prevailing under the statutorily proscribed method, the attorney’s fees must rise and fall with the special motion. Thus, if the special motion cannot apply in federal court, neither can the attorney’s fees provision.

UNIFORMITY, AND PROTECT SLAPP TARGETS IN DIVERSE FEDERAL
LITIGATION

Because state anti-SLAPP statutes cannot apply in federal court, there are several reasons that federal protection against SLAPPs is necessary. First, the inapplicability of state anti-SLAPP statutes in federal court gives SLAPP filers great incentive to forum shop.²¹⁵ Not only would they not have to overcome an extra pre-trial hurdle, but they also would not be subject to attorney's fees if they lose²¹⁶—a huge win for a typical SLAPP filer who is just trying to drag a defendant through costly litigation.²¹⁷ Further, federal anti-SLAPP protection is necessary because anti-SLAPP statutes serve important purposes in protecting the speech and petitioning rights of American citizens by providing extra protection to victims of meritless lawsuits intended to chill expression.²¹⁸ While just over half of the states have enacted anti-SLAPP statutes, nearly half still have not.²¹⁹ Further, the strength of the protections in the statutes varies from state to state.²²⁰ Such an “uneven patchwork” of state anti-SLAPP laws undermines the overall effectiveness of these efforts.²²¹ Federal protection would increase uniformity and “protect the speech of all Americans in all courts”

215. See *Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999). The plurality in *Shady Grove* acknowledged the reality that allowing the Federal Rules to control would lead to forum shopping. See *Shady Grove*, 559 U.S. at 415–16 (plurality opinion). However, Justice Scalia concluded that when it comes to a Federal Rule, it does not matter:

The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to “disembowel either the Constitution’s grant of power over federal procedure” or Congress’s exercise of it.

Id. at 416.

216. *Godin*, 629 F.3d at 92.

217. Ho, *supra* note 4, at 551.

218. See Eric Goldman, *Law Professor Letter in Support of SPEAK FREE Act*, Santa Clara L. Digit. Commons (Sept. 16, 2015), <https://digitalcommons.law.scu.edu/historical/1047/>.

219. See Vining & Matthews, *supra* note 15; see also Goldman, *supra* note 218.

220. Jeremy Rosen & Felix Shafir, *Helping Americans to Speak Freely*, 18 FEDERALIST SOC’Y REV. 62, 68 (2017). Some anti-SLAPP statutes are narrow and “apply only to actions brought by public applicants against people who have challenged or opposed such applications to government bodies” or to “speech seeking to influence decisions by the legislature or executive branch.” *Anti-SLAPP Statutes and Commentary*, Media L. Res. Ctr., <https://www.medialaw.org/component/k2/item/3494> (last visited Apr. 7, 2021). On the other hand, other states have statutes that are much broader and protect both speech and petitioning “in connection with issues of public concern.” *Id.* Over the years, some states with weaker anti-SLAPP statutes have taken to updating them to provide for more protection. Heather Goldman et al., *New York Becomes Latest State to Strengthen Anti-SLAPP Law, Providing Greater Protections for the Exercise of Free Speech, Petition, and Association*, JDSupra (Nov. 11, 2020), <https://www.jdsupra.com/legalnews/new-york-becomes-latest-state-to-49082/>. New York was the most recent state to make a significant update to its anti-SLAPP statute, expanding both the types of claims the statute covers and the protections given to targets in November 2020. *Id.*

221. Rosen & Shafir, *supra* note 220, at 68; see also Goldman, *supra* note 218.

by preventing SLAPP filers from bringing SLAPPs in states with weak or no anti-SLAPP laws or in federal court.²²²

Some critics contend that the First Amendment provides sufficient protection for targets, who often prevail anyway.²²³ They see anti-SLAPP statutes, which “tip the balance” towards targets, as improper.²²⁴ Others fear that a federal anti-SLAPP statute with the hallmark fee-shifting provision would lead to a significant “abuse[] and misuse[]” of the special motions to strike, as was the case with prior versions of Federal Rule 11.²²⁵ These criticisms are unfounded. The fact that SLAPP targets often prevail is irrelevant—SLAPP filers do not care whether they win or not.²²⁶ Rather, their purpose is to wear down the target and get them to stop speaking.²²⁷ Accordingly, anti-SLAPP statutes are important because they are not meant to help targets win, but rather to prevent them from being dragged through costly, meritless litigation.²²⁸ Further, while anti-SLAPP statutes are intended to help targets, “tipping the balance” is not improper because FRCP 9(b) and the PSLRA do the same thing in other types of claims.²²⁹ Additionally, unlike Rule 11, anti-SLAPP statutes deal with a limited number of claims, and they often punish targets filing frivolous special motions, so abuse of the statute would be minimal compared with that of Rule 11.²³⁰ Despite these criticisms, a federal remedy is still the best way to protect the speech and petitioning rights of American citizens.²³¹

A. Proposal #1: An Amendment to the Federal Rules to Heighten the Pleading Standard in Common SLAPP Causes of Action

The first possible federal protection is an amendment to the Federal Rules similar to Rule 9(b), which would heighten the pleading standard for claims based on common SLAPP causes of action, such as defamation. Such a rule would take SLAPP claims out of the sphere of Rules 8 and 12 and place them

222. Goldman, *supra* note 218.

223. Joseph W. Beatty, Note, *The Legal Literature on SLAPPs: A Look Behind the Smoke Nine Years After Professors Pring and Canan First Yelled “Fire!”*, 9 U. FLA. J.L. & PUB. POL’Y 85, 106 (1997).

224. *Id.*; see also Aaron Smith, Note, *SLAPP Fight*, 68 ALA. L. REV. 303, 329 (2016).

225. James W. Devine, Note, *Rule 11’s Big-Mouthed Little Brother: How a Federal Anti-SLAPP Statute Would Reproduce Rule 11’s Growing Pains*, 9 AVE MARIA L. REV. 367, 387–89 (2011).

226. See Tate, *supra* note 7, at 803–04.

227. See *id.*

228. *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 967 (Cal. 2005) (quoting *People ex rel. Lockyer v. Brar*, 9 Cal. Rptr. 3d 844, 846 (Ct. App. 2004)).

229. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b) (2018); FED. R. CIV. P. 9(b).

230. See, e.g., CAL. CIV. PROC. CODE § 425.16 (West 2015).

231. See Goldman, *supra* note 218.

into their own spheres, as some courts have tried to do.²³² Rule 9(b) was intended to prevent frivolous fraud claims, which tend to damage the reputation of the defendant.²³³ Likewise, one significant impetus behind anti-SLAPP statutes is the damaging and chilling effect that meritless suits have on targets exercising their rights.²³⁴ An amendment to the Federal Rules heightening the pleading standard in SLAPP suits would resolve the conflict between state anti-SLAPP laws and Rules 8 and 12 by raising the first hurdle that plaintiffs must overcome to get to trial and preserving the plaintiff's right to discovery prior to summary judgment.²³⁵

There are at least two possible options for the pleading standard. Rule 9(b) requires plaintiffs to "state with particularity the circumstances constituting fraud or mistake."²³⁶ As one option, the pleading standard for SLAPP claims could also be particularity and require the facts serving as the basis of the claim to be alleged with specificity.²³⁷ Often under Rule 9(b) this requires a specific showing of the facts of the claim.²³⁸ Requiring such specificity in a SLAPP suit would help to ensure the merit of the suit without being so stringent as to require a showing of a probability of success. The particularity standard is also more consistent with the Federal Rules because Rule 9(b) is the only exception within the Rules to the pleading standards set forth in Rules 8 and 12.²³⁹ Alternatively, another option would be to require a *prima facie* showing of a likelihood of success or a probability of success. Such a standard would be stricter and more consistent with many pre-existing anti-SLAPP statutes.²⁴⁰ This standard would essentially ensure that all filers must overcome the same hurdle in both state and federal court without adding an extra step,²⁴¹ even though it is more inconsistent with the Federal Rules. Both standards provide workable options for a heightened pleading standard.

An amendment to the Federal Rules would carve out a specific sphere to provide for SLAPP claims by raising the height of the first hurdle that filers must

232. See *Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999).

233. 5A ARTHUR R. MILLER ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1296 (4th ed. 2020); see also *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004).

234. *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 169 (5th Cir. 2009).

235. See *Abbas*, 783 F.3d at 1334.

236. FED. R. CIV. P. 9(b).

237. See FED. R. CIV. P. 9(b); *Sweeney Co. of Md. v. Eng'rs-Constructors, Inc.*, 109 F.R.D. 358, 360 (E.D. Va. 1986); see also *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997) (citing *Fitch v. Radnor Indus., Ltd.*, No. 90-2084, 1990 U.S. Dist. LEXIS 13023, at *2 (E.D. Pa. Sept. 27, 1990)).

238. See FED. R. CIV. P. 9(b); *Sweeney*, 109 F.R.D. at 360.

239. See FED. R. CIV. P. 9(b).

240. See, e.g., D.C. CODE ANN. § 16-5502 (West 2012).

241. See *id.*; *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015).

overcome to get to trial, while keeping the discovery and summary judgment standards in place.²⁴² Further, Rule 11 still provides an opportunity for sanctions to serve as an extra “slap” to filers who still attempt to bring SLAPPs.²⁴³ Thus, an amendment to the Federal Rules is one potential method of ensuring anti-SLAPP protection in federal court in a way that would embed the protection within the existing framework of the Federal Rules.

B. Proposal #2: A Federal Anti-SLAPP Statute

Another potential federal protection is a federal anti-SLAPP statute. In recent years Congress has made various attempts at such a statute, but none have been successful.²⁴⁴ Most recently, the SPEAK FREE Act²⁴⁵ was introduced in May 2015, just after the D.C. Circuit’s decision in *Abbas*.²⁴⁶ A bipartisan effort,²⁴⁷ the SPEAK FREE Act was designed to protect Americans from meritless lawsuits targeting their First Amendment rights.²⁴⁸ The Act’s structure was similar to the District of Columbia’s anti-SLAPP statute and would have enabled SLAPP targets to file a special motion to dismiss in actions arising from expressions about an official proceeding or a matter of public concern.²⁴⁹ If the target could make a prima facie showing that the claim was a SLAPP, the court would have been required to grant the motion unless the filer could demonstrate a likelihood of success on the merits.²⁵⁰ The Act also provided for special procedural requirements pertaining to discovery and fee-shifting should the target have prevailed on the special motion.²⁵¹ However, the SPEAK FREE Act was never passed.²⁵²

Congress has only once enacted a statute outside of the Federal Rules that serves to combat frivolous lawsuits.²⁵³ The PSLRA heightens the pleading

242. See *Abbas*, 783 F.3d at 1334.

243. Fed. R. Civ. P. 11(c).

244. See Rosen & Shafir, *supra* note 221, at 68.

245. SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015). SPEAK FREE stands for Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts. *Id.*

246. *Id.*; *Abbas*, 783 F.3d at 1328 (decided on April 24, 2015); Rosen & Shafir, *supra* note 221, at 68; Smith, *supra* note 224, at 326; *SPEAK FREE Act of 2015*, Pub. Participation Project, <https://anti-slapp.org/speak-free-act> (last visited Mar. 25, 2021); *H.R. 2304-SPEAK FREE Act of 2015*, Libr. of Cong., <https://www.congress.gov/bill/114th-congress/house-bill/2304> (last visited Mar. 25, 2021).

247. The SPEAK FREE Act was sponsored by Representative Blake Farenthold (R-TX) and had multiple cosponsors on both sides of the aisle, including Representative Anna Eshoo (D-CA). H.R. 2304.

248. *Id.*

249. H.R. 2304 § 4202.

250. *Id.*

251. *Id.* § 4203(a), 4207(a).

252. The SPEAK FREE Act died in committee. *H.R. 2304—SPEAK FREE Act of 2015*, Congress.gov, <https://www.congress.gov/bill/114th-congress/house-bill/2304?q=%7B%22search%22%3A%5B%22HR+2304%22%5D%7D&s=5&r=1> (last visited Mar. 27, 2021).

253. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2018).

standard in private securities class actions, requiring plaintiffs to plead “with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”²⁵⁴ The PSLRA also provides for fee-shifting for successful defendants.²⁵⁵ Rather than enacting a statute like the SPEAK FREE Act, which would still add an extra hurdle to litigation procedures, Congress should enact a federal anti-SLAPP statute similar to the PSLRA, which would heighten the pleading standard and guarantee fee-shifting to provide more teeth to the protections.

A federal statute like the PSLRA would accomplish the goals of anti-SLAPP statutes while maintaining consistency with the Federal Rules. Such a statute would have three major benefits. First, the heightened pleading standard, as discussed above, would make it much harder to surmount the first hurdle in federal litigation for these types of claims and would maintain the force of anti-SLAPP statutes, making SLAPPs harder to bring and easier to dismiss.²⁵⁶ Second, a provision providing for fee-shifting would both preserve the power behind the anti-SLAPP statutes, which seek to deter frivolous suits through punishment, and discourage forum-shopping by remaining consistent with state anti-SLAPP statutes.²⁵⁷ Finally, a federal anti-SLAPP statute similar to the PSLRA would provide a necessary balance between accomplishing the goals of anti-SLAPP statutes on a federal level and maintaining consistency with federal procedure. Traditional anti-SLAPP statutes, with their special motions to strike and stays of discovery, “cut[] an ugly gash through th[e] orderly process” that the Federal Rules create.²⁵⁸ Rather than imposing a process on the federal courts that would greatly disrupt the carefully designed framework that already exists, an anti-SLAPP version of the PSLRA would fit neatly within the pre-existing framework. In doing so, the statute would be able to effectively protect the speech rights of American citizens while working alongside the goal of the Federal Rules to provide a cohesive federal procedure in the federal courts. Consequently, a federal anti-SLAPP statute structured like the PSLRA would be an alternative and effective way to enforce anti-SLAPP protections in diverse federal litigation.

IV. CONCLUSION

As various courts and commentators have increasingly agreed, SLAPPs pose a significant threat to the First Amendment, and many states have enacted anti-SLAPP statutes in an effort to combat this threat.²⁵⁹ However, these statutes

254. *Id.* § 78u-4(b)(2)(A).

255. *Id.* § 78u-4(c)(3).

256. *See Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015).

257. Marc J. Randazza, *The Need for a Unified and Cohesive National Anti-SLAPP Law*, 91 OR. L. REV. 627, 628 (2012); Smith, *supra* note 224, at 331.

258. *Makaeff v. Trump Univ., LLC (Makaeff I)*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring).

259. *Anti-SLAPP Statutes and Commentary*, *supra* note 220.

unavoidably conflict with Federal Rules 8, 12, and 56 because they seek to govern pre-trial dismissal of certain types of claims. Following the Supreme Court's jurisprudence from *Hanna* to *Shady Grove*, such conflicts render the state statutes inapplicable in federal court. Consequently, this inapplicability in federal court, coupled with the already existing lack of uniformity among the states, greatly hinders states' efforts to protect SLAPP targets.

The federal government should work to protect targets in one of two ways. One option is for Congress to heighten the pleading standard for SLAPP claims and avoid additional procedures by amending the Federal Rules. Alternatively, Congress could enact a federal anti-SLAPP statute that heightens the pleading standard and provides for attorney's fees to both make it harder to bring SLAPP claims and to conform with federal litigation procedures. Either option would have a significant impact in protecting the rights of average Americans simply trying to have their voices heard by providing for quick dismissal of SLAPP suits in federal court.

