

SLAPP FIGHT

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INTRODUCTION

Donald Trump founded Trump University—a private, for-profit entity now called The Trump Entrepreneur Initiative—because of his “real passion for learning.”¹ The University offers real estate seminars and books, touting its program as a chance to “[l]earn from the Master.”² Almost immediately, Trump University drew public comment.³

Trump University’s advertisements attracted many consumers, including Tarla Makaeff. She enrolled in a Trump University seminar and then raised her credit card limit to enroll in the “Trump Gold Elite Program.”⁴ Soon, though, Makaeff was disgruntled with the effectiveness of the programs and the sales practices of Trump University. She complained to Trump University and demanded a refund, which Trump University declined.⁵ In response, Makaeff wrote to her bank, to government agencies, and on Internet message boards about her dispute.⁶ Later, she filed a lawsuit, asserting that Trump University engaged in deceptive business practices and unethical sales tactics.⁷

In response, Trump University filed a defamation counterclaim against Makaeff, arguing that she unlawfully damaged the university’s reputation. Under defamation law, Makaeff’s speech was clearly protected—it is commentary on a limited-purpose public figure, made without actual malice.⁸ Winning was only a secondary concern for Trump University; instead, Trump University’s primary motivation was to muzzle Makaeff’s voice by filing a counterclaim, “obviously designed to overwhelm Makaeff by making it more burdensome and expensive for her to pursue her” own claims.⁹ Under normal judicial proceedings, Makaeff would encounter a choice: continue the litigation, and vindicate First Amendment rights at a cost she may have trouble bearing, or end the lawsuit, meaning Trump University succeeded in silencing a voice that should be shielded by the First Amendment.

1. See *Makaeff v. Trump Univ., L.L.C.*, 715 F.3d 254, 258 (9th Cir. 2013).

2. *Id.* (alteration in original).

3. See *id.* at 259 & n.3 (discussing Doonesbury comic strips, Jay Leno monologues, and a Los Angeles Times article as examples).

4. *Id.* at 260.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 266–67 (holding Trump University was a limited-purpose public figure); *Makaeff v. Trump Univ., L.L.C.*, 26 F. Supp. 3d 1002, 1008–14 (S.D. Cal.) (granting Makaeff’s motion to strike after finding a lack of actual malice on remand).

9. See *Makaeff v. Trump Univ., L.L.C.*, 736 F.3d 1180, 1185 (9th Cir. 2013) (Wardlaw & Callahan, JJ., concurring in denial of rehearing en banc).

This type of claim, brought not to win but to suppress First Amendment activity, is a SLAPP—a Strategic Lawsuit Against Public Participation.¹⁰ Recognizing the problems this type of claim creates, a majority of states have enacted anti-SLAPP statutes to help shield citizens such as Makaeff from lawsuits brought to suppress legitimate, protected forms of First Amendment expression. As explained below, anti-SLAPP statutes provide key procedural protections to those exercising their First Amendment rights by increasing the burden on the filer of the lawsuit to prove they have a legitimate claim not protected by the First Amendment.¹¹ For more than two decades, subjects of such harassing lawsuits could rely on these statutory protections in both state and federal courts. Within the last year, however, those protections have been eroded by judicial decisions prohibiting and questioning their operation in federal courts.

This Note seeks to describe the importance of anti-SLAPP statutes in strengthening and preserving crucial First Amendment values, to analyze the legal uncertainty surrounding their applicability in federal court, and to examine the future of anti-SLAPP efforts. While some commentators have considered the issue of state anti-SLAPP laws' applicability in federal courts,¹² none have done so after a circuit split emerged in full. Furthermore, no commentators have explored the benefits and drawbacks of the proposed federal anti-SLAPP law. This Note contributes to the literature by filling that void.

Part I discusses the relevant First Amendment principles that serve as the backdrop to anti-SLAPP statutes. Part II discusses what anti-SLAPP statutes are, how they work, and why they are beneficial to citizens seeking to exercise their First Amendment rights of expression. Part III provides an overview of the recent circuit split on whether state anti-SLAPP statutes can apply in federal courts. Part IV argues that, based on Supreme Court precedent, anti-SLAPP statutes should not apply in a federal court sitting in diversity as a procedural matter. Part V analyzes the impact on First Amendment rights of that procedural answer, concludes that the lack of anti-SLAPP protections in federal court is a negative result normatively, and posits that federal legislation is needed.

10. See *infra* Part II, for a full discussion of what a SLAPP aims to accomplish.

11. See *infra* Part II.

12. See Laura Lee Prather & Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH. L. REV. 725 (2015); Benjamin Ernst, Note, *Fighting SLAPPs in Federal Court: Erie, the Rules Enabling Act, and the Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. REV. 1181 (2015); Caleb P. Lund, Note and Comment, *It's Time to SLAPP Back: Why California's Anti-SLAPP Statute Should Not Apply in Federal Court*, 44 SW. L. REV. 97 (2014); Colin Quinlan, Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367 (2014); Katelyn E. Saner, Note, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 DUKE L.J. 781 (2013).

I. THE RELEVANT FIRST AMENDMENT PRINCIPLES

The right to comment on and participate in “‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’”¹³ Although “the boundaries of the public concern test are not well defined,”¹⁴ generally, a matter qualifies as one of public concern when it is “a subject of general interest and of value and concern to the public,”¹⁵ regardless of any arguably “inappropriate or controversial character” of the commentary.¹⁶ Ultimately, the Supreme Court has announced, courts should take a broad view of what constitutes a matter of public concern, so that “courts themselves do not become inadvertent censors.”¹⁷

The right to comment on matters of public concern derives from both the Free Speech Clause and the Petition Clause of the First Amendment.¹⁸ The rights to free speech and petition are not identical, but are “cognate rights.”¹⁹ They “share substantial common ground,” are “[b]oth . . . integral to the democratic process,” and “advance personal expression,” even when conducted “[b]eyond the political sphere.”²⁰ The Supreme Court has long recognized the importance of the First Amendment as part of a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”²¹

The Free Speech Clause is vital because “speech concerning public affairs is more than self-expression; it is the essence of self-government.”²² “[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”²³ Accordingly, “speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”²⁴ The right to speak is not limited to governmental issues,

13. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

14. *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004).

15. *Id.* at 83–84.

16. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

17. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

18. U.S. CONST. amend. I.

19. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (noting that “[i]t was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guarant[ee]”).

20. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388–89 (2011) (holding that a public employee’s claim under the Petition Clause should typically undergo the same analysis as one brought under the Speech Clause).

21. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 279–80 (1964) (establishing the defamation “actual malice” standard for speech against public officials acting in their official capacity).

22. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

23. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

24. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

however. Free speech “fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.”²⁵

The Petition Clause also occupies a cherished place among First Amendment values. The right to petition is “among the most precious of the liberties safeguarded by the Bill of Rights.”²⁶ The ability to circulate ideas and gather support for change is central to “[t]he very idea of a government, republican in form.”²⁷ The Petition Clause thus permits citizens the right “to express their ideas, hopes, and concerns to their government and their elected representatives.”²⁸

Because of the value of the First Amendment, courts disfavor actions that may “chill” a person’s exercise of those rights. “The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without . . . *fear of subsequent punishment*.”²⁹ In the context of criminal statutes, the Supreme Court noted that a “threat of prosecution . . . raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability.”³⁰ The same can be said of the threat of civil litigation, which is at issue here. When speech is chilled, “[s]ociety as a whole then would be the loser,”³¹ not only because a constitutional right has been infringed but also because a fundamental necessity for democracy—free speech on matters of public concern—has been reduced or eliminated.

Anti-SLAPP statutes emerged against the backdrop of these fundamental First Amendment values, and this Note examines them now.

II. SLAPPS AND ANTI-SLAPPS

A SLAPP is a Strategic Lawsuit Against Public Participation.³² These lawsuits are, by definition, meritless. The SLAPP filers do not have a valid claim, most often because the First Amendment protects the speaker’s

25. *Guarnieri*, 564 U.S. at 388.

26. *United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967).

27. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

28. *Guarnieri*, 564 U.S. at 388.

29. *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940) (emphasis added).

30. *Multimedia Holdings Corp. v. Circuit Court of Fla.*, 544 U.S. 1301, 1304 (2005).

31. *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

32. The term “SLAPP” was coined by two professors who conducted an empirical study of such lawsuits in the 1990s. See GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996). SLAPPs have been brought under the guise of a variety of claims, including defamation, business interference, conspiracy, and trespass. *Id.* at 217.

conduct.³³ Because SLAPPs inherently have, in theory, no chance of prevailing in court, filers bring them not to remedy a wrong but to interfere with the First Amendment rights of targeted individuals. Their goal is to force targets into costly litigation that reduces or prevents their current and future involvement in public discourse.³⁴

The Ninth Circuit, which has adjudicated cases involving anti-SLAPP statutes since the late 1990s, has identified two principal risks of SLAPPs. First, “there is a danger that men and women will be chilled from exercising their [First Amendment] rights . . . by fear of the costs and burdens of resulting litigation”; and second, “that unscrupulous lawyers and litigants will be encouraged to use meritless lawsuits to discourage the exercise of [F]irst [A]mendment rights.”³⁵

Because SLAPP filers do not seek a legal victory, “traditional [judicial] safeguards against meritless actions” are ineffective to prevent the filing of such lawsuits.³⁶ First, SLAPPs “masquerade as ordinary lawsuits,”³⁷ and “thus are not easy to recognize, even by the courts.”³⁸ A SLAPP can be easily disguised as meritorious on its face, and at early stages of litigation, a court is unlikely to perceive this distinction. As discussed below, anti-SLAPP statutes allow a party wrongfully targeted to bring the court’s attention to its meritless nature early in the litigation process. Second, a SLAPP-filing party “expects to lose and is willing to write off litigation expenses”³⁹ as “merely a cost of doing business.”⁴⁰ For example, Trump in 2006 sued a New York Times reporter for libel over a story allegedly undervaluing Trump’s net worth. Trump spent \$1 million over five years litigating the case, only to be defeated on summary judgment.⁴¹ In an interview, Trump justified his approach: “I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable,

33. Because SLAPPs come in the form of both claims and counterclaims, this Note will, for clarity, refer to persons bringing the frivolous SLAPPs as “filers” and to persons targeted by such lawsuits, and hoping to invoke anti-SLAPP statutory protections, as “targets.”

34. See Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State’s New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495, 496 (2012) (“The strategy is to file weak claims with the goal of silencing speakers because they fear the expense and travails of litigation.”).

35. *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 799–800 (9th Cir. 2012).

36. *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 500, 508, 511–12 (Cal. Ct. App. 2004).

37. *Id.*

38. 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, 804, 806–10 (2000) (discussing the legislative history and judicial interpretations of California’s anti-SLAPP statute).

39. *Id.* at 805.

40. *Wilbanks*, 17 Cal. Rptr. 3d at 500.

41. See *Trump v. O’Brien*, 29 A.3d 1090 (N.J. Super. Ct. App. Div. 2011).

which I'm happy about."⁴² Third, other devices typically available to targets to combat a meritless claim, such as bringing a malicious prosecution claim or a request for sanctions, are often "inadequate to counter" SLAPPs because those devices consume more litigation costs, the underlying problem for the targets in the first place.⁴³

Anti-SLAPP statutes were created, as the name connotes, to help citizens effectively counter SLAPPs. Twenty-eight states and the District of Columbia have enacted some version.⁴⁴ Among the jurisdictions that have enacted an anti-SLAPP statute, the scope of protected speech and activity varies. Some states protect only discrete types of activities,⁴⁵ while others offer broad protections virtually coextensive with the First Amendment.⁴⁶

Anti-SLAPP statutes are meant to deter filers from bringing meritless lawsuits, and accelerate the judicial review process when filers do so anyway, to protect First Amendment activity. A typical anti-SLAPP statute enables the target, after a claim is asserted against them, to file a special motion and offer evidence establishing a prima facie case that their speech

42. Paul Farhi, *What Really Gets Under Trump's Skin? A Reporter Questioning His Net Worth*, WASH. POST (Mar. 8, 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html.

43. *Wilbanks*, 17 Cal. Rptr. 3d at 500.

44. See ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (2016); ARK. CODE ANN. §§ 16-63-501 to -508 (2005); CAL. CIV. PROC. CODE § 425.16 (West Supp. 2016); DEL. CODE ANN. tit. 10, §§ 8136-8138 (2013); D.C. CODE §§ 16-5501 to -5505 (Supp. 2016); FLA. STAT. ANN. § 720.304(4) (West 2015); *id.* § 768.295 (West 2011 & Supp. 2016); GA. CODE ANN. §§ 9-11-11.1, 51-5-7(4) (Supp. 2016); HAW. REV. STAT. §§ 634F-1 to -4 (LexisNexis 2012); 735 ILL. COMP. STAT. ANN. 110/15 to /25 (West 2011); IND. CODE ANN. §§ 34-7-7-1 to -10 (West 2011); LA. CODE CIV. PROC. ANN. art. 971 (Supp. 2016); ME. REV. STAT. ANN. tit. 14, § 556 (West Supp. 2015); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis 2013); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000); MINN. STAT. ANN. §§ 554.01-.05 (West 2010 & Supp. 2015); MO. ANN. STAT. § 537.528 (West Supp. 2016); NEB. REV. STAT. §§ 25-21,241 to -21,246 (2010); NEV. REV. STAT. ANN. §§ 41.637, 41.650-.670 (LexisNexis 2013); N.M. STAT. ANN. § 38-2-9.1 (2016); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2009); N.Y. C.P.L.R. 3211(g) (MCKINNEY 2016); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2010); OR. REV. STAT. ANN. §§ 31.150-.155 (2003); 27 PA. CONS. STAT. ANN. §§ 7707, 8301-8303 (West 2011); 9 R.I. GEN. LAWS §§ 9-33-1 to -4 (2012); TENN. CODE ANN. §§ 4-21-1001 to -1004 (2015); TEX. CIV. PROC. & REM. CODE ANN. §§ 27.001-.011 (West 2015); UTAH CODE ANN. §§ 78B-6-1401 to -1405 (LexisNexis 2012); VT. STAT. ANN. tit. 12, § 1041 (Supp. 2015); WASH. REV. CODE ANN. §§ 4.24.510-.525 (West 2005 & Supp. 2016). For an overview of these statutes, see *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited May 15, 2016) (citing relevant statutes in each of the states with anti-SLAPP laws).

45. For example, Pennsylvania's statute applies only to "[c]ommunication . . . to a government agency [relating to] implementation and enforcement of environmental law and regulations," before a government body, or in "connection with an issue under consideration or review" by government body. 27 PA. CONS. STAT. § 8301. Arizona's statute covers "statement[s] that fall[] within the constitutional protection of free speech" and that are "made as part of an initiative, referendum or recall effort" before a government body and concerning an issue under review by that body, made "for the purpose of influencing a governmental action." ARIZ. REV. STAT. ANN. § 12-751.

46. For example, Indiana protects "an act in furtherance of a person's [Constitutional] right of petition or free speech . . . in connection with a public issue." IND. CODE § 34-7-7-1. Texas protects statements or actions based on "a party's exercise of the right of free speech, right to petition, or right of association." TEX. CIV. PROC. & REM. CODE ANN. § 27.003.

or conduct was protected under the statute. Discovery is often stayed upon a target filing an anti-SLAPP motion. If a target makes a prima facie case of protected speech or activity, the burden shifts onto the filer to produce evidence that their claim is meritorious rather than one designed to harass the other party.⁴⁷ If the filer fails to meet this burden, the lawsuit is dismissed. Interlocutory appeals are generally available, and targets who successfully invoke the anti-SLAPP statute may recoup attorneys' fees.

These statutes benefit targets for three primary reasons. First, targets are given financial relief in both the short term (through a stay of discovery) and long term (through recovery of attorneys' fees). Without the statute, targets would be faced with the prospect of battling a SLAPP filer whose primary motivation is not to win but rather to harass the target through a protracted lawsuit designed to be as cumbersome and as expensive as possible.⁴⁸ Recovery of attorney fees is especially important in cases where there is a substantial disparity in financial resources between the filer and the target.⁴⁹ Second, targets have a better chance of prevailing earlier in litigation under the anti-SLAPP statute than under the ordinary judicial process. While targets are not precluded from filing a regular motion to dismiss or motion for summary judgment, anti-SLAPP statutes shift the burden on the filer to support the claim to an earlier stage in the litigation process. Third, targets have a right of immediate appeal, should they lose their anti-SLAPP argument in the lower court, another mechanism designed to ensure speedy decisions to determine whether a lawsuit is or is not a SLAPP.

These components of anti-SLAPP statutes provide “not simply the right to avoid ultimate liability in a SLAPP case, but . . . the right to avoid

47. The statutory language about the filer's threshold here varies. *Compare* CAL. CIV. PROC. CODE § 425.16(b)(1) (requiring the filer to establish “a probability” of prevailing), *with* D.C. CODE § 16-5502(b) (requiring the filer to demonstrate that the claim “is likely to succeed on the merits.”). Additionally, judicial interpretation of such anti-SLAPP language differs. *Compare* *Taus v. Loftus*, 151 P.3d 1185, 1205 (Cal. 2007) (holding that “a probability” does not require a determination of whether it “is more probable than not” that a filer would prevail, but instead requires a “summary-judgment-like” determination on whether the filer has a valid, plausible claim), *with* *Abbas v. Foreign Policy Grp.*, L.L.C., 783 F.3d 1328, 1334–35 (D.C. Cir. 2015) (holding that “likely to succeed” is not a summary-judgment-like determination, but imposes a more stringent standard akin to preponderance of the evidence).

48. *See* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 845 (2010) (“[V]alues underlying First Amendment protections . . . demand that individuals and groups have the opportunity to make their voices heard, without the threat of retaliation by those equipped with greater financial or institutional power.”).

49. EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 111 (5th ed. 2014) (“[A]n unfounded lawsuit by a relatively rich entity against a person of modest means can cause the person to quickly surrender,” which “deter[s] public debate.”). However, anti-SLAPP statutes are not only helpful in situations of disparate financial resources. *See* *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1109 (9th Cir. 2003) (holding that the anti-SLAPP statute applies even where the SLAPP filer is a “little guy,” not a paradigmatic “large private company seeking to deter private individuals from engaging in political debate”).

trial in the first instance.”⁵⁰ Because going to trial potentially chills speech, avoiding trial itself is a legitimate goal against the backdrop of the First Amendment. As a judge deciding one of the first anti-SLAPP cases wrote, perhaps a bit dramatically but with continued validity, the “ripple effect” of forcing targets facing a meritless lawsuit to settle or expend great costs on litigation “is enormous. . . . Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.”⁵¹ Anti-SLAPP statutes combat such threats by allowing “early dismissal of meritless [F]irst [A]mendment cases aimed at chilling expression through costly, time-consuming litigation.”⁵² Thus, in states with anti-SLAPP statutes available and pertinent to the claim filed, targets gain significant advantages that promote the exercise of First Amendment rights. However, the effectiveness of these statutes is in question after a recent federal appellate court decision that created a circuit split regarding the application of anti-SLAPP statutes in federal court.

III. THE CIRCUIT SPLIT

In April 2015, the U.S. Court of Appeals for the District of Columbia held that the D.C. anti-SLAPP statute cannot apply in federal diversity jurisdiction cases.⁵³ This holding created a circuit split and raised doubts about the viability of state anti-SLAPP laws in federal courts moving forward.⁵⁴ The circuit split revolves around the issue of whether Federal Rules of Civil Procedure (“FRCP”) 12 and 56 prohibit anti-SLAPP statutes from operating in federal courts. Rules 12 and 56 provide mechanisms and standards for pretrial dispositive motions,⁵⁵ while anti-SLAPP statutes set their own threshold a claimant must meet to proceed with their case.⁵⁶

50. *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 751–52 (5th Cir. 2014) (holding that the Texas anti-SLAPP statute confers a right to immediate appeal).

51. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 650–51 (N.Y. App. Div. 1992) (upholding an award of attorneys’ fees where a real estate investor interfered with a conservationist group’s public efforts to prevent the purchase of land).

52. *Vess*, 317 F.3d at 1109 (quoting *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001)).

53. *Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

54. See *infra* Part III.B–D for discussion of the cases creating the circuit split; see *infra* notes 130–35 for discussion of other circuit courts that have assumed an answer or noted without deciding the issue.

55. Rule 12 allows for dismissal for failure to state a claim, see FED. R. CIV. P. 12(b)(6), a standard the Supreme Court has interpreted to allow dismissal if the party bringing the claim does not allege facts sufficient to show the claim is plausible on its face, see *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); Rule 56 allows for dismissal of a claim if there is “no genuine dispute as to any material fact,” see FED. R. CIV. P. 56(a).

56. See *supra* note 47.

This Part looks first at relevant Supreme Court doctrine that, while not analyzing an anti-SLAPP statute or the specific federal rules relevant to the anti-SLAPP issue, establish the framework for the procedural issue that led to the circuit split. This Part then briefly examines the opinions and rationales of three circuits that have directly addressed whether anti-SLAPP statutes protecting First Amendment expression can apply in a federal court sitting in diversity.

A. *From Hanna to Shady Grove: Supreme Court Precedent*

The issue of applying state laws in federal diversity cases when federal rules potentially apply to the same issue extends back to *Hanna v. Plumer*.⁵⁷ The analytical framework has largely remained the same: generally, the federal court must look to see whether the federal rule and state law “clash.” If a clash exists, the court applies the federal rule if it is valid under the Constitution and the Rules Enabling Act. If a clash does not exist, courts must weigh the federal policies of the Rule against *Erie* concerns of forum shopping and inequitable results. The existence or absence of a clash is generally the disputed question in this field, and is an issue the Supreme Court has confronted multiple times.

In *Hanna*, the Court faced a state law that required in-hand delivery on the executor or administrator of an estate and FRCP 4, which permitted in-hand delivery but also permitted other options.⁵⁸ The Court gave cursory treatment to the issue of a conflict, holding—in a parenthetical—that the “clash [wa]s unavoidable” because FRCP 4 “implicitly, but with unmistakable clarity,” said that personal service was “not required in federal courts.”⁵⁹

In *Walker v. Armco Steel Corp.*,⁶⁰ the Court framed the issue as whether “the scope of the Federal Rule in fact is sufficiently broad to control the issue”⁶¹ The Court held in the negative when confronted with a state law that deemed an action commenced when service was made for purposes of its statutes of limitation and FRCP 3, which provided that an action is deemed commenced when the complaint is filed.⁶² The Court held that FRCP 3 “governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations,”⁶³ while the state law was a “statement of a

57. 380 U.S. 460 (1965).

58. *Id.* at 461–62 (citing FED. R. CIV. P. 4(d)(1); MASS. GEN. LAWS ANN. 197 § 9 (1958)).

59. *Id.* at 470.

60. 446 U.S. 740 (1980).

61. *Id.* at 749–50.

62. *Id.* at 750–51.

63. *Id.* at 751.

substantive decision . . . that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations.”⁶⁴ Therefore, the Court held, the two provisions “can exist side by side, . . . each controlling its own intended sphere of coverage without conflict.”⁶⁵

In *Burlington Northern Railroad Co. v. Woods*,⁶⁶ the Court was faced with a state law that mandated a 10% penalty on any money judgment affirmed on appeal and Federal Rule of Appellate Procedure 38, which permitted appellate judges to impose penalties on “frivolous” appeals.⁶⁷ The Court established that federal laws could be “sufficiently broad” either by causing a “direct collision” with the state law or by “control[ing] the field” and “leaving no room” for the state law to operate.⁶⁸ The Court found that the federal rule’s “discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama’s affirmance penalty statute,”⁶⁹ and that the federal rule’s purposes were “sufficiently coextensive” with the state law’s purposes “to indicate that the Rule occupies the statute’s field of operation.”⁷⁰

In *Shady Grove*,⁷¹ its most recent pronouncement in this area, the Court considered whether a New York law precluding plaintiffs from “maintain[ing] as a class action” a lawsuit seeking statutory penalties⁷² could apply in federal court, when FRCP 23 permits class actions if four prerequisites are met, none of which involve whether the lawsuit seeks statutory penalties.⁷³ In a fractured opinion⁷⁴ that a D.C. Circuit judge said during oral argument in an anti-SLAPP case was “strange . . . and cause[d] one to have headaches,”⁷⁵ the Court held that FRCP 23 conflicted with the

64. *Id.*

65. *Id.* at 752.

66. 480 U.S. 1 (1987).

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

68. *Id.* at 4–5.

69. *Id.* at 6.

70. *Id.* at 7.

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

72. N.Y. C.P.L.R. § 901(b) (MCKINNEY 2006).

73. *See* FED. R. CIV. P. 23(a).

74. One section of the opinion, analyzing whether Federal Rule 23 conflicted with the state law, garnered a majority vote (consisting of Justices Scalia, Stevens, Thomas, Roberts, and Sotomayor). In addition, there was a four-Justice plurality (consisting of Justices Scalia, Thomas, Roberts, and Sotomayor) regarding the validity of the Federal Rule; a partial concurrence from Justice Stevens taking a slightly different approach to deciding whether the Rule and the state law conflicted, and taking a significantly different approach regarding the validity of the Federal Rule; and a four-Justice dissent (consisting of Justices Ginsburg, Kennedy, Breyer, and Alito) that disagreed on the issue of the conflict.

75. Oral argument at 9:05–9:15, *Abbas v. Foreign Policy Grp.*, L.L.C., 783 F.3d 1328 (D.C. Cir. 2015), [http://www.cadc.uscourts.gov/recordings/recordings2015.nsf/363F50B1AF33E8BC85257D770055EC2E/\\$file/13-7171.mp3](http://www.cadc.uscourts.gov/recordings/recordings2015.nsf/363F50B1AF33E8BC85257D770055EC2E/$file/13-7171.mp3).

state law,⁷⁶ was valid under the Rules Enabling Act, and thus excluded the state law from operation in federal court.⁷⁷

Justice Scalia's majority section of the opinion held that Rule 23 and the state law did answer the same "question in dispute"—whether a suit "may proceed as a class action."⁷⁸ At its core, the opinion settled on this point: FRCP 23 categorically permitted plaintiffs to maintain a class action if certain prerequisites are met;⁷⁹ the New York law prohibited some plaintiffs—those seeking statutory penalties—from maintaining a class action despite meeting the Rule 23 prerequisites.⁸⁰ Thus, the Court ruled, there was an unavoidable conflict between the state law and the Federal Rule, with no room for the state law to coexist in federal court.

A four-Justice plurality then analyzed the Federal Rule's validity under the Rules Enabling Act. The test, it held, was whether the "rule[] regulate[s] matters 'rationally capable of classification' as procedure,"⁸¹ and the statutory limitation that the rules "shall not abridge, enlarge or modify any substantive right"⁸² simply meant that the Rule must "really regulat[e] procedure."⁸³ Noting that the Court has "rejected every statutory challenge to a Federal Rule," the plurality held that Rule 23 regulated procedure and therefore was valid.⁸⁴

Justice Stevens's concurring opinion agreed with the specific end result—that Rule 23 was sufficiently broad to control the issue of class certification, and that Rule 23 did not violate the Rules Enabling Act—but utilized a different analysis to reach that conclusion. In determining whether the Federal Rule and the state law "collide," courts must "fairly construe[]" the Federal Rule with "sensitivity to important state interests

76. The majority framed this prong as whether the Federal Rule "answers the question in dispute," *Shady Grove*, 559 U.S. at 398; the concurrence asked whether the scope of the Federal Rule is "'sufficiently broad' to 'control the issue,'" *id.* at 421 (Stevens, J., concurring in part and concurring in the judgment) (quoting *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987); and *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980)); and the dissent framed it as whether the Federal Rules "controls an issue and directly conflicts with state law," *id.* at 438 (Ginsburg, J., dissenting).

77. *Id.* at 399 (majority opinion).

78. *Id.* at 398. This announced standard built on, but changed the wording of, a previous test that asked whether there was a "direct collision" between the Federal Rule and the state law. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1978).

79. *Shady Grove*, 559 U.S. at 406 ("Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met.").

80. *Id.* at 399–400.

81. *Id.* at 406 (plurality opinion) (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)).

82. 28 U.S.C. § 2072(b) (2012).

83. *Shady Grove*, 559 U.S. at 407 (plurality opinion) (alteration in original) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)); *id.* at 407, 409 (reasoning that "[w]hat matters is what the Rule itself *regulates*," and the potential substantive nature of the state law "*makes no difference*.").

84. *Id.* at 407–08.

and regulatory policies.”⁸⁵ But, the concurrence noted, courts may not “rewrite” the Federal Rules just because a state law with substantive interests is at stake.⁸⁶ Thus, the concurrence agreed with the specific result in *Shady Grove*—that Rule 23’s “explicit function” was to govern the class certification process.⁸⁷

On the second step of the analysis, Justice Stevens took a stricter view of compliance with the Rules Enabling Act than the plurality. In his view, a rule must not only “really regulate[] procedure” but also must not “effectively abridge[], enlarge[], or modif[y] a state-created right or remedy.”⁸⁸ Thus, a Federal Rule “cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”⁸⁹ Justice Stevens noted that “the bar for finding an Enabling Act problem is a high one.”⁹⁰ Under this framework, Justice Stevens concluded that Rule 23 was valid because a “plain textual reading” of the state law showed that it was predominantly procedural, not substantive, in scope.⁹¹

A four-Justice dissent differed on the first prong of the analysis. In deciding whether a “Federal Rule controls an issue and directly conflicts with state law,”⁹² Justice Ginsburg wrote, courts must ask “before undermining state legislation” whether the “conflict [is] really necessary.”⁹³ To that end, “state interests . . . warrant our respectful consideration,”⁹⁴ a proposition that a majority of the Court agreed with.⁹⁵ In deciding there was not a conflict between the Federal Rule and the state law, the dissent focused on the purpose of the New York law’s provision: to prevent excessive damages.⁹⁶ Under its framework, the dissent held, there was no “unavoidable conflict” because “[s]ensibly read, Rule 23 governs

85. *Id.* at 421 (Stevens, J., concurring in part and concurring in the judgment) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996)).

86. *Id.* at 431.

87. *Id.* at 429–30.

88. *Id.* at 422–24.

89. *Id.* at 423.

90. *Id.* at 431–32 (reasoning that courts should “generally presume” that Congress has not supplanted state law with rules that are rationally classified as procedural).

91. *Id.* at 436 (citing the law’s placement in the procedural code and its application to cases that arose both within New York and from outside the jurisdiction).

92. *Id.* at 438 (Ginsburg, J., dissenting).

93. *Id.* at 437.

94. *Id.* at 443.

95. *See id.* at 442 n.2 (“[A] majority of this Court, it bears emphasis, agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns.”).

96. *Id.* at 443 (citing multiple pieces of legislative history). The majority rejected the dissent’s proposition that the state law affects only the remedy a plaintiff may obtain because the state law “says nothing about what remedies a court may award,” but rather “addresses . . . the procedural right to maintain a class action.” *Id.* at 401 & n.4 (majority opinion).

procedural aspects of class litigation, but allows state law to control the size of a monetary award a class plaintiff may pursue.”⁹⁷ That is, “Rule 23 describes a method of enforcing a claim for relief, while [the state law] defines the dimensions of the claim itself.”⁹⁸

Because the dissent found no conflict, the second step of its analysis was to determine whether to apply the state law in federal court under *Erie* doctrine.⁹⁹ The dissent held that forum shopping would “undoubtedly result if a plaintiff need only file in federal instead of state court to seek a massive monetary award explicitly barred by state law.”¹⁰⁰ The dissent also noted that, while the state law had a procedural thrust to it, its underlying purpose was substantive.¹⁰¹ Thus, the dissent would apply the New York law in federal court.¹⁰²

B. The First Circuit Holds Anti-SLAPP Statutes Applicable in Federal Court

About ten months after *Shady Grove* was decided, the First Circuit held that a state anti-SLAPP statute could apply in federal court.¹⁰³ The court held that neither Federal Rule 12 nor 56, “on a straightforward reading of [the] language, was meant to control the particular issues” of the anti-SLAPP statute.¹⁰⁴ Federal Rules 12 and 56 are “general federal procedures governing all categories of cases” that provide “a mechanism to test the sufficiency” of the plaintiff’s claim.¹⁰⁵ The anti-SLAPP statute, in contrast, “provides a mechanism . . . to dismiss a claim on an entirely different basis: that the claims in question rest on the [target]’s protected petitioning conduct and that the [filer] cannot meet” the burden under the anti-SLAPP statute to attack such petitioning activity.¹⁰⁶ The First Circuit also noted the multiple “substantive . . . aspects” of the anti-SLAPP statute,¹⁰⁷ which under *Shady Grove* are relevant to the interpretation prong. Because the

97. *Id.* at 446–47, 452 (Ginsburg, J., dissenting).

98. *Id.* at 447.

99. *Id.* at 451–52.

100. *Id.* at 456.

101. *Id.*

102. *Id.* at 459.

103. *Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010). The state statute provides protection for claims based on a target’s petitioning activity, and 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.” ME. REV. STAT. 14 § 556 (West Supp. 2015).

104. *Godin*, 629 F.3d at 86.

105. *Id.* at 88–89.

106. *Id.* at 89.

107. *Id.* The state law shifted the burden to the plaintiff to defeat the special anti-SLAPP motion, determined the scope of the plaintiff’s burden by altering what filers must prove to prevail, and changed the type of harm actionable by requiring actual injury. *See id.*

anti-SLAPP statute is “intertwined with a state right or remedy,” the First Circuit reasoned, “it cannot be displaced” by the Federal Rules.¹⁰⁸

The First Circuit briefly concluded by holding that applying the state law in federal courts serves the dual aims of *Erie*.¹⁰⁹ If the state laws did not apply, there would be inequity between the “same defense” asserted in state court and federal court, and “the incentives for forum shopping would be strong.”¹¹⁰

C. A Divided Ninth Circuit Upholds Precedent

The Ninth Circuit had twice held that anti-SLAPP statutes could apply in federal court¹¹¹ before revisiting the issue in the wake of *Shady Grove*.¹¹² A five-judge majority denying en banc review again held that the anti-SLAPP statute supplements rather than contradicts the Federal Rules.¹¹³

First, the Ninth Circuit reasoned, “[t]he question asked by Rule 12 is whether the plaintiff has stated a claim that is plausible on its face,” while the anti-SLAPP statute instead answers “whether the claims rest on the SLAPP defendant’s protected First Amendment activity” and whether the filer can meet the burden of the statute.¹¹⁴ Next, the court reasoned, anti-SLAPP statutes have a clear state interest—“securing its citizens’ free speech rights”—which “cautions against finding a direct collision with the Federal Rules.”¹¹⁵ Finally, the Ninth Circuit held there was no unavoidable collision between the texts. In *Shady Grove*, the Ninth Circuit reasoned, Federal Rule 23 “provides a categorical rule” for when a class action may be maintained, while Federal Rules 12 and 56 “provide various theories upon which a suit may be disposed of before trial.”¹¹⁶ While the state law in *Shady Grove* had no room to supplement the one-size-fits-all federal rule,

108. *Id.* (quoting *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring in part and concurring in the judgment)).

109. *Id.* at 91 (noting the twin aims of *Erie*: “discouragement of forum shopping and inequitable administration of the laws”) (quoting *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 773 (1st Cir. 1994)).

110. *Id.* at 92.

111. *See* U.S. *ex rel.* *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (holding that “there is no indication that Rules . . . 12, and 56 were intended to ‘occupy the field’ with respect to pretrial procedures aimed at weeding out meritless claims”) (citations omitted); *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 845 (9th Cir. 2001).

112. *Makaeff v. Trump Univ., L.L.C.*, 736 F.3d 1180 (9th Cir. 2013) (denying en banc review). At issue was California’s anti-SLAPP statute, which protects “any act . . . in furtherance of the [target’s] right of petition or free speech . . . in connection with a public issue” and requires a filer to “establish[] a probability” of prevailing on the claim. CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 2016).

113. *Makaeff*, 736 F.3d at 1181–82.

114. *Id.* at 1182 (noting that a state statutory analog of Rule 12 “does” answer the same question as Federal Rule 12, which is “strong evidence” that the anti-SLAPP statute does not).

115. *Id.* at 1183–84.

116. *Id.* at 1182.

the state anti-SLAPP statute “creat[es] a separate and additional theory upon which certain kinds of suits may be disposed of before trial,” in addition to the ones prescribed by Federal Rules 12 and 56.¹¹⁷

Although the majority favored the application of anti-SLAPP statutes, two opinions stemming from the *Makaeff* litigation laid the groundwork for the future circuit split. Drawing on *Shady Grove*, the *Makaeff* four-judge dissent would preclude the application of the state anti-SLAPP statute because the “anti-SLAPP statute creates the same conflicts with the Federal Rules that animated the Supreme Court’s ruling in *Shady Grove*.”¹¹⁸ The dissent argued that the FRCP “establish the exclusive criteria for testing the legal and factual sufficiency” of a claim, while the state law “impermissibly supplements the Federal Rules’ criteria for pre-trial dismissal.”¹¹⁹ Specifically, the dissent reasoned that Rule 12 imposes a standard of plausibility to survive a motion to dismiss, while the state law imposes a standard of probability, creating an “obvious[] conflict.”¹²⁰ Additionally, Rule 56 permits a party to proceed with a claim by designating specific facts showing a genuine issue for trial, a standard the anti-SLAPP statute “eviscerates . . . by requiring the plaintiff to prove that she will probably prevail if the case proceeds to trial.”¹²¹

Judge Kozinski, in a concurrence earlier in the litigation, similarly reasoned that the anti-SLAPP statute gives targets significant procedural advantages that cut against the FRCP’s “integrated program” of litigation.¹²² Judge Kozinski reasoned that “[f]ederal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules.”¹²³

Although the Ninth Circuit upheld the application of anti-SLAPP statutes in federal court, the rationale of the dissenting and concurring opinions would prove persuasive two years later in the D.C. Circuit.

D. The D.C. Circuit Creates a Circuit Split

The D.C. Circuit created a split of authority when it held that D.C.’s anti-SLAPP statute could not apply in federal court.¹²⁴ While recognizing

117. *Id.*

118. *Id.* at 1189 (Watford, J., dissenting).

119. *Id.* at 1188.

120. *Id.* at 1188–89.

121. *Id.* at 1189.

122. *Makaeff v. Trump Univ., L.L.C.*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring).

123. *Id.* at 275.

124. *Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328 (D.C. Cir. 2015). The statute at issue allows a target to file for dismissal of “any claim arising from an act in furtherance of the right of

the important First Amendment rights implicated by the case,¹²⁵ the court held that Federal Rules 12 and 56 “‘answer the same question’ about the circumstances under which a court must dismiss a case before trial” as the anti-SLAPP statute, creating a conflict that requires the federal rules to prevail.¹²⁶ “Put simply, the [anti-SLAPP statute’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.”¹²⁷

Specifically, the court reasoned, Federal Rule 12 requires a plaintiff to allege facts to state a plausible claim and Federal Rule 56 requires plaintiffs to show a genuine dispute as to a material fact, while the D.C. statute requires the filer to show a likelihood of success on the merits.¹²⁸ Thus, the anti-SLAPP statute “conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial.”¹²⁹ Therefore, the anti-SLAPP statute violates the FRCP because it establishes a new “procedural mechanism” for dismissing certain cases.¹³⁰

IV. STATE ANTI-SLAPP LAWS SHOULD NOT APPLY IN FEDERAL COURT

For years, the applicability of anti-SLAPP statutes in federal court was either approved or taken for granted by federal circuit courts. As discussed above, the Ninth Circuit¹³¹ has long held that state anti-SLAPP laws apply in federal court, and the First Circuit¹³² quickly held the same in the wake of *Shady Grove*. Two other circuits, the Second¹³³ and Fifth,¹³⁴ have not

advocacy on issues of public interest,” and the burden is to demonstrate that the claim is “likely to succeed on the merits.” D.C. CODE § 16-5502.

125. *Abbas*, 783 F.3d at 1332 (“Many States have enacted anti-SLAPP statutes to give more breathing space for free speech about contentious public issues. . . . The statutes generally accomplish that objective” by allowing earlier, easier dismissal of defamation claims.).

126. *Id.* at 1333–34.

127. *Id.* at 1333–34.

128. *Id.* at 1334–35.

129. *Id.* at 1333–34.

130. *Id.* at 1335. The D.C. Circuit rejected an argument that the anti-SLAPP statute was “functionally identical” to a summary judgment test because the material difference in language requires a material difference in meaning.

131. *See supra* Part III.C.

132. *See supra* Part III.B.

133. *See Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (holding that anti-SLAPP immunity and fee-shifting provisions applied, while noting that discovery provisions “may present a closer question” without deciding the issue); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 152–54 (2d Cir. 2013).

134. *See Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168–69 (5th Cir. 2009) (holding that “Louisiana law, including the nominally-procedural [anti-SLAPP statute]” that imposes a probability-of-success standard on the filer, “governs this diversity case”); *Culbertson v. Lykos*, 790 F.3d 608, 631 (5th Cir. 2015) (“We have not specifically held that the [state anti-SLAPP statute] applies in federal court; at most we have assumed without deciding its applicability.”)

fully analyzed the issue but have applied state anti-SLAPP laws in federal court.

However, the Ninth Circuit dissenters¹³⁵ and the D.C. Circuit¹³⁶ disagreed vigorously, and have drawn attention (and votes) to their side. A recent Fifth Circuit case produced a dissent arguing against applying anti-SLAPP statutes in federal court,¹³⁷ a Ninth Circuit judge previously in the majority has switched sides,¹³⁸ and the Seventh Circuit favorably noted the D.C. Circuit decision in dicta while deciding an anti-SLAPP case on other grounds, leaving an “important” open question going forward.¹³⁹ Finally, the Eighth Circuit heard oral arguments on the issue, but the parties settled before a decision was reached.¹⁴⁰

The D.C. Circuit has it right: under *Shady Grove*, state anti-SLAPP laws should not be applied in federal court.¹⁴¹ Although Part V will explore why this is a negative result as a normative matter, this Part explains why it is a correct result as a procedural matter.

A. *State Anti-SLAPP Laws Impermissibly Conflict with the Federal Rules*

Under the first prong of the analysis, a court must ask what question the federal and state laws answer. Here, anti-SLAPP statutes answer the same question as Federal Rules 12 and 56: whether a party’s claim may proceed further in the litigation timeline toward trial.¹⁴² Anti-SLAPP statutes allow a party to file a special motion to dismiss a claim because it lacks merit according to the anti-SLAPP standard;¹⁴³ Federal Rules 12 and

135. See *supra* Part III.C.

136. See *supra* Part III.D.

137. See *Cuba v. Pylant*, 814 F.3d 701, 718 (5th Cir. 2016) (Graves, J., dissenting) (disagreeing with the majority’s “assum[ption]” that the anti-SLAPP statute should apply).

138. See *Travelers Cas. Ins. Co. of Am. v. Hirsh*, No. 14-55539, 2016 WL 4120689 (9th Cir. Aug. 3, 2016) (Gould, J., concurring) (“I am now persuaded by Judge Kozinski’s reasoning, as well as that of the D.C. Circuit . . . that an anti-SLAPP motion has no proper place in federal court in light of the Federal Rules of Civil Procedure, . . . Having recognized that there was error in the position that I previously joined, I recede from it.”).

139. See *Intercom Solutions, Inc. v. Basel Action Network*, 791 F.3d 729, 732 (7th Cir. 2015) (“This circuit’s resolution of questions about how the procedural aspects of other states’ anti-SLAPP statutes work in federal court will have to await some other case.”).

140. See *Unity Healthcare, Inc. v. Meridian Servs., Inc.*, No. 15-2489 (8th Cir. argued Feb. 10, 2016). The district court below did not apply the anti-SLAPP statute, relying heavily on the D.C. Circuit opinion. See *Unity Healthcare, Inc. v. Cty. of Hennepin*, No. 14-CV-114, 2015 WL 3935878 (D. Minn. June 25, 2015).

141. This Note takes no position on the merits of the *Shady Grove* decision or opinions, but simply analyzes what result *Shady Grove* dictates in this context.

142. *Abbas v. Foreign Policy Grp.*, L.L.C., 783 F.3d 1328, 1333–34 (D.C. Cir. 2015).

143. This analysis assumes a typical state anti-SLAPP statute that requires the plaintiff to prove something akin to a “likelihood of success on the merits.” However, because no anti-SLAPP statute’s burden of proof is textually identical to the Federal Rules, this analysis should apply in equal measure to any of the currently existing anti-SLAPP laws.

56 likewise provide a mechanism for a party to dismiss a claim because it lacks merit according to the FRCP standards. Thus, both the state law and the Federal Rules address the question of “the circumstances under which a court must dismiss a [case] before trial.”¹⁴⁴ The broad definition of the question, as derived from a textual comparison of the state law and the federal rules—whether a party’s suit may continue to be litigated—is in accord with *Shady Grove*, where the majority framed the question as “whether [the plaintiff’s] suit may proceed as a class action.”¹⁴⁵

The Ninth Circuit framed the question differently, reasoning that Rule 12 asks “whether the plaintiff has stated a claim that is plausible on its face and upon which relief can be granted” while the anti-SLAPP statute asks “whether the claims rest on the SLAPP defendant’s protected First Amendment activity and whether the plaintiff can meet the substantive requirements” of the state law.¹⁴⁶ But the second question is simply a subsidiary of the first: in an anti-SLAPP motion, courts determine whether First Amendment activity was involved in order to determine whether the filer has stated a claim upon which relief can be granted. At their core, both anti-SLAPP statutes and Federal Rules 12 and 56 govern “pre-trial dismissal mechanisms,” and therefore ask the same question.¹⁴⁷

Although courts should analyze whether a Federal Rule “can reasonably be interpreted” to avoid a collision with a state rule and give effect to that interpretation,¹⁴⁸ no such construction exists here. Federal Rules 12 and 56 and the state anti-SLAPP statutes directly bear on one subject matter: whether a court must dispose of a claim pursuant to a pretrial motion. Federal Rules 12 and 56 provide a fairly straightforward answer: if a party meets the requisite pleading or evidentiary standard—either facial plausibility or a genuine dispute of material fact—then the party’s claim “may proceed” further down the litigation stream.¹⁴⁹ Anti-SLAPP statutes, however, provide a different answer than the Federal Rules by heightening the standard a filer must meet to proceed with a claim.¹⁵⁰ As the D.C. Circuit reasoned, the Federal Rules establish an

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

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

146. *Makaeff v. Trump Univ., L.L.C.*, 736 F.3d 1180, 1182 (9th Cir. 2013).

147. *Cuba v. Pylant*, 814 F.3d 701, 721 (5th Cir. 2016) (Graves, J., dissenting).

148. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 405–06 (majority opinion) (“[W]e would agree” that, if a Rule “were susceptible of two meanings,” the one that does not collide with a state law or violate the Rules Enabling Act should prevail).

149. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (holding that a well-pleaded complaint “may proceed” if the allegations are plausible). The use of the word “may” in both Rule 23 and *Twombly* indicate categorical approaches.

150. No state anti-SLAPP statute sets an identical standard as the Federal Rules with regard to dismissing a claim, which the D.C. Circuit noted would present an “interesting issue.” *Abbas v. Foreign*

“entitlement” to trial if certain conditions are met; the anti-SLAPP statutes “nullif[y] that entitlement.”¹⁵¹ The collision between the Federal Rules’ standards and the anti-SLAPP standards is unavoidable.

This clear procedural conflict is similar to the conflict in *Shady Grove*. There, Federal Rule 23 was construed to be categorical: if a party met the prerequisites, then the party could maintain a class action. The state law in *Shady Grove*, the majority reasoned, kept claims meeting the Federal Rules’ requirements from “coming into existence at all.”¹⁵² The state law in *Shady Grove* that added a damages-related requirement for maintaining a class action thus had no room to operate alongside the federal rule, which had no damages-related requirement. Conversely, the state anti-SLAPP statutes make claims meeting the Federal Rules’ requirements disappear.¹⁵³ A plaintiff who legitimately meets the FRCP’s standard to survive a dispositive motion has to meet a different standard when challenged by the state law. Accordingly, state anti-SLAPP statutes that increase the pleading or evidentiary requirements for proceeding with a claim have no room to operate alongside the relevant federal rules.

The First and Ninth Circuits attempted to find an alternate interpretation. Seizing on the five *Shady Grove* Justices who want courts to be sensitive to state rules, the First Circuit held that Federal Rule 12 “serves to provide a mechanism to test the sufficiency of the complaint” while the state anti-SLAPP law “provides a mechanism for a defendant to move to dismiss.”¹⁵⁴ But these are simply two sides of the same coin: both Federal Rule 12 and a state anti-SLAPP statute provide a mechanism for the defendant to move to dismiss by challenging the evidentiary or legal sufficiency of the plaintiff’s claim. The First Circuit’s reading contorts the plain meaning of the federal rules and the anti-SLAPP laws to accommodate the underlying state interests, a methodology that five *Shady Grove* Justice prohibit.¹⁵⁵

Similarly, the Ninth Circuit distinguished the “categorical” Rule 23 analyzed in *Shady Grove* from Rules 12 and 56, which “do not provide that a plaintiff is entitled to maintain his suit if their requirements are met;

Policy Grp., L.L.C., 783 F.3d 1328, 1335 n.4 (D.C. Cir. 2015) (asking but declining to answer that hypothetical).

151. *Id.* at 1334.

152. *Shady Grove*, 559 U.S. at 401.

153. *See* Makaeff v. Trump Univ., L.L.C., 736 F.3d 1180, 1189 (9th Cir. 2013) (Watford, J., dissenting) (“Just as the New York statute in *Shady Grove* impermissibly barred class actions when Rule 23 would permit them, so too [the state’s] anti-SLAPP statute bars claims at the pleading stage when Rule 12 would allow them to proceed.”).

154. *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010).

155. *Shady Grove*, 559 U.S. at 421, 431 & n.5 (Stevens, J., concurring in part and concurring in the judgment) (disagreeing with the dissent “about the degree to which the meaning of federal rules may be contorted . . . to accommodate state policy goals,” and reasoning that “even when ‘state interests . . . warrant our respectful consideration,’ . . . federal courts cannot rewrite the rules.”).

instead, they provide various theories upon which a suit may be disposed of before trial.”¹⁵⁶ This, the Ninth Circuit reasoned, “supplements rather than conflicts with the Federal Rules.”¹⁵⁷ But this line of reasoning—the Federal Rules provide nonexclusive “various theories” that the state law adds to—is similar to the argument rejected in *Burlington*.¹⁵⁸ There, the plaintiff argued that a judge could apply the state-mandated 10% appeals penalty and then apply the federal rule’s discretionary policy on top of it.¹⁵⁹ The Court held that the operation of the two laws “unmistakeably conflict[]” and that the underlying purposes of the two laws were “sufficiently coextensive.”¹⁶⁰ So it is here. The state law may in theory provide an alternative, additional basis on which a defendant can dismiss an action, but the discrepancy in the required burdens of proof is clear and concrete. Furthermore, the underlying purposes of the Rules and the anti-SLAPP statutes include providing defendants faced with legally insufficient claims an exit out of litigation. Thus, the Rules and the anti-SLAPP laws “unmistakeably conflict” and have “sufficiently coextensive” underlying purposes.

The First and Ninth Circuits are incorrect because they stretch the interpretation of the Federal Rules too far. While Rules 12 and 56 may not be framed in positive requirements like Rule 23, they are still categorical: if a filer does not meet the established standards, he or she cannot proceed with litigation. And one of the “various theories” upon which a suit to be dismissed is that a claim is implausible on its face,¹⁶¹ which is precisely the standard that anti-SLAPP statutes alter. The Federal Rules provide the standard for when a claim must be dismissed, and “occup[y] the [state] statute’s field of operation.”¹⁶² The anti-SLAPP statutory burden-of-proof standards thus “impermissibly supplement[] the Federal Rules’ [exclusive] criteria for pre-trial dismissal of an action.”¹⁶³

State anti-SLAPP statutes undeniably contain important state interests—interests which should be vindicated as a normative matter, as discussed in Part V—but under *Shady Grove*, their procedural components inescapably conflict with the Federal Rules.

156. *Makaeff*, 736 F.3d at 1182.

157. *Id.*

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

159. *See id.* at 7.

160. *Id.*

161. *See* FED. R. CIV. P. 12(b)(6).

162. *Burlington*, 480 U.S. at 7.

163. *Makaeff v. Trump Univ., L.L.C.*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., dissenting).

B. The Federal Rules Do Not Violate the Rules Enabling Act

If a Federal Rule and a state law conflict, the Federal Rule applies if it is constitutional and complies with the Rules Enabling Act.¹⁶⁴ Here, Federal Rules 12 and 56 are valid.

The constitutional issue is straightforward: a Rule is constitutionally valid if it “regulates matters which can reasonably be classified as procedural.”¹⁶⁵ Here, Federal Rules 12 and 56 govern the procedural processes to challenge the sufficiency of a claim and the standards by which a court assesses such a challenge, and are thus reasonably capable of classification as procedural.

Compliance with the Rules Enabling Act presents a slightly less clear inquiry. Under the REA, Federal Rules must “not abridge, enlarge or modify any substantive right.”¹⁶⁶ The plurality in *Shady Grove* framed this standard as whether the rule “regulate[s] matters ‘rationally capable of classification’ as procedure.”¹⁶⁷ Justice Stevens’s concurrence considered not only whether the Federal Rule regulated procedure or substance but also whether the Federal Rule “actually” affects the underlying substantive rights. For Justice Stevens, a “federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”¹⁶⁸

The plurality likely has it right. Reaching back to precedent, *Sibbach*—a case directly confronting the validity of Federal Rules—held that the “test must be whether a rule really regulates procedure.” The *Sibbach* Court made no mention of whether the state rule is “so intertwined” that it defines the scope of a right. Confined to this single test, the Federal Rules at issue undoubtedly regulate the procedural matters of whether a lawsuit meets the pleading or evidentiary standards required to survive a motion to dismiss.

Some commentators have argued that Rules 12 and 56 should be invalidated with respect to special anti-SLAPP motions under the “intertwined” language of Justice Stevens’s Rules Enabling Act inquiry.¹⁶⁹ Arguably, the anti-SLAPP laws, though nominally procedural, are “so

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

165. *Burlington*, 480 U.S. at 8.

166. 28 U.S.C. § 2072(b) (2012).

167. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) (plurality opinion).

168. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring in part and concurring in the judgment).

169. *See Saner, supra* note 12, at 815–18.

intertwined” with a substantive right that they define the scope of the state-created right. By shifting the burden and raising the standard the filer must meet, anti-SLAPP laws have substantive undertones of protecting and encouraging First Amendment expression. Justice Stevens did note in dicta that “seemingly procedural [state] rules that make it significantly more difficult to bring or to prove a claim,”¹⁷⁰ such as “state-imposed burdens of proof,”¹⁷¹ may be examples of such “intertwined” state laws. A state anti-SLAPP statute does just that.

Justice Stevens’s view is likely misguided under precedent, and he was a single vote on this issue in *Shady Grove* because the dissent did not address the REA argument. But even if Justice Stevens’s view is correct, Rules 12 and 56 are still valid. In his concurrence, Justice Stevens noted the “high” bar for finding a Rules Enabling Act violation.¹⁷² “The mere fact that a state law is designed as a procedural rule,” as anti-SLAPP statutes typically are, “suggests” it does not reflect “a judgment about the scope of state-created rights and remedies.”¹⁷³ Anti-SLAPP statutes are normally placed in procedural codes, suggesting a predominantly procedural aim.

And it’s uncertain that the Federal Rules “abridge” any substantive state rights. Anti-SLAPP statutes make it easier to vindicate existing First Amendment rights that have been threatened, and certainly First Amendment rights are significant and important. But implicating “important” rights are not enough,¹⁷⁴ and anti-SLAPP statutes do not confer or eliminate any additional substantive rights.¹⁷⁵ A target’s First Amendment protections do not change based on the availability of an anti-SLAPP statute. The only change is the ease with which they may invoke those protections. This reality—that procedural rights inevitably affect substantive rights by their operation—is contemplated by and permitted under the Court’s REA precedent.¹⁷⁶

170. *Shady Grove*, 559 U.S. at 420.

171. *Id.* at 420 n.4.

172. *Id.* at 432.

173. *Id.*

174. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14 (1941) (validating a federal rule permitting court-ordered physical examinations, which implicated “important” rights of personal privacy).

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

176. See *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965) (rejecting an argument that a Federal Rule “must cease to function whenever it alters the mode of enforcing” substantive rights); see also *Shady Grove*, 559 U.S. at 431–32 (Stevens, J., concurring in part and concurring the judgment) (explaining that the Enabling Act inquiry is “not always a simple one” because almost any rule of procedure can be said to have substantive effects).

Although the fact that the Supreme Court has never upheld a statutory challenge to a Federal Rule¹⁷⁷ does not mean it is impossible to find a violation, a court invalidating Federal Rules 12 and 56, as applied here, would be a misguided pioneer. Even under Justice Stevens's view, there must be "little doubt" about a Rules Enabling Act violation.¹⁷⁸ The Federal Rules' preemption of anti-SLAPP statutes falls short of that threshold. Thus, because state anti-SLAPP statutes impermissibly conflict with the Federal Rules and do not violate the Rules Enabling Act, state anti-SLAPP statutes should not apply in federal diversity cases as a procedural matter. As a normative matter, however, this is a negative result.

V. MOVING FORWARD: THE FEDERAL ANTI-SLAPP STATUTE

If the courts hold as a matter of procedure that anti-SLAPP statutes are not applicable in federal court, citizens exercising their First Amendment rights suffer. They must make do with a patchwork of laws to vindicate those rights, with significant discrepancies not only state-to-state but also among court systems within any one state. The First Amendment becomes inconsistently protected procedurally, thereby increasing the opportunities for SLAPP filers to fulfill their goals and chill speech. Although the judicial branch is not the proper governmental body to secure First Amendment procedural protections in the federal system, the legislative branch can be, and some members of Congress are proposing just that.

Less than a month after the D.C. Circuit denied the application of anti-SLAPP statutes in federal courts, five members of Congress introduced a bill that would serve as a federal version of an anti-SLAPP statute.¹⁷⁹ The pending bill protects speech, writing, or related conduct that "was made in connection with an official proceeding or about a matter of public concern."¹⁸⁰ It gives targets the ability to make a prima facie showing that their speech falls within this category, and if made, the case will be dismissed unless the filer can show the claim is "likely to succeed on the

177. See *Shady Grove*, 559 U.S. at 407 (plurality opinion) ("[W]e have rejected every statutory challenge to a Federal Rule that has come before us.").

178. See *id.* at 432 (Stevens, J., concurring in part and concurring in the judgment).

179. Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015, H.R. 2304, 114th Cong. (2015). This bill is colloquially known as the "SPEAK FREE Act of 2015." The bill included bipartisan support, with three Republicans and two Democrats serving as the original cosponsors. As of October 1, 2016, thirty-two total representatives (twenty Democrats, twelve Republicans) have cosponsored the bill, which has been referred to the Subcommittee on the Constitution and Civil Justice. See *Cosponsors: H.R. 2304 – 114th Congress (2015-2016): SPEAK FREE Act of 2015*, LIBRARY OF CONGRESS, <https://www.congress.gov/bill/114th-congress/house-bill/2304/cosponsors> (last visited May 15, 2016).

180. H.R. 2304 § 4201.

merits.”¹⁸¹ Like other broad state anti-SLAPP laws, it suspends discovery unless the court finds a limited amount is needed,¹⁸² provides for interlocutory appeal,¹⁸³ and awards attorneys’ fees to targets who are successful under the statute.¹⁸⁴ Additionally, the bill offers targets the ability to remove cases from state court if the speech falls within the legislation’s protections.¹⁸⁵

Texas Republican Blake Farenthold, an original co-sponsor of the bill, asserts that federal legislation would protect “principles fundamental to our democracy,” such as public debate and civic engagement, by serving as a “nationwide backstop to stop SLAPPs from stifling free speech.”¹⁸⁶ Farenthold says “[t]oo many Americans are being censored by costly legal battles over their honest opinions,” and citizens “shouldn’t have to fear someone suing you to shut you up.”¹⁸⁷ Support from other groups, including law professors,¹⁸⁸ commentators,¹⁸⁹ and businesses,¹⁹⁰ emerged after the proposal.

The likelihood of enacting a federal anti-SLAPP statute is unclear.¹⁹¹ But federal legislation is warranted and provides the best outcome for citizens seeking to exercise their First Amendment rights.¹⁹² This Part

181. *Id.* § 4202(a). Although this standard also heightens the standard found in Federal Rule 12, Congress has permission to do so. See *Shady Grove*, 559 U.S. at 400 (2010) (citing the Private Securities Litigation Reform Act of 1995, which modified the pleading standards in certain securities cases, and noting that Congress “has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit”).

182. H.R. 2304 § 4203.

183. *Id.* § 4204.

184. *Id.* § 4207.

185. *Id.* § 4206.

186. Michael Rekola, Press release, *Coalition Building Behind Farenthold’s SPEAK FREE Act* (June 17, 2015), <http://farenthold.house.gov/news/documentsingle.aspx?DocumentID=398850>.

187. *Id.*

188. In September, a group of fifty-nine law professors representing twenty-five schools signed a letter urging the bill’s adoption because anti-SLAPP laws “provide a crucial counterweight to keep legal proceedings from silencing voices that we all need to hear.” Letter from Professor Eric Goldman et al. to Subcommittee on Constitution and Civil Justice Chairman (Sept. 16, 2015), <https://consumermediallc.files.wordpress.com/2015/09/law-professor-letter-in-support-of-speak-free-act.pdf>).

189. See Eric Goldman, *How Congress Can Protect Online Consumer Reviews*, FORBES (Nov. 2, 2015), <http://www.forbes.com/sites/ericgoldman/2015/11/02/how-congress-can-protect-online-consumer-reviews/> (advocating for a federal anti-SLAPP statute to ensure “a solid legal foundation for the continued growth and success of online consumer reviews”).

190. See Laurent Crenshaw, *Freedom of Speech Deserves Better Federal Protection*, YELP OFFICIAL BLOG (May 15, 2015), <http://officialblog.yelp.com/2015/05/freedom-of-speech-deserves-better-federal-protection.html> (writing that “Yelp strongly supports” federal anti-SLAPP legislation because “it’s important that [reviewing customers] not be bullied into retracting their criticism”).

191. An online website dedicated to tracking federal bills gives the SPEAK FREE Act an 11% chance of passing, according to its formula. See *H.R. 2304: SPEAK FREE Act of 2015*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/hr2304> (last visited May 11, 2016).

192. Because the SPEAK FREE Act is in the formative stages and will likely undergo changes if it progresses, I decline to thoroughly address the specific provisions of the initial proposed version of

shows that anti-SLAPP statutes, as seen on the state level, are valuable laws, and explores why the existing patchwork of procedural protections left by the circuit split (and the correct procedural answer) creates a need to expand anti-SLAPP protections nationally.

A. *Anti-SLAPP Laws Protect Important First Amendment Values*

The First Amendment is a fundamental right,¹⁹³ but possessing the right alone is not enough. Effective “judicial First Amendment protections for speech are necessary” for the First Amendment to be meaningful.¹⁹⁴ As the Fifth Circuit noted, while the Supreme Court’s “actual malice” standard “has substantially lessened the chilling effect of abusive tort claims for conduct stemming from the exercise of First Amendment rights” by “shield[ing] individuals from the chill of liability,” defamation law alone has “often failed to protect speakers from the similarly-chilling cost and burden of defending such tort claims.”¹⁹⁵ Thus, the normal procedural tools that may be invoked to safeguard First Amendment rights do not always fully prevent First Amendment harms.

Avoiding the chilling costs associated with fighting for pretrial dismissals or undergoing a trial itself is precisely the problem anti-SLAPP statutes alleviate. By giving targets additional protections against frivolous lawsuits designed to curb public discourse,¹⁹⁶ anti-SLAPP statutes preserve important First Amendment principles by “decreas[ing] the ‘chilling effect’ of certain kinds of libel litigation and other speech-restrictive litigation.”¹⁹⁷ The end result of such a law, as even the D.C. Circuit recognized in its ruling adverse to anti-SLAPP statutes, is “more breathing space for free speech about contentious public issues.”¹⁹⁸

the bill. Instead, my stance is more general: federal legislation, of the kind generally similar to that proposed, is needed. I note, however, that a House Subcommittee hearing drew testimony from both supporters and skeptics. *See Hearing on H.R. 2304, the SPEAK FREE Act of 2015 Before the Comm. on the Judiciary Subcomm. on the Constitution and Civil Justice*, 114th Cong. (2016) (prepared statement of Alexander A. Reinert, Professor of Law, Benjamin N. Cardozo School of Law) (questioning the constitutional basis for the Act and arguing that it would curb civil rights litigation). *But see id.* (supplemental testimony of Bruce D. Brown, Executive Director, Reporters Committee for Freedom of the Press) (challenging Reinert’s assertions and advocating for the passage of the federal law).

193. *See supra* Part I.

194. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 17 (2012).

195. *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 167 (5th Cir. 2009).

196. For example, a Washington Redskins executive said publicly that a 2011 lawsuit against a journalist who wrote a negative article about the team owner was a “warning shot” to other media. Jason Linkins, *Dan Snyder’s Flack Admits Lawsuit Is a ‘Warning Shot’ to the Media*, HUFFINGTON POST (June 28, 2011), http://www.huffingtonpost.com/2011/04/28/dan-snyders-idiot-flack-a_n_855140.html.

197. VOLOKH, *supra* note 49, at 188.

198. *Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328, 1332 (D.C. Cir. 2015).

Critics of the value of anti-SLAPP legislation argue that the First Amendment itself sufficiently protects expressive activities, rendering a statutory supplement unnecessary. In pushing back against Pring and Canan's seminal paper that brought the topic of SLAPPs to the national discussion, for example, Joseph Beatty noted that SLAPP targets "prevail most of the time" anyway under First Amendment protections through the normal judicial process, and anti-SLAPP laws improperly "tip the balance even further" in their favor.¹⁹⁹ According to Beatty, SLAPP targets should be content with relying solely on the First Amendment doctrinal protections available.

But the Supreme Court has recognized frivolous lawsuits as a legitimate concern, worthy of being singled out and shielded against, in other contexts. In an antitrust case, the Supreme Court provided exceptions from immunity for "sham" litigation designed "merely to harass their competitors by instituting repetitive, baseless actions."²⁰⁰ Just as the Supreme Court noted the validity of providing additional protection against "sham" litigation in antitrust cases, anti-SLAPP statutes provide additional protection against "sham" litigation in First Amendment cases. A federal anti-SLAPP statute, then, would be "commensurate with the importance of the First Amendment rights that it would protect."²⁰¹

Additionally, the Supreme Court has recognized that the First Amendment deserves special procedural treatment. As a general jurisdictional rule, a plaintiff "must assert his own legal rights and interests."²⁰² But "[w]ithin the context of the First Amendment," the "danger of chilling free speech" may outweigh that prudential concern, and parties may bring claims for injuries to third parties.²⁰³ Just as the Supreme Court has recognized that the First Amendment is important enough to relax justiciability requirements, thereby permitting more plaintiffs access to the courts to bring meritorious suits, anti-SLAPP statutes work in the

199. 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).

200. Quinlan, *supra* note 12, at 373 (discussing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). Specifically, the Court in *Cal. Motor Transp. Co.* had provided for immunity for persons engaged in legitimate petitioning activity to influence the government under the *Noerr-Pennington* doctrine, but created this "sham exception" to preclude certain litigants from claiming the immunity. 404 U.S. at 510-16.

201. Sean P. Trendle, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 644 (2006) (arguing for federal anti-SLAPP legislation to protect First Amendment freedoms on the internet).

202. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

203. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (noting that third-party litigants are permitted in First Amendment cases because a challenged statute's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

inverse, permitting parties covered by the First Amendment more effective exit options out of court when confronted with frivolous suits. While Beatty argues this will “tip the scales” further in favor of parties invoking anti-SLAPP statutes, the Supreme Court has signaled that tipping the scales in favor of the First Amendment is a permissible, and often desirable, result.

Thus, the anti-SLAPP statute’s thumb on the scale in favor of the First Amendment is warranted. The First Amendment protects expressive activities, but those protections must be judicially vindicated to be meaningful.²⁰⁴ Even if targets do typically prevail under a First Amendment defense, as Beatty asserts, harm is not averted. When sued, even if resolution comes by pretrial dispositive motions, parties have often spent significant time and resources on the lawsuit. At that point, “the damage has been done”—the speaker “has been silenced by the very cost of defending the suit.”²⁰⁵ And when speech is chilled, citizens have lost their First Amendment rights, a loss which “for even minimal periods of time[] unquestionably constitutes irreparable injury.”²⁰⁶ Anti-SLAPP statutes prevent such an injury.

B. A Federal Law Provides Consistent First Amendment Protections

As the Supreme Court famously said, the First Amendment embodies a “profound *national* commitment” to freedom of expression.²⁰⁷ Federal anti-SLAPP legislation would signal a profound national commitment to protecting free speech and petitioning rights. With a national law, Congress could ensure all citizens’ rights to free speech and petition are not abridged “by the threat of being dragged into onerous judicial proceedings by improper or abusive tort claims.”²⁰⁸ A federal anti-SLAPP law would do so by providing consistent procedural protections between court systems and

204. See Editorial, *U.S. Needs an Anti-SLAPP Law Like California’s*, L.A. TIMES (Aug. 16, 2015), <http://www.latimes.com/opinion/editorials/la-ed-slapp-20150816-story.html> (“The bill . . . strikes a reasonable balance between the competing interests involved, and lawmakers should move it forward.”).

205. Prather & Bland, *supra* note 12, at 730.

206. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013) (“[S]ummary proceedings are essential in the First Amendment area because if a suit entails ‘long and expensive litigation,’ then the protective purpose of the First Amendment is thwarted even if the [target] ultimately prevails.”) (quoting *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)).

207. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasis added).

208. *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1357 (11th Cir. 2014); see also Benjamin Conery, Note, *Maintaining the Mask of the First Amendment: Procedural and Legislative Approaches to Protecting Anonymous Online Speech*, 47 SUFFOLK U. L. REV. 823, 843 (2014) (arguing that a “strong federal law is necessary to protect . . . the corporate or political giant trampling the little guy’s constitutional right to free speech”).

between jurisdictions, which avoids inequitable results and prevents forum shopping.

Currently, in a place like Washington, D.C.—a hotbed of First Amendment expression—speech or expression has varying levels of legal protection based solely on the court system, despite the speech or expression occurring within the same jurisdiction. As a civil procedure matter, this is how it should be in every jurisdiction.²⁰⁹ But the disparities in anti-SLAPP protections lead to forum shopping, which occurs not only implicitly but sometimes overtly. In 2012, for example, one plaintiff moved to voluntarily dismiss libel claims from a state court, where anti-SLAPP laws applied, so that he could re-file the same claims in federal court, where he stood a good chance of avoiding the anti-SLAPP procedural mechanisms.²¹⁰ The discrepancy in anti-SLAPP availability in a jurisdiction like D.C.,²¹¹ if no federal law is in force, encourages parties bringing a meritless claim to go forum shopping. Faced with the decision of suing in a state court with access to an anti-SLAPP statute or in a federal court, filers should routinely choose the federal court because they would not be subject to anti-SLAPP protections.

Although *Shady Grove*'s plurality acknowledged and accepted the reality of forum shopping when state laws are interpreted to clash with federal law,²¹² this duality still “chips away at ‘one of the modern cornerstones of our federalism.’”²¹³ As the Ninth Circuit recognized, without the possibility of facing a special motion that raises the bar to proceed and imposes potential costs, “SLAPP [filers] would have an incentive to file or remove to federal courts strategic, retaliatory lawsuits that are more likely to have the desired effect of suppressing a SLAPP [target]’s speech-related activities.”²¹⁴ The availability of this choice emboldens those who wish to chill speech, and this choice gives rise to a “need for a federal statute that would create a unified definition of a SLAPP suit and [a] mechanism for disposing of them.”²¹⁵ Citizens engaged in public participation should be able to know, at a minimum, they won’t lose access to anti-SLAPP protections simply by moving from the state system to the federal system. As the Ninth Circuit noted, “citizens . . . that

209. See *supra* Part IV.

210. *Dean v. NBC Universal*, No. 2011 CA-006055-B, Order at 2 (D.C. Sup. Ct. June 25, 2012).

211. And, potentially, in other circuits that decide the issue, if they side with the D.C. Circuit.

212. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (plurality opinion) (“[D]ivergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.”)

213. *Makaeff v. Trump Univ., L.L.C.*, 736 F.3d 1180, 1187 (9th Cir. 2013) (quoting *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring)).

214. *Id.* at 1187.

215. Marc J. Randazza, *The Need for a Unified and Cohesive National Anti-SLAPP Law*, 91 OR. L. REV. 627, 633 (2012) (asserting that the need is “clear and immediate”).

have anti-SLAPP laws [available to them] should not be stripped of their state's free speech protections whenever they step inside a federal court."²¹⁶ All citizens, not just those who happen to be in a federal court that recognizes their application, should have access to anti-SLAPP statutes to preserve important First Amendment rights.²¹⁷ A federal anti-SLAPP statute is a direct solution to this problem. It provides the "consistent approach to the application of anti-SLAPP statutes in federal court"²¹⁸ that the judiciary cannot provide, given the conflict with the federal procedural rules. And if consistency "is critical to serve the purposes of the statutes,"²¹⁹ a national anti-SLAPP law provides just that.

The state-to-state inconsistencies under the current statutory landscape are more justified. States, as popularly cited, "serve as a laboratory" of experiment.²²⁰ That a minority of states has chosen not to enact an anti-SLAPP statute is a sign of federalism at work. Intruding on the states' experiments should not be taken lightly, and the SPEAK FREE Act does encroach on the federal-state balance. In particular, the removal provision enables targets sued in states currently lacking anti-SLAPP statutes to get into federal court, which incentivizes a form of reverse forum shopping: defendants would nearly always seek to remove a case into federal court to gain access to the anti-SLAPP protections. This incentive may exacerbate a concern held by critics: anti-SLAPP statutes, designed to curb harassing lawsuits, are now themselves being used as a tool for harassment.²²¹ Expanding the reach of anti-SLAPP statutes may further "risk . . . severely prejudicing the rights of" filers with legitimate claims whose cases "happen to resemble the paradigm SLAPP."²²² Filers with valid claims may be deterred from bringing lawsuits against genuine tortfeasors, out of fear that they will be unsuccessful and have to not only shoulder their own legal expenses but also pay the targets' legal expenses.²²³ Critics point out the

216. *Makaeff v. Trump Univ., L.L.C.*, 736 F.3d 1180, 1187 (9th Cir. 2013).

217. Take, for example, the *Makaeff* case. Although the Ninth Circuit got the civil procedure issue wrong, the end result promotes First Amendment values. For her constitutionally protected speech, Makaeff would have been subject to \$798,779 in fees and costs of litigation. *Makaeff v. Trump Univ., L.L.C.*, No. 10cv0940 GPC (WVG), 2015 WL 1579000, at *28 (S.D. Cal. Apr. 9, 2015). With the anti-SLAPP statute, Makaeff's speech on a public matter was not chilled.

218. Prather & Bland, *supra* note 12, at 800; *see also* Rekola, *supra* note 186 (writing that the federal coverage and removal "is critical" for targets in the twenty-two states without state anti-SLAPP statutes and in states with weak versions of them).

219. Prather & Bland, *supra* note 12, at 800.

220. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

221. *Id.* at 79.

222. Beatty, *supra* note 199, at 95.

223. See Landon A. Wade, Comment, *The Texas Citizens Participation Act: A Safe Haven for Media Defendants and Big Business, and a SLAPP in the Face for Plaintiffs with Legitimate Causes of Action*, 47 TEX. TECH. L. REV. ONLINE EDITION 69, 94 (2014) ("The legislature will undoubtedly accomplish its goal to deter frivolous lawsuits, but it will also deter a number of plaintiffs that may have a legitimate claim from bringing suit as well.").

proliferation of anti-SLAPP motions, particularly in recent years, as a reason to reign in rather than expand the availability of anti-SLAPP statutes.²²⁴ The increased filings, in their view, indicate that targets are willing to cross the line between meritoriously and frivolously invoking an anti-SLAPP statute in the hopes of getting out of a lawsuit before it can truly begin.²²⁵ As one commentator argued, anti-SLAPP laws have become a “blossoming cottage industry for the defense bar” and simply “further clog[] [courts’] docket[s].”²²⁶ One judge wrote that targets are overeager to file an anti-SLAPP motion, and “[t]he cure has become the disease—SLAPP motions are now just the latest form of abusive litigation.”²²⁷

Unquestionably, anti-SLAPP statutes cannot protect the First Amendment to the exclusion of all other interests. The First Amendment is not absolute.²²⁸ Even when a citizen’s statements relate to a public official and a matter of public concern, the First Amendment freedom of speech “is . . . not the only societal value at issue.”²²⁹ But the critics’ concern about a newfound overload of anti-SLAPP motions isn’t clearly demonstrated, and even if it is, the burden a federal anti-SLAPP state places on potential claimants is justified.

A federal anti-SLAPP statute would likely lead to more motions that do place extra filings in front of a judge on a micro level,²³⁰ but the net result could actually unclog the court dockets in the macro. The anti-SLAPP procedural mechanisms in theory facilitate quicker disposal of cases that deserve to be quickly disposed of. As two practitioners describe, state anti-SLAPP statutes have “achieved [their] goal of prompt resolution of meritless claims by significantly shortening the life of non-viable SLAPP claims from a matter of years to months.”²³¹ An anti-SLAPP motion

224. See Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J.L. & PUB. POL’Y 426 (2015) (arguing that anti-SLAPP statutes have been interpreted too broadly by courts in various contexts, such as discrimination claims).

225. See *id.* at 454–55 (citing *Grewal v. Jammu*, 119 Cal. Rptr. 3d 835, 851 (Cal. Ct. App. 2011), in which a judge found annotations of a state anti-SLAPP statute increased threefold from 1992–2004 to 2005–2010).

226. Lund, *supra* note 12, at 125 (arguing that anti-SLAPP statutes should not apply in federal court under choice-of-law doctrine).

227. *Navellier v. Sletten*, 52 P.3d 703, 714 (Cal. 2002) (Brown, J., dissenting).

228. See generally Kathleen A. Buck, *The First Amendment—An Absolute Right?*, 26 WM. & MARY L. REV. 851 (1985) (noting various limitations on First Amendment rights).

229. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (holding that the “actual malice” standard does not apply to a publication about a private figure engaged in private activity).

230. A California Judicial Council study showed that anti-SLAPP motions made up 0.046% of the total number of civil filings in the state court system from 2005–2010. Michael Lambert, *Camera Access, Anti-SLAPP Laws Introduced in Congress*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Fall 2015), <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2015/camera-access-anti-slapp-laws>.

231. See *Johnson & Duran*, *supra* note 34, at 526 (citing three cases, brought within the span of a year and each dismissed under the anti-SLAPP statute three-to-five months later).

removes extraneous discovery, subsequent motions, and potentially even full trials from the court system that would otherwise be subject to a full litigation process, thereby avoiding the chilling of free speech. Furthermore, while the anecdotal evidence from judges and practitioners may conflict about the volume of litigation anti-SLAPP laws create—empirical research would be a welcome addition to the literature in this area—the concern about the removal provision and abusive anti-SLAPP motions overlooks the safeguards included within the SPEAK FREE Act itself to combat this very possibility. The proposed federal anti-SLAPP law, like many state versions, anticipates the problem of targets trying to wiggle their way under the statutory protections, and provides that a frivolous anti-SLAPP motion requires disgorgement of attorneys’ fees to the filer.²³² Thus, targets who become part of the “disease” face penalties that reflect those they sought from the other side. These penalties should provide sufficient deterrence, and strike the right balance between allowing valid claims to come through the court system and protecting citizens exercising their First Amendment rights from meritless suits.

Even if the critics’ concerns about the amount of anti-SLAPP litigation that would ensue are correct, a federal law is still justified. The burden placed on claimants would increase, but the burden is this: be prepared to back up a claim with legitimate evidence that the claim is meritorious. That’s a small cost to pay when balanced against the benefits anti-SLAPP statutes provide in furtherance of fundamental First Amendment values: “It would be difficult to find a value of a ‘high[er] order’ than the constitutionally-protected rights to free speech and petition that are at the heart” of state anti-SLAPP statutes.²³³ While the Constitution protects freedom of expression and petition, targets must still pay to defend those rights if sued.²³⁴ Not every—indeed, not many—citizens exercising their First Amendment rights have the resources to vindicate them if confronted

232. See, e.g., CAL. CIV. PROC. CODE § 425.16(c)(1) (West Supp. 2016) (“If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion.”).

233. *D.C. Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015–16 (9th Cir. 2013) (alteration in original) (citations omitted) (holding that an anti-SLAPP statute did not extend to contractual disputes over Superman copyrights).

234. For example, in a recent case from Idaho, which has no anti-SLAPP statute, a magazine was on the hook for \$650,000 in legal fees in successfully defending a defamation claim brought by a local CEO who contributed to a Presidential campaign. See *Vandersloot v. Found. for Nat’l Progress*, Case No. CV-2013-532 (D. Idaho Oct. 6, 2015), <https://assets.documentcloud.org/documents/2454188/vanderslootdecision.pdf>; Monika Bauerlein & Clara Jeffery, *Why We’re Stuck With \$650,000 in Legal Fees, Despite Beating the Billionaire Who Sued Us*, MOTHER JONES (Oct. 23, 2015), <http://www.motherjones.com/mojo/2015/10/why-wont-we-get-our-legal-fees-back>.

with a strategic lawsuit.²³⁵ Citizens fearful of protracted, costly litigation may engage in self-censorship before a claim is even filed, particularly if the speech is aimed at a litigious opponent.²³⁶

In light of the First Amendment's goal of encouraging robust, uninhibited discussion about public issues, these protections should take priority over the less severe burdens placed on those seeking to validly remedy a wrong. Extending anti-SLAPP protections to the twenty-two states that do not have an anti-SLAPP statute—and to those states with a weak anti-SLAPP statute—would provide vital procedural protections in a consistent manner for those exercising First Amendment rights. Citizens deserve to have these extra protections available when their First Amendment rights are threatened. These protections should be expanded nationally.²³⁷

CONCLUSION

The First Amendment offers crucial protections for citizens engaged in public discourse. The Supreme Court has repeatedly noted the importance of the First Amendment in a functioning democracy. While some states are “helping the First Amendment live up to its promise and potential”²³⁸ by enacting anti-SLAPP statutes of their own, a value of such importance deserves a national scope. The judicial branch, however, is the wrong branch to do so. Instead, the legislative branch should foster the true value of the First Amendment and facilitate civic engagement by passing a strong federal anti-SLAPP statute.

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235. See *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 314 (D. Mass. 2003) (noting the benefits of anti-SLAPP statutes in “protecting citizens from [the] David and Goliath power difference” between litigants commonly involved in First Amendment lawsuits).

236. Johnson & Duran, *supra* note 34, at 527 (endorsing strong anti-SLAPP legislation to “spare[]” targets the “cost[s] and emotional toll of unnecessary litigation”).

237. Daniel Castro & Laura Drees, *Why We Need Federal Legislation to Protect Public Speech Online*, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION 10 (May 2015), <http://www2.itif.org/2015-anti-slapp.pdf> (arguing for a federal statute to “enable e-commerce to flourish.”).

238. Charles D. Tobin, *Help Restore Balance to Free Expression Litigation with Anti-SLAPP Statutes*, COMM. LAW., June 2013, at 2–3 (asking the American Bar Association to advocate for anti-SLAPP statutes because “the standard litigation regime is an especially bad fit for freedom of expression”).

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