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State Anti-SLAPPs and Erie: Murky, but Not Chilling

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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, May 2017; B.A., Classics, Bowdoin College, 2011. Thanks to Professor Benjamin Zipursky for his guidance, support, and thoughtful critique; thanks to the Board of the IPLJ for its generosity and assistance this year; and thanks to Dorothy Kadar for her unwavering love and friendship.

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Yando Peralta*

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INTRODUCTION

Somewhere on the periphery of Middle Eastern-American politics is the story of Yasser Abbas. Yasser Abbas is a businessman and the son of Mahmoud Abbas, leader of the Palestinian Authority. In 2012, *Foreign Policy* magazine published an article questioning the sources of Yasser Abbas' wealth.¹ The article alleged that Abbas had accumulated his wealth through his family lineage and po-

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¹ Jonathan Schanzer, *The Brothers Abbas*, FOREIGN POL'Y (June 5, 2012), <http://foreignpolicy.com/2012/06/05/the-brothers-abbas/> [https://perma.cc/A929-PVS6].

litical ties, as well as from American taxpayers.² Abbas then sued *Foreign Policy*'s publisher in federal court in the District of Columbia.³ *Foreign Policy* sought a quick dismissal under the District of Columbia's recently enacted anti-SLAPP statute.⁴ Anti-SLAPP statutes are meant to deter filing of meritless suits meant to chill free speech.⁵ District Judge Sullivan granted *Foreign Policy*'s motion and dismissed the suit.⁶

Abbas appealed dismissal of his defamation suit on the ground that federal courts should not be governed by non-federal procedural devices—like the District of Columbia's anti-SLAPP statute—aimed at implementing state and local anti-litigation policies.⁷ Deviating from the majority of other federal courts of appeals that have addressed the issue (i.e., the First, Fifth, and Ninth Circuits), the D.C. Circuit accepted Abbas's federalist argument.⁸ The D.C. Circuit held that the District of Columbia's special motion to dismiss statute did not apply in federal courts sitting in diversity.⁹ Employing the analysis laid out by the Supreme Court in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,¹⁰ the D.C. Circuit found that Rules 12 and 56 of the Federal Rules of Civil Procedure govern in a federal diversity case, and therefore denied application of the District of Columbia's special motion to dismiss statute.¹¹ Admittedly, Abbas enjoyed only a Pyrrhic victory

² *See id.*

³ *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 5 (D.D.C. 2013), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015).

⁴ *Id.* at 9–10.

⁵ “SLAPP” is an acronym standing for “Strategic Lawsuits Against Public Participation.” *See* discussion *infra* Section I.A.

⁶ *Abbas*, 975 F. Supp. 2d at 20.

⁷ *Abbas*, 783 F.3d at 1332.

⁸ *Id.* at 1335–36.

⁹ *Id.*

¹⁰ 559 U.S. 393 (2010). In *Shady Grove*, the United States Supreme Court, in a plurality decision, found that section 901(b) of New York's Civil Practice and Law Rules did not apply in federal diversity jurisdiction because section 901(b) conflicted with Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 399. The Court applied a two-step framework for deciding whether to apply a Federal Rule or a state law in diversity jurisdiction. First, a court should not apply a state law if a Federal Rule “answer[s] the same question” as the state law. *Id.* at 398–99. Second, a court must apply the Federal Rule if it does not violate the Rules Enabling Act. *Id.*

¹¹ *Abbas*, 783 F.3d at 1333.

because the D.C. Circuit actually applied the federal rules to reach the same result, and affirmed the district court's dismissal.¹² Nevertheless, *Abbas* puts a federalist issue in free speech litigation front and center: Are federal courts required to accord deference to the twenty-eight states who seek to curb abusive litigation practices attacking free speech? Are they even permitted to do so?

This Note compares the different treatment of state anti-SLAPP laws in federal courts, especially in light of the Supreme Court's decision in *Shady Grove*. This Note posits two reasons why special motions to dismiss should not apply in federal courts sitting in diversity jurisdiction. First, state anti-SLAPPs conflict directly with Rules 12 and 56 of the Federal Rules of Civil Procedure because these Federal Rules directly address the question as to dismissal on the pleadings and on summary judgment. Second, a finding that the state anti-SLAPP procedures conflict with the Federal Rules will not frustrate legislatures' interests in swatting down chilling litigation. This is so because federal courts retain the power to screen meritless defamation suits through the available pleading and summary judgment rules.

Part I introduces the two main legal authorities whose convergence is the topic of this Note: state anti-SLAPP laws, provisions that either immunize certain speech or dismiss litigation chilling free speech; and *Shady Grove*,¹³ the most recent opinion on Federal Rule-state rule conflicts. Part II analyzes federal diversity cases applying anti-SLAPP special motions since *Shady Grove*, notably, *Godin v. Schencks*¹⁴ and *Abbas v. Foreign Policy Group, LLC*.¹⁵ It also looks at other courts' responses to this problem. Part III then argues that federal courts should not apply anti-SLAPP provisions that generate powerful state-based motions to dismiss. Lastly, this Note concludes that the approach in *Abbas* and similar cases does not frustrate the aims of anti-SLAPP laws.

¹² *Id.* at 1339–40.

¹³ 559 U.S. 393 (2010).

¹⁴ 629 F.3d 79 (1st Cir. 2010).

¹⁵ 783 F.3d at 1328.

I. ANTI-SLAPP STATUTES AND *SHADY GROVE*A. *Anti-SLAPP Statutes*

In 1992, professors George W. Pring and Penelope Canan coined the term “SLAPP”—Strategic Lawsuits Against Public Participation—in response to a growing number of suits attempting to stifle political speech.¹⁶ Such lawsuits target individuals and groups participating in political advocacy and government petitioning.¹⁷ Under numerous aliases, including defamation, SLAPP filers attempt to “privatize public debate . . . transform[ing] a public, political dispute into a private, legal adjudication” at the expense of defendants.¹⁸ The suits, usually meritless, force defendants to spend money mounting a legal defense.¹⁹ When defendants win, it is a Pyrrhic victory because they have spent considerable sums in filing and attorney’s fees.²⁰ Defendants without resources face defaults or unfavorable settlements.²¹ Most importantly, the suits discourage future speech—a severe threat to First Amendment expression.²²

To combat the proliferation of SLAPPs, Professors Pring and Canan argued for legislation, *inter alia*,²³ to combat protected

¹⁶ George W. Pring & Penelope Canan, “*Strategic Lawsuits Against Public Participation*” (“SLAPPs”): *An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937, 938 (1992).

¹⁷ *Id.* Examples of targeted political activity that professors Pring and Canan cited include:

Voicing criticism at a school board meeting; [t]estifying at a zoning hearing against a new real estate development; [s]ending a letter to public officials; [r]eporting police misconduct; [f]iling a complaint with a government consumer, civil rights, or labor relations office; [r]eporting violations of law to health authorities; [l]obbying for reform legislation; [and] [f]iling administrative agency appeals.

Id.

¹⁸ *Id.* at 941–42 (“Thus, citizens may involve themselves in a city hall zoning dispute, only to find that ‘city hall’ has become ‘courtroom,’ and ‘zoning’ has become ‘defamation’ or ‘interference with business.’”).

¹⁹ *See id.* at 943–44.

²⁰ *See id.* at 944.

²¹ *See id.*

²² *See id.* (citing *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992), *aff’d*, 616 N.Y.S.2d 98 (1994)).

²³ *See id.* at 950. Pring and Canan argued for lawyers representing SLAPP targets to file a motion to dismiss or a motion for summary judgment. *Id.*

speech.²⁴ The professors suggested two kinds of legislation to combat pernicious SLAPP suits. The first was an anti-SLAPP statute creating substantive privileges and immunities for protected speech.²⁵ The second, relying on *Protect Our Mountain Environment, Inc. v. District Court*,²⁶ would establish procedural safeguards to summarily dispose of SLAPP suits and deter would-be SLAPP filers.²⁷

States have heeded the warnings of Professors Pring and Canan. As of the end of 2015, twenty-eight states, the District of Columbia, and Guam have enacted anti-SLAPP statutes.²⁸ Colorado and West Virginia have implemented similar rules through judicial precedent.²⁹ The various statutes are not uniform in their application; states employ either one or both of the substantive and procedural safeguards.³⁰

²⁴ See *id.* at 958.

²⁵ See *id.* at 958–59.

²⁶ *Protect Our Mountain Env't, Inc. v. Dist. Court*, 677 P.2d 1361 (Colo. 1984) (establishing summary disposition and burden-shifting standards in a SLAPP case targeting defendant's petitioning activity).

²⁷ See Pring & Canan, *supra* note 16, at 959–61.

²⁸ See ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (2006); ARK. CODE ANN. §§ 16-63-501 to -508 (2005); CAL. CIV. PROC. CODE §§ 425.16–425.18 (West 2015); DEL. CODE ANN. tit. 10, §§ 8136–8138 (1992); D.C. CODE §§ 16-5501 to -5505 (2012); FLA. STAT. §§ 720.304, 768.295 (2010); GA. CODE ANN. § 9-11-11.1 (1998); 7 GUAM CODE ANN. §§ 17101-17109 (1998); HAW. REV. STAT. §§ 634F-1 to -4 (2002); 735 ILL. COMP. STAT. 110/1-110/99 (2007); IND. CODE §§ 34-7-7-1 to -10 (1998); LA. CODE CIV. PROC. ANN. art. 971 (2012); ME. REV. STAT. tit. 14, § 556 (2012); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2010); MASS. GEN. LAWS ch. 231, § 59H (1996); MINN. STAT. §§ 554.01-.06 (2015); MO. REV. STAT. § 537.528 (2012); NEB. REV. STAT. §§ 25-21,241-,246 (1994); NEV. REV. STAT. §§ 41.635-.670 (2013); N.M. STAT. ANN. §§ 38-2-9.1-.2 (2001); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 1992); OKLA. STAT. tit. 12, §§ 1430-1440 (2014); OR. REV. STAT. §§ 31.150-.155 (2010); 27 PA. CONS. STAT. §§ 7707, 8301-8305 (2001); 9 R.I. GEN. LAWS §§ 9-33-1 to -4 (1993); TENN. CODE ANN. §§ 4-21-1001 to -1004 (1997); TEX. CIV. PROC. & REM. CODE ANN. §§ 27.001-.011 (West 2011); UTAH CODE ANN. §§ 78b-6-1401 to -1405 (West 2008); VT. STAT. ANN. tit. 12, § 1041 (2005); WASH. REV. CODE §§ 4.24.500-.525 (2010).

²⁹ See generally *Protect Our Mountain Env't*, 677 P.2d 1361; *Harris v. Adkins*, 432 S.E.2d 549 (W. Va. 1993).

³⁰ Compare WASH. REV. CODE §§ 4.24.500-.525 (containing both privilege/immunity provisions and special motions to dismiss), with D.C. CODE §§ 16-5501 to -5505 (containing only a special motion to dismiss provision), and 9 R.I. GEN. LAWS §§ 9-33-1 to -4 (containing only a privilege/immunity provision).

Some anti-SLAPP statutes grant immunity to only certain speech or protected activity. These statutes are based in part on the *Noerr-Pennington* doctrine³¹ and in part on common law immunities.³² For example, Rhode Island's section 9-33-2 grants conditional immunity to speech exercised under the right of petition or free speech in connection with a matter of public concern.³³ It carves an exception for sham proceedings. The statute exempts the targeted party's petitioning or free speech activity if it is objectively and subjectively baseless, mirroring the requirements set out in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*³⁴ However, Professors Pring and Canan warned that such immunity provisions were imperfect safeguards for SLAPP targets.³⁵

³¹ The *Noerr-Pennington* doctrine grants immunity to citizens petitioning the government from antitrust liability through the Petition Clause of the First Amendment. See, e.g., *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); accord *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 685–86 (2d Cir. 2009). This immunity extends to concerted actions before courts and administrative agencies. See *Trucking Unlimited*, 404 U.S. at 510–11. When, however, petitioning activity “ostensibly directed toward influencing governmental action[] is a . . . sham to cover what is . . . nothing more than an attempt to interfere directly with the business relationships of a competitor[, then] the application of the Sherman Act would be justified.” *Noerr*, 365 U.S. at 144. The sham exception to the *Noerr-Pennington* doctrine does not insulate petitioning activity that is both objectively baseless and an attempt to directly interfere with a competitor's business relationships through the use of the governmental process. See *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). Whether the *Noerr-Pennington* doctrine applies outside of the antitrust context is a question of some dispute. See, e.g., *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (finding the *Noerr-Pennington* doctrine to be generally applicable as a First Amendment principle); *Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills*, 701 F. Supp. 2d 568, 594–96 (S.D.N.Y. 2010) (collecting cases and finding the doctrine applicable in a civil rights suit).

³² Three privileges come to mind. First, the judicial privilege grants people absolute immunity for “communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought.” *Bochetto v. Gibson*, 860 A.2d 67, 71 (Pa. 2004). Second, there exists a qualified privilege for defamatory statements made by private individuals to police or state attorneys prior to institution of criminal suits. See *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992). Last, defamatory statements in publications that are a “full, fair, and accurate account of [an] official proceeding” receive qualified immunity under the fair-report privilege. *Catalanello v. Kramer*, 18 F. Supp. 3d 504, 514 (S.D.N.Y. 2014).

³³ See 9 R.I. GEN. LAWS § 9-33-2 (1993).

³⁴ See *id.*; see also *Prof'l Real Estate Inv'rs*, 508 U.S. at 60.

³⁵ Pring & Canan, *supra* note 16, at 958.

Enter the special motion to dismiss, the preferred solution of Professors Pring and Canan and twenty-five jurisdictions.³⁶ The special motions to dismiss resemble the standard set forth in *Protect Our Mountain Environment, Inc. v. District Court*.³⁷ Looking at the Washington anti-SLAPP statute is instructive. First, the anti-SLAPP statute applies in any case based on the right to petition or the right to free speech in connection with an issue of public concern.³⁸ Next, the special motion requires the movant to show by a preponderance of the evidence that its action was based on the above First Amendment rights.³⁹ If the movant meets that burden, the non-movant must then demonstrate by clear and convincing evidence that it will prevail on the claim.⁴⁰ The court *must* consider the pleadings and outside affidavits stating facts upon which the liability or defense is based.⁴¹ It must also stay all discovery pending resolution of the motion, with targeted discovery allowed for good cause shown.⁴² Finally, the motion moves up the judge's docket, and if the movant wins, it receives attorney's fees.⁴³

Georgia's anti-SLAPP statute presents a variant strain on the special motion, one based on Rule 11 of the Federal Rules of Civil Procedure.⁴⁴ SLAPP filers must verify that the pleadings: (1) are grounded in fact; (2) are warranted by existing law or a good faith argument requiring its change; (3) do not assert claims against

³⁶ *Id.* at 959–61.

³⁷ 677 P.2d 1361 (Colo. 1984). The Supreme Court of Colorado held that the court should treat the motion as one for summary judgment based on a heightened constitutional standard when plaintiff sues for judicial or administrative abuse of process and defendant files a motion to dismiss based on the right to petition. *Id.* at 1370. Plaintiff must show that defendant's petitioning was not immunized under the First Amendment because: (1) defendant's claims had no cognizable basis in law or fact; (2) the primary purpose of defendant's activity was to harass plaintiff or accomplish an improper objective; and (3) defendant's petitioning adversely affected plaintiff's legal interests. *Id.* at 1369.

³⁸ WASH. REV. CODE § 4.24.525(2)(a)–(e) (2010).

³⁹ § 4.24.525(4)(a)–(b).

⁴⁰ § 4.24.525(4)(b).

⁴¹ § 4.24.525(4)(c). Note the mandatory nature of this rule, especially in contrast to Rule 12(d). See discussion *infra* Section II.C.2.

⁴² § 4.24.525(5)(c).

⁴³ § 4.24.525(5)(c), (6)(a)(i).

⁴⁴ See GA. CODE ANN. § 9-11-11.1 (1996); cf. ARK. CODE ANN. § 16-63-506 (2005) (containing a verification requirement in place of the special motion to dismiss).

statements privileged by Georgia’s privilege provision; and (4) are not asserted to suppress free speech, harass, delay, or needlessly increase the cost of litigation.⁴⁵ The claim is stricken if it is not verified within ten days.⁴⁶ If plaintiff verifies in violation of the statute, the court may dismiss the claim and impose sanctions.⁴⁷

Because the anti-SLAPP statutes expressly incorporate the language of the First Amendment defamation cases, they seek to add another layer of protection to certain speech. Professors Pring and Canan noted that many SLAPP cases are filed as defamation cases.⁴⁸ In turn, states like Washington apply the special motions to dismiss when the defendant’s action includes:

Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or [a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.⁴⁹

Statements “in connection with an issue of public concern” include speech protected in cases such as *New York Times v. Sullivan*,⁵⁰ *Curtis Publishing Co. v. Butts*,⁵¹ and *Philadelphia Newspapers, Inc. v. Hepps*.⁵² Provisions like these give defendants, especially

⁴⁵ § 9-11-11.1(b).

⁴⁶ *Id.*

⁴⁷ *Id.* For a recent defamation case holding that section 9-11-11.1 of the Georgia code violates Rule 11 of the Federal Rules of Civil Procedure, see *Royalty Network, Inc. v. Harris*, 756 F.3d 1351 (11th Cir. 2014).

⁴⁸ Pring & Canan, *supra* note 16, at 947.

⁴⁹ WASH. REV. CODE § 4.24.525(2)(d)–(e) (2010).

⁵⁰ 376 U.S. 254, 279–80 (1964) (holding that, in libel cases, the First Amendment requires plaintiffs who are public officials to prove that defendants published statements with actual malice—knowledge of or reckless disregard toward the statements’ falsity).

⁵¹ 388 U.S. 130, 134, 155 (1967) (extending *Sullivan* to apply to public figures—people “who are not public officials, but who are . . . involved in issues in which the public has a justified and important interest”).

⁵² 475 U.S. 767, 776 (1986) (holding that, under the First Amendment, private figures in libel cases suing over an issue of public concern have the burden of proving both falsity and fault before recovering damages, in contravention of the common law of libel).

media defendants, yet another tool to fight defamation suits: summary disposition at the pleading stage.

The special motion to dismiss is ultimately one more protection given to defendants in public figure libel cases based on the First Amendment. First, public officials and figures must prove by clear and convincing evidence that defendants published with “actual malice” (i.e., with either knowledge or reckless disregard as to the statements’ falsity).⁵³ Second, courts cannot hold defendants strictly liable in a libel case under the First Amendment.⁵⁴ Third, plaintiffs have the burden of proving a publication’s falsity, as well as fault, before recovering damages—an inversion of the common-law rule.⁵⁵ Fourth, the First Amendment precludes recovery from statements that “could not reasonably have been interpreted as stating actual facts about the public figure involved.”⁵⁶ Fifth, plaintiffs must also prove actual malice by clear and convincing evidence at summary judgment under Rule 56 of the Federal Rules of Civil Procedure, or on a motion for directed verdict under Rule 50.⁵⁷ Last, appellate courts must engage in de novo review of the whole record in constitutional defamation cases, bypassing Rule 52(a).⁵⁸

B. Shady Grove and the Federal Rules

In *Shady Grove Orthopedic Associates, P.C. v. Allstate Insurance Co.*, petitioner medical practice sought to maintain a class action in the U.S. District Court for the Eastern District of New York under Rule 23.⁵⁹ Petitioner also asserted federal jurisdiction over the claims under the Class Action Fairness Act.⁶⁰ Petitioner tendered a

⁵³ See *Butts*, 388 U.S. at 155; *Sullivan*, 376 U.S. at 279–80.

⁵⁴ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

⁵⁵ See *Hepps*, 475 U.S. at 776.

⁵⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988); see also *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284–86 (1974); *Greenbelt Coop. Publ’g Ass’n, Inc. v. Bresler*, 398 U.S. 6, 13–14 (1970).

⁵⁷ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

⁵⁸ See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 492, 499 (1984); see also FED. R. CIV. P. 52(a) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

⁵⁹ See 559 U.S. 393, 397 (2010).

⁶⁰ See *id.* at 397 n.3. The Class Action Fairness Act grants federal courts jurisdiction over class actions under Rule 23 where: (1) the aggregate value of the claims exceeds five

claim for insurance benefits to respondent Allstate Insurance Company, which paid the claims late and refused to pay the accrued interest on the overdue payments.⁶¹ Petitioner sought relief on behalf of a class of all to whom respondent Allstate owed interest.⁶² The District Court for the Eastern District of New York dismissed the case for lack of jurisdiction for two reasons.⁶³ First, it found that section 901(b) precluded class actions from recovering a “penalty.”⁶⁴ Second, because petitioner could no longer maintain its suit as a class action, the court found that its individual claim, approximately five hundred dollars, did not meet the amount-in-controversy requirement of 28 U.S.C. § 1332(a).⁶⁵ The Court of Appeals for the Second Circuit affirmed, finding that there was no conflict between Rule 23 and section 901(b), that section 901(b) was substantive under *Erie*, and that section 901(b) thus applied in federal diversity suits.⁶⁶

The Supreme Court reversed the Second Circuit, finding that petitioner could file a suit under Rule 23.⁶⁷ The Court laid out a two-step framework to determine whether a federal rule or state rule applied in a federal diversity case. First, a court must determine whether the rule “answers the question in dispute. If it does, it governs.”⁶⁸ In *Shady Grove*, the question was whether petitioner could maintain his suit as a class action.⁶⁹ The Court found that by

million dollars and (2) minimal diversity exists between the parties (i.e., any plaintiff is from a different state than any defendant). *See* 28 U.S.C. § 1332(d)(2) (2012).

⁶¹ *Shady Grove*, 559 U.S. at 397.

⁶² *Id.*

⁶³ *See id.* (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006)).

⁶⁴ *Id.*

⁶⁵ *Id.*; *see also* N.Y. C.P.L.R. § 901(b) (McKinney 2015) (“Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute *may not be maintained* as a class action.” (emphasis added)).

⁶⁶ *Id.* at 398 (citing *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 549 F.3d 137 (2d Cir. 2008)).

⁶⁷ *Id.* at 399.

⁶⁸ *Id.* at 398 (citing *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5, (1987) (“The initial step is to determine whether, when fairly construed, the scope of Federal Rule 38 is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of that law.”)).

⁶⁹ *Id.*

the terms of Rule 23, a “class action may be maintained” if the two criteria set forth in Rule 23(a) and 23(b) are met.⁷⁰ Rule 23 directly conflicts with section 901(b), which states that actions seeking statutory penalties “may not be maintained” as a class action.⁷¹ Therefore, under the first step, section 901(b) cannot apply, unless Rule 23 is *ultra vires*.⁷²

Second, a court must determine whether the federal rule “falls within the statutory authorization” of the Rules Enabling Act.⁷³ Congress has the power both to supplant state law and to create rules for the federal courts.⁷⁴ The test for a federal rule’s validity is whether the rule “abridge[s], enlarge[s,] or modif[ies] any substantive right,” which in turn requires asking whether the rule “really regulates procedure.”⁷⁵ The Court found that Rule 23 falls within the Rules Enabling Act because a class action is merely a process for adjudicating multiple claims at once.⁷⁶ It neither changes the parties’ legal rights nor alters the rules of decision.⁷⁷ The Court emphasized the tough challenge any party faces when attempting to displace a federal rule: “We have rejected every statutory chal-

⁷⁰ *Id.* at 398–99; see FED. R. CIV. P. 23(a) (“One or more members of a class *may sue or be sued* as representative parties on behalf of all members only if . . .” (emphasis added)); FED. R. CIV. P. 23(b) (“A class action *may be maintained* if Rule 23(a) is satisfied and if . . .” (emphasis added)).

⁷¹ N.Y. C.P.L.R. § 901(b) (McKinney 2015).

⁷² *Shady Grove*, 559 U.S. at 399.

⁷³ *Id.* at 406; see 28 U.S.C. § 2072 (2012) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”).

⁷⁴ *Id.* at 406; see also *Burlington N. R.R. Co.*, 480 U.S. at 5 (“The Rule must then be applied if it represents a valid exercise of Congress’ rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act”).

⁷⁵ *Shady Grove*, 559 U.S. at 406–07 (citing 28 U.S.C. § 2072(b) (2012)); see also *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (defining procedure as “the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them”).

⁷⁶ *Id.* at 408.

⁷⁷ *Id.*

lenge to a Federal Rule that has come before us.”⁷⁸ Because the federal rule applied and was not invalid, the Court felt no need to conduct the “murky” *Erie* analysis (i.e., whether enforcement of a right in state or federal court would encourage forum shopping and inequitable administration of the laws).⁷⁹

Justice Stevens, concurring in part and in the judgment, joined the majority on the narrowest ground: Rule 23 applied in the instant case.⁸⁰ However, he also agreed with the dissent in arguing that some state procedural rules might apply in federal court because such rules are a part of the “state’s definition of substantive rights and remedies.”⁸¹ Justice Stevens called for application of the Rules Enabling Act with sensitivity to important state interests and regulatory policies.⁸² Ultimately, Justice Stevens said, a federal rule does not apply in a case where the state law is procedural “but is so intertwined with a state right or remedy that functions to define the scope of the state-created right.”⁸³ In the instant case, he concluded that section 901(b) did not define New York’s rights and

⁷⁸ *Id.* at 407; *see also* *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 554 (1991) (upholding the validity of Rule 11 of the Federal Rules of Civil Procedure); *Burlington N. R.R. Co.*, 480 U.S. at 8 (upholding the validity of Rule 38 of the Federal Rules of Appellate Procedure); *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (upholding the validity of Rule 4(d)(1) of the Federal Rules of Civil Procedure); *Schlagenhauf v. Holder*, 379 U.S. 104, 114 (1964) (upholding the validity of Rule 35 of the Federal Rules of Civil Procedure); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445–46 (1946) (upholding the validity of Rule 4(f) of the Federal Rules of Civil Procedure); *Sibbach*, 312 U.S. at 14–15 (1941) (upholding the validity of Rule 35 of the Federal Rules of Civil Procedure).

⁷⁹ *See Shady Grove*, 559 U.S. at 398. The Court in *Shady Grove* cited *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Hanna*, two of the seminal cases on the *Erie* doctrine. In *Erie*, the Supreme Court overruled *Swift v. Tyson*, 41 U.S. 1 (1842), announcing that in federal cases invoking diversity jurisdiction, the law of the state is the rule of decision “[e]xcept in matters governed by the Federal Constitution or by acts of Congress.” *Erie*, 304 U.S. at 77–78. Nearly thirty years later, in *Hanna*, the Court reflected on the *Erie* doctrine in light of the Rules Enabling Act. *See Hanna*, 380 U.S. at 463–64. There, the Court held that in federal diversity cases where a state rule conflicts with a Federal Rule of Civil Procedure, courts should apply the federal rule if it neither exceeds the Rules Enabling Act nor transgresses the Constitution. *See id.*

⁸⁰ *Shady Grove*, 559 U.S. at 416 (Stevens, J., concurring).

⁸¹ *Id.* at 417.

⁸² *Id.* at 424.

⁸³ *Id.* at 423.

remedies, and that Rule 23 did not violate the Rules Enabling Act.⁸⁴

In short, *Shady Grove* held that section 901(b) did not apply in federal cases invoking diversity jurisdiction.⁸⁵ First, because Rule 23 entitles any eligible party to file a class action, it supplants state laws prohibiting the same suits.⁸⁶ Second, Rule 23 is valid under the Rules Enabling Act and the U.S. Constitution.⁸⁷ Justice Stevens, however, wrote separately to add that some state procedural rules might be a part of “the [s]tate’s definition of substantive rights and remedies.”⁸⁸

II. ANTI-SLAPP CASES IN FEDERAL COURTS

A. *Godin v. Schencks*

In *Godin v. Schencks*, Pat Godin, a former principal at an elementary school in Maine, filed a defamation suit against defendants Patty Schencks and two other individual defendants.⁸⁹ She also filed a suit under 42 U.S.C. § 1983 against the Machiasport School Department Board of Directors and School Union No. 134, alleging due process violations.⁹⁰ After plaintiff was hired as principal of the Fort O’Brien Elementary School in 2006, the school received complaints about plaintiff’s conduct toward students from the three individual defendants.⁹¹ In May 2008, the school board conducted an investigation into plaintiff’s allegedly abusive conduct; a month later, the investigation concluded the allegations were unsupported.⁹² On June 6, 2008, Godin received notice from the school board that her employment was terminated due to “budge-

⁸⁴ *Id.* at 432.

⁸⁵ *Id.* at 399 (majority opinion).

⁸⁶ *Id.* at 398–99.

⁸⁷ *Id.* at 408.

⁸⁸ *Id.* at 416–17 (Stevens, J., concurring).

⁸⁹ 629 F.3d 79, 80–81 (1st Cir. 2010).

⁹⁰ *Id.* at 80. The claims against defendants School Board and Union No. 134 were not under review on appeal to the First Circuit. *Id.*

⁹¹ *Id.* at 81 n.1. Defendants Schencks, Nicely, and Metta reported to either the school board, the Maine Department of Health, or Human Services and the Maine State Police that plaintiff treated her students abusively. *Id.*

⁹² *Id.* at 81.

tary constraints caused by ‘significant subsidy loss.’”⁹³ Godin then sued the school board and the union under 42 U.S.C. § 1983 and brought state law defamation claims against former school employees Schencks, Nicely, and Metta.⁹⁴

The individual defendants filed a special motion to dismiss under the Maine anti-SLAPP statute, section 556.⁹⁵ Plaintiff did not dispute that the individual claims derived from defendants’ exercise of their right to petition.⁹⁶ Under section 556, a party may move to dismiss an action when it asserts that the adversary’s claims are “based on the moving party’s exercise of the moving party’s right of petition” under either the Maine or U.S. Constitution.⁹⁷ A court *must* grant the special motion, unless the non-movant demonstrates: (1) that movant’s exercise of its right of petition lacked “any reasonable factual support or any arguable basis in law” and (2) that movant’s acts “caused actual injury to the responding party.”⁹⁸ In addition, a court must look at both the pleading and the supporting and opposing affidavits.⁹⁹ Last, a court must also stay discovery unless the court finds, “on motion and after a hearing and for good cause shown,” that “specified discovery be conducted.”¹⁰⁰

The district court denied the special motion, holding that section 556 conflicted with Rules 12 and 56 and therefore did not apply in federal court. The First Circuit first determined, *sua sponte*, that it had supplemental jurisdiction over plaintiff’s state law claims.¹⁰¹ Second, on interlocutory appeal, the court found that it had appellate jurisdiction over the order denying section 556 under the collateral order doctrine.¹⁰² Next, the court had to determine whether section 556 applied in the instant federal proceeding.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 81–82; *see also* ME. REV. STAT. tit. 14, § 556 (2012).

⁹⁶ *Godin*, 629 F.3d at 82 (quoting § 556).

⁹⁷ § 556.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* The statute also provides a successful movant with costs and reasonable attorney’s fees. *Id.*

¹⁰¹ *Godin*, 629 F.3d at 83.

¹⁰² *See id.* at 83–84; *see also* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (establishing the collateral order doctrine and finding appealable those orders that

Because the court had supplemental jurisdiction over plaintiff's state law claims, it had to engage in the general *Erie* analysis: determining whether section 556 was a "substantive" or "procedural" rule.¹⁰³ First, it held that Federal Rules 12 and 56 did not preempt application of section 556 because those two rules did not attempt to answer the same question or address the same subject as section 556.¹⁰⁴ Section 556 provides a supplemental and substantive mechanism to protect defendants exercising constitutional petitioning activities.¹⁰⁵ Rules 12 and 56, on the other hand, govern all categories of suits.¹⁰⁶ Rule 12(b)(6) only exists to "test the sufficiency of the complaint," whereas section 556 dismisses claims where plaintiff challenges defendant's petitioning activity yet cannot meet Maine's special rules for protecting such activity.¹⁰⁷ Rule 56, on the one hand, grants parties judgment before trial when there are no disputed material issues of fact, and as a matter of law, one party is entitled to judgment.¹⁰⁸ Section 556, on the other hand, requires courts to consider whether the defendant's conduct had a reasonable basis in fact or law and whether the conduct caused injury.¹⁰⁹ For those reasons, the court found section 556 addressed neither of the questions posed by Rules 12 and 56.¹¹⁰ The court avoided conducting a Rules Enabling Act analysis.¹¹¹

"finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated").

¹⁰³ *Godin*, 629 F.3d at 85; see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."); *Felder v. Casey*, 487 U.S. 131, 151 (1988) (finding that *Erie* applies when a federal court exercises supplemental jurisdiction over a state law claim).

¹⁰⁴ *Godin*, 629 F.3d at 88.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; see also *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980) ("The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court.").

¹⁰⁷ *Godin*, 629 F.3d at 89 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 89–90.

¹¹¹ *Id.* at 90.

The court found that failing to apply section 556 would encourage forum shopping and inequitable administration of the law.¹¹² Section 556 “substantively alters [state]-law claims” by shifting the burden to plaintiff to prove that defendant’s petitioning had no legal or factual basis, by awarding attorney’s fees to successful defendants, and by replacing the common-law libel per se damages standard with an actual injury standard.¹¹³ If such a rule does not apply in federal court, plaintiffs would have a strong incentive to file state-law claims in federal court, avoiding section 556 altogether.¹¹⁴ Inequitable administration of the law would result; defendants in federal court would have fewer protections than an identical defendant in state court.¹¹⁵ As a result, the court reversed the district court’s order and remanded the case.¹¹⁶

B. *Abbas v. Foreign Policy Group*

Plaintiff Yasser Abbas is the son of Palestinian Authority leader Mahmoud Abbas and is a businessman with interests in the Middle East.¹¹⁷ In *Abbas v. Foreign Policy Group*, Abbas sued defendants Foreign Policy magazine and journalist Jonathan Schanzer based on an online article titled “The Brothers Abbas.”¹¹⁸ The article addressed the sources of his and his brother Tarek’s wealth.¹¹⁹ Specifically, the article begins with two questions: “Are the sons of the Palestinian president off their father’s system?” and “Have they enriched themselves at the expense of regular Palestinians—and even U.S. taxpayers?”¹²⁰ Among other things, the article chronicles allegations of corruption leveled against Mahmoud Abbas, noting his sons’ conspicuous wealth.¹²¹ Once Abbas filed suit, defendants moved to dismiss under both District of Columbia section 16-5502(a) and Rule 12(b)(6).¹²² The district court granted defendants

¹¹² *Id.* at 92.

¹¹³ *Id.* at 91.

¹¹⁴ *Id.* at 92.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Abbas v. Foreign Policy Grp.*, 783 F.3d 1328, at 1331 (D.C. Cir. 2015).

¹¹⁸ *See* Schanzer, *supra* note 1.

¹¹⁹ *Id.*

¹²⁰ *Abbas*, 783 F.3d at 1331.

¹²¹ *See* Schanzer, *supra* note 1.

¹²² *Abbas*, 783 F.3d at 1333.

the special motion to dismiss and denied their Rule 12(b)(6) motion as moot.¹²³

On appeal, the D.C. Circuit disagreed with the lower court's decision on the defendant's special motion to dismiss.¹²⁴ The court first found a conflict between the federal rules and section 16-5502(a); both "answer the same question" as to the circumstances when a court must dismiss a case before trial.¹²⁵ To survive a section 16-5502(a) special motion to dismiss, a plaintiff must show that it is likely to succeed on the merits.¹²⁶ Rule 12(b)(6) allows plaintiffs to survive a motion to dismiss by "simply alleging facts" sufficient to state a facially plausible claim.¹²⁷ Rule 56(a) permits summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."¹²⁸ Rules 12 and 56 form an exclusive, integrated, and less stringent program for determining pretrial judgment in federal court.¹²⁹ Therefore, the court found the federal rules were broad enough to displace section 16-5502(a).¹³⁰

Comparing Rules 12 and 56, the court found that those rules did not violate the Rules Enabling Act,¹³¹ which states that federal rules "shall not abridge, enlarge or modify any substantive right."¹³² Here, the court noted the difficulty of applying *Shady Grove*: the fractured decision holds no "common conclusion" for determining what standard governs when comparing federal rules with the Rules Enabling Act.¹³³ The court sided with the Scalia plu-

¹²³ *Id.*

¹²⁴ *Id.* at 1332.

¹²⁵ *Id.* at 1333-34, 1336.

¹²⁶ *See id.* at 1332; *see also* D.C. CODE § 16-5502(b) (2012).

¹²⁷ *Abbas*, 783 F.3d at 1334 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

¹²⁸ FED. R. CIV. P. 56(a).

¹²⁹ *Abbas*, 783 F.3d at 1334.

¹³⁰ *Id.* The court also rejected claims defending the provision as applicable because: (1) it is simply another layer to add to a Rule 56 summary judgment motion; (2) the special motion is another way of creating a form of qualified immunity; (3) the federal rules, as evidenced by Congressional amendment (i.e., the Private Securities Litigation Reform Act of 1995) are not to be rigidly construed; and (4) other Courts of Appeals have found so. *See id.* at 1334-36.

¹³¹ *Abbas*, 783 F.3d at 1337.

¹³² 28 U.S.C. § 2072(b) (2012).

¹³³ *Abbas*, 783 F.3d at 1337 (citing *Marks v. United States*, 430 U.S. 188 (1977)).

rality and applied *Sibbach v. Wilson & Co.* Rules 12 and 56, according to the plurality in *Shady Grove*, “really regulate[] procedure.” Therefore, Rules 12 and 56 applied, and the court denied defendant’s special motion to dismiss.

The court, however, still dismissed plaintiff’s claim under Rule 12(b)(6).¹³⁴ Applying the plausibility pleading standard required by *Bell Atlantic Corp. v. Twombly*,¹³⁵ the court held that defendant had not made a defamatory statement about plaintiff.¹³⁶ Defendant had merely asked questions. A “question,” the court said, “however embarrassing or unpleasant to its subject, is not accusation.”¹³⁷ It then remarked that questions had rarely given rise to successful defamation claims in other jurisdictions.¹³⁸ The court refused to chart new territory in defamation law, and thus dismissed plaintiff’s claim.¹³⁹

C. Other Cases

The federal landscape is divided. Other circuits have weighed in on whether anti-SLAPPs are substantive or procedural under *Erie* with a resultant split on either side. The Fifth and Ninth Circuits have found that anti-SLAPPs apply in federal court.¹⁴⁰ The Seventh Circuit, however, has held that Washington’s anti-SLAPP statute does not apply in federal court, but decided the case on different grounds than its lower court.¹⁴¹

¹³⁴ *Id.* at 1339.

¹³⁵ 550 U.S. 544, 570 (2007) (retiring the liberal pleading standard allowed by *Conley v. Gibson*, 355 U.S. 41 (1957), and requiring plaintiffs “to state a claim to relief that is plausible on its face”).

¹³⁶ *Abbas*, 783 F.3d at 1338–39.

¹³⁷ *Id.* at 1338 (quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993)).

¹³⁸ *Id.* at 1338–39.

¹³⁹ *Id.* at 1339.

¹⁴⁰ See *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164 (5th Cir. 2009); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir.1999).

¹⁴¹ Compare *Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729 (7th Cir. 2015) (applying the Supreme Court of Washington’s decision that section 4.24.525 violates the right to trial by jury under the Washington Constitution), with *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026 (N.D. Ill. 2013) (finding that section 4.24.525 conflicts with Rules 12(d) and 56 and therefore does not apply in diversity suits).

1. Pro-Substance: *Henry* and *Newsham*

In *Henry v. Lake Charles American Press LLC*, the Fifth Circuit applied article 971 of the Louisiana Code of Civil Procedure and dismissed plaintiff's defamation claim.¹⁴² There, the plaintiff, owner of a military jet fuel concern, sued the defendant after it had published that defendant sold "contaminated fuel" to the government that caused its military aircraft to "flame out."¹⁴³ The lower court denied defendant's special motion to dismiss, and defendant appealed.¹⁴⁴ In its opinion, the Fifth Circuit wrote that "Louisiana law, including the nominally-procedural article 971, governs this diversity case."¹⁴⁵

Applying state law interpreting article 971, the court found that defendant had made a prima facie showing that it published on an issue of public concern.¹⁴⁶ Having shifted its burden, the plaintiff then had to show, on the motion to dismiss, a probability of success on the merits using the pleadings as well as supporting and opposing affidavits.¹⁴⁷ The court found that the plaintiff had little chance of proving the defendant had not reasonably inquired into the falsity of its statements, partly because the district court, in applying article 971, had stayed discovery.¹⁴⁸ With little evidence, the plaintiff could not prove the requisite elements of libel, and the court dismissed.

United States ex rel. Newsham v. Lockheed Missiles & Space Co., a case on which the *Henry* court relied, provides a more helpful analysis of the nature of the anti-SLAPP statute.¹⁴⁹ Though decided eleven years before *Shady Grove*, *Newsham* compared California's anti-SLAPP provision, section 425.16, with Federal Rules 12 and 56 in the same framework.¹⁵⁰ The plaintiffs sued Lockheed Missiles

¹⁴² 566 F.3d 164, 168 (5th Cir. 2009).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 168–69 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Newsham*, 190 F.3d at 972–73).

¹⁴⁶ *Id.* at 181.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 181–83.

¹⁴⁹ *Newsham*, 190 F.3d at 972.

¹⁵⁰ *Id.* at 972.

under the False Claims Act¹⁵¹ for fraudulently billing the federal government.¹⁵² Lockheed Missiles filed a counterclaim, at which point the plaintiffs moved to dismiss under the California anti-SLAPP statute and Rule 12(b)(6).¹⁵³ On recommendation from a special master, the district court granted the relators' special motion to dismiss.¹⁵⁴ Relators appealed, wishing to recover attorney's fees under the anti-SLAPP provision.¹⁵⁵

The Ninth Circuit found that the provision applied in federal court, remanding the case for the district court to rule on the motion.¹⁵⁶ First, the court asked whether the anti-SLAPP statute would directly collide with the Federal Rules.¹⁵⁷ Although it admitted a "commonality of purpose" between the two rules, namely, "expeditious weeding out of meritless claims before trial," the court found no conflict.¹⁵⁸ First, it saw no indication that Rules 12 and 56 were meant to occupy the field of pretrial procedures.¹⁵⁹ Second, the anti-SLAPP statute concerned an interest separate from that of the federal rules: protection of constitutional free speech and petition.¹⁶⁰ Next, defendant had identified no countervailing federal interest requiring application of Rules 12 and 56.¹⁶¹ Finally, the court found that serious forum-shopping concerns would arise if it had failed to apply the anti-SLAPP statute. Plaintiffs would always seek a federal forum, knowing the statute would not apply.¹⁶² Therefore, the court applied the California anti-SLAPP statute.

It should be noted that several Ninth Circuit judges have expressed disagreement with the holding announced by the three-

¹⁵¹ The False Claims Act allows private individuals, known as "relators," to file civil suits in the name of the government against persons who make fraudulent claims for payment to the government. 31 U.S.C. § 3730(b)(1) (2012).

¹⁵² *Newsham*, 190 F.3d at 967.

¹⁵³ *Id.* at 972.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 973.

¹⁵⁷ *Id.* at 972.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 973.

¹⁶¹ *Id.*

¹⁶² *Id.*

judge panel in *Newsham*. In *Makaeff v. Trump University, LLC (Trump II)*, Circuit Judge Watford and three other judges dissented from the denial of rehearing *en banc* of an anti-SLAPP motion to strike.¹⁶³ In the first appeal, *Makaeff v. Trump University, LLC (Trump I)*, the Ninth Circuit had dismissed Trump University's defamation counterclaim against Makaeff, finding her letters and postings protected First Amendment speech.¹⁶⁴ Dissenting in *Trump II*, Judge Watford found that section 425.16 conflicted with the federal rules.¹⁶⁵ Ultimately, Judge Watford argued that Rules 12 and 56, linked by the mandatory language of Rule 12(d), "establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court."¹⁶⁶

2. Pro-Procedure: *Intercon*

The Seventh Circuit, in *Intercon Solutions, Inc. v. Basel Action Network*, has found Washington's anti-SLAPP statute inapplicable in federal court, by way of irony: it followed precedent from the Supreme Court of Washington.¹⁶⁷ The Seventh Circuit in *Intercon* chose not to decide whether Washington's anti-SLAPP statute conflicted with the federal rules, as the Northern District of Illinois District Court had done below.¹⁶⁸ Instead, it followed state decisional law—substantive law under *Erie*.¹⁶⁹ Because the Supreme Court of Washington found that section 4.24.525 violated the Washington Constitution's right to trial by jury, there was "no remaining state substance" to compare against Rules 12 and 56.¹⁷⁰ The Seventh Circuit affirmed the lower court.¹⁷¹

The lower court, however, squarely faced the issue in a lengthy, complicated opinion. Plaintiff *Intercon Solutions* was a provider of

¹⁶³ *Makaeff v. Trump Univ., LLC (Trump II)*, 736 F.3d 1180, 1188 (9th Cir. 2013).

¹⁶⁴ *Makaeff v. Trump Univ., LLC (Trump I)*, 715 F.3d 254, 258 (9th Cir. 2013).

¹⁶⁵ *Trump II*, 736 F.3d at 1188 (Watford, J., dissenting).

¹⁶⁶ *Id.* at 1188.

¹⁶⁷ 791 F.3d 729, 732 (7th Cir. 2015).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (citing *Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015)).

¹⁷¹ *Id.*

electronic recycling services in Illinois.¹⁷² It had asked defendant, a certifier of electronic recycling businesses, to perform an audit so that it could obtain e-Stewards certification.¹⁷³ Among other things, plaintiff sued in defamation and false light, claiming that defendant falsely published that Intercon shipped two containers of illegal and hazardous materials to Hong Kong and China.¹⁷⁴ Defendant had published this information on its own website, and released it to “selected news media” and the Illinois and federal environmental protection agencies.¹⁷⁵

Defendants sought to dismiss the action on two fronts. First, defendants asserted that they were immune from liability under section 4.24.510¹⁷⁶ because defendant’s publications conveyed information to government agencies and were of reasonable concern to them.¹⁷⁷ Second, defendants sought to apply section 4.24.525, the special motion to dismiss, because defendant’s actions involved public participation and plaintiff could not prove by clear and convincing evidence that it would prevail on its claims.¹⁷⁸

The district court found that defendant’s statements, when released to the Illinois and federal environmental protection agencies, were immune from civil liability.¹⁷⁹ Section 4.24.510 requires that: (1) the statement must be reported to a “branch or agency of federal, state, or local government,” and (2) the statement must be regarding a “matter reasonably of concern to that agency or organization.”¹⁸⁰ Defendant had conveyed the information to the envi-

¹⁷² *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1032 (N.D. Ill. 2013).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1031.

¹⁷⁵ *Id.* at 1031, 1038.

¹⁷⁶ WASH. REV. CODE § 4.24.510 (2010) (“A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization” (emphasis added)).

¹⁷⁷ *Intercon*, 969 F. Supp. 2d at 1034.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1038.

¹⁸⁰ *Id.* at 1037 (citing WASH. REV. CODE § 4.24.510 (2010)).

ronmental protection agencies.¹⁸¹ Moreover, the court found that reports of shipping hazardous waste in contravention of state and federal law to be of reasonable concern to those agencies.¹⁸² Therefore, the court found the statements made to the government immune under section 4.24.510.¹⁸³

The lower court conducted an extensive analysis of Rule 12(d) in its decision not to apply section 4.24.525, the special motion to dismiss. First, it engaged in the requisite *Shady Grove* analysis,¹⁸⁴ framing the precise question: Whether a federal court may look to the pleadings and to outside materials and dismiss a plaintiff's claims preliminarily based on defendant's showing "that those claims are based on an action involving public participation and petition" and plaintiff's subsequent failure to "establish by clear and convincing evidence a probability of prevailing" on the claim?¹⁸⁵ The court then quoted Rule 12(d) in full.¹⁸⁶ The court found that the Advisory Committee on Rules of Civil Procedure added Rule 12(d) in 1946 to "link Rule 12 with Rule 56 to provide the exclusive means for federal courts to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint."¹⁸⁷ The Advisory Committee clarified that if extraneous material is included under Rule 12(b)(6), the motion would become a summary judgment motion.¹⁸⁸ If the motion becomes a summary judgment motion, then both parties must have a reasonable opportunity to submit extraneous proofs "to avoid taking a party by surprise."¹⁸⁹

¹⁸¹ *Id.*

¹⁸² *Id.* at 1038.

¹⁸³ *Id.* However, the court found the statements did not immunize defendant for claims arising under section 4.24.510 for communications made to the media or on the Internet. *Id.* at 1038-39.

¹⁸⁴ *See id.* at 1042-44.

¹⁸⁵ *Id.* at 1044.

¹⁸⁶ *Id.*; *see also* FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all material that is pertinent to the motion.").

¹⁸⁷ *Intercon*, 969 F. Supp. 2d at 1044 (quoting *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 98 (D.D.C. 2012)).

¹⁸⁸ *Id.* at 1045.

¹⁸⁹ *Id.* (quoting FED. R. CIV. P. 12 advisory committee's note to 1946 amendment).

As compared to Rule 12(d), section 4.24.525 directly interferes with the federal rules' mode of operation, and is therefore void. First, section 4.24.525 poses a higher evidentiary burden on a plaintiff than does Rule 12 and allows dismissal on the merits without tying the motion to summary judgment.¹⁹⁰ Second, the mandatory language of section 4.24.525 conflicts with the discretionary operation of Rule 12(d).¹⁹¹ Last, section 4.24.525 imposes a clear and convincing standard on plaintiffs, without discovery, in contravention of the "genuine issue of material fact" standard of Rule 56.¹⁹² For those reasons, the Northern District of Illinois refused to apply section 4.24.525, and denied defendant's motion to dismiss Intercon's defamation claims.¹⁹³

III. *ABBAS*, *INTERCON*, AND DIVERSE SLAPPS

Federal courts sitting in diversity jurisdiction should follow *Abbas* and *Intercon*. Anti-SLAPP motions to dismiss disrupt the exclusive method of pretrial procedure inscribed in Rules 12 and 56, as linked by Rule 12(d). As a matter of pretrial procedure, the courts have repeatedly insisted on maintaining important federal interests, to wit, uniform pleading and summary judgment practice. The likelihood that *Abbas* will create forum shopping does not warrant its reversal, because the Constitution created diversity jurisdiction in part to combat local prejudice. Moreover, the rule in *Abbas* and *Intercon*, when combined with the significant protections of the First Amendment, does not make it any easier for plaintiffs to prevail.

Anti-SLAPP statutes with special motions to dismiss are not *Erie*-substantive, and therefore do not apply in federal court. Defendants arguing the opposite will likely point to two reasons. First,

¹⁹⁰ *Id.* at 1047.

¹⁹¹ *Id.* Compare FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and *not excluded by the court* . . .") (emphasis added), with WASH. REV. CODE § 4.24.525(4)(b) (2010) ("In making a determination under (b) of this subsection, the court *shall consider* pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.") (emphasis added).

¹⁹² *Intercon*, 969 F. Supp. 2d at 1047.

¹⁹³ *Id.* at 1055. The court noted that the plaintiff, a public figure, had sufficiently pled actual malice, and that defendant's statements were not statements of opinion. *Id.* at 1057-58.

a nominally procedural rule that works to define the scope of the state-created right should apply in federal court. Second, if the rule is found not to be substantive, it will create serious forum shopping concerns.

The first argument relies upon Justice Stevens' concurrence in *Shady Grove* for support. First, if the federal and state rules can coexist side by side, then the court must follow *Erie* and the Rules of Decision Act.¹⁹⁴ Because the anti-SLAPP statutes apply only to suits challenging constitutional free speech rights, they are meant to supplement, not supplant, the general federal rules.¹⁹⁵ Second, even if there is a direct collision, courts should not presume preemption, especially if such a preemptive reading contravenes the Rules Enabling Act.¹⁹⁶ The federal rules should be read with sensitivity to important state interests and regulatory policies.¹⁹⁷ Here, defendants find that the anti-SLAPP statute creates a right—the ability to dismiss certain suits based on constitutional free speech at pretrial—that, while nominally procedural, is really substantive.

The second argument raises a serious concern: Failure to apply anti-SLAPP statutes in diversity will create forum shopping and inequitable administration of the laws. The courts in *Godin* and *Newsham* applied the anti-SLAPP statutes partly out of this fear.¹⁹⁸ Under this line of reasoning, a plaintiff suing a diverse defendant over a defamatory news story would always choose the federal forum, knowing the statute would not apply. As a result, the defendant would be treated inequitably, as the defendant cannot avail herself of what she believes to be a substantive state right.

The first argument fails because the federal rules so obviously conflict with the state rule. To survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only allege facts sufficient to state a

¹⁹⁴ See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 421 (2010) (Stevens, J., concurring).

¹⁹⁵ See, e.g., *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010).

¹⁹⁶ See *Shady Grove*, 559 U.S. at 422–23 (Stevens, J., concurring) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

¹⁹⁷ See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–04 (2001); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996).

¹⁹⁸ See *Godin*, 629 F.3d at 91; *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999).

facially plausible claim.¹⁹⁹ Moreover, “plausibility” is not “akin to a probability requirement.”²⁰⁰ Special motions to dismiss, however, require a plaintiff to establish “by clear and convincing evidence a *probability* of prevailing on the claim.”²⁰¹ This same standard generally conflicts with Rule 56, which requires only a preponderance of the evidence standard.²⁰² Moreover, anti-SLAPP statutes require a stay of discovery, as opposed to Rule 56, which allows for liberal discovery prior to summary judgment.²⁰³ The statutes require that a court consider materials outside the pleadings, but without tying the motion to summary judgment, in contrast to Rule 12(d).²⁰⁴ Finally, Rules 12 and 56, like all the other rules, apply to all cases in federal court, necessarily occupying the field of the anti-SLAPP statutes.²⁰⁵ Therefore, there is a direct conflict, and Rules 12 and 56 apply.

The existence of a direct collision with Rules 12 and 56 calls for the rules’ application, not their exclusion. Even *Semtek International Inc. v. Lockheed Martin Corp.*, a case applying Rule 41(b) with sensitivity to state claim preclusion law, stated that “federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests.”²⁰⁶ Here, the federal interest supports uniform procedure, which might not be attained if the courts defer to each state’s particular anti-SLAPP statute.²⁰⁷ The cleaner approach, therefore, is to allow the federal rules to stand on their own.

¹⁹⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

²⁰⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

²⁰¹ WASH. REV. CODE § 4.24.525(4)(b) (2010) (emphasis added).

²⁰² *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

²⁰³ *See, e.g.*, WASH. REV. CODE § 4.24.525(5)(c); *see also* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 2721 (3d ed. 1998).

²⁰⁴ *See, e.g.*, WASH. REV. CODE § 4.24.525(4)(c).

²⁰⁵ *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (citing FED. R. CIV. P. 1).

²⁰⁶ *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (“If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts’ interest in the integrity of their own processes might justify a contrary federal rule.”).

²⁰⁷ *See Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965); *see also Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1189 (9th Cir. 2013) (Watford, J., dissenting) (finding that California

While forum shopping and inequitable administration are valid concerns, reference to *Erie* is inappropriate when comparing a federal rule of civil procedure with a state rule. Invalidating a federal rule whenever it alters enforcement of state rights would “disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.”²⁰⁸ This statement in *Hanna*, quoted in *Shady Grove*, echoes the belief that created diversity jurisdiction in the first place: Foreign citizens may be prejudiced in state courts against resident defendants.²⁰⁹ The Supreme Court famously expressed this sentiment in *Bank of United States v. Deveaux*:

However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.²¹⁰

The Constitution itself allows federal courts to administer disputes between diverse citizens, and as to procedure, some divergence from state law is the attendant, and perhaps intended, result.²¹¹

In addition, the fact that a defendant may not use a special motion to dismiss does not spell a victory for a plaintiff or a Pyrrhic victory for a defendant. As *Intercon* demonstrated, the immunity anti-SLAPP statute, section 4.24.510, still applied in federal court as a substantive defense.²¹² State law immunities are still substan-

has amalgamated California’s anti-SLAPP and Rule 56, leaving a crippled anti-SLAPP statute that applies some, but not all, of each).

²⁰⁸ *Hanna*, 380 U.S. at 473–74.

²⁰⁹ See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493 (1928).

²¹⁰ *Bank of United States v. Deveaux*, 9 U.S. 61, 87 (1809).

²¹¹ See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010).

²¹² See discussion *supra* Section II.C.2.

tive under *Erie*.²¹³ Looking next at *Abbas*, the D.C. Circuit still dismissed plaintiff for failure to state a plausible defamation claim under Rule 12(b)(6).²¹⁴ The above cases demonstrate that federal courts are well-suited for early dismissal of meritless claims. This is especially important, as anti-SLAPP statutes exist to minimize the costs of a legal defense.²¹⁵

Finally, it is not at all certain that a plaintiff is likely to win on a public libel defamation case in the first instance. As highlighted in Section I.A, a libel defendant can rely on three structural protections: evidentiary, interpretive (a court will not quickly infer libel based on certain words and their possible meanings), and procedural.²¹⁶ Given these protections, resort to federal court may not result in the mischief that the anti-SLAPP statutes sought to remedy.

CONCLUSION

Application of the federal rules will not completely disembowel the policy of the states to support free speech. First, they do not target all anti-SLAPP provisions, merely those that conflict with the Federal Rules of Civil Procedure. Federal courts following *Abbas* and the federal rules can still screen out meritless claims and protect free speech. Resort to federal courts may inevitably create divergences in the federal and state courts, but the U.S. Constitution has embedded this policy so that federal courts across the country may apply uniformly. Finally, applications of the federal rules will not result in a parade of horrors for libel defendants. The Supreme Court has erected protective barriers that, as a whole, maintain the important values of free speech in public society.

²¹³ See, e.g., *Napolitano v. Flynn*, 949 F.2d 617, 620–21 (2d Cir. 1991) (finding that the substantive law of Vermont governs the applicability of qualified immunity to plaintiff's state law claims).

²¹⁴ See discussion *supra* Section II.B.

²¹⁵ See, e.g., CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2011) (awarding costs and attorney's fees to successful anti-SLAPP movants).

²¹⁶ See discussion *supra* Section I.A.