APPLYING ANTI-SLAPP LAWS IN DIVERSITY CASES: HOW TO PROTECT THE SUBSTANTIVE PUBLIC INTEREST IN STATE PROCEDURAL RULES

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I. INTRODUCTION

Many states have enacted statutes designed to prevent the use of lawsuits as instruments for discouraging free speech about contentious public issues. Those statutes "try to decrease the `chilling effect' of certain kinds of libel litigation and other speech-restrictive litigation."[1] Such speech-restrictive litigation has been identified by the acronym "SLAPP," which stands for "Strategic Lawsuits Against Public Participation." The state statues designed to discourage such suits are commonly known as anti-SLAPP laws.

The statutes accomplish the objective of protecting important public speech by making it easier to dismiss defamation and similar suits at an early stage. In this respect, these statutes create procedural rules designed to expand the substantive speech rights of individuals and to protect the public interest in a robust debate about important matters of public concern. Anti-SLAPP statutes create procedural means to accomplish substantive policy objectives.

Because anti-SLAPP statutes have a mixed character, combining both procedural and substantive aspects, there can be questions about how to apply them in federal diversity cases, where the federal court must apply state substantive law and federal procedural rules.[2] In the first years after states enacted anti-SLAPP statutes, the federal courts that considered these questions almost uniformly held that anti-SLAPP rules could be applied in federal diversity cases.[3] More recently, the District of Columbia Circuit, with dissenting judges on the Ninth Circuit, including its Chief Judge, have

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+ I am so blessed & greatly appreciate the love of my life, M.G.S, for her love and making me smile every minute of every day. To Dr.'s Aida & Adil Elias, my first great teachers in life, I thank you and appreciate more than words can ever say. I am truly grateful to the best brother anyone could be blessed to have, my brother, Pierre A. Elias. To the *Thurgood Marshall Law Journal*, for their non-stop attention to detail I appreciate and thank.

1. EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 118 (5th ed. 2014)
2. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965).
3. *See, e.g.,* Godin v. Schencks, 629 F.3d 79 (1th Cir. 2010); Henry v. Lake Charles American 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).

challenged these holdings and contended that the procedural elements of anti-SLAPP statutes should not be applied in federal diversity cases.[4]

The argument against applying state anti-SLAPP statutes in federal diversity cases is persuasive if those statutes are understood as entirely, or even predominantly, procedural. The courts challenging the federal application of state anti-SLAPP statutes have this understanding, interpreting those statutes as giving private litigants a collection of special procedural instruments for defending or asserting their private rights. But those statutes also protect an important public interest in protecting advocacy and debate about matters of common concern. When anti-SLAPP laws are understood as using procedural means to accomplish a substantive end, it is impossible to characterize them as purely procedural, and therefore, more difficult to dismiss them from applying in federal court.

This paper argues that the latter understanding of anti-SLAPP laws is the correct one. This argument chiefly depends upon the proposition that statutes can create substantive rights that belong to the public and substantive and procedural rights that belong to private parties. This proposition explains why the D.C. Circuit and the dissenting judges on the Ninth Circuit are incorrect in their assessment of the substantive character of state anti-SLAPP statutes.

Part I of this paper describes the origin and development of anti-SLAPP statutes since the late 1980s, when they were first conceived. Part II discusses the general principles that determine how federal courts choose the rules from state law applied in cases falling within their diversity jurisdiction. Part III discusses the cases in which federal circuit courts concluded that anti-SLAPP laws could be applied in federal diversity cases. Part IV summarizes the recent opinions challenging those earlier rulings. Finally, Part V proposes a way to resolve the circuit split that focuses on the public interests at stake in anti-SLAPP laws and on why those public interests give anti-SLAPP statutes a substantive character that must be respected in federal courts according to principles of federalism.

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4. Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328 (D.C. Circuit 2015); Makaeff v. Trump University, LLC, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., dissenting from the denial of rehearing *en banc*); Makaeff v. Trump University, LLC, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, C.J., dissenting).

II. THE ORIGIN AND DEVELOPMENT OF STATE ANTI-SLAPP LAWS

Beginning in the 1970s and 1980s, courts and commentators recognized that lawsuits were being used to quash controversial speech on public issues. In *Protect Our Mountain Environment, Inc. v. District Court,*[5] the Supreme Court of Colorado, noted that "suits filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their First Amendment right to petition the courts for redress of grievances."[6] This recognition followed scholarship pointing out that legal proceedings could be used strategically to shape public debate.[7]

Two professors at the University of Denver, George W. Pring and Penelope Canan, developed the concept of a "Strategic Lawsuit Against Public Participation" in a study of 240 cases in which a business entity sued an individual who had spoken out on a matter of public concern, alleging that the individual's speech defamed it or otherwise interfered with its business interests.[8] Pring and Canan described several common scenarios for SLAPPs: a suit by a real estate development company against homeowners who petitioned local government against a development project;[9] a suit by public officials against citizens who criticized their conduct;[10] a suit by commercial enterprises against environmental organizations that challenged commercial activity as harmful;[11] and a suit by a commercial enterprise against a whistleblowing employee or consumer.[12] In all, powerful entities with extensive access to legal resources use a lawsuit as an instrument to quiet public speech intended to serve the public interest.

To protect the public interest in such speech, Pring and Canan suggested the outlines of an "anti-SLAPP statute" – legislation designed to make it

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5. Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984).
6. *Id*. at 1368.
7. *See* Note, *Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 MICH. L. REV. 106, 110–11 (1975).
8. George W. Pring & Penelope Canan, S*trategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937 (1992); GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996), *see* Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 423–24 (1991).
9. PRING & CANAN, *supra* note 8, at 30.
10. *Id*. at 46.
11. *Id*. at 83.
12. *Id*. at 128.

harder for powerful actors to quell criticism.[13] They drew on the burden-shifting framework first identified by the Colorado Supreme Court in *Protect Our Mountain Environment*.[14] According to Pring and Canan, government could promote the public interests in promoting debate on important issues by making it harder for entities to pursue legal actions intended to be nuisances to the defendant rather than sincere efforts to redress a legitimate grievance.[15] They proposed that anti-SLAPP legislation must have certain core characteristics: (1) it must cover all public advocacy and communication with government; (2) it must cover all government bodies and agents; and (3) it must provide a procedural mechanism early in a case in which a defendant could challenge the merits of the allegations, especially by giving the plaintiff a heavier burden for demonstrating the viability of the claim.[16] Pring and Canan even proposed a model anti-SLAPP statute.[17]

Numerous states followed by enacting version of the anti-SLAPP legislation suggested by Pring and Canan.[18] Obviously, these statutes vary substantially. These statutes fall into three broad categories: (1) those that protect a relatively narrow class of parties, especially those who are involved in applications of one kind to government agencies;[19] (2) those that protect

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13. *Id.* at 188-90.

14. PRING & CANAN, *supra* note 8, at 42-44 (discussing *Protect Our Mountain Environment*).

15. PRING & CANAN, *supra* note 8, at 42-44.

16. *Id*. at 189-90.

17. *Id.* at 190-207.

18. *See, e.g.,* ARK. CODE ANN. §§ 16-63-501-08; CAL. CIV. P. CODE §§ 425.17 & 425.17 (West 2004 & Supp. 2006); CAL. CIV. CODE § 47 (West 2004 & Supp. 2006); DEL. CODE ANN. tit. 10, §§ 8136-8138 (1999); D.C. CODE § 16-5502, *et seq*.; FLA. STAT. §§ 768.295, 720.304 (2005); GA. CODE ANN. § 9-11-11.1 (2006); GUAM CODE ANN. tit. 7, §§ 17101-17109 (2006); HAW. REV. STAT. §§ 634F-1 to -4 (Supp. 2005); IND. CODE § 34-7-7-1 to -10 (2006); LA. CODE CIV. PROC. ANN. art. 971 (2005); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis Supp. 2006); MASS. GEN. LAWS ch. 231, § 59H (2000); MINN. STAT. §§ 554.01 to .05 (2000); MO. REV. STAT. § 537.528 (2006); NEB. REV. STAT. §§ 25-21,241 to -246 (1995); NEV. REV. STAT. §§ 41.635 to .670 (2002); N.M. STAT. ANN. §§ 38-2-9.1 to -9.2 (LexisNexis 2004); N.Y. C.R. LAW §§ 70-a, 76-a (McKinney Supp. 2007); N.Y. C.P.L.R. 3211(g), 3212(h) (McKinney 2005 & Supp. 2007); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 1993); OR. REV. STAT. §§ 31.150-.155 (2005); 27 PA. CONS. STAT. ANN. § 7707, §§ 8301-8305 (West Supp. 2006); R.I. GEN. LAWS § 9-33-1 to -2 (2006); R.I. GEN. LAWS § 45-24-67 (1997); TENN. CODE ANN. §§ 4-21-1001 to -1004 (2005); UTAH CODE ANN. §§ 78-58-101 to -105 (2002); WASH. REV. CODE §§ 4-24-500 to -520 (West 2005).

19. *See, e.g.,* HAW. REV. STAT. § 634F-1 (Supp. 2005); MO. REV. STAT. § 537.528 (2006); NEB. REV. STAT. §§ 25-21,241-246 (1995); N.M. STAT. ANN. §§ 38-2-9.1 to -9.2 (LexisNexis 2004); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney Supp. 2007); N.Y. C.P.L.R. 3211(g), 3212(h) (McKinney 2005 & Supp. 2007); OKLA. STAT. ANN. tit. 12, § 1443.1A (West 1993); 27 PA. CONS. STAT. § 7707, §§ 8301-8305 (West Supp. 2006); TENN. CODE ANN. §§ 4-21-

statements made *about* matters being considered by government agencies, and statements made to those agencies;[20] and (3) those that protect any exercise of the constitutional right of free speech or the constitutional right to petition the government on a public issue or an issue of public interest.[21]

III. THE PRINCIPLES FOR APPLYING STATE-LAW RULES IN FEDERAL DIVERSITY CASES

In *Erie Railroad Co. v. Tompkins*,[22] the Supreme Court declared that federal courts must look to state law for the rules of decision governing adjudication of state law claims in cases falling under the federal diversity jurisdiction.[23] As the Court later explained, *Erie*'s principles of federalism purport to achieve "twin aims:" the "discouragement of forum-shopping and [the] avoidance of inequitable administration of the laws." [24] As a general rule, this means that federal courts sitting in diversity apply state rules of substantive law and federal rules of procedure.[25]

But distinctions between "substance" and "procedure" are not always easy to make and a superficial characterization of a rule into one of these categories does not determine whether federal courts could enforce a rule from state law.[26] In *Guaranty Trust Co. v. York*,[27] the Court acknowledged that the labels "substance" and "procedure" are inapposite for the *Erie* doctrine and that avoiding disregard of state law—"[a] policy so important to our federalism"—demanded that the doctrine's application "be kept free

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1001 to -1004 (2005); UTAH CODE ANN. §§ 78-58-101 to -105 (2002); WASH. REV. CODE §§ 4-24-500 to -520 (West 2005).

20. *See, e.g.,* GA. CODE ANN. § 9-11-11.1(c) (2006); GUAM CODE ANN. tit. 7 § 17104 (2006); MASS. GEN. LAWS, ch. 231, § 59H; ME. REV. STAT. ANN., tit. 14, § 556; MINN. STAT. § 554.01 (West 2000); NEV. REV. STAT. § 41.637 (2002); R.I. GEN. LAWS § 45-24-67 (1997).

21. *See, e.g.,* ARK. CODE ANN. §16-63-503(1) (2006); CAL. CIV. PROC. CODE § 425.16(e); LA. CODE CIV. PROC. ANN. art. 971 (2006); OR. REV. STAT. §§ 30.142-30.146 (2006).

22. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

23. *Erie*, 304 U.S. at 78 (holding that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . There is no federal general common law.").

24. Hanna v. Plumer, 380 U.S. 460, 468 & n. 9 (1965).

25. *See id.* at 471.

26. *See generally* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 735 (1974) (describing Court prior to *York* as "still operating on the assumption that the Rules of Decision Act divided legal problems into two separate piles marked 'substance' and 'procedure'").

27. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

from entanglements with analytical or terminological niceties."[28] In *Byrd v. Blue Ridge Electric Cooperative, Inc.*,[29] the Court stated that certain aspects of the federal system need not "yield to the state rule in the interest of uniformity of outcome."[30] In *Byrd*, the Court held that the allocation of the fact finding role between judge and jury is one such aspect of the federal system that controls even when adjudicating a state law issue.[31]

The Federal Rules of Civil Procedure ("Fed. R. Civ. P.") are promulgated under the Rules Enabling Act of 1934,[32] which authorizes the Supreme Court "to prescribe general rules of practice and procedure"[33] with the restriction that "[s]uch rules shall not abridge, en-large or modify any substantive right."[34] The framework under which putative conflicts between state laws and the Federal Rules are analyzed was announced in *Hanna v. Plumer*.[35] This framework begins with whether an actual, direct conflict exists; if there is no true conflict, the court's *Erie* analysis proceeds as it would otherwise.[36] If, however, a state law cannot be applied side-by-side with the Federal Rules, the court must determine whether the Federal Rule is valid under the Constitution the terms of the Rules Enabling Act.[37] If valid, a Federal Rule displaces contrary state law; if a Rule does not comply with constitutional and statutory limits, state law applies.[38]

In *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*,[39] U.S. the Supreme Court recently revisited the question of how federal courts in diversity cases should balance the competing principles derived from *Erie* and the Rules Enabling Act. The Court's resolution of the question was sharply divided, with differing understandings of the balance coming from a plurality opinion by Justice Scalia, which commanded the votes of four justices, and a partial concurrence by Justice Stevens, which agreed with the plurality on the result but offered a distinct analysis of how and when a rule of state law should trump a federal procedural rule. The division of opinion in *Shady Grove* between Justice Scalia and Justice Stevens parallels the

28. *Id.* at 110.
29. Byrd v. Blue Ridge Rural Elec. Coop, Inc., 356 U.S. 525 (1958).
30. *Id.* at 540.
31. *Id.* at 537-38.
32. Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2012)).
33. 28 U.S.C. § 2072(a).
34. 28 U.S.C. § 2072(b).
35. Hanna v. Plumer, 380 U.S. 460, 468-69 (1965).
36. *Id.*
37. *Id.*
38. *Id.*
39. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010)

differing views of the federal circuits on how and when federal courts should apply anti-SLAPP statutes in diversity cases.

In *Shady Grove*, a person covered under an Allstate auto insurance policy was injured in an auto accident, and was entitled to policy benefits that, according to New York insurance law, were payable within thirty days. The insured assigned her right to the benefit payments to her health care provider. When Allstate paid late and then refused to pay the statutorily prescribed interest on overdue benefits, the healthcare provider sued Allstate in federal district court in a class action, alleging that the insurance company routinely violated this aspect of New York insurance law.[40]

A New York statute prohibited class actions to recover "penalties" or statutory minimum damages.[41] The district court in *Shady Grove* held that the statutorily required interest on overdue benefit payments was a penalty and this statute applied to preclude the putative class representative from maintaining a class action. According to the district court, the state-law rule trumped the requirements of Fed. R. Civ. P. 23, which imposed no such limitation on class actions. The Supreme Court considered whether that ruling was correct.

The plurality opinion was written by Justice Scalia, who was joined by three other justices. He began his analysis by de-emphasizing the importance of the "substantive-procedural" distinction. He noted that the principles in *Erie* "involved the constitutional power of federal courts to supplant state law with judge-made rules. In that context, it made no difference whether the rule was technically one of substance or procedure; the touchstone was whether it 'significantly affect[s] the result of a litigation.'"[42] According to Justice Scalia, "[w]hat matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."[43] In a diversity case in federal court, if a state-law rule regulates "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," it is trumped by federal procedural rules.[44]

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40. *Shady Grove*, 130 S. Ct. at 1436-37.

41. N.Y. CIV. PRAC. LAW ANN. § 901(b).

42. *Shady Grove*, 130 S. Ct. at 1442 (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)).

43. *Shady Grove*, 130 S. Ct. at 1442 (quoting Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 446 (1946)).

44. *Shady Grove*, 130 S. Ct. at 1442 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

On the basis of this principle, the plurality opinion rejected the argument that the New York rule limiting class actions created a substantive right to be free from class actions seeking statutory penalties, and it concluded that Rule 23 took precedence over the New York rule.[45]

Justice Stevens concurred in the judgment but he declined to join Justice Scalia's opinion and wrote separately, expressing a different view of how the federal courts must identify the cases in which a federal procedural rule is applied in place of a rule from state law. Unlike Justice Scalia, Justice Stevens did not diminish the importance of the distinction between substantive and procedural law in diversity cases: "[i]t is a long-recognized principle that federal courts sitting in diversity 'apply state substantive law and federal procedural law.'"[46] For Justice Stevens, the problem came in refining this broad principle in light of the Rules Enabling Act and the Rules of Decision Act.[47] He explained:

> Although the Enabling Act and the Rules of Decision Act say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, the inquiries are not the same . . . [t]he Enabling Act . . . instructs only that federal rules cannot "abridge, enlarge or modify any substantive right," § 2072(b). The Enabling Act's limitation does not mean that federal rules cannot displace state policy judgments; it means only that federal rules cannot displace a State's definition of its own rights or remedies . . . [f]ederal rules must be interpreted with some degree of sensitivity to important state interests and regulatory policies.[48]

Focusing on this principle of federalism, Justice Stevens pointed out that states may choose different means for defining substantive rights and remedies within a statutory scheme, and that, in many situations, a rule nominally procedural is actually a means for defining a substantive right under state law and is therefore entitled to deference from the federal courts. In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take . . . [w]hen a State chooses to use a traditionally procedural vehicle as a means

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45. *Shady Grove*, 130 S. Ct. at 1443.

46. *Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring) (quoting *Hanna*, 380 U.S. at 465)).

47. *See generally id.*

48. *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring) (citations and internal quotations omitted).

of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice.[49]

IV. FEDERAL CIRCUIT COURT DECISIONS APPLYING ANTI-SLAPP STATUTES IN DIVERSITY CASES

Until 2013, the federal circuit courts that considered whether to apply anti-SLAPP statutes in diversity cases agreed these statutes were not purely procedural and could be applied. These cases adopted the analytical approach taken by Justice Stevens in *Shady Grove*. They held that the procedural elements of the anti-SLAPP statutes did not determine their character for the *Erie* analysis, and these statutes were best characterized as substantive.

A. The First Circuit

In a decision issued shortly after *Shady Grove*, the First Circuit held that Maine's anti-SLAPP law could be applied in a federal diversity action, relying heavily on the principles articulated by Justice Stevens in his *Shady Grove* concurrence. In *Godin v. Schencks*,[50] some public school employees complained to school officials that the school principal was treating students in an abusive an inappropriate manner. The school investigated the complaints and found they were not supported. But, immediately after making this finding, the school terminated the principal's employment contract, citing budget cuts. The principal sued in federal court, asserting a variety of claims, including causes of action for tortious interference with an advantageous business relationship and for defamation against the school employees who had complained about her.[51]

Under Maine's anti-SLAPP statute, a defendant may bring a "special motion to dismiss" any claim that arises from the defendant's exercise of the right of petition under either the state or federal constitutions.[52] The statute provides that when a defendant files such a "special motion to dismiss" and demonstrates that the challenged claims arise from the defendant's petitioning activity, the court shall grant the special motion "unless the party against

49. *Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring) (citation omitted).
50. Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010).
51. *Id*. at 81.
52. ME. REV. STAT. tit. 14, § 556 ("Section 556").

whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party."[53] In deciding the special motion, "the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[54] In addition, when good cause is shown, a court may order discovery specific to the Section 556 motion.[55]

In *Godin*, the individual defendants filed a Section 556 motion, which was denied.[56] The district court held that Section 556 conflicts with Fed. R. Civ. P. 12 and 56 and therefore does not apply in federal court.[57] On appeal, the First Circuit considered whether the district court erred in finding such a conflict between the state and federal rules.[58]

The First Circuit began its analysis by primary question addressed in Justice Stevens' concurrence in *Shady Grove*. "In getting at the potential rub in the relationship between a Federal Rule of Procedure and the state law, courts now ask if the federal rule is 'sufficiently broad to control the issue before the court.'"[59] The First Circuit concluded that neither Rule 12 nor Rule 56 were so broad.[60] "To use the language of *Shady Grove,* Rules 12 and 56 do not 'attempt[] to answer the same question" . . . nor do they 'address the same subject' . . . as Section 556."[61]

The First Circuit explained the different questions addressed by Section 556, on the one hand, and Rules 12 and 56 on the other. According to the First Circuit, "Maine has not created a substitute to the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities."[62] The Court also pointed out that Section 556 establishes a burden of proof while neither Rule 12 nor Rule 56 determine which party must prove in a cause of action created by state law.[63] "And it is long settled that the allocation of burden of proof

53. *Id*.
54. *Id.*
55. *Id*.
56. *Godin*, 629 F.3d at 82.
57. *Id*.
58. *Id*. at 86.
59. *Id*. at 86 (quoting *Shady Grove*, 130 S. Ct. at 1437 (Stevens, J., concurring)).
60. *Godin*, 629 F.3d at 86.
61. *Id*. at 88 (quoting *Shady Grove*, 130 S. Ct. at 1437, 1440 (Stevens, J., concurring).
62. *Godin*, 629 F.3d at 88.
63. *Id*. at 89.

is substantive in nature and controlled by state law."[64] The Court concluded that "Section 556 is 'so intertwined with a state right or remedy that it functions to define the scope of the state-created right,' it cannot be displaced by Rule 12(b)(6) or Rule 56."[65]

The *Godin* Court then went on to the second stage of its analysis. "[I]f a federal rule is not so broad as to control the issues raised, a federal court might nonetheless decline to apply state law if so declining would better advance the dual aims of *Erie*: 'discouragement of forum-shopping and avoidance of inequitable administration of the laws'."[66] The Court held that denying that application of Section 556 in federal diversity actions would frustrate these "dual aims." The Court pointed out that has a substantial effect on the substantive structure of rights and duties under Maine law regarding defamation claims arising from "protected petitioning activity."[67] The Court noted that: Section 556 shifts burdens of proof and changes the showing that defamation plaintiffs must make; it alters the traditional rule that a plaintiff need not show damages to recover; and it makes attorneys' fees available to prevailing defendants.[68]

Declining to apply Section 556 in federal court would result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court. Likewise, were Section 556 not to apply in federal court, the incentives for forum shopping would be strong: electing to bring state-law claims in federal as opposed to state court would allow a plaintiff to avoid Section 556's burden-shifting framework, rely upon the common law's per se damages rule, and circumvent any liability for a defendant's attorney's fees or costs.[69]

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64. *Id*. at 89 (citing Palmer v. Hoffman*,* 318 U.S. 109 (1943) and American Title Ins. Co. v. E.W. Fin. Corp.*,* 959 F.2d 345, 348 (1st Cir.1992)).

65. *Godin*, 629 F.3d at 89 (quoting *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring)

66. *Godin*, 629 F.3d at 86-87 (quoting *Hanna*, 380 U.S. at 468 and citing *Shady Grove*, 130 S. Ct. at 1437 (Stevens, J., concurring)).

67. *Godin*, 629 F.3d at 91.

68. *Id*. at 91 (citing § 556).

69. *Id*. at 92.

B. The Ninth Circuit

The other significant decision[70] affirming the application of an anti-SLAPP statute in a federal diversity case was the Ninth Circuit's ruling in *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*[71] Coming before the Supreme Court's ruling in *Shady Grove,* it did not closely follow Justice Stevens' analytical approach, as the First Circuit did in *Godin*. Its general assessment of how to achieve the "twin purposes" of *Erie.*[72]

California enacted its anti-SLAPP statute[73] in 1993 because the state's legislature noted a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[74] Because prevailing on the merits is not the primary motivation of a party who brings a SLAPP suit, "defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, and requests for sanctions) are inadequate to counter SLAPPs."[75] Through the anti-SLAPP statute, the California legislature looked for procedural and substantive remedies for the prompt exposure, dismissal, and discouragement of SLAPP suits.[76] In asserting the purpose for the statute, the California Legislature provided that it was revising substantive rights and remedies under state law because "it is in the public interest to encourage continued participation in matters of public

70. In Henry v. Lake Charles American Press, LLC, 566 F.3d 164 (5th Cir. 2009), the Fifth Circuit ruled that a state anti-SLAPP statute could be applied in a federal diversity action, but it did not undertake any meaningful analysis of whether the state law rule conflicted with federal procedural rules. There, a federal government contractor sued a newspaper, alleging that the newspaper made defamatory statements about the contractor in a story about a government investigation of the contractor's business practices. The Fifth Circuit considered whether the district court had correctly applied the anti-SLAPP statute's provision for a special motion to strike, and it considered whether the district's ruling under that statute was a collateral order subject to immediate appeal, but it did not address the question whether there was any conflict between the state-law rule and the federal procedural rules. It just applied the anti-SLAPP statute. In so doing, it implicitly sided with the First and Ninth Circuits, but *Henry*'s lack of any analysis of federalism concerns makes that opinion less than useful for the inquiry presented here.

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

72. *Id*. at 973.

73. CAL. CIV. PROC. CODE § 425.16.

74. CAL. CIV. PROC. CODE § 425.16(a).

75. Wilcox v. Superior Court*,* 27 Cal. App. 4th 809, 817; 33 Cal. Rptr. 2d 446, 450 (1994)

76. *Id*.

significance, and that this participation should not be chilled through abuse of the judicial process."[77]

Like the Maine legislation in *Godin*, the California statute creates a special burden-shifting framework for suits arising from certain protected activity – any act ""in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."[78] Under this framework, once a defendant could file a "special motion to strike" in which it would be required to show on the basis of the pleadings and supporting affidavits that the plaintiff's claims arose from protected activity. Once this showing was made, the SLAPP plaintiff would have to establish by a "reasonable probability" that the [SLAPP] plaintiff will prevail on the claim and that the [citizen party's] "purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses."[79] The party prevailing on a special motion to strike would be entitled to attorneys' fees.[80]

The *Newsham* case arose from a *qui tam* action against a defense contractor, Lockheed Missile & Space Co., Inc. ("LMSC"), in which the relators were LMSC's former employees.[81] LMSC asserted counterclaims against the relators, alleging breach of fiduciary duty, breach of contract, and breach of the covenant of good faith.[82] The relators responded by moving to strike under the anti-SLAPP statute.[83] The district court declined to apply the anti-SLAPP statute on the ground that the state's rules for protecting certain categories of speech conflicted with Fed. R. Civ. P. 8, 12, and 56.[84] The Ninth Circuit framed the relators' appellate argument this way: "that the district court's erroneous refusal to apply the Anti-SLAPP statute denied them of their substantive rights to attorneys' fees and costs under California state law, and failed to carry out the goals of [*Erie*]."[85]

The district court's decision in *Newsham* implicated two particular aspects of California's anti-SLAPP statutory scheme: the special motion to strike, and the availability of attorneys' fees and costs as a sanction against

77. CAL. CIV. PROC. CODE § 425.16(a).
78. CAL. CIV. PROC. CODE § 425.16(b)(1).
79. *Wilcox*, 27 Cal. App. 4th at 824-25; 33 Cal. Rptr. 2d at 455.
80. CAL. CIV. PROC. CODE § 425.16(c).
81. *Newsham*, 190 F.3d at 971.
82. *Id*. at 971-72.
83. *Id*. at 972.
84. *Id*.
85. *Id*.

the losing party on the motion to strike.[86] The Ninth Circuit concluded there was no "direct collision" between those two elements of the anti-SLAPP law and Rules 8, 12, and 56.[87] This was because the Ninth Circuit did not see the anti-SLAPP rules and applying the federal procedural rules as mutually exclusive. As the *Newsham* Court put it:

> A *qui tam* plaintiff, for example, after being served in federal court with counterclaims like those brought by LMSC, may bring a special motion to strike pursuant to § 425.16(b). If successful, the litigant may be entitled to fees pursuant to § 425.16(c). If unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment. We fail to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of Rule 8, 12, or 56.[88]

The Ninth Circuit elaborated on this point by identifying an additional reason for finding there was no "direct collision" between the state and federal rules. According to the Ninth Circuit, California intended that the anti-SLAPP statute serve a particular public interest: "the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'"[89] The Ninth Circuit concluded that this interest was distinct from – and not antagonistic to – the interests behind the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").[90] The Ninth Circuit pointed out that "there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims."[91]

Absent a direct conflict between the federal and state rules, the *Newsham* Court made the "typical, relatively unguided *Erie* choice."[92] In making that choice, the Ninth Circuit could find no federal interests that would be undermined by applying the special motion to strike or by the award of attorneys' fees and costs to the prevailing party on that special motion to strike.[93] But the Ninth Circuit found that important policy choices reflected

86. *Newsham*, 190 F.3d at 972.
87. *Id*.
88. *Id*.
89. *Id*. at 972-73 (quoting CAL. CIV. PROC. CODE § 425.16(a)).
90. *Newsham*, 190 F.3d at 972-73.
91. *Id*.
92. *Hanna,* 380 U.S. at 471 (quoted in *Newsham*, 190 F.3d at 973).
93. *Newsham*, 190 F.3d at 973.

in state law would be frustrated if the anti-SLAPP rules were not applied.[94] , California would be denied an opportunity to advance its stated public interest in protecting certain kinds of speech on matters of public concern.[95] Finally, the Ninth Circuit observed that applying the anti-SLAPP rules in a federal diversity case would discourage forum-shopping and avoid the inequitable administration of the law.[96] If the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the 'twin aims' of the *Erie* doctrine.[97]

V. RECENT CHALLENGES TO THE APPLICATION OF ANTI-SLAPP STATUTES IN FEDERAL DIVERSITY CASES

The approach undertaken by the First and Ninth Circuit has recently been challenged by judges on the Ninth Circuit who would overrule *Newsham* and by a recent ruling of the District of Columbia Circuit. In these opinions, the authors conclude that, when applied in federal court diversity cases, anti-SLAPP statutes provide purely procedural rules incompatible with and must be supplanted by the Federal Rules of Civil Procedure, especially Rule 12 and Rule 56. In reaching this conclusion, these authors dismiss, more or less out of hand, any suggestion that anti-SLAPP statutes involve substantive rules; and they give no consideration at all to the idea these statutes reflect a substantive public interest entitled to deference under principles of *Erie* federalism.

A. The Dissenting Opinions in the Ninth Circuit

Two dissenting opinions by Ninth Circuit judges at different stages of the same case have challenged the continued viability of *Newsham*. That case, *Makaeff v. Trump University, LLC*,[98] arose with the business practices

94. *Id*.
95. *Id*. (citing CAL. CIV. P. CODE § 425.16(a)).
96. *Newsham*, 190 F.3d at 973 (quoting *Hanna,* 380 U.S. at 468)).
97. *Newsham*, 190 F.3d at 973.
98. Makaeff v. Trump University, LLC, 715 F.3d 254 (9th Cir. 2013).

of Trump University, LLC, an entity that offers seminars in real estate sales strategies, ostensibly under the auspices of Donald Trump.[99] A former student sued Trump University for deceptive business practices, and she posted her account of those practices online. Trump University counterclaimed for defamation, citing the online statements.[100]

The disgruntled seminar attendee moved to strike the defamation counterclaim under California's anti-SLAPP statute. The district court ruled that, because Trump University was not a public figure, it was not required to prove that the utterance of the allegedly defamatory statements was characterized by actual malice. Given this lighter burden, the district court concluded that Trump University had shown a reasonable probability of prevailing on the merits. The Ninth Circuit granted an interlocutory appeal and addressed whether Trump University was public figure and, therefore, whether the district court had applied the correct legal standard in evaluating Trump University's likelihood of success under the defamation counterclaim.[101]

A majority of the Ninth Circuit overruled the district court. It first concluded that the anti-SLAPP statute applied to the plaintiff's statements because allegedly deceptive business practices qualified as a matter of public concern under that statute.[102] The Ninth Circuit also held that Trump University was a limited purpose public figure, and it remanded the case with instructions that the district court should apply the actual malice standard when determining whether Trump University had a probability of success on the merits of its counterclaims.[103] But a dissent by Chief Judge Kozinski insisted that the anti-SLAPP statute should not apply and that *Newsham* was wrongly decided in its assessment of the intersection between the federal procedural rules and the state-law rule from the anti-SLAPP statute.[104]

Chief Judge Kozinski started his analysis with the proposition that, under *Erie*, the legal rules applicable in diversity cases fall neatly into two broad categories, substantive and procedural.[105] He noted that in federal courts, the federal procedural rules governed the application of substantive rules of state law.[106] He saw little difficulty in determining which category a

99. *Id*. at 258-59.
100. *Id*.
101. *Id*. at 259-60.
102. *Id*. at 262-64.
103. *Makaeff*, 715 F.3d at 265-71.
104. *Id*. at 272-76.
105. *Makaeff,* 715 F.3d at 272 (Kozinski, C.J., dissenting).
106. *Id.*

rule fell into: "the time to answer a complaint, the manner in which process is served, the methods and time limits for discovery, and whether the jury must be unanimous are controlled by the Federal Rules of Civil Procedure.[107] Moreover, he pointed out that the federal procedural rules apply even when they affect substantive outcomes "and, hence, substantive rights."[108]

Despite the general simplicity of distinguishing between matters of substance and matters of procedure, Chief Judge Kozinski acknowledged that "[w]hile many rules are easily recognized as falling on one side or the other of the substance/procedure line, there are some close cases that call for a more nuanced analysis."[109] In these closer cases, Chief Judge Kozinski explained that the correct analysis involved an examination of the question that each of the apparently competing state-law and federal rules would answer. If the rules "dealt with different questions," there was no conflict and both rules "could coexist peaceably within their respective spheres."[110]

Chief Judge Kozinski thought that the *Newsham* Court erred by engaging in this more nuanced analysis when it was unnecessary: "*Newsham*'s mistake was that it engaged in conflict analysis without first determining whether the state rule is, in fact, substantive."[111] In Chief Judge Kozinski's view, it was easy to determine that the anti-SLAPP statute was purely procedural.

> The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights. The language of the statute is procedural: Its mainspring is a "special motion to strike"; it contains provisions limiting discovery; it provides for sanctions for parties who bring a non-meritorious suit or motion; the court's ruling on the potential success of plaintiff's claim is not "admissible in evidence at any later stage of the case"; and an order granting or denying the special motion is immediately appealable. *See* Cal.Civ.Proc. Code § 425.16. The statute deals only with the conduct of the lawsuit; it creates no rights independent of existing litigation; and its only purpose is the swift termination of certain lawsuits the legislators believed to be unduly burdensome. It is codified in the state code of civil procedure and the California Supreme Court has characterized it as a "procedural device to

107. *Id*.
108. *Id*. (citing *Hanna*, 380 U.S. at 471).
109. *Makaeff,* 715 F.3d at 272 (Kozinski, C.J., dissenting).
110. *Id*. at 272-73 (Kozinski, C.J., dissenting).
111. *Id*. at 273 (Kozinski, C.J., dissenting)

> screen out meritless claims." *See Kibler v. N. Inyo Cnty. Local Hosp. Dist.,* 39 Cal.4th 192, 46 Cal.Rptr.3d 41, 138 P.3d 193, 198 (2006).[112]

Judge Kozinski also criticized *Newsham*'s conclusion that that anti-SLAPP statute and Fed. R. Civ. P. 8, 12, and 56 were not necessarily mutually exclusive.

> The Federal Rules aren't just a series of disconnected procedural devices. Rather, the Rules provide an integrated program of pre-trial, trial and post-trial procedures . . . [T]he California anti-SLAPP statute cuts an ugly gash through this orderly process. Designed to extricate certain defendants from the spider web of litigation, it enables them to test the factual sufficiency of a plaintiff's case prior to any discovery; it changes the standard for surviving summary judgment by requiring a plaintiff to show a "reasonable probability" that he will prevail, rather than merely a triable issue of fact; it authorizes attorneys' fees against a plaintiff who loses the special motion by a standard far different from that applicable under Federal Rule of Civil Procedure 11; and it gives a defendant who loses the motion to strike the right to an interlocutory appeal, in clear contravention of Supreme Court admonitions that such appeals are to be entertained only very sparingly because they are so disruptive of the litigation process.[113]

To emphasize the point that the Federal Rules create an integrated system of procedure which must be applied as a unit, Chief Judge Kozinski identified problems of fundamental fairness that would arise from mixing and matching some of the procedural elements of the anti-SLAPP statute with the Federal Rules. He pointed to the problem of trying to separate the methods for testing the viability of a case through Rules 12 and 56 with the system of discovery under the Federal Rules. "The Federal Rules don't contemplate that a defendant may get a case dismissed for factual insufficiency while concealing evidence that supports plaintiff's case . . . The California anti-SLAPP statute allows for precisely that."[114]

Chief Judge Kozinski found inconsistency between the analysis undertaken in *Newsham* and in another case concerning a different element of the anti-SLAPP statute, *Metabolife International, Inc. v. Wornick*.[115] In

112. *Id.*
113. *Id.* at 274 (Kozinski, C.J., dissenting).
114. *Id.*
115. *Id.* (discussing Metabolife Intern'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir.2001)).

Metabolife, the Ninth Circuit refused to apply the "discovery-limiting aspects" of the anti-SLAPP statute,[116] preventing the defendants in SLAPP suits from shortening the discovery phase of the litigation process.[117] Chief Judge Kozinski thought this inconsistency between *Metabolife* and *Newsham* resulted in a "hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed."[118]

He criticized *Newsham*, and the opinions of the First and Fifth Circuits that had agreed with it, and he called for the Ninth Circuit to set a new trend among the federal courts in applying anti-SLAPP statutes in diversity cases.[119]

> It's time we led the way back out of the wilderness. Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof. As a three judge panel, *Metabolife* could only do so much, and we are generally bound to follow *Newsham*. But if this or another case were taken en banc, we could take a fresh look at the question. I believe we should.[120]

Trump University took Chief Judge Kozinski's hint about an *en banc* hearing and moved for reconsideration by the entire Ninth Circuit. The motion was denied,[121] but the denial inspired its own dissent by Judge Watford, who was joined by Chief Judge Kozinski and Judges Paez and Bea.[122] Mostly, Judge Watford followed Chief Judge Kozinski's arguments against *Newsham*; but he departed from the earlier dissenting opinion in one significant respect. Unlike Chief Judge Kozinski, he did not begin from the premise that the anti-SLAPP statute was purely procedural; he therefore undertook the analysis of whether its provisions conflicted with Fed. R. Civ.

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116. *Metabolife*, 264 F.3d at 845

117. *Makaeff,* 715 F.3d at 275 (Kozinski, C.J., dissenting) ("*Metabolife* crippled the anti-SLAPP statute by forcing defendants sued in federal court to suffer the slings and arrows of outrageous discovery, pushing back by months or years the time when they can free themselves from litigation").

118. *Makaeff,* 715 F.3d at 275 (Kozinski, C.J., dissenting).

119. *Id*. (criticizing Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010) and Henry v. Lake Charles American Press, LLC, 566 F.3d 164 (5th Cir. 2009)).

120. *Makaeff,* 715 F.3d at 275 (Kozinski, C.J., dissenting).

121. Makaeff v. Trump University, LLC, 736 F.3d 1180 (9th Cir. 2013).

122. *Makaeff*, 736 F.3d at 1188 (Watford, J., dissenting).

P. 12 and 56. And he concluded there was a direct conflict that had to be resolved in favor of applying the federal procedural rules.[123]

Judge Watford's analysis of the conflict depended upon Justice Scalia's opinion in *Shady Grove*.[124] Like Justice Scalia, Judge Watford considered whether the federal procedural rule or rules sought to answer the same question as the state-law rule. Judge Watford concluded that the special motion to strike provision of the anti-SLAPP statute was directed at the same question as Federal Rules 12 and 56: what must the plaintiff show to establish that his claim is viable, both before and after discovery.[125] Regarding Rule 12, he noted that, "[b]y forcing the plaintiff to establish that success is not merely plausible but probable, the anti-SLAPP statute effectively stiffens the Rule 12 standard for testing the legal sufficiency of a claim."[126] Similarly, he concluded that "[t]he anti-SLAPP statute eviscerates Rule 56 by requiring the plaintiff to prove that she will probably prevail if the case proceeds to trial — a showing considerably more stringent than identifying material factual disputes that a jury could reasonably resolve in the plaintiff's favor."[127]

B. The District of Columbia Circuit

In a 2015 decision, the D.C. Circuit echoed the analysis of the Ninth Circuit dissenters, particularly in its reliance on the plurality opinion in *Shady Grove*. There, *Abbas v. Foreign Policy Group, LLC*,[128] the court considered whether and to what extent the anti-SLAPP statute from the District of Columbia could apply in a diversity case brought by Yasser Abbas, the son of Palestinian leader Mahmoud Abbas. Abbas alleged that he was defamed in an article published on the internet, which had suggested that his personal wealth was the product of a corrupt connection to his father's political activity.[129] The defendant, the entity that published the article on its website, moved to dismiss, relying on the D.C. Anti-SLAPP Act, which, like its sibling statutes, made it possible to dismiss an action before discovery was complete when the case arose from an act involving advocacy about a matter

123. *Id*.
124. *Id*. ("Viewed through *Shady Grove*'s lens, California's anti-SLAPP statute conflicts with Federal Rules 12 and 56.").
125. *Makaeff*, 736 F.3d at 1188-89 (Watford, J., dissenting).
126. *Id*. at 1189 (Watford, J., dissenting).
127. *Id*.
128. Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328 (D.C. Circuit 2015).
129. *Id*. at 1333.

of public concern and when the plaintiff could not show a probability of success on the merits.[130] The district court granted the motion.[131]

The D.C. Circuit began with the same fundamental inquiry as the plurality opinion in *Shady Grove* and as the dissenting opinions in *Makaeff*: does the state-law rule answer the same question as the applicable federal procedural rule?[132] The D.C. Circuit concluded there was such a conflict in *Abbas*.[133] "[U]nlike the D.C. Anti-SLAPP Act, the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal. Under *Shady Grove,* therefore, we may not apply the D.C. Anti-SLAPP Act's special motion to dismiss provision."[134]

In supporting this conclusion, the D.C. Circuit specifically rejected that the anti-SLAPP statute created a substantive right that deserved federal deference under *Erie*.[135] The defendants in *Abbas* argued that the anti-SLAPP statute creates a form of qualified immunity against tort liability, which is a substantive right.[136] But the D.C. Circuit firmly rejected that contention, characterizing qualified immunity as a procedural right and affirming its own conclusion that the D.C. Anti-SLAPP Act created a procedural regime that impermissibly competed with the Federal Rules:

> Qualified immunity heightens the substantive showing a plaintiff must make in order to hold a defendant liable. To over-simplify for present purposes, qualified immunity allows defendants to avoid liability even when they may have violated the law so long as they acted reasonably. Qualified immunity (on its own) does not tell a court what showing is necessary at the motion to dismiss or summary judgment stages in order to dismiss a case before trial. Rather, Federal Rules 12 and 56 do that. The D.C. Anti-SLAPP Act, to use the words of the D.C. Court of Appeals, establishes a new "procedural mechanism" for dismissing certain cases before trial.[137]

Having reached this conclusion about the procedural character of the anti-SLAPP statute, the *Abbas* Court sided with the dissenting judges in

130. *Id*. at 1333-34.
131. Abbas v. Foreign Policy Group, LLC, 975 F. Supp. 2d 1, 20 (D.D.C. 2013).
132. *Abbas*, 783 F.3d at 1333 (citing *Shady Grove*, 559 U.S. at 398-99).
133. *Abbas*, 783 F.3d at 1333-34.
134. *Id*. at 1334.
135. *Id*. at 1335.
136. *Id*.
137. *Id*.

Makaeff and dismissed the contrary opinions of other circuit courts as "unpersuasive."[138]

VI. RESOLVING THE CONFLICT BETWEEN THE CIRCUITS BY CONSIDERING THE SUBSTANTIVE PUBLIC RIGHTS CREATED BY ANTI-SLAPP STATUTES

Given the competing analyses in the leading appellate opinions, *Shady Grove* holds the key to resolving the division of opinion among the federal circuit courts on the applicability of anti-SLAPP statutes in diversity cases. The circuit split seems to depend upon conclusions about what the holding of *Shady Grove* is, in light of difference in analysis between Justice Scalia's plurality opinion and Justice Stevens' concurring opinion. In *Godin*, the First Circuit followed Justice Stevens.[139] In *Abbas* and in the dissenting opinions in *Makaeff*, the judges followed Justice Scalia's analysis for the plurality.[140]

The most obvious way to reach a conclusion about the authoritative holding of *Shady Grove* is to follow the judicially created rules for interpreting fractured opinions. According to those rules, as set forth by the Supreme Court in *Marks v. United States*,[141] in a case before a panel of appellate judges, when no single opinion commands the assent of a majority, the holding is the narrowest conclusion upon which a majority of the judges agree.[142] But the *Abbas* Court nicely explained why this rule hurts much regarding *Shady Grove*:

> So four Justices adopted one formulation. One Justice adopted a different formulation. And four Justices did not address the question. What should we do in the face of such an unresolved 4-1 disagreement? Neither the 4-Justice view nor the 1-Justice view on its own is binding in these unusual circumstances. Moreover, neither opinion can be considered the *Marks* middle ground or narrowest opinion, as the four Justices in dissent simply did not address the issue.[143]

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138. *Abbas*, 783 F.3d at 1335-36 ("we agree with Judge Kozinski and Judge Watford that [*Godin* and *Henry*] are ultimately not persuasive.").

139. *See Godin*, 629 F.3d at 86-87.

140. *Abbas*, 783 F.3d at 1333; *Makaeff*, 736 F.3d at 1188-89 (Watford, J., dissenting); *Makaeff*, 715 F.3d at 272-73 (Kozinski, J., dissenting).

141. Marks v. United States, 430 U.S. 188 (1977).

142. *See id.*

143. *Abbas*, 783 F.3d at 1336-37.

Because the conventional canons of interpretation fail to solve the dilemma created by the circuit split, another approach is necessary. Such an approach begins with a consideration of just what divides the analyses of Justice Scalia and Stevens in *Shady Grove*, and, by extension, the analyses of the circuit judges who would apply state anti-SLAPP statutes in diversity cases and those who would not. The point of division in both *Shady Grove* and the anti-SLAPP cases is about whether the state-law rule is purely procedural or has a substantive character. When a judicial opinion characterizes a state-law rule as purely procedural, it is supplanted by the applicable Federal Rule of Civil Procedure. When a judicial opinion characterizes a state-law rule as having substantive elements, the court typically applies the state-law rule in the name of federalism.

It is difficult to place anti-SLAPP statutes into either the procedural or substantive box. On the one hand, such statutes have a procedural orientation because they create procedural instruments, such as the "special motion to dismiss," shift burdens of proof, and do other things to alter the ordinary course of pre-trial procedure. They advance a substantive legal policy about when and whether state-law rights can be enforced through litigation, and they provide litigants with substantive remedies, such as fee-shifting on special motions to dismiss.

Ultimately, the way to decide whether anti-SLAPP statues are substantive or procedural is to consider that they create rights that belong to the public and to private individuals. When a state enacts an anti-SLAPP statute, it makes a policy judgment that the public has an important interest in a vigorous public debate about matters of common concern and that individuals or entities should not be able to mute or silence that debate by litigating attenuated claims of right against persons with an idea or opinion that the public deserves to hear. To effect this policy objective, anti-SLAPP statutes give individual litigants certain procedural tools they can employ in individual cases. These procedural instruments serve the substantive public right to promote – or, at least, protect – individual advocacy on matters of public concern.

As Justice Stevens pointed out in *Shady Grove*, a state may choose "to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies" and, when they do, "federal courts must recognize and respect that choice."[144] When courts have concluded that anti-SLAPP statutes are purely procedural, they have focused too narrowly on the

144. *Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring) (citation omitted).

procedural means for accomplishing a substantive end. Perhaps this narrow focus occurs because these courts think of litigation as a forum exclusively reserved for the vindication of individual interests. From that viewpoint, a rule that shifts the burden of going forward in the early stages of a case seems entirely procedural because it does not change the substantive rights held by the individual litigant. If, however, litigation is understood as a forum in which the public interest can be served through the actions of individual litigants, the meaning of a burden-shifting rule seems different. Such a rule creates a substantive right held by the public has a whole.

Viewed in the broadest context, anti-SLAPP statutes create a substantive right for the public – a right to enjoy a vigorous public debate on matters of common concern. Towards that substantive end, these statutes delegate vindicating that public right to private parties involved in litigation arising from public advocacy. That delegation involves giving those private parties certain procedural tools. The principles of federalism should not be used to prevent a state from choosing procedural means to create a substantive public right.

VII. CONCLUSION

The recent trend of decisions in the federal circuit courts threatens both the viability of state anti-SLAPP statutes and the important interests in public debate that lie behind those statutes. If anti-SLAPP statutes cannot be applied in federal diversity actions, federal courts will become the forum of choice for well-heeled private parties who wish to use marginally meritorious litigation to stifle public criticism or to alter the dynamics of public debate. This would be an unfortunately ironic outcome.

The enactment of a federal anti-SLAPP statute would be one way to avoid this outcome. But, regardless of whether such legislation is ever adopted, a question remains about whether, in diversity actions, the federal courts should respect the state policy choices about how to protect public advocacy and debate through anti-SLAPP laws. These state choices differ from each other, and they would undoubtedly differ from the policy choices reflected in any prospective federal anti-SLAPP statute. As this paper has shown, because these statutes each create a substantive right that belongs to the public fundamental principles of federalism require that the federal courts enforce these substantive rights and respect the policy choices that they embody.