No. 18-696

In The
Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, ET AL.,

Respondents.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PLANNED PARENTHOOD NORTHERN CALIFORNIA
BETH H. PARKER
2185 Pacheco Street
Concord, CA 94250

PLANNED PARENTHOOD FEDERATION OF AMERICA
HELENE T. KRASNOFF
1110 Vermont Avenue, NW, Ste. 300
Washington, DC 20005-6300
(202) 973-4800

ARNOLD & PORTER KAYE SCHOLER LLP
STEVEN L. MAYER
Counsel of Record
AMY L. BOMSE
SHARON D. MAYO
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 471-3100
steve.mayer@arnoldporter.com

Attorneys For Respondents

QUESTIONS PRESENTED

1. When a defendant files an anti-SLAPP motion attacking state-law claims in a federal lawsuit, and the motion is based solely on the alleged legal insufficiency of the plaintiff's complaint, and raises no factual issues, does the plaintiff in responding to the motion have an obligation to show that its state-law claims are supported by evidence sufficient to survive a motion for summary judgment or non-suit under state law?

2. Does the First Amendment pose an insurmountable legal barrier to one of Respondents' eleven state law claims, even though that claim includes a request for damages that are not caused by Petitioners' expressive activities?

LIST OF PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS

Petitioners: DAVID DALEIDEN, aka Robert Daoud Sarkis; GERARDO ADRIAN LOPEZ; CENTER FOR MEDICAL PROGRESS; and BIOMAX PROCUREMENT SERVICES, LLC. All Petitioners are Defendants in the U.S. District Court for the Northern District of California and were the Appellants in the Court of Appeals for the Ninth Circuit. Petitioner BioMax Procurement Services, LLC is wholly owned by Petitioner Center for Medical Progress.

Respondents: PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD: SHASTA-DIABLO, INC., dba Planned Parenthood Northern California; PLANNED PARENTHOOD MAR MONTE, INC.; PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST; PLANNED PARENTHOOD LOS ANGELES; PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC.; PLANNED PARENTHOOD OF SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES, INC.; PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC.; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; PLANNED PARENTHOOD GULF COAST; and PLANNED PARENTHOOD CENTER FOR CHOICE. The Planned Parenthood entities are Plaintiffs in the U.S. District Court for the Northern District of California and were the Appellees in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, counsel for Respondents states that PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD: SHASTA-DIABLO, INC. dba Planned Parenthood Northern California; PLANNED PARENTHOOD MAR MONTE, INC.; PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST; PLANNED PARENTHOOD LOS ANGELES; PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC.; PLANNED PARENTHOOD OF SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES, INC.; PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC.; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; PLANNED PARENTHOOD GULF COAST; and PLANNED PARENTHOOD CENTER FOR CHOICE have no parent corporation and there is no publicly-held corporation that owns 10% or more of their stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS ii

CORPORATE DISCLOSURE STATEMENT iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 8

I. THE ANTI-SLAPP ISSUE THIS CASE PRESENTS IS A NARROW, FACT-SPECIFIC QUESTION THAT DOES NOT WARRANT REVIEW. 8

A. The Court of Appeals' Resolution Of The Narrow Issue It Decided Does Not Warrant Review 9

B. The Court of Appeals' Decision Is Correct. 12

II. THERE IS ALSO NO REASON TO REVIEW THE COURT OF APPEALS' UNPUBLISHED DECISION REJECTING PETITIONERS' MOTION ON THE MERITS 17

TABLE OF CONTENTS

Page

III. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE CIRCUIT SPLIT REGARDING THE APPLICABILITY OF STATE ANTI-SLAPP STATUTES IN FEDERAL COURT. 21

A. No Party Contends That The Federal Courts Cannot Apply State Anti-SLAPP Statutes. 22

B. Petitioners Failed Below To Advance The Arguments They Now Make. 23

C. The Court Already Has Had An Opportunity To Address The Circuit Split And Failed To Do So. 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Abbas v. Foreign Policy Grp., LLC,
783 F.3d 1328 (D.C. Cir. 2015).....22

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....14, 15

Animal Legal Def. Fund v. Wasden,
878 F.3d 1184 (9th Cir. 2018).....18, 19

Ashcroft v. Iqbal, 556
U.S. 662 (2009).....14

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....14

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991).....2, 18

Compuware Corp. v. Moody's Inv'rs Servs., Inc.,
499 F.3d 520 (6th Cir. 2007).....19, 20

Cuba v. Pylant,
814 F.3d 701 (5th Cir. 2016).....10

Cutter v. Wilkinson,
544 U.S. 709 (2005).....24

Davis v. United States,
417 U.S. 333 (1974).....9

TABLE OF AUTHORITIES

Page(s)

Delta Air Lines, Inc. v. August,
450 U.S. 346 (1981).....24

Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.,
635 F.3d 1106 (8th Cir. 2011).....20

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938).....3, 10, 23

Food Lion, Inc. v. Capital Cities/ABC, Inc.,
194 F.3d 505 (4th Cir. 1999).....19

Godin v. Schencks,
629 F.3d 79 (1st Cir. 2010).....22

Hanna v. Plumer,
380 U.S. 460 (1965).....3, 23

Henry v. Lake Charles Am. Press, L.L.C.,
566 F.3d 164 (5th Cir. 2009).....9, 10, 22

Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.,
885 F.3d 659 (10th Cir.), *cert. denied*, 139 S. Ct. 591 (2018).....3, 22, 24

Makaeff v. Trump Univ., LLC,
736 F.3d 1180 (9th Cir. 2013).....22

Metabolife Int'l, Inc. v. Wornick,
264 F.3d 832 (9th Cir. 2001).....15, 22

TABLE OF AUTHORITIES

Page(s)

MMM Holdings, Inc., v. Reich,
21 Cal. App. 5th 167 (2018).....12

Nat'l Abortion Fed'n v. Ctr. for Med. Progress,
685 F. App'x 623 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1438 (2018).....4

Nat'l Abortion Fed'n v. Ctr. for Med. Progress,
No. 15-cv-03522-WHO, 2016 WL 454082 (N.D. Cal. Feb. 5, 2016), *aff'd*, 685 F. App'x 623 (9th Cir. 2017), *cert denied*, 138 S. Ct. 1438 (2018).....4, 5

Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress,
No. 16-cv-00236-WHO (DMR), 2019 WL 311622 (N.D. Cal. Jan. 24, 2019) 4

Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.,
559 U.S. 393 (2010).....3, 12, 16, 17, 23, 24

Snead v. Metro. Prop. & Cas. Ins. Co.,
237 F.3d 1080 (9th Cir. 2001).....16

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993).....17

United States ex rel. Newsham v. Lockheed Missiles & Space Co.,
190 F.3d 963 (9th Cir. 1999).....17, 22

TABLE OF AUTHORITIES

Page(s)

STATUTES AND RULES

42 U.S.C. § 289g-2 4

FED. R. CIV. P.
- 8 13
- 12 ..... 13, 14, 15, 16, 17
- 12(b)(6) 5, 6, 7, 13
- 56 ..... 14, 15, 17
- 56(b) 14, 15

SUP. CT. R.
- 10(a) 1
- 10(c) 1, 9

CAL. CODE CIV. PROC.
- § 425.16 5
- § 425.16(f) 15
- § 425.16(g) 15

OTHER AUTHORITIES

5B CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357 (3d ed. 2015) 21

THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 8.1 (2018) 10

INTRODUCTION

This case does not satisfy any of the criteria for granting certiorari contained in this Court's rules. It presents neither a conflict between Court of Appeals' decisions nor "an important question of federal law that has not been, but should be, decided by this Court." SUP. CT. R. 10(a), (c). Instead, it presents only a narrow question concerning how the federal courts should interpret a single aspect of California's anti-SLAPP statute in a unique procedural context.

In response to a complaint alleging eleven state-law causes of action, brought under the district court's supplemental jurisdiction, Petitioners filed a motion to strike under California's anti-SLAPP statute. The motion was based only on the alleged insufficiency of Respondents' state-law claims. Respondents "responded in kind, defending the legal sufficiency of their pleading." Pet. App. 13a. Petitioners' reply memo then argued that, because Respondents had failed to produce evidence in response to Petitioners' motion, they had failed to carry the burden imposed by California's anti-SLAPP statute. *Id.* However, the district court held that because Petitioners' motion to strike attacked only "pleading deficiencies," the court limited its review to the adequacy of Respondents' pleadings and denied the motion. Pet. App. 8a.

The Court of Appeals affirmed. In its published opinion, it held that a plaintiff faced with an anti-SLAPP motion that attacks only the legal sufficiency of its complaint need only respond to the defendant's challenges, and need not produce evidence to rebut evidence that the defendant never submitted. Pet. App. 13a–14a. Then, in an unpublished memorandum disposition, the court held that Respondents'

state-law claims were legally sufficient. Pet. App. 23a–36a.

These decisions do not warrant review. The court's published decision does not conflict with any other Court of Appeals decision or any decision of this Court, and addresses only the narrow question of whether California's anti-SLAPP statute requires a federal plaintiff to produce evidence in response to an anti-SLAPP motion in the unusual case where the motion challenges only the complaint's legal sufficiency. That question, which turns on the application of a single state's anti-SLAPP statute to an idiosyncratic factual situation, is both unimportant and unlikely to recur. *See* Part I(A), *infra*. Moreover, the Court of Appeals properly recognized that a wooden application of the burden-shifting aspect of California's anti-SLAPP statute would conflict with the Federal Rules, and properly interpreted the former to conform to the latter. *See* Part I(B), *infra*.

Similarly, there is no reason to review the Court of Appeals' decision unpublished and non-precedential decision affirming the district court's denial of Petitioners' anti-SLAPP motion on the merits. Petitioners do not contend that that decision conflicts with any other decision by the Courts of Appeals or any decision by this Court, and it does not. Instead, the court's unpublished decision does nothing more than apply the unremarkable principle—endorsed by this Court in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)—that the First Amendment does not give anyone the right to trespass on private property, breach contracts, or violate facially neutral state privacy laws. *See* Part II, *infra*.

Instead of focusing on what the Court of Appeals actually decided, the Petition's primary focus is the

broader, antecedent issue of whether federal courts should apply state anti-SLAPP statutes. Although there is a circuit split on that issue, that issue is not disputed here. Neither party has contended that federal courts cannot apply anti-SLAPP statutes. Without an actual controversy on this critical issue, this case is a poor vehicle for resolving the circuit split on which Petitioners rely so heavily. *See* Part III(A), *infra*. In addition, the arguments that Petitioners make in their brief—based on cases such as *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *Hanna v. Plumer*, 380 U.S. 460 (1965), or *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), were neither raised below nor addressed by the Court of Appeals. *See* Part III(B), *infra*. Moreover, when this Court had an opportunity to resolve the circuit split in a case squarely presenting the issue only a few months ago, it declined to do so. *AmeriCulture, Inc. v. Los Lobos Renewable Power, LLC*, 139 S. Ct. 591 (2018) (cert. denied on Dec. 3, 2018). *A fortiori*, there is no reason to grant certiorari in this case. *See* Part III(C), *infra*.

STATEMENT OF THE CASE

Respondents brought this action more than three years ago to hold Petitioners responsible for an elaborate multi-year scheme in which they first created a fake fetal tissue procurement company and then produced and used false government identification to infiltrate and secretly film Respondents' staff at private reproductive health care conferences organized by both Planned Parenthood and the National Abortion Federation ("NAF"). This conduct violated numerous state laws, as well as confidentiality agreements that Petitioners signed fully intending to violate them. Indeed, Petitioners "do not contest

that they engaged in misrepresentation and breached their contracts." *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 685 F. App'x 623, 626 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1438 (2018) ("*NAF*").

Wearing their hidden cameras, and posing as employees of the fake company, Petitioners actively sought to entrap attendees at these private conferences into providing sound bites. Thus, Petitioner "Daleiden told his associates that their 'goal' was to trap people into 'saying something really like messed up, like yeah, like, I'll give them, like, live everything for you. You know. If they say something like that it would be cool.'" *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-cv-03522-WHO, 2016 WL 454082, at *6 (N.D. Cal. Feb. 5, 2016), *aff'd*, 685 F. App'x 623 (9th Cir. 2017). Despite this, Planned Parenthood staff repeatedly stated in the secret recordings that Planned Parenthood does not make a profit from fetal tissue donation—statements that Petitioners edited out of the "highlight" videos that circulated virally on the internet. Indeed, the federal judge who reviewed hours of tape, including the recordings Petitioners point to most vigorously as evidence of Respondents' alleged wrongdoing, stated that "[h]aving reviewed the records or transcripts in full and in context, I find that no NAF attendee admitted to engaging in, agreed to engage in, or expressed interest in engaging in potentially illegal sale of fetal tissue for profit." *Id.* at *8; *see also Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-cv-00236-WHO (DMR), 2019 WL 311622, at *4 (N.D. Cal. Jan. 24, 2019) (finding no "evidence of actual criminal wrongdoing with respect to 42 U.S.C. § 289g-2" or "profiteering from the sale of fetal tissue" in recordings of two Planned

Parenthood physicians submitted by Petitioner Center for Medical Progress).

Petitioners' conspiracy put the safety and security of Respondents' personnel and patients at serious risk. After the release of the videos, there was a dramatic increase in threats, harassment, and criminal activities targeting abortion providers and their supporters. *Nat'l Abortion Fed'n*, 2016 WL 454082, at *20. Planned Parenthood bore the brunt of these attacks, which included, most horrifically, the shootings at a Planned Parenthood health center in Colorado Springs in November 2015. *Id.* at *11, *22, *23 n.42. Petitioners' conspiracy also cost Respondents millions of dollars in increased security costs.

Respondents brought this action to recover the costs they incurred as a result of Petitioners' infiltration, as well as statutory penalties, and to obtain an injunction against further abuse. Their fifteen causes of action are based on the federal Racketeer Influenced and Corrupt Organizations (RICO) Act and the federal wiretap law; California, Florida and Maryland laws against nonconsensual taping, invasion of privacy, fraud, and trespass; and breaches of multiple contracts. *See* Pet. App. 41a–43a.

Petitioners filed a motion to dismiss all fifteen causes of action under Federal Rule of Procedure 12(b)(6) and a motion to strike Plaintiffs' state law claims under Code of Civil Procedure Section 425.16 ("anti-SLAPP statute"). As the district court explained, Petitioners' anti-SLAPP motion "repeat[ed] the *identical* arguments they made on their motions to dismiss" (Pet. App. 117a (emphasis in original)), because the motion was "based solely on pleading deficiencies," and "did not expressly

challenge plaintiffs' ability to prove with evidence the substance of any of [Respondents'] state law claims." Pet. App. 118a (emphasis omitted).[1]

Faced with a motion to strike that attacked only their complaint's alleged legal insufficiency, Respondents "responded in kind, defending the legal sufficiency of their pleading." Pet. App. 13a. Accordingly, they did not submit evidence in opposition to the motion to strike or request a stay of the motion in order to seek discovery.

While Petitioners' opening memorandum had acknowledged that an anti-SLAPP motion based on a complaint's alleged legal insufficiency "must be treated in the same manner as a motion under Rule 12(b)(6)" (Ninth Circuit Excerpts of Record 105), their reply memorandum argued that, because Respondents had not produced evidence to support the allegations in their complaint, they had not met their burden of showing that their claims have the minimal merit required by California's anti-SLAPP statute. Pet. App. 13a. But the district court rejected the argument, denying both Petitioners' motion to dismiss and the motion to strike. Pet. App. 124a–125a.

The court held that in order to impose an evidentiary burden on Respondents, Petitioners had "to raise explicit arguments that [Respondents] would not be able to prove (as opposed to plead) specific claims." Pet. App. 120a. They had not done so.

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[1] A separate motion to strike was filed by another defendant, Susan Merritt. *See* Pet. App. 8a. However, because she has not petitioned for certiorari, her motion need not be discussed.

Indeed, the district court held that Petitioners had "fail[ed] to identify" any instances "where [Petitioners] expressly argued that [Respondents] would be unable to come forth with *evidence* to support a specific claim." Pet. App. 118a–119a (emphasis in original).

Petitioners appealed, and the Court of Appeals unanimously affirmed. The court held that "when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated." Pet. App. 14a. Accordingly, when an anti-SLAPP motion urges "only insufficiency of pleadings, then the plaintiff can properly respond merely by showing sufficiency of pleadings, and there's no requirement for a plaintiff to submit evidence to oppose contrary evidence that was never presented by defendants." Pet. App. 13a–14a.

Based on these rulings, the Court of Appeals held that "the district court correctly applied a Rule 12(b)(6) standard to [Petitioners'] Motion to Strike challenging the legal sufficiency of [Respondents'] complaint." *Id.* Then, in an unpublished memorandum, the Court of Appeals upheld the district court's ruling that each of Respondents' state-law claims was sufficient to withstand a motion to dismiss under the federal Rule 12(b)(6) standard. Pet. App. 23a–36a.[2]

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[2] Judges Gould and Murguia wrote a concurring opinion "to challenge the appropriateness of our court reviewing denials of anti-SLAPP motions to strike on interlocutory appeal." Pet. (. . . continued)

Petitioners then filed a petition for panel rehearing and rehearing en banc. The petition was denied, with no judge voting to take the case en banc. Pet. App. 129a–130a.

REASONS FOR DENYING THE WRIT

I.

THE ANTI-SLAPP ISSUE THIS CASE PRESENTS IS A NARROW, FACT-SPECIFIC QUESTION THAT DOES NOT WARRANT REVIEW.

Contrary to the Petition, the Court of Appeals did not hold, expressly or impliedly, that "state anti-SLAPP statutes do not apply in federal court." Pet. 21. Instead, its holding was much narrower: that where a defendant's anti-SLAPP motion challenges only the legal sufficiency of the plaintiff's pleadings, to defeat the motion the plaintiff need only show that its pleadings are legally sufficient, and need not introduce evidence that supports its claims. Pet. App. 13a–15a. That holding does not warrant review. *See* Part II(A), *infra*. Moreover, it was also correct. *See* Part II(B), *infra*.

(Continued . . .)

App. 16a. However, the Petition does not challenge the Court of Appeals' jurisdiction to hear the appeal, doubtless because Petitioners are the appellants.

A. The Court of Appeals' Resolution Of The Narrow Issue It Decided Does Not Merit Review.

There is no reason why this Court should review the narrow issue that the Court of Appeals actually decided. To begin with, that issue turns on the interaction between one provision of one state's anti-SLAPP statute and the Federal Rules of Civil Procedure. That is hardly "an important question of federal law." SUP. CT. R. 10(c).

In addition, the Court of Appeals' decision does not conflict with any of the cases cited by Petitioners, which neither address nor resolve the issue decided below. Instead, these cases all deal with the separate and broader question of whether anti-SLAPP statutes apply at all in federal court. *See* Part III(A), *infra*. Indeed, Petitioners do not contend that any other Court of Appeals has faced the issue actually decided in this case and given a different answer.[3]

Petitioners' silence is no accident, for the decision below does not conflict with any other Court of Appeals decision. The closest case is *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164 (5th

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[3] Petitioners do argue that "the decision below directly conflicts with Ninth Circuit precedent." Pet. 27. But the Ninth Circuit rejected that contention when it denied rehearing en banc without dissent. Pet. App. 129a–130a. Moreover, an intra-circuit conflict, even if one existed, is not a basis for granting certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). That is even more true for a conflict between district court decisions. *See* Pet. 38 (complaining that Petitioners "have received different resolutions from the same district court judge").

Cir. 2009), where the Fifth Circuit reversed the denial of a motion to strike because the plaintiff did not present sufficient evidence in support of his claims. *Id.* at 181–82. But there is no indication in that case that the defendants challenged only the legal insufficiency of the plaintiff's claims. More importantly, the Fifth Circuit subsequently held that "*Henry* does not resolve . . . whether, under the *Erie* doctrine, the array of state procedural rules surrounding anti-SLAPP motions to dismiss . . . follow the core anti-SLAPP motion to dismiss into federal court." *Cuba v. Pylant*, 814 F.3d 701, 706 n.6 (5th Cir. 2016). Accordingly, the Fifth Circuit has not decided the issue resolved by this appeal.

In addition, the unique set of procedural circumstances that gave rise to the issue presented by the Petition is unlikely to recur. For one thing, Petitioners have failed to show that the burden-shifting required by California's anti-SLAPP statute is replicated in other states. The most Petitioners say is that "at least ten states, the District of Columbia, and Guam have modeled their anti-SLAPP statutes on features or interpretations of California's anti-SLAPP statute." Pet. 17 (quoting THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 8.1 (2018)). But this falls far short of showing that the idiosyncratic burden-shifting effect of California's anti-SLAPP statute has been incorporated in the anti-SLAPP statutes enacted in other states.[4]

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[4] Indeed, if the compilation of anti-SLAPP statutes contained in the treatise Petitioners cite demonstrates anything, it is that many states have adopted anti-SLAPP statutes with language that differs from the California statute. (. . . continued)

Moreover, the issue presented by this case is extremely unlikely to recur. For the same issue to arise in another circuit, a defendant would have to file an anti-SLAPP motion based only on the complaint's alleged legal insufficiency, and the plaintiff would have to limit its response to those arguments. Petitioners offer no reason why any other parties would follow the lead of the parties to this case.[5]

That is particularly true in light of the Court of Appeals' decision. That decision notifies defense counsel in cases covered by a burden-shifting anti-SLAPP statute that if they want to impose an evidentiary burden on the plaintiff they need only "challenge[] the factual sufficiency of a claim." Pet.

(Continued . . .)

These differences could well result in future cases presenting different issues when a litigant seeks to apply these other anti-SLAPP statutes in federal court.

[5] Nor is there merit to Petitioners' repeated claims that the decision below invites forum-shopping. Pet. 7, 27. It is quite unlikely that *any* plaintiff would file in federal court instead of state court merely to avoid having to produce evidence in the unlikely event that defendants filed an anti-SLAPP motion based only on the complaint's alleged legal insufficiency.

The state case cited by Petitioners involving a different plaintiff (Pet. 38) proves nothing. Although Petitioners have failed to inform the Court of the fact, their anti-SLAPP motion in that case was *denied*. *See* Defendant-Appellants' Petition for Panel Rehearing and Rehearing En Banc at 13 ("Defendants appealed the denial of their anti-SLAPP motion"). Thus, Petitioners have filed anti-SLAPP motions in all three cases arising from their infiltration (one in state court and two in federal court). Each motion has been denied, thereby negating Petitioners' claim that the decision below will result in forum-shopping.

App. 14a. Making such a challenge is not very difficult. Accordingly, there is no reason to think that the issue presented by this case will *ever* recur.[6]

B. The Court of Appeals' Decision Is Correct.

The Court of Appeals' resolution of the narrow issue before it was also correct. As Petitioners acknowledge, the first step in deciding whether to apply a state law in federal court is to "determine whether there is a conflict between the state law and a Federal Rule of Civil Procedure." Pet. 32 (citing

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[6] The ease by which defense counsel can impose an evidentiary burden on plaintiffs undermines Petitioners' hyperbolic claims that the decision below "den[ies] disfavored speech the special protection to which it is entitled under state law" (Pet. 6), "obliterat[es] defendants' protections against being dragged through a spurious lawsuit aimed at suppressing the exercise of their First Amendment rights" (*id.*), holds "that the California case law interpreting 'probability of prevailing' would no longer apply in federal court" (*id.* at 20), holds that "the central provision of anti-SLAPP statutes cannot be applied in federal court" (*id.* at 31), and "eviscerat[es] the central protection provided by anti-SLAPP statutes" (*id.* at 32). Contrary to these contentions, the decision below leaves defense counsel free to obtain the evidentiary protection of the anti-SLAPP statute in either of two ways. First, it can simply assert that the plaintiff has no evidence to prove its case. Second, it can provide evidence that the complaint is barred under one of the many state law privileges (such as the litigation privilege) that give absolute immunity under state law to broad categories of protected speech. *See, e.g.*, *MMM Holdings, Inc., v. Reich*, 21 Cal. App. 5th 167, 183 (2018) ("A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim").

Shady Grove, 559 U.S. at 398). If there is a conflict, the federal rule governs as long as it does not exceed statutory authorization or Congress's rulemaking power. *Shady Grove*, 559 U.S. at 398.

The Court of Appeals held that if, as in this case, an anti-SLAPP motion raises only legal issues, "the analysis is made under Fed. R. Civ. P. 8 and 12 standards." Pet. App. 11a (citation and internal quotation marks omitted). Respondents therefore "were not required to present prima facie evidence supporting [their] claims" (Pet. App. 12a), and "the district court did not err in refusing to evaluate the factual sufficiency of the complaint at the pleading stage." Pet. App. 14a–15a. Conversely, "when an anti-SLAPP motion challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply." Pet. App. 14a.

As the Court of Appeals recognized, interpreting California's anti-SLAPP statute in this manner was necessary to avoid a conflict between the statute and the Federal Rules. *See* Pet. App. 12a ("In order to prevent the collision of California state procedural rules with federal procedural rules, we will review anti-SLAPP motions to strike under different standards depending on the motion's basis. Our interpretation eliminates conflicts between California's anti-SLAPP law's procedural provisions and the Federal Rules of Civil Procedure"); 14a ("A contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure . . . .").

The court's concern was well-founded. Like a motion to dismiss under Rule 12(b)(6), Petitioners' motion to strike challenged only the complaint's

"pleading deficiencies." Pet. App. 8a. But the burdens imposed by a Rule 12(b)(6) motion in federal court and an anti-SLAPP motion in a California court are quite different. As long as the lawsuit arises from protected activity, an anti-SLAPP motion filed in state court requires the plaintiff to respond by producing evidence supporting the complaint's allegations, and this burden exists even if the motion challenges only the legal sufficiency of a complaint. Rule 12 imposes no similar requirement. Instead, when ruling on a motion to dismiss, the court must accept the plaintiff's factual allegations as true and—based on those allegations alone—determine whether the complaint plausibly states a claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Accordingly, the California anti-SLAPP statute imposes a burden on plaintiffs in state court that does not exist under the Federal Rules, a burden that is inconsistent with the careful framework the rules establish for securing the just, speedy, and inexpensive determination of claims.

Similarly, although it is not directly presented by this case (because Petitioners did not make an evidentiary showing in support of their motion), the burden-shifting framework imposed by California's anti-SLAPP statute in state court also conflicts with Rule 56. Under that rule, if a plaintiff needs discovery to obtain evidence necessary to defeat the motion for summary judgment, the court must allow it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). Moreover, under the Federal Rules, a summary judgment motion can be filed at any time before 30 days after the close of discovery, and can only be decided after giving the non-moving party an adequate time to conduct discovery. FED. R. CIV. P.

56(b); *Anderson*, 477 U.S. at 250 n.5. In contrast, discovery is normally prohibited under California's anti-SLAPP statute. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001); CAL. CODE CIV. PROC. § 425.16(g). Moreover, under California law an anti-SLAPP motion must usually be filed within 60 days of service of the complaint and must normally be heard within 30 days of its filing. *See* CAL. CODE CIV. PROC. § 425.16(f). Accordingly, as the Court of Appeals found, Rule 56 provides the non-moving party with procedural safeguards that do not exist under California's anti-SLAPP statute. *See* Pet. App. 14a.[7]

Petitioners nonetheless contend that there is no conflict between the Federal Rules and California's anti-SLAPP statute because Rules 12 and 56 "do not answer the same question as anti-SLAPP statutes." Pet. 33. Rules 12 and 56, Petitioners contend, address whether the plaintiff has met the appropriate burden to proceed past the pleading phase and the summary-judgment phase, respectively. In contrast, "California's anti-SLAPP statute" addresses whether a plaintiff has "presented a strong enough case to overcome the suspicion that he is using the

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[7] A future case may test whether the discovery-limiting provisions of state-law anti-SLAPP statutes trump the provision of Rule 56 authorizing stays of summary judgment motions so that the non-moving party can obtain necessary discovery. *See Metabolife Int'l*, 264 F.3d at 846 ("Because the discovery-limiting aspects of § 425.16(f) and (g) collide with the discovery-allowing aspects of Rule 56, these aspects of subsections (f) and (g) cannot apply in federal court"). But that issue is not presented here because Respondents did not seek to obtain discovery to oppose Petitioners' anti-SLAPP motion.

specter of a trial to suppress the defendant's First Amendment rights." *Id.*

Petitioners have reached the wrong answer because they posed the wrong question. While California's anti-SLAPP statute as a whole attempts to ensure that plaintiffs do not use lawsuits to stifle speech, the burden-shifting rule at issue in this case addresses a far more narrow question: whether a plaintiff must respond with evidence if the defendant's motion to strike attacks only the complaint's alleged pleading deficiencies. Rule 12 unambiguously answers that question "no."

That rule—and not a contrary state rule—must govern unless it exceeds statutory authorization or Congress's rulemaking power. *Shady Grove*, 559 U.S. at 398. But Petitioners do not challenge Rule 12 on this basis. Moreover, the Court has "rejected every statutory challenge to a Federal Rule" that has come before it. *Id.* at 407 (opinion of Scalia, J.). The Court of Appeals was therefore correct in interpreting California's anti-SLAPP statute to avoid a conflict with the Federal Rules.[8]

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[8] Petitioners also rely on Justice Ginsburg's dissenting opinion in *Shady Grove* to contend that the Court of Appeals should have interpreted the Federal Rules narrowly to avoid a conflict with the state's substantive law. Pet. 34–35. But even if that opinion were the law, it would not help Petitioners. The issue whether a plaintiff must produce the evidence supporting its complaint if the defendant's anti-SLAPP motion raises only legal issues is a classic procedural question: it regulates only what a defendant must do in order to impose a burden on plaintiff to come forward with evidence to support its claim. *See Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, (. . . continued)

Applying Rules 12 and 56 to motions to strike filed under California's anti-SLAPP statute in federal court does not frustrate the statute's purpose. Federal courts in the Ninth Circuit have long been applying the fee-shifting provision in the California statute, which requires that courts award fees to a defendant who files a successful motion to strike. *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999). Nothing about the decision below changes that rule; indeed, the Court of Appeals expressly recognized that attorney's fees and costs could continue to be awarded under the State's anti-SLAPP statute. *See* Pet. App. 12a–13a. Consequently, the decision below does not lessen the deterrent effect of an attorney's fee award on plaintiffs bringing meritless lawsuits aimed at a defendant's expressive activities.

II.

THERE IS ALSO NO REASON TO REVIEW THE COURT OF APPEALS' UNPUBLISHED DECISION REJECTING PETITIONERS' MOTION ON THE MERITS.

There is also no reason for this Court to review the Court of Appeals' unpublished decision affirming the district court's denial of Petitioners' motion to

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(Continued . . .)

1090–93 (9th Cir. 2001); *cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993). Accordingly, this portion of California's anti-SLAPP statute does not further "important state regulatory policies," and therefore need not be applied in federal court under the dissent's analysis in *Shady Grove*. 559 U.S. at 442 (citation and internal quotation marks omitted).

strike. As an initial matter, the decision is unpublished and non-precedential, and will therefore affect no one other than the parties to this case.

Moreover, that decision does not conflict with any other Court of Appeals decision or any decision by this Court. Indeed, Petitioners do not claim otherwise.

Instead, they argue that the Ninth Circuit's decision "contradicts its holding announced in [*Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018)] a mere three months earlier." Pet. 40. Likewise, Petitioners complain that the Court of Appeals "ignored *Wasden*" in affirming the denial of their motion to strike. Pet. 41. But Petitioners themselves "ignored *Wasden*": they did not mention that decision, much less claim that a conflict existed between *Wasden* and the decision in this case, in their petition for panel rehearing and rehearing en banc. Their claim of conflict has therefore been newly-minted for this Court.

Moreover, the conflict claim is meritless. *Wasden* invalidated two provisions of an Idaho "Ag-Gag" law, concluding that the statute could not "broadly criminalize[] making misrepresentations to access an agricultural production facility as well as making audio and video recordings of the facility without the owner's consent." 878 F.3d at 1189. *Wasden* found that these provisions unconstitutionally targeted "protected speech under the First Amendment." *Id.* at 1190. But *Wasden* also recognized that "the First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability." *Id.* This Court has said the same thing. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend

the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.").

That principle underlies Respondents' claims. Unlike the provisions of the statute invalidated in *Wasden*, Respondents' causes of action are based on statutes of general applicability prohibiting trespass, invasions of privacy, and recording conversations, as well as the common law principles providing a remedy for breaches of contract. *Wasden* thus supports, rather than undermines, the legal sufficiency of these claims.

Petitioners also contend that the First Amendment "bar[s] PPFA's claims for lack of legally cognizable damages." Pet. 41. This contention has largely been waived. The only First Amendment defense Petitioners raised in their Ninth Circuit briefs concerned Respondents' claim for fraudulent misrepresentation, and this was the only First Amendment issue the Ninth Circuit addressed. *See* AOB 43–45; Pet. App. 28a–29a. Consequently, Petitioners have waived any contention that the First Amendment bars the imposition of damages for all but one of Respondents' eleven state law claims. *See* p.1, *supra*.

Even as to that claim, Petitioners' contention is meritless. Petitioners cite the holding in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), that the First Amendment precluded the plaintiff in that case from recovering "reputational damages from publication." Pet. 22 (quoting *Food Lion*, 194 F.3d at 523). Likewise, they cite the holding in *Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007), that the plaintiff in that case sought "compensation for harm

caused to its reputation." Pet. 23 (quoting *Compuware*, 499 F.3d at 530). But Respondents do not seek damages for harm to their reputation, lost profits or loss of good will. Instead, as the Ninth Circuit acknowledged, the damages they seek include the increased costs for security and IT services that were directly caused by Petitioners' misrepresentations about their identity. Pet. App. 28a.[9]

Petitioners challenge the Court of Appeals' decision that Respondents do not seek reputation damages. Pet. 39. That fact-specific issue hardly warrants review, and certainly not at this early stage of the proceeding. Moreover, Petitioners make no attempt to demonstrate that the Court of Appeals mischaracterized the relief Respondents seek. Instead, Petitioners cherry-pick snippets from *the district court's* opinion which they say held that Respondents "had a legally-protectable commercial interest in what amounts to squelching future scrutiny of it." *Id.* (citing Pet. App. 83a, 92a). Needless to say, the district court said no such thing. Even if it had, that would not provide a basis for reviewing *the Court of Appeals'* opinion.

To survive a motion to dismiss, Respondents needed to claim only one item of permissible damage. *See Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp.*

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[9] The Ninth Circuit suggested, but did not decide, that other damages Respondents seek may be barred by "[n]otions of proximate cause." Pet. App. 28a. That, too, counsels against intervention by this Court at this time. *See* Pet. App. 29a ("A decision on the propriety of particular damages is premature at this stage").

L.L.C., 635 F.3d 1106, 1108–09 (8th Cir. 2011); 5B CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357 (3d ed. 2015) ("[I]t need not appear that the plaintiff can obtain the particular relief prayed for in the complaint, as long as the district judge can ascertain from what has been alleged that some relief may be granted by the court."). They did so by claiming the increased security and IT costs they were forced to spend as a result of Petitioners' pre-publication activities. That is more than sufficient to survive a motion to dismiss—and, consequently, to survive an anti-SLAPP motion that challenged only the complaint's alleged legal insufficiency.

Indeed, that is yet another reason why the Petition should be denied. In light of Petitioners' waivers, the only merits issue properly raised by the Petition is the narrow one of whether the First Amendment imposes an absolute bar to Respondents' fraudulent misrepresentation claim. There is no reason for the Court to review that issue now. Instead, resolution of any First Amendment issues raised by this case should be done in the first instance by the lower courts on the basis of a full factual record developed on summary judgment or at trial.

III.

THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE CIRCUIT SPLIT REGARDING THE APPLICABILITY OF STATE ANTI-SLAPP STATUTES IN FEDERAL COURT.

Instead of urging the Court to review how the Court of Appeals applied California's anti-SLAPP

statute in this case, Petitioners contend that the Court should grant certiorari "to resolve the circuit split regarding the applicability of state anti-SLAPP laws in federal court." Pet. 43. There are multiple reasons why that contention should be rejected.

A. No Party Contends That The Federal Courts Cannot Apply State Anti-SLAPP Statutes.

The D.C. Circuit and the Tenth Circuits have decided that state anti-SLAPP statutes cannot be applied in federal court. *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 668–73 (10th Cir.), *cert. denied*, 139 S. Ct. 591 (2018); *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333–36 (D.C. Cir. 2015). The First Circuit, the Fifth Circuit, and the Ninth Circuit have held otherwise. *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845–47 (9th Cir. 2001); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

This conflict is irrelevant to this Petition. Because they filed an anti-SLAPP motion, Petitioners have no interest in arguing that anti-SLAPP statutes do not apply in federal court. But neither do Respondents. They do not care whether they prevail on the merits of the appeal (as they did in the Court of Appeals) or by a dismissal for lack of jurisdiction. Indeed, they have never argued that federal courts cannot apply state-law anti-SLAPP statutes in appropriate cases.

Accordingly, the Ninth Circuit did not address that issue in the decision below.[10]

That makes this case a poor vehicle for resolving the circuit split on which the Petition so heavily relies. Instead, resolution of the split should await a case in which the parties have diametrically opposed positions on this fundamental issue. That is not this case.

B. Petitioners Failed Below To Advance The Arguments They Now Make.

Petitioners support their claim for review with an extended discussion of this Court's cases regarding the application of state law in federal diversity cases and an argument that these cases require the federal courts to apply state anti-SLAPP statutes. Pet. 11–15, 32–38. But this discussion, and the arguments that follow, were never presented in the courts below. Thus, neither Petitioners' merits briefs in the Court of Appeal nor their petition for panel rehearing and rehearing en banc mentioned *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *Hanna v. Plumer*, 380 U.S. 460 (1965), or *Shady Grove Orthopedic Assocs.,*

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[10] Petitioners nevertheless claim that the Ninth Circuit in this case "has aligned itself with the Tenth and the D.C. Circuits." Pet. 31. The contention is bizarre, because the Ninth Circuit has repeatedly held—over spirited dissents—that the anti-SLAPP statute *can* be invoked in federal court. *See, e.g.*, *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1180–81 (9th Cir. 2013). Nothing in the decision below holds otherwise. To the contrary, the Court of Appeals expressly recognized that the fee-shifting provisions of California's anti-SLAPP statute are still applicable in state law cases. Pet. App. 12a–13a.

P.A. v. Allstate Insurance Co., 559 U.S. 393 (2010), much less contend that these cases had any bearing on the issues presented by their appeal. Nor, of course, did the Court of Appeals address these cases or the purported conflict between these decisions and its narrow holding.

A "question . . . not raised in the Court of Appeals is not properly before us." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). Likewise, the Court does not consider issues not addressed by the lower courts. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here"). These principles, too, compel denial of the Petition. Whether *Shady Grove* and the other decisions cited by Petitioners require federal courts to apply state anti-SLAPP statutes should be decided in a case where the lower courts have been presented with, and addressed, that issue.

C. The Court Already Has Had An Opportunity To Address The Circuit Split And Failed To Do So.

Petitioners contend that the circuit split is not only important, but "already has drawn the attention of this Court." Pet. 28. But the only basis for this assertion is the fact that the Court requested a response to the "related petition" for certiorari in *AmeriCulture, Inc. v. Los Lobos Renewable Power, LLC*, (No. 18–89 July 16, 2018). Pet. 28–29. However, that petition was denied on December 3, 2018. *See* 139 S. Ct. 591.

The Petition in *Los Lobos* squarely presented the conflict on which Petitioners rely. That is, one party

claimed that anti-SLAPP statutes apply in federal court while the opposing party took the contrary position. *See* Petition for Writ of Certiorari at 25–26; Brief in Opposition at 21–22, *AmeriCulture, Inc. v. Los Lobos Renewable Power, LLC*, 139 S. Ct. 591 (2018) (No. 18-89). That is not true here. *See* Part III(A), *supra*. There is no reason why the Court would deny the Petition in *Los Lobos* and grant the Petition in this case.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

PLANNED PARENTHOOD NORTHERN CALIFORNIA
BETH H. PARKER
2185 Pacheco Street
Concord, CA 94250

PLANNED PARENTHOOD FEDERATION OF AMERICA
HELENE T. KRASNOFF
1110 Vermont Avenue, NW, Ste. 300
Washington, DC 20005-6300
(202) 973-4800

ARNOLD & PORTER KAYE SCHOLER LLP
STEVEN L. MAYER
Counsel of Record
AMY L. BOMSE
SHARON D. MAYO
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 471-3100
steve.mayer@arnoldporter.com

Attorneys For Respondents

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