No. 18-696

In The
Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS,
DAVID DALEIDEN, GERARDO ADRIAN LOPEZ,
AND BIOMAX PROCUREMENT SERVICES, LLC,

Petitioners,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA,
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 CENTRAL COAST CALIFORNIA,
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,

Respondents.

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

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit's decisions below decided two important questions of federal law that implicate citizens' First Amendment rights: (i) whether federal courts must grant defendants sued for engaging in First Amendment-protected speech the special motions to strike provided by states with anti-SLAPP statutes; and (ii) whether this Court's precedents permit litigants to recharacterize publication damages in order to circumvent the First Amendment. The Ninth Circuit's conclusions as to both issues conflict with this Court's precedents and decisions of other circuits. Therefore, both questions are ripe for review by this Court.

ARGUMENT

I. The Court Should Resolve the Circuit Split Regarding Federal Courts' Application of State Anti-SLAPP Motions.[1]

California, like many other states, has enacted an anti-SLAPP law to prevent plaintiffs from "chill[ing]

[1] It does not weigh against granting the writ that the parties did not brief "the application of state law in federal diversity cases" in lower courts. *But see* Opp. at 23. The parties thoroughly briefed the question of what standards should apply to the anti-SLAPP motions in this case, but until the Ninth Circuit decided otherwise, no one disputed that anti-SLAPP motions to strike were available to defendants in federal court in the Ninth Circuit, as clearly held in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999). Moreover, this Court will review questions that are resolved by the Court of Appeals. *See*, *e.g.*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976)

through abuse of the judicial process" the valid exercise of the constitutional rights of freedom of speech and petition. Cal. Code Civ. Proc. § 425.16(a). The Legislature determined that already-existing procedural mechanisms were insufficient to combat the "disturbing increase in lawsuits brought primarily to chill [free speech]." *Id.* Therefore it established a special motion to strike by which a defendant sued for the exercise of First Amendment rights can require a plaintiff to demonstrate the sufficiency of its case early in the lawsuit.[2] *Id.* § 425.16(b)(1).

Federal courts of appeals have split on how to apply state anti-SLAPP protections in federal court,[3]

(articulating this Court's practice "[o]rdinarily" to avoid deciding questions "not raised *or resolved* in the lower court") (emphasis added); *see also* Pet. App. 11a-14a (Ninth Circuit holding) (quoted *infra* § I.A); Pet. at 10, 20-21. Finally, although it is not clearly necessary for this Court's review, it is noteworthy that the Ninth Circuit explicitly tied its holding to the requirements of this Court's cases. Pet. App. 14a (quoted *infra* § I.A); *compare with* Opp. at 24 (mysteriously claiming the Court of Appeals did not address *Erie*, *Hanna* or *Shady Grove*).

[2] Respondents' suggestion that California's burden-shifting motion to strike is "idiosyncratic" is unavailing. Opp. at 10. A burden-shifting scheme early in litigation is a characteristic of many anti-SLAPP statutes. *See* Lori Potter & W. Cory Haller, *SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation*, 45 ENV'L LAW REP. 10136 (2015) (reviewing newer state statutes).

[3] Respondents suggest that this case does not present the same issue as the cases in the circuit split, which they claim is over "whether anti-SLAPP statutes apply at all in federal court." Opp. at 9. Neither claim is accurate. All cases described as part of this circuit split, Pet. at 28-32, considered, like the Ninth Circuit here, whether to grant defendants in federal court special motions

Pet. at 28-32, and the two parties before the Court take diametrically opposed positions, *compare* Pet. at 32-38 *with* Opp. 13-16.[4] In the decision below, the Ninth Circuit reversed its own precedent and switched sides in the circuit split.[5] *See* Pet. at 28-32.

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provided by anti-SLAPP statutes. *See*, *e.g.*, *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (considering the "special motion to dismiss" available under the "D.C. Anti-SLAPP Act"); *Henry Lake Charles Am. Press LLC*, 566 F.3d 164 (5th Cir. 2009) (reviewing a special motion under the anti-SLAPP statute, reversing the District Court and dismissing the claim); *see also Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 668-73 (10th Cir. 2018) (considering entire anti-SLAPP statute in the context of a lower court's denial of anti-SLAPP special motion). Some courts have referred interchangeably to the Motion to Strike procedures and the "anti-SLAPP statute." *See*, *e.g.*, *Godin v. Shencks*, 629 F.3d 79, 82-83, 89 (1st Cir. 2010) (considering "Section 556," which is both Maine's entire anti-SLAPP statute and the special motion provision). That is unsurprising, given that special motions are the "mainspring" of anti-SLAPP statutes, and other provisions (*e.g.*, fee-shifting, stay of discovery, expedited consideration, interlocutory appeal) are typically merely supportive of them. Pet. at 21; *see also Los Lobos Renewable Power*, 885 F.3d at 669 (calling special motion provision "unquestionably most important" subsection of anti-SLAPP statute). Because the question presented here, which was decided below and is the subject of a circuit split, is whether federal courts must offer special motions under anti-SLAPP statutes, it is irrelevant that the Ninth Circuit still applies an ancillary provision of the California anti-SLAPP statute, Opp. at 17 (citing Pet. App. 12a-13a), 23 n.10, and that Respondents "have no interest in arguing that anti-SLAPP statutes do not apply in federal court." Opp. at 22.

[4] Respondents suggest in their Opposition that the parties' interests are not opposed, but they are considering a caricature of the question presented. Opp. at 22.

[5] The Ninth Circuit decision here "interprets" California's anti-SLAPP motion to strike right out of existence in federal

The circuit split and the Ninth Circuit's confusion reflect broader confusion about the application of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Hanna v. Plumer*, 380 U.S. 460 (1965), particularly as interpreted in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). Pet. at 11-15, 28-32. Thus, this case is an ideal occasion for this Court to clarify further when federal courts must apply state laws.

A. The question whether federal courts must grant free speech defendants anti-SLAPP motions to strike is appropriate for review.

This Court favors certiorari when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Court also looks for when a court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

Petitioners, who are investigative journalists, filed a motion to strike under the California anti-SLAPP statute that should protect them from proceeding to trial on charges aimed solely at chilling their speech.

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court, claiming that such a reading is necessary to avoid a "stark collision" between the anti-SLAPP statute and federal rules. Pet. App. 14a. In doing so, it reverses the Circuit's earlier decision in *Newsham*, which held explicitly that anti-SLAPP motion to strike procedures did not collide with the federal rules. *See Newsham*, 190 F.3d at 972; *see also* Pet. at 19.

Respondent abortion providers, seeking to prevent Petitioners' truthful speech about their disturbing activities, argued that Petitioners should receive nothing more than the procedure applicable to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Brief of Appellees at 22-28 (2017 WL 1831820).

The Ninth Circuit agreed, holding that federal courts in the Ninth Circuit must treat all anti-SLAPP motions to strike as one of the two standard pre-trial motions available to all parties under the Federal Rules: Rule 12(b)(6) or Rule 56. Pet. App. 14a. The Court characterized its holding as required by this Court's federalism jurisprudence: "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 while in a federal district court." Pet. App. 14a (citing *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) and *Erie v. Tompkins*, 304 U.S. 64 (1938)).

Having eliminated all unique characteristics of anti-SLAPP motions, the Court "conclude[d] that the district court correctly applied a Rule 12(b)(6) standard to Defendants' Motion to Strike challenging the legal sufficiency of Plaintiffs' complaint, and the district court did not err in declining to evaluate the factual sufficiency of the complaint at the pleading stage." Pet. App. 14a-15a.

In their Opposition, Respondents excerpt the last and narrowest implication of the Court's decision, ignoring its primary holding, its application of Supreme

Court federalism jurisprudence, and its participation in a circuit split. Opp. at 7-8. Then they suggest that the issue "actually decided" is too "narrow" for this Court to bother reviewing.[6] Opp. at 8. That is wishful thinking.

The Ninth Circuit's holding applying this Court's federalism precedents to deny litigants state First Amendment protections (1) decides an important federal question (whether federal courts must honor state law anti-SLAPP motions to strike) in a way that conflicts with the very Supreme Court precedents that it cites, *compare* Pet. App. 11a-14a *with* Pet. at 32-38; and (2) stands in conflict with the decisions of several other federal courts of appeals on the same important matter, Pet. at 28-32. This Court should grant certiorari to address this critical question and resolve confusion among the courts of appeals.

B. Federal courts should allow special motions under anti-SLAPP statutes in addition to motions under Federal Rules 12 and 56.

A federal court considering whether to apply the motion to strike provisions of anti-SLAPP statutes

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[6] Respondents' emphasis on the fact that "defendants challenged only the legal insufficiency of the plaintiff's claims" is misplaced. Opp. 10, 11. There is no authority suggesting that challenging legal sufficiency undermines a defendant's entitlement to the full protection of California anti-SLAPP law as it has been applied by longstanding Ninth Circuit precedent. *See Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 599 (9th Cir. 2010).

must first determine whether there is a "contest" between the state laws and a federal law or rule. Pet. App. 14a.

1. The parties agree that anti-SLAPP motions to strike impose a unique burden on plaintiffs.

Respondents point out that "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." Opp. at 14. There is thus no question in this case that anti-SLAPP motions impose different burdens on different parties and do not duplicate the standards or procedures of Rules 12 and 56. *Compare Shady Grove*, 559 U.S. at 398-99 (considering incompatible state and federal provisions; one had to yield to the other).[7]

2. Anti-SLAPP motions to strike coexist, rather than "collide," with motions under Federal Rules 12 and 56.

Respondents suggest that the differences between anti-SLAPP motions and the federal rules evince a "conflict." Actually, the differences between the requirements of anti-SLAPP motions and the requirements of other pre-trial motions under the federal rules establish that they are *not* in conflict. Instead,

[7] Respondents' concession that anti-SLAPP motions to strike impose a unique burden on plaintiffs belies their claim that the Ninth Circuit's decision not to apply this burdensome provision in federal court will NOT lead to forum shopping.

their differences allow for all three provisions to function in consonance with one another—hence, the number of states that have added anti-SLAPP statutes to statutory schemes that already provide motions to dismiss and motions for summary judgment. *See*, *e.g.*, Pet. at 33-34 (citing *Godin v. Shencks*, 629 F.3d 79, 82-83, 87-88 (1st Cir. 2010) (holding the provisions do not collide in federal court in part because the State of Maine includes all three types of motion); Cal. Code Civ. Proc. §§ 425.16, 430.10, 437c (laying out California's scheme involving all three types of motion)); *see also United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (finding no conflict because anti-SLAPP defendants are still free to bring Rule 12 and Rule 56 motions).

3. Anti-SLAPP motions to strike and Federal Rules 12 and 56 answer different "questions in dispute."

Thus, as evidenced by the "quite different" burdens imposed by each, anti-SLAPP motions to strike and their associated procedures "answer [a different] question in dispute," *Shady Grove*, 559 U.S. at 398-99, than the pre-trial motions available to all parties under the federal rules. Pet. at 32-35. States offering anti-SLAPP motions to strike require courts to consider the question: "Has *this* plaintiff presented a strong enough case to overcome the suspicion that he is using the specter of a trial to suppress the defendant's First Amendment rights?" Pet. at 33. The procedures used to

answer this question impose on a particular subset of plaintiffs—those whose litigation actions imperil free speech—a burden "that does not exist under the Federal Rules." Opp. at 14. By contrast, Federal Rules 12 and 56 offer all parties the chance to ask: "Has my opponent met the appropriate burden to proceed past the pleading phase?" and "Have I met the appropriate burden to merit judgment as a matter of law?" Pet. at 33. The three provisions impose different burdens on different parties at different pre-trial stages. This is far from a "collision" such as that in *Shady Grove*, for example, where state and federal law gave irreconcilable answers to the question whether the litigation could proceed as a class action. Pet. at 32-33.

4. *Erie* requires federal courts to apply California's anti-SLAPP motion to strike provisions.

Since there is no "collision" between California's anti-SLAPP motion to strike and the federal rules, federal courts must apply the state law if it is "substantive" rather than "procedural." Pet. at 36 (citing *Erie* and progeny). Because it is potentially "outcome-determinative" and not applying it will promote forum-shopping and inequitable administration of laws, California's anti-SLAPP motion to strike provision is "substantive" within the meaning of *Erie*. Pet. at 36-38. The Ninth Circuit therefore erred in declining to apply it in federal court. *Id.*

II. The Court Should Resolve Lower Court Confusion Regarding the Application of *Cohen v. Cowles Media Co.* and the First Amendment.

The Court should also grant certiorari to clarify that *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), does not license lower courts to permit favored parties to circumvent the First Amendment's prohibition on reputational damages resulting from the publication of truthful speech. *See* Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media Co., 35 GA. L. REV. 1087, 1122-24 (2001) (noting how *Cohen* set up a false distinction between "economic" and "reputational" damages).

Respondents contend that this issue is not suitable for certiorari because the Ninth Circuit's decision did not conflict with a decision of any other circuit. Opp. at 18. But the Petition clearly explained that, by permitting PPFA to claim increased expenditures for "security" measures as damages in this case, the Ninth Circuit departed from Supreme Court precedent, from the decisions of sister circuits, and even from its own recent precedent. *See* Pet. at 21-26, 39-42.[8]

Respondents do not address the substantive concern raised by the Petition—that the Ninth Circuit and

[8] Petitioners raised similar arguments before the district court and Ninth Circuit, long before *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1194-99 (9th Cir. 2018), was decided. *See* Pet. App. 28a-29a; 87a-93a. Accordingly, Respondents' attempt to characterize this conflict as limited to the Ninth Circuit and "newly minted" fails. *See* Opp. at 18.

other courts have misused *Cohen v. Cowles Media Co.* to allow certain litigants to make an end run around the First Amendment's prohibition on reputational damages. *See* Pet. at 23-24. Instead, they make the observation that their stated causes of action do not apparently "target 'protected speech,'" Opp. at 18, which proves nothing about whether their alleged injuries resulted from actual or anticipated harm to their reputation. *See Compuware Corp.*, 499 F.3d at 532 ("[W]e must look beyond the damages sought by the plaintiff *to the injuries actually sustained*.") (emphasis added).

And then they restate, without support, the false claim that "the increased costs for security and IT services" they voluntarily assumed to prevent future exposés "were *directly caused* by Petitioners' misrepresentations about their identity," Opp. at 20 (emphasis added)—as if Plaintiffs' desire to conceal the gruesome reality of the abortion industry played no role in their decision to incur those "increased costs" to prevent future infiltrations. In fact, as the Ninth Circuit itself has recognized, Petitioners' use of fake identities to attend NAF Conferences caused Respondents no legally-cognizable harm. *See Wasden*, 878 F.3d at 1194-95. Respondents' increased costs were caused by the laxity of their previous security measures coupled with their desire to avoid future truthful disclosures—neither of which was "directly caused" by Petitioners.

Perhaps recognizing the weakness of their substantive position, Respondents level a litany of procedural objections to this Court's review of the Ninth Circuit's decision on this point. Opp. at 18-21 (arguing

against certiorari because, *inter alia*, the Ninth Circuit decision was unpublished; Petitioners allegedly waived the argument; the Ninth Circuit's decision was "fact-specific"; and Petitioners cited the district court opinion). Even if all of those claims were accurate (which Petitioners do not concede), none would prevent this Court from granting certiorari to alleviate confusion about its First Amendment jurisprudence. *See*, *e.g.*, *United States v. Mendenhall*, 446 U.S. 544, 552 n.5 (1980) (allowing for review of an argument not raised below in "exceptional circumstances," such as when the lower court decisions "rest[ ] on a serious misapprehension of federal constitutional law"); *Smith v. United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review.").

Respondents should have to do more than invoke non-binding procedural technicalities in order to sustain their vexatious assault on Petitioners' First Amendment rights. The constitutional principles at stake in this and similar cases are too great.

CONCLUSION

For the reasons stated above and in the Petition, the Court should take this opportunity to resolve lower court confusion about both questions presented.

Respectfully submitted,

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