No.

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICULTURE, INC., *et al.*,

Petitioners,

v.

LOS LOBOS RENEWABLE POWER, LLC, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Like twenty-nine other states and the District of Columbia, New Mexico has enacted a statute specifically designed to deter SLAPP ("strategic lawsuits against public participation") lawsuits, which unduly discourage speech and engagement about matters of public concern.

New Mexico's "anti-SLAPP" statute requires expedited disposition of dismissal motions and an award of attorneys' fees and costs to a prevailing defendant. In the decision below, the Tenth Circuit held that those provisions are inoperative in federal court—deepening an entrenched circuit split on the applicability of state anti-SLAPP provisions in federal court.

The questions presented are:

1. Whether a state anti-SLAPP provision requiring an award of attorneys' fees and costs to a prevailing defendant applies in federal court—as the First, Second, Fifth and Ninth Circuits have concluded, in conflict with the D.C. Circuit and the Tenth Circuit below.

2. Whether a state anti-SLAPP provision requiring expedited disposition of dismissal motions applies in federal court, as the First and Fifth Circuits have concluded, in conflict with the D.C. Circuit and the Tenth Circuit below.

PARTIES TO THE PROCEEDING

Petitioners are AmeriCulture, Inc., a New Mexico corporation, and Damon Seawright, an individual, defendants-appellants in the court below.

Respondents are Los Lobos Renewable Power, LLC, and Lightning Dock Geothermal, HI-01, LLC, both Delaware corporations, plaintiffs-appellees in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Petitioner AmeriCulture, Inc. states that it has no parent corporation, and no publicly held company owns 10% or more of its stock. Petitioner Damon Seawright is an individual.

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The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a-33a) is reported at 885 F.3d 659. The opinion of the United States District Court for the District of New Mexico denying Petitioners' motion to dismiss is available at 2016 WL 8254920 and reproduced at App. 40a-51a. The opinion of the District Court certifying its order for interlocutory appeal is available at 2016 WL 8261743 and reproduced at App. 34a-39a.

JURISDICTION

The Court of Appeals entered judgment on March 12, 2018. On April 4, 2018, Justice Sotomayor extended the time to file a petition for certiorari to and including July 16, 2018 (No. 17A1064). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions and rules relevant to this petition, including the Rules of Decision Act, the Rules Enabling Act, Federal Rule of Civil Procedure 12, New Mexico's anti-SLAPP statute, and the anti-SLAPP statutes implicated in the other cases relevant to the circuit splits discussed in this petition are reproduced in the Appendix at 52a-78a.

INTRODUCTION

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

To protect their citizens' rights to participate freely in self-government, thirty states and the District of Columbia have enacted "anti-strategic lawsuits against public participation" (or "anti-SLAPP") statutes to deter lawsuits that chill speech and engagement about matters of public concern. The decision below deepened a circuit split over whether such state anti-SLAPP laws apply in federal courts exercising jurisdiction over state law claims.[1]

New Mexico's anti-SLAPP statute features two mechanisms to protect against SLAPP suits: (1) it requires "expedited" consideration of a defendant's motion to dispose of the case, and (2) it requires an award of attorneys' fees to a defendant who invokes the statute as a defense and obtains dismissal. In the decision below, the Tenth Circuit held—in conflict with other circuits (and in accord with the D.C. Circuit)—that those state anti-SLAPP protections are inoperative in federal court.

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[1] While the plaintiffs in this case invoked the District Court's diversity jurisdiction, *infra* at n. 3, the questions presented here can arise whenever federal courts exercise jurisdiction over state law claims, such as pursuant to the supplemental jurisdiction statute, 28 U.S.C. § 1367. *See Felder v. Casey,* 487 U.S. 131, 151 (1988).

The Tenth Circuit's holding was incorrect. As several other circuits have recognized when confronting similar state anti-SLAPP provisions, those provisions do not conflict with any federal rule, and are part of the substantive "law of the state" that must apply in federal court unless federal law says otherwise.

The decision below also interferes with state-created rights. New Mexico's anti-SLAPP statute was designed and enacted "to protect citizens who exercise their right to petition from the financial burden of having to defend against retaliatory lawsuits." *Cordova v. Cline*, 396 P.3d 159, 166 (N.M. 2017). That objective was frustrated by the Tenth Circuit's refusal to apply the State's anti-SLAPP law in federal court.

And, ironically, the decision below encourages precisely the kind of forum-shopping the *Erie* doctrine seeks to avoid—in at least two respects. The refusal to give effect in federal court to state anti-SLAPP laws will encourage the filing of SLAPP suits in federal court. But the disagreement among courts of appeals about the questions presented also means that a given state's anti-SLAPP law may be enforced in some federal courts but not others—encouraging plaintiffs to cherry-pick among federal courts to avoid application of the statutes.

The Court should grant the petition to resolve the circuit split regarding the important questions presented.

STATEMENT OF THE CASE

A. Legal Background

1. The Erie/Hanna Doctrine

This case concerns an important, contemporary application of the familiar and longstanding rule that "roughly, . . . federal courts are to apply state 'substantive' law and federal 'procedural' law" when adjudicating state law claims. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-79 (1938).

This Court has explained that a federal rule governs the matters to which it applies, so long as the rule is consistent with the Constitution, and with the Rules Enabling Act, which requires that the federal rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). Where there is no federal rule on point, the Rules of Decision Act requires that federal courts apply the "law of the state" within the meaning of that Act, as interpreted in *Erie* and its progeny. *See* 28 U.S.C. § 1652; *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-52 (1980).

While familiar, this framework has occasionally presented this Court with challenging questions. *See Walker*, 446 U.S. at 744 ("The question whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court under diversity of citizenship jurisdiction has troubled this Court for many years.").

In *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99 (1945), this Court set out what later became known as the "outcome-determination" test for whether the Rules of Decision Act and *Erie* make a state-law rule applicable in federal court. The Court explained that

Erie's intent "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court. The nub of the policy that underlies *Erie R.R. Co. v. Tompkins* is that for the same transaction the accident of suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result." *Id.* at 109. The *Guaranty Trust* Court accordingly concluded that a New York statute of limitations barring recovery in a suit if brought in state court "bears on a State-created right vitally and not merely formally or negligibly," and that because the consequences of the rule "so intimately affect recovery or non-recovery," it should apply in federal court. *Id.* at 110.

In *Hanna*, 380 U.S. 460, the Court announced another "pathmarking" decision, in which it explained that *Erie* "command[s] the enforcement of state law" only where there is "no Federal Rule which cover[s] the point in dispute." *Id.* Where a federal rule conflicts with a state rule on the same point, *Hanna* held the federal rule controls so long as it falls within Congress's "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Id.* at 472. As for the "outcome-determination" test, the *Hanna* court explained it should be read in light of "the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468.

In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), the Court addressed the application of the *Erie/Hanna* doctrines to a New York statute that permitted the state's appellate courts "to order new trials when the jury's award 'deviates materially from what would be reasonable compensation.'" *Id.* at 418 (quoting N.Y. Civ. Prac. Law & Rules (CPLR) § 5501(c)). Recognizing that the provision at issue contained "both 'substantive' and 'procedural'" aspects, the Court explained that the "dispositive question" was "whether federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases." *Id.* at 426. The Court determined they could, holding: New York's *substantive* "deviates materially" standard applies in federal court, but primary responsibility for its application would be "lodge[d] in the district court, not the court of appeals," in light of the Seventh Amendment's constraint on appellate review of jury-found facts. *Id.* at 437-38.

More recently, this Court considered whether Federal Rule of Civil Procedure 23 precluded the application in federal court of a New York statute barring "a suit to recover a 'penalty' from proceeding as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397 (2010).

Five Justices concurred in a judgment reversing the court below, concluding that Rule 23 preempted the New York law, but without agreeing on a single rationale.

In the only section of any opinion to command a majority of the Court, Justice Scalia explained that because in that case the federal and state rules were in

conflict—Federal Rule of Civil Procedure 23 provided that a class action like Shady Grove's "may be maintained," while the New York statute provided that a class action seeking penalty damages "may *not* be maintained"—the state rule could not apply in federal court unless the federal rule was invalid. *Id.* at 399.

The Court fractured on the next steps in the analysis, however. Justice Scalia wrote that upon finding a conflict between a federal and state rule—where the rules "attempt[] to answer the same question," 559 U.S. at 399—the only remaining inquiry is whether the federal rule is valid. *Id.* at 407-09. If so, it controls. *Id.*

Justice Scalia explained that a federal rule promulgated under the Rules Enabling Act is valid so long as it governs "only the manner and the means by which the litigants' rights are enforced," and does not "alter[] the rules of decision by which the court will adjudicate those rights." *Id.* at 407. According to Justice Scalia, a federal rule's validity does not depend on whether it affects a litigant's state-created substantive rights. *Id.* at 407, 408-410. A federal procedural rule is either valid or invalid in all jurisdictions and all cases. *Id.* at 409-10.

Justice Stevens, the fifth vote to reverse, agreed there was a conflict between Rule 23 and the New York law, but disagreed with the next steps in Justice Scalia's analysis. In Justice Stevens's view, where federal and state rules appear to conflict, the Rules Enabling Act's command that the Federal Rules "shall not abridge, enlarge or modify any substantive right" means "federal rules cannot displace a State's definition of its own rights or remedies." *Id.* at 418. Therefore, "federal rules must be interpreted with

some degree of sensitivity to important state interests and regulatory policies, and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts." *Id.* at 418-19.

Although Justice Stevens conceded this can be "tricky" to implement," he explained "the balance . . . turns, in part, on the nature of the state law that is being displaced by a federal rule." *Id.* at 419. The "nature of the state law," meanwhile, "does not necessarily turn on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural. Rather, it turns on whether the state law actually is part of a State's framework of substantive rights or remedies." *Id.*

Justice Stevens laid out a two-step framework that, in his view, this Court's precedents require courts to implement: "The court must first determine whether the scope of the federal rule is sufficiently broad to control the issue before the court, thereby leaving no room for the operation of seemingly conflicting state law," including after the federal rule has been "fairly construed, with sensitivity to important state interests and regulatory policies." *Id.* at 421.

Then—if the federal rule *is* "sufficiently broad to control the issue before the Court, such that there is a 'direct collision'" between the federal and state rule—the court must decide whether the rule is a valid exercise of the Court's power to prescribe rules under the Rules Enabling Act. *Id.* at 422. Here again, a reviewing court has an obligation to construe the

federal rule narrowly, where possible, to avoid an interpretation that would "abridge, enlarge, or modify a substantive right," including one cloaked in the guise of a state procedural rule. *Id.* at 422-23. If such a "saving construction" is impossible, "federal courts cannot apply the rule." *Id.* at 423.

In dissent, Justice Ginsburg and three other Justices concluded that there was "no unavoidable conflict" between Rule 23 and New York's law, *id.* at 452, and that "[w]hen no federal law or rule is dispositive of an issue, and a state statute is outcome affective . . . the Rules of Decision Act commands application of the State's law in diversity suits," *id.* at 456. The four dissenting Justices therefore would have held that New York's law applies in federal court. *Id.* at 458.

2. Anti-SLAPP Statutes

Three decades ago, Professors George Pring and Penelope Canan warned of a "new and very disturbing trend": "Americans by the thousands [were] being *sued*, simply for . . . 'speaking out' on political issues." George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 938 (1992); *see also* Penelope Canan & George W. Pring, *Research Note, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & Soc'y Rev. 385, 386 (1988). To describe such lawsuits, Professors Pring and Canan coined the term "Strategic Lawsuits Against Public Participation," or "SLAPP."

The "disturbing trend" identified by Professors Pring and Canan thirty years ago persists—and, according to some, has intensified. *See* Jeremy Rosen & Felix Shafir, *Helping Americans to Speak Freely*, 18 Federalist Soc'y Rev. 62, 70 (2017) ("Each year, more and more people across the country are sued for speaking out"); Timothy D. Biché, Note, *Thawing Public Participation: Modeling the Chilling Effect of Strategic Lawsuits Against Public Participation and Minimizing Its Impact*, 22 S. Cal. Interdisc. L.J. 421, 422-23 (2013) ("Over the past forty years, there has been a surge in the number of lawsuits brought in retaliation for a citizen's exercise of his or her right to petition."); Katelyn E. Saner, Note, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After* Shady Grove, 63 Duke L.J. 781, 789 (2013) ("[T]he advent of the Internet as a new means for speaking out publicly has greatly increased the number of SLAPP suits.").

Seeking to deter SLAPP suits, thirty states and the District of Columbia have enacted anti-SLAPP statutes, "to give more breathing space for free speech about contentious public issues." *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015); *see also* Robert Post, *Reply: Understanding the First Amendment*, 87 Wash. L. Rev. 549, 550 (2012) (most states have enacted anti-SLAPP statutes "tak[ing] account of the transaction costs" and chilling effects "of litigating First Amendment rights"); Colin Quinlan, Note, Erie *and the First Amendment: State Anti-SLAPP Laws in Federal Court After* Shady Grove, 114 Colum. L. Rev. 367, 370 (2014) (SLAPP suits "inhibit[] the exercise of First Amendment rights, because even targets who persevere and eventually prevail on the merits must spend substantial time and money to do

so, and the experience deters them from speaking out in the future.").

Common anti-SLAPP provisions include expedited consideration of motions to dismiss, modification of the standard of proof on such a motion, a stay discovery while an anti-SLAPP motion is pending, and award of attorney's fees for a prevailing defendant.

3. New Mexico's Anti-SLAPP Statute

New Mexico enacted its anti-SLAPP statute in 2001. The original bill was the product of bipartisan sponsorship in New Mexico's House of Representatives, and—hardly coincidentally, but appropriately given the facts of this case—emerged in the wake of two high-profile lawsuits designed to "intimidat[e] citizen opposition in public forums to land development projects," which two scholars have described as "classic SLAPP suits." Frederick M. Rowe & Leo M. Romero, *Resolving Land-Use Disputes by Intimidation: SLAPP Suits in New Mexico*, 32 N.M. L. Rev. 217, 219 (2002); *see also id.* at 226-27 (describing passage of the law).

New Mexico's anti-SLAPP statute declares that "it is the public policy of New Mexico to protect the rights of its citizens to participate in quasi-judicial proceedings before local and state governmental tribunals." N.M. Stat. Ann. § 38-2-9.2. Finding that lawsuits frustrating these rights "have been filed," the statue provides they "should be subject to prompt dismissal or judgment to prevent the abuse of the legal process and avoid the burden imposed by such baseless lawsuits." *Id.*; *see also Cordova*, 396 P.3d at 166 ("[T]he purpose of the statute is to protect citizens who exercise their right to petition from the financial burden of having to defend against retaliatory

lawsuits."). Accordingly, the statute's Subsection A—its expedited disposition provision—states:

> Any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding . . . is subject to a special motion to dismiss . . . that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.

N.M. Stat. Ann. § 38-2-9.1(A).

Subsection B, the fee-shifting provision, provides that the statute may be raised "as an affirmative defense," and that where a defendant raises "the rights afforded" by the statute and prevails on a motion to dismiss, "the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action." *Id.* § 38-2-9.1(B).[2]

B. Facts and Proceedings Below

Petitioner Damon Seawright is co-founder and President of Petitioner AmeriCulture, Inc. ("AmeriCulture"), an aquaculture company specializing in the farming of Nile tilapia. Since 1995, AmeriCulture has operated a tilapia farm on its 15-acre property in southwestern New Mexico, rearing

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[2] Although the provision is not implicated here, New Mexico's anti-SLAPP statute also provides for an expedited appeal from a trial court's order disposing of an anti-SLAPP motion, or from a trial court's "failure to rule on the motion on an expedited basis." N.M. Stat. Ann. § 38-2-9.1(C).

tilapia on pure, naturally heated well water drawn from the geothermal aquifer beneath the land.

Respondent Los Lobos Renewable Power Company, LLC ("Los Lobos") is the sole member of Respondent Lightning Dock Geothermal HI-01, LLC ("LDG"). C.A. App. 116 (Am. Compl. ¶ 1). LDG is the current lessee of a geothermal resources lease from the Bureau of Land Management. *Id.* at 118 (Am. Compl. ¶ 9). LDG uses the underground resources for geothermal power generation. *Id.*

Some of the geothermal resources included in LDG's federal lease underlie AmeriCulture's land. When AmeriCulture began operations in 1995, it entered into a Joint Facilities Operating Agreement ("JFOA") with LDG's predecessor on the federal lease, reconciling each party's rights in the geothermal resources under AmeriCulture's land. C.A. App. 138-145. In that agreement, LDG's predecessor granted AmeriCulture the right to "drill and develop" any geothermal resources under AmeriCulture's land up to a depth of 1,000 feet, so long as AmeriCulture's activity is intended for uses other than electric generation, like supplying heated water to AmeriCulture's fish-farming facilities. C.A. App. 140. LDG is now the successor to the federal lease and assignee of its predecessor's rights and obligations under the JFOA. C.A. App. 118-19.

The dispute giving rise to this case centers on Petitioners' participation in public proceedings related to activities that Respondents planned to carry out on land not covered by the JFOA. App. 3a-4a; C.A. App. 171. In 2011, AmeriCulture was among the dozens of parties who filed protests with the New Mexico State Engineer relating to Respondents' application for a

permit relating to wells that would produce water for use at their power plant. C.A. App. 41, 201-04. Respondents also separately applied to the New Mexico Oil Conservation Division for permits relating to three shallow injection wells, all of which were off the property covered by the JFOA. C.A. App. 47-57. AmeriCulture also filed a protest to that application. C.A. App. 58.

Six days after Petitioners filed their protest with the Oil Conservation Division, Respondents commenced a lawsuit in federal district court against them, asserting claims based on their petitioning activities, App. 3a-4a; C.A. App. 127-28 (Am. Compl. ¶ 44), and seeking declaratory, injunctive and monetary relief. C.A. App. 129-136.[3] Expressly invoking their rights under New Mexico's anti-SLAPP statute, Petitioners moved to dismiss the complaint, seeking both expedited dismissal and an award of attorneys' fees. App. 4a, 43a; C.A. App. 29-40.

Without reaching the substance of Petitioners' anti-SLAPP motion, the District Court denied it, holding that "New Mexico's Anti-SLAPP statute is a procedural provision that does not apply in the courts of the United States." App. 35a, 43a. However, the District Court "observe[d] disagreement among the courts of appeals" about whether state anti-SLAPP provisions apply in federal court. App. 46a; *see id.* at 46a-47a

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[3] Respondents invoked the District Court's jurisdiction under 28 U.S.C. § 1332, alleging complete diversity among the parties, and that the amount in controversy exceeds $75,000 excluding interest and costs. App. 42a-43a.

(reviewing holdings of the First and Ninth Circuits in conflict with that of the D.C. Circuit).

Petitioners sought leave to file an interlocutory appeal to the Tenth Circuit. App. 35a. The District Court granted that motion, holding that its order denying the anti-SLAPP motion to dismiss was immediately appealable under the collateral order doctrine, App. 35a-37a, and separately certifying its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), App. 38a-39a. As the District Court explained, it reached that latter conclusion because "the applicability of state Anti-SLAPP statutes in diversity cases is an important question of law about which the circuits are divided." App. 39a.

The Tenth Circuit affirmed.[4] After noting that "Justice Stevens' concurrence in *Shady Grove* provides the controlling analysis in the Tenth Circuit" on questions of state-law application in federal diversity suits, App. 17a n.3, the panel explained its view that an "overriding consideration" in such cases is whether the state provision at issue would be outcome-determinative. App. 16a-17a. According to the panel, "[t]his means that in a federal diversity action, the district court applies state substantive law—those rights and remedies that bear upon the outcome of the suit—and federal procedural law—the processes or modes for enforcing those substantive rights and remedies." App. 17a.

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[4] The panel held that it had appellate jurisdiction under the collateral order doctrine, after concluding Petitioners had not timely applied to the Tenth Circuit for permission to file an interlocutory appeal under 28 U.S.C. § 1292(b). App. 8a-16a.

The panel observed that "distinguishing between procedural and substantive law is not always a simple task," and that "[w]here the line between procedure and substance is unclear, the Supreme Court has set forth a multi-faceted analysis designed to prevent both forum shopping and the inequitable administration of the laws." App. 17a-18a.

The panel, however, disclaimed the need for any such analysis in the case of New Mexico's anti-SLAPP statute, calling it "hardly a challenging endeavor" to determine whether the statute's provisions should apply in federal court, "assuming one is able to read." App. 18a.

The panel concluded that New Mexico's anti-SLAPP statute "is nothing more than a *procedural* mechanism designed to expedite the disposal of frivolous lawsuits" (App. 18a; *see also* App. 27a), and therefore may not be applied in federal court. The panel also determined the statute's fee-shifting provision may not be applied in federal court, calling the provision "entirely meaningless absent" the expedited motion-to-dismiss provision,[5] and merely a "sanction" "designed not to compensate for legal services but to vindicate First Amendment rights threatened by a kind of unwarranted or specious litigation." App. 23a.

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[5] The panel did not acknowledge or discuss the statute's severability provision, N.M. Stat. Ann. § 38-2-9.1(F). *See* App. 19a.

REASONS FOR GRANTING THE PETITION

I. There Is a Circuit Split on the Applicability of State Anti-SLAPP Fee-Shifting Provisions in Federal Court

Nearly every jurisdiction which has enacted an anti-SLAPP statute has provided for an award of attorneys' fees to a prevailing defendant.[6] Both before and after *Erie*, this Court has made clear that a state statute awarding attorneys' fees to a prevailing party "reflects a substantial policy of the state," which "should be followed" in diversity litigation unless it "run[s] counter to a valid federal statute or rule of court" which "usually it will not." *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 259 n.31 (1975) (quoting 6 Moore, Federal Prac. 54.77(2), at 1712-13 (2d ed. 1974)); *see People of Sioux Cnty. v. Nat'l Surety Co.*, 276 U.S. 238, 243 (1928); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991) ("fee-

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[6] *See* Ariz. Rev. Stat. Ann. § 12-752(D); Ark. Code Ann. § 16-63-506(b)(1); Cal. Civ. Proc. Code § 425.16(c)(1); Conn. Gen. Stat. § 52-196a(f); Del. Code Ann. tit. 10, § 8138(a)(1); D.C. Code § 16-5504(a); Fla. Stat. § 768.295(4); Ga. Code Ann. § 9-11-11.1(b.1); Haw. Rev. Stat. § 634F-2(8)(B); 735 Ill. Comp. Stat. 110/25; Ind. Code § 34-7-7-7; Kan. Stat. Ann. § 60-5329(g); La. Code Civ. Proc. Ann. art. 971(b); Me. Rev. Stat. Ann. tit. 14, § 556; Mass. Gen. Laws ch. 231 § 59(H); Minn. Stat. § 554.04(1); Mo. Rev. Stat. § 537.528; Neb. Rev. Stat. § 25-21,243(1); Nev. Rev. Stat. § 41.670(1)(a); N.M. Stat. Ann. § 38-2-9.1(B); N.Y. Civ. Rights Law § 70-a(1)(a); Okla. Stat. tit. 12, § 1438(A)(1); Or. Rev. Stat. § 31.152(3); 27 Pa. Cons. Stat. § 7707; R.I. Gen. Laws § 9-33-2(d); Tenn. Code Ann. § 4-21-1003(c); Tex. Civ. Prac. & Rem. Code § 27.009(a)(1); Utah Code Ann. § 78B-6-1405(1)(a); Vt. Stat. Ann. tit. 12, § 1041(f)(1); Va. Code Ann. § 8.01-223.2(B).

shifting rules . . . embody a [state] substantive policy" when a statute "permits a prevailing party in certain classes of litigation to recover fees").

Consistent with that understanding, several circuits have applied the fee-shifting provisions of anti-SLAPP statutes. Two circuits, however, including the Tenth Circuit in the decision below, have concluded otherwise.

A. Several Circuits Have Held That Anti-SLAPP Fee-Shifting Provisions Apply in Federal Court

In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), the Ninth Circuit determined that certain provisions of the California anti-SLAPP statute, Cal. Civ. P. Code § 425.16, must apply in federal court. *Id.* at 973. Among those was Cal. Civ. P. Code § 425.16(c), which provides that a defendant who prevails with an anti-SLAPP motion "shall be entitled to his or her attorney's fees and costs." Cal. Civ. P. Code § 425.16(c). *Newsham*, 190 F.3d at 972-73. The Ninth Circuit observed that the fee-shifting provision of California's anti-SLAPP statute did not conflict with any federal rule. *Id.* Next, the court determined that California's anti-SLAPP law furthered substantive interests, and that applying the law in federal court advanced the "twin purposes" of *Erie*—discouraging forum-shopping and avoiding inequitable administration of the law. *Id.* at 973. Unpreempted by a valid federal law, California's anti-SLAPP fee-shifting provision therefore applied in federal court. *Id.*

Since *Newsham*, the Ninth Circuit has "repeatedly held that the [California] anti-SLAPP provisions governing attorneys' fees apply to state-law claims in federal court." *Law Offices of Bruce Altschuld v. Wilson*, 632 Fed. App'x 321, 322 (9th Cir. 2015) (affirming an anti-SLAPP fee award and citing cases); *see also Khai v. Cnty. of L.A.*, --- Fed. App'x ---, 2018 WL 1476646, at *2 (9th Cir. Mar. 27, 2018) (affirming award of attorneys' fees, which "are mandatory for a successful anti-SLAPP motion").[7] And the Ninth Circuit has extended its holding in *Newsham* to apply to Oregon's anti-SLAPP statute, including its fee-shifting provision. *See Northon v. Rule*, 637 F.3d 937,

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[7] The Ninth Circuit subsequently reaffirmed *Newsham* while declining to reconsider its holding *en banc*. *See Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013), *reh'g en banc denied*, 736 F.3d 1180 (9th Cir. 2013). Concurring in the denial of rehearing *en banc*, Judges Wardlaw and Callahan (joined by Judges Fletcher and Gould) reaffirmed the reasoning of *Newsham,* explaining it was unaltered by *Shady Grove*. 736 F.3d at 1181 (Wardlaw, J., and Callahan, J., concurring in the denial of rehearing *en banc*). Judge Watford dissented from the court's denial of rehearing *en banc*, joined by then-Chief Judge Kozinski and Judges Paez and Bea. In their view, Federal Rules of Civil Procedure 12 and 56 together "establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court." *Id.* at 1188 (Watford, J., dissenting from denial of rehearing *en banc*). But the dissent made no specific argument that California's anti-SLAPP fee-shifting provision should not apply in federal court. *Id.* at 1188-92.

938-39 (9th Cir. 2011); *Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009).[8]

Like the Ninth Circuit, the First Circuit has determined that state anti-SLAPP fee-shifting provisions apply in federal court. In *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010), the court held that Maine's anti-SLAPP statute, Me. Rev. Stat. Ann. § 556, which includes a provision for attorneys' fees to prevailing defendants, "must be applied" in federal court. *Id*. at 81. The *Godin* court concluded that Federal Rules of Civil Procedure 12 and 56 were not sufficiently broad "as to cover the issues within the scope of" Maine's anti-SLAPP statute, and that the dual purposes of *Erie*—discouragement of forum-shopping and avoidance of inequitable administration of the laws—"are best served" by enforcement of the anti-SLAPP statute in federal court. *Id.* at 87-88. The court also observed that declining to apply Maine's statute would "result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court," specifically noting that doing so would allow a plaintiff filing in federal court to "circumvent any liability for a defendant's attorney's fees or costs." *Id*. at 92. Although it concluded that the Maine anti-SLAPP statute was "so intertwined with a state right or

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[8] The Ninth Circuit had also applied Washington's anti-SLAPP statute. *See Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 941-42 (9th Cir. 2013). However, in 2015, the Washington Supreme Court struck down the entire law because one of its provisions violated the state's constitutional guarantee of a trial by jury, and the provision was not severable. *Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015).

remedy that it functions to define the scope of the state-created right," and that no properly interpreted federal rule supplanted the Maine fee-shifting provision, *id.* at 89, the First Circuit noted that "if Rules 12(b)(6) and 56 were thought to preempt application of all of Section 556, a serious question might be raised under the Rules Enabling Act," *id.* at 90.[9]

The Second Circuit too has found anti-SLAPP fee-shifting provisions applicable in federal court. In *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138 (2d Cir. 2013), the Second Circuit confronted California's anti-SLAPP statute and, like the Ninth Circuit, held that it applies in federal court. The court of appeals explained that "federal courts apply those state rules of decision that are 'substantive' under *Erie,* and are consistent with federal law." *Id.* at 152. Because the anti-SLAPP statute was "a substantive policy favoring the special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity," *id.* at 148, the court held that the district court erred in concluding the anti-SLAPP rule did not apply, *id.* at 156. Then, in *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014), the Second Circuit held that Nevada's anti-SLAPP fee-shifting provision, Nev. Rev. Stat § 41.670, applies in federal court, calling its application

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[9] The First Circuit has extended *Godin*'s holding concerning Maine's anti-SLAPP statute to Massachusetts's anti-SLAPP statute—which also includes a fee-shifting provision. *Steinmetz v. Coyle & Caron, Inc.*, 862 F.3d 128 (1st Cir. 2017) (applying Mass. Gen. Laws ch. 231, § 59H).

"unproblematic." *Id.* at 809 (citing *Liberty Synergistics*, 718 F.3d at 153)).

And, citing the Ninth Circuit's holding in *Newsham*, the Fifth Circuit has applied Louisiana's anti-SLAPP statute, La. Code Civ. P. art. 971, in federal court. *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 168-69, 182-83 (5th Cir. 2009) (ordering dismissal of plaintiff's complaint based on the statute's burden-shifting framework, and remanding the case "for a determination of [defendant's] entitlement to fees and costs" under the anti-SLAPP law's fee-shifting provision).[10]

B. Two Circuits Have Held That Anti-SLAPP Fee-Shifting Provisions Are Inapplicable in Federal Court

Parting ways with several of their sister circuits, the Tenth Circuit in the decision below joined the D.C. Circuit in concluding that a state anti-SLAPP fee-

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[10] Several times since *Henry* the Fifth Circuit has applied a state anti-SLAPP statute in deciding the case before it. *See*, *e.g.*, *Cuba v. Pylant*, 814 F.3d 701, 711 (5th Cir. 2016) ("The TCPA [Texas Citizen Participation Act] applies to these claims"). In *Cuba*, the court observed: "The *Henry* court reasoned that even though the Louisiana anti-SLAPP statute was built around a procedural device—a special motion to dismiss—it nonetheless applied in federal court under the Erie doctrine because it was functionally substantive." *Id.* at 706 n.6. Noting a circuit split, Judge Graves dissented in *Cuba*, arguing the TPCA should not apply in federal court, citing the D.C. Circuit's decision in *Abbas*. *Id.* at 719-20 & n.1 ("Our sister circuits that have considered this issue have split"). Some Fifth Circuit panels applying state anti-SLAPP laws have assumed they apply without expressly deciding the question. *See*, *e.g.*, *Block v. Tanenhaus*, 867 F.3d 585, 589 (5th Cir. 2017).

shifting provision may not be applied in federal court. *See* App. 16a-28a; *see also supra* at 16.

In *Abbas*, the D.C. Circuit held that the D.C. anti-SLAPP statute may not be applied in federal court. *Abbas*, 783 F.3d at 1333-37. Believing that the statute and Federal Rules of Civil Procedure 12 and 56 "answer the same question," *id.* at 1337, the *Abbas* court proceeded to consider whether those federal rules are valid. Noting that *Shady Grove*'s fractured opinions failed to produce binding precedent regarding the "test for whether a Federal Rule violates the Rules Enabling Act," *id.* at 1336-37, the *Abbas* court adopted the approach described in Justice Scalia's plurality opinion, which "strictly followed" *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941), under which "any federal rule that 'really regulates procedure' is valid under the Rules Enabling Act." *Abbas*, 783 F.3d at 1337.

Concluding that Federal Rules of Civil Procedure 12 and 56 "really regulate[] procedure," the *Abbas* court determined they are "valid under the Rules Enabling Act" and preempt state rules that attempt to answer the "same question" differently. *Id.* at 1337 (citing *Sibbach*, 312 U.S. at 14). The court accordingly found that the district court had erred in granting an anti-SLAPP motion to dismiss. *Id.* at 1337. And, even though the D.C. Circuit affirmed dismissal of the complaint on other grounds, the court refused to award fees or costs to the prevailing defendant, which were authorized by the D.C. anti-SLAPP law. *Abbas*, 783 F.3d at 1335 n.5. Instead, the court held that the fee-shifting provision could only apply in federal court if the other anti-SLAPP provision did as well. *Abbas*, 783 F.3d at 1335 n.3.

II. There Is a Circuit Split on the Applicability of State Anti-SLAPP Expedited Motions in Federal Court

Twenty-four of the thirty-one anti-SLAPP jurisdictions have included provisions calling for some form of expedited consideration of anti-SLAPP motions.[11] Two circuits, covering seven of the states that have enacted such provisions, have determined these expedited motion to dismiss provisions harmonize (or can be harmonized) with the Federal Rules of Civil Procedure and should apply in federal court. Two circuits—including the Tenth Circuit, in the decision below—covering five of the jurisdictions that have enacted such provisions, have determined they are inapplicable in federal court.

As detailed above (*supra* at 20-21), in *Godin*, 629 F.3d at 89-90, the First Circuit held that Maine's anti-SLAPP statute, Me. Rev. Stat. § 556, which calls for expedited consideration of an anti-SLAPP motion, applies in federal court. The Fifth Circuit reached the

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[11] *See* Ariz. Rev. Stat. Ann. § 12-752(A); Ark. Code Ann. § 16-63-507(a)(2); Cal. Civ. Proc. Code § 425.16(f); Conn. Gen. Stat. § 52-196a(e); D.C. Code § 16-5502(d); Fla. Stat. § 768.295(4); Ga. Code Ann. § 9-11-11.1(d); Haw. Rev. Stat. § 634F-2(1); 735 Ill. Comp. Stat. 110/20(a); Ind. Code § 34-7-7-9(a)(2); Kan. Stat. Ann. §§ 60-5320(d), (f); La. Code Civ. Proc. Ann. art. 971(C)(3); Me. Rev. Stat. Ann. tit. 14, § 556; Md. Code Ann., Cts. & Jud. Proc. § 5-807(d)(1); Mass. Gen. Laws ch. 231, § 59(H); Mo. Rev. Stat. § 537.528(1); Neb. Rev. Stat. § 25-21,245; Nev. Rev. Stat. § 41.660(3)(f); N.M. Stat. Ann. § 38-2-9.1(A); Okla. Stat. tit. 12, §§ 1433(A)-(C); Or. Rev. Stat. § 31.152(1); Tex. Civ. Prac. & Rem. Code Ann. §§ 27.004(a), 27.007(b); Utah Code Ann. § 78B-6-1404(1)(b); Vt. Stat. Ann. tit. 12, § 1041(d).

same conclusion with regard to Louisiana's anti-SLAPP law, and its expedited motion-to-dismiss provision, in *Henry*, 566 F.3d at 168-69.

The Tenth Circuit in the decision below, and the D.C. Circuit, disagreed—as explained above (*supra* at 16, 23-24). *See* App. 19a-20a ("All subsection A demands is expedited procedures designed to promptly identify and dispose of [frivolous] lawsuits."); *Abbas*, 783 F.3d at 1337 (D.C. Cir. 2015) (holding that the District of Columbia's expedited anti-SLAPP motion does not apply in federal court).

III. The Decision Below Was Incorrect

A. Anti-SLAPP Fee-Shifting Provisions Should Apply in Federal Court

The Tenth Circuit's refusal to apply New Mexico's anti-SLAPP fee-shifting provision was incorrect—and can find little support in this Court's precedents.

No federal rule or law even arguably conflicts with New Mexico's anti-SLAPP fee-shifting provision[12]—and

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[12] Although the Tenth Circuit did not cite Federal Rule of Civil Procedure 54, it creates a default rule that prevailing federal litigants are entitled to costs, but does not itself create an entitlement to fees. *See* Fed. R. Civ. P. 54(d)(2)(B)(ii) (motion for fees must "specify . . . statute, rule, or other grounds entitling the movant to the award"); *see also Medical Protective Co. v. Pang*, 740 F.3d 1279, 1283 (9th Cir. 2013) ("Rule 54 provides a federal procedural mechanism for moving for attorney's fees that are due under state law.").

the Tenth Circuit cited none.[13] *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 410 (2010) (Scalia, J.) ("the framework we apply . . . requires first, determining whether the federal and state rules can be reconciled").

Because no federal rule answers the question whether Petitioners may recover attorneys' fees if they prevail, New Mexico's fee-shifting provision must govern because it is part of the State's substantive law.

Like other States' analogous provisions, New Mexico's Subsection B "creates a new liability where none existed before." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555 (1949). It does not regulate "merely the manner and the means by which a right to recover, as recognized by the State, is enforced"—it *is* a

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[13] The decision below made no attempt to argue that a federal rule conflicts with the fee-shifting provision, and no federal rule does. But even if there *were* an arguable conflict, the fee shifting provision is "so intertwined with a state right or remedy that it functions to define the scope of the state created right" and so "cannot be displaced by" the federal rules. *Godin*, 629 F.3d at 89 (quoting *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring)). "Further, if [the federal rules] were thought to preempt application of" that provision, "a serious question might be raised under the Rules Enabling Act," *id.*, as it is highly doubtful whether the Act permits this Court to preempt a state's mandatory fee-shifting provision. Faced with a (hypothetical) colorable argument that some federal rule *did* conflict with a state's fee-shifting provision, the proper course would be for this Court to adopt a "saving construction" of the federal rule to comport with the Rules Enabling Act's command that the federal rule "shall not abridge . . . or modify any substantive right"—including substantive rights based on state law. *Shady Grove*, 559 U.S. at 422-23 (Stevens, J., concurring).

"right to recover." *Guaranty Trust*, 326 U.S. at 109. *See also Chambers*, 501 U.S. at 52 ("fee-shifting rules . . . embody a [state] substantive policy" when a statute "permits a prevailing party in certain classes of litigation to recover fees"); 17A Moore's Federal Practice–Civil § 124.07[3][b] (2008) ("State law generally governs a litigant's entitlement to an award of attorney's fees because attorney fee statutes are substantive state law.") (citing *Alyeska*, 421 U.S. at 259 n.31); 10 Wright & Miller, Federal Practice & Procedure § 2669 (3d ed. 2014) ("[C]ases holding state law controlling . . . appear analytically sounder. . . . [and] particularly appropriate . . . when state law provides for the recovery of an attorney's fee as a part of the claim being asserted.").

As such, "the accident of suit by a non-resident litigant in federal court instead of in a State court a block away" cannot be allowed to determine New Mexico's prerogative to create and enforce that right to recover. *Guaranty Trust*, 326 U.S. at 109. The First Circuit correctly recognized this in *Godin*, when it observed that declining to apply Maine's anti-SLAPP statute would "result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court," specifically noting that doing so would allow a plaintiff filing in federal court to "circumvent any liability for a defendant's attorney's fees or costs." 629 F.3d at 92. Applying New Mexico's fee-shifting provision in federal court would advance *Erie*'s "twin aims"—"discouragement of forum-shopping and avoidance of

inequitable administration of the laws." *Hanna*, 380 U.S. at 468.[14]

The decision below "represent[s] a serious encroachment on state-created rights in the absence of a clear countervailing federal policy." 10 Wright & Miller, Federal Practice & Procedure § 2669 (3d ed. 2014); *cf. Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 443 (2010) (Ginsburg, J., dissenting) (This Court's "decisions instruct over and over again that, in the adjudication of diversity cases, state interests . . . warrant our respectful consideration."). The purpose of New Mexico's anti-SLAPP statute "is to protect citizens who exercise their right to petition from the financial burden of having to defend against retaliatory lawsuits." *Cordova*, 396 P.3d at 165. That objective was frustrated by the Tenth Circuit's refusal to apply the statute's fee-shifting provision in federal court.[15]

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[14] The Tenth Circuit concluded that New Mexico intended Subsection B as a "sanctions" provision, which the court therefore viewed as "procedural." App. 22a. The better reading is that Subsection B is exactly what it says it is: a state-law provision awarding attorneys' fees to all prevailing defendants whose speech or public participation has become the target of litigation. But in any event, a proper analysis under *Erie* "looks not to the *labels* but to the *content* of state rules of decision." *Liberty Synergistics*, 718 F.3d at 152.

[15] The New Mexico Supreme Court has held that attorneys' fees and costs made available under the State's anti-SLAPP statute are available even when dismissal is based on federal law. *See Cordova*, 396 P.3d at 162 (affirming dismissal based on the First Amendment, but reversing lower court's determination that anti-SLAPP statute did not apply, and holding that "Petitioners are statutorily entitled to an award of attorney fees").

B. Anti-SLAPP Provisions for Expedited Consideration of Motions Should Apply in Federal Court

Subsection A of New Mexico's anti-SLAPP statute provides that a SLAPP suit "is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation." N.M. Stat. Ann. § 38-2-9.1(A).

The Tenth Circuit held that Subsection A is "procedural" as a matter of New Mexico law and therefore inapplicable in federal court. But, as with its assessment of the statute's fee-shifting provision, the court's analysis and conclusion are both incorrect.

No federal statute or rule conflicts with the New Mexico anti-SLAPP statute's expedited motion to dismiss provision.

Federal Rules of Civil Procedure 12 and 56, which govern aspects of motions to dismiss and for summary judgment in federal court, are silent about the timing of a court's *consideration* of such motions. Fed. R. Civ. P. 12, 56. Unlike in *Shady Grove*, they do not answer the "same question." 559 U.S. at 399.

The panel's contrary holding ignored this, focusing entirely on the supposed "procedural" character of New Mexico's expedited motion to dismiss provision. But "[r]ules which lawyers call procedural do not always exhaust their effect by regulating procedure." *Cohen*, 337 U.S. at 555. New Mexico's expedited-motion-to-dismiss provision is "so intertwined with a state right or remedy that it functions to define the scope of the

state created right," and is appropriately viewed as "substantive" for purposes of an *Erie* analysis. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring).

The Tenth Circuit's refusal to give effect to the right to expedited disposition conferred by New Mexico's anti-SLAPP statute also runs counter to well-established *federal* law that a federal court "cannot give a [state-created claim] longer life in the federal court than it would have had in the state court without adding something to the cause of action." *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949).

In a closer case than this one, a federal rule of procedure arguably in conflict with a state law provision would have to be read with "sensitivity to important state interests," *Shady Grove*, 559 U.S. at 421 (Stevens, J., concurring)—to both faithfully interpret the Rules Enabling Act, and avoid if possible a reading that would render the federal rule invalid, *id.* at 422-24. Those considerations, combined with the longstanding presumption that federal law does not "cavalierly" preempt state law, *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009), and the special force of that presumption in the Rules Enabling Act area, reinforce the conclusion that there is no conflict here.

In any event, reconciling Subsection A with Federal Rule of Civil Procedure 12, so that both can apply, does not present a serious problem. They "can exist side by side, . . . each controlling its own intended sphere of coverage without conflict." *Walker*, 446 U.S. at 752. A federal court can plainly "give effect to the substantive thrust" of Subsection A "without untoward alteration of the federal scheme" governing dispositive motions. *Gasperini*, 518 U.S. at 426.

IV. This Case Is an Excellent Vehicle for Resolving the Circuit Split Regarding the Important Questions Presented

The proliferation of anti-SLAPP statutes is one of the most significant statutory developments affecting speech and public debate in recent decades. And as anti-SLAPP statutes have multiplied, so have cases about them. *See Travelers Casualty Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1182 (9th Cir. 2016) (Kozinski, J., concurring) (reporting that anti-SLAPP "cases have more than tripled over the last ten years").

But the well-recognized divide among the courts of appeals about their application in federal court[16] is promoting forum-shopping and undercutting the efficacy of anti-SLAPP laws.

Given the prevalence of anti-SLAPP laws and their impact on the exercise of First Amendment rights, the

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[16] *See*, *e.g.*, 19 Wright & Miller, Federal Practice & Procedure § 4509 (3d ed. 2016) (discussing "divergent case law currently surrounding statutes meant to curb the use of . . . SLAPP lawsuits," and observing that "[r]esolution of some of the questions raised by anti-SLAPP statutes may require resolution by the Supreme Court"); William James Seidleck, Comment, *Anti-SLAPP Statutes and the Federal Rules: Why Preemption Analysis Show They Should Apply in Federal Diversity Suits*, 166 U. Pa. L. Rev. 547, 548 (2018) ("The anti-SLAPP circuit split now offers the Supreme Court a unique opportunity to correct the broader confusion over the relationship between the Federal Rules of Civil Procedure and state laws."); David C. Thornton, Comment, *Evaluating Anti-SLAPP Protection in the Federal Arena: An Incomplete Paradigm of Conflict*, 27 Geo. Mason U. Civ. Rts. L.J. 119, 121 (2016) ("circuit courts are divided in their determination of whether state anti-SLAPP laws apply in federal courts"); *see also Travelers Casualty*, 831 F.3d at 1183 (Kozinski, J., concurring) (Observing after *Abbas* was decided by the D.C. Circuit: "Now we've got a circuit split, and we're standing on the wrong side."); *Cuba v. Pylant*, 814 F.3d 701, 718 n.1 (5th Cir. 2016) (Graves, J., dissenting) ("Our sister circuits that have considered this issue have split, with some deciding that federal courts may apply Anti-SLAPP statutes."); *Mitchell v. Hood*, 614 Fed. App'x. 137, 139 n.1 (5th Cir. 2015) ("there is disagreement among courts of appeals as to whether state anti-SLAPP laws are applicable in federal court at all"); *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015) (noting "disagreement among appellate judges"); *Abbas*, 783 F.3d at 1335 (acknowledging contrary decisions by the First, Fifth and Ninth Circuits).

disparate treatment of states by their home federal circuits concerning application of their anti-SLAPP statutes is sufficient to warrant this Court's intervention. But the problem is even more acute. A California speaker can rely on the Ninth Circuit to afford her the protection of her home state's anti-SLAPP law. But what if that California speaker is sued in federal court in the Tenth Circuit or the District of Columbia? Even if local choice-of-law rules mandate the application of California law, local circuit precedent holding anti-SLAPP provisions inapplicable in federal court would deny her *all* the California law to which she is entitled. *Cf. Adelson*, 774 F.3d at 809 (Second Circuit analyzing, independently and *de novo*, the applicability of Nevada's anti-SLAPP statute in federal court, despite the Ninth Circuit's earlier resolution of the issue).

This case presents the Court with an opportunity to consider the applicability in federal court of two specific, but widely implemented, anti-SLAPP provisions—without having to decide the applicability in federal court of *every* feature of state anti-SLAPP laws.[17] Providing much-needed guidance to the lower

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[17] Some circuits have taken a piecemeal approach in evaluating the applicability of particular anti-SLAPP provisions in federal court. The Second Circuit has held that two provisions of Nevada's anti-SLAPP statute are applicable in federal court, but explained that a third, which bars discovery upon filing of an anti-SLAPP motion, "may present a closer question." *Adelson*, 774 F.3d at 809. The Ninth Circuit has held that the California anti-SLAPP statute's fee-shifting and "special motion to strike" provisions must apply in federal court, *Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004), but has separately held that the statute's discovery-limiting provisions

courts will enable those courts to address disputes about *other* anti-SLAPP provisions informed by, and with the benefit of, this Court's views about the questions presented in this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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and limitations on amendment must not, *id.*; *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845 (9th Cir. 2001). The Eleventh Circuit has recognized the circuit splits discussed here, but held that a different provision—the Georgia anti-SLAPP statute's then-effective requirement that a complaint be accompanied by an attorney's "written verification under oath," Ga. Code Ann. § 9-11-11.1(b) (West 2015)—could not apply in federal court because it was preempted by Federal Rule of Civil Procedure 11. *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1357-62 (11th Cir. 2014); *but see id.* at 1362-63 (Jordan, J., concurring).