No. 19-20

In The
Supreme Court of the United States

WILLIAM ANDREOLI, et al.,

Petitioners,

v.

YOUNGEVITY INTERNATIONAL CORP., et al.,

Respondents.

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

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") erred in applying and enforcing the California anti-SLAPP statute's immunity from trial by permitting interlocutory appellate review of the trial court's denial of an anti-SLAPP motion under the collateral order doctrine.

CORPORATE DISCLOSURE STATEMENT

Youngevity International Inc. (hereinafter "YGYI") is a Delaware corporation. YGYI is traded on the NASDAQ (symbol YGYI). No publicly held company owns 10% or more of YGYI.

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INTRODUCTION

Some anti-Strategic Lawsuit Against Public Participation statutes ("anti-SLAPP statutes"), including California's, provide for interlocutory appeal of orders denying anti-SLAPP motions. Under California law, interlocutory appeal guards against irreparable constitutional injury that would arise were a libel case to proceed to trial that fails prima facie. An order denying an anti-SLAPP motion also falls under the collateral order doctrine. *See Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), *superseded by statute as stated in Breazeale v. Victim Services, Inc.*, 878 F.3d 759 (9th Cir. 2017); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009); *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742 (5th Cir. 2014).

Certiorari may be denied outright because the Petitioners raise an issue here that they never timely briefed below. The Petitioners challenged the entirety of interlocutory appeal for the first time in a petition for rehearing *en banc*, which petition was not addressed by the panel and was summarily denied. An argument first raised *en banc*, and not the subject of decision below, is not appropriately the basis for a cert. petition. *See, e.g.*, *Easley v. Reuss*, 532 F.3d 592, 594–95 (7th Cir. 2008) (per curiam) ("Panel rehearing is not a vehicle for presenting new arguments[.]"). Consequently, the Petition lacks any targeted challenge to the order on appeal and thus begs for an advisory opinion.

Even were the issue timely raised, it is not one of import or for which circuits disagree. Petitioners

depend on a Second Circuit decision (*Ernst v. Carrigan*, 814 F.3d 116 (2d Cir. 2016)), but *Ernst* is not in conflict with prevailing authority, including decisions in the Ninth and Fifth Circuits explaining why interlocutory review must remain available at the federal level. Where state anti-SLAPP law provides a substantive immunity from trial, the circuits have consistently held they have jurisdiction to review interlocutory orders denying anti-SLAPP motions. Those courts have recognized that refusing jurisdiction would conflict with the *Erie* doctrine. *See Batzel*, 333 F.3d at 1025–26; *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The trial court dismissed Petitioners' claims under the anti-SLAPP statute because the suit targeted privileged communications. The Petitioners filed defamation claims based on content appearing in a Complaint. The Ninth Circuit held the allegedly "defamatory" statements privileged because they were part of, or related to, legal proceedings. Interlocutory appeal enabled Respondents to avoid trial on statements that were subject to the California litigation privilege. The Ninth Circuit also had jurisdiction under the Federal Arbitration Act to review aspects of the District Court's decision. Thus, even if the Ninth Circuit lacked express jurisdiction to evaluate the anti-SLAPP issue (which was part of the same order), the panel had supplemental appellate jurisdiction to rectify the constitutional injury. Appellate review on certiorari is thus unlikely to alter the course of the underlying litigation.

Although Petitioners argue their issue is of national import, the Petition is limited to an interpretation of California's anti-SLAPP statute, including

immunities and protections provided by California law. No other circuit has passed on the relationship between California's anti-SLAPP statute and federal procedure. The applicable precedent in California is well-established, and the Ninth Circuit has routinely declined *en banc* review of this very issue. The Petition should be denied.

STATEMENT OF THE CASE

A. Legal Background

Anti-SLAPP statutes arrest abuse of legal process effected by a party who sues to "stop citizens from exercising . . . political rights or to punish them for having done so." George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5–6 (1989). Thirty-four jurisdictions, including California, have anti-SLAPP statutes. *See, e.g.*, Cal. Civ. Proc. Code § 425.16(a) ("The Legislature finds . . . that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."); *see also Henry*, 556 F.3d at 167–68 ("Concerned over the growth of meritless lawsuits that have the purpose or effect of chilling the exercise of First Amendment rights, . . . state legislatures have created a novel method for better striking the balance between interests in individual reputation and freedom of speech.").

California was among the first to enact anti-SLAPP protections. The California statute is intended to be "construed broadly" to ensure that citizens are protected in their exercise of free speech and petition. *See* Cal. Civ. Proc. Code § 425.16(a). The California legislature intended for the statute to protect persons from having to proceed through trial on meritless claims aimed at chilling constitutional rights. *See Batzel*, 333 F.3d at 1024; *see also Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 839 & fn.11 (9th Cir. 2001). California codified an immediate right to appeal the denial of certain anti-SLAPP motions in furtherance of those objectives. *See* Cal. Civ. Proc. Code § 425.16(j). In *Batzel*, the Ninth Circuit upheld that process for interlocutory appeal at the federal level. *See Batzel*, 333 F.3d at 1024–26. *Batzel* acknowledged that, "[w]ithout this ability [for interlocutory review], a defendant [would] have to incur the cost of a lawsuit before having his or her right to free speech vindicated. . . . If the defendant wins, the Anti-SLAPP Law is useless and has failed to protect the defendant's constitutional rights." *See* Cal. Bill Analysis, A.B. 1675 Assem. (Apr. 20, 1999); *see also Batzel*, 333 F.3d at 1025. Because California's statute provided an immunity from trial, the right to immediate appellate review was necessary to prevent irreparable injury. *See Batzel*, 333 F.3d at 1025–26. The Ninth Circuit concluded denial of an anti-SLAPP motion under federal law was properly reviewable under the collateral order doctrine. *See id.* at 1024–26.

The California Legislature has occasionally amended its statute in response to concerns over operation of the law. For example, after *Batzel*, the legislature amended § 425.17, which included a "public interest" exception to the right of immediate appeal. *See* Cal. Civ. Proc. Code § 425.17(b). The legislature also removed interlocutory review for claims involving commercial speech. *See id*. at § 425.17(e); *Breazeale*, 878 F.3d at 766; *see also* Pet.App. at 96a. The legislature nonetheless preserved interlocutory appeal for anti-SLAPP motions generally.

Since *Batzel*, the Ninth Circuit has consistently held interlocutory review available for orders denying anti-SLAPP motions. *See Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1180–81 (9th Cir. 2016); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009 (9th Cir. 2013) (reaffirming *Batzel* and rejecting argument that *Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009) abrogated *Batzel*); *see also* Pet.App. at 94a–97a. The Ninth Circuit has repeatedly declined to revisit *Batzel*. *See Makaeff v. Trump Univ., LLC*, 736 F.3d 1180 (9th Cir. 2013) (denying rehearing *en banc* seeking to overturn *Batzel*); Pet.App. at 98a.

Batzel remains good law in the Ninth Circuit and was properly decided. *See infra*. *Breazeale* did not alter or overrule *Batzel*. *See* Pet. at 14 (discussing *Breazeale*; Cal. Civ. Proc. Code § 425.17(e)). The Ninth Circuit continues to rely on *Batzel* to support interlocutory review of orders denying anti-SLAPP relief. *See, e.g.*, *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 (9th Cir. 2010); *DC Comics*, 706 F.3d 1009; *Planned Parenthood Fed'n of*

Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 832 (9th Cir.), *amended*, 897 F.3d 1224 (9th Cir. 2018), *and cert. denied sub nom. Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.*, 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019).

B. Factual Background

The Petitioners include Wakaya Perfection LLC ("Wakaya") and several Wakaya officers, employees, and distributors. The Respondents include YGYI Corp. ("YGYI"). Wakaya and YGYI are competitors. Pet.App. at 7a. The companies rely on independent distributors to sell product. *Id.* The Petitioners were high-ranking officers and distributors for YGYI in 2016, including YGYI's then-President, William Andreoli. *See Youngevity Int'l Corp. v. Smith*, No. 16-CV-704-BTM-JLB (S.D. Cal. 2016), Docket Index ("D.I.") No. 269, pp. 4–7 (hereinafter "*Youngevity v. Smith*").

Beginning in 2015, the Petitioners endeavored to start a competing venture: Wakaya. They recruited YGYI's distributors, employees, and officers to the fledgling venture. *See, e.g.*, *id.* at pp. 51–52. Petitioners' conduct violated employment agreements and misappropriated YGYI intellectual property. From 2016 to the present, Wakaya has marketed its products with advertising and earnings claims that are literally false in violation of the Lanham Act. *See id.* at D.I. No. 648, p. 1 (also available at *Youngevity v. Smith*, 2019 WL 2918161 (S.D. Cal. July 5, 2019)); *see also* 15 U.S.C. § 1125(a)(1).

Wakaya initiated suit against YGYI on March 17, 2016. *Wakaya Perfection, LLC v. YGYI Int'l, Inc.*, No. 2:16-CV-00315-DN, 2019 WL 977916, at *1 (D. Utah Feb. 28, 2019). YGYI notified its distributors of the litigation. Pet.App. at 24a. YGYI filed suit against Wakaya on March 23, 2016, alleging nine claims under contract, tort, and the Lanham Act. *Id.* at 25a. YGYI provided copies of the complaint to certain individuals with interest in the litigation. *Id.* at 26a. YGYI's counsel also prepared a perfunctory press release that directed interested parties to the pleadings on the public docket. *Youngevity Int'l Corp. v. Andreoli*, No. 18-55031 (9th Cir. 2018), D.I. No. 13-1, 2, pp. 64, 257. YGYI provided the press release to a trade press publication and one (1) individual with an interest in the litigation. *Id.* at D.I. No. 13-1, p. 257.

In February 2017, Wakaya filed an Amended Counterclaim against YGYI. Pet.App. at 2a–49a. Wakaya therein asserted several defamation counts based on content contained in YGYI's Verified Complaint. *Id.* at 37a–44a. Wakaya argued that republication of the Verified Complaint constituted actionable defamation. *Id.* at 37a–38a.

YGYI moved to dismiss certain claims under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. *Id.* at 53a. YGYI also moved under Rule 12(b)(6) citing Wakaya's failure to state a claim for defamation. Finally, and as relevant here, YGYI sought dismissal of certain counterclaims under the California anti-SLAPP statute. *Id.* at 51a–54a. Because Wakaya's counterclaims directly targeted YGYI's pleadings (or statements made in those

pleadings), YGYI argued the litigation privilege applied as did the anti-SLAPP statute's corresponding protections. *Id.* at 51a–52a.

C. Proceedings Below

On December 13, 2017, the district court granted in part and denied in part YGYI's anti-SLAPP motion. Pet.App. at 57a–77a. The court granted the motion to the extent Wakaya's counterclaims sought relief on defamation grounds for statements made directly in YGYI's legal pleadings. *Id.* However, the court denied YGYI's motion as to YGYI's press release. *Id.* The court also denied YGYI's motion on grounds that certain statements fell within the anti-SLAPP statute's commercial speech exemption. *Id.* at 62a–66a. The district court also denied YGYI's motion under the Federal Arbitration Act, finding YGYI had waived its right to compel arbitration. *Id.* at 78a–83a.

YGYI timely appealed, seeking interlocutory review of the anti-SLAPP issues and the court's decision regarding arbitration. *Id.* at 95a–97a. YGYI asked the Ninth Circuit to review the entire order, including the court's decision to invoke the "commercial speech" exemption under the anti-SLAPP statute. *Id.*

The district court stayed the proceedings pending review. *Id.* at 91a–93a. The Petitioners opposed that stay, but never contested YGYI's right to interlocutory appeal under the California anti-SLAPP statute. *Youngevity v. Smith*, D.I. No. 483. At the district court,

Petitioners therefore failed timely to raise the legal issue now featured in their Petition for Certiorari.

Petitioners also failed timely to raise that issue on appeal. In Petitioners' merits brief, they argued against appellate jurisdiction over statements subject to the commercial speech exemption. *Youngevity Int'l Corp. v. Andreoli*, No. 18-55031 (9th Cir. 2018), D.I. No. 19, pp. 20–22. Wakaya did not challenge, however, whether YGYI had a right to interlocutory appeal over the remaining aspects of the anti-SLAPP order. *Id.* Wakaya mentioned in passing, in a footnote, that the Ninth Circuit should revisit *Batzel*, but never developed argument on that point and did not raise the issue in subsequent briefing. *Id.* at p. 21. Wakaya first raised its jurisdictional concerns in a petition for rehearing *en banc*. *See generally id.*; *see also id.* at D.I. No. 49. The court denied Wakaya's petition without comment on the merits. Pet.App. at 98a. The full court did not publish any opinion on the issue presented to this Court. *See id.* at 94a–98a.

Notably, the Ninth Circuit held that "[w]e lack jurisdiction to review the district court's determination that Joel Wallach's oral statements, Steve Wallach's email, and Michelle Wallach's alleged emails constitute commercial speech and therefore are not protected by the anti-SLAPP statute." *Id.* at 95a-96a. The Petitioners thus prevailed on half of the anti-SLAPP issues presented to the Ninth Circuit. The Ninth Circuit nonetheless ruled for YGYI on the remainder:

> We reverse the district court's decision not to strike those portions of Wakaya's counterclaims based on republication of the Verified Complaint and the YGYI press release, which summarized the substance of the Verified Complaint [because] California's litigation privilege applies to communications made in judicial proceedings . . . and extends to communications regarding such judicial proceedings made to people with a 'substantial interest in the outcome of the pending litigation[.]'

Id. at 96a (internal citations omitted). The Ninth Circuit held "republication of the Verified Complaint . . . constitute[s] protected speech." *Id.*

The Ninth Circuit's unpublished Memorandum Opinion (not citable as precedent) includes no discussion of the right to interlocutory appeal itself. On February 7, 2019, Wakaya filed a petition for rehearing *en banc*. *See generally Youngevity Int'l Corp. v. Andreoli*, No. 18-55031 (9th Cir. 2018), D.I. No. 49. In that petition Wakaya argued anew that the entire interlocutory appeal was unlawful, but the panel denied the petition without comment on the new argument. *Id.*; Pet.App. at 98a. The underlying case has remained stayed pending the outcome of Wakaya's Petition for Certiorari.

REASONS FOR DENYING THE PETITION

The issue Petitioners present was not timely raised below and not addressed on the merits by the Ninth Circuit. The underlying case raises no issue of

national import, and no split exists in the circuits that requires resolution. The circuits are in accord that, when an anti-SLAPP statute provides a substantive immunity from trial, the federal courts properly exercise jurisdiction over interlocutory appeals arising from denials of anti-SLAPP motions. The Petition seeks review of an interlocutory order that, even were it decided in Petitioners' favor, would not influence the underlying proceedings other than to foster delay. The underlying case involves a paradigmatic SLAPP suit challenging as defamation content that is privileged (*i.e.*, content in a Verified Complaint). A reversal would thus directly cause infringement of Respondents' constitutionally protected right to petition. Finally, the Ninth and Fifth Circuits are correct in holding interlocutory jurisdiction exists to review denial of an anti-SLAPP motion under the collateral order doctrine.

I. There Is No Split In Appellate Authority

The circuits have consistently held interlocutory appeal from denial of an anti-SLAPP motion reviewable under the collateral order doctrine. *See Batzel*, 333 F.3d at 1024–26; *Henry*, 566 F.3d at 169–81; *NCDR*, 745 F.3d at 746–52; *DC Comics*, 706 F.3d at 1012–16. Whether an anti-SLAPP order falls under that doctrine is determined by reference to the underlying state anti-SLAPP statute. The courts focus their analysis on whether the statute provides interlocutory review as a means to preserve *immunity from trial*. *See NCDR*, 745 F.3d at 751; *Englert v. MacDonell*, 551 F.3d 1099, 1105–06 (9th Cir. 2009), *superseded by statute as*

stated in Schwern v. Plunkett, 845 F.3d 1241 (9th Cir. 2017). If the state legislature intended to create an immunity *from trial*, then resolution of the anti-SLAPP motion is critical separate from the merits of the overall action. The circuit courts have consistently held that where an anti-SLAPP statute includes a mechanism for interlocutory appeal, the State likely intended to create an immunity from trial, and an order denying an anti-SLAPP motion thus falls within the collateral order doctrine. *See Batzel*, 333 F.3d at 1025–26; *Schwern*, 845 F.3d at 1243–45; *NCDR*, 745 F.3d at 750–52.

Three different circuits have considered whether orders denying anti-SLAPP motions are within the collateral order doctrine. All three have evaluated whether the state legislature, by enacting an anti-SLAPP statute, intended to protect defendants from trial on meritless suits filed to chill constitutionally protected speech. *See Batzel*, 333 F.3d at 1023–24; *Henry*, 566 F.3d at 167–70; *Ernst*, 814 F.3d at 120–22. The Ninth Circuit reviewed California's anti-SLAPP statute, concluding that the California legislature intended to enact immunity protections *from trial*. *Batzel*, 333 F.3d at 1025–26. Similarly, the Fifth Circuit reviewed Louisiana's anti-SLAPP statute, concluding that the Louisiana legislature intended to enact immunity *from trial*. *See Henry*, 566 F.3d at 177. Consistent with those immunities, the Ninth and Fifth Circuits have ruled respectively that through the availability of immediate interlocutory appellate review from denials of California and Louisiana anti-SLAPP orders in state

court, those states intended to create a protection analogous to certain federal immunities which were also subject to appellate review under the collateral order doctrine. *See Batzel*, 333 F.3d at 1024–26; *Henry*, 566 F.3d at 170–81.

By contrast, the Second Circuit reached a different conclusion on a different statutory scheme in *Ernst*, which Petitioners cite as their principal authority. The Second Circuit rejected interlocutory jurisdiction arising from Vermont's anti-SLAPP statute precisely because it found Vermont did not intend to create an immunity from trial. *See Ernst*, 814 F.3d at 121. Denial of an anti-SLAPP motion under the Vermont statute thus did not trigger the necessary protections of interlocutory review under the collateral order doctrine. *Ernst* does not reveal a split in circuit authority as the Petitioners argue, because the Vermont statute is not the same as the California and Louisiana statutes: While Vermont did not intend to afford immunity from trial under its anti-SLAPP statute, California and Louisiana did so intend under their respective anti-SLAPP statutes.

A. Each State's Anti-SLAPP Statute Is Unique Requiring Independent Analysis by the Circuit Courts

Each of the thirty-four anti-SLAPP statutes is unique. Some states have included provisions that allow for interlocutory appeals, while others have not. The Arkansas and Tennessee anti-SLAPP statutes

solely provide immunity from *liability*. *See* Ark. Code Ann. § 16-63-504;[1] Tenn. Code Ann. § 4-21-1003.[2] By contrast, California and Louisiana provide an immunity from *trial*. *See* Cal. Civ. Proc. Code §§ 425.16 *et seq.*; *Batzel*, 333 F.3d at 1025–26; La. Code Civ. Proc. Ann. art. 971; *Henry*, 566 F.3d at 177. When the statute protects an immunity from trial, then forcing the litigant to proceed through trial before seeking a corrective appeal nullifies the immunity and defeats the statutory purpose.

B. Federal Circuits Uniformly Hold Interlocutory Review Available Where a State Anti-SLAPP Statute Is Intended to Create an Immunity from Trial

California's anti-SLAPP statute is intended to provide immunity from trial against meritless claims

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[1] "Any person making a privileged communication or performing an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern shall be immune from civil liability, unless a statement or report was made with knowledge that it was false or with reckless disregard of whether it was false." Ark. Code Ann. § 16-63-504.

[2] "Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency." Tenn. Code Ann. § 4-21-1003(a).

aimed at chilling constitutional rights. To that end, California codified the immediate-right-to-appeal provision. *See Batzel*, 333 F.3d at 1025–26. In *Batzel*, the Ninth Circuit held that the California legislature specifically intended to protect citizens from "trial" on a meritless claim arising out of that person's exercise of constitutionally protected speech. *See id.* In so concluding, *Batzel* quoted the state Judiciary Committee's analysis of the bill text. *See* Cal. Bill Analysis, A.B. 1675 Assem. (Apr. 20, 1999); *see also Batzel*, 333 F.3d at 1025. *Batzel* concluded that the right to immediate appellate review was the crux of California's immunity. An order denying an anti-SLAPP motion under federal law is thus properly reviewed under the collateral order doctrine.

Other states within the Ninth Circuit that have included an immediate right to appeal have also clarified that their anti-SLAPP statutes provide an immunity from "trial." In 2009, the Ninth Circuit evaluated whether it had interlocutory jurisdiction to review a denial of an anti-SLAPP motion under the Oregon anti-SLAPP statute. *See Englert*, 551 F.3d 1099. The court concluded that Oregon did not "intend[] to provide a right not to be tried, as distinguished from a right to have the legal sufficiency of the evidence underlying the complaint reviewed by a *nisi prius* judge before a defendant is required to undergo the burden and expense of a trial." *See id.* at 1105. In short, Oregon's anti-SLAPP statute originally did not provide an immunity from trial and, thus, appellate review of orders denying anti-SLAPP motions were not completely

separate from the merits. As such, the Ninth Circuit concluded that district court orders under Oregon's anti-SLAPP statute did not come within the collateral order doctrine.

The Oregon legislature responded to *Englert*. "The legislature immediately passed amendments to create a right of immediate appeal from denials of anti-SLAPP motions to strike[.]" *Schwern*, 845 F.3d at 1244. To clarify the statute's purpose and rebut the Ninth Circuit's position, the Oregon legislature stated "that the purpose of Oregon's anti-SLAPP procedure 'is to provide a defendant with the right to not proceed to trial[.]'" *Id.* (quoting Or. Rev. Stat. § 31.152(4)). Evaluating those amendments, the Ninth Circuit subsequently held Oregon's anti-SLAPP statute "grants an immunity from suit," and a denial of an Oregon anti-SLAPP motion protecting that immunity was subject to immediate interlocutory appeal under 28 U.S.C. § 1291 and the collateral order doctrine. *See id.* at 1243–45.

In 2012, the Ninth Circuit reviewed Nevada's anti-SLAPP statute and concluded Nevada did not intend for its anti-SLAPP statute to operate as an immunity from trial. *See Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 800 (9th Cir. 2012), *superseded by statute as stated in Delucchi v. Songer*, 396 P.3d 826, 830–31 & fn. 3 (Nev. 2017). The Ninth Circuit explained that Nevada's statute only provided an immunity "*from civil liability* for claims based upon the communication." *See id.* at 802 (emphasis original) (citing Nev. Rev. Stat. § 41.650). Because an immunity from civil liability

can be properly safeguarded through standard post-judgment appeal, the Ninth Circuit concluded it lacked interlocutory jurisdiction under the Nevada anti-SLAPP statute. *See id.* at 802–03; *see also DC Comics*, 706 F.3d at 1015. Like Oregon, Nevada then revised its anti-SLAPP statute immediately after *Metabolic Research*. *See Delucchi*, 396 P.3d at 830. Nevada amended its anti-SLAPP statute to clarify that "there is an immediate appeal from a denial of a special motion to dismiss a SLAPP suit. . . ." *Id.* at 830 fn. 3 (citing Nev. Rev. Stat. § 41.670(4)).

Like the Ninth Circuit, the Fifth Circuit held that where anti-SLAPP statutes intend to provide an immunity from trial, orders denying anti-SLAPP motions are subject to interlocutory review under the collateral order doctrine. *See Henry*, 566 F.3d at 170–81; *NCDR*, 745 F.3d at 747–52. In *Henry*, the Fifth Circuit agreed with *Batzel*, concluding that a denial of a Louisiana anti-SLAPP motion fell within the collateral order doctrine precisely because the statute provided litigants with an immunity from *trial*, and was therefore properly subject to interlocutory appellate review. *See Henry*, 566 F.3d at 170–81.

The Fifth Circuit evaluated the Texas anti-SLAPP statute in 2014. *See NCDR*, 745 F.3d 742. The *NCDR* decision ruled that the protections provided by the Texas law created an "immunity from suit." *See id.* at 750–52. The Fifth Circuit thus again held that it had interlocutory appellate jurisdiction over a denial of a Texas anti-SLAPP motion under the collateral order doctrine. *See id*. The Court reasoned that "by providing this right, the Texas legislature has indicated the

nature of the underlying right the [Texas anti-SLAPP statute] seeks to protect. That right is not simply the right to avoid ultimate liability in a slap case, but rather is the right to avoid trial in the first instance." *Id.* at 751; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 27.008(b).

In sum, the circuits have uniformly held that where a state anti-SLAPP statute is intended to provide an immunity *from trial*, orders denying anti-SLAPP motions are subject to interlocutory appeal under the collateral order doctrine, but when legislatures have not made that intent manifest, interlocutory appeals are not allowed under the collateral order doctrine. *See Metabolic Research, Inc.*, 693 F.3d at 799 ("[anti-SLAPP] statutes have common elements, [but] there are significant differences as well, so that each state's statutory scheme must be evaluated separately[.]").

Far from evidencing a circuit conflict, the circuit decisions reveal a consistent approach entirely dependent on the intentions of the respective state legislatures and the statutory language embodying those intentions. The Petitioners' broad claim of a circuit conflict is belied by the precedent. The circuits are in accord: No circuit has held a state anti-SLAPP statute evincing an intent to create an immunity from trial ineligible for interlocutory review under the collateral order doctrine; and no circuit has held a state anti-SLAPP statute which is void of evidence of that intent to be eligible for interlocutory review. There is in this no conflict.

II. The Petitioners Did Not Adequately Raise the Issue at the Ninth Circuit

In the proceedings below, Petitioners' jurisdictional argument was limited to whether the Ninth Circuit should review the district court's finding that certain speech was subject to the commercial speech exemption in the California anti-SLAPP statute. *See Youngevity Int'l Corp. v. Andreoli*, No. 18-55031 (9th Cir. 2018), D.I. No. 19, at pp. 20–22. California recently amended the anti-SLAPP statute to make clear that no interlocutory review is available for issues that concern commercial speech. *See* Cal. Civ. Proc. Code § 425.17(e). Therefore, the Ninth Circuit agreed with Petitioners and dismissed Respondents' appeal for lack of jurisdiction on those narrow issues. Petitioners prevailed on the only jurisdictional argument they adequately briefed. *See* Pet.App. at 96a.

Petitioners first presented their argument that the Ninth Circuit lacked jurisdiction over the entirety of Respondents' anti-SLAPP appeal in a Petition for Rehearing *En Banc* after the Ninth Circuit ruled for YGYI on the remaining issues. *See Youngevity Int'l Corp. v. Andreoli*, No. 18-55031 (9th Cir. 2018), D.I. No. 49; *see also* Pet.App. at 98a. The Ninth Circuit summarily denied the petition for rehearing *en banc* without briefing. *See* Pet.App. at 98a. The parties never briefed the issue Wakaya presents to this Court, and the Ninth Circuit was never required to address the arguments now raised in the Petition.

This Court disfavors certiorari where an issue is first raised in the petition for rehearing *en banc* in part because presenting the issue on the merits first before this Court strips the circuit court of the "benefit[of] full, adversarial briefing." *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 988, 197 L. Ed. 2d 398 (2017) (Thomas, J., dissenting); *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1531, 203 L. Ed. 2d 802 (2019) (Gorsuch, J., dissenting). Without complete briefing—or any substantive rulings by the court below—this case presents a poor vehicle to re-evaluate or reconsider the scope of the collateral order doctrine and whether it would embrace the type of appeal filed by YGYI.

Petitioners failed to address the *Erie* doctrine before the court below and again in their Petition. *Cf.* Pet.; *Youngevity Int'l Corp. v. Andreoli*, No. 18-55031 (9th Cir. 2018), D.I. No. 19. In the underlying action, the district court has jurisdiction over Petitioners' defamation claims through diversity jurisdiction. *See* 28 U.S.C. § 1132. Under *Erie*, "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). The Ninth Circuit has long held California's anti-SLAPP statute applicable in federal court. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970–73 (9th Cir. 1999). Petitioners did not address the legal reasoning supporting *Batzel*. *See generally* Pet.; *see also Batzel*, 333 F.3d at 1025–26. An immunity provided by state law is substantive and properly applied by a federal court sitting in diversity. *See Batzel*, 333 F.3d at 1025–26; *cf.* Fed. R. Evid. 501 (in a civil case, state law privilege

applies where state law provides rules of decision for a claim).

Batzel explains that California's anti-SLAPP statute provides immunity from trial. *See Batzel*, 333 F.3d at 1025–26. That substantive immunity must be applied by the Federal Court sitting in diversity regardless of the procedural implications. Petitioners ignored *Batzel* and, by so doing, failed to give effect to judicial interpretations of California law. At a minimum, the unarticulated *Erie* questions not raised in the Petition provide another basis to reject certiorari. This case is not a suitable vehicle for the Court to evaluate the scope of the collateral order doctrine in the anti-SLAPP context.

III. Reversal by the Supreme Court Would Not Affect the Underlying Litigation

The Ninth Circuit held the conduct targeted by Petitioners' defamation claims absolutely protected by the litigation privilege, the Petition is therefore a suboptimal vehicle to re-evaluate the scope of the collateral order doctrine. *See Will v. Hallock*, 546 U.S. 345, 350 (2006) ("On the immediately appealable side are orders rejecting absolute immunity . . . and qualified immunity[.]" (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). Petitioners' defamation claims arise, in part, out of statements Respondents made in a Verified Complaint. *See* Pet.App. at 96a–97a. Petitioners argue that this case is appropriate for certiorari because they

suffered "a substantial, costly delay in the adjudication of their rights." *See* Pet. at 21. That argument rings hollow because the claims they asserted were meritless under California law. *See generally* Pet.; *see also* Pet.App. at 94a–97a. Petitioners seek to reinvigorate claims against Respondents that were deemed meritless by the Ninth Circuit.

Reversing the Ninth Circuit's decision would only increase the parties' costs and burdens incurred through the meritless claims. Because the Petitioners' claims are barred by the litigation privilege, Respondents would prevail whether at summary judgment or trial. However, the process leading to that dismissal imperils Respondents' constitutional rights, affecting an irreparable injury under the anti-SLAPP statute. Because the merits of the underlying claims are not at issue in the Petition, this appeal serves only to tax judicial and party resources needlessly.

Finally, even had the Ninth Circuit erred in accepting jurisdiction solely based on the anti-SLAPP statute, the Ninth Circuit had an independent basis to accept pendant appellate jurisdiction. *See, e.g.*, *Doe v. Regents of the Univ. of California*, 891 F.3d 1147, 1154 (9th Cir. 2018) ("Under the doctrine of pendent appellate jurisdiction, we may review an otherwise non-appealable ruling when it is 'inextricably intertwined' with or 'necessary to ensure meaningful review of' the order properly before us." (citations and quotations omitted)). The Order was properly before the Ninth Circuit under the Federal Arbitration Act, which also provides for interlocutory appeal. *See* 9 U.S.C. § 16(a)(1);

see also Pet.App. at 95a. The same Order on appeal would have proceeded to the Ninth Circuit under that independent provision. YGYI could have sought pendant appellate jurisdiction to review the clear error of law committed by the district court. *See Doe*, 891 F.3d at 1154. In fact, had the Petitioners properly raised the jurisdictional question before the Ninth Circuit, YGYI would have advanced that theory as an alternative jurisdictional basis, but because Petitioners failed timely to raise the legal issue, this Court cannot determine whether appellate jurisdiction would have been lacking even were the Court to issue the Writ and agree with Petitioners' jurisdictional theory.

IV. The Ninth Circuit Did Not Err Because the Courts Have Interlocutory Appellate Jurisdiction to Review Orders Denying Anti-SLAPP Motions in California

The Petition should also be denied because the Ninth Circuit did not err in permitting interlocutory appeal of the anti-SLAPP order under the collateral order doctrine. The circuit courts have published dozens of decisions holding interlocutory appeal available under the collateral order doctrine in circumstances analogous to those here. *See generally Hilton*, 599 F.3d 894; *DC Comics*, 706 F.3d 1009. The Ninth Circuit explained in a published decision denying *en banc* review why those orders fall within the collateral order doctrine. *See Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1180–87 (9th Cir. 2013). Moreover, the Petitioners' argument conflicts with the *Erie* doctrine. Forbidding

interlocutory appeals of orders denying anti-SLAPP motions in instances where the statutes at issue reflect legislative intent favoring such appeals would encourage forum-shopping and result in inequitable administration of the law.

A. A Denial of an Anti-SLAPP Motion Fits Within the Collateral Order Doctrine

The collateral order doctrine allows for interlocutory review of orders to "achieve a healthy legal system." *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citations omitted); *see also Mohawk Indus., Inc.*, 558 U.S. at 103 ("Although 'final decisions' typically are ones that trigger the entry of judgment, they also include a small subset of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review." (quoting *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 546 (1949))). As a judicially-created doctrine, prudential considerations undergird the collateral order doctrine. *See Will*, 546 U.S. at 350.

When a trial court issues an order inconsistent with a litigant's right to immunity from trial, that order satisfies the collateral order doctrine, particularly when the purpose of immunity is to protect fundamental constitutional rights. The trial court's denial of immunity is conclusive, separate, and effectively unreviewable on an important legal issue. The circuit courts have jurisdiction to review those orders under the collateral order doctrine.

1. Denial of an Anti-SLAPP Motion Conclusively Determines a Disputed Question

To come within the collateral order doctrine, an order must conclusively determine the disputed question, *Will*, 546 U.S. at 349 (citations omitted); it "should not be subject to later review or revision in the district court," and the "mere power to revisit an order, however, is insufficient to preclude a finding of conclusivity." *Henry*, 566 F.3d at 173 (citations omitted). An order denying an anti-SLAPP motion is a conclusive determination on whether a defendant must continue to withstand litigation and proceed to trial on allegedly meritless claims calculated to chill the defendants' free speech rights. *See DC Comics*, 706 F.3d at 1013 (citing *Batzel*, 333 F.3d at 1025); *Henry*, 566 F.3d at 174; *NCDR*, 745 F.3d at 748. Trial courts are unlikely to reconsider orders denying anti-SLAPP motions. *Henry*, 566 F.3d at 174 ("There is also no indication that a trial court would revisit an earlier decision on an [anti-SLAPP] motion.").

Petitioners argue that orders denying anti-SLAPP motions do not meet the first element of the collateral order doctrine because "[t]he denial of a motion to strike an anti-SLAPP does not conclusively resolve anything." *See* Pet. at 18. That argument fails because an order denying an anti-SLAPP motion is a conclusive determination by the court that the challenged claim does not infringe on free speech rights and may thus proceed to trial. *See Batzel*, 333 F.3d at 1025. Courts will not revisit that decision and, thus, the order

conclusively determines the issue. *See id.*; *see also Henry*, 566 F.3d at 173–74; *NCDR*, 745 F.3d at 748.

2. Denial of an Anti-SLAPP Motion Is Separate from the Merits of the Claim

To come within the collateral order doctrine, an order must resolve an important issue separate from the merits of the action. *Will*, 546 U.S. at 349 (citations omitted). Orders rejecting immunity from trial are sufficiently separate from the underlying merits to fall within the second element of the collateral order doctrine. *See Mitchell*, 472 U.S. at 528 (explaining that denial of a motion to dismiss based on a qualified immunity is sufficiently separate from underlying merits); *Abney v. United States*, 431 U.S. 651, 659 (1977) (holding an order rejecting immunity under double jeopardy sufficiently separate to meet collateral order doctrine); *see also Batzel*, 333 F.3d at 1025; *Henry*, 566 F.3d at 174–77; *NCDR*, 745 F.3d at 749.

The separability element is met where issues under appeal are "significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits." *Johnson v. Jones*, 515 U.S. 304, 314 (1995). Where the issues under appeal are "conceptually distinct from the merits of the plaintiff's claim," the separability element is satisfied. *See id.* (citation omitted); *see also NCDR*, 745 F.3d at 749. The Fifth Circuit explained that "some involvement with the underlying facts is acceptable, as the [Supreme] Court has found the issue of immunity to be separate from

the merits of the underlying dispute 'even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.'" *Henry*, 566 F.3d at 175 (quoting *Mitchell*, 472 U.S. at 529). The Fifth Circuit further explained "issues concerning immunity from suit are often separate from the underlying dispute in the litigation . . . [and c]laims of qualified immunity are distinct from the merits of a plaintiff's claim." *See NCDR*, 745 F.3d at 749 (citing *Henry*, 566 F.3d at 174; *Mitchell*, 472 U.S. at 527–28).

Petitioners' argument has been rejected by the Ninth and Fifth Circuits. Those courts held the separability element satisfied because "[a]n anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff's claim is to succeed." *See NCDR*, 745 F.3d at 749 (quotations omitted) (quoting *Henry*, 566 F.3d at 174) (citing *Batzel*, 333 F.3d at 1025). Put simply, "the purpose of an anti-SLAPP motion is to determine whether the defendant is being forced to defend against a meritless claim, not to determine whether the defendant actually committed the relevant tort." *Henry*, 566 F.3d at 175 (brackets and quotations omitted) (quoting *Batzel*, 333 F.3d at 1025).

A denial of an anti-SLAPP motion thus resolves a single question—whether the protections of an anti-SLAPP statute apply to the claims. *See Henry*, 566 F.3d at 175; *Makaeff*, 736 F.3d at 1185; *NCDR*, 745 F.3d at 749. Put differently, the Court must evaluate whether the threatened claim infringes on a defendant's

constitutional right to petition the courts. The mere fact that a court must evaluate certain legal or factual elements that coincide with the underlying claims does not render the analysis "on the merits" of those claims. That distinction is apparent here, where the underlying legal issue concerned whether certain statements were subject to the litigation privilege—and not whether the statements themselves were "defamatory" as would be necessary for liability under the asserted defamation tort. The Ninth Circuit did not determine whether the defamation claims were otherwise supported by fact or law.

Petitioners emphasize the phrase, "probability that the plaintiff will prevail on the claim," which appears in the California anti-SLAPP statute. *See* Pet. at 19–20. The Ninth Circuit has rejected their argument, *see Makaeff*, 736 F.3d at 1185–86, clarifying that the "probability that the plaintiff will prevail" is in harmony with federal procedure because, "[u]nlike the sufficiency of evidence inquiry in *Johnson* [*v. Jones*, 515 U.S. 304 (1995), the language of the California anti-SLAPP statute] does 'not consider the correctness of the plaintiff's version of the facts.'" *Id.* at 1186 (quoting *Johnson v. Jones*, 515 U.S. at 313). Thus, Petitioners' interpretation of the California anti-SLAPP statute is a misconstruction and a misapplication of the law in federal court.

3. Denial of an Anti-SLAPP Motion Is Effectively Unreviewable After Final Judgment

To come within the collateral order doctrine, an order must be effectively unreviewable on appeal from a final judgment. *Will*, 546 U.S. at 349 (citations omitted). Orders abrogating an immunity from trial are effectively unreviewable on such an appeal. *See id.* at 350–54. This Court has explained, where "immunity from trial" is "embodied in a constitutional or statutory provision . . . there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip. Corp.*, 511 U.S. at 879. It is "difficult to find a value of higher order than the constitutionally-protected rights to free speech and petition that are at the heart of [an] anti-SLAPP statute." *DC Comics*, 706 F.3d at 1016; *NCDR*, 745 F.3d at 752; *see also Branzburg v. Hayes*, 408 U.S. 665, 734 (1972) ("[W]e have shown a special solicitude towards the 'indispensible liberties' protected by the First Amendment, . . . for freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." (citations omitted)).

Orders denying anti-SLAPP motions under California's anti-SLAPP statute are effectively unreviewable on appeal from a final judgment. California intended to codify something akin to an immunity from trial for those who sought to exercise fundamental freedoms. *See Batzel*, 333 F.3d at 1025 (quoting Cal. Sen. Judiciary Comm. Rep. on AB 1675, which added the immediate right to appeal anti-SLAPP orders, to

explain that without immediate appeal, a defendant's constitutional rights cannot be adequately protected).[3]

Petitioners equate anti-SLAPP with Rule 12(b)(6) motions in an attempt to diminish the importance of the State-sponsored immunities. *See* Pet. at 20–21. Unlike Rule 12(b)(6), however, the anti-SLAPP statute is designed to protect state citizens from continuing constitutional injury from meritless claims. By contrast, 12(b)(6) simply asks whether the plaintiff has sufficiently stated a claim. *Compare* Fed. R. Civ. P. 12(b)(6) *with* Cal. Civ. Proc. Code §§ 425.16, *et seq.* Rule 12(b) has a broader purpose than California's anti-SLAPP, and is significantly less expansive in its protections. Although the federal courts may evaluate anti-SLAPP motions under the Rule 12(b)(6) standards early in litigation (*U.S. ex rel. Newsham*, 190 F.3d at 972–73), an anti-SLAPP motion only applies to a narrow subset of suits that challenge defendants' rights to petition. Within that narrow subset, the anti-SLAPP statute provides critical protections that a Rule 12(b)(6) motion cannot provide, including cost- and fee-shifting and interlocutory appeal. Defendants who prevail on an anti-SLAPP motion under California law are

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[3] Respondents do not contend that a state legislature can create interlocutory appellate jurisdiction in federal court merely through a state statute that includes an immediate right to appeal. *See Godin v. Schencks*, 629 F.3d 79, 85 (1st Cir. 2010). Rather, the right to immediate appeal in the various anti-SLAPP statutes is validated by the importance of the underlying constitutional rights and substantive protections of those rights afforded by the States to their citizens. *See Metabolic Research Inc.*, 693 F.3d at 801–02; *NCDR*, 745 F.3d at 751–52.

"entitled to receive his or her attorney's fees." Cal. Code Civ. Proc. § 425.16(c)(1).

An award of attorney fees only after trial does not make a person subject to a SLAPP whole, in part because the injury flowing from a SLAPP includes the legal proceeding itself.[4] Forcing a person to defend against a claim intended to chill that person's constitutional rights, even if he or she recovers fees and costs, does not remedy the harm suffered for engaging in constitutionally protected speech. SLAPP lawsuits are often calculated to inflict emotional and financial harm through meritless litigation. *See* George W. Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5–6 (1989). When addressing constitutional injuries to the Freedom of Speech, the Courts have consistently held infringement of those rights, even for short periods, inflict irreparable constitutional injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("loss of First Amendment freedoms, for even minimal periods . . . , unquestionably constitutes irreparable injury." (citation omitted)). The defendant in a SLAPP experiences that irreparable harm from the outset of litigation.

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[4] To guard against misuse of the anti-SLAPP statute, the statute also provides that any plaintiff subject to a meritless anti-SLAPP is entitled to attorney fees incurred in defending against the motion. *See* Cal. Civ. Proc. Code § 425.16(c)(1); *see also Workman v. Colichman*, 33 Cal. App. 5th 1039, 1062–65 (Cal. Ct. App. 2019) (awarding appellate attorneys fees to plaintiffs under frivolous appeal statute where defendant frivolously appealed a denial of an anti-SLAPP motion); *Pers. Court Reporters, Inc. v. Rand*, 205 Cal. App. 4th 182, 191–93 (Cal. Ct. App. 2012) (same).

The States' interest in preventing constitutional injuries defines the core purpose of anti-SLAPP statutes. The constitutional injury, as well as the right to be immune from trial, cannot be remedied post-trial. *See City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782 (2004) ("courts are aware of the constitutional need to avoid 'undue delay resulting in the unconstitutional suppression of protected speech.'" (brackets omitted) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)*, holding modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004)) (citing *Schlesinger v. Councilman*, 420 U.S. 738 (1975)).

B. Eliminating Interlocutory Review for Anti-SLAPP Motions Is Inconsistent with the *Erie* Doctrine

Rejecting interlocutory jurisdiction over anti-SLAPP orders in federal court promotes forum-shopping. That ruling would remove citizens' immunities from suit in diversity cases based on state law whenever those cases proceed in federal court. That outcome would result in a federal safe-harbor from SLAPP suits. That encourages increased litigation in federal courts on state law theories.

Petitioners do not dispute the applicability of anti-SLAPP statutes in federal court. They do not challenge Ninth Circuit precedent holding California's anti-SLAPP statute substantive and applicable in federal court sitting in diversity. *See generally* Pet.; *see also U.S. ex rel. Newsham*, 190 F.3d at 970–73 (holding

California's anti-SLAPP statute which provides for a special motion to strike and award of attorneys' fees to a prevailing defendant does not conflict with Federal Rules of Civil Procedure). Petitioners thus concede California's anti-SLAPP statute affords litigants substantive protections.[5]

A federal court sitting in diversity must give effect to state substantive law. *Gasperini*, 518 U.S. at 426–27; *see generally Erie R.R. Co.*, 304 U.S. 64. Federal courts must apply the substantive rule that California defendants are immune from trial on meritless litigation attacking their constitutional rights. *See id.*; *see also Batzel*, 333 F.3d at 1025–26; *cf.* Fed. R. Evid. 501 (indicating state privilege law applies in a civil suit in federal court). The Ninth Circuit's current approach is consonant with the "twin aims of *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the law." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

An inequitable administration of law occurs where an action would be dismissed in state court but the identical action would proceed through litigation in federal court "solely because of the fortuity that there is diversity of citizenship between the litigants." *Burke v. Air Serv. Int'l, Inc.*, 685 F.3d 1102, 1109 (D.C. Cir. 2012); *see also Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 264 (3d Cir. 2011) ("Were we not to apply

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[5] Similar to the Appellees in *Newsham*, Petitioners were unable to "identif[y] any federal interests that would be undermined by application of the anti-SLAPP provisions urged by the [Respondents] here." *U.S. ex rel. Newsham*, 190 F.3d at 973.

the state rule, a defendant in federal court would be forced to engage in additional litigation and expense in a non-meritorious malpractice suit simply because the plaintiff was from a different state. . . . Moreover, a non-diverse plaintiff in state court would be required to comply with the rule, while a plaintiff in federal court could avoid the certificate of merit requirement simply because he or she is a citizen of a different state.") (citation omitted). In California state court, a defendant can always pursue an immediate interlocutory appeal of an order denying an anti-SLAPP motion. Defendants in federal court, meanwhile, would lack that ability. The immunity from trial, and the protections necessary to protect that immunity, should not be based on whether suit is brought in state or federal court when the rule provided in a diversity case is based on a California statute. That outcome would force defendants in federal court to face liability under state statutory torts, but without the attendant protections provided by that same state law. Such a result violates *Erie*. *See, e.g.*, *Markham v. City of Newport News*, 292 F.2d 711, 718 (4th Cir. 1961) ("[*Erie*'s] basic philosophy is that a federal court exercising diversity jurisdiction to adjudicate rights created by the state . . . should reach the same result as the state courts . . . in deciding the identical issue.").

Petitioners failed to brief the *Erie* implications in this case. The Ninth Circuit properly approached this issue and held that California's anti-SLAPP statute affords a protection akin to an immunity from trial. That immunity protects the right of California citizens to engage in freedoms guaranteed them by the United

States and California Constitutions. When construing a state immunity from trial designed to safeguard an important constitutional freedom, a federal court sitting in diversity must likewise respect intended interlocutory rights of appeal. Petitioners' contrary position should be rejected along with the Petition.

CONCLUSION

The issue the Petitioners present to this Court was never addressed on the merits below and was first raised in Petitioners' motion for an en banc hearing, which motion was denied without comment; accordingly, the Petition seeks an advisory opinion. Moreover, the matter at issue is not of special import and there is no conflict among the circuits, because they consistently hold interlocutory appeals appropriate in instances where state anti-SLAPP statutes are aimed at averting a trial to protect underlying rights to free speech and petition. Therefore, this Court should deny the Petition.

Respectfully submitted,

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