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

REPLY BRIEF FOR PETITIONERS

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The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondents are faced with the unenviable task of having to look a manifest split of authority in the face and claim that it does not exist. Respondents' attempt to persuade this Court that there is no split of authority among the circuit courts fails utterly and merely highlights the deep disagreement among the circuit courts regarding the application collateral order doctrine to denials of motions to strike under state anti-SLAPP provisions.

Respondents assert that Petitioners' appeal of this issue was waived because Petitioners did not address interlocutory jurisdiction before the Ninth Circuit panel. This assertion is false (because Petitioners *did* address the collateral order doctrine in their brief before the Ninth Circuit panel) and irrelevant (because objections as to lack of subject-matter jurisdiction can be raised at any time—even for the first time on the appeal).

Respondents further claim that reversing the Ninth Circuit's decision below would have no effect on the pending litigation. Even if this were true (and it is not true), this Court has repeatedly held that the application of the collateral order doctrine must be determined as to "categories of cases" and not on the basis of the facts of an individual case.

Finally, Respondents fault Petitioners for failing to address the *Erie* doctrine in the petition. In so doing, Respondents have highlighted a separate, independent basis for this Court to reverse the decision below.

I. RESPONDENTS HIGHLIGHT, RATHER THAN REFUTE, THE DIRECT AND ACKNOWLEDGED SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS

Respondents claim that there is no split of authority among the circuit courts on the application of the collateral order doctrine to state anti-SLAPP provisions. If this is the case, then someone has failed to inform the judges on the Second and Ninth Circuits.

The Second Circuit expressly highlighted its disagreement with the Ninth Circuit (and the Fifth Circuit), holding that appeals passing on the merits of an anti-SLAPP motion do not meet the requirements of the collateral order doctrine. *Ernst v. Carrigan*, 814 F.3d 116, 120-21 (2d Cir. 2016) (citing *Batzel v. Smith*, 333 F.3d 1018 (9th Cir.2003); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 175, 177 (5th Cir. 2009)). "Other courts to consider the question have concluded otherwise," the Second Circuit stated, but "[w]e prefer to follow the Supreme Court's holding in *Johnson* that 'completely separate from the merits' means what it says, that is, 'conceptually distinct' and 'significantly different.'" *Id.* at 120-21 (referencing *Johnson v. Jones*, 515 U.S. 304, 314 (1995)).

In a similar vein, Ninth Circuit Judge Ronald M. Gould expressly highlighted the Ninth Circuit's disagreement with the Second Circuit's decision in *Ernst*, observing that the Second Circuit's decision "makes the point I make here, the denial of an anti-SLAPP motion is inextricably intertwined with the merits of the underlying case. Such a decision is not appropriate for interlocutory appeal." *Planned Parenthood v. Center for Medical Prog.*, 890 F. 3d 828, 838 (9th Cir. 2018) (Gould, J., concurring) (citing *Ernst v. Carrigan*, 814 F.3d 116, 119 (2d Cir. 2016)).

Faced with this manifest disagreement between the Second and Ninth Circuit, Respondents attempt to recast these differences, claiming that differences between the Ninth Circuit and the Second Circuit results from the examination of "different statutory scheme[s]." Resp. Br. at 13. But Respondents have failed to identify *any* textual differences between the California anti-SLAPP statute and the Vermont anti-SLAPP statute that would compel a different treatment under the collateral order doctrine. Indeed, the Second Circuit expressly noted that the Vermont anti-SLAPP provision examined in *Ernst* was based on the California provision addressed by the Ninth Circuit. *See Ernst*, 814 F.3d at 121.

Respondents claim that the Second Circuit and the Ninth Circuit reached different conclusions because, according to the Ninth Circuit, the California anti-SLAPP provision provides for "immunity from trial," whereas, according to the Second Circuit, the Vermont anti-SLAPP provision does not. Resp. Br. at 4, 13. Here again, Respondents merely highlight a disagreement between two courts and fail to identify any textual difference between to the two statutes that compels different treatment under the collateral order doctrine. If two separate circuit courts examined similar statutes and one concludes that the statute creates immunity from suit, and the other concludes the opposite (and this different result is not grounded in some textual requirement of the statutes themselves), then there is a split of authority. The Second Circuit and the Ninth Circuit are not reaching different conclusions because they are reading different statutes. They are reaching different conclusions simply because they disagree.

The California Supreme Court has held that the California anti-SLAPP provision "neither constitutes—nor enables courts to effect—*any kind* of 'immunity.'" *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal.4th 728, 738, 3 Cal.Rptr.3d 636, 74 P.3d 737 (2003) (emphasis added) (quotation marks omitted). Instead, the California anti-SLAPP provision creates "a *procedure* where the trial court evaluates the merits of the lawsuit using a summary-judgment-like *procedure* at an early stage of the litigation." *Flatley v. Mauro*, 39 Cal.4th 299, 312, 46 Cal.Rptr.3d 606, 139 P.3d 2 (2006) (emphasis added) (quotation marks omitted).[1]

But even if it were true that the California anti-SLAPP provision created immunity from trial, the Second Circuit made clear that this fact would not be relevant to its decision finding no interlocutory jurisdiction under the collateral order doctrine. "Even if the Vermont anti-SLAPP statute does provide immunity from trial, it does not follow that rulings on motions to strike are immediately appealable. Not every adverse ruling on a 'right not to stand trial' automatically is subject to interlocutory review." *Ernst*, 814 F.3d at 121 (quoting *Will v. Hallock*, 546 U.S. 345, 350-51 (2006)). Such a generalization, "would leave the final order requirement of § 1291 in tatters." *Id.* (quoting *Will*, 546 U.S. at 351).

At bottom, the Ninth Circuit and the Second Circuit examined similar anti-SLAPP provisions. The Ninth Circuit found (contrary to the holding of the California Supreme Court) that the California anti-

[1] *Wainwright v. Goode*, 464 US 78, 84 (1983) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts.").

SLAPP provision created immunity from trial. The Second Circuit found that the Vermont anti-SLAPP provision (which was based on the California provision) does not create immunity from trial. Both Circuits disagreed about whether or not federal courts of appeals possess interlocutory jurisdiction anti-SLAPP provisions. In short, there is a split of authority.[2]

II. PETITIONER RAISED THE COLLATERAL ORDER DOCTRINE BELOW AND A CHALLENGE TO THE SUBJECT-MATTER JURISDICTION MAY BE RAISED AT ANY TIME

Respondents claim that Petitioners failed to preserve their objection to the application of the collateral order doctrine because Petitioners first raised the Ninth Circuit's lack of interlocutory jurisdiction "in a Petition for Rehearing *En Banc* . . . ." Resp. Br. at 19. This statement is both false and irrelevant. Petitioners raised the Ninth Circuit's lack of interlocutory jurisdiction in their initial response brief before the Ninth Circuit panel:

> Appellees . . . submit that interlocutory review of the denial of an anti-SLAPP motion is inappropriate under the collateral order doctrine because resolution of an anti-SLAPP motion is inextricably intertwined with the merits of the underlying

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[2] Matthew R. Pikor, Comment, The Collateral Order Doctrine in Disorder: Redefining Finality, 92 Chi.-Kent L. Rev. 619, 644 (2017) ("The most recent federal circuit split addressing collateral order appeals emerged [the Second Circuit's *Ernst* decision]. In that case, the Second Circuit declined to follow previous rulings [of] . . . the Fifth and Ninth Circuits.").

> case. Appellees respectfully submit that any review of the denial of an anti-SLAPP motion should be inappropriate under the collateral order doctrine and request that the appeal be dismissed on that basis.

See Youngevity Int'l Corp. v. Andreoli, No. 18-55031 (9th Cir. 2018), D.I. No. 19, at p. 11 n.3 (citing *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 835-38 (9th Cir. 2018) (Gould, J., concurring)).

Even if it were true that Petitioners had failed to raise the Ninth Circuit's lack of interlocutory jurisdiction prior to the petition for rehearing *en banc* (and it is not true), this Court's resolution of this appeal would still be proper because challenges to a court's subject matter jurisdiction cannot be waived, and may be raised for the first time on appeal. *See Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013) ("Objections to a tribunal's jurisdiction can be raised *at any time*, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy.") (emphasis added); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 444-45 (2011) (subject-matter jurisdictions may be raised at any time, even after trial, and are never waived)..

Jurisdiction in this case is premised on the "final decisions" rule set forth in on 28 U.S.C. § 1291 and the application of that rule to so-called collateral orders set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1948). If the collateral order doctrine does not apply, there is no subject-matter jurisdiction and the Ninth Circuit's decision below must be reversed. Objection to such a lack of jurisdiction cannot be waived.

III. THIS COURT LOOKS TO THE CATEGORY OF CASES, NOT THE INDIVIDUAL CASE, WHEN APPLYING THE COLLATERAL ORDER DOCTRINE

Respondents claim that a reversal of the Ninth Circuit's decision below would have no effect on the underlying litigation because the Ninth Circuit has already determined that Petitioners defamation claims are barred by the litigation privilege under California law. Resp. Br. at 22. Even if this assertion were true, it would have no bearing on this Court's analysis of the present appeal. This is because this Court has repeatedly held that it will not evaluate the application of the collateral order doctrine on an individualized basis, but instead must determine whether the doctrine applies to an "*entire category* to which a claim belongs." *Digital Equipment*, 511 U.S. at 868 (emphasis added). Even where an "appeal might result in substantial savings of time and expense," this Court "look[s] to *categories of cases*, not to particular injustices," when determining whether the collateral order doctrine is applicable. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988) (emphasis added).

The Ninth Circuit below was required to analyze the merits of Respondents' litigation privilege defense and draw conclusions regarding whether or not the alleged defamatory statements were directed at those with "a substantial interest in the outcome of the pending litigation" and not merely "the general public." *Id.* at 96a–97a. This Court need not speculate with Respondents whether further factual development at trial would alter the Ninth Circuit's view of this question. All that is required is for this Court to determine whether denials of anti-SLAPP motions *as a category* properly fall within the ambit of the collateral order doctrine.

Respondents further insist that reversal would have no effect on the litigation below because, even if there was no jurisdiction to review the denial of anti-SLAPP motions, the Ninth Circuit had an independent basis for pendent jurisdiction because Respondents also sought review of the denial of their motion to compel arbitration and the Federal Arbitration Act provides for interlocutory appeal. Resp. Br. at 22-23. But Petitioners' defamation claims and the trial court's refusal to compel arbitration of Petitioners' contract claims are not even remotely related. This Court has resisted efforts to expand pendent appellate jurisdiction to such unrelated claims and has indicated that such jurisdiction should only apply where a decision is "inextricably intertwined with" one over which the court has jurisdiction or where review of one decision is "necessary to ensure meaningful review" of another. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 15 (1995). Petitioners' defamation claims and contract claims were not "inextricably intertwined," and no pendent jurisdiction would have been available.

IV. APPLICATION OF STATE ANTI-SLAPP PROVISIONS IN FEDERAL COURTS IS FORECLOSED BY THE *ERIE* DOCTRINE

Petitioners' appeal is directed to the application of the collateral order doctrine to state anti-SLAPP provisions. But Respondents have identified a separate, independent basis for reversing the Ninth Circuit's opinion below: The application of state anti-SLAPP provisions in federal courts is foreclosed by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. Resp. Br. 20-21. Federal courts of appeals are sharply divided on the question of whether *Erie* bars

the application of state anti-SLAPP provisions in federal courts, and a resolution of that issue would resolve completely the issues disputed in this appeal.

Petitioners sought review of an entirely separate issue and did not address the application of the *Erie* doctrine in the Court below. Petitioners address the *Erie* doctrine here only because it was raised in Respondents' Response Brief. Resp. Br. 20-21. However, this Court has discretion to address any matter argued in the briefs that "will reduce the likelihood of further litigation." *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 14 (2009). Petitioners provide the following analysis to the extent that it will be helpful to the Court. Petitioners will happily address the issue in greater detail, if the Court so desires, with supplemental briefing or in a merits brief.

Pursuant to its authority under the Rules Enabling Act, 28 U.S.C. § 2072, this Court has promulgated Rules 12 and 56 of the Federal Rules of Civil Procedure, both of which ought to govern the pre-trial disposition of cases in federal courts. The application of state anti-SLAPP statutes in federal courts interposes a state procedural mechanism on the operation of the Federal Rules. This intrusion ought to be foreclosed by *Erie* and its progeny.

Under the *Erie* doctrine, federal courts sitting in diversity "are to apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 US 460, 465 (1965). To determine whether a law is substantive or procedural under *Erie*, this Court first looks to whether there is an applicable federal rule or statute that is "sufficiently broad to control the issue before the Court." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980). In making this determination, this

Court has made clear that "[i]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 410 (2010). Moreover, this Court has specified that "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure." *Id.* at 406 (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)). If a federal rule answers the disputed question, the federal rule governs unless it is invalid. *Shady Grove*, 559 U.S. at 398. And federal rules are valid when they do not violate the Rules Enabling Act because they "really regulate[] procedure." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

Rules 12 and 56 are much more than "rationally capable of classification as procedure"—they are procedural rules, plain and simple, and there is no question of their validity. Thus, under *Erie* and its progeny, the pretrial disposition of disputes in federal courts should be governed by Rules 12 and 56 of the Federal Rules of Civil Procedure and not by state anti-SLAP provisions.

There is an acknowledged split of authority among the federal courts of appeals regarding the application of state anti-SLAPP provisions in federal courts. In *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1337 (2015), the D.C. Circuit found that "Federal Rules 12 and 56 answer the same question as the D.C. Anti–SLAPP Act, and those Federal Rules are valid under the Rules Enabling Act." Consequently, the court held that "[a] federal court exercising diversity

jurisdiction . . . must apply Federal Rules 12 and 56 instead of the D.C. Anti–SLAPP Act's special motion to dismiss provision." *Id.* Similarly, in *Los Lobos Renewable Power v. Americulture, Inc.*, 885 F. 3d 659, 668-69 (10th Cir. 2018), the Tenth Circuit held that application of a state anti-SLAPP procedure was barred in federal court by the *Erie* doctrine because "[t]he plain language of the New Mexico anti-SLAPP statute reveals the law is nothing more than a *procedural* mechanism designed to expedite the disposal of frivolous lawsuits aimed at threatening free speech rights." (emphasis in the original). *See also, Intercon Sols., Inc. v. Basel Action Network*, 969 F.Supp.2d 1026, 1042 (N.D. Ill. 2013), *aff'd*, 791 F.3d 729 (7th Cir. 2015).

Courts of Appeals for the First, Fifth, and Ninth Circuits have reached the opposite conclusion—finding that state anti-SLAPP provisions are substantive and not procedural in nature and that their application in federal courts is appropriate under *Erie*. *See Godin v. Schencks*, 629 F.3d 79, 85-92 (1st Cir. 2010); *Cuba v. Pylant*, 814 F. 3d 701, 706 (5th Cir. 2016); *United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th Cir. 1999).[3]

The resolution of this additional circuit split would resolve all of the issues in this appeal. Petitioners would welcome the opportunity to fully address this important issue in supplemental briefing or a merits brief.

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[3] *But see, Cuba v. Pylant*, 814 F. 3d 701, 706 (5th Cir. 2016) (Graves, J., dissenting) ("The [Texas anti-SLAPP provision] creates no substantive rule of Texas law; rather [it] is clearly a procedural mechanism for speedy dismissal of a meritless lawsuit that infringes on certain constitutional protections.").

CONCLUSION

With respect to all other issues raised in Respondents' Response Brief, Petitioners stand by the analysis set forth in their petition and respectfully request that the Court grant the petition.

Respectfully submitted,

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