No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD: SHASTA-DIABLO, INC., DBA PLANNED PARENTHOOD NORTHERN CALIFORNIA, PLANNED PARENTHOOD MAR MONTE, INC., PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST, PLANNED PARENTHOOD LOS ANGELES, PLANNED PARENTHOOD/ ORANGE AND SAN BERNARDINO COUNTIES, INC., PLANNED PARENTHOOD OF CENTRAL COAST CALIFORNIA, INC., PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC., PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD GULF COAST, AND PLANNED PARENTHOOD CENTER FOR CHOICE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Ninth Circuit have reversed itself and exacerbated an unsettled and widening split among the First, Fifth, Tenth, and D.C. Circuits by failing to apply the distinctive First Amendment immunity provided by the anti-SLAPP statutes of California and more than 30 states?

2. Did the lower courts improperly permit Plaintiffs to perform an end run around the First Amendment's heightened pleading standards for claims against protected speech?

PARTIES AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the present petition for certiorari and the proceedings below:

Petitioners are DAVID DALEIDEN, GERARDO ADRIAN LOPEZ, CENTER FOR MEDICAL PROGRESS, AND BIOMAX PROCUREMENT SERVICES, LLC. All five are Defendants in the U.S. District Court for the Northern District of California and were the Appellants in the U.S. Court of Appeals for the Ninth Circuit. Petitioner BioMax Procurement Services, LLC is wholly owned by Petitioner the Center for Medical Progress, a nonprofit corporation. Daleiden and Lopez are investigative journalists who have worked on behalf of CMP.

Respondents are PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD: SHASTA-DIABLO, INC., dba Planned Parenthood Northern California, PLANNED PARENTHOOD MAR MONTE, INC., PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST, PLANNED PARENTHOOD LOS ANGELES, PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES, INC., PLANNED PARENTHOOD OF CENTRAL COAST CALIFORNIA, INC., PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC., PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD GULF COAST, PLANNED PARENTHOOD CENTER FOR CHOICE, SANDRA SUSAN MERRITT, TROY NEWMAN, and ALBIN RHOMBERG. The Planned Parenthood entities are Plaintiffs in the U.S. District Court for the Northern District of California and were the Appellees in the U.S. Court of Appeals for

PARTIES AND RULE 29.6 STATEMENT—
Continued

the Ninth Circuit. Sandra Susan Merritt, Troy Newman and Albin Rhomberg are Defendants in the U.S. District Court for the Northern District of California. Merritt was an Appellant in the U.S. Court of Appeals for the Ninth Circuit; Newman and Rhomberg were not. Merritt is an investigative journalist who has worked on behalf of CMP. Newman and Rhomberg are former board members of CMP.

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All lower court decisions in this case are styled *Planned Parenthood Federation of America, Inc., et al. v. Center for Medical Progress, et al*. The district court decision converting Petitioners' anti-SLAPP special motion to strike into a motion to dismiss is published at 214 F. Supp. 3d 808 (N.D. Cal. 2016). Pet. App. C. The opinion of the U.S. Court of Appeals for the Ninth Circuit affirming conversion of the motion is published at 890 F.3d 828 (9th Cir. 2018). Pet. App. A. The Ninth Circuit's concurrently filed memorandum affirming the district court's denial of the converted motion is unpublished but is available at 735 F. App'x 241 (9th Cir. 2018). Pet. App. B. The order amending the concurrence to the opinion is published at 897 F.3d 1224 (9th Cir. 2018). Pet. App. D. The Ninth Circuit's order denying rehearing is unreported. Pet. App. E.

JURISDICTION

The panel decision of the Ninth Circuit issued on May 16, 2018. The Ninth Circuit denied a timely petition for rehearing/rehearing en banc on August 23, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

California's anti-SLAPP statute reads as follows:

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares 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. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination

shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the

motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Cal. Code Civ. Proc. § 425.16.

INTRODUCTION

Thirty states and the District of Columbia now have anti-SLAPP ("Strategic Lawsuits Against Public Participation") laws. Thus, a majority of federal jurisdictions must wrestle with how to handle them when they are entangled in federal lawsuits. Anti-SLAPP laws protect individual defendants from being sued to obstruct them from exercising their First Amendment rights, particularly in exposing corruption.

Five federal Circuits have lined up on either side of the question whether federal courts should apply the motion to strike crucial to state-law SLAPP protections. The First and Fifth Circuits have held that federal courts must apply the state statutes; the D.C. and Tenth Circuits have held that they must not.

In this high-profile, politically-charged matter, the Ninth Circuit has flip-flopped on its own earlier decision, choosing now to deny disfavored speech the special protection to which it is entitled under state law. In an about-face, the Ninth Circuit no longer will apply the special anti-SLAPP motion to strike, which is intended to shift the evidentiary burden to plaintiffs who seek to suppress speech. Instead, Ninth Circuit courts will re-categorize that motion to strike as either a motion to dismiss or a motion for summary judgment, obliterating defendants' protections against being dragged through a spurious lawsuit aimed at suppressing the exercise of their First Amendment rights.

This case implicates fundamental questions of federalism, revisiting *Erie v. Tompkins* and *Hanna v.*

Plumer, and the ongoing confusion caused by *Shady Grove*. The Ninth Circuit's newly-adopted, erroneous approach invites the forum-shopping and inequity those cases expressly aimed to thwart.

This Court should review the decision below and hold that the First and Fifth Circuits are correct that federal courts must offer free-speech defendants the motion to strike provided by state anti-SLAPP statutes. In the alternative, the Court should review the decisions below and hold that the First Amendment bars Plaintiffs' claims.

STATEMENT OF THE CASE

I. Facts and Proceedings Below

A. The Center for Medical Progress's undercover investigation

Petitioner David Daleiden founded the Center for Medical Progress ("CMP") to inform the public about unethical and inhumane medical practice, including the selling of aborted fetal tissue for research. Daleiden and other investigators, including Petitioner Gerardo Adrian Lopez, posed as potential business partners of abortion providers and tissue procurement business owners, while outfitted with hidden cameras. Beginning on July 14, 2015, CMP released a series of videos, highlighting clips of conversations showing abortion providers engaged in fetal organ trafficking and associated abuses. With each video release, CMP simultaneously released complete footage of the

conversations, to allow every viewer to examine the full context.

The resultant exposé did not please abortion providers. The first videos showed Planned Parenthood executives enjoying wine and salad while casually discussing how best to "crush" fetuses, debating what monetary figure might suffice to induce them to do business with CMP's supposed tissue procurement operation (Petitioner BioMax Procurement Services), and musing aloud about how to best keep up the appearance of legality. Subsequent videos featured executives and employees of fetal tissue procurement companies discussing their illegal business models.

Within two weeks of the public release of the "Human Capital Project," a fetal tissue procurement company called StemExpress, LLC, brought a lawsuit in Los Angeles County, California Superior Court. Soon thereafter, the abortion industry's trade group, the National Abortion Federation ("NAF"), brought a lawsuit in the Northern District of California, alleging twelve state law claims bootstrapped to a single federal claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The StemExpress lawsuit was dismissed during the pendency of an anti-SLAPP appeal; the NAF lawsuit remains pending.

Six months after the original two lawsuits were filed, and after the District Court had granted NAF a prior-restraint preliminary injunction, Respondent Planned Parenthood Federation of America, Inc., and ten franchise affiliates (collectively "PPFA") brought

the present lawsuit. Like NAF, PPFA brought a host of state law claims bootstrapped to tenuous federal claims. The lawsuit was assigned to the same federal district court judge who had ruled favorably for NAF.

Defendants' investigation and reporting to law enforcement so far has led to successful lawsuits by the Orange County District Attorney against two companies for trafficking in fetal organs. It also has resulted in the ongoing federal Department of Justice investigation of PPFA.

B. The District Court proceedings

On January 14, 2016, PPFA filed an initial complaint in the District Court and amended it on March 24, 2016. On May 6, 2016, Petitioners filed an anti-SLAPP motion pursuant to Cal. Code Civ. Proc. § 425.16.

In opposing the motion, PPFA did not attempt to establish a prima facie case for each of its claims using admissible evidence, as required by California's anti-SLAPP statute. Instead, it argued the anti-SLAPP motion should be treated as a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

The District Court agreed and treated it as a motion to dismiss, holding that anti-SLAPP motions do not require an evidentiary rebuttal unless the defendant explicitly raises factual deficiencies. Pet. App. 110a–125a.

Defendants also argued that Plaintiffs were using RICO to pursue what essentially was a state-law defamation claim without pleading it, thereby violating Defendants' First Amendment rights recognized under prior Ninth Circuit cases. The District Court held PPFA had adequately pleaded damages other than defamation damages, in the form of voluntary costs PPFA incurred to enhance corporate security, thereby to preclude journalists from scrutinizing it in the future. Pet. App. 88a–93a.

C. The Ninth Circuit rulings

Petitioners appealed. The Ninth Circuit issued both a published opinion, Pet. App. A, and a memorandum affirmance, Pet. App. B.

The published opinion affirmed the District Court's treatment of Defendants' anti-SLAPP motion as a Rule 12(b)(6) motion, because the anti-SLAPP motion explicitly had identified deficiencies in the pleadings. It further held that anti-SLAPP motions raising factual deficiencies would be treated as summary judgment motions. Unlike the District Court, the Ninth Circuit found that anti-SLAPP motions conflict with the Federal Rules of Civil Procedure. Pet. App. 9a–15a.

The unpublished memorandum then affirmed that PPFA's claims were adequately pleaded. Pet. App. 24a–36a. Two members of the panel also filed a concurrence discussing the growing dispute regarding anti-SLAPP interlocutory appeals. Pet. App. 16a–22a, *see* Pet. App. D.

The Ninth Circuit denied Petitioners' request for rehearing and rehearing en banc. Pet. App. E.

II. Legal Background

A. The backdrop of federalism: *Erie* to *Shady Grove*

This Court's decisions in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Hanna v. Plumer*, 380 U.S. 460 (1965), set forth how federal courts adjudicate state law claims. Under *Erie*, federal courts must apply the *substantive* law of the states to state law claims, but must apply federal *procedural* law. *Hanna*, 380 U.S. at 471; *Erie*, 304 U.S. at 77–79. This scheme aims to discourage "forum-shopping" and prevent inequity between litigants. *See Erie*, 304 U.S. at 78.

This principle has not proven easy to apply. This Court soon qualified *Erie*'s basic distinction between "substantive" and "procedural," and explained that "the intent of [*Erie*] was to insure that . . . the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). Where a traditionally "procedural" state law is outcome-determinative, therefore, it must be applied. This result was necessary to fulfill the aims of *Erie*, namely avoiding inequity between litigants and avoiding forum-shopping. *Id.* at 109–10.

In *Hanna v. Plumer*, the Court considered conflicts between the Federal Rules of Civil Procedure and state laws. 380 U.S. at 468–69. The Federal Rules were promulgated under the authority of the Rules Enabling Act of 1934, codified at 28 U.S.C. § 2072 (2012), which permits federal courts to make "rules of practice and procedure" that do not "abridge, enlarge or modify any substantive right." *Id.* at §§ 2072(a) & 2072(b). Given such a limitation, wrote the Court in *Hanna*, when a federal court is faced with a potential conflict between a state law and a federal rule of procedure, the federal court must identify whether there is an actual, direct conflict between the two. *Hanna*, 380 U.S. at 468–69. If there is no direct conflict, the Court must decide which law would apply under *Erie*. *Id.* at 465. If there is a direct conflict, then a federal rule remains valid so long as it does not "abridge, enlarge, or modify any substantive right." *Id*. (quoting 28 U.S.C. § 2072(b)).

Interpreting *Hanna* has proven no more straightforward than following *Erie*. Courts have not found a predictable way to determine whether a true conflict exists between a federal rule and a state law. Moreover, when a court finds a conflict, no consistent analysis has emerged for determining whether a particular federal rule trumps state law.

The abiding confusion about both steps set forth in *Hanna* is evident in this Court's 2010 decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). There, the Court divided into a four-justice plurality, a solo concurrence, and a

four-justice dissent on the question of whether Rule 23 should apply to permit a class action where New York state law would preclude one.

A five-justice majority held that: (1) there was a conflict between Rule 23 and New York law, *Shady Grove*, 559 U.S. at 398–406; and (2) federal courts should apply Rule 23 rather than the conflicting state law, *id.* at 407–10; *id.* at 436 (Stevens, J., concurring in part and concurring in the judgment). However, only four justices agreed on a single justification for applying Rule 23, *id.* at 406–10, and four justices dissented from the judgment, concluding that there was no necessary conflict between the federal rule and state law, *id.* at 437 (Ginsburg, J., dissenting).

On the preliminary question whether Rule 23 conflicted with New York state law, five justices agreed that Rule 23 and the state law conflicted because they answered the same question (*i.e.*, may this suit proceed as a class action?) differently. *Id.* at 398. A majority having agreed that the two provisions were irreconcilable, the Court moved to the second question under *Hanna*: whether Rule 23 or the state law should apply in federal court.

Analyzing the cases since *Erie* and *Hanna*, Justice Scalia wrote on behalf of a four-justice plurality that, in the case of a conflict, the central question to determine which law to apply is whether the federal rule "really regulates procedure" rather than substance. *Id.* at 407. If so, federal courts must apply the federal rule

to state law claims regardless of its effect on the rights and remedies of state litigants.

A rule regulates procedure, according to Justice Scalia, if it "regulate[s] only the process for enforcing . . . [parties'] rights" and does not affect "the rights themselves, the available remedies, or the rules of the decision" which the court will apply. *Id.* at 407–08.

Justice Stevens's concurrence in *Shady Grove*, *id.* at 417–36 (Stevens, J., concurring), which is significant because his conclusion was essential to the holding, focused on a question Justice Scalia had declared irrelevant: whether the state law applicable in the particular case, though procedural in form, "actually is part of a State's framework of substantive rights or remedies." *Id.* at 419 (Stevens, J., concurring). If a state law is truly substantive, then displacing it with a federal rule would improperly "abridge, enlarge, or modify a[ ] substantive right." 28 U.S.C. § 2072(b).

Thus, according to Justice Stevens, before allowing application of a conflicting federal rule, federal courts must determine the true nature of the state law before it. To do that, a court begins with consideration of the text of the law in question, but must then go beyond the text to consider whether a particular law actually "alters a state-created right." *Id.* at 432.

Justice Stevens, however, also agreed with the four dissenters that "some state procedural rules . . . function as a part of the State's definition of substantive rights and remedies." *Id.* (Ginsburg, J., dissenting). The dissenters stated the Court's precedents require

that the federal courts, including the Supreme Court, interpret the federal rules with "sensitivity to important state interests" and "to avoid conflict with important state regulatory policies." *Id.* at 442 (Ginsburg, J., dissenting) (internal quotations marks and citations omitted). According to the dissenters, unless a "direct collision" between a federal rule and a state law is "unavoidable," federal courts proceed under a general *Erie* analysis, which requires that federal courts apply state laws when not doing so would lead to forum-shopping or inequitable results. *Id.* at 438–39.

Thus, in *Shady Grove* this Court broke down 5-4 on the question whether there was an actual conflict between the state law and federal rule; 4-1 on how to determine which law to apply when there is such a conflict; and, according to Justice Stevens, 5-4 (with the plurality opinion in the minority) on whether state laws that appear to regulate procedure may nevertheless operate as part of a state's substantive law and therefore be binding in federal court.

With the Supreme Court thus divided, it is easy to see why federal courts have struggled in cases, such as the instant case, in which they must weigh apparent conflicts between federal rules and state laws.

B. Anti-SLAPP statutes

In 1992, the California Legislature enacted California's anti-SLAPP statute, because it found a "disturbing increase" in strategic lawsuits against public participation that "chill the valid exercise of the

constitutional rights of freedom of speech and petition." *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1042 (1997). "California lawmakers wanted to protect speakers from the trial itself rather than merely from liability." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003). "Thus, a defendant's rights under the anti-SLAPP statute are in the nature of immunity: They protect the defendant from the burdens of trial, not merely from ultimate judgments of liability." *Id*. "[T]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights." *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 193 (2005).

California's anti-SLAPP statute contains five main provisions applicable to all cases, based on "any . . . conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Code Civ. Proc. § 425.16, subd. (e). These include: (1) the right to move to strike claims unless the plaintiff establishes a "probability of prevailing" as to that claim (subd. (b)); (2) the right to attorneys' fees for a successful defendant (subd. (c)); (3) the right to have the motion heard quickly (within 30 days of being filed) and requirement that the motion be filed quickly (within 60 days after the filing of the complaint) (subd. (f)); (4) the right to a stay of "[a]ll discovery proceedings" (subd. (g)); and (5) the right to an immediate, interlocutory appeal (subd. (i)).

These five main provisions are the bread and butter of anti-SLAPP statutes, which have been enacted by thirty states, the District of Columbia, and Guam. *See* George W. Pring & Penelope Canan, "*Strategic Lawsuits Against Public Participation" ("Slapps"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 952 (1992) (law and sociology professors who invented SLAPP theory explaining the necessary elements of an anti-SLAPP statute). Moreover, "[a]t least ten states, the District of Columbia, and Guam have modeled their anti-SLAPP statutes on features or interpretations of California's anti-SLAPP statute." THOMAS R. BURKE, ANTI-SLAPP LITIGATION § 8.1 (2018); *see also id.* at § 8.2–8.33 (list of anti-SLAPP statutes by jurisdiction).

Four of the five anti-SLAPP provisions identified above are self-explanatory, but (1), the right to move to strike claims unless the plaintiff establishes a "probability of prevailing" as to that claim (subd. (b)), has given rise to a voluminous body of case law.

The California Supreme Court has explained that, despite imposing an evidentiary burden on the plaintiff, an anti-SLAPP motion is more akin to a "conventional motion to strike" than a motion for summary judgment. *Baral v. Schnitt*, 1 Cal. 5th 376, 393 (2016). This is because "an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded." *Id*.

When adjudicating anti-SLAPP motions, California state courts engage in an analysis of shifting

burdens. First, the moving defendant has the burden to establish a prima facie showing that the "particular alleged acts giving rise to a claim for relief" are acts undertaken in support of the right to free speech or the right to petition the government. If the defendant meets his burden, then the burden shifts to the plaintiff to demonstrate a "probability of prevailing" on his claim. *Id*. at 385.

The "probability of prevailing" standard imposes on the plaintiff three separate burdens. First, the plaintiff has to respond to any arguments raised by the defendant that the complaint is legally insufficient. *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002). Second, the plaintiff has to respond to any evidence put forth by the defendant which defeats the plaintiff's case. *Id.* These two burdens are essentially identical to responding to a motion to dismiss and a motion for summary judgment.

However, the plaintiff also has a third burden to demonstrate that his claims are "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id.* This burden is identical to the burden for surviving a motion for nonsuit made by a defendant after a plaintiff rests his case at trial. *Id*. at 824. Also like a motion for nonsuit, the defendant bears no "initial burden of production." *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 599 (9th Cir. 2010); *see also Tuchscher Dev. Enterprises, Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1239 (2003). ("[I]t was not [the defendants'] burden to show [the

plaintiff] *could not* demonstrate a probability of prevailing on its claims; its only burden was to establish that the claims fell within the ambit of the statute."). If the plaintiff cannot meet his three burdens, each challenged claim is stricken from the complaint.

In figuring out how to apply California's anti-SLAPP statute in federal court, the Ninth Circuit has taken a convoluted approach, first holding that it generally applied, and then whittling away at each of the five main provisions.

The Ninth Circuit first held that California's anti-SLAPP statute applied in federal court in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), which held: (1) the motion to strike procedure (subd. (b)); and (2) the right to attorneys' fees for a successful defendant (subd. (c)), applied in federal court because "there is no direct collision" with the Federal Rules. Rather, "there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims" and, if unsuccessful, a SLAPP defendant "remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Id*. at 972.

Two years later, the Ninth Circuit revisited California's anti-SLAPP statute in *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001), and held that two portions of it could not apply in federal court: (3) the requirement to file an anti-SLAPP motion within 60 days of the filing of a complaint (subd. (f)); and (4)

the right to a stay of all discovery proceedings (subd. (g)). *Id*. at 846. Recognizing the plaintiff's burden to establish a prima facie case with admissible evidence, the Ninth Circuit stated that federal courts cannot scrutinize whether a plaintiff has established that prima facie case if the needed evidence is "uniquely within the Defendants' control" without delaying adjudication of the motion and "ordering discovery." *Id*.

After another two-year jump, the Ninth Circuit in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) affirmed that: (5) the right to an immediate, interlocutory appeal (subd. (i)), applied in federal court "[b]ecause California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit." *Id*. at 1025–26.

Until the Ninth Circuit's opinion in this case, provision (1), the right to move to strike claims unless the plaintiff establishes a "probability of prevailing" as to that claim (subd. (b)), had been secure—along with all three of the plaintiff's associated burdens. *See Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598–99 (9th Cir. 2010).

In this case, the Ninth Circuit has reversed course, holding that the California case law interpreting "probability of prevailing" would no longer apply in federal court. Pet. App. 9a–15a. Rather, defendants can file only a motion to dismiss or a motion for summary judgment, and then tack on the two remaining SLAPP provisions, the right to attorneys' fees and the right to

an interlocutory appeal, so long as the claim is based on constitutionally protected conduct. *Id*.

The special anti-SLAPP motion to strike with its burden-shifting implications "is the law's mainspring because every provision in [an anti-SLAPP statute] has meaning and effect only in connection with the filing of the special motion to strike under subsection [(b)]." *See Davis v. Cox*, 183 Wash. 2d 269, 295 (2015) (interpreting Washington anti-SLAPP statute). Thus, in effect, the Ninth Circuit has now ruled that state anti-SLAPP statutes do not apply in federal court.

C. The First Amendment end run

Federal courts are particularly protective of First Amendment free speech and freedom of the press rights. For example, where a party seeks to recover damages caused by publication, they require that party to "satisfy[ ] the stricter (First Amendment) standards of a defamation claim." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) and *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

To that end, courts look beyond artful pleading to take a holistic and practical look at "the injuries actually sustained." *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 499 F.3d 520, 530–33 (6th Cir. 2007). If the damages could be recovered via a defamation claim, and the plaintiff does not bring a defamation claim, they are not recoverable. *See La Luna Enterprises, Inc.*

v. CBS Corp., 74 F. Supp. 2d 384, 388, 392 (S.D.N.Y. 1999).

Food Lion involved a plaintiff that sought damages for injuries to its reputation as a result of undercover journalists publishing truthful information about its actual business practices. The ABC program *Prime Time Live* sent two undercover reporters to infiltrate and secretly film Food Lion's meat-handling practices. The reporters obtained jobs at Food Lion under false pretenses, using fake identifications and making false representations on the job applications. They secretly filmed Food Lion employees handling meat, and the films were later broadcast on national television. 194 F.3d at 510–11.

Although the facts in *Food Lion* were remarkably similar to the facts in this case, the result was quite different.

"Food Lion did not sue for defamation, but focused on how ABC gathered its information. Food Lion made claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices." *Id.* at 510. However, it sought to recover damages as a result of consumers learning of its business practices on *Prime Time Live*, or "reputational damages from publication." *Id.* at 523. Recognizing this as an attempted "end run" around First Amendment protections of speech, the Fourth Circuit held that, because Food Lion did not claim defamation, Food Lion could not recover any damages for injuries attributable to the videos' *publication*. *Id*. at 522.

Similar issues were raised in *Compuware Corp. v. Moody's Investors Services*. There, "Compuware asked Moody's to rate its ability to repay funds borrowed under a $900 million revolving bank credit facility." 499 F.3d at 523. Moody's then published a highly negative rating for Compuware, which filed suit, alleging breach of contract. *Id*. at 524. Attempting to avoid constitutional problems, Compuware requested rescission only—not monetary damages. *Id*. at 532. The court rejected that effort, and affirmed the grant of summary judgment, stating: "Despite Compuware's attempt to avoid the actual-malice standard by clothing its requested relief in the contractual garb of rescission, we must look beyond the damages sought by the plaintiff *to the injuries actually sustained*." *Id*. (emphasis added); *see also id.* at 530, 533 ("[I]t is inescapable that Compuware seeks compensation for harm caused to its reputation. . . . [I]ts only injuries are defamation-type harm.").[1]

Despite this line of cases, other cases have looked to *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), and turned it "into a 'First Amendment neutralizer,'" such that *Cohen* has "become the case that parties cite[] to persuade a court to skip First Amendment analysis." Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from*

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[1] Other cases are in accord with *Food Lion* and *Compuware*. *See, e.g., Hornberger v. Am. Broad. Co., Inc.*, 351 N.J. Super. 577 (2002); *Desnick v. Am. Broad. Co., Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995).

Newsgathering Torts, 32 HARV. J. L. & PUB. POL'Y 1093, 1110 (2009).

"In *Cohen*, a 5-4 majority of the Supreme Court determined that the First Amendment did not bar a lawsuit against two Minnesota newspapers that broke a promise of confidentiality to a source." *Id*. at 1109. *Cohen* implied that where the alleged "damages were economic (loss of his job and earning capacity) as opposed to reputational," the First Amendment is irrelevant. Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media Co., 35 GA. L. REV. 1087, 1122 (2001).

But "[t]his distinction between economic versus reputational damages, which *Cohen* implies . . . is unfortunately specious. Neither *New York Times* nor its progeny make a distinction between 'economic' and 'reputational' damages, and such a distinction cannot be reasonably sustained. One of the obvious ways in which a defamatory remark can harm someone, particularly a business, is by causing economic losses. Such damages are not distinguishable from the damages caused by the harm to reputation but rather flow directly from the loss in reputation." *Id*. at 1123–24.

D. Costs of excluding the press

This year, the Ninth Circuit reaffirmed the proposition that misrepresentations by journalists made to gain entry to publicly accessible property do not cause the property owner any legally cognizable harm. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194–99 (9th Cir. 2018); *see also Northside Realty Assocs.,*

Inc. v. United States, 605 F.2d 1348, 1355 n.19 (5th Cir. 1979). This is because "news gathering is not without its First Amendment protections." *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

Wasden concerned an "ag-gag" law. Since Upton Sinclair, undercover investigators have been investigating abuses in the animal agriculture industry. "At the end of the day, [these] undercover investigations are effective. Evidence obtained from these investigations has led to criminal convictions, massive food recalls, lawsuits, stronger animal-protection laws, and even changes in corporate policy. Undercover exposés have even had a measurable impact on consumers' buying habits." Sarah Hanneken, *Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy, and Logic*, 50 J. MARSHALL L. REV. 649, 657–58 (2017).

Due to the effectiveness of the investigations, "the meat, dairy, and egg lobbies got to work in state legislatures encouraging lawmakers to enact the types of laws the industry had previously lacked use of in court. And thus, 'ag-gag' laws were born: legislation specifically designed to stop undercover investigators from documenting abuse at animal agricultural operations." *Id*. at 658.

Wasden concerned Idaho's ag-gag law which made it a crime to obtain entry to an agricultural production facility by misrepresentation. *Wasden*, 878 F.3d at 1191 (citing Idaho Code Ann. § 18-7042). *Wasden* struck down the provision as unconstitutional. *Id*. at

1194–99. In so doing, *Wasden* took the principle that "news gathering is not without its First Amendment protections," and applied it to the provision. As a result, *Wasden* held that lying to gain access to property does not cause the property owner "legally cognizable harm." *Id*. at 1194. Rather, "[t]he targeted speech—a false statement made in order to access an agricultural production facility—cannot on its face be characterized as made to effect a fraud. . . . [L]ying to gain entry merely allows the speaker to cross the threshold of another's property, including property that is generally open to the public." *Id*. at 1194–95 (quotation marks and citations omitted). The dissent in *Wasden* stated that the "legally cognizable harm" was common-law trespass, *id*. at 1206–13. The majority rejected that, though, stating instead that the trespasser "gains little to nothing from his misrepresentation," so there is no legally cognizable harm, at least when positioned against free press rights, *id*. at 1195.

REASONS FOR GRANTING THE WRIT

There are two issues in this case. The first issue is the validity in federal court of the central, substantive provision of anti-SLAPP statutes, which have been adopted in 32 American jurisdictions to protect the public and the judiciary by forestalling the use of SLAPP suits to chill protected speech. Federal courts applying the confusing lineage of *Erie* and *Hanna* have divided over whether anti-SLAPP statutes should protect litigants in federal courts.

This Court should accept an anti-SLAPP case to clarify the operation of *Erie* and *Hanna* throughout the federal system and to afford free-speech defendants the protections provided by their state legislatures consistently—throughout state and federal courts and between different federal circuits. This case is ideal for review because the Ninth Circuit has an unusually confused history of inconsistent cases considering anti-SLAPP statutes, and the decision below directly conflicts with Ninth Circuit precedent. This case also vividly illustrates how misapplication of *Erie* and *Hanna* can lead to forum-shopping and inequitable treatment.

The second issue in this case is whether the Ninth Circuit has improperly permitted PPFA to engage in an end run around the First Amendment.

First Amendment damages jurisprudence flowing from *Hustler Magazine* has become particularly confused in light of the "mischief" of *Cohen v. Cowles*. On the one hand, a line of cases flowing from *Hustler Magazine* holds that Courts should be particularly wary of attempts to engage in an end run around the defamation standards of the First Amendment via artful pleading. On the other hand, many courts feel free to cite *Cohen v. Cowles* as a justification that no First Amendment analysis is needed. This confusion leads to inconsistent application.

For example, First Amendment protection in the Ninth Circuit appears to apply differently depending on one's political associations and beliefs—and does

not apply at all if the political belief is opposition to abortion. *See Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016); *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 685 F. App'x 623 (9th Cir. 2017).

First Amendment jurisprudence is clear in its vigorous protection for the rights of journalists and speakers generally. Indeed, the Ninth Circuit has expanded that protection even farther than other Circuits. A mere three months before adjudicating Defendants' appeal, the Ninth Circuit expanded that jurisprudence in a way that should have protected Defendants from all liability. *See supra*, Statement of the Case § II.D. Nevertheless, the Ninth Circuit ignored its jurisprudence and reversed course. This is the second time the Ninth Circuit has turned a blind eye to these Defendants' First Amendment rights in an unpublished memorandum affirmance.

This Court should grant review to explain the apparent inconsistency between *Hustler Magazine* and *Cohen v. Cowles* and to ensure that lower courts are not applying them selectively based solely on whose speech is at issue.

I. The Circuits Have Split Over Whether to Apply Anti-SLAPP Statutes in Federal Courts, and the Ninth Circuit Chose the Wrong Side.

The circuit split exhibited here is significant and already has drawn the attention of this Court, which

recently ordered a response to a related petition for certiorari from the Tenth Circuit. *See Los Lobos Renewable Power, LLC v. Americulture, Inc.*, No. 18-89 (U.S. July 16, 2018).

This case is an ideal vehicle for resolving this circuit split because the Ninth Circuit's anti-SLAPP jurisprudence has been both especially voluminous and especially confused. In fact, the Ninth Circuit has now moved, *sub silentio*, from one side of the circuit split to the other. This case is also especially worthy of the Court's prompt attention because it illustrates both the forum-shopping and the inequitable administration of justice that *Erie* meant to prevent.

A. The breadth of the Circuit split

In *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010), the First Circuit held that Maine's anti-SLAPP statute "must be applied" in federal court. *Id*. at 81; *Steinmetz v. Coyle & Caron, Inc.*, 862 F.3d 128 (1st Cir. 2017) (applying Massachusetts's anti-SLAPP statute).

Applying *Shady Grove*, the *Godin* court concluded Maine's anti-SLAPP statute did not conflict with Rules 12 and 56, because those rules were not so broad "as to cover the issues within the scope of" Maine's anti-SLAPP statute. *Godin*, 629 F.3d at 87–88. The First Circuit specifically noted that the three rules do not "answer the same question" or "address the same subject," as the Court found in *Shady Grove*. *Id.* at 88. Moreover, nothing kept federal courts from applying all three pre-trial motions, just as the State of Maine

requires of its courts. *Id.* The First Circuit further held that affording anti-SLAPP protections in federal court was consistent with the dual purposes of *Erie*—discouragement of forum-shopping and avoidance of inequitable administration of the laws. *Id*. at 91–92.

The Fifth Circuit later followed suit, applying Louisiana's anti-SLAPP statute in federal court. *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 168–69 (5th Cir. 2009); *see also Cuba v. Pylant*, 814 F.3d 701, 706 (5th Cir. 2016) (applying Texas's anti-SLAPP statute).

In contrast, in *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015), the D.C. Circuit held that the District of Columbia's anti-SLAPP statute may not be applied in federal court. *Id*. at 1333–37. Holding that the statute and Rules 12 and 56 "answer the same question," *i.e.*, "the circumstances under which a court must dismiss a case before trial," *id.* at 1333–34, the D.C. Circuit proceeded along the path marked by the plurality in *Shady Grove*, which relied on pre-existing Supreme Court precedent: to determine whether those federal rules "really regulate[] procedure," *id.* at 1337. Finding that they do regulate procedure, the D.C. Circuit held that Rules 12 and 56 preempt anti-SLAPP pre-trial motions. *Id*. at 1337.

In *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659 (10th Cir. 2018), the Tenth Circuit also held that New Mexico's anti-SLAPP statute did not apply in federal court, but for different reasons than the D.C. Circuit. Not pausing to identify a conflict

between a state and federal provision, the *Los Lobos* court cited precedents applying *Erie* generally as well as Justice Stevens's concurring opinion in *Shady Grove* and concluded that New Mexico's anti-SLAPP statute "is nothing more than a procedural mechanism designed to expedite the disposal of frivolous lawsuits" and therefore may not be applied in federal court. *Id.* at 668–69.

Both the First and Fifth Circuits cited *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), the early Ninth Circuit case in which it held that anti-SLAPP motions to strike were consistent with Rules 12 and 56 in the federal courts. *Godin*, 629 F.3d at 80; *Henry*, 566 F.3d at 168–69. But after decades of chipping away at *Newsham*, in this case the Ninth Circuit has finally abandoned its central holding allowing anti-SLAPP motions to strike in federal court, albeit without explicitly stating so. *See supra*, Statement of the Case § II.B.

In holding that the central provision of anti-SLAPP statutes cannot be applied in federal court, the Ninth Circuit has aligned itself with the Tenth and the D.C. Circuits—but using a third, entirely distinct rationale. In the Ninth Circuit's view, *Erie* and its progeny require it to interpret state law (the anti-SLAPP provision) such that it does not collide with federal law. Pet. App. at 12a. Although the Ninth Circuit provided no authority for this claim, the interpretation is most akin to the rationale of the dissenters in *Shady Grove*, who stated that state and federal provisions should be interpreted so as not to collide, but there the federal

courts had the obligation to narrow the federal rule in question, not the state law. *See Shady Grove*, 559 U.S. at 440–42 (Ginsburg, J., dissenting).

By interpreting anti-SLAPP motions as either Rule 12 or Rule 56 motions, the Ninth Circuit managed to avoid explicitly overruling its longstanding precedent that anti-SLAPP statutes should be applied in federal court, while also eviscerating the central protection provided by anti-SLAPP statutes. Although it will still entertain "anti-SLAPP motions," the possibility of an expedited dismissal based on the plaintiff's failure to meet its three burdens does not apply. *See supra*, Statement of the Case § II.B.

B. Anti-SLAPP motions do not collide with any Federal Rule of Civil Procedure.

In this Court's very divided decision in *Shady Grove*, all nine justices agreed that the first step in considering whether to apply a state law in federal court is to determine whether there is a conflict between the state law and a Federal Rule of Civil Procedure. *Shady Grove*, 559 U.S. at 398; *id.* at 421 (Stevens, J., concurring); *id.* at 438–39 (Ginsburg, J., dissenting). The Court divided 5-4 (minority and plurality) on the question of how to determine whether such a conflict exists. The five-justice majority in *Shady Grove* held that the standard for whether a conflict exists is whether the federal rule and the state law answer the same "question in dispute." *Id.* at 398–99. In *Shady Grove*, Rule 23 and New York law answered the

question "whether Shady Grove's suit may proceed as a class action" in directly opposite ways. *Id.* at 398–99. Thus, the Court concluded that the two laws were irreconcilable.

Applying the majority analysis here, Rules 12 and 56 do not answer the same question as anti-SLAPP statutes. California's anti-SLAPP statute addresses the question: "Has *this* plaintiff presented a strong enough case to overcome the suspicion that he is using the specter of a trial to suppress the defendant's First Amendment rights?"

Rules 12 and 56 promote efficiency at two other pre-trial stages by allowing *any party to a lawsuit* to ask the Court to apply a particular standard of review to the other party's case before proceeding. These motions address the questions: "Has this party met the appropriate burden to proceed past the pleading phase?" and "Has this party met the appropriate burden to merit judgment as a matter of law?"

These three provisions are available at different stages, to different parties, with different burdens of proof. There is nothing incompatible about applying different standards of proof to a party's case at different pre-trial stages. If there were, Rules 12 and 56 would themselves be irreconcilable.

Put another way, as the Ninth Circuit once clearly stated, there is nothing contradictory between the three motions, because a SLAPP defendant "remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Newsham*, 190 F.3d at

972; *see also Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1182 (9th Cir. 2013) (Wardlaw and Callahan, JJ., concurring in denial of rehearing en banc). Indeed, this is what is required under California state law, which added anti-SLAPP protections to a scheme that already included analogs to Rules 12 and 56. Cal. Code Civ. Proc. §§ 430.10, 437c; *see also Godin*, 629 F.3d at 87–88 (holding that the provisions could all be applied, in part because Maine adopted its anti-SLAPP statute in addition to the protections afforded by state analogs to Rules 12 and 56).

Moreover, since all three provisions can be applied without infringing on one another, anti-SLAPP measures present a much easier case than *Shady Grove* and *Hanna*, where the federal rules and state laws provided directly opposite answers to the same question. *See Shady Grove*, 559 U.S. at 398–99; *Hanna*, 380 U.S. at 470. Here, providing an anti-SLAPP motion to strike will not affect the operation of the federal rules in any way.

The minority in *Shady Grove* would agree that there is no conflict. The four-justice minority in *Shady Grove* examined the two provisions in that case and found them not in conflict. Justice Ginsburg interpreted *Hanna* to require that federal courts "interpre[t] the federal rules to avoid conflict with important state regulatory policies." *Id.* at 441 (Ginsburg, J., dissenting) (citation omitted). "[S]ensitivity to important state interests" led Justice Ginsburg to examine the legislative history of the state law in order to determine its purpose, and to conclude that, though

procedural in form, the statute had a "manifestly substantive end." *Id.* at 442 (citation omitted), 445. She concluded that precedent required that the Court interpret Rule 23 narrowly to permit application of the state law. *Id.* at 448–49 & n.8.

Applying Justice Ginsburg's reasoning here, the legislative history of California's anti-SLAPP statute reveals clearly that it has a substantive purpose and effect, *i.e.*, protecting the First Amendment rights of speech and petition by protecting individuals from litigation aimed at chilling free speech. *See supra*, Statement of the Case § II.B. These interests are sufficiently strong that 30 states plus the District of Columbia and Guam have passed anti-SLAPP statutes. *See id.*

It is particularly easy in this case to apply both state and federal law, because the Court need not constrict Rules 12 and 56 in order to allow free-speech defendants an anti-SLAPP motion to strike. Unlike in *Shady Grove*, where the dissent constrained Rule 23 by allowing a state law to change the result it otherwise provided, granting free-speech defendants an additional motion would do nothing to alter the text, purpose, scope, and operation of Rules 12 and 56. No convoluted interpretation is necessary here—just straightforward application of the text of all three provisions.

Thus, applying either standard set forth in *Shady Grove*, this Court should hold that there is no conflict between California's anti-SLAPP motion to strike and Rules 12 and 56.

C. *Erie* requires federal courts to provide anti-SLAPP motions to strike.

This Court in *Hanna v. Plumer* made clear that, in cases involving no conflict with a Federal Rule of Civil Procedure, the "broad command of *Erie*" still requires that federal courts hearing state law claims apply "state substantive law and federal procedural law." *Hanna*, 380 U.S. at 465. *Hanna* also confirmed *Guaranty Trust Co. v. York*'s holding that courts must identify "substantive" state laws by reference to whether declining to apply a state law will be "outcome-determinative" in the federal litigation. *Hanna*, 380 U.S. at 467–69 (citing *York*, 326 U.S. at 108–12). However, *Hanna* made the important qualification that this "outcome-determinative" test must be applied "by reference to the policies underlying the *Erie* rule," which are "discouraging forum-shopping and avoidance of inequitable administration of the laws." *Id*. at 467, 468. In other words, "substantive" state laws are those whose failure to apply in federal courts will encourage litigants at the point of filing suit to forum-shop and/or will result in an inequitable administration of the laws. *Id.* at 468–69.

Provisions providing anti-SLAPP motions to strike are certainly "substantive" in this important sense. The right afforded to free-speech defendants to file a special motion to strike is sufficiently "outcome-determinative" to lead plaintiffs to forum-shop in order to avoid the burdens it imposes on them. *See supra*, Statement of the Case § II.B. (laying out the burdens

on plaintiffs). Indeed, this case is a clear example of such forum-shopping.

Petitioners defended a lawsuit brought against them in state court by filing an anti-SLAPP motion. The plaintiffs in that case dismissed it before the anti-SLAPP claims could be fully adjudicated. The two other lawsuits were brought in federal court—both based on spurious federal claims—for the apparent purpose of evading the anti-SLAPP statute.[2]

Such forum-shopping should not surprise the Ninth Circuit, which held early on that "the twin purposes of the *Erie* rule—discouragement of forum-shopping and avoidance of inequitable administration of the law—favor application of California's anti-SLAPP statute in federal cases." *Newsham*, 190 F.3d at 973. "Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the anti-SLAPP statute would find considerable disadvantage in a federal proceeding." *Id*.

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[2] Bootstrapping state law claims to a RICO claim to avoid California's anti-SLAPP statute appears to be an increasingly common practice. *See*, *e.g.*, *Yagman v. Edmondson*, 723 F. App'x 463 (9th Cir. 2018); *Resolute Forest Prod., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005 (N.D. Cal. 2017); *Khuc v. Peninsular Investments, Inc.*, No. 15-CV-02898-BLF, 2016 WL 3916519 (N.D. Cal. July 20, 2016); *Klayman v. Deluca*, No. 5:14-CV-03190-EJD, 2015 WL 427907 (N.D. Cal. Jan. 30, 2015).

This case also presents a clear example of the inequitable administration of laws, as feared in *Erie*. Defendants have now filed anti-SLAPP motions to strike in three cases and have received three different dispositions. In California state court, the anti-SLAPP motion to strike froze discovery and complicated a motion for preliminary injunction aimed at curtailing Defendants' speech. The plaintiffs eventually dismissed the suit. *StemExpress, LLC, et al. v. The Ctr. for Med. Progress, et al.*, No. BC589145 (Cal. Super. Ct. July 27, 2015).

In two other related cases, Defendants have received different resolutions from the same district court judge. Defendants have filed anti-SLAPP motions in two suits brought by related plaintiffs and assigned to the same judge in the Northern District of California. ER51–53; *Nat'l Abortion Fed'n v. Ctr. for Med. Progress, et al.*, No. 3:15-CV-3522-WHO (N.D. Cal. July 31, 2015) ("*NAF v. CMP*"). In *NAF v. CMP*, the district court refused to treat the anti-SLAPP motion as a Rule 12(b)(6) motion. *NAF v. CMP*, 2015 WL 5071977, at *5–*9 (N.D. Cal. Aug. 27, 2015). In the case below, the same district court flatly contradicted its previous holding and held that the court would *only* consider an anti-SLAPP motion under the standards of Rule 12 or Rule 56. ER51–53. There could not be a more clear-cut case of the inequitable administration of justice.

II. The Lower Courts Wrongly Refuse to Prohibit an End Run Around the First Amendment.

In attempting to distinguish *Food Lion* and *Hustler Magazine*, and the bar on "publication damages," PPFA claimed, and the lower courts accepted, that it was not seeking publication damages but rather damages for increased expenditures on "security" measures intended to preclude journalists from investigating it in the future. Pet. App. 28a, 88a–93a.

In accepting this argument, the lower courts cited *Cohen v. Cowles* to sidestep the First Amendment interest in precluding a plaintiff from engaging in an end run around the First Amendment. The lower courts held that PPFA had a legally-protectable commercial interest in what amounts to squelching future scrutiny of it, the costs of which it could seek as damages against the party which motivated that scrutiny. Pet. App. 92a; *cf. also id.* at 83a ("[D]efendants' goal" of putting "one of the largest providers of reproductive health services in the country [] out of business" "threatens the type of harm the antitrust and federal consumer protection laws aim to prevent.").

The lower courts' analyses paid no attention to the First Amendment concerns at issue, and instead of engaging in the appropriate scrutiny of PPFA's case to ensure that no end run was being tolerated, summarily affirmed a novel theory aimed precisely at circumventing the First Amendment.

The Ninth Circuit's rationale is troubling, because it contradicts its holding announced in *Wasden* a mere three months earlier. As stated above, *Wasden* held that misrepresentations by journalists made to gain entry to property do not cause the property owner any legally cognizable harm. This directly conflicts with the Ninth Circuit's holding that PPFA's efforts to exclude journalists can be legally cognizable damages.

The mere fact that Defendants infiltrated PPFA clinics is no distinction. For example, in adjudicating a case where a journalist became employed by the corporation he was investigating, the court rejected the corporation's argument that its offices were not generally open to the public. It was enough that "those areas were easily accessible to anyone who claimed an interest in working for" the corporation. *Pitts Sales, Inc. v. King World Prods., Inc.*, No. 04-60664-CIV-COHN, 2005 WL 4038673, at *5 (Bankr. S.D. Fla. July 29, 2005); *see also id.* at *4 (The defendant "did not gain access to special areas of Plaintiff's property that others could not have accessed simply by telling Plaintiff that they were interested in selling magazines for Pitts Sales or any other companies traveling with Pitts Sales."); *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979) ("The testers did no more than what any member of the home-buying public is invited, and indeed welcomed, to do. . . . The testers did not enter into any restricted areas of the office, such as an employees' lounge.").

The fact that the Ninth Circuit ignored *Wasden*—and engaged in an about face after a mere three months—is troubling. The comparison between the ag-gag cases and the present case is striking. The existence of ag-gag legislation confirms that when investigators publish information about the animal agriculture industry, that industry is injured. That is why industry has lobbied for the passage of ag-gag laws. But the fact that it is injured does not mean that it has suffered a legally cognizable harm. The industry is not harmed by trespass, and it has not been defamed (*i.e.*, harmed by *false* statements). It is harmed because the truth about the industry is unsavory. The animal agriculture industry involves the dismemberment of living creatures. That practice is perfectly legal, but unpleasant. Unsurprisingly, the industry also has activists seeking to shut it down.

These observations apply equally to the abortion industry. Case law provides that a woman has a constitutional right to obtain an abortion, but the reality is unpleasant. That right involves dismembering a living creature. The exercise of that right results in blood and body parts. Like the animal agriculture industry, merely publishing the reality of what goes on causes the public to become uncomfortable. But that does not mean that the industry has suffered a legally cognizable harm. There is simply no reason that the rationale of *Wasden* does not apply fully here, barring PPFA's claims for lack of legally cognizable damages.

The Ninth Circuit's repudiation of *Wasden* in this case "is a matter of serious constitutional concern." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (Kennedy, J., concurring).

As Justice Kennedy recently noted:

> [I]t is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable. It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief.

Id. at 2379 (Kennedy, J., concurring) (quotation marks, brackets, and citations omitted).

Just like the statutory law at issue in *Nat'l Inst. of Family & Life Advocates*, the case law announced by the lower courts in this case, "imperils th[e] liberties" of "freedom of thought and belief." *Id*. (Kennedy, J., concurring). This Court should grant review to protect those liberties.

CONCLUSION

This Court should grant certiorari to resolve the circuit split regarding the applicability of state anti-SLAPP laws in federal court and to resolve conflicting case law that permits lower courts too much flexibility in determining when to permit an end run around the First Amendment.

Respectfully submitted,

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November 21, 2018