NO. 20-_____

# In the Supreme Court of the United States

STEPHANIE G. CLIFFORD,

*Petitioner,*

v.

DONALD J. TRUMP,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), this Court held that a valid Federal Rule of Civil Procedure governs over a state procedural rule if the two rules "answer the same question." *Id.* at 399. The Court outlined a two-pronged test: A federal rule governs when it (1) "answer[s] the same question" as the state law, and (2) it is not "ultra vires." *Id.* This Court also made clear that rules on pleadings and summary judgment are "ostensibly addressed to procedure." *Id.* at 404.

This case involves the Texas Citizens' Participation Act ("TCPA"). The TCPA, like Fed. R. Civ. P. 12 and 56, provides a "*procedure* for the expedited *dismissal of* [meritless] suits." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (emphasis added). Applying *Shady Grove*, the Fifth Circuit held that the TCPA answers the same questions as Fed. R. Civ. P. 12 and 56—*i.e.*, "what are the circumstances under which a court must dismiss a case before trial?" The Fifth Circuit held that the TCPA is inapplicable in federal court. But in the decision below, the Ninth Circuit split with the Fifth Circuit, holding that the TCPA applies in federal court. Thus, the Second, Fifth, Tenth, Eleventh, and D.C. Circuits all hold that statutes like the TCPA are inapplicable, while the First and Ninth Circuits apply them.

THE QUESTION PRESENTED IS:

Does the TCPA apply in Federal Court diversity jurisdiction cases under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)?

## LIST OF PROCEEDINGS

1. *Clifford v. Trump*, 18-cv-03842-JMF (S.D.N.Y.). On April 30, 2018, plaintiff filed her complaint. But the parties jointly stipulated to a transfer to the C.D. California.

2. *Clifford v. Trump*, 2:18-cv-06893-SJO-FFM (C.D. Cal.). On October 15, 2018, the district court granted defendant's motion to dismiss/strike the complaint based on the TCPA and Fed. R. Civ. P. 12(b)(6).

3. *Clifford v. Trump*, No. 18-56351 (9th Cir.). On July 31, 2020, the court of appeals affirmed. The Ninth Circuit denied en banc rehearing on September 10, 2020.

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The Ninth Circuit's opinion, 81 F.App'x 746, is unreported and reproduced at App.1a-9a. The district court's opinion is reported at 339 F.Supp.3d 915 and reproduced at App.10a-34a.

## JURISDICTION

The Ninth Circuit issued its opinion on July 31, 2020, and denied rehearing en banc on September 10, 2020. App.35a-36a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

The relevant laws from the Texas Civil Practice and Remedies Code §§ 27.001–27.011 are included in the appendix at App.37a-45a.

## STATEMENT OF THE CASE

### A. Statutory Background

This case involves the TCPA, a Texas anti-SLAPP statute. The acronym "SLAPP" stands for "Strategic Lawsuits Against Public Participation." *KBMT Op. Co., LLC v. Toledo*, 492 S.W.3d 710, 713 n. 6 (Tex. 2016). Anti-SLAPP statutes are state laws designed to dismiss meritless lawsuits that target expressive activity. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017). The Supreme Court of Texas considers the TCPA a procedural statute. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015).

The most stringent anti-SLAPPs, like the TCPA, serve strong medicine to accomplish their goals: An accelerated dismissal procedure soon after suit is filed, Tex. Civ. Prac. & Rem. § 27.003(a) (West 2015), and a complete stay of discovery unless a judge permits limited discovery. *See* § 27.003(c); § 27.006(b). All the while, a plaintiff must, at the pleading stage, still come forward with evidence to establish her prima facie trial-like burden. § 27.003(a); § 27.006(a). For the prevailing defendant, the TCPA awards mandatory attorney fees, costs, and sanctions, § 27.009(a); and an interlocutory appeal if the trial court denies the motion. § 27.008.

In diversity jurisdiction cases, whether the TCPA—a statute the Texas Supreme Court considers procedural—should apply in federal court is subject to a familiar framework. *See Erie*, 304 U.S. at 78-79; *see also* Rules of Decision Act, 28 U.S.C. § 1652 (state

substantive law to govern in diversity cases); *see also* Rules Enabling Act, 28 U.S.C. § 2072 (federal procedural rules applicable in federal court). Together, that framework requires a federal court to apply the Federal Rules of Civil Procedure when they cover the situation, even if the rule incidentally affects state law. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *Burlington N. R. R. Co. v. Woods*, 480 U.S. 1, 5 (1987); *Shady Grove Ortho. Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399-401 (2010).

### B. Procedural Background

1. Petitioner Stephanie Clifford (a.k.a "Stormy Daniels") is an adult movie actor and entertainer. After Clifford agreed to an interview with IN TOUCH MAGAZINE about her affair with Mr. Trump in 2011, a stranger threatened her and her child. The man confronted Clifford in a parking lot telling her, "Leave Trump alone. Forget the story." App.11a.

Clifford publicly released a sketch of the man who threatened her. But the next day, Mr. Trump accused Clifford of lying. In a tweet, Mr. Trump claimed: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" App.11a-12a.

2. After seeing Mr. Trump's tweet, Clifford sued him for defamation. Clifford filed her Complaint in the Southern District of New York. At the time, Mr. Trump was a New York resident, while Clifford was a Texas resident. Mr. Trump moved in a combined motion to transfer venue or to stay or dismiss the action. His argument turned on that he and Clifford had other pending litigation in that circuit. App.12a-14a.

3. Before the Southern District of New York could rule on Mr. Trump's motions, the parties stipulated to a transfer to the Central District of California. App.13a-14a.

4. Mr. Trump moved to dismiss the case based on the TCPA. Mr. Trump claimed that his statements were protected opinion: hyperbole. Thus, he argued, Clifford's lawsuit sought to punish him for his protected speech. Clifford countered: the TCPA is inapplicable in federal court. Alternatively, because Trump's statements were provably false, they were actionable under longstanding law. App.18a-20a.

5. The district court ruled for Mr. Trump. Applying the RESTATEMENT (SECOND) CONFLICT OF LAWS § 150 (1971), the court ruled that Clifford's Texas domicile was controlling and Texas law applied. App.15a-17a. The court assumed that the TCPA is functionally the same as the California anti-SLAPP statute. App.17a. Under Ninth Circuit law, anti-SLAPP statutes apply in federal court. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999). The court then applied Ninth Circuit law and dismissed. The court also held that Mr. Trump had a right to seek his attorney's fees, costs, and sanctions under the TCPA. App.17a-34a.

6. Ms. Clifford appealed. The Ninth Circuit affirmed. It held that the TCPA is functionally the same as the California anti-SLAPP statute. The Ninth Circuit split with the Fifth Circuit, holding that the TCPA applies in federal court. Turning to the merits, the court—while acknowledging that one of Trump's two statements can be proven true or false—held that the context of the publication made it clear that it was protected opinion. App.2a-9a. The

court affirmed. *Id.* The court denied rehearing en banc. App.35a-36a.

## REASONS FOR GRANTING THE PETITION

### I. THERE IS A SPLIT AMONG THE CIRCUITS ON THE APPLICABILITY OF ANTI-SLAPP STATUTES.

The Ninth Circuit's decision to apply the TCPA not only departs from this Court's precedents, but conflicts with decisions of other circuits (some on this very statute). App.2a (expressly creating split with Fifth Circuit); *see also Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015) (anti-SLAPP laws have "produced disagreement among appellate judges"). *Shady Grove* leaves no doubt about the correct answer here: the TCPA is inapplicable in diversity jurisdiction cases. *See Shady Grove*, 559 U.S. at 399-401. After all, in diversity jurisdiction cases, federal courts apply federal (not state) procedural rules. *See Erie*, 304 U.S. at 78-79. Because the TCPA is procedural, *In re Lipsky*, 460 S.W.3d at 586, *Erie* and *Shady Grove* foreclose its application.

In *Shady Grove*, this Court addressed a conflict between Fed. R. Civ. P. 23's permissive class action certification rules and a restrictive state statute also on the same subject. *See Shady Grove*, 559 U.S. at 396-397. To answer the question presented, this Court outlined a two-pronged test: A federal rule governs when it (1) "answer[s] the same question" as the state law, and (2) it is not "ultra vires." *Id.* Applying that test, this Court held that the state law was inapplicable in diversity cases. *Id.* at 399-401.

On the first prong, this Court held that the state law answered the same question as Fed. R. Civ. P. 23—*i.e.*, whether "a class action may proceed in a given suit." *Id.* at 401. Thus, Rule 23 applied. *Id.* But on the second prong—whether Rule 23 was *ultra vires*—there was no clear majority. A Justice Scalia-led-plurality held that Rule 23 was valid. *Id.* at 407-416 (plurality opinion). But Justice Stevens concurred only in the judgment on that issue. *Id.* at 416-436 (Stevens, J., concurring in part and concurring in judgment).

In a decision tracking *Shady Grove*, the Fifth Circuit held that the TCPA is inapplicable because it answers the same questions as the Federal Rules of Civil Procedure. *See Klocke v. Watson*, 936 F.3d 240, 244-249 (5th Cir. 2019). The Second Circuit has aligned itself with that reasoning, as have the Tenth, Eleventh, and D.C. Circuits. In fact, the Second Circuit has held that the California anti-SLAPP statute—the linchpin of the Ninth Circuit's anti-SLAPP jurisprudence—is inapplicable in federal court after applying *Shady Grove*. *See La Liberte v. Reid*, 966 F.3d 79, 85-88 (2d Cir. 2020).

But in the decision below, the Ninth Circuit acknowledged that it was creating a circuit split with the Fifth Circuit over the TCPA. App.2a. The Ninth Circuit, together with the First Circuit, hold that anti-SLAPP statutes can co-exist with the Federal Rules of Civil Procedure as a gloss on those rules. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971-973 (9th Cir. 1999); *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010).

Thus, following the Ninth Circuit's circuit-splitting decision, there is an anomaly in the law. A losing

Texas law defamation plaintiff in the Fifth Circuit faces only federal pretrial dismissal standards with no threat of attorney's fees, costs, and sanctions because of the TCPA. *See Klocke*, 936 F.3d at 244-249. But a losing Texas law defamation plaintiff like Clifford—who lands in the Ninth Circuit (because of conflict-of-law or transfer-of-venue rules)—faces the threat of the TCPA and its attendant attorney's fees, costs, and sanctions. *See Clifford*, 818 F.App'x at 747.

Besides the lower courts inviting this Court to resolve this circuit split, *see La Liberte*, 966 F.3d at 88, leading commentators have also urged this Court to weigh-in. *E.g.*, 19 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 4509 (4th ed. 2019) ("Resolution of * * * the questions raised by anti-SLAPP statutes may require resolution by the Supreme Court."). This case presents an ideal vehicle to address the question presented because, unlike prior petitions, here the two circuits *have split on the same anti-SLAPP statute* and *there is simply a final judgment to review*. This Court should grant certiorari.

### A. The Fifth Circuit, Together with Four Other Circuits, Holds That Anti-SLAPP Statutes Do Not Apply in Diversity Jurisdiction Cases.

Then-Judge Kavanaugh's opinion in the D.C. Circuit led the way in holding that anti-SLAPP statutes do not apply in federal court. *See Abbas v. Foreign Policy Grp.*, 783 F.3d 1328, 1332-1335 (D.C. Cir. 2015). In *Abbas*, the court addressed D.C.'s anti-SLAPP law. *Id.* at 1331-1332. Applying *Shady Grove*'s majority opinion, the D.C. Circuit held that the anti-

SLAPP law answered the same questions as Fed. R. Civ. P. 12 and 56. Those rules, the court held, set standards for when a federal court "must dismiss a case before trial." *Abbas*, 783 F.3d at 1334. As the state law answered those same questions (albeit differently), *Shady Grove* foreclosed the law's application. *Id.* The D.C. Circuit found that the Federal Rules of Civil Procedure were not *ultra vires*. As the anti-SLAPP law was inapplicable, its attorney's fees, costs, and sanctions provisions also did not apply. *Id.*

Adopting *Abbas*' reasoning, the Fifth Circuit has also held that the TCPA does not apply in federal court. *See Klocke*, 936 F.3d at 244-249. In *Klocke*, the Fifth Circuit applied *Shady Grove*'s framework—*i.e.*, whether the TCPA answers the same question as the Federal Rules of Civil Procedure. *Id.* The Fifth Circuit held that the two laws answered the same question of when a federal court should dismiss a case pretrial. *Id.* Like the D.C. Circuit, the Fifth Circuit also held that the Federal Rules of Civil Procedure were valid exercises of delegated congressional power. *Id.* (citing *Burlington N. R. R. Co. v. Woods*, 480 U.S. 1, 5 (1987)). Because the TCPA was inapplicable, neither were its attorney's fees, costs, and sanctions provisions. *Id.*

The Eleventh Circuit also reached the same conclusion on Georgia's anti-SLAPP law on nearly identical reasoning. *See Carbone v. CNN*, 910 F.3d 1345 (11th Cir. 2018) (Pryor, J.). The Eleventh Circuit held that, together, Fed. R. Civ. P. 8, 12, and 56 delineate when a federal court should dismiss a case pretrial. The Georgia anti-SLAPP law's focus was also pretrial dismissal, but with varying evaluative standards. At the pleading stage, for example, the Georgia anti-SLAPP statute requires a plaintiff to establish

"a probability" that she "will prevail on the claim" to survive dismissal, something that neither Fed. R. Civ. P. 8 or 12 do. *Carbone*, 901 F.3d at 1350 (citations omitted). At the summary judgment stage, the existence of material factual disputes is not enough to get to trial, but a plaintiff must also show a "probability" of ultimately succeeding at trial. *Id.* at 1351. Thus, given the anti-SLAPP law's varied and exacting evaluative standards, *Shady Grove* precluded it, including its fees, costs, and sanctions provisions. *Id.* at 1350-1357.

The Second Circuit has also rejected anti-SLAPP statutes—splitting with the Ninth Circuit on the California anti-SLAPP law. *La Liberte*, 966 F.3d at 85-88. The court had previously *only assumed the applicability* of anti-SLAPPs. *Id.* at 86 ("We have decided some cases involving these special motions, *but we have not yet decided the question of applicability*.") (emphasis added). The court applied *Shady Grove* and held, adopting the Fifth Circuit's reasoning, that California's anti-SLAPP statute was inapplicable. *Id.* at 86-88. As the anti-SLAPP law did not apply, neither did its attorney's fees and sanctions provisions. *Id.*

Finally, the Tenth Circuit has also disavowed anti-SLAPP statutes. Rather than apply the majority opinion in *Shady Grove*, the Tenth Circuit instead applies Justice Stevens' separate concurrence as the controlling opinion. *See Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983 n. 6 (10th Cir. 2010). Based on Justice Stevens' *Shady Grove* concurrence, the Tenth Circuit has held that New Mexico's anti-SLAPP law is inapplicable in federal court. *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659 (10th Cir. 2018), *cert. denied*, 139 S.Ct. 591

(2018). The court applied the longstanding *Erie* rule: that federal courts apply state substantive rules but not state procedural law. *Id.* Analyzing the clear wording of the state law's dismissal provisions, the court held that it was a procedural law and discarded it. *Id.* at 668-673.

### B. The Ninth and First Circuits Hold That Anti-SLAPP Statutes Apply in Federal Court.

The Ninth Circuit led the way holding that anti-SLAPP statutes apply in federal court. *See Newsham*, 190 F.3d at 973. The court held that the California anti-SLAPP statute applied in diversity cases. *Id.* at 972-973. While acknowledging that the anti-SLAPP statute—just as Fed. R. Civ. P. 12 and 56—also provides streamlined procedures for pretrial dismissal of a case, the court held the two sets of laws could co-exist. *Id.* at 973. Applying *Walker v. Armco Steel Corp.*, 446 U.S. 740, 742-743 (1980), *Newsham* held that there was no direct collision between California's anti-SLAPP provisions and the federal rules, and the federal rules do not occupy the field of pretrial dismissal. *See Newsham*, 190 F.3d at 972-973.

But later sensing unavoidable conflict between several features of anti-SLAPP statutes and the federal rules, the Ninth Circuit has tried to remove the conflict. To begin, anti-SLAPP statutes' discovery preclusion provisions no longer apply. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) ("the discovery-limiting aspects of * * * [anti-SLAPP law] collide with the discovery-allowing aspects of Rule 56"). Anti-SLAPP laws' time constraint provisions are

also inapplicable. *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016).

Those same concerns have led the Ninth Circuit to contort unambiguous anti-SLAPP laws to perpetuate their application in diversity cases. The Ninth Circuit now distinguishes between two kinds of anti-SLAPP motions: (1) those non-evidentiary motions that only challenge the allegations in a complaint, and (2) evidentiary motions that seek dismissal. *Planned Parenthood Fed. of Am., Inc. v. Cntr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018). For sufficiency anti-SLAPP motions targeting the complaint, the Ninth Circuit has contorted contrary state law to mirror Fed. R. Civ. P. 12, while for evidence-based anti-SLAPP motions, Rule 56 standards apply. *See Planned Parenthood*, 890 F.3d at 834. In doing so, the Ninth Circuit believes there is no tension between the federal rules and state law. *Id.* at 833-834.

The First Circuit has adopted *Newsham* and also upheld anti-SLAPP statutes. *Godin*, 629 F.3d at 81. According to *Godin*, the anti-SLAPP motion's special motion to dismiss does not answer the same question as Fed. R. Civ. P. 12(b)(6) or Rule 56. *Id.* at 86-88. For that reason, the First Circuit has upheld anti-SLAPP statutes. *Id.*

## II. THE NINTH CIRCUIT'S DECISION IS WRONG.

Since *Erie*, federal courts exercising diversity jurisdiction have consistently applied state substantive law and federal procedural rules. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *Erie*, 304 U.S. at 78-79. In *Shady Grove*, as noted, this Court recalibrated the *Erie* rule into a straightforward two-tiered analysis: A federal rule governs (1) when

it "answer[s] the same question" as the state law, and (2) it is not "ultra vires." *Shady Grove*, 559 U.S. at 399. This Court made clear that rules on pleading standards, summary judgment and the like are "ostensibly addressed to procedure." *Id.* at 404.

That framework should have led the Ninth Circuit to the same conclusion as the Fifth Circuit: that the TCPA is inapplicable. As noted, the TCPA is a straightforward procedural statute that expedites dismissals. *See In re Lipsky*, 460 S.W.3d at 586. The Supreme Court of California also considers California's anti-SLAPP law procedural. *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 138 P.3d 193, 198 (Cal. 2006) (anti-SLAPP law is a "procedural device to screen out meritless claims."). And the Ninth Circuit has held that the California anti-SLAPP law is identical to the TCPA. *Clifford*, 818 F.App'x at 747.

Against this background, federal procedural law should have governed in place of the TCPA. To be clear, and as noted, the TCPA is a state procedural law for dismissing lawsuits and there already exist valid Federal Rules of Civil Procedure 12 and 56 that also govern dismissals. *See Woods*, 480 U.S. at 5-7 (federal procedural rules presumptively valid). Thus, under *Erie*, the state anti-SLAPP procedural law is inapplicable. *See Erie*, 304 U.S. at 78-79; *Gasperini*, 518 U.S. at 427.

### A. The TCPA Does Not Apply in Federal Court Because It Answers the Same Question as the Federal Rules of Civil Procedure.

Under *Shady Grove*, the threshold question is whether the Federal Rules of Civil Procedure answer

the question at issue. *See Shady Grove*, 559 U.S. at 398-399. Understood in that sense, this case turns on whether the TCPA answers the same questions as Fed. R. Civ. P. 8, 12, and 56—*i.e.*, under what circumstances must a court "dismiss a case before trial?" *Klocke*, 936 F.3d at 245; *La Liberte*, 966 F.3d at 85-88. To ask the question is to answer it: "Rules 12 and 56 * * * form 'an integrated program' for determining whether to grant pre-trial judgment in cases in federal court." *Abbas*, 783 F.3d at 1334. The TCPA, as noted, also provides a "procedure for the expedited dismissal of [meritless] suits." *In re Lipsky*, 460 S.W.3d at 586. So does the California's statute. *Kibler*, 138 P.3d at 198; *accord La Liberte*, 966 F.3d at 85-86. Thus, the two sets of procedural rules (federal and state) have the same end goal: pretrial dismissal of a case.

Resisting that straightforward conclusion, however, the Ninth Circuit holds that Fed. R. Civ. P. 12 and 56 do not occupy the field of pretrial dismissals. *See Newsham*, 190 F.3d at 972-973; *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188-1190 (9th Cir. 2013) (Wardlaw, J., concurring in denial of rehearing en banc). The First Circuit also subscribes to that view. *Godin*, 629 F.3d at 86-88. In fact, those courts hold that the federal rules are not as broad as urged and they answer different questions from those addressed by anti-SLAPP statutes (*i.e.*, lawsuits intended to chill speech). *Makaeff*, 736 F.3d at 1188-1190 (Wardlaw, J.); *Godin*, 629 F.3d at 88.

That view is incorrect. This Court has twice unanimously rejected any suggestion that federal courts should read the Federal Rules of Civil Procedure narrowly. *See Walker*, 446 U.S. at 750 n. 9 ("This is not to suggest that the Federal Rules of Civil Proce-

dure are to be narrowly construed"); *see also Woods*, 480 U.S. at 4 (a federal court should "fairly construe[]" a federal rule). And a majority of this Court in *Shady Grove*, no doubt spurred on by those pronouncements, applied a two-pronged analysis to Fed. R. Civ. P. 23 that also rejected reading a clear federal rule narrowly. First, considering the text, the Court construed Rule 23's terms ordinarily; the Court declined to read Rule 23 narrowly. *See Shady Grove*, 559 U.S. at 398-399 & 406. Second, with the benefit of that textual analysis, this Court then analyzed how Rule 23 functions to achieve its ends and found that because it and the state law both sought to answer the same question, the federal rule preempted state law. *Id.* at 399-401; *Woods*, 480 U.S. at 6-7 (similarly comparing the "mode of operation" of a federal rule and state law).

Applying *Shady Grove*'s two-pronged framework here underscores the Ninth Circuit's error. Begin with Fed. R. Civ. P. 8 and 12. Rule 8 states that "a short statement of a claim" is all that is required to state a claim. *See* Rule 8(a)(2). Rule 12, in turn, allows a party to challenge the sufficiency of the complaint before trial. *See* Rule 12(b). Considered together, this Court has held that once a plaintiff pleads plausible facts showing a right to relief, a federal court should not dismiss the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-680 (2009). Rule 56's function and scope are also clear: it is the only pretrial rule that determines whether there are material factual disputes warranting a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-252 (1986). This Court has also made clear that the federal rules apply *to all civil cases*. *Shady Grove*, 559 U.S. at 399 ("the Federal Rules of Civil Proce-

dure * * * automatically appl[y] 'in all civil actions and proceedings'") (cleaned up).

Once this Court adopted those authoritative constructions of the scope and mode of operation of the Federal Rules of Civil Procedure, they became "part of the [legal] scheme" of those rules. *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015). Given the broad scope that this Court has accorded to Rules 8, 12, and 56, they fully cover the circumstances under which a federal court should dismiss a case pretrial. *See Abbas*, 783 F.3d at 1332-1333; *Los Lobos*, 885 F.3d at 673 n.8 (noting that it is "very much debatable" that the federal rules do not "cover all the bases leaving little room" for anything else).

The Ninth Circuit's contrary analysis—that attempts to differentiate between the scope and function of the Federal Rules of Civil Procedure and anti-SLAPPs—is artificial. *Newsham*—the linchpin of the Ninth Circuit's jurisprudence—embraced flawed reasoning that *Shady Grove* rejected.[1] *Newsham* suggested that Rule 12 and 56 could co-exist with state law because they address different subjects. *Shady Grove* rejected similar reasoning from the Second Circuit about Rule 23 and state law. *See Shady Grove*, 559 U.S. at 399. According to the Second Circuit in *Shady Grove*, Rule 23 only addressed "the criteria for determining whether a given class can and should

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[1] Perhaps that is because *Newsham* predates *Shady Grove*, which, as shown, undercuts its rationale. That should have been reason enough for the Ninth Circuit to discard *Newsham*. *See Cooper Ind., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions * * * *neither brought to the attention of the court nor ruled upon*, are not to be considered as having been so decided *as to constitute precedents*.") (emphasis added) (cleaned up).

be certified," while state law addressed which claims were eligible for class treatment. *Id.* This Court rejected that distinction because, at their core, both laws addressed when a court could certify a class action. *Id.* at 399-400. In other words, the two laws answered the same question. *Id.*

The Ninth Circuit's purported distinction between the scope and mode of operation of anti-SLAPPs and Fed. R. Civ. P. 12 and 56 suffers the same flaws highlighted in *Shady Grove*. First, *Newsham* conceded that there is a "commonality of purpose" between the federal rules and anti-SLAPP statutes: they are both geared to "the expeditious weeding out of meritless claims before trial." *Newsham*, 190 F.3d at 972. That concession shows that the two laws target the same end. *See Abbas*, 783 F.3d at 1332-1333; *Klocke*, 936 F.3d at 247; *see also Kibler*, 138 P.3d at 197 (describing California's anti-SLAPP law as "a summary-judgment-like procedure at an early stage of the litigation"). Second, the TCPA (just like the California anti-SLAPP law) accomplishes its stated goals "*by winnowing claims and defenses* in the course of litigation, *just like Rules 12 and 56*." *Carbone*, 910 F.3d at 1354 (emphasis added). Thus, however one slices the two sets of laws, they *ultimately* seek to control the same issue: pretrial dismissal of a lawsuit.

Nothing in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), can salvage the Ninth Circuit's flawed reasoning. *See Newsham*, 190 F.3d at 972-973 (suggesting that *Walker* supports reading Fed. R. Civ. P. 12 and 56 as not covering the same ground as anti-SLAPP law); *accord Makaeff*, 736 F.3d at 1188-1190 (Wardlaw, J., concurring in denial of rehearing en banc). The Ninth Circuit misread *Walker*. In *Walker*,

this Court held that there was no direct conflict between Fed. R. Civ. P. 3—which addresses how a litigant commences a civil action in federal court—and state law that addressed when a litigant satisfied state statute of limitations requirements. *See Walker*, 446 U.S. at 750-751. But as this Court explained, the two rules *targeted distinct questions*, especially since Rule 3 says nothing about statutes of limitations. *Id.* at 750. In contrast here, and as shown, Fed. R. Civ. P. 12 and 56 and the TCPA ultimately seek to control the same issue: pretrial dismissal of a civil lawsuit. Thus, *Walker* is not controlling. *See Shady Grove*, 559 U.S. at 406 n. 6 (reaching same conclusion about *Walker* while considering similar reasoning as to Rule 23).

### B. *Shady Grove* Forecloses the Ninth Circuit's Co-Existence Theory Especially When the Federal Rules Answer the Same Question as the State Law.

The Ninth Circuit holds that anti-SLAPP statutes and Rules 12 and 56 "can exist side by side . . . each controlling its own intended sphere of coverage without conflict." *Newsham*, 190 F.3d at 972. In any event, *Shady Grove* rejected a similar co-existence argument while addressing Fed. R. Civ. P. 23. *See Shady Grove*, 559 U.S. at 446-447 (Ginsburg, J., dissenting) (suggesting that Rule 23 could co-exist with state law); *accord Makaeff*, 736 F.3d at 1182 (Wardlaw, J., concurring). But the *Shady Grove* majority rejected that theory because both the state law and Rule 23 "answered the same question"—*i.e.* "whether a class action may proceed for a given suit." *Id.* at 401. Because the two laws answered the same question, there was no room for co-existence. *Id.*

As applied here, there is no principled reason why *Shady Grove*'s preclusive rationale that applied to Rule 23 cannot also apply to Rules 12 and 56. As noted, the federal rules—like the state anti-SLAPP statutes—also address when a court can dismiss a case before trial. *See Klocke*, 936 F.3d at 245; *Abbas*, 783 F.3d at 1334.

This Court's decision in *Walker* does not support the co-existence of anti-SLAPPs and the federal rules. *See, e.g.*, *Makaeff*, 736 F.3d at 1182 (Wardlaw, J., concurring in denial of rehearing en banc) (suggesting co-existence theory). Besides *Shady Grove* rejecting co-existence when, as here, a state law answers the same question as a federal rule, it also made clear that state law cannot superimpose additional requirements on the Federal Rules of Civil Procedure. 599 U.S. at 404-406. Considered on its own terms, *Walker* does not support the Ninth Circuit's co-existence theory. In *Walker*, this Court held that state law applied because Fed. R. Civ. P. 3—the rule at issue—did not address statute of limitations, while state law did. *See Walker*, 446 U.S. at 750-751; *Shady Grove*, 599 U.S. at 403 n. 6. Thus, this Court only accommodated state law because (1) Fed. R. Civ. P. 3 did not address the same issue; and (2) the state law concerned statutes of limitations, a substantive issue that a federal court cannot ignore under *Erie*. *See Walker*, 446 U.S. at 749-750; *Makaeff*, 715 F.3d at 273 (Kozinski, C.J., concurring) ("*Walker* considered whether there was a conflict between the state and federal rules *only after it determined that the state rule was substantive*") (emphasis added). In short, in *Walker*, state law co-existed with federal law because it was *substantive and it addressed a distinct issue that Rule 3 did not*.

Here, in contrast, this case deals with the TCPA, a straightforward procedural state law that under *Erie* federal courts should ignore. The key aspect of the TCPA is its motion to dismiss. *See In re Lipsky*, 460 S.W.3d at 586, 590-591. That part of the law is procedural. *Id.*; *Shady Grove*, 559 U.S. at 404 (pleading and summary judgment rules are "ostensibly addressed to procedure"); *Erie*, 304 U.S. at 78-79 (federal court should not apply state procedural rules in diversity cases). Thus, the TCPA is inapplicable, and the Ninth Circuit was wrong to apply it.

Nor does *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), compel a different outcome. *See Newsham*, 190 F.3d at 971-973 (relying on *Cohen*); *see also Makaeff*, 736 F.3d at 1183 (Wardlaw, J., concurring) (relying on *Cohen* to justify applying anti-SLAPP law). *Cohen* upheld the application of a state law that required plaintiffs in shareholder derivative lawsuits to post bonds before commencing suit. *Id.* at 547-548. The Court upheld the state law, in part, because it did not conflict with former Fed. R. Civ. P. 23 (now Rule 23.1). Given the lack of conflict between the state and federal rules, the Court applied the policy behind the outcome determination test, *see Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), to ensure uniformity of outcomes in federal and state court. *See Cohen*, 337 U.S. at 556; *see also id.* at 559-560 (Rutledge, J., dissenting) (arguing that the Court applied outcome determination test when it was unwarranted).

Against this background, the Ninth Circuit's reliance on *Cohen* to support applying anti-SLAPP laws was inapt for three reasons.

First, since *Cohen*, this Court has held that the outcome determination test—that undergirds *Cohen*—is not a "talisman" or the sole controlling criterion. *Hanna*, 380 U.S. at 466; *Byrd v. Blue Ridge Rural Elec. Coop, Inc.*, 356 U.S. 525, 537 (1958) ("*[W]ere 'outcome' the only consideration*, a strong case might appear for saying that the federal court should follow the state practice.") (emphasis added).

Second, as *Hanna* later made clear, *Cohen* (and other cases like it) only applied state law because "there * * * [was] no Federal Rule which covered the point in dispute, [so] *Erie* commanded the enforcement of state law." *Hanna*, 380 U.S. at 470. But here, as *Newsham* itself *conceded*, Fed. R. Civ. P. 12 and 56 and the anti-SLAPP statutes answer the same question: both laws are geared to "the expeditious weeding out of meritless claims before trial." *Newsham*, 190 F.3d at 972; *Kibler*, 138 P.3d at 197 (describing California's anti-SLAPP law as "a summary-judgment-like procedure"). As both laws answer the same question, precedent forecloses state law. *Hanna*, 380 U.S. at 471; *Shady Grove*, 559 U.S. at 399-401.

Third, to apply the anti-SLAPP law in the wake of applicable federal rules would eviscerate countervailing federal interests. This Court has recognized that Congress has an important federal interest in ensuring uniformity of practice in federal courts. *See Hanna*, 380 U.S. at 472-473. And the Federal Rules of Civil Procedure embody Congress's exercise of its authority in that area. *Id.* Indeed, *Hanna* and other cases have also recognized that when, as here, there are important countervailing federal interests at stake, a federal court must accept that there must (sometimes) be differences in outcomes in federal and state

court. *Id.* *Byrd* counsels that when, as here, a state law undermines an important federal interest, a federal court should disregard it. *See Byrd*, 356 U.S. at 537-540; Bryan A. Garner, * * * Neil M. Gorsuch, * * * Brett M. Kavanaugh, et al., THE LAW OF JUDICIAL PRECEDENT § 70, at 581 (2016) ("[A] federal court will not apply a state's law or procedure that conflicts with an overriding federal interest") (citations omitted).

Those concerns are at issue here. Following the Ninth Circuit's decision below, there is an anomaly in the law. A losing Texas law defamation plaintiff in the Fifth Circuit faces only federal pretrial dismissal standards with no threat of attorney's fees, costs, and sanctions. *See Klocke*, 936 F.3d at 244-249. But a losing Texas law defamation plaintiff like Clifford—who lands in the Ninth Circuit (because of conflict-of-law or transfer-of-venue rules)—faces the TCPA and its attendant attorney's fees, costs, and sanctions, *under identical circumstances*. *See generally Clifford*, 818 F.App'x at 747. There is now inconsistency in the application of federal pretrial dismissal standards, which Congress and this Court intended to apply uniformly. *See Hanna*, 380 U.S. at 472-473.

### C. The Ninth Circuit's Approach Impermissibly Contorts State Law.

This Court has held that when "the words of [a] statute are unambiguous, the 'judicial inquiry is complete.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (cleaned up). The TCPA is unambiguous that for it to apply, a movant must adduce evidence to trigger its provisions. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b)&(c); *In re Lipsky*, 460 S.W.3d at 590-591. In fact, the TCPA does not draw any dis-

tinction between evidence-based and non-evidence-based motions to dismiss. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b). But intent on avoiding a conflict between the Federal Rules of Civil Procedure and anti-SLAPP motions, the Ninth Circuit has chosen to contort unambiguous state law. The Ninth Circuit has contorted contrary worded anti-SLAPP law to mirror Fed. R. Civ. P. 12, while for evidence-based anti-SLAPP motions, Rule 56 standards apply. *See Planned Parenthood*, 890 F.3d at 834. In doing so, the Ninth Circuit believes there is no tension between the federal rules and state law. *Id.* at 833. That solution is wrong and is foreclosed by this Court's precedent.

### 1. *Shady Grove* Precludes Federal Courts from Contorting State Law to Make It Co-Exist with Controlling Federal Rules.

In *Shady Grove*, this Court rejected that federal courts can contort unambiguous state law to avoid a collision with a federal rule. *Shady Grove*, 559 U.S. at 403-404 (rejecting "revising state laws * * * [to] [avoid] a potential conflict with a Federal Rule"). *Shady Grove* also rejected that federal courts can superimpose state law requirements on the Federal Rules of Civil Procedure when both laws, as here, answer the same question. *Id.* at 399-404. Instead, *Hanna* laid down a bright line rule when state law seeks to encroach the proper domain of a federal rule: courts should disregard the state law and apply the federal rule. *Hanna*, 380 U.S. at 471 ("When [a] situation is covered by one of the Federal Rules, * * * the court * * * [must]apply the Federal Rule"). There is no need to contort state law. *Shady Grove*

and *Hanna* foreclose the Ninth Circuit's solution of contorting state law.

At best, the Ninth Circuit's judicial revision of the anti-SLAPP laws shortchanges both the federal rules and state law. *See, e.g., Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring) (noting that the Ninth Circuit's judicial revision of the anti-SLAPP laws "diminished some of the tension between the state and federal schemes, *but at the expense of* * * * [creating] *a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed*.") (emphasis added); *see also generally, BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 78 (Tex. 2017) ("[T]he foremost task of legal interpretation [is] divining what the law is, *not what the interpreter wishes it to be*.") (emphasis added).

In sum, the Ninth Circuit's interpretative solution is wrong and foreclosed by precedent.

### 2. The Ninth Circuit's Interpretation Also Violates Longstanding *Erie* Principles.

The "highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts" in diversity cases. *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). The Supreme Court of Texas has spoken clearly on the TCPA. For one, the Court has declined to sanction judicial rewriting of the TCPA. *See Exxon-Mobil Pipeline*, 512 S.W.3d at 901 (rejecting "an effort to narrow the scope of the TCPA by reading language into the statute that is not there"); *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (courts

"must apply the [TCPA] * * * as written."). As written, the TCPA "requires that on motion the plaintiff present 'clear and specific evidence' of 'each essential element.'" *In re Lipsky*, 460 S.W.3d at 590.

The Ninth Circuit's interpretation contradicts the Supreme of Texas. Under the Ninth Circuit's interpretation, and contrary to the Texas Supreme Court, a TCPA motion in the Ninth Circuit attacks complaints without requiring the parties to produce supporting evidence or subjecting the claims to the statute's heightened dismissal standards. *See Planned Parenthood*, 890 F.3d at 834; *Clifford*, 818 F.App'x at 747. In doing so, the Ninth Circuit violated *Erie* principles. *West*, 311 U.S. at 236.

The Ninth Circuit's interpretative approach also contradicts this Court's treatment of state law. The only time this Court has sanctioned contorting state law in diversity cases is when: (1) there is no controlling federal rule, *see Hanna*, 380 U.S. at 470-472; and (2) the applicable state law conflicts with a countervailing federal interest like the Seventh Amendment. *See Byrd*, 356 U.S. at 535-538; *Gasperini*, 518 U.S. 435-438. But here, since Fed. R. Civ. P. 12 and 56 govern the situation, there is no need to "wade into *Erie*'s murky waters," *Shady Grove*, 559 U.S. at 398, or to contort state law. *Id.* at 403-404.

### D. The Ninth Circuit's Approach Adversely Impacts Important Federal Interests.

Besides disrupting state law, the Ninth Circuit's interpretation has three clear adverse impacts on federal interests. First, because Fed. R. Civ. P. 12 and 56 preempt the field of pretrial dismissal in federal court, complementary state regulation is impermissible.

Second, and as shown below, the TCPA's attorney's fees, costs, and sanctions provisions are procedural and do not justify the unwarranted disruption of Fed. R. Civ. P. 12 and 56. Third, the Ninth Circuit's ruling will encourage forum-shopping.

### 1. Under Ordinary Field Preemption Principles, the Federal Rules of Civil Procedure Preempt Complementary State Law on Pretrial Dismissal.

Any attempts to superimpose anti-SLAPP provisions on Fed. R. Civ. P. 8, 12, and 56 are preempted. The Supremacy Clause provides that federal law is the "Supreme Law of the Land." U.S. Const. Art. VI, cl. 2. The Federal Rules of Civil Procedure "have the same status as any other federal law under the Supremacy Clause." *Gallivan v. United States*, 943 F.3d 291, 295 (6th Cir. 2019). This Court recognizes three forms of preemption: express, field, and conflict preemption. *Arizona v. United States*, 567 U.S. 387, 399 (2012).

A six-justice majority has stated that the Federal Rules of Civil Procedure preempt their field of operation. *See Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1905 (2019) (Gorsuch, Kavanaugh, and Thomas, JJ.) (lead op.) (citing *Shady Grove*, 559 U.S. 393); *accord id.* at 1909 (Ginsburg, Kagan, and Sotomayor, JJ., concurring) (agreeing with lead opinion on that issue). Again, Fed. R. Civ. P. 8, 12, and 56 occupy the field of pretrial dismissal in federal court. *See Klocke*, 936 F.3d at 244-249. When field preemption applies in a given area, as it does with Fed. R. Civ. P. 8, 12, and 56, there is no room for parallel state law. *See, e.g.*, *Arizona*, 567 U.S. at 399, 401 (when field

preemption applies, "even complementary state regulation is impermissible.").

### 2. Superimposing Anti-SLAPP Laws on Fed. R. Civ. P. 12 And 56 Changes Their Mode of Operation and Is Preempted.

In enacting the Federal Rules of Civil Procedure, Congress had a goal of uniform procedural standards in federal courts. *See Hanna*, 380 U.S. at 471-473. Adorning the federal rules with categorical costs, sanctions, and attorney's fees when a federal court grants a dismissal, conflicts with the federal rules' original mode of operation and this Court's precedent. That is like the problem this Court encountered in *Woods*, where it rejected a state statute that *categorically* imposed a 10% penalty on judgments, when a parallel federal rule only applied a "case-by-case approach." *See Woods*, 480 U.S. at 4, 7.

That same conclusion is inescapable here. Categorical aspects of anti-SLAPP laws conflict with "the mode of operation" of parallel Federal Rules of Civil Procedure. *See id.* The federal rules do not impose categorical sanctions or fees on a losing party; instead, federal courts make case-specific assessments whether sanctions are warranted. *See* 5A Wright & Miller § 1336 (When to impose sanctions is discretionary). And under the federal rules, a litigant's ability to pay the exactions is also critical. *See Gaskell v. Weir*, 10 F.3d 626, 629 (11th Cir. 1993) (sanctions) (collecting cases); *cf. Newman v. Piggie Park Enterp.*, 390 U.S. 400, 402 (1968) (attorney's fees). But the TCPA does not consider similar factors. *See Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

To permit anti-SLAPP laws to add a gloss to the federal rules frustrates Congress' goal for uniformity and breeds confusion. As a result of the Ninth Circuit's decision below, pretrial dismissal standards are different in that circuit than in the Second and Fifth Circuits. *See Planned Parenthood*, 890 F.3d at 834, *compare with Klocke*, 936 F.3d at 245-247; *La Liberte*, 966 F.3d at 86-88.

The inconsistent application of state anti-SLAPPs also fosters unnecessary confusion. Consider, for example, how an anti-SLAPP law like the TCPA (or its California counter-part) complicates Fed. R. Civ. P. 56 despite the Ninth Circuit's saving interpretation. When a movant files an evidence-based anti-SLAPP motion, the Ninth Circuit requires its courts to apply Rule 56 standards. *Planned Parenthood*, 890 F.3d at 834. Under Rule 56, favorable law aside, the existence of material factual disputes warrants a trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). But under the TCPA and its California counterpart, material factual disputes do not have the same controlling weight. The non-movant must still show "clear and specific evidence," Tex. Civ. Prac. Rem. § 27.003(a)&(b), or "probability of success," Cal. Civ. Proc. Code § 425.16, to get to trial. As a result, there still remains a question whether the Ninth Circuit's "direction to use Rule 56 in considering factual anti-SLAPP challenges supplanted the state law 'reasonable probability' burden." *Todd v. Lovecruft*, 2020 WL 60199, at *8 n. 7 (N.D. Cal. Jan. 6, 2020). As the California anti-SLAPP law is identical to the TCPA, *see Clifford*, 818 F.App'x at 747, that concern applies to the TCPA. *See Heffernan v. City of Paterson*, 136

S.Ct. 1412, 1418 (2016) ("[I]n the law, what is sauce for the goose is normally sauce for the gander.").

When, as here, a state law injects inconsistency in an area that Congress intended uniform national standards—like in Fed. R. Civ. P. 8, 12 & 56—state law conflicts with federal law and is preempted. *See generally English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n. 5 (1990); *see also generally Arizona*, 567 U.S. at 399. In short, the TCPA is preempted.

### 3. The Anti-SLAPP Statute's Attorney's Fees, Costs, and Sanctions Provisions Do Not Justify Disrupting the Uniformity of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure's field preemption, *see Virginia Uranium*, 139 S.Ct. at 1905 (Gorsuch, J.) (lead op.); *accord id.* at 1909 (Ginsburg, concurring), affects the ability to collect attorney's fees under the TCPA.[2] Although a federal court should ordinarily apply state attorney's fees laws, *it should not* if, as here, the state law "run[s] counter to * * * valid federal statute[s] or *rule[s] of court*." *Alyeska Pipeline Servs. Co. v. Wilderness Soc.*, 421 U.S. 240, 259 n. 31 (1975) (emphasis added).

More so, if as here, the TCPA's attorney's fees and sanctions provisions are not substantive for *Erie* purposes. Statutory provisions permitting an award of attorney's fees can either be substantive or procedural.

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[2] Federal law governs the award of costs in federal court. *Henkel v. Chicago, St. P., M. & O. Ry. Co.*, 284 U.S. 444, 447 (1932). Federal law also governs the award of sanctions. *See Chambers NASCO, Inc.*, 501 U.S. 32, 48-53 (1991).

*Chieftain Royalty Co. v. Enervest Energy Inst. Fund. XIII-A, LLP*, 888 F.3d 455, 460 (10th Cir. 2017), *cert. denied*, 139 S.Ct. 482 (2018); *see also generally Chambers v. NASCO, Inc.*, 501 U.S. 32, 52-53, 55 (1991). Substantive fees apply in diversity cases, while procedural fees do not. *Chieftain*, 888 F.3d at 460. Substantive fees are "part and parcel of the *cause of action*" being litigated. *Id.* (emphasis added); *see* 10 Wright & Miller § 2669 ("[W]hen state law provides for the recovery of an attorney's fees *as part of the claim* being asserted * * * the federal court should permit an award of a fee") (emphasis added). But procedural fees are those that a court awards for abusive litigation or tactics. *See Goodyear Tire & Rubber Co v. Haeger*, 137 S.Ct. 1178, 1186 (2017); *Chieftain*, 888 F.3d at 460.

The TCPA's attorney's fees are procedural. Attorney's fees are substantive only *if they are tied to a cause of action*. *Chieftain*, 888 F.3d at 460. Begin with considering the meaning of "cause of action." A cause of action is generally a "legal theory of a lawsuit [*i.e.*] a malpractice cause of action." BLACK'S LAW DICTIONARY 267 (11th ed. 2019). The TCPA does not tie the attorney's fees award *to a specific legal theory*, like a bad faith claim; instead, the Texas Legislature tied the attorney's fees award to the *TCPA dispositive motion*. *See* Tex. Civ. Prac. & Rem. § 27.009(a); *Klocke*, 936 F.3d at 247 n. 6. Thus, if a movant prevailed on a defamation cause of action, for example, under Fed. R. Civ. P. 56 or its state analog, state law would not award fees. *See Century Sur. Co. v. Prince*, 782 F.App'x 553, 557-558 (9th Cir. 2019) (no attorney's fees for non-anti-SLAPP motions); *River Oaks L-M, Inc. v. Vinton-Duarte*, 469 S.W. 3d 213, 234 (Tex. Ct. App. 2015) ("Attorney's fees are not

recoverable on * * * [a] defamation claim."). Understood in that sense, the TCPA's attorney's fees are not substantive because—to qualify—the fees must be tied to a *specific claim or cause of action*. *See Chieftain*, 888 F.3d at 460. The TCPA's fees are not.

Instead, the TCPA's fees aim to punish those who abuse the judicial system with meritless suits. *Whisenhunt v. Lippincott*, 416 S.W.3d 689, 696 (Tex. Ct. App. 2013), *rev'd on other grounds*, 462 S.W.3d 507 (Tex. 2015) (TCPA "seeks to *punish or deter*, through the *assessment of attorney's fees* and sanctions, *those who abuse* * * * tort action[s] to silence others") (emphasis added). Attorney's fees that punish abusive litigation or tactics are procedural for *Erie* purposes. *Chieftain*, 888 F.3d at 460.

Since the TCPA's procedural dispositive motion answers the same questions as the federal rules, under *Shady Grove*, it does not apply, *see* 559 U.S. at 399-401; and because the motion is inapplicable, so are its attendant fees and costs provisions. *Klocke*, 936 F.3d at 247 n. 6; *La Liberte*, 966 F.3d at 88-89.

#### 4. The Ninth Circuit's Approach Encourages Forum-Shopping.

Finally, the Ninth Circuit's interpretation and application of the TCPA encourages forum-shopping. The Ninth Circuit chose to apply anti-SLAPP statutes, in part, to prevent forum-shopping between state and federal courts. *See Newsham*, 190 F.2d at 272-273. But the Ninth Circuit's anti-SLAPP interpretative device undercuts that goal in two ways.

First, a plaintiff has extra motivation to file her defamation lawsuit in federal court than state court

because, at the sufficiency stage in the Ninth Circuit, she need not adduce evidence, even though the anti-SLAPP laws require it. *In re Lipsky*, 460 S.W.3d at 590 (requiring evidence to support TCPA motion); *but see Planned Parenthood*, 890 F.3d at 834. Thus, based on the Ninth Circuit's own interpretation, a plaintiff should be able to proceed to discovery on allegations alone, with no supporting evidence, defeating the design of the state legislatures. *See Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring).

Second, because of the Ninth Circuit's circuit-splitting decision, a plaintiff has every incentive to file her case in the Fifth Circuit (where there are no anti-SLAPPs) rather than in the Ninth Circuit. *See Klocke*, 936 F.3d at 244-249, *compare with*, *Clifford*, 818 F.App'x at 747; *see also La Liberte*, 966 F.3d at 88.

### E. The Federal Rules of Civil Procedure Are Not *Ultra Vires.*

Since the TCPA answers the same questions as the Federal Rules of Civil Procedure, precedent requires that we consider whether the federal rules are valid. *Shady Grove*, 559 U.S. at 406. This Court has rejected every challenge to the validity of a Federal Rule of Civil Procedure. *See Hanna*, 380 U.S. at 470-471; *Woods*, 480 U.S. at 5-7 (federal procedural rules are presumptively valid). Indeed, as then-Judge Kavanaugh recognized in *Abbas*, under this Court's longstanding precedent, federal rules that govern procedure are valid. *Abbas*, 783 F.3d at 473-474 (citing *Sibbach v. Wilson*, 312 U.S. 1, 14 (1949)). The rules mainly at issue, Fed. R. Civ. P. 12 and 56, which address pleading standards and summary judgments, this Court has made clear are procedural. *Shady Grove*, 559 U.S. at

404. Thus, under *Sibbach*, *Hanna* and *Woods*, Fed. R. Civ. P. 8, 12, and 56 are valid. *See* Rules Enabling Act, 28 U.S.C. § 2072.

Finally, we briefly address whether Justice Stevens' separate concurrence in *Shady Grove* altered the *Sibbach/Hanna* rule stated above based on the rule in *Marks v. United States*, 430 U.S. 188, 193 (1977) (the narrowest concurring opinion supporting the judgment is controlling when Supreme Court is fragmented). The *Marks* rule occupies the middle ground of the broadest majority opinion and the dissent. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1416 n. 6 (2020) (Kavanaugh, J. concurring). In other words, the middle ground is one the plurality must necessarily accept because of its conclusion. *See King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). In *Shady Grove*, Justice Stevens concurred only in the judgment on whether Fed. R. Civ. P. 23 was valid, while a Justice-Scalia-led-plurality held Rule 23 valid. Justice Stevens sought to limit the reach of *Sibbach*. *See Shady Grove*, 559 U.S. at 427-428 (Stevens, J., concurring in part and concurring in judgment). The plurality refused to accept Justice Stevens' intended course, of overruling *Sibbach*. *Id.* at 412 (plurality opinion).

Justice Stevens' opinion in *Shady Grove* is not controlling law. Justice Stevens' separate opinion was not a subset of the plurality; instead, Justice Stevens went further than the plurality. Under those circumstances, *Marks* does not make Justice Stevens' separate opinion controlling law. *See Abbas*, 783 F.3d at 473-474; B. Garner, et al., THE LAW OF JUDICIAL PRECEDENT § 70, at 586 (then-Judge Kavanaugh was correct that Justice Stevens' separate opinion in *Shady*

*Grove* did not overrule *Sibbach*). As a result, *Sibbach* still governs; the Fed. R. Civ. P. 12 and 56 are valid.

## III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND MERITS THE COURT'S REVIEW.

The decision below not only conflicts with this Court's precedent, but it has both created a circuit split among the circuits and deepened pre-existing splits on important questions about the interaction between the Federal Rules of Civil Procedure and state law. Equally important, the Ninth Circuit's treatment of the TCPA (and other anti-SLAPP statutes of similar import) threatens to contort federal rules to accommodate inapplicable state law when this Court has rejected such attempts and Congress has not authorized such action. *See Shady Grove*, 559 U.S. at 403-404 (rejecting "revising state laws * * * [to] [avoid] a potential conflict with a Federal Rule"); *accord id.* at 421 n. 5 (Stevens, J., concurring in part and concurring in judgment) (declining to contort "the meaning of federal rules * * * absent congressional authorization to do so, to accommodate state policy goals."). Indeed, the Ninth Circuit's decision below exacerbates the inconsistent interpretation and application of the Federal Rules of Civil Procedure—rules that Congress intended to apply uniformly in the federal courts. *See Hanna*, 380 U.S. at 472-473.

This case exemplifies the problems that a fragmented application of the Federal Rules of Civil Procedure fosters. As noted, litigants in the Fifth Circuit are subject to different procedural rules than litigants in the Ninth Circuit, even while litigating exactly the same issues over the same law—*i.e.*, the

TCPA. Neither *Hanna* nor *Shady Grove* tolerates such disparities.

This case also presents an ideal vehicle for addressing the question presented. This case presents a split between *two circuits over the same anti-SLAPP law*. *See Klocke*, 936 F.3d at 244-249, *compare with*, *Clifford*, 818 F.App'x at 747. What is more, unlike previous petitions that have come before the Court, there are no collateral order issues here. The district court dismissed the entire case with prejudice, and the Ninth Circuit affirmed. App.1a-36a. Thus, there is only a final judgment to review.

Finally, the unpublished nature of the Ninth Circuit's decision does not lessen the importance of the issues raised or affect the certiorari calculus. "[T]he fact that the Court of Appeals' order under challenge here is *unpublished carries no weight* in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (emphasis added). This Court has, in the past, granted certiorari to review unpublished decisions that either create (or exacerbate) a circuit split or those that conflict with this Court's precedent. *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 177 (1997) (granting certiorari to review an unpublished Ninth Circuit decision that exacerbated a circuit-split); *Davis v. United States*, 140 S.Ct. 1060, 1061-1062 (2020) (granting certiorari and reversing unpublished opinion inconsistent with Fed. R. Crim. P. 52(b)). This Court should grant certiorari.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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