No. 21-832

IN THE

# Supreme Court of the United States

TERRANCE WALKER,

*Petitioner,*

v.

INTELLI-HEART SERVICES INC; DANIEL GERMAIN; DANNY WEISBERG; and VANNESSA PARSONS,

*Respondents.*

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

## PETITION FOR WRIT OF CERTIORARI

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December 2, 2021

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## QUESTIONS PRESENTED

The question presented is:

1. Is applying state law Anti-Slapp procedure in Federal Court consistent with this Court's decision in *Shady Grove*? In particular,

a. Do Anti-Slapp law procedures Directly Conflict with Federal Rules 8, 12, and 56; the Necessary and Proper Clause; and Federal law?
b. Is the Ninth Circuit's "Side By Side" Approach impracticable, Rendering *Shady Grove* as well as Rules 8, 12, and 56 Easily-Evaded Formalites
c. Does the Ninth Circuit Approach Conflict With Other Circuits That Have Uniformly Followed the *Shady Grove* Rule, rejecting state procedures ?

2. Should this Court wait ten more years to ensure Circuit compliance with *Shady Grove*?

## LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, Walker v. Intelli-heart Services, Inc. et. al Case Nos. 20-15688, 20-16341, final judgments entered Sept 23, 2021

U.S. District Court for Nevada Walker v. Intelli-heart Services, Inc. et. al., Case No. 3:18-cv-00132, final judgment entered Mar. 4, 2020

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## PETITION FOR WRIT OF CERTIORARI

Terrance Walker ("Walker") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The panel memorandum of the Court of Appeals is unpublished and included in the Petitioner's Appendix("Pet.App..") at 16a . The denial of the petition for rehearing *en banc is* included in Pet. App. 1a. The opinion of the District Court granting the Anti-Slapp motion is included in Pet. App. 2a and is not reported.

## JURISDICTION

On Mar 4, 2020, the U.S. District Court of Nevada granted the Defendants' Nevada law Anti-Slapp motions to strike. It had jurisdiction under 28 U.S.C. § 1331-2. The Ninth Circuit affirmed the judgment on Sept 23, 2021 and it had jurisdiction under 28 U.S.C. §. 1291. Walker filed a petition for rehearing *en banc on Sept.* 24, 2021. On Oct 27, 2021, the court denied the petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

In pertinent part, **Article I, Section 8, of the U.S. Constitution** gives Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the other federal powers granted by the Constitution.

**Nevada Anti-Slapp provisions** are in Pet. App. 20a

## INTRODUCTION

Under Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co , 559 U.S. at 404, 130 S.Ct. 1431 (2010), if a state law and valid Federal Rule of Civil Procedure "answer the same question," then the state law *cannot* apply—end of story. Id. at 398-99. Courts are not supposed to "wade into Erie's murky waters unless the federal rule is inapplicable or invalid." Id. at 398

The Federal Rules have "presumptive validity under both the constitutional and statutory constraints." *Burlington* , 480 U.S. at 6, 107 S.Ct. 967. A federal rule falls within Congress's power under "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)" if it is "rationally capable of classification" as procedural. *Hanna* , 380 U.S. at 472, 85 S.Ct. 1136. Rules 8, 12, and 56 comply with the Rules Enabling Act and the Constitution; Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1357 (11th Cir. 2018) Those rules are valid under the Rules Enabling Act because they define the procedures for determining whether a claim is alleged in a sufficient manner in a complaint and whether there is a genuine dispute of material fact sufficient to warrant a trial. These rules "affect[ ] only the process of enforcing litigants' rights and not the rights themselves," *Burlington* , 480 U.S. at 8, 107 S.Ct. 967, and thus "really regulate procedure." *Sibbach* , 312 U.S. at 14, 312 U.S. at 14, 61 S.Ct. 422 ; *see also* Shady Grove Id. , 559 U.S. at 404, 130 S.Ct. 1431 (2010) (concluding that pleading standards and rules governing summary judgment are "addressed to procedure").

Over thirty states[1] now have Anti-Slapp[2] laws which command court procedures that are starkly different from the federal rules.

They allow a defendant to make an allegation that a plaintiff's complaint is based on their protected speech or petitioning activity. Then, "[t]he burden then shifts to the [] plaintiff" to "establish[] that there is a probability that [he] will prevail on the claim," and "that [defendant's] 'purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses,'" Newsham, 190 F.3d at 971 (quoting Wilcox v. Superior Court, 27 Cal. App. 4th 809, 824 (1994)). "To make this determination, the court 'shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" Id. Furthermore, a "prevailing party on a special motion to strike is entitled to [mandatory] attorney's fees and costs." Id. ; NRS 41.665(2)(Nevada requires the same burden as "California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015."). A plaintiff's entitlement to discovery in this process is dependent upon a court's often-shifting and uncertain assessment of a plaintiffs' complaint's "factual sufficiency" or "legal deficiency". Despite these labels, it is clear that it allows a court to consider "supporting and opposing affidavits" which *are* evidence.

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[1] According to the Reporters' Committee for Freedom of the Press, there are now 31 states with anti-SLAPP laws, see Austin Vining & Sarah Matthews, Introduction to Anti-SLAPP Laws, at https://www.rcfp.org/introduction-anti-slapp-guide/ ).

[2] "Anti-SLAPP" is an acronym for "Anti-Strategic Lawsuit Against Public Participation." *See* Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 837 n.7 (9th Cir. 2001)

Twenty years ago in United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999), the Ninth Circuit held Anti-Slapp Statutes can apply in federal court because they did not "directly collide" with and, thus, could "exist side by side" with Federal Rules of Civil Procedure 8, 12, and 56, and *Erie's* twin purposes favored its application. Id. at 972.

As a District Court in the Ninth Circuit recently noted, "Our own court of appeals, however, has not yet expressly decided how *Shady Grove* applies to a state anti-SLAPP statute. " CoreCivic Inc. v. Candide Grp. , No. C-20-03792-WHA, 5 (N.D. Cal. Apr. 6, 2021)

Walker urges that utilizing state Anti-Slapp procedure in federal court violates this Court's Decision in *Shady Grove*; Federal Rules 8, 12, and 56; the Necessary and Proper Clause; and federal law. Five out of six U.S. Circuit Court of Appeals agree. The U.S. District Court of Nevada and the Ninth Circuit sidestepped this issue, which was raised by Walker.

## STATEMENT OF THE CASE

The question here is whether federal courts can dismiss claims under state procedures which call for consideration of evidence without discovery, an overriding of plaintiffs' allegations, and an increase in plaintiffs' burdens to survive dismissal.

Petitioner Terrance Walker operates a sole proprietor consulting firm that consults on government procurements. James Winters was an independent business man engaged in selling medical services, as well as a distributor for Intelli-heart Services Inc ("IHS") in 2014. Walker consulted with James Winters ("Winters") in helping him with, inter alia, market research and advising him on various aspects of

government procurements with the U.S. Dept. of Veteran Affairs ("VA"). In a bilateral contract, IHS agreed to pay Winters 10 percent, monthly, for his work in landing federal contracts in a bilateral contract. Winters agreed to pay Walker 50 percent of his take, monthly, for Walker's consulting. Walker helped Winters land several VA contracts for IHS; four were the subject of this action. Yet, "Intelli-Heart was routinely late in paying Winters his commission payments on the VA contracts he helped Winters secure. As a result, Winters was late paying Walker." (EFC 135, Order, pg 2) When the payments began to get 120 days apart Walker notified the VA contract officers. IHS got upset and immediately cancelled Winters' contract in Jan. 2018. IHS also made several misrepresentations to the VA, including that it had always timely paid Winters. Yet, IHS never paid the over $318,000 it owed Winters; half of which was due to Walker.

Walker filed a lawsuit to recover this money owed to him in the District Court. Yet, based upon Nevada Anti-Slapp law procedures, Walker's complaint allegations were overridden. His allegations were reframed as entirely being about Defendants' "good faith communications in furtherance of their right to petition or free speech in connection with an issue of public concern" Pet.App.8a ; Pet.App.9a(finding, "Defendants have met their initial burden under the Statute to show they were engaged in protected activity when they corresponded with various VA employees and officials ")

Walker was denied evidence via discovery, though the District Court considered *Defendants'* evidence. Walker's claim was also dismissed and he was assessed attorney fees pursuant to NRS 41.670

**A. The Use of state Anti-Slapp Law in Federal Court**

There is no dispute that under this Court's precedents,

people have a constitutional right to seek redress for their grievances. Anti-Slapp laws, as applied in federal Court, frustrate that right by injecting novel procedural issues. They thwart a fair presentation of facts and allegations to support or defend one's claims. They cause uncertainty as to procedures which have been set in stone for decades by federal rules. They increase one's burden to survive dismissal. They have precisely the intended effect of parties bent on obfuscating[3] or overriding[4] a plaintiff's claims which often succeeds. Every day that this Anti-Slapp law (and others) remain applied in federal court is a day in which such tactics are rewarded. Every day these procedural schemes increase the likelihood that they will be adapted to attack federal constitutional rights such as the right to a trial by jury[5].

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[3] See *Am. Preparatory Sch., Inc. v. Nevada Charter Acad.*, Case No.: 2:20-cv-01205-JAD-NJK, 10 (D. Nev. Oct. 28, 2020)(Noting a Defendant's Anti-Slapp use where the Court found "The defendants' arguments are not persuasive because they merely obfuscate the nature of APS's claims." )

[4] See Smith v. Craig, Case No.: 2:19-cv-00824-GMN-EJY, 12 (D. Nev. Mar. 4, 2020)("there is no basis for the Court to override plaintiff's allegations and declare them 'good faith communications' under Nevada's anti-SLAPP statute. )

[5] Cf. Davis v. Cox, 351 P.3d 862 (Wash. 2015)( holding statute, RCW 4.24.525, which provided a procedure for early and efficient disposition of lawsuits targeting "public participation and petition" in violation of the right to trial by jury under the State Constitution)

When applied in a federal forum these laws only invite chaos and confusion. For example, should a litigant expect state procedure apply or the federal? Which state procedure? Will they be allowed to obtain evidence? Will their allegations be overridden? Should they gather all of their evidence before filing so as to be able to counter an Anti-Slapp motion? If not, will they be assessed attorney fees while their claim is disregarded?

Usually, if a First Amendment issue is involved in a plaintiff's complaint, a federal court typically engages the Noerr-Pennington doctrine to sufficiently address the same issues that an Anti-Slapp is supposed to address. See e.g. *Mitchell v. Water*, No. 3:16-cv-00537-HZ, 8 (D. Or. Oct. 31, 2016)(noting a plaintiff's claims "do not survive Defendants' motion to dismiss because they fail to state a First Amendment retaliation claim or relate to Defendants' litigation conduct immunized by the *Noerr-Pennington* doctrine"); L. Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 673 (10th Cir. 2018)(same)

In 1999, United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999) considered as a question "of first impression" the "issue of the application of [California's Anti-SLAPP Statute] in federal court." Id. at 971.

The Newsham Court—eleven years before Shady Grove— laid out the framework it used for its inquiry:

> In determining whether the relevant provisions of California's Anti- SLAPP statute may properly be applied in federal court, we begin by asking whether such an application would result in a "direct collision" with the Federal Rules. ... In the absence of a "direct collision" between a state enactment and the Federal Rules, we must make the "typical, relatively unguided Erie choice." Id. at 972-73 (quoting Walker v. Armco Steel

Corp., 446 U.S. 740, 749-50 (1980); Hanna v. .Plumer, 380 U.S. 460, 471 (1965)).

The Newsham Court then applied that test. Although the Court expressly recognized that California's Anti-SLAPP Statute and "[Federal] Rules 8, 12, and 56" share a "commonality of purpose," it held that there is no "direct collision" between them because California's Anti-SLAPP Statute "and Rules 8, 12, and 56 can exist side by side." Id. at 972. The Court reasoned that, if successful, a special motion to strike under the Act will end the case, and, "[i]f unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." Id. Thus, it concluded, despite the "commonality of purpose" of the Statute and "[Federal] Rules 8, 12, and 56," "there is no 'direct collision.'" Id. at 972-73. The Newsham Court then made "the 'typical relatively unguided Erie choice,'" and concluded 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." Id. at 973 (quoting Hanna, 380 U.S. at 468, 471).

The U.S. Supreme Court, in its seminal decision in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 559 U.S. 393 (2010), materially changed the framework for determining whether a state law can apply in federal court. E.g., Stender v. Archstone-Smith Operating Tr., 958 F.3d 938, 945-46 (10th Cir. 2020) ("Shady Grove was a turning point in the Supreme Court's doctrine regarding the relationship between the Federal Rules and state law."). Under Shady Grove, "the relevant inquiry isn't whether the federal and state rules can coexist"—as the Newsham Court considered—"but whether [valid] Federal Rules 'answer[] the question in dispute.'" E.g., Gallivan v. United States, 943 F.3d 291,

296 (6th Cir. 2019).

In *Shady Grove*, the U.S. Supreme Court addressed the question whether a New York law prohibiting class actions seeking penalties or statutory minimum damages applied in federal court sitting in diversity to preclude it from entertaining a class action under Federal Rule of Civil Procedure 23 where the claims sought penalties or statutory minimum damages. 559 U.S. at 396 & n.1. The district court held that the state law applied in federal court and, based on it, dismissed the case. Id. at 397. The Second Circuit affirmed. Id. at 398. Like the Court in *Newsham*, it held that because the state law did not "cause a direct collision with" Rule 23, and because "the twin aims of Erie" would be served, the state law applied in federal court. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 143-45 (2d Cir. 2008).

The Supreme Court reversed, holding that the New York law at issue cannot apply in federal court. *Shady Grove*, 559 U.S. at 416. In so doing, the Supreme Court set forth a new—or at least clarified—framework for determining when state laws can apply in federal court:

> We must first determine whether [a Federal Rule of Civil Procedure] answers the question in dispute. If it does, it governs—[state] law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power. We do not wade into Erie's murky waters unless the federal rule is inapplicable or invalid.
> Id. at 398.

This is the rule regardless of the "policies [the state law] pursue[s]" or the "subjective intention of the state legislature" in enacting it. Id. at 404-06;

Following *Shady Grove*, La Liberte v. Reid 966 F.3d 79, 86 (2nd 2020) held the Anti-Slapp law of California (which Nevada tethers[6] its law to) is inapplicable in Federal Court. The,

> "circuits split on whether federal courts may entertain the various state iterations of the anti-SLAPP special motion. The Fifth, Eleventh, and D.C. Circuits hold that they are inapplicable in federal court on the ground that they conflict with Federal Rules of Civil Procedure 12 and 56. See Klocke v. Watson, 936 F.3d 240, 242 (5th Cir. 2019) (Texas); Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1350 (11th Cir. 2018) (Georgia); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1335 (D.C. Cir. 2015) (D.C.)"

It is time for the Circuit split to be resolved.

**B. Proceedings in the District Court Court and Court of Appeals**

Walker filed suit alleging (as IHS admits) " that he was not paid, in a contractual scheme flowing from IHS to Winters to Walker."(EFC 114, pg 2, ll. 1-2) "money" was received by IHS but withheld from Winters, and payments were "far short of projected contract totals."(EFC 114, pg 9, ll. 11-12) Walker filed claims for tortious interference and unjust enrichment. After brief discovery on IHS, Walker moved to Amend his Complaint to add Defendants Daniel Weisberg, Vanessa Parsons and Daniel Germain. The District Court Magistrate approved Walker's Second Amended complaint ("SAC"), finding it sufficient. (EFC 135, pg 9)

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[6] Shapiro v. Welt, 389 P.3d 262, 268 (Nev. 2017) ("California's and Nevada's anti-SLAPP 'statutes are similar in purpose and language'")

Walker moved to compel discovery from IHS pending such Amendment. While Walker was awaiting the ruling on his motion to compel evidence from IHS, the Magistrate *sua sponte* stayed discovery on April 24, 2019. (EFC 157, ordering "discovery is STAYED until the newly named defendants have entered an appearance") On May 8, 20219 the newly added Defendants (along with IHS) filed Nevada law Anti-Slapp Motions to Strike, with affidavits and evidence attached. (EFC 159, 169)

Walker filed multiple requests to reopen discovery and to stay a ruling on the Anti-Slapp motion until he could get discovery on these communications. Walker also challenged the applicability of the Nevada Anti-Slapp law in the federal District Court in Opposing the Motion. (EFC 197, pg 31) Yet, the District Court denied all of Walker's motions. Pet.App.23a, Pet. App.2a

Walker alleged he was a second-tier subcontractor under the federal acquisition regulations by being a subcontractor of Winters. See F.A.R. 52.232-40 The District Court, instead, accepted Defendants' *reframing* of *Walker's* allegations – asserting Walker alleged he was "IHS's [direct] subcontractor". Yet, that version was *solely* in Defendants' Anti-Slapp motions.

The District Court granted the Anti-Slapp motion citing "evidence" on March 4, 2020. It found, " the Court is required to consider evidence in making a determination under these paragraphs. See NRS § 41.660(3)(d)" Pet.App.8a

Though there was no contract language designating Winters as an "agent", the District Court held Winters was an "agent" and there were "circumstances known to both parties mak[ing] [Walker's] contract or agreement absolutely void.' Edwards v. Carson Water Co., 34 P. 381, 386 (Nev. 1893)" Pet.App.12a alterations in brackets [] Yet, Walker was

not allowed, inter alia, to explore those "circumstances" via discovery, nor obtain evidence of a potential change of terms (or the "circumstances") of Winters contract with IHS in 2015. (EFC 197, pg 10, 11,ll. 4-10)

The entirety of evidence required to support or defend his case was not provided to Walker. Nor did three of four Defendants have to undergo any discovery before these evidentiary findings were made. In sum, the District Court found Walker's SAC to be based "entirely" on Defendants' "good faith communications". Pet.App.8a-10a.

It also based its ruling on one-sided evidentiary submissions and a slew of Defendant's ipse dixits, misrepresenting Walker's allegations and contracts. The District Court did not even bother to analyze the federal contract terms and regulations attached to, and referred to in, Walker's complaint.

The Ninth Circuit Court of Appeals affirmed on Sept. 23, 2021. It expanded the District Court findings by holding that Winters was a "personal service contract[or]"Pet.App. 18a who could not assign part of his pay to Walker. Yet, "personal service contract" appears nowhere in Winter's contract with IHS.

The Ninth Circuit also held Walker's allegations that he was a "second-tier subcontractor" were properly considered "legal conclusions" (Pet.App. 17a), though this appears nowhere in the District Court judgment. The Circuit panel also cited the authority of the District Court holding Winters was an "agent" Edwards v. Carson Water Co., 34 P. 381, 386 (Nev. 1893).

On Sept. 23, 2021 The Circuit panel sanctioned the District Court's explicit consideration of "evidence" (without discovery) (See Pet.App.9a-12a)

by belatedly deeming such analysis one of "legal deficiencies" [7]. Pet.App. 19a

The District Court held that Defendants' communications to the VA were supposedly "made without knowledge of its falsehood." NRS § 41.637(1). Pet.App. 8a. In the District Court's Anti-Slapp assessment it held "there is at least no *evidence* that Defendants made any false statements." Pet.App.10a. The Circuit panel, in a striking about-face, held that Walker's allegations of Defendants' "false statements" to the VA were "beside the point". Pet.App. 17a

No doubt these vacillating findings are due to the uncertainty presented by the Anti-Slapp law.

Neither of the lower Courts provided any substantive ruling on Walker's repeated claims [8] that a federal Court could not apply State Anti-Slapp procedures due to Rules 8, 12, and 56 and the Necessary and Proper Clause of the constitution.

Asserting these issues, Walker moved for rehearing *en banc* on Sept. 24, 2021. (Dkt. 49) Walker's petition for rehearing was denied on Oct. 27, 2021 (Dkt. 58)

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[7] This finding was odd given that an "agent" relationship in Nevada is to be proved, "by a preponderance of the **evidence**." Hamm v. Arrow creek Homeowners' Ass'n, 124 Nev. 290, 300, 183 P.3d 895, 903 (Nev. 2008)

[8] Asking for extra pages to address "the constitutionality of (and applicability of) the Anti-slapp provisions" (EFC 175, pg 2), Walker was "granted leave to file a combined response of 40 pages in length" Pet.App.24a. Yet, the issue he raised(EFC 197, pg 31) was ignored. Walker raised the issue in the Ninth Circuit opening brief (Dkt. 14, pg 51-52, Case 20-15688), and rehearing petition (Dkt 49, pg 29-31, Case 20-15688). The lower courts ignored this serious issue, again.

## REASONS FOR GRANTING THE PETITION

### I

### NINTH CIRCUIT HOLDINGS THAT STATE ANTI-SLAPP PROCEDURAL RULES DO NOT CONFLICT WITH, AND CAN EXIST "SIDE-BY-SIDE", WITH FEDERAL RULES IGNORES *SHADY GROVE*, OTHER CIRCUIT HOLDINGS, IS UNWORKABLE, AND UNDERMINES FEDERAL RULES

State anti-slapp laws were designed to be so procedurally lopsided – and in doing so threaten crushing liability – while they deter the filing of suits altogether when applied in federal court.

This case raises a serious constitutional question about the disregarding of plaintiffs' rights under Rules 8, 12, and 56 and procedural limitations imposed by the Constitution's Necessary and Proper Clause. It has wider implications than just in one case

Under rule 8, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the ground upon which it rests." Fed. R. Civ. P. 8(a)(2); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)." (EFC 197, pg 11, ll. 15-20)

In accordance with Rule 12,

"On a motion to dismiss, the Court is to take "well-pleaded factual allegations in the complaint as true," Iqbal, 556 U.S. at 678, 129 S.Ct. 1937, (EFC 197, pg 11, 15-16)

Under Rule 56, when considering evidence, a plaintiff is "to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)

**A. Anti-Slapp law procedure "Directly Conflicts" with Federal Rules 8, 12, and 56; the Necessary and Proper Clause; and Federal law**

As *Carbone* highlighted,

> A federal rule falls within Congress's power under the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)" if it is "rationally capable of classification" as procedural. *Hanna*, 380 U.S. at 472, 85 S.Ct. 1136. " *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1357 (11th Cir. 2018)

Clearly, federal rules 8, 12, and 56 are procedural and this clause does not give power to make such rules to the States.

Also as shown above, Rules 8, 12, and 56 holdings thereon have been clear that a plaintiff's allegations and evidence are to be credited as true.

Yet, Instead of the deference embraced under federal rules, Walker's allegations and evidence that he was owed money as a second-tier federal subcontractor who did work for Winters were sidestepped. The lower Courts, instead, heeded state law deference to Defendants' claim that Walker alleged "IHS's [direct] subcontractor". This latter claim was nowhere in Walker's complaint. Defendants were allowed to "construct and then topple over a straw man that bears little resemblance to the actual allegations of the [SAC] pleading" Church v. Accretive Health, Inc., CIVIL ACTION 14-0057-WS-B, * 9 (S.D. Ala. Dec. 16, 2014) (analyzing a motion to dismiss where, as here, it was

based upon straw man arguments)(alterations in brackets). The reframing of Walker's complaint as "entirely" concerning Defendants' "good faith communications" is not endorsed by federal procedure but, obviously, state procedure.

Walker was tasked with proving he had a probability of prevailing under Anti-Slapp law. Under federal rules he had no such burden and the two are not the same: "The plausibility standard is ***not akin to a 'probability requirement,'*** but it asks for more than a ***sheer possibility*** that a defendant has acted unlawfully." *Id.* (quoting *Twombly,* 550 U.S. at 556)

Further highlighting the conflict , under Rule 8 Walker's SAC was deemed sufficient under the federal rules (EFC 135, pg 9 ""the court cannot conclude the proposed amendments are entirely futile""). Yet, under Anti-slapp rules, Walker's SAC was deemed insufficient. If there was no "direct conflict" between these state and federal procedures, the result would have been the same. See e.g. Fulton v. Advantage Sales & Marketing, LLC, No. 2012 WL 5182805 at *2 (D. Or. Oct. 18, 2012)(The test for futility is the *same* used for a Rule 12(b)(6) motion to dismiss.)

It is noteworthy that neither the Anti-Slapp judgment nor affirmance mention any federal rules,

Also, discovery is harder to obtain under Anti-Slapp law. Unity Healthcare, Inc. v. Cty. of Hennepin, 308 F.R.D. 537, 541 (D. Minn. 2015) ("The restrictive standard for discovery under the anti-SLAPP law is oil to the water of Rule 56's more permissive standard.") See, e.g., Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1047 (N.D. Ill. 2013), aff'd, 791 F.3d 729 (7th Cir. 2015)

Evidence is examined without an opportunity for some plaintiffs to complete discovery under Anti-Slapp law. S. Middlesex Opportunity Council, Inc. v. Town of Framingham, No. 07-CV-12018 (DPW), 2008 WL 4595369,

at *10 (D. Mass. Sept. 30, 2008) (state process that incorporated "additional fact-finding beyond the facts alleged in the pleadings" was "fundamentally different from a Rule 12 motion"); *see also* Adelson v. Harris, 774 F.3d 803 , 809 (2nd Cir. 2014)(noting that whether provision of Nevada's anti-SLAPP statute barring discovery upon filing of anti-SLAPP motion applied in federal court "may present a closer question" and noting that other courts declined to apply such provisions as conflicting with Rule 56).

Even the exercise of an "inherent power *cannot* be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." Dietz v. Bouldin, 136 S. Ct. 1885, 1892 (2016) Here, the Federal Rules of Procedure expressly gave Walker the right to request discovery. Yet, the express grant of Walker's right to discovery under Rule 56 was denied (and approved) under Anti-Slapp procedures. There is no "inherent" power to do that. *Dietz* Id.

Assuming the District Court Magistrate forecasted the Anti-Slapp motions, the premature *sua sponte* stay of discovery would have not been sanctioned under federal rules. Turner Broad Sys., Inc. v. Tracinda Corp., 175 F.R.D. 554, 556 (D. Nev. 1997)("a pending dispositive motion ' is not ordinarily a situation that in and of itself would warrant a stay of discovery.' ); Escareno ex rel. A.E. v. Lundbeck, LLC, No. 3:14-CV-257-B, 2014 WL 1976867, at *2 (N.D. Tex. May 15, 2014)("a motion to dismiss does not automatically stay discovery or require postponing a Rule 26(f) conference until the motion is resolved." ) Yet, this was held to be acceptable under the Anti-Slapp procedure, according to the lower courts.

Under state Anti-Slapp law, Walker bore the burden to prove his case without discovery on three of four Defendants (and incomplete discovery as to the fourth).

Walker also had to counter Defendants' evidence with no evidence and, also, denied discovery (Pet.App.23a) of Defendants' alleged "good faith communications".

A federal contractor's false statements about its late payments to the VA can constitute federal crimes. U.S. v. Bazantes 978 F.3d 1227, 1242 (11th Cir 2020)( conviction of a federal contractor under the False Statements Act of person(s) who "submitted to the agency certified payroll forms containing false, fictitious, and fraudulent statements" Title 18 § 1001(a)(3) affirming conviction for even "transmitting" "false statements" and "certif[ying] that his statements were true") Oddly, the panel held Defendants "false statements" are "beside the point". Pet.App.17a in its Anti-Slapp holding, ignoring federal regulations and potential federal crimes. Bazantes Id.

In sum, state law and procedure, embraced by *Newsham, does* involve substantial direct conflicts with federal law, the Necessary and Proper Clause, and Federal Rules 8, 12, and 56

**B. Ninth Circuit's "Side By Side" Approach Is Impracticable and Renders *Shady Grove* as well as Rules 8, 12, and 56 Easily-Evaded Formalites**

The "side by side" approach of the Ninth Circuit has turned federal court pleading and discovery into a farcical guessing game. It invites this disregard of a plaintiff's allegations, need for evidence, and deference to their claim. The denial of discovery this approach invites runs afoul of the mandates of federal rule 56. It forces, without a compass or rudder, Courts and litigants to see-saw back and forth between a muddying of rules and standards.

Most circuits agree (see e.g *La Liberte)* that the Ninth Circuit's "side by side" exception allows the

District Court to circumvent the constitutional mandate to abide by federal rules. Using this exception, the panel declared the District Court's evidentiary assessment was one based on "legal deficiency". This state law play on words was meant to avoid the troublesome realization that Walker was not allowed to complete discovery of evidence before the Court's judgment. This procedure is clearly not allowed under the federal rules. Discovery is mandated "where the nonmoving party has not had the opportunity to discover information that is essential to its opposition." Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)

As Courts have explained, California's Anti-SLAPP Statute (and "analogous" statutes) "answer[s] the same question[s] as" Federal Rules 8, 12, and 56—but "require[s] [a] plaintiff to make a showing that the Federal Rules do not require." E.g., La Liberte, 966 F.3d at 87, thereby establishing "the circumstances under which a court must dismiss a plaintiff's claim before trial." Id. (quoting Cal. Code Civ. Proc. §425.16(b)(3)). But Rule 8 provides that a complaint need only "contain ... a short and plain statement of the claim showing that the pleader is entitled to relief," Fed R. Civ. P. 8(a)(2); Carbone, 910 F.3d at 1350. And under Rule 12(b)(6), a plaintiff need only "allege 'enough facts to state a claim to relief that is plausible on its face'"—which "'does not impose a probability requirement at the pleading stage,'" La Liberte, 966 F.3d at 87 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 570 (2007)). Moreover, Defendants—not plaintiffs—bear the burden of demonstrating that their Federal Rule 12(b)(6) motion to dismiss should be granted, Raymond v. Avectus Healthcare Sols., LLC, 859 F.3d 381, 383 (6th Cir. 2017); Stavrianoudakis v. U.S. Dep't of Fish & Wildlife, 435 F. Supp. 3d 1063, 1100 (E.D. Cal. 2020). Nevada and California's Anti-SLAPP Statute "'abrogates that [standard] ... by requiring the plaintiff to establish that

success is not merely plausible but probable,'" and by changing the party who bears the burden of demonstrating entitlement to relief from defendant to plaintiff. La Liberte, 966 F.3d at 87 (quoting Carbone, 910 F.3d at 1353); accord Abbas, 783 F.3d at 1333-35.

Nevada and California's Statute "requires outright dismissal unless the plaintiff can 'establish[] a probability that he or she will prevail on the claim,'". As the Second Circuit further explained, California's Anti-SLAPP Statute also conflicts with Federal Rule 56 because it "nullifies" plaintiff's entitlement under Rule 56 to "proceed to trial by identifying any genuine dispute of material fact" by instead "'requiring the plaintiff to prove that it is likely, and not merely possible, that a reasonable jury would find in his favor.'" La Liberte, 966 F.3d at 87 (quoting Carbone, 910 F.3d at 1353). "[T]ogether, Rules 12 and 56 express with 'unmistakable clarity' that proof of probability of success on the merits is not required in federal courts to avoid pretrial dismissal." Id.

Furthermore, when are defendants entitled to attorneys' fees if a plaintiff's complaint fails to state a claim upon which relief can be granted? Under Federal Rules 11 and 12, the answer is: only if plaintiff's claims were frivolous or presented for an improper purpose. Fed. R. Civ. P. 11(b). But Nevada's Anti-SLAPP Statute answers that same question differently by requiring a mandatory fee award (NRS 41.670) even if a claim was not frivolous or presented for an improper purpose.

Moreover, even to the extent that the Nevada legislature's purpose in enacting its Anti-SLAPP Statute of preventing "baseless lawsuit[s]," is considered ( it should not be, see Shady Grove, 559 U.S. at 404-06); Cf. *Ingraham v. Wright,* 430 U.S. 651, 670 n.39 (1977) ("There is no support whatever for this [purposive analysis] in the decisions of this Court."). the Supreme Court has

explained that Rule 11 has the same purpose: "the central purpose of Rule 11 is to deter baseless filings in district court." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) Also, the Noerr-Pennington doctrine sufficiently addresses immunized litigation conduct. Mitchell v. Water, No. 3:16-cv-00537-HZ, 8 (D. Or. Oct. 31, 2016)(noting claims did "not survive Defendants' motion to dismiss because they fail to state a First Amendment retaliation claim or relate to Defendants' litigation conduct immunized by the Noerr-Pennington doctrine")

Simply put, Rules 8, 11, 12, and 56 answer the same question as Nevada's(and other state) Anti-SLAPP laws, and, accordingly, they cannot apply in federal court. By exempting a substantial swath of litigation from the holdings of *Shady Grove* and Rules 8, 12, and 56, the Ninth Circuit and the panel opinion degrades Congress' authority under the Rules Enabling Act in a way contrary to the Constitution's text and history.

Rather than let these "side by side" exceptions to federal rules linger and metastasize in 31 states (and counting), this Court should grant certiorari and make good its pledge in *Shady Grove* to resolve conflicts as to the Necessary and Proper Clause and Rules Enabling Act so that federal plaintiffs can have their day in court.

Considering the democratic goals of the Necessary and Proper Clause, the consequences of the Ninth Circuit's fashioned rule are troubling, particularly in these cases where straight-forward procedures that were long-enshrined are short-circuited and overridden. Litigators are supposed to easily understand the rules to follow and be able to debate the merits of their case. But when 31 different States have their procedures "side by side" in federal court, it becomes unpredictable which procedure is to be followed. See Nunes v. Lizza, 476 F. Supp. 3d 824, 846 (N.D. Iowa 2020) finding "the Court finds that Rules 8, 12 and 56 are valid under the Rules

Enabling Act and preempt California's anti-SLAPP statute", but also forced to decide whether to ""apply federal, Iowa, and California law as appropriate" Id. The Ninth Circuit's rule renders *Shady Grove's* mandate for following federal rules ineffective in exactly those instances when it matters most.

The Ninth Circuit's "side by side" holding fundamentally handicaps a plaintiff's federal case and effectively neutralizes the Necessary and Proper Clause.

### C. Ninth Circuit Approach Is Unprecedented And Conflicts With Every Circuit That Has Uniformly followed *Shady Grove*, Rejecting State Procedures

The *Newsham* Court claimed that its "side by side" test was consistent with existing prior precedent, but those precedents—*Hanna*—announced no such rule. Instead, in that case it was declared,

> "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." Hanna v. Plumer, 380 U.S. 460, 473-74 (1965)

A growing chorus of Circuits are sounding the alarm. Since *Shady Grove*, Circuits have held that California's Anti-SLAPP Statute and "anti-SLAPP statutes [] analogous to California's" cannot apply in federal court—including in a D.C. Circuit opinion authored by now-Justice Kavanaugh. See La Liberte v. Reid, 966 F.3d 79, 86-88 & n.1 (2d Cir. 2020) (California); Klocke v. Watson, 936 F.3d 240, 244-49 (5th Cir. 2019) (Texas); Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1349-57 (11th Cir. 2018) (Georgia); Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 673 (10th Cir. 2018), cert. denied, 139 S. Ct. 591

(2018) (New Mexico); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015) (Kavanaugh, J.) (D.C.); Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1042 (N.D. Ill. 2013), aff'd, 791 F.3d 729 (7th Cir. 2015) (Washington); see also Lampo Grp., LLC v. Paffrath, No. 18-cv-1402, 2019 WL 3305143, at *3 (M.D. Tenn. July 23, 2019) (California). Every Circuit that has considered whether a state Anti-SLAPP Statute can apply under the Shady Grove majority's framework has held that it cannot, and not a single Circuit has held that an Anti-SLAPP Statute can apply in federal court under that framework. (Only the First Circuit has held otherwise but it mistakenly relied on a single-Justice concurrence in Shady Grove, not the majority opinion. See Godin v. Schencks, 629 F.3d 79, 88-90 (1st Cir. 2010); Intercon Sols., 969 F. Supp. 2d at 1053

## II. THE LOWER COURTS' REFUSAL TO ACKNOWLEDGE SHADY GROVE FOR TEN YEARS ROBS THE NECESSARY AND PROPER CLAUSE OF ALL MEANING AND DENIES PLAINTIFFS THEIR DAY IN COURT

Many lower courts in the Ninth Circuit, including in this case, have followed this "side by side" requirement and avoided *Shady Grove* for over ten years.

Walker (EFC 197, pg 31) specifically asserted the,

> "Anti-Slapp Motions (EFC 159, 169) fail to correspond to Rule 12 or Rule 8 ,56, Enabling Act, or the Constitution. Carbone v.Cable News Network, 910 F.3d 1345, 1357 (11th Cir. 2018)...state rules which call for a disregarding of Walker's discovery rights conflict with federal rules...[the] "procedure created by that [anti-Slapp] statute cannot apply in federal court."

*Carbone* cites *Shady Grove*, *Hanna*, *Newsham* and the Necessary and Proper clause. Walker also cited *Los Lobos* which also alludes to *Shady Grove*. (See fn. 8) Yet, the lower courts disregarded precedent, repeated challenges, circuit conflict, and conflict with this court..

*Shady Grove* accords with common sense. It sets forth the purpose of the Necessary and Proper Clause, since without it, the states would be free to originate procedural laws to apply in federal court without any limit, rendering the Clause ineffectual. Such a reading would do violence to "the 'finely wrought' procedure commanded by the Constitution." Cf. *Clinton v. City of New York*, 524 U.S. 417, 447 (1998)

This case is timely, presents an excellent vehicle for addressing this question, and calls for no complicated line-drawing by the Court. With a growing number of Anti-Slapp laws as well as a crescendo of decisions and challenges[9] echoing concerns about applying them in federal Court, now is the perfect time to ensure compliance with *Shady Grove*. Otherwise, more federal Courts will stray from Constitutional origins. Action is needed to ensure plaintiffs can properly have their day in federal Court.

## CONCLUSION

The petition for writ of certiorari should be *granted*.

Respectfully submitted,

Terrance Walker, *Petitioner*

[9] Retzlaff v. Van Dyke, 141 S. Ct. 610 (2020)(cer. den.); Clifford v. Trump, 141 S. Ct. 1374 (2021)(cer. den.)