No. 24-1173

In the Supreme Court of the United States

EVANS HOTELS, LLC, ET AL.,
Petitioners,

v.

UNITE HERE! LOCAL 30, ET AL.,
Respondents.

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

JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment, and the First Amendment-based *Noerr-Pennington* doctrine, are inapplicable to claims that a union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(ii)(B), by lobbying and engaging in other petitioning, letter-writing, and a publicity campaign.

2. Whether a "serial-sham" exception to the *Noerr-Pennington* doctrine applies when a defendant has filed ten administrative or judicial challenges over an eleven-year period against entities other than the plaintiffs and such challenges were mostly successful and in no way barred the plaintiffs (or anyone else) "from meaningful access to adjudicatory tribunals." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972).

3. Whether California's anti-SLAPP statute, Cal. Civ. Proc. Code §425.16, allows a federal district court to award attorneys' fees to the defendants after the court dismissed the plaintiffs' state-law claims and denied the defendants' anti-SLAPP motion as moot and the plaintiffs then declined to re-plead those state-law claims.

CORPORATE DISCLOSURE STATEMENT

Respondents UNITE HERE! Local 30 and San Diego County Building and Construction Trades Council, AFL-CIO do not have parent corporations, and no publicly held company owns stock in these Respondents. The other Respondents, Brigette Browning and Tom Lemmon, are not corporations.

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PRELIMINARY STATEMENT

The unpublished decision below upheld the dismissal of part of Petitioners' lawsuit and remanded one claim for further trial court proceedings. Petitioners seek review of two questions about the application of the *Noerr-Pennington* doctrine to the facts of this sprawling case. The Ninth Circuit's analysis of those questions faithfully applied this Court's precedents, and there is no circuit conflict to resolve, so the questions are not worthy of review. Petitioners also ask the Court to resolve a question regarding the applicability of California's anti-SLAPP law. But the question was not fairly presented or addressed below, may be addressed imminently in pending Ninth Circuit en banc proceedings, and is not the subject of any meaningful inter-circuit division warranting certiorari. As such, the petition should be denied.

STATEMENT OF THE CASE

1. This case, which remains pending on remand in the federal district court, arises out of Respondents' exercise of their right to petition local and state officials. According to Petitioners' complaint, Petitioners (who own and operate hotels in the San Diego area) wanted the City Council to approve an amendment to their lease of City-owned land, which would have allowed them to expand their hotel resort. Pet. 17a. Petitioners alleged that Respondents opposed the proposed lease amendment and lobbied against it, including by sending two letters to City officials, lobbying individual City Council members, conditioning future political support of Council members on their opposition to the amendment, and publicizing reasons to oppose the amendment. Pet. 17a-20a, 26a.

Petitioners also alleged that Respondents threatened to continue their opposition unless Petitioners agreed to Respondents' labor-related demands, which included a "card check neutrality agreement" covering Petitioners' hotel workers and a "project labor agreement" covering any hotel construction. Pet. 16a, 18a-20a. According to the complaint, Respondents' lobbying was successful, and the City Council did not approve the requested amendment. Pet. 19a.

Petitioners' complaint further alleged that Respondents interfered with Petitioners' joint venture involving a potential hotel development near SeaWorld park. Pet. 20a. According to Petitioners, Respondents threatened to oppose SeaWorld's plans to build new theme park attractions—including by lobbying the City Council and the State Coastal Commission and engaging in "'negative publicity' on subjects like animal cruelty"—unless SeaWorld ended its business relationship with Petitioners. Pet. 20a-21a. As a result, the complaint alleged, SeaWorld abandoned the joint venture. Pet. 21a-22a.[1]

According to Petitioners, Respondents had a "playbook" for opposing San Diego developments in order to obtain labor agreements, and lobbied or litigated against ten other developments in San Diego County—none of which involved Petitioners—between 2007 and 2018. Pet. 16a, 39a-40a.

2. Petitioners initiated this action in December 2018, bringing claims under the Sherman Act, the Racketeer Influenced and Corrupt Organizations

[1] Respondents have not yet filed an answer, but deny these and many other allegations.

("RICO") Act, and Labor Management Relations Act ("LMRA"), as well as numerous state-law causes of action. Pet. 56a-57a. In the years since the lawsuit was filed, Petitioners amended their complaint three times, and three different district court judges have dismissed Petitioners' claims.[2] Each time, the court held that all or almost all of the complaint's allegations were non-actionable under the *Noerr-Pennington* doctrine, which requires courts to construe statutes to avoid imposing liability for First Amendment petitioning activity. Pet. 14a-15a, 22a-52a.

In the decision at issue, the district court dismissed Petitioners' LMRA and Sherman Act claims (the only claims then remaining in the case) under the *Noerr-Pennington* doctrine. Pet. 23a. The court determined that all the activity that Petitioners alleged as the basis for Respondents' liability (writing letters, lobbying City officials, engaging in online publicity to influence public opinion, and threatening future environmental challenges and other opposition to SeaWorld's plans) constitutes speech and petitioning activity or conduct incidental to such activity. Pet. 28a-34a.[3]

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[2] Judge William Hayes dismissed all of Petitioners' claims in January 2020. Pet. 56a. Judge Todd Robinson dismissed most of Petitioners' claims in August 2021, allowing only a narrow part of their LMRA claim to go forward. Pet. 57a. In July 2023, in the decision that went up on appeal, Judge Robert Huie dismissed Petitioners' complaint in its entirety. Pet. 22a-54a.

[3] The district court deemed conclusory many of Petitioners' allegations—including that Respondents had engaged in "extortion" and "bribery" and that Respondents' statements could be construed to threaten future picketing. Pet. 32a n.9, 35a n.11.

The district court acknowledged that the *Noerr-Pennington* doctrine does not protect "sham petitioning," but concluded that this exception did not apply to Respondents' actions. Pet. 36a-52a. The court held that the Ninth Circuit's "serial-sham" exception applies only to judicial or quasi-judicial proceedings, not lobbying, and that most of the legal challenges identified in the complaint (none of which were against Petitioners) had been settled or at least partially successful. Pet. 40a-42a (citing *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994)). The court concluded that Petitioners' allegations did not establish "[s]ham lobbying" because Respondents' petitioning efforts were aimed at a legislative objective (blocking the lease amendment), not at imposing burdens on Petitioners through the lobbying process itself. Pet. 42a-48a. The court observed that "ha[ving] an ulterior motive for lobbying" does not deprive a party of *Noerr-Pennington* protection. Pet. 45a-46a; *see also* Pet. 43a-44a (citing *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993) ("*PREI*")). The district court held that it could not assume that Respondents' alleged threats to oppose SeaWorld's future attractions necessarily meant that Respondents would engage in sham petitioning. Pet. 48a-49a.

In a separate order, the district court denied Respondents' motion for attorneys' fees under a California statute that seeks to deter strategic lawsuits against public participation ("SLAPP" suits), Cal. Civ. P. Code §425.16. Pet. 66a-70a. Respondents had previously filed two motions to strike Petitioners' state-law claims under California's anti-SLAPP law. Pet. 57a. After dismissing Petitioners' state-law claims in the first and second amended complaints,

the district court had denied these anti-SLAPP motions as moot. Pet. 57a-58a. Then, after Petitioners' third amended complaint declined to re-plead their state-law claims, the district court determined that it lacked authority to award attorneys' fees under the anti-SLAPP law. Pet. 69a-70a.

3. Petitioners appealed the dismissal of their LMRA and Sherman Act claims, and Respondents cross-appealed the denial of their motion for anti-SLAPP fees. Pet. 2a. The court of appeals issued an unpublished memorandum disposition affirming the dismissal of almost all of Petitioners' claims. Pet. 2a-6a.

The court of appeals held that the *Noerr-Pennington* doctrine precluded almost all of Petitioners' LMRA claims. Pet. 3a-6a. It rejected Petitioners' argument that the doctrine (and the First Amendment more generally) is categorically unavailable to labor unions accused of secondary boycotts against third-party businesses. Pet. 3a (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988)). And, the court explained, Petitioners' allegations did not plead "sham petitioning" under the *Noerr-Pennington* doctrine, because Petitioners' factual allegations did not establish that Respondents' petitioning lacked objective merit or sought to "use[] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon." Pet. 3a-4a (quotations omitted). In fact, the court pointed out, Respondents had succeeded in their petitioning objective because the City Council did not approve Petitioners' proposed lease amendment. Pet. 4a. Finally, the court rejected Petitioners' argument that the "serial sham

exception" to the *Noerr-Pennington* doctrine applied, explaining that the complaint did not allege that Respondents had ever filed a legal or administrative challenge against Petitioners or that the eight legal challenges pursued against other developers, over more than a decade, had blocked Petitioners' (or anyone's) access to the adjudicative process. Pet. 4a.

The court of appeals reversed the district court's dismissal of one part of Petitioners' LMRA claims, holding that Petitioners' allegations about Respondents' threats to SeaWorld sufficiently alleged "sham" petitioning. Pet. 5a. Construing the allegations in the light most favorable to Petitioners, the court concluded that Respondents' purported threats to oppose future attractions sought to use the governmental process, rather than its outcome, to coerce SeaWorld. Pet. 5a. The court explained that, according to the complaint, Respondents' alleged threats were baseless because Respondents did not know which attractions SeaWorld intended to open and did not intend to follow through on their threats, so Respondents "could not have reasonably expected to secure favorable government action." Pet. 5a.

In addition, the court of appeals affirmed the dismissal of Petitioners' Sherman Act claims and denial of leave to file a fourth amended complaint. Pet. 2a, 6a-7a.

The court of appeals reversed the district court's determination that Respondents were ineligible for attorneys' fees under California's anti-SLAPP statute "solely because [Respondents'] anti-SLAPP motion was no longer pending when [Respondents] filed their fee motion" and remanded for the district court to

determine whether Respondents' anti-SLAPP motion had achieved a practical result warranting a fees award. Pet. 7a.

Judge Callahan dissented in part. She would have allowed all the LMRA claims to go forward because in her view the complaint sufficiently alleged that Respondents had a policy of initiating legal proceedings without regard to merit. Pet. 10a-11a.

4. The case remains pending in district court, where Petitioners are pursuing their LMRA claim based on Respondents' alleged threats against SeaWorld.

REASONS FOR DENYING THE PETITION

Petitioners seek review of two questions about the application of the First Amendment and *Noerr-Pennington* doctrine. But Petitioners' argument for review misunderstands the relevant legal precedents. The Ninth Circuit's unpublished disposition faithfully applied this Court's decisions, and there is no circuit conflict on these questions. Even if the Ninth Circuit erred (and it did not), that would not be sufficient reason to grant review. Petitioners also seek review of a question about California's anti-SLAPP statute. But the circuit courts, including the Ninth Circuit, apply the same legal test to decide the applicability of state anti-SLAPP laws in federal court. Even if differences in the application of that test were sufficiently important to review, the question was not addressed below and a pending en banc proceeding in the Ninth Circuit may change the Ninth Circuit's approach, so this case would not be

an appropriate vehicle. The petition should be denied.

I. The first question presented is not worthy of this Court's review.

Petitioners argue that the court of appeals departed from this Court's precedent and that of other circuits by holding that the First Amendment applies to NLRA Section 8(b)(4)(ii)(B), 29 U.S.C. §158(b)(4)(ii)(B), and interpreting that provision in light of constitutional concerns. Pet. 13-14. Petitioners' argument is based on a misunderstanding of settled law, developed over a half century, which construes Section 8(b)(4)(ii)(B) to apply to picketing and picketing-like conduct, but not to speech or petitioning the government (unless the "sham" exception applies, *see infra* Section II), in order to avoid the serious constitutional problems that would otherwise result. The court of appeals applied that settled rule, and there is no circuit split on this issue.

A. The court of appeals' decision is consistent with this Court's precedent.

The court of appeals' application of the First Amendment-based *Noerr-Pennington* doctrine faithfully applied this Court's precedents. The *Noerr-Pennington* doctrine derives from the First Amendment, and requires courts to construe statutes to avoid imposing liability on petitioning activity. *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 535-36 (2002). Almost four decades ago, this Court unanimously rejected the claim that a labor union violates NLRA Section 8(b)(4)(ii)(B)—which makes it an unfair labor practice for a union to "threaten, coerce, or restrain

any person" where an object is "forcing or requiring any person … to cease doing business with any other person," 29 U.S.C. §158(b)(4)(ii)(B)—by advocating a boycott that caused harm to a "secondary" employer. *DeBartolo*, 485 U.S. at 578-79.[4] The Court adopted this construction because reading Section 8(b)(4)(ii)(B) broadly to reach such non-picketing speech would give rise to "serious constitutional problems." *Id*. at 575.

DeBartolo involved union leafletting at a retail mall, a tenant of which had hired a general contractor that was using a non-union subcontractor. 485 U.S. at 570. The union's leaflets called for a boycott "of the stores in the mall" to pressure the mall's owner and tenants (secondary and tertiary targets) to intervene in the union's (primary) labor dispute. *Id.* The National Labor Relations Board ("NLRB") held the union's leafletting violated Section 8(b)(4)(ii)(B) because "'[a]ppealing to the public not to patronize secondary employers is an attempt to *inflict economic harm* on the secondary employers by causing them to lose business,' and 'such appeals constitute "economic retaliation" and are therefore a form of coercion.'" *Id*. at 573 (emphasis added) (citation omitted).

This Court rejected the NLRB's reasoning, and held that because Section 8(b)(4)(ii)'s reference to "threats, coercion, or restraints" is "'nonspecific, indeed vague,'" these words "should be interpreted with 'caution' and not given a 'broad sweep.'" *DeBartolo*, 485 U.S. at 578 (citation omitted). Reading Section 8(b)(4)(ii)(B) to forbid such leafletting would raise

[4] A "secondary" target is a business other than the one with which a union has a primary labor dispute.

"serious constitutional problems," and the Act's legislative history evinced no intent to proscribe forms of "coercion" other than picketing. *Id*. at 575-76, 586-87.

While *DeBartolo* involved leafletting and this case involves petitioning, this Court later applied the same reasoning to limit Section 8(a)(1)'s proscription against employer "coercion" of employees through activity protected by the Petition Clause. *BE&K*, 536 U.S. at 536 ("Section 158(a)(1)'s prohibition on interfering, restraining, or coercing in connection with the above rights is facially as broad as the prohibition at issue in *DeBartolo*.") (citing 29 U.S.C. §158(a)(1)).

DeBartolo resolved a tension present in earlier cases going back to the 1959 amendments that had adopted the relevant statutory language: how to reconcile Section 8(b)(4)(ii)(B)'s ban on secondary union *picketing* with the First Amendment's bar on content discrimination. It resolved that tension by focusing on the *conduct* that defines picketing: patrolling the entry to a workplace in order to create a physical barrier (or the threat of such).

In the earliest such case, *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58 (1964), the Court addressed whether a union violated Section 8(b)(4)(ii)(B) by picketing a grocery store to boycott apples packed at a struck facility and sold at the store. Recognizing that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment," the Court held that Congress did not intend to prohibit picketing so long as it was aimed only at inducing a consumer boycott of the primary employer's product (such as Washington apples). *Id*. at 63, 71. Then, in *NLRB v. Retail Store*

Employees Union, Local 1001, 447 U.S. 607 (1980) ("*Safeco*"), the Court held that a union's picketing of a secondary title company violated Section 8(b)(4)(ii)(B), but divided over the rationale. *Id*. at 614-15. In a concurring opinion that this Court subsequently recognized as controlling, Justice Stevens reasoned that Section 8(b)(4)(ii)(B) is constitutional when applied to labor picketing because picketing "is a mixture of conduct and communication." *Id*. at 618-19 (Stevens, J., concurring). The physical conduct of picketing, Justice Stevens explained, "involves patrol of a particular locality" and the mere "presence of a picket line" induces action—namely, avoiding crossing that line. *Id*. (quotation omitted).

In *DeBartolo*, this Court adopted the view of Justice Stevens' concurring opinion from *Safeco*, explaining that "picketing is qualitatively 'different from other modes of communication'" because of the non-speech conduct that accompanies it: "intimidat[ion] by a line of picketers." *DeBartolo*, 485 U.S. at 580 (quoting *Babbitt v. Farm Workers,* 442 U.S. 289, 311, n.17 (1979)).[5]

Petitioners' assertion that *DeBartolo* "never decided" whether the First Amendment applies to

[5] Petitioners argue that *DeBartolo* does not apply because Respondents threatened to "harm Evans [and SeaWorld] financially." Pet. 17. But *DeBartolo* rejected the idea that speech could violate Section 8(b)(4)(ii)(B) based on its "economic impact on the neutral" (the purpose of every peaceful boycott). 485 U.S. at 479. Amici contend that *DeBartolo* immunizes "only peaceful persuasion." Amicus Br. 4. But Respondents' activities consisted of peaceful efforts to persuade the government—*i.e.*, to petition—which this Court has recognized as directly analogous to the handbilling in *DeBartolo*. *BE&K*, 536 U.S. at 535-36.

Section 8(b)(4)(ii)(B) misunderstands constitutional avoidance doctrine. Pet. 17. If the First Amendment did not apply to Section 8(b)(4)(ii)(B), there would have been no need for this Court to avoid the "serious constitutional problems" that would arise from applying that prohibition. *DeBartolo*, 485 U.S. at 575.

All later precedent has followed *DeBartolo*'s distinction between speech and petitioning—which Section 8(b)(4)(ii)(B) does not prohibit—and *picketing* and picketing-like conduct—which it does.[6]

The court of appeals' decision below faithfully applied that same distinction. Petitioners' complaint does not accuse Respondents of any conduct that is picketing or picketing-like. Rather, Petitioners alleged that Respondents violated Section 8(b)(4)(ii)(B) by engaging in lobbying, letter writing, and publicity. Such expressive petitioning and speech activity falls squarely on the speech line of *DeBartolo*'s distinction, and the court of appeals' unpublished disposition was an unremarkable application of *DeBartolo* to the allegations in this case.

B. There is no circuit conflict.

Petitioners' contention that there is a circuit conflict misunderstands the applicable law. They point to other circuits' decisions that have held the First

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[6] *International Brotherhood of Electrical Workers, Local 501 v. NLRB,* 341 U.S. 694, 701-02 (1951) ("*IBEW Local 501*"), on which Petitioners primarily rely, also involved picketing, concerned a different provision of Section 8(b)(4) (*see infra* at 16-19), and was decided before the 1959 amendments that added Section 8(b)(4)(ii)(B) and before this Court confirmed the relevant constitutional distinction in *DeBartolo*.

Amendment inapplicable to picketing or picketing-like conduct, and to a different provision of Section 8(b)(4) that bars labor unions from engaging in or promoting illegal strikes.

1. Following *DeBartolo*, lower courts have uniformly held that the First Amendment precludes holding leafletting, letter writing, publicity, and (non-sham) petitioning and other forms of peaceful, non-picketing expressive acts to violate Section 8(b)(4)(ii)(B), while labor *picketing* (and picketing-like conduct) may be held to violate Section 8(b)(4)(ii)(B).[7]

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[7] *See, e.g., Pye v. Teamsters Loc. Union No. 122*, 61 F.3d 1013, 1023 (1st Cir. 1995) (union's non-expressive acts were akin to picketing and violated Section 8(b)(4)(ii)(B)); *Metro. Opera Ass'n, Inc. v. Loc. 100, Hotel Emps. & Rest. Emps. Int'l Union*, 239 F.3d 172, 178 (2d Cir. 2001) (union leafletting of secondary target "may be harassing, upsetting, or coercive, but … [is] constitutionally protected"); *George v. Nat'l Ass'n of Letter Carriers*, 185 F.3d 380, 385-89 (5th Cir. 1999) (letter-writing campaign spreading negative publicity could not violate Section 8(b)(4)(ii)); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 326 (5th Cir. 1994) ("Lobbying, like hand-billing, is activity protected by the First Amendment."); *Storer Commc'ns, Inc. v. Nat'l Ass'n of Broad. Emps. & Technicians*, 854 F.2d 144, 147 (6th Cir. 1988) ("union's letters, telephone calls and visits to secondary employers" urging boycott, and peaceful threats of same, could not violate Section 8(b)(4)(ii)(B)); *520 S. Mich. Ave. Assocs., Ltd. v. Unite Here Loc. 1*, 760 F.3d 708, 726-27 (7th Cir. 2014) (handbilling, demonstrations, and delegations to hotels' secondary customers could not violate Section 8(b)(4)(ii)(B) because they "involved communication, … not physical trespass or repeated patrolling or harassment"); *BE&K Constr. Co. v. United Bhd. of Carpenters & Joiners of Am.*, 90 F.3d 1318, 1330 (8th Cir. 1996) ("Even if the purpose of the activity is to force an employer to stop doing business with another, a union may attempt peacefully to persuade, induce, or encourage it to cease the relationship.");

No circuit holds the First Amendment inapplicable to Section 8(b)(4)(ii)(B) or to labor speech in general.

Contrary to Petitioners' contention, *Kentov v. Sheet Metal Workers' International Ass'n Local 15*, 418 F.3d 1259 (11th Cir. 2005), is fully consistent with the court of appeals' decision in this case. There, the Eleventh Circuit reviewed an NLRB Regional Director's conclusion that a union's "mock funeral" outside a secondary hospital was the functional equivalent of picketing and violated Section 8(b)(4)(ii)(B). *Id.* at 1265. The court acknowledged that Section 8(b)(4)(ii) must be read in a manner consistent with the First Amendment, explaining that the "question [was] whether the Union's activity was equivalent to secondary picketing and patrolling which can be regulated under Section 8(b)(4)(ii)(B), or more like peaceful handbilling, which raises First Amendment concerns." *Id.*[8] Contrary to Petitioners' portrayal,

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Overstreet v. United Bhd. of Carpenters & Joiners of Am., Loc. Union No. 1506, 409 F.3d 1199, 1218 (9th Cir. 2005) (stationary bannering calling for boycott of secondary target was not akin to picketing and did not violate Section 8(b)(4)(ii)(B)); *Sheet Metal Workers' Int'l Ass'n, Loc. 15 v. NLRB*, 491 F.3d 429, 438 (D.C. Cir. 2007) (union's "mock funeral" street theater outside secondary hospital was not functional equivalent of picketing); *see also Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005) ("[T]he use of the portable rat balloon on the public right-of-way is deserving of First Amendment protection."); *Constr. & Gen. Laborers' Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120, 1123 (7th Cir. 2019) (First Amendment protected union's display of "Scabby the Rat" balloon at secondary car dealership).

[8] Applying a "deferential" standard, the Eleventh Circuit upheld the NLRB Regional Director's theory that the mock funeral was akin to picketing. *Id.* at 1263, 1266. The D.C. Circuit later rejected that conclusion, holding that the street theater could

Kentov in no way "held secondary activity prohibited by Section 8(b)(4) is not protected by the First Amendment." Pet. 14.

Petitioners also point to *Metropolitan Regional Council of Philadelphia v. NLRB*, 50 F. App'x 88, 91-92 (3d Cir. 2002). There, the Third Circuit's unpublished decision upheld an NLRB determination that a union had violated Section 8(b)(4)(ii)(B) by *picketing* secondary housing complexes that employed a non-union contractor and broadcasting, at high volumes, "unintelligible 'garble' by the use of unsynchronized loudspeakers." *Id.* at 91. This decision, again, simply applies the longstanding rule that secondary labor *picketing* is not constitutionally protected. It does not conflict with the court of appeals' decision in this case.

2. The decisions of the District of Columbia and Second Circuits that Petitioners contend fall on the opposite side of a circuit split from the decision below did not involve Section 8(b)(4)(*ii*)(B) at all, but rather Section 8(b)(4)(*i*)(B), 29 U.S.C. §158(b)(4)(*i*)(B). *See* Pet. 14. That provision addresses non-expressive conduct: unlawful secondary strikes.

Both *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 950-54 (D.C. Cir. 1999), and *NLRB v. Local Union No. 3*, 477 F.2d 260, 263, 266 (2d Cir. 1973), held that the

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not, consistent with the First Amendment, be held to violate Section 8(b)(4)(ii)(B). *Sheet Metal Workers Loc. 15*, 491 F.3d at 439. While the Eleventh and D.C. Circuits differed over whether the mock funeral was akin to picketing such that it could be deemed to violate Section 8(b)(4)(ii)(B), neither held the First Amendment categorically inapplicable.

First Amendment was not implicated where union officials had violated Section 8(b)(4)(*i*)(B) by inducing neutral employees to engage in an unlawful strike. They relied on this Court's decision in *IBEW Local 501*, which held that "[t]he prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)[i] carries no unconstitutional abridgment of free speech." 341 U.S. at 705.[9]

Section 8(b)(4)(*i*)(B) makes it unlawful for a union to "induce or encourage any individual" to engage in "a strike or a refusal in the course of his employment" to perform work, where an object is "forcing or requiring any person ... to cease doing business with any other person." 29 U.S.C. §158(b)(4)(i)(B).[10] There is no circuit split regarding that provision, which is not at issue in this case and so is not even addressed by the court of appeals' decision. In fact, an earlier Ninth Circuit decision expressly followed *Warshawsky*, distinguishing between 8(b)(4)(*ii*)(B)—which is addressed by *DeBartolo*'s picketing and speech distinction—and 8(b)(4)(*i*)(B)—which is covered by *IBEW Local 501*. *See NLRB v. Iron Workers, Loc. 229*, 941 F.3d 902, 906 (9th Cir. 2019) ("*DeBartolo* addressed the issue of whether a *different* provision of the

[9] *IBEW Local 501* predated Congress's 1959 enactment of Section 8(b)(4)(ii)(B).

[10] While Section 8(b)(4)(*ii*)(B) "requires a showing of threats, coercion, or restraints," Section 8(b)(4)(*i*)(B) prohibits any form of "'induc[ing] or encourag[ing]' employees of the secondary employer to strike." *DeBartolo*, 485 U.S. at 578; *see also Sheet Metal Workers Loc. 15*, 491 F.3d at 437 ("*DeBartolo* also makes clear that, in contrast to Section 8(b)(4)(i)(B), under which it is illegal per se to 'induce or encourage' employees of a secondary employer to strike, not every effort to convince consumers to boycott a secondary employer is illegal under Section 8(b)(4)(ii)(B).").

statute, Section 8(b)(4)(ii), protected handbills urging consumers to lawfully boycott a neutral employer.") (emphasis added).

In attempting to shoehorn these decisions into a non-existent circuit split, Petitioners argue it would be illogical to apply the First Amendment to claims under Section 8(b)(4)(*ii*)(B) but not to claims under Section 8(b)(4)(*i*). Pet. 16. But Section 8(b)(4)(*i*)'s "induce[ment]" to *strike* and Section 8(b)(4)(*ii*)'s "threat[s]" and "coerc[ion]" are fundamentally different because the former involves inducing neutral employees to engage in non-expressive conduct—a secondary strike—that is *independently unlawful* under the NLRA.[11]

The D.C. Circuit thus explained:

> We think *DeBartolo,* and the constitutional issue the Board's statutory interpretation would have presented there, is fundamentally different because, as the Supreme Court observed, the mall's potential customers were being urged "to follow a *wholly legal* course of action, namely, not to patronize the retailers doing business in the mall." [485 U.S.] at 575 (emphasis added). The issue in the case was whether that sort of appeal to the consumers—which obviously implicates the First Amendment—could be thought to *threaten, coerce, or*

[11] This is an unexceptional application of First Amendment principles. *See, e.g., United States v. Hansen*, 599 U.S. 762, 783 (2023) ("Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected."); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

> *restrain* the mall tenants to cease doing business with another (*DeBartolo*) within the meaning of § 8(b)(4)(ii)(B). By contrast, the conduct sought by a union that directly *induces* or encourages a secondary strike is itself unlawful under § 8(b)(4)(i). *See* 29 U.S.C. § 158(b)(4)(i) (providing that it is an unfair labor practice for a labor organization or its agents "to engage in ... a strike ... [the object of which is] forcing or requiring any person ... to cease doing business with any other person").

Warshawsky, 182 F.3d at 952; *see also id.* at 953 (explaining that Supreme Court decisions "draw a distinction between urging consumers to engage in a lawful boycott and inducing union members to engage in an unlawful secondary strike"); *Iron Workers, Loc. 229*, 941 F.3d at 905-06.

In this case, Petitioners do not contend that Respondents violated Section 8(b)(4)(*i*)(B) or induced a secondary strike. Thus, neither *Warshawsky*, *Local Union No. 3*,[12] nor *IBEW Local 501* conflicts with the court of appeals' application of the First Amendment-based *Noerr-Pennington* doctrine to conduct by

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[12] *Local Union No. 3* also held that union *work stoppages* could constitute "coercion" under Section 8(b)(4)(ii)(B). Because work stoppages are not speech or petitioning, the Court had no reason to address any First Amendment implications. 477 F.2d at 266. *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212, 214 (1982), another Section 8(b)(4)(*i*)(B) case, involved the "refusal by an American longshoremen's union to unload cargoes shipped from the Soviet Union." The Court made clear that it was this *non-expressive conduct* that was being declared unlawful. *Id.* at 226 & n.26.

Respondents that allegedly violated Section 8(b)(4)(*ii*)(B).

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The courts are uniform in holding that the First Amendment applies to Section 8(b)(4)(ii)(B) and precludes its application to non-picketing expression and petitioning that is not a sham. Petitioners' imagined world in which labor unions lack constitutional protection for peaceful calls to boycott businesses, while other speakers enjoy full First Amendment rights, does not exist. *Cf. Snyder v. Phelps*, 562 U.S. 443, 458 (2011). The court of appeals' unpublished disposition did not conflict with decisions of this Court or other circuits, so there is no reason for this Court's review.

II. The second question presented is not worthy of review.

The court of appeals' application of the *Noerr-Pennington* doctrine's "sham" exception to the allegations in this particular case is also consistent with this Court's precedent and decisions by other circuit courts.[13] As such, there is no reason to grant review of the second question presented.

As Petitioners acknowledge, Pet. 18, the *Noerr–Pennington* doctrine immunizes from statutory liability conduct aimed at influencing government decision-

[13] Petitioners do not seek review of the court of appeals' holdings that the sham exception did *not* apply to Respondents' lobbying against Petitioners' redevelopment, nor its determination that the sham exception *did* apply to Petitioners' SeaWorld-related allegations (which remain pending on remand).

making, unless the "sham" exception applies. *PREI*, 508 U.S. at 56.[14] The sham exception requires *objective* baselessness: "[A]n objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Id.* at 57. Thus, for litigation to be a sham, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* In that case, the court asks "whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor,' through the 'use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.'" *Id.* at 60-61 (citations omitted).[15]

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[14] While the *Noerr-Pennington* doctrine and its "sham" exception both arose in the antitrust context, they have been extended to the NLRA. *See PREI*, 508 U.S. at 59 (noting that *Bill Johnson's Rests., Inc. v. NLRB,* 461 U.S. 731, 743–744 (1983), held that an "improperly motivated" lawsuit may not be enjoined under the NLRA as an unfair labor practice unless it is "baseless"); *BE&K*, 536 U.S. at 536 (holding that employer's unsuccessful, retaliatory lawsuit against employees could not violate the NLRA because it was not "objectively baseless"); *see also id.* at 537 (Scalia, J., concurring).

[15] Amici overlook this objective component and propose that "[g]reenmail tactics" should be held shams because unions do not "genuine[ly]" care about the environment. Amicus Br. 11, 14. Even if this accurately described Respondents' motives, *Noerr-Pennington* cases *always* involve claims that petitioning was for an improper (indeed illegal) purpose: to restrain trade, to retaliate against employees in violation of labor laws, or to coerce a neutral during a labor dispute. Under *PREI*, such improper purpose or subjective genuineness is insufficient. 508 U.S. at 58.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), which predated *PREI*, is consistent with this approach. There, the Court held that litigation could be a "sham" when it "sought to bar ... competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" by "'institut[ing] ... proceedings and actions ... with or without probable cause, and regardless of the merits of the cases.'" *Id.* at 512. As *PREI* pointed out, *California Motor* involved "'a pattern of *baseless*, repetitive claims ... which [led] the factfinder to conclude that the administrative and judicial processes have been abused.'" *PREI*, 508 U.S. at 58 (quoting *Cal. Motor*, 404 U.S. at 513) (emphasis added); *id.* ("Our recognition of a sham in that case signifies that the institution of legal proceedings 'without probable cause' will give rise to a sham if such activity effectively 'bar[s] ... competitors from meaningful access to adjudicatory tribunals and so ... usurp[s] th[e] decisionmaking process.'") (quoting *Cal. Motor,* 404 U.S. at 512).

A number of courts, including the Ninth Circuit, read *California Motor* to adopt a "serial-sham" exception that applies "where [a] defendant is accused of bringing a whole series of legal proceedings." *USS-POSCO*, 31 F.3d at 811. That "serial-sham" exception asks whether "legal filings [were] made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment." *Id.* As required by this Court's precedent, it has an "indispensable objective component." *PREI*, 508 U.S. at 58; *see USS-POSCO*, 31 F.3d at 811 (holding that lawsuits by unions could not be held a "serial sham" because the majority (15 out of 29) had succeeded).

Petitioners argued below that the "serial-sham" exception, rather than *PREI*'s "sham" test, should apply because, they alleged, Respondents' actions were part of a "playbook" whereby "the Unions raised administrative challenges to, or filed lawsuits seeking to block, eight different development projects between 2007 and 2018." Pet. 4a, 11a, 16a, 39a-40a. The court of appeals considered and rejected application of that "serial sham" exception. Petitioners do not argue that this was contrary to this Court's precedent, but that it conflicts in two ways with other circuits' interpretation of *California Motor*, *PREI*, and the "serial-sham" exception.

First, Petitioners contend, the court of appeals "require[d] allegations that the sham petitioning created a literal barrier to tribunals," in conflict with decisions of the Second and Fourth Circuits. Pet. 19-20. However, that misrepresents the decision below. The court of appeals' determination that Petitioners did not plausibly show that "the prior challenges 'effectively "barred"' it or any other developer 'from meaningful access to adjudicatory tribunals and so ... usurp[ed] the decision-making process' as necessary to establish the exception" comes *directly*, word-for-word, from this Court's decisions. Pet. 4a (quoting *PREI*, 508 U.S. at 58 (quoting *Cal. Motor*, 404 U.S. at 515)). There could be no good reason to grant review of *this* decision, which simply applied the exact words of this Court's test. Moreover, the decision below did not need to determine whether Respondents' purported "playbook" created a "literal barrier" to Petitioners' access to tribunals because eight instances of lobbying and litigation against entirely different entities and projects over more than a decade could not create *any*

barrier to Petitioners' access to judicial or administrative tribunals.

In any event, the court of appeals' application of *California Motor* and the "serial-sham" exception did not conflict with any other circuit's decision. *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 809 n.36 (2d Cir. 1983), which predated *PREI* by a decade, did not involve "serial litigation" at all, but a single action. *Id.* at 811 ("This was not so much a 'pattern of ... repetitive claims' as it was a unitary, ongoing claim."). The court held that because "[t]here was sufficient evidence to allow the jury to conclude that this claim was 'baseless,'" the sham exception applied. *Id.* That in no way implicates the proper test for any serial-sham exception.[16]

Nor does *Waugh Chapel South, LLC v. United Food & Commercial Workers Union Local 27,* 728 F.3d 354, 363–364 (4th Cir. 2013), establish any conflict. There, the Fourth Circuit applied the "serial" sham exception when a union had filed fourteen lawsuits or administrative actions against the same developer, "withdrew ten of the fourteen suits under suspicious circumstances" without receiving any relief or adjudication, lacked standing in two others, and had another dismissed as "based only on … 'conjecture' and

[16] In fact, when it later adopted the *USS-POSCO* "series" sham exception, the Second Circuit emphasized the access-denying element of the test. *See Primetime 24 Joint Venture v. Nat'l Broad. Co.,* 219 F.3d 92, 101 (2d Cir. 2000) (holding that repetitive challenges to license applications were a sham when the defendants "coordinated their efforts to submit huge volumes of challenges simultaneously … in order to overwhelm PrimeTime 24 and make it difficult and expensive for PrimeTime 24 to comply with'" the licensing process).

'speculation.'" *Id.* at 358, 365. The court rejected the union's defense that the serial-sham test required a showing that it had "literally incapacitate[d] the legal system." *Id.* at 366. In doing so, the Fourth Circuit did not purport to reject *California Motor*'s conclusion that "access denial" was an element of the applicable test, but construed it to mean that "legal challenges need only 'harass and deter [litigants] in their use of administrative and judicial proceedings so as to deny them *"free and unlimited"* access to those tribunals.'" *Id.* (quoting *Cal. Motor*, 404 U.S. at 511). The court of appeals' conclusion here that Petitioners' allegations did not "plausibly show the prior challenges 'effectively "bar[red]"' it or any other developer 'from meaningful access to adjudicatory tribunals,'" Pet. 4a (quoting *PREI*, 508 U.S. at 58 (quoting *Cal. Motor*, 404 U.S. at 512)), in no way conflicts with *Waugh Chapel*'s understanding of that test as requiring a showing of the denial of "free and unlimited" access to the relevant tribunals.[17]

Second, Petitioners argue that the court of appeals' reasoning that Petitioners were "not ... party to any of those [prior] proceedings," Pet. 4a, conflicts with *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982).[18] Like *Litton Systems*, *Grip-Pak* was decided a decade before *PREI* and did not involve the "serial-sham" exception. *Grip-Pak*'s reference to lawsuits against entities other than the plaintiff was not an invocation of the "serial-sham" doctrine, but a

[17] Petitioners truncate the *Waugh Chapel* court's quotation from *California Motor* to omit this reference to "'*free and unlimited*' access to … tribunals." *See* Pet. 20.

[18] It is unclear what (if any) effect the court of appeals gave to that observation.

response to the (now-rejected) conclusion of some courts after *California Motor* "that a single lawsuit cannot provide a basis for an antitrust claim." *Grip-Pak*, 694 F.2d at 472. Further, as Petitioners acknowledge, in *PREI*, this Court *expressly disapproved* of *Grip-Pak*'s reasoning, which understood subjective intent alone to establish "sham" petitioning. 508 U.S. at 65.[19]

Finally, even if there were some conflict over these issues, Petitioners' allegations establish that a majority of Respondents' challenges to past developments were successful, and none were "objectively baseless." Pet. 41a-42a ("[O]f the seven lawsuits identified above, five settled or were at least partially settled."). Based on its "indispensable objective component," *PREI*, 508 U.S. at 58, the serial-sham exception could not possibly apply for this independent reason as well. *See USS-POSCO*, 31 F.3d at 811 ("serial-sham" exception could not apply because majority of the defendant's actions had succeeded); *Kaiser Found. Health Plan, Inc. v. Abbott Laboratories, Inc.,* 552 F.3d 1033, 1046 (9th Cir. 2009) (finding no serial sham when defendant "won seven of the seventeen suits" and each of the ten remaining cases "had a plausible argument on which it could have prevailed").[20]

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[19] Petitioners rely on a concurring opinion, which was not necessary to the result, rather than the majority decision. Pet. 21 n.15.

[20] Contrary to amici's view, this does not mean that "every union" gets "one free pass to extort each employer." Amicus Br. 16. The *PREI* objective baselessness test protects against sham petitioning, and Petitioners do not contest the court of appeals'

III. The third question presented was not addressed below and is not worthy of review.

Anti-SLAPP statutes, adopted by more than thirty States, protect against meritless lawsuits that chill speech and other First Amendment activities. For example, the California law at issue allows defendants facing SLAPP lawsuits to file a special motion to strike and awards attorneys' fees to defendants who prevail on such motions. Cal. Civ. Proc. Code §425.16; *see also, e.g.*, Ariz. Rev. Stat. Ann. §12-752; N.M. Stat. Ann. §38-2-9.1. Although the goals of the various States' anti-SLAPP statutes are similar, the laws may vary significantly. For example, some anti-SLAPP statutes apply only in limited contexts, such as in cases involving the right to petition the government. *See, e.g.*, Mass. Gen. Laws Ann. ch. 231, §59H. Some stay discovery while an anti-SLAPP motion is pending, *see, e.g.*, Colo. Rev. Stat. §13-20-1101(6), while others do not, *see, e.g.*, Del. Code Ann. tit. §§8136-38.

Petitioners ask this Court to consider whether state anti-SLAPP statutes apply in federal court. *See* Pet. 22-26. But the unpublished decision below addressed a far narrower question regarding an interpretation of California's anti-SLAPP statute that does not warrant this Court's review. Further, the supposed inter-circuit conflict merely reflects differences in state anti-SLAPP laws or in courts' interpretation of those laws. Accordingly, the Court cannot answer as a general matter whether "the

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determination that their lobbying against Petitioners' development was not a "sham" (as shown by its success). Pet. 3a-4a.

procedures authorized by state anti-SLAPP statutes … apply in federal courts," as Petitioners have requested. Pet. i. This Court has denied numerous petitions presenting the same or a similar question, including in recent years, and there is no reason for a different result here.[21]

A. This case would be a poor vehicle to address the question presented.

Petitioners ask this Court to resolve the question whether, as a general matter, state anti-SLAPP statutes apply in federal court. But in three rounds of district court briefing, Petitioners did not argue that state anti-SLAPP statutes do not apply at all in federal court. *See* D. Ct. Dkt. 37, 83, 127.[22] As a result, the district court never addressed this issue. *See* Pet. 66a-70a; D. Ct. Dkt. 93 at 59-60; D. Ct. Dkt. 60 at 25. The court of appeals did not address the argument either after Petitioners raised it for the first time on appeal. *See* Pet. 7a-9a; C.A. Dkt. 36 at 84. Because this Court is a "court of review, not of first review," it should not consider the anti-SLAPP

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[21] *See, e.g.*, *Doe v. Sterling*, *cert. denied*, No. 21-1543 (May 1, 2023); *Clifford v. Trump*, *cert. denied*, No. 20-602 (Feb. 22, 2021); *Retzlaff v. Van Dyke*, *cert. denied*, No. 19-1272 (Oct. 13, 2020); *Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.*, *cert. denied*, No. 18-696 (Apr. 1, 2019); *Yagman v. Colello*, *cert. denied*, No. 18-582 (Jan. 7, 2019); *AmeriCulture, Inc. v. Los Lobos Renewable Power, LLC*, *cert. denied*, No. 18-89 (Dec. 3, 2018); *Tobinick v. Novella*, *cert. denied*, No. 17-344 (Nov. 13, 2017).

[22] Petitioners briefly alluded to the issue once, asking the district court to defer determination of the fee amount, if it were inclined to award fees, pending the resolution of a separate Ninth Circuit case addressing the question. *See* D. Ct. Dkt. 127 at 22.

question presented in the petition in the first instance. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

As the court of appeals' unpublished decision makes clear, the anti-SLAPP issue actually presented in this case is a narrow state-law question that does not warrant this Court's review: whether, under the fee-shifting provision of California's anti-SLAPP statute, Respondents were barred from recovering fees after the district court dismissed Petitioners' state-law claims and denied Respondents' anti-SLAPP motion as moot and Petitioners then declined to re-plead those state-law claims. Pet. 7a-9a. That determination turns on an interpretation of California's anti-SLAPP statute, which is not "an important question of federal law." Sup. Ct. R. 10(c). Petitioners do not contend that the narrow state-law question decided by the court of appeals warrants this Court's review.

B. The Ninth Circuit's precedents are consistent with this Court's.

Even setting aside the vehicle problem, Petitioners' anti-SLAPP arguments do not warrant review. Consistent with this Court's decisions, Ninth Circuit precedents analyze specific provisions of state anti-SLAPP statutes on a case-by-case basis and apply them in federal court only when they do not conflict with any Federal Rule of Civil Procedure.

That approach represents an unremarkable application of the *Erie* doctrine, under which federal courts must apply "state 'substantive' law and federal 'procedural' law" when adjudicating state-law claims. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *see also*

Erie R. Co. v. Tompkins, 304 U.S. 64, 77-79 (1938). That framework applies to federal courts exercising diversity jurisdiction as well as to those exercising supplemental jurisdiction over state-law claims, as is the case here. *See Felder v. Casey*, 487 U.S. 131, 151 (1988). To determine whether a state law applies in federal court, a court first asks whether a Federal Rule of Civil Procedure "answer[s] the same question" as and conflicts with the state law. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). If it does, then the Federal Rule applies if it does not violate the Rules Enabling Act. *Id.* at 406-07.[23] If no Federal Rule "answers the same question," then the state law applies if it is substantive and if applying it in federal court would advance "'the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 428 (1996).

Consistent with that framework, the Ninth Circuit has analyzed specific provisions of state anti-SLAPP statutes on a case-by-case basis and held that only substantive provisions of state anti-SLAPP statutes that do not conflict with any Federal Rule apply in federal court. For example, *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999), held that the fee-shifting provision of California's anti-SLAPP statute applies in federal court because it does not conflict with any Federal Rule, it advances important "substantive

[23] Even if a Federal Rule is arguably in conflict with a state-law provision, it must be interpreted with "sensitivity to important state interests." *Id.* at 421 (Stevens, J., concurring).

state interests," and applying it in federal court promotes the twin aims of *Erie*.

By contrast, the Ninth Circuit has refused to apply the provision of California's anti-SLAPP statute that automatically stays all discovery until a court rules on the anti-SLAPP motion, reasoning that the provision is a procedural rule that conflicts with Federal Rule 56. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001). Similarly, to avoid conflict between state procedural rules and the Federal Rules, the Ninth Circuit has held that the Federal Rule 12(b)(6) standard applies when a federal court considers a motion under California's anti-SLAPP statute challenging the legal sufficiency of claims, while the Federal Rule 56 standard applies when a federal court is considering an anti-SLAPP motion challenging the factual sufficiency of claims. *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-34 (9th Cir. 2018).

Thus, the Ninth Circuit applies provisions of state anti-SLAPP laws only when they are substantive and do not conflict with any Federal Rules. That approach is entirely consistent with this Court's decisions. *See Shady Grove*, 559 U.S. at 399.

The court of appeals' application of the fee-shifting provision of California's anti-SLAPP statute in this case does not conflict with any decisions of this Court. No Federal Rule "answer[s] the same question" as that provision, and Petitioners do not contend otherwise. *Id.* The fee-shifting provision is a substantive rule that furthers California's interests in deterring meritless lawsuits that chill speech. *See Newsham*, 190 F.3d at 973. In fact, this Court has

made clear that state laws providing for attorneys' fees generally apply in federal court if they do not conflict with a federal statute or rule, because they "reflect[] a substantial policy of the state, [which] should be followed." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975) (quotation marks omitted). Applying the fee-shifting provision in federal court also advances *Erie*'s twin aims by discouraging litigants bringing SLAPP lawsuits from shopping for a federal forum and promoting the equitable administration of laws in state and federal courts. *See Newsham*, 190 F.3d at 973.

C. There is no meaningful conflict among the circuits that warrants this Court's intervention.

Petitioners do not identify any conflict on the actual, narrow state-law question decided by the court of appeals in this case.

Nor is there any circuit conflict over the methodology used to determine whether particular elements of the various state anti-SLAPP statutes apply in federal court. A comparison of circuit court decisions that Petitioners claim are in conflict with those of the Ninth Circuit makes clear that the different case outcomes result from differences in the various state anti-SLAPP statutes or courts' interpretation thereof, rather than differences in analytical approaches. For example, Petitioners point out that the Fifth Circuit held that Texas's anti-SLAPP statute does not apply in federal court. *Klocke v. Watson*, 936 F.3d 240, 245-46 (5th Cir. 2019). And yet, applying the standard *Erie* analysis, the Fifth

Circuit held that Louisiana's anti-SLAPP statute does apply in federal court. *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009). As the court pointed out, the Louisiana and Texas anti-SLAPP laws "differ in that Texas imposes higher and more complex preliminary burdens on the motion to dismiss process and imposes rigorous procedural deadlines," rendering it inapplicable under *Erie*, "while the comparable conflict between the Federal Rules and Louisiana law is less obvious." *Klocke*, 936 F.3d at 248-49.

Similarly, Petitioners identify *La Liberte v. Reid*, 966 F.3d 79, 87-88 (2d Cir. 2020), which held that the provision of California's anti-SLAPP statute providing for a special motion to strike does not apply in federal court because it conflicts with Federal Rules of Civil Procedure 12 and 56. But the Second Circuit also held that certain provisions of Nevada's anti-SLAPP statute do apply in federal court because they do not conflict with any Federal Rules. *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014). The court explained that "Nevada's statute is quite different" from California's in that it raises the "*substantive* standard that applies to a defamation claim," whereas California's statute establishes a higher procedural standard for pretrial dismissal, which resulted in different outcomes under the *Erie* analysis. *La Liberte*, 966 F.3d at 86 n.3 (quotation marks and citation omitted). These cases show that divergent outcomes in anti-SLAPP cases result from differences in the various state laws, rather than from differences in how the courts analyze whether the laws apply in federal court.

While the Second and Ninth Circuits reached different conclusions as to whether the California anti-SLAPP law's motion-to-strike provision applies in federal court, they took the same approach to decide that issue: they both analyzed whether the provision "conflict[s] with" Federal Rules 12 and 56. *La Liberte*, 966 F.3d at 87; *see Planned Parenthood*, 890 F.3d at 834-35. The Second Circuit answered that question differently from the Ninth Circuit because, unlike the Ninth Circuit, it interpreted the provision to adopt different standards from Federal Rules 12 and 56. *Compare La Liberte*, 966 F.3d at 87, *with Planned Parenthood*, 890 F.3d at 834. That difference in interpreting a state-law provision is not the type of inter-circuit split that is worthy of this Court's review.

Petitioners also point to *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1332-37 (D.C. Cir. 2015). There again, however, the D.C. Circuit took a very similar approach to the Ninth Circuit in analyzing whether the special motion-to-dismiss provision of the District of Columbia's anti-SLAPP statute applies in federal court: it considered whether that provision "conflicts" with any Federal Rules that "'answer the same question' about the circumstances under which a court must dismiss a case before trial." *Id.* at 1333-34. The D.C. Circuit concluded that the provision "conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial" and thus does not apply in federal court. *Id.* at 1334.

The other decisions cited by Petitioners, Pet. 22-23, also took similar approaches to analyze whether provisions of state anti-SLAPP statutes apply in federal court. *See Klocke*, 936 F.3d at 244-47

(considering whether Texas's anti-SLAPP statute "conflicts with" Federal Rules); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1356 (11th Cir. 2018) (considering whether "dismissal provision of the Georgia anti-SLAPP statute conflicts with the Federal Rules"); *cf. Franchini v. Inv.'s Bus. Daily, Inc.*, 981 F.3d 1, 6-8 (1st Cir. 2020) (cited by Petitioners as evidence of circuit split but considering different question of whether court has appellate jurisdiction under collateral order doctrine over interlocutory appeal from denial of anti-SLAPP motion). The cases cited by Petitioners thus do not establish a circuit split on an issue worthy of this Court's review.

Petitioners' suggestion that the Ninth Circuit takes a "piecemeal approach to anti-SLAPP statutes" that differs from the approach of other circuit courts fares no better. Pet. 25. Every circuit takes the same approach, analyzing separately whether each provision of a state anti-SLAPP statute applies in federal court. For example, the Second Circuit held that two provisions of Nevada's anti-SLAPP statute (providing for immunity from civil liability and mandatory fee shifting) clearly applied in federal court, while a third (barring discovery upon filing of anti-SLAPP motion) "present[ed] a closer question." *Adelson*, 774 F.3d at 809. Similarly, in *Abbas*, the D.C. Circuit analyzed only whether the special motion-to-dismiss provision of the District of Columbia's anti-SLAPP law applies in federal court. 783 F.3d at 1333-37 & n.5. No circuit court has analyzed as a general matter whether state anti-SLAPP laws apply in federal court, regardless of any differences among those laws, as Petitioners ask this Court to do.

D. The Ninth Circuit is reconsidering its approach to anti-SLAPP statutes.

Finally, this Court should not grant review of the third question presented because the Ninth Circuit recently heard argument en banc on the application of California's anti-SLAPP provisions in federal court. *See Gopher Media, LLC v. Melone*, No. 24-2626 (9th Cir. argued June 24, 2025) (en banc). The Ninth Circuit sua sponte took the case en banc to reconsider prior holdings on that issue. *Id.*, Dkts. 49, 60. At oral argument, members of the en banc panel expressed interest in reconsidering circuit precedent. And as Petitioners mentioned, the Ninth Circuit had also, sua sponte, granted en banc review in another case presenting the same issue before that appeal was dismissed by the parties. *See Martinez v. ZoomInfo Techs., Inc.*, 82 F.4th 785 (9th Cir. 2023), *reh'g granted*, 90 F.4th 1042 (9th Cir. 2024); *see id.*, No. 22-35305, Dkt. 76.

Thus, the Ninth Circuit may well reconsider its determinations regarding the applicability of certain provisions of California's anti-SLAPP law in federal court. If the Court deems review of this issue appropriate, it should await the en banc decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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