

No. _____

In the Supreme Court of the United States

GOPHER MEDIA, LLC and AJAY THAKORE,
Petitioners,

v.

ANDREW MELONE and
AMERICAN PIZZA MANUFACTURING,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

“[A]ll final decisions” are appealable. 28 U.S.C. §1291. Whether a decision to deny a “pretrial request to dismiss” is final “will generally turn on whether the defendant has asserted a defense to liability or instead an immunity from suit.” *GEO Grp., Inc. v. Menocal*, 607 U.S. ____, 2026 WL 513536, at *4 (Feb. 25, 2026). Unlike liability defenses, immunities from suit are “irretrievably lost once trial occurs” because their “essence” is a right to “avoid[], in addition to liability, all the usual ‘burdens of litigation,’ including a trial.” *Id.* at *5.

California was the first of thirty-nine states to provide Americans with statutory “anti-SLAPP” rights to avoid “harassment and burdens of litigation” targeting speech. *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 967 (Cal. 2005). The circuits are divided on whether pretrial denials of such rights are immediately appealable. The en banc Ninth Circuit held they are not, departing from a majority of circuits holding they are.

The question presented is:

Whether a pretrial denial of rights conferred by California’s anti-SLAPP law is immediately appealable.

CORPORATE DISCLOSURE STATEMENT

Petitioner Gopher Media LLC has no parent company.
No publicly held company owns more than 10 percent of
Gopher's stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Gopher Media LLC v. Melone*, No. 24-2626, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 9, 2025.
- *Gopher Media LLC v. Melone*, No. 3:21-cv-01909, U.S. District Court for the Southern District of California. Judgment entered April 17, 2024.

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WRIGHT & MILLER, 15A FED. PRAC. & PROC. JURIS.
§3914.10.9 (3d ed. 2025)7

Note

Unless otherwise indicated, all quoted emphasis is added
and internal quotations are removed.

PETITION FOR WRIT OF CERTIORARI

The Constitution protects speech *through* litigation. It does not protect speech *from* litigation. In response to the rise of lawsuits brought to silence public discussion—so-called “Strategic Lawsuits Against Public Participation” or “SLAPPs”—thirty-nine states and the District of Columbia enacted “anti-SLAPP” laws. Despite their differences on certain details, all anti-SLAPP laws effectuate the same essential policy of conferring rights to avoid trials on speech.

Those rights cannot be vindicated after trials occur and speech is silenced. For that reason, a majority of circuits hold that orders denying anti-SLAPP rights are denials of “immunity from suit” and thus immediately appealable under the collateral order doctrine. For 22 years, the Ninth Circuit reviewed denials of anti-SLAPP rights in California—the first state to enact such rights.

The en banc decision below reverses course. Declining to decide whether California’s anti-SLAPP law confers immunity from suit, the Ninth Circuit found the existence of “fact-based issues entangled in the immunity determination” dispositive of appellate jurisdiction.

The decision below deepens a circuits split over anti-SLAPP appealability, contradicts this Court’s collateral-order jurisprudence, and implicates the speech rights of most Americans. The Court should grant review.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-51a) is reported at 154 F.4th 696. The three-judge panel of the court of appeals issued no opinion. The district court's order denying Petitioners' anti-SLAPP motion (*id.* at 52a-107a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2025. On December 11, 2025, Justice Kagan extended the time within which to file any petition for a writ of certiorari to and including March 8, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. §1291 provides, in relevant part:

“The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]”

STATEMENT OF THE CASE**A. Pretrial orders denying rights to avoid trial are immediately appealable.**

1. Federal appellate courts have jurisdiction to review only “final decisions” of district courts. 28 U.S.C. §1291. But this Court has “long given” Section 1291 a “practical rather than technical construction.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Under *Cohen*, orders are “final” if they “finally determine claims of right separable from, and collateral to, rights asserted in the action,” which are “too important to be denied review.” *Id.* at 546. The Court has “distilled” *Cohen* into three “conditions”: the order must (1) “conclusively determine the disputed question”; (2) “resolve an important issue completely separate from the merits”; and (3) “be effectively unreviewable on appeal from a final judgment.” *GEO Grp., Inc. v. Menocal*, 607 U.S. ____, 2026 WL 513536, at *4 (Feb. 25, 2026).

2. “When, as here, an order denies a pretrial request to dismiss, appealability under *Cohen* will generally turn on whether the defendant has asserted a defense to liability or instead an immunity from suit.” *Id.* That distinction is “dispositive.” See *id.* at *11 (Alito, J., concurring in the judgment); accord *id.* at *5 & n.3 (“[D]istinguishing between a merits defense and an immunity from suit * * * offers a ready way of determining whether the denial of a request to dismiss a case can satisfy *Cohen*’s third condition” and “[b]y the same token, that distinction is likely to determine whether the other two *Cohen* conditions are met.”); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878-79 (1994) (“The substance of the rights entailed * * * is dispositive.”); *Puerto Rico*

Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (“Once it is established that” a party is “immune from suit in federal court, it follows that the elements of the *Cohen* collateral order doctrine are satisfied.”). A merits defense “leads to judgment of non-liability” but “does not allow the defendant to escape the varied rigors and costs of legal proceedings.” *GEO Grp.*, 2026 WL 513536, at *5. Immunity is different: its “essence” is a right to “avoid[], in addition to liability, all the usual ‘burdens of litigation,’ including trial.” *Id.*; *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (Scalia, J.) (a “right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery”). Orders denying such immunity are “final” under all three *Cohen* conditions:

a. Start with conclusivity. Orders denying immunity “conclusively determine whether the defendant is entitled to immunity from suit.” *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014). “Whether or not a later summary judgment motion is granted, denial of a motion to dismiss is conclusive as to this right.” *Behrens*, 516 U.S. at 308. Immunity denials thus “always act[] as a ‘fully consummated decision’ because nothing can then happen to avert ‘the trial the defendant maintains is barred.’” *GEO Grp.*, 2026 WL 513536, at *5 n.3.

b. Next, separability. A “claim of immunity is conceptually distinct from the merits.” *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). This is so even when the immunity claim “depends very much on the facts of the case.” *Plumhoff*, 572 U.S. at 779, or requires “a reviewing court [to] consider the plaintiff’s factual allegations.” *Mitchell*, 472 U.S. at 528-29. Qualified immunity, for example, requires “analyz[ing] the totality of the

circumstances” and “determining the objective reasonableness” of a defendant’s alleged conduct. *Plumhoff*, 572 U.S. at 774. Speech and Debate Clause immunity requires “analyz[ing] the plaintiff’s complaint to determine whether the plaintiff seeks to hold a Congressman liable for protected legislative actions.” *Mitchell*, 472 U.S. at 528. Despite “factual overlap” with the merits, these and other “entitlement[s] not to be forced to litigate” are “conceptually distinct from the merits of the plaintiff’s claim that his rights have been violated.” *Id.* at 527-28, 529 n.10.

c. Finally, unreviewability. A “right to avoid trial” is, as a practical matter, “irretrievably lost once trial occurs, even supposing the defendant were to prevail on the merits.” *GEO Grp.*, 2026 WL 513536, at *5. By contrast, a “right to a finding of non-liability” can be “effectively vindicated after a trial has occurred, through the reversal of an adverse final judgment.” *Id.*

3. The “critical question,” then, is “whether ‘the essence’ of the claimed right is a right not to stand trial.” *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988). Courts must “examine the nature of the right asserted with special care to determine whether an essential aspect of the claim is the right to be free of the burdens of a trial.” *Id.* at 525. “If a defense, *Cohen* is likely to block an immediate appeal; if an immunity, *Cohen* will likely allow it.” *GEO Grp.*, 2026 WL 513536, at *4.

4. An asserted “interest in avoiding trial” generally qualifies as immunity when it is supported by a “particular value of high order”—an “avoidance of a trial that would imperil a substantial public interest.” *Will v. Halllock*, 546 U.S. 345, 352-53 (2006). Constitutional rights

fit that description. “[W]here trial itself threatens certain constitutional interests,” this Court “treat[s] the trial court’s resolution of the issue as a ‘final decision’ for purposes of appellate jurisdiction.” *Trump v. United States*, 603 U.S. 593, 654 (2024) (Barrett, J., concurring in part); accord *Digital Equip.*, 511 U.S. at 879 (“When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit[,] * * * there is little room for the judiciary to gainsay its ‘importance.’”). “[R]ights protected by the First Amendment,” in particular, are too important to be “deprive[d] * * * during the period of appellate review.” *Nat’l Socialist Pty. of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977). This reflects the practical reality that the litigation process itself—though a vehicle for *vindicating* speech—is also a vehicle for *suppressing* speech:

Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.

Virginia v. Hicks, 539 U.S. 113, 119 (2003) (Scalia, J.).

5. A right to avoid trial establishes federal appellate jurisdiction even when conferred by state law. *Cohen* itself extended appellate jurisdiction to review an order denying “rights conferred by [a state] statute” against “strike suits”—“abus[ive]” litigation “brought not to redress real wrongs, but to realize upon their nuisance

value.” 337 U.S. at 546, 548-50.¹ The Court reasoned that if denial of that right were not reviewable until “final disposition of the merits,” it would “be too late effectively to review the present order and the rights conferred by the [state] statute * * * will have been lost, probably irreparably.” *Id.* at 546. Since *Cohen*, federal appellate courts recognize that “[i]f state law establishes a right not to be tried, federal collateral-order doctrine supports appeal.” WRIGHT & MILLER, 15A FED. PRAC. & PROC. JURIS. §3914.10.9 (3d ed. 2025); see also *id.* at nn.78-88 (collecting cases). Examples abound: attorney immunity, *Ironshore Europe DAC v. Schiff Hardin, LLP*, 912 F.3d 759, 763 (5th Cir. 2019), governmental immunity, *Meyers v. Cincinnati Bd. of Educ.*, 983 F.3d 873, 880 (6th Cir. 2020), public official immunity, *R.A. v. Johnson*, 36 F.4th 537, 541 (4th Cir. 2022), sovereign immunity, *Butler v. Gualtieri*, 41 F.4th 1329, 1335 (11th Cir. 2022), judicial proceedings privilege, *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 397-98 (5th Cir. 2017), workers’ compensation tort immunity, *Amisi v. Brooks*, 93 F.4th 659, 671-72 (4th Cir. 2024), prosecutorial immunity, *Nero v. Mosby*, 890 F.3d 106, 121 (4th Cir. 2018), and more.

B. California’s anti-SLAPP statute confers a right to avoid trial targeting speech.

1. “[T]o combat ‘a disturbing increase in lawsuits brought primarily to chill the valid exercise of the

¹ The New Jersey law in *Cohen* “ma[d]e the plaintiff, if unsuccessful” in bringing certain state-created claims, “liable for all expenses, including attorney’s fees, of the defense” and “require[d] security for their payment as a condition of prosecuting the action.” 337 U.S. at 543.

constitutional rights of freedom of speech and petition for the redress of grievances,’” most states passed “anti-SLAPP” laws. App.2a n.1. “SLAPP” stands for “Strategic Lawsuit Against Public Participation”—a suit designed to “sue[] [a speaker] into silence.” George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE EVTL L. REV. 3, 3 (1989). This pattern of lawfare is familiar: a plaintiff files a defamation or libel claim against someone who spoke negatively in public—a parent who criticized a school board, a customer who left a negative review, a reporter who published unfavorable coverage. The suit’s “clear message” is that “there is a ‘price’ for speaking out”—namely: “a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings.” *Id.* at 6.

2. California responded first. Its anti-SLAPP statute “declares that it is in the public interest” that “rights of freedom of speech and petition” “should not be chilled through abuse of the judicial process.” CAL. CODE CIV. P. §425.16(a). To “deter” and “prevent SLAPPs by ending them early and without great cost to the SLAPP target,” *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 966 (Cal. 2005), the statute authorizes a “special motion to strike” lawsuits “arising from any act * * * in furtherance of the right of petition or free speech * * * in connection with a public issue.” CAL. CODE CIV. P. §425.16(b)(1). If a suit meets that threshold criteria, it is dismissed, and the movant is awarded attorneys’ fees and costs unless the plaintiff shows a “probab[le]” right to relief. *Id.*; see also *id.* §425.16(c). “The point,” as California’s supreme court puts it, “is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights.” *Varian*, 106 P.3d at 967 (original emphasis); see

also *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 413 P.3d 650, 653 (Cal. 2018) (“[T]he whole purpose of the statute is to provide a mechanism for the *early* termination of claims that are improperly aimed at the exercise of free speech or the right of petition.”) (original emphasis); *Barry v. State Bar of Cal.*, 386 P.3d 788, 792 (Cal. 2017) (anti-SLAPP rights “shield defendants from the undue burden of defending against claims” targeting speech and petitioning activities).

Thirty-nine states and the District of Columbia have followed California in passing anti-SLAPP protections.² Like California, these jurisdictions generally classify anti-SLAPP rights as a form of immunity from suit.³

² See David Keating et al., *Anti-SLAPP Statutes: A Report Card*, INST. FOR FREE SPEECH, at 3 (Sept. 2025), perma.cc/7G4C-CPTL; *Updates to the 2025 Anti-SLAPP Report Card*, INST. FOR FREE SPEECH (Jan. 16, 2026), perma.cc/T8J9-B8D3.

³ See, e.g., *Panik v. TMM, Inc.*, 538 P.3d 1149, 1153 (Nev. 2023) (Nevada’s anti-SLAPP law “provide[s] immunity ‘from any civil action for claims based upon’ a person’s protected good faith communications”); *Smith v. Supple*, 293 A.3d 851, 864 (Conn. 2023) (Connecticut’s law “affords a defendant a substantive right to avoid litigation on the merits that can be costly and burdensome”); *Geer v. Phoebe Putney Health Sys., Inc.*, 849 S.E.2d 660, 663 (Ga. 2020) (Georgia’s law provides “an avenue for ending the suit quickly, summarily, and at minimal expense”); *Anagnost v. Tomecek*, 390 P.3d 707, 712 (Okla. 2017) (Oklahoma’s law “creates a new defense to causes of action involving first amendment rights, which effectively provides immunity from suit and would act as a complete bar to the plaintiff’s claim in this cause.”); *Cordova v. Cline*, 396 P.3d 159, 165 (N.M. 2017) (New Mexico’s law “underscore[s] a clear legislative intent to provide an interlocutory appeal”); *Wright Dev. Grp., LLC v. Walsh*, 939 N.E.2d 389, 396 (Ill. 2010) (Illinois’s law “seeks to extinguish SLAPPs” and “immuniz[e] citizens from civil actions based

C. The en banc Ninth Circuit held anti-SLAPP denials are not appealable until after trial.

After 22 years of reviewing anti-SLAPP denials on direct appeal, the Ninth Circuit changed course. It held that “a district court’s denial of a motion to strike under the California anti-SLAPP statute does not satisfy the requirements for interlocutory appeal under the collateral order doctrine.” App.3a.

The decision below “d[id] not turn on the particular factual allegations here,” App.3a, because “[a]ppeal rights cannot depend on the facts of a particular case.” *Behrens*, 516 at 311. Briefly: Petitioners moved to strike defamation and libel counterclaims under California’s anti-SLAPP statute. The district court denied the motion.

Petitioners appealed under then-prevailing circuit precedent, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). After hearing oral argument, a three-judge panel of the Ninth Circuit “refrained from issuing a decision and instead directed the parties to file supplemental briefs” on “whether the case should be heard en banc.” App.5a. A majority voted yes.

The 11-judge en banc panel unanimously held that orders denying California anti-SLAPP motions are not

on acts made in furtherance of a citizen’s free speech rights or rights to petition government”); *Schelling v. Lindell*, 942 A.2d 1226, 1229 (Me. 2008) (Maine’s law confers “substantial rights” to “avoid” “impos[ing] additional litigation costs on defendants”); *Fabre v. Walton*, 781 N.E.2d 780, 784 (Mass. 2002) (Massachusetts’s law confers “protections * * * against the harassment and burdens of litigation” such that denials “interfer[] with rights in a way that cannot be remedied on appeal from the final judgment” just “[a]s in the governmental immunity context”).

appealable.⁴ It reasoned that such orders fail *Cohen*'s second and third conditions because they do not resolve issues "completely separate from the merits" and are not "effectively unreviewable on appeal from a final judgment."⁵ App.6-9a. The panel expressed "doubt" about the "analogy between anti-SLAPP protection and immunity defenses," but did not decide whether California's statute actually confers immunity. App.12a. Even if it does, the court reasoned, a "decision denying immunity * * * does not satisfy the collateral order doctrine's requirements" "if there are fact-based issues entangled in the immunity determination." App.13a. The court dismissed the appeal for lack of jurisdiction and remanded. It then stayed its mandate pending disposition of a petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. The decision below deepens a circuit split on appealability of anti-SLAPP denials.

Six circuits have addressed whether orders denying anti-SLAPP rights are immediately appealable. Three hold yes. Two hold yes and no. One holds no.

A. Three circuits hold anti-SLAPP denials are immediately appealable.

1. ***Federal Circuit.*** Six days after the decision below, the Federal Circuit reached the opposite conclusion in *IQE PLC v. Newport Fab, LLC*, 155 F.4th 1370 (Fed Cir.

⁴ A 7-4 majority declined to overrule longstanding circuit precedent upholding the application of California's anti-SLAPP statute in federal court. App.3a n.2.

⁵ The court of appeals did not address the first *Cohen* condition.

2025). The court held that “[the] denial of an anti-SLAPP motion to strike under California law is immediately appealable under the collateral order doctrine as a matter of Federal Circuit law.” *Id.* at 1378. The “central purpose” of California’s law, the court explained, “is to provide *an added statutory protection from the burdens of litigation that is unavailable during the ultimate merits inquiry.*” *Id.* at 1377 (original emphasis). That purpose “would not be served if a party is forced to litigate the entire case before denial of its motion to strike can be reviewed.” *Id.*

2. **First Circuit.** The First Circuit agreed in *Franchini v. Investor’s Business Daily*, 981 F.3d 1 (1st Cir. 2020). Applying Maine’s anti-SLAPP law, the court found all three *Cohen* conditions satisfied: the order “conclusively denied” anti-SLAPP protection; such protection raised “legal issues” that are “distinct from the issues the court would address” in a final judgment; and the statutory “right to avoid litigation” would be “denied meaningful relief if [the movant] must go through the time and expense of fully litigating this matter before it can address the anti-SLAPP issue.” *Id.* at 7.

3. **Fifth Circuit.** The Fifth Circuit similarly reviews denials of anti-SLAPP rights under Texas and Louisiana law. See *NCDR, LLC v. Mauze & Bagby, PLLC*, 745 F.3d 742, 748 (5th Cir. 2014); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 176-78 (5th Cir. 2009). It classifies anti-SLAPP rights as “immunity from suit.” *NCDR*, 745 F.3d at 750. Because “avoiding the costs of trial is the very purpose of the statute,” anti-SLAPP laws “provide[] a right not to stand trial” that is “effectively

destroyed” if erroneously denied without appeal. *Henry*, 566 F.3d at 178; accord *NCDR*, 745 F.3d at 750-52.

B. Two circuits are internally divided.

1. ***Ninth Circuit.*** The decision below treated “fact-based issues” as dispositive of appealability under *Cohen*, “[e]ven if” such issues are “entangled in [an] immunity determination.” App.13a. The court reasoned that anti-SLAPP cases “are in fact ‘inextricably intertwined with the merits of the litigation.’” App.9a. While expressing “doubt” about the “analogy between anti-SLAPP protection and immunity defenses,” the panel never decided whether the California statute confers immunity. App.12a. Nor did it overrule circuit precedent holding that other states’ anti-SLAPP laws do confer immunity worthy of interlocutory review. See *Wynn v. Bloom*, 852 F. App’x 262, 262 n.1 (9th Cir. 2021) (Nevada); *Schwern v. Plunkett*, 845 F.3d 1241, 1242 (9th Cir. 2017) (Oregon). The court “confine[d] [its] en banc consideration to orders denying motions to strike under California’s anti-SLAPP statute” and declined to address appealability under “other states’ anti-SLAPP statutes.” App.13a.

2. ***Second Circuit.*** The Second Circuit’s split runs the other direction. It holds California anti-SLAPP denials *are* appealable, *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 151 (2d Cir. 2013), but another state’s (Vermont) anti-SLAPP denials are not. *Ernst v. Carrigan*, 814 F.3d 116, 119 (2d Cir. 2016). Its latter and more recent decision reasons, like the decision below, hold that “fact-based determinations” preclude direct appeal—

“[e]ven if the [] anti-SLAPP statute *does* provide immunity from trial.” *Id.* at 121-22 (original emphasis).

C. One circuit holds anti-SLAPP denials are not immediately appealable.

Tenth Circuit. The Tenth Circuit holds that Colorado anti-SLAPP denials are not appealable. *Coomer v. Make Your Life Epic LLC*, 98 F.4th 1320, 1325 (2024). Like the decision below, it reasons that “[f]act-related immunity orders are not completely separate from the merits.” *Id.* at 1325.

* * *

In short, the circuits are divided over “whether [they] have jurisdiction over an appeal from a district court’s denial of an anti-SLAPP motion to strike before entry of a final judgment.” *IQE*, 155 F.4th at 1375.

II. The decision below is wrong.

The decision below departs from this Court’s framework for analyzing immunity-based direct appeals.

1. The decision below declined to answer the “critical question” of whether California’s anti-SLAPP statute confers immunity from suit or a defense to liability. *Van Cauwenberghe*, 486 U.S. at 524. It only expressed “doubt” about the “analogy between anti-SLAPP protection and immunity defenses,” App.12a, without analyzing or resolving the very issue that appellate jurisdiction “generally turn[s] on.” *GEO Grp.*, 2026 WL 513536, at *4. This Court’s precedent requires more: the court of appeals had to “examine the nature of the right asserted with special care to determine whether an essential

aspect of the claim is the right to be free of the burdens of a trial.” *Van Cauwenberghe*, 486 U.S. at 525.

2. The decision below treated “fact-based issues” as dispositive even if the statute confers immunity. App.13a. It read this Court’s decision in *Johnson v. Jones*, 515 U.S. 304 (1995), to hold that “if there are fact-based issues entangled in the immunity determination, then the decision does not satisfy the collateral order doctrine’s requirements.” App.13a. But the Court has already said that is a “misreading” of *Johnson. Behrens*, 516 U.S. at 312. “*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable * * * if what is at issue in the sufficiency determination is *nothing more than whether the evidence could support a finding that particular conduct occurred.*” *Id.* at 313. The California anti-SLAPP inquiry is not a determination of evidentiary sufficiency at summary judgment; nor does it consider whether particular conduct occurred. It asks the legal question of whether pled and sworn facts, taken as true, establish a probable right to relief. CAL CODE CIV. P. §425.16(a)(2). Mere consideration of facts does not defeat separability under *Johnson*, much less appealability of immunity denials. To the contrary, the Court has repeatedly found immunity denials separable even when they “depend[ed] very much on the facts of the case.” *Plumhoff*, 572 U.S. at 772-73, 779; *cf. Ashcroft v. Iqbal*, 566 U.S. 662, 673-75 (2009) (considering “whether the facts pleaded establish [] a violation”); *Mitchell*, 472 U.S. at 528-29 (“immunity is separate from the merits of the underlying action for purposes of the [collateral order] test *even though a reviewing court must consider the plaintiff’s factual allegations* in resolving the immunity issue”). The Court has also made clear that

“appealability under *Cohen* will generally turn on whether the defendant has asserted a defense to liability or instead an immunity from suit”—not on whether the immunity determination involves facts, as the court of appeals believed. *GEO Grp.*, 2026 WL 513536, at *4.

California’s anti-SLAPP law confers immunity from suit. The “right to be free of the burdens of a trial” is more than an “essential aspect” of anti-SLAPP protection, *Van Cauwenberghe*, 486 U.S. at 525; it is the entire point. Even the decision below acknowledges (without overruling) prior circuit precedent finding that the statute “demonstrates that California lawmakers wanted to protect speakers from the trial itself rather than merely from liability.” App.12a; see, e.g., CAL. CODE CIV. P. §425.16(a). California’s supreme court has been explicit: “The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights”—a right “lost if the petitioner is forced to litigate a case to its conclusion.” *Varian*, 106 P.3d at 966 (original emphasis); see also *Newport*, 413 P.3d at 653 (“[T]he whole purpose of the statute is to provide a mechanism for the *early* termination of claims”) (original emphasis); *Barry*, 386 P.3d at 792 (anti-SLAPP rights “shield defendants from the undue burden of defending against claims”).⁶ The statute’s

⁶ The decision below states that “California” has “discussed anti-SLAPP protection in a way that casts doubt on our analogy between anti-SLAPP protection and immunity defenses,” App.12a, based solely on the Second Circuit’s characterization of what “California courts have ruled.” App.12-13a (citing *Liberty*, 718 F.3d at 148 n.9, as “discussing *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737 (Cal. 2003),” which itself is quoting *Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002)). This “makes far too much of one piece of loose language.” *GEO Grp.*, 2025 WL 513536, at *7 n.4. It misreads

text says the same. CAL. CODE CIV. P. §425.16(a) (“rights of freedom of speech and petition” “should not be chilled through abuse of the judicial process”).

3. The decision’s real concern appeared to be case-loads. The en banc panel “recogniz[ed] that some important interest may be lost if a defendant must wait to appeal,” but reasoned that “this lost interest” does not “justify *the cost* of allowing immediate appeal.” App.11a. Four concurring judges wrote that “[g]iven [the] circuit’s vastly greater caseload, allowing anti-SLAPP motions to be filed in our district courts has a profoundly greater effect” than elsewhere. App.39a (Bress, Collins, Lee, and Bumatay, JJ., concurring). But docket pressures have never been grounds for denying appellate jurisdiction. This Court has long considered immunity from suit a “right [] important enough to support an immediate appeal,” even if that means “cumbersome review of the record.” *Behrens*, 516 U.S. at 308, 313.

III. This case is an ideal vehicle to address an issue of nationwide importance.

1. The rights at stake are important. This Court recognizes that direct appeal is justified where “the interest in avoiding trial” is supported by a “particular value of high order.” *Will*, 546 U.S. at 352. It is “difficult to find

Navallier’s reference to “immunity,” which in context simply notes that a plaintiff can prevail at step two of the anti-SLAPP framework even if the targeted speech is “protected” under step one. Regardless, this characterization ignores nearly two decades of subsequent California supreme court precedent expressly holding that the anti-SLAPP statute *is* to provide *immunity from the burdens of SLAPP suits*. See, e.g., *Newport*, 413 P.3d at 653 (2018); *Barry*, 386 P.3d at 792 (2017); *Varian*, 106 P.3d at 966 (2005).

a value of a ‘high[er] order’ than the * * * rights to free speech and petition that are at the heart of California’s anti-SLAPP statute.” *IQE*, 155 F.4th at 1377; *cf. Skokie*, 432 U.S. at 44 (granting immediate review of asserted “rights protected by the First Amendment”). Thirty-nine states have recognized the modern necessity of protecting Americans’ speech rights from the burdens of litigation. Those rights “would be irretrievably lost absent an immediate appeal,” *GEO Group*, 2026 WL 513536, at *5, because speakers sued for their public speech would face years of litigation before learning whether they had a right not to be sued at all.

2. The timing and posture of this case are favorable. This petition challenges an en banc decision holding anti-SLAPP denials are *not* appealable. By contrast, this Court has denied review of decisions holding such denials are appealable. See, e.g., *Youngevity Int’l Corp. v. Andreoli*, 749 F. App’x 634 (9th Cir. 2019), cert. denied, 589 U.S. 968 (2019); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004).

3. This case also cleanly presents the question of anti-SLAPP appealability without the added complexity of disputes over anti-SLAPP applicability. No party disputes the applicability of California’s anti-SLAPP in federal court, and the en banc Ninth Circuit declined to disturb its 27-year precedent holding the statute applicable. App.2-3a & n.2. Although four judges voted to overrule that precedent, App.24-51a, they wrote without the benefit of *Berk v. Choy*, 607 U.S. ___, 146 S. Ct. 546 (2026)—this Court’s first decision on the application of state law in federal court in more than fifteen years. As relevant here, *Berk* distinguished the state law it held inapplicable from the one held applicable in *Cohen*—“a

state law [that] rendered an unsuccessful plaintiff in a shareholder derivative suit liable for all the defendant's expenses, *including attorney's fees*, and as security for *that potential liability*, required the plaintiff to post a bond before proceeding with the action." *Id.* at 554. Because California's anti-SLAPP statute creates similar fee-shifting liability, it applies in federal court under *Berk*.⁷

IV. Alternatively, *GEO Group* warrants GVR.

If the Court does not grant full review, it should grant, vacate, and remand for further consideration in view of *GEO Group*, which issued after the decision below. "Where intervening developments * * * reveal a reasonable possibility that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," GVR is "potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The decision below rests on the premise that appellate jurisdiction turns on the existence of "fact-based issues"—and does not determine whether the California anti-SLAPP statute confers immunity from suit. App.13a. Yet *GEO Group* makes clear that "appealability under *Cohen* will generally turn on whether the defendant has asserted a defense to liability or instead an immunity from suit"—regardless of the fact-based issues involved. 2026 WL 513536, at *4. Thus, it is reasonable to assume the Ninth Circuit would address the immunity question head-on if given the opportunity to reconsider on remand.

⁷ If the Court prefers to address anti-SLAPP applicability and appealability together, it should grant the petition, vacate the decision below, and remand for consideration in view of *Berk*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 6, 2026

APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED OCTOBER 9, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2626
D.C. No. 3:21-cv-01909-RBM-VET

GOPHER MEDIA LLC, A NEVADA LIMITED
LIABILITY CORPORATION FORMERLY KNOWN
AS LOCAL CLICKS DOING BUSINESS AS
DOCTOR MULTIMEDIA; AJAY THAKORE,
AN INDIVIDUAL,

Plaintiffs-Appellants,

v.

ANDREW MELONE, AN INDIVIDUAL;
AMERICAN PIZZA MANUFACTURING,
A CALIFORNIA BUSINESS ENTITY ALSO
KNOWN AS AMERICAN PIZZA MFG.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Ruth Bermudez Montenegro, District Judge, Presiding

Argued and Submitted June 24, 2025
Seattle, Washington

Appendix A

Filed October 9, 2025

Before: Mary H. Murguia, Chief Judge, and Consuelo M. Callahan, Milan D. Smith, Jr., Michelle T. Friedland, Mark J. Bennett, Daniel P. Collins, Kenneth K. Lee, Daniel A. Bress, Patrick J. Bumatay, Lawrence VanDyke and Holly A. Thomas, Circuit Judges.

Opinion by Judge Murguia;
Concurrence by Judge Bennett;
Concurrence by Judge Bress

OPINION

MURGUIA, Chief Circuit Judge:

We voted to decide this case en banc to reconsider the appropriateness of our court’s interlocutory review of a district court order denying a motion to strike under California’s anti-SLAPP statute.¹ In *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), we held that we have jurisdiction to review such orders pursuant to the collateral order doctrine. Upon reexamination, we now

1. The SLAPP acronym stands for “Strategic Lawsuit Against Public Participation.” *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 886 (9th Cir. 2016). Anti-SLAPP statutes have been passed in various states, including California, to combat “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” *Id.* (citing Cal. Civ. Proc. Code § 425.16(a)); see also *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133, 246 Cal.Rptr.3d 591, 439 P.3d 1156, 1160-61 (2019).

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conclude that a district court’s denial of a motion to strike under the California anti-SLAPP statute does not satisfy the requirements for an interlocutory appeal under the collateral order doctrine. We reach this conclusion because such an order does not resolve issues “completely separate from the merits of the action” and does not render the decision “effectively unreviewable on appeal from a final judgment.” *Will v. Hallock*, 546 U.S. 345, 349, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)). Accordingly, we overrule *Batzel* and dismiss this appeal for lack of jurisdiction.²

I

Although we are deciding this case as an initial matter en banc, our jurisdictional analysis does not turn on the particular factual allegations here. Therefore, we only briefly recount the factual allegations and procedural details.

In July 2020, Appellee Andrew Melone opened Appellee American Pizza Manufacturing (“APM”) in the La Jolla neighborhood of San Diego, California. APM serves uncooked pizzas and pasta that customers can bake

2. We do not reconsider our precedent in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), and we assume for purposes of this opinion that California’s anti-SLAPP statute applies in federal court based on the principles set forth in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). See *Newsham*, 190 F.3d at 972-73.

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at home. This is commonly referred to as a “take-n-bake” business model. Appellant Ajay Thakore is a La Jolla resident and the owner of Appellant Gopher Media LLC. Gopher Media “is a digital marketing agency.”

This case’s history began in late 2020 when the City of San Diego converted the parking spaces outside of APM to 15-minute parking zones. As alleged in the underlying countercomplaint, Thakore frequented businesses near APM, including a competing business in which Thakore is alleged to own a 25% financial stake, and parked his car in the spaces outside of APM for extended periods of time. Apparently upset with the new 15-minute time limit, Thakore initiated a series of odd exchanges between the parties, which culminated in this litigation. Thakore and Gopher Media filed a lawsuit against Melone and APM in the United States District Court for the Southern District of California, alleging harassment, discrimination, unfair competition, and other claims. Specifically, Thakore and Gopher Media alleged that Melone called Thakore a racial slur, tried to intimidate Thakore from parking in front of APM, and kicked Thakore’s handicapped dog. They also alleged that APM falsely advertised its use of fresh ingredients when the restaurant really uses “frozen crust.” Melone and APM filed a countercomplaint alleging defamation, trade libel, and unfair business practices. Relevant to this appeal, the operative countercomplaint alleges that Gopher Media, under the control of Thakore, paid its employees to leave over one hundred negative reviews of APM on websites such as Yelp.com and Google.com, and that Thakore made false statements about Melone and APM on his Instagram social media account.

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In response to the countercomplaint, Thakore and Gopher Media filed an anti-SLAPP motion to strike the countercomplaint under California Civil Procedure Code § 425.16. They asserted that the internet reviews and other comments were speech in relation to a public issue, and therefore, the comments constituted protected First Amendment speech. The district court denied the motion, and Thakore and Gopher Media filed this interlocutory appeal.

After hearing oral argument, a three-judge panel of this court refrained from issuing a decision and instead directed the parties “to file supplemental briefs addressing whether this case should be heard en banc to reconsider (1) whether California’s anti-SLAPP statute applies in federal court, and (2) whether the denial of a motion to strike under California’s anti-SLAPP statute is immediately appealable under the collateral order doctrine.” As to the first question posed by the three-judge panel’s order, neither side argues in favor of overruling our precedent holding that the California anti-SLAPP statute applies in federal court under the *Erie* doctrine. As to the second question, Thakore and Gopher Media argue that *Batzel* was correctly decided and that the importance and independence of anti-SLAPP rights make their denial subject to immediate appeal. In contrast, Melone and APM assert that an order denying an anti-SLAPP motion is unappealable under the collateral order doctrine. They also highlight the potential for a defendant to abuse the rule we adopted in *Batzel* by using the interlocutory appeal process to unnecessarily delay progression of a lawsuit.

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A majority of the non-recused active judges agreed that this case should be decided en banc so that our governing precedent could be reconsidered. *Gopher Media LLC v. Melone*, 129 F.4th 1196 (9th Cir. 2025) (mem.); Fed. R. App. P. 40(g).

II

Generally, our jurisdiction is limited to appeals from a final decision by the district court. 28 U.S.C. § 1291. But the collateral order doctrine establishes “a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final.” *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (citation modified). To fall into this narrow class of appealable nonfinal orders, a district court decision must “[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.” *Will*, 546 U.S. at 349, 126 S.Ct. 952 (alterations in original) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)); see also *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). An issue is completely separate from the merits if it is “significantly different” and “conceptually distinct” from the “fact-related legal issues that likely underlie the plaintiff’s claim on the merits.” *Johnson v. Jones*, 515 U.S. 304, 314, 115 S.Ct. 2151, 132 L.Ed.2d 238

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(1995) (citation omitted). A court considers whether an order is “effectively unreviewable” by considering “the value of the interests that would be lost through rigorous application of a final judgment requirement.” *Will*, 546 U.S. at 351-52, 126 S.Ct. 952 (quoting *Digit. Equip. Corp.*, 511 U.S. at 878-79, 114 S.Ct. 1992). In making the “effectively unreviewable” determination, “we do not engage in an individualized jurisdictional inquiry. Rather, our focus is on the entire category to which a claim belongs.” *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009) (citation modified). “The Supreme Court has repeatedly emphasized that these requirements are stringent and that the collateral-order doctrine must remain a narrow exception.” *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 724 (9th Cir. 2017).

In *Batzel*, we held that we have jurisdiction to review orders denying anti-SLAPP motions under California’s statute pursuant to the collateral order doctrine. We concluded that the “[d]enial of an anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff’s claim will succeed.” *Batzel*, 333 F.3d at 1025. We also reasoned that “[i]f the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court’s denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression.” *Id.* To that end, we found

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it “instructive” that California’s anti-SLAPP statute expressly provides that an order denying an anti-SLAPP motion may be appealed immediately in California state court. *Id.* A decade later, in *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009 (9th Cir. 2013), we reaffirmed *Batzel*, holding that the Supreme Court’s intervening decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009), did not disturb our earlier decision.

Since that time, several members of our court have called for reconsideration of *Batzel* due to an enduring disagreement about whether the denial of an anti-SLAPP motion meets the collateral order doctrine’s stringent requirements. *See, e.g., Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 835-38 (9th Cir. 2018) (Gould, J., concurring); *Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1182-86 (9th Cir. 2016) (Kozinski, J., concurring); *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188-92 (9th Cir. 2013) (Watford, J., dissenting from the denial of rehearing en banc); *Martinez v. ZoomInfo Techs., Inc.*, 82 F.4th 785, 794, 796-97 (9th Cir. 2023) (McKeown, J., concurring, and Desai, J., concurring), *vacated*, 90 F.4th 1042 (9th Cir. 2024) (mem.). In addition, other circuits have held that the denial of an anti-SLAPP motion does not satisfy the collateral order doctrine. *E.g., Ernst v. Carrigan*, 814 F.3d 116, 119 & n.1 (2d Cir. 2016) (discussing Vermont’s anti-SLAPP statute); *Coomer v. Make Your Life Epic LLC*, 98 F.4th 1320, 1328-29 (10th Cir. 2024) (discussing Colorado’s anti-SLAPP statute). We have noted these developments and now hold that orders denying anti-SLAPP motions under

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California's statute are not immediately appealable under the collateral order doctrine.³

III**A**

To begin, orders denying anti-SLAPP motions under California's statute do not resolve questions "completely separate from the merits." *Will*, 546 U.S. at 349, 126 S.Ct. 952 (quotation marks omitted). In *Batzel*, we held that a ruling under California's anti-SLAPP statute involves a question completely separate from the merits because "it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed." 333 F.3d at 1025. But our experience with anti-SLAPP cases over the ensuing two decades has shown that the questions that must be answered to resolve an anti-SLAPP motion are in fact "inextricably intertwined with the merits of the litigation." *Planned Parenthood*, 890 F.3d at 836 (Gould, J., concurring).

California's anti-SLAPP statute requires a two-step analysis. At the first step, a court must decide whether a plaintiff's claim arises from any act "in furtherance of the person's right of petition or free speech," Cal. Civ. Proc. Code § 425.16(b)(1), which necessarily involves reviewing the "content" and "context" of the factual allegations in a

3. To be sure, nothing in our holding abrogates a district court's ability to certify a question for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

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plaintiff's complaint. *FilmOn.com Inc.*, 246 Cal.Rptr.3d 591, 439 P.3d at 1160, 1165. At the second step, a court must decide whether "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1). These questions are not "neat abstract issues of law" that can be decided once and will not reemerge at trial. *Johnson*, 515 U.S. at 317, 115 S.Ct. 2151 (citation omitted); *Coomer*, 98 F.4th at 1328 ("[A] principal purpose of the separability requirement [is] preventing piecemeal appellate review."); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 527-28, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (explaining that a question of law satisfies the "conceptually distinct" requirement under the collateral order doctrine because a court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim"). Instead, the anti-SLAPP analysis intertwines factual and legal questions, which requires a court to go beyond "merely find[ing] that such merits may exist." *Batzel*, 333 F.3d at 1025. Even purely legal issues bearing on whether there "is a probability that the plaintiff will prevail on the claim," Cal. Civ. Proc. Code § 425.16(b)(1), are likely to reemerge at later procedural stages, which would unnecessarily create the need for "piecemeal appellate review." *Coomer*, 98 F.4th at 1328. Therefore, "[g]iven the fact-dependent nature of the anti-SLAPP analysis," the denial of an anti-SLAPP motion is not "conceptually distinct" from the merits of a plaintiff's claims. *Coomer*, 98 F.4th at 1326, 28 (citing *Johnson*, 515 U.S. at 314, 115 S.Ct. 2151).

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Additionally, orders denying California anti-SLAPP motions are not “effectively unreviewable on appeal from a final judgment.” *Will*, 546 U.S. at 349, 126 S.Ct. 952 (quoting *Metcalfe & Eddy*, 506 U.S. at 144, 113 S.Ct. 684). The Supreme Court has “routinely require[d] litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system.” *Mohawk Indus., Inc.*, 558 U.S. at 108-09, 130 S.Ct. 599. Although we still recognize that some important interest may be lost if a defendant must wait to appeal a final judgment in an anti-SLAPP case—such as the potential unfairness of having to defend a meritless action all the way through trial—this lost interest does not render the decision “effectively unreviewable” for purposes of the collateral order doctrine because deferring review of these motions until final judgment will not “so imperil[] the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.”⁴ *Id.* at 108, 130 S.Ct. 599. Indeed, our court has already reached this

4. One way the California Legislature sought to protect the interest of having to defend a meritless action is through the right to recover attorneys’ fees, and our decision today does not affect that protection. *FilmOn.com Inc.*, 246 Cal.Rptr.3d 591, 439 P.3d at 1161 (“[T]he Legislature shifted . . . fees onto the lawsuit filer to compensate the prevailing defendant for the undue burden of defending against litigation designed to chill the exercise of free speech and petition rights.” (citation modified)). If a defendant successfully challenges the denial of an anti-SLAPP motion on appeal after a final judgment, then the defendant is entitled to obtain the attorneys’ fees required to defend against the SLAPP-related appeal. Cal. Civ. Proc. Code § 425.16(c)(1).

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conclusion about orders *granting* an anti-SLAPP motion under California’s statute. *Hyan v. Hummer*, 825 F.3d 1043, 1046-47 (9th Cir. 2016) (per curiam) (holding that the district court’s order granting an anti-SLAPP motion against two out of three defendants was not immediately appealable under the collateral order doctrine because an erroneous grant of an anti-SLAPP motion is “fully reviewable” and “can be fully remedied on appeal”). Thus, our holding in this case unifies the approach we use for anti-SLAPP motions under the California statute; whether the motion is granted or denied, a party may not take an interlocutory appeal as of right from that decision under the collateral order doctrine. *See Mohawk Indus., Inc.*, 558 U.S. at 107, 130 S.Ct. 599.

Moreover, the California anti-SLAPP statute’s provision allowing for an interlocutory appeal of denials of anti-SLAPP motions in state court does not alter our conclusion on this issue. In *Batzel*, we found it “instructive” that California’s anti-SLAPP statute expressly provides for an immediate interlocutory appeal upon denial of an anti-SLAPP motion in California state court because it “demonstrates that California lawmakers wanted to protect speakers from the trial itself rather than merely from liability.” 333 F.3d at 1025. We characterized California’s anti-SLAPP statute “in the nature of immunity” and reasoned that the denial of an anti-SLAPP motion should be immediately appealable for the same reasons that a denial of an immunity defense is. *Id.* However, since *Batzel*, California has discussed anti-SLAPP protection in a way that casts doubt on our analogy between anti-SLAPP protection and immunity defenses. *See Ernst*,

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814 F.3d at 121 (“While anti-SLAPP statutes have much in common with immunity statutes, the California courts have ruled that the California statute . . . does not provide . . . ‘a substantive immunity from suit.’” (quoting *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 n.9 (2d Cir. 2013) (discussing *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal.4th 728, 3 Cal.Rptr.3d 636, 74 P.3d 737 (2003))). Even if that analogy were correct, the Supreme Court has ruled that not every district court decision denying immunity is entitled to an interlocutory appeal under the collateral order doctrine—if there are fact-based issues entangled in the immunity determination, then the decision does not satisfy the collateral order doctrine’s requirements. *See Johnson*, 515 U.S. at 307, 115 S.Ct. 2151. It remains that the collateral order doctrine does not extend to denials of anti-SLAPP motions under the California statute because “[e]ffective appellate review can be had by other means.” *Mohawk Indus., Inc.*, 558 U.S. at 114, 130 S.Ct. 599.

IV

For the foregoing reasons, we overrule *Batzel*’s holding, but we confine our en banc consideration to orders denying motions to strike under California’s anti-SLAPP statute. We do not address the application of the collateral order doctrine to other states’ anti-SLAPP statutes because those statutes are not currently before us.

APPEAL DISMISSED AND CASE REMANDED.
Each side shall bear their own costs.

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BENNETT, Circuit Judge, joined by CALLAHAN, Circuit Judge, concurring:

I join the majority opinion in full. But I write separately because I believe that California’s anti-SLAPP¹ special-motion and attorney-fee-shifting provisions, Cal. Civ. Proc. Code § 425.16(b)(1), (c)(1) (together, the “anti-SLAPP provisions”), create a substantive right.² In substance, these provisions provide defendants with a pretrial claim for attorneys’ fees for plaintiffs’ abuse of the judicial process by filing a meritless SLAPP suit. No federal rule controls or directly collides with that right. Thus, the anti-SLAPP provisions apply in federal court under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny.

I

“The [California] Legislature enacted [the anti-SLAPP statute] to prevent and deter ‘[SLAPP] lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’” *Varian Med. Sys., Inc. v. Delfino*, 35 Cal.4th 180, 25 Cal.Rptr.3d 298, 106 P.3d 958, 966 (2005) (alteration omitted) (quoting Cal. Civ. Proc.

1. A “SLAPP” is a “strategic lawsuit against public participation.” *Ketchum v. Moses*, 24 Cal.4th 1122, 104 Cal.Rptr.2d 377, 17 P.3d 735, 738 (2001).

2. My concurrence addresses only the special-motion and attorney-fee-shifting provisions under Cal. Civ. Proc. Code § 425.16(b)(1), (c)(1).

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Code § 425.16(a). “The hallmark of a SLAPP suit is that it lacks merit” and is instead brought for the purpose of “obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party’s case will be weakened or abandoned, and of deterring future litigation.” *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-71 (9th Cir. 1999). The California Legislature determined that a SLAPP suit is an “abuse of the judicial process.” Cal. Civ. Proc. Code § 425.16(a). But “[b]ecause winning is not a SLAPP plaintiff’s primary motivation, defendants’ traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPs.” *Wilcox v. Superior Ct.*, 27 Cal.App.4th 809, 33 Cal. Rptr. 2d 446, 450 (1994), *disapproved of on other grounds by Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal.4th 53, 124 Cal.Rptr.2d 507, 52 P.3d 685 (2002). “By the time a SLAPP victim can win a ‘SLAPP-back’ suit years later the SLAPP plaintiff will probably already have accomplished its underlying objective.” *Id.*

To remedy that problem, the California Legislature enacted the anti-SLAPP statute, which includes the special-motion and attorney-fee-shifting provisions. Cal. Civ. Proc. Code § 425.16(b)(1), (c)(1). The special-motion provision allows a court to strike any cause of action that “aris[es] from any act of [the defendant] in furtherance of the [defendant]’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue,” “unless the court determines that the plaintiff has established that there is

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a probability that the plaintiff will prevail on the claim.”³
Id. § 425.16(b)(1).

If successful, with some exceptions, the “prevailing defendant on a special motion to strike shall be entitled to recover [his or her] attorney’s fees.” *Id.* § 425.16(c)(1). The fee-shifting provision “discourage[s] [SLAPPs] by imposing the litigation costs on the party seeking to ‘chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’” *Ketchum*, 104 Cal.Rptr.2d 377, 17 P.3d at 741 (quoting Cal. Civ. Proc. Code § 425.16(a)). “The fee-shifting provision also encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement.” *Id.* Together, these anti-SLAPP provisions promote California’s goals of deterring SLAPPs, *Varian Med. Sys.*, 25 Cal.Rptr.3d 298, 106 P.3d at 966, and “compensating the prevailing defendant for the undue burden of defending against litigation designed to chill the exercise of free speech and petition rights,” *Barry v. State Bar of Cal.*, 2 Cal.5th 318, 212 Cal.Rptr.3d 124, 386 P.3d 788, 794 (2017).

3. As discussed below, in *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, we reconciled the special-motion provision with Federal Rules of Civil Procedure 12 and 56 by holding that the Rule 12(b)(6) standard applies “when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim,” and the Rule 56 standard applies “when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim.” 890 F.3d 828, 834 (9th Cir.), *amended by* 897 F.3d 1224 (9th Cir. 2018).

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To determine whether the anti-SLAPP provisions may be properly applied in federal court, we must first ask whether a federal rule “answers the question in dispute.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 398, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010). The federal rule must be “‘sufficiently broad’ to cause a ‘direct collision’ with the state law or, implicitly, to ‘control the issue’ before the court, thereby leaving no room for the operation of that law.” *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749, 750 n.9, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980)). If such a federal rule exists, it “controls ‘unless it exceeds statutory authorization or Congress’s rulemaking power.’” *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1269 (9th Cir. 2022) (quoting *Shady Grove*, 559 U.S. at 398, 130 S.Ct. 1431).

But if no federal rule answers the question in dispute, we “proceed to determine whether the state law applies in federal court under the *Erie* doctrine.” *Id.* at 1270. “Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.” *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996). “A substantive rule is one that creates rights or obligations. . . .” *In re County of Orange*, 784 F.3d 520, 527 (9th Cir. 2015). “A procedural rule, by contrast, defines ‘a form and mode of enforcing’

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the substantive right or obligation.” *Id.* (quoting *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 536, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958)). Ultimately, though, “the line between substance and procedure must be drawn so as to ensure that ‘the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.’” *Ellis*, 24 F.4th at 1270 (quoting *Felder v. Casey*, 487 U.S. 131, 151, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988)). This “‘outcome-determination’ test must not be applied mechanically.” *Gasperini*, 518 U.S. at 428, 116 S.Ct. 2211. “[I]nstead, its application must be guided by ‘the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.’” *Id.* (quoting *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)).

B

As discussed above, the California Legislature views SLAPP suits as an “abuse of the judicial process.” Cal. Civ. Proc. Code § 425.16(a). To protect defendants from this improper conduct, the California Legislature created a meaningful remedy: a defendant may file a special motion to strike and, if the defendant prevails, then the court shall strike the claim and award defendant his attorneys’ fees. Cal. Civ. Proc. Code § 425.16(b)(1), (c)(1). In substance, these anti-SLAPP provisions provide defendants with a claim for attorneys’ fees for the pretrial dismissal of a meritless SLAPP suit.

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Thus, the “question in dispute,” *Shady Grove*, 559 U.S. at 398, 130 S.Ct. 1431, is whether defendants may obtain attorneys’ fees for the pretrial dismissal of a meritless suit.⁴ No federal rule answers that question. Judge Bress’s concurrence points to Federal Rules of Civil Procedure 12 and 56. Bress Concurrence at 713-14-. But those rules do not control, as they establish no entitlement to a claim for attorneys’ fees. *See* Fed. R. Civ. P. 12, 56. For the same reason, Rules 12 and 56 do not conflict with the attorney-fee-shifting provision.

Nor do Rules 12 and 56 directly collide with the special-motion provision. In *Planned Parenthood*, we inspected the standards to be applied under the special-motion provision and Rules 12 and 56 and confirmed that they could be reconciled.⁵ 890 F.3d at 833-34. There, we held

4. Because this is the proper question, I find unpersuasive the out-of-circuit cases that Judge Bress’s concurrence cites. Bress Concurrence at 714-15. Those cases framed the question differently in holding that various state anti-SLAPP statutes conflicted with a federal rule. *See La Liberte v. Reid*, 966 F.3d 79, 87 (2d Cir. 2020) (identifying the question as “the circumstances under which a court must dismiss a plaintiff’s claim before trial” (quoting *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015))); *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir.), *as revised* (Aug. 29, 2019) (same); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018) (identifying the question as “whether [a] complaint states a claim for relief supported by sufficient evidence to avoid pretrial dismissal”); *Abbas*, 783 F.3d at 1333-34 (identifying the question as “the circumstances under which a court must dismiss a case before trial”).

5. The Supreme Court has directed that “if the federal and state rules ‘can be reconciled,’ then they do not qualify as in

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that “when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a . . . court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated.” *Id.* at 834. But “when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply.” *Id.* Thus, there is no direct collision between California’s anti-SLAPP provisions and Rules 12 and 56. *See CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1143 (9th Cir. 2022) (explaining that, under *Planned Parenthood*, no “conflict exists in this Circuit” between California’s anti-SLAPP special-motion provision and the standards under Rules 12 and 56).

C

Because no federal rule controls or directly conflicts with the anti-SLAPP provisions, “we must make the ‘typical, relatively unguided *Erie* choice.’” *Newsham*, 190 F.3d at 973 (quoting *Hanna*, 380 U.S. at 471, 85 S.Ct. 1136). The anti-SLAPP provisions provide defendants

conflict.” *Hamilton v. Wal-Mart Stores, Inc.*, 39 F.4th 575, 585 (9th Cir. 2022) (quoting *Shady Grove*, 559 U.S. at 410, 130 S.Ct. 1431 (plurality opinion)) (first citing *Shady Grove*, 559 U.S. at 421, 130 S.Ct. 1431 (Stevens, J., concurring in part and concurring in the judgment); and then citing *Shady Grove*, 559 U.S. at 437, 130 S.Ct. 1431 (Ginsburg, J., dissenting)); *see also Gasperini*, 518 U.S. at 437 n.22, 116 S.Ct. 2211 (“[The] Court ‘has continued since [*Hanna*] to interpret the federal rules to avoid conflict with important state regulatory policies’ . . .” (quoting R. Fallon, D. Meltzer, & D. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 729-30 (4th ed. 1996))).

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with a pretrial claim for attorneys' fees for plaintiffs' abuse of the judicial process. This is a substantive rule. *See Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 973 (9th Cir. 2013) ("The Supreme Court held in *Alyeska Pipeline Service Co. v. Wilderness Society* that for *Erie Railroad Co. v. Tompkins* purposes, state law on attorney's fees is substantive, so state law applies in diversity cases." (footnotes omitted)). The anti-SLAPP provisions "create[] [a] right[] or obligation[]." *County of Orange*, 784 F.3d at 527. They create a defendant's right to attorneys' fees and a plaintiff's obligation to pay such fees. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-56, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (holding that a state law that "create[d] a new liability where none existed before" was substantive). The anti-SLAPP provisions also "serve [California's] substantive state polic[y]," *County of Orange*, 784 F.3d at 530 (quoting *Feldman v. Allstate Ins.*, 322 F.3d 660, 667 (9th Cir. 2003)), of protecting "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," Cal. Civ. Proc. Code § 425.16(a), by deterring SLAPPs and compensating prevailing defendants, *see Ketchum*, 104 Cal.Rptr.2d 377, 17 P.3d at 741.

The Supreme Court has long held that state statutes requiring an award of attorneys' fees to further a substantial policy apply in federal court:

[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee

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mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.

Sioux County v. Nat'l Sur. Co., 276 U.S. 238, 243, 48 S.Ct. 239, 72 L.Ed. 547 (1928). This holding survived *Erie*, as confirmed by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 n.31, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *superseded by statute on other grounds as stated in Lackey v. Stinnie*, 604 U.S. 192, 205, 145 S.Ct. 659, 221 L.Ed.2d 63 (2025). Indeed, in *Alyeska Pipeline*, the Court reiterated that in “an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law . . . giving a right [to attorneys’ fees], which reflects a substantial policy of the state, should be followed.” *Id.* (quoting 6 J. Moore, *Federal Practice* § 54.77(2), at 1712-13 (2d ed. 1974)). Because the anti-SLAPP provisions grant defendants a right to attorneys’ fees to further an important state policy, Supreme Court precedent compels us to conclude that the anti-SLAPP provisions are substantive under *Erie*.⁶

6. For this reason, I respectfully disagree with Judge Bress’s suggestion that the anti-SLAPP provisions merely “adopt[] a set of procedures.” Bress Concurrence at 719. Judge Bress also argues that, even assuming the fee-shifting provision is substantive, it would be “wholly improper to apply [the] attorneys’ fees provision” because “[t]here is, in effect, no underlying statute to which the attorneys’ fee provision could even apply.” Bress Concurrence at 717. But, as explained above, we have reconciled the special-

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Erie's "twin aims"—"discouragement of forum-shopping and avoidance of inequitable administration of the laws"—confirm that the anti-SLAPP provisions are substantive. *Hanna*, 380 U.S. at 468, 85 S.Ct. 1136. "Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum." *Newsham*, 190 F.3d at 973. "[W]ere [the anti-SLAPP provisions] not to apply in federal court, the incentives for forum shopping would be strong: electing to bring state-law claims in federal as opposed to state court would allow a plaintiff to . . . circumvent any liability for a defendant's attorney's fees or costs." *Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010). "Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding." *Newsham*, 190 F.3d at 973. As we correctly noted in *Newsham*, "[t]his outcome . . . run[s] squarely against the 'twin aims' of the *Erie* doctrine." *Id.*; see also *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013) (order) (Wardlaw and Callahan, JJ., joined by Fletcher and Gould, JJ., concurring in the denial of rehearing en banc) ("Without anti-SLAPP protections in federal courts, SLAPP plaintiffs would have an incentive to file or remove

motion provision with the federal rules, and thus it continues to apply. Further, contrary to Judge Bress's suggestion, the Eleventh Circuit in *Carbone* did not reject the notion that fee-shifting provisions under an anti-SLAPP statute that further an important state policy are substantive. Bress Concurrence at 720-21. Indeed, in rejecting that the statute there was substantive, the *Carbone* court did not even consider whether the fee-shifting provision could be viewed as substantive. See *Carbone*, 910 F.3d at 1355.

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to federal courts strategic, retaliatory lawsuits that are more likely to have the desired effect of suppressing a SLAPP defendant's speech-related activities.”).⁷

III

California's anti-SLAPP special-motion and attorney-fee-shifting provisions, Cal. Civ. Proc. Code § 425.16(b)(1), (c)(1), provide defendants with a pretrial claim for attorneys' fees for plaintiffs' abuse of the judicial process. That is a substantive right, and no federal rule controls or directly collides with that right. Thus, the anti-SLAPP provisions apply in federal court.

BRESS, Circuit Judge, with whom COLLINS, LEE, and BUMATAY, Circuit Judges, join, concurring in the judgment:

For over twenty-five years, the Ninth Circuit has struggled with its misguided experiment of allowing

7. I find unpersuasive the Tenth Circuit's decision in *Los Lobos Renewable Power, LLC v. Americulture, Inc*, 885 F.3d 659 (10th Cir. 2018), in which it held that New Mexico's anti-SLAPP statute is procedural and not substantive. First, in determining that the fee-shifting provision was procedural, *id.* at 668-73, the court did not consider the Supreme Court's longstanding precedent that state statutes requiring an award of attorneys' fees to further a substantial policy should be applied in federal court, *see Sioux County*, 276 U.S. at 243, 48 S.Ct. 239; *Alyeska Pipeline*, 421 U.S. at 259 n.31, 95 S.Ct. 1612. Second, the *Los Lobos* court's cursory discussion of *Erie*'s twin aims fails to acknowledge the strong incentive to forum shop if the fee-shifting provision were not to apply in federal court. *See Los Lobos*, 885 F.3d at 673 n.8.

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California's anti-SLAPP statute to apply in federal court. Almost as soon as we allowed these motions to be filed in federal litigation, we were forced to alter the state's anti-SLAPP procedures in various ways to avoid conflicts with the Federal Rules of Civil Procedure. Over the years, numerous judges of this court have implored us to reevaluate the broader issue, forcefully explaining why California's anti-SLAPP statute should have no place in federal court. Picking up on those criticisms, virtually every other circuit to consider the issue has come out against us.

The time was therefore ripe—beyond ripe—for bringing our circuit in line with the overwhelming majority view and holding that California's anti-SLAPP statute is a state procedural device that does not apply in federal court. Today's decision unfortunately ducks that issue. In concluding that the denial of an anti-SLAPP motion is not immediately appealable under the collateral order doctrine, the majority opinion instead continues our multi-decade project of surgically altering the core components of the anti-SLAPP law to make it compatible with federal procedural law. But in the process, the majority allows to prevail in federal court a version of the anti-SLAPP statute that looks even less like the original than the already contorted version we have spent years jerry-rigging.

The issue of whether the anti-SLAPP statute applies in federal court is not going away. And we have no license for allowing state procedural law to govern in federal court, much less state procedural law that looks nothing

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like the law the state enacted. Rather than wait for the next case, it would have been far better, after a quarter-century of confusion, to deal with this issue once and for all. We have no jurisdiction to resolve this appeal of the denial of an anti-SLAPP motion for the more fundamental reason that California’s anti-SLAPP statute does not apply in federal court.

I**A**

Like many other states, California has an anti-SLAPP statute. *See* Cal. Civ. Proc. Code §§ 425.16-17. SLAPP stands for “strategic lawsuit against public participation.” The idea behind anti-SLAPP laws is to “protect against ‘lawsuits brought primarily to chill’ the exercise of speech and petition rights” and to “encourage continued participation in matters of public significance.” *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133, 246 Cal. Rptr.3d 591, 439 P.3d 1156, 1160 (2019) (quoting Cal. Civ. Proc. Code § 425.16(a)).

To combat such litigation, California allows defendants to file anti-SLAPP motions. *See* Cal. Civ. Proc. Code § 425.16. California’s anti-SLAPP motion is “a special motion to strike” a cause of action “arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” *Id.* § 425.16(b)(1); *see generally Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839-40 (9th Cir. 2001) (outlining

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the mechanics of an anti-SLAPP motion). There are also exceptions to the anti-SLAPP law. *See, e.g.*, Cal. Civ. Proc. Code § 425.17(b) (anti-SLAPP law generally does not apply to “any action brought solely in the public interest or on behalf of the general public”).

Under the anti-SLAPP statute, if a defendant makes a prima facie showing that the plaintiff’s lawsuit arises from the defendant’s exercise of his right to free speech, the defendant may bring an anti-SLAPP motion. Cal. Civ. Proc. Code § 425.16(b)(1); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013). At that point, the burden shifts to the plaintiff to “establish[] that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code § 425.16(b)(1); *see also Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188-89 (9th Cir. 2013) (Watford, J., joined by Kozinski, C.J., and Paez and Bea, JJ., dissenting from the denial of rehearing en banc).

In addition to its heightened “probability” standard, California’s anti-SLAPP law includes various other procedures “for weeding out, at an early stage, meritless claims arising from protected activity.” *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 4 Cal.5th 637, 230 Cal.Rptr.3d 408, 413 P.3d 650, 653 (2018) (quoting *Baral v. Schnitt*, 1 Cal.5th 376, 205 Cal.Rptr.3d 475, 376 P.3d 604, 608 (2016) (emphasis omitted)). For example, “the filing of an anti-SLAPP motion automatically stays all further discovery until the court rules on the motion.” *Metabolife*, 264 F.3d at 846 (citing Cal. Civ. Proc. Code § 425.16(g)). In addition, the statute permits immediate appeals of orders granting or denying

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anti-SLAPP motions. *Newport Harbor*, 230 Cal.Rptr.3d 408, 413 P.3d at 655 (citing Cal. Civ. Proc. Code § 425.16(i)). The statute also provides that “a defendant that prevails on a special motion to strike is entitled to attorney’s fees and costs.” *Barry v. State Bar of Cal.*, 2 Cal.5th 318, 212 Cal.Rptr.3d 124, 386 P.3d 788, 790 (2017) (citing Cal. Civ. Proc. Code § 425.16(c)(1)). These and other features of the law “provide a mechanism for the *early* termination of claims that are improperly aimed at the exercise of free speech or the right of petition.” *Newport Harbor*, 230 Cal. Rptr.3d 408, 413 P.3d at 653 (quoting *Lam v. Ngo*, 91 Cal. App.4th 832, 111 Cal. Rptr. 2d 582, 589 (2001)).

Several years after California enacted its anti-SLAPP statute, we held that the anti-SLAPP law applied in federal court. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th Cir. 1999). We concluded that there was “no ‘direct collision’” between Federal Rules of Civil Procedure 12 and 56 and California’s anti-SLAPP device, even though the latter “adds an additional, unique weapon to the pretrial arsenal.” *Id.* at 972-73. And we reasoned that the purposes of the *Erie* doctrine, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), supported applying the state anti-SLAPP law in federal court. Otherwise, “a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum.” *Newsham*, 190 F.3d at 973. We did not grapple with how the anti-SLAPP statute’s “probability” standard deviates from the Rule 12(b)(6) and Rule 56 standards.

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Several years later, we took the next step and held that the denial of an anti-SLAPP motion is immediately appealable in federal court. *See Batzel v. Smith*, 333 F.3d 1018, 1024-26 (9th Cir. 2003). While the anti-SLAPP statute permits interlocutory appeals, *see* Cal. Civ. Proc. Code § 425.16(i), in federal court, a party is generally “entitled only to a single appeal, to be ‘deferred until final judgment has been entered.’” *Batzel*, 333 F.3d at 1024 (quoting *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994)). Still, aligning our law with California’s procedural law, *Batzel* held that “we have jurisdiction to review the denial of an anti-SLAPP motion pursuant to the collateral order doctrine.” *Id.*

The result of these precedents is the widespread use of the anti-SLAPP mechanism in federal courts in this circuit. *See Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1182-83 (9th Cir. 2016) (Kozinski, J., joined by Gould, J., concurring). Experience shows that it is standard practice for parties litigating in our district courts to include an anti-SLAPP motion as part of the standard suite of dispositive pre-trial motions.

B

But a major problem lurked. Federal courts do not apply state laws or rules if the Federal Rules of Civil Procedure “attempt[] to answer the same question” and the relevant Federal Rule does not violate the Rules Enabling Act. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99, 130 S.Ct. 1431, 176

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L.Ed.2d 311 (2010); *see also Hanna v. Plumer*, 380 U.S. 460, 463-64, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Thus, “[w]hen a situation is covered by one of the Federal Rules,” we apply that rule over a corresponding state rule, unless the Federal Rule is invalid. *Hanna*, 380 U.S. at 471, 85 S.Ct. 1136. In that situation, “[w]e do not wade into *Erie*’s murky waters unless the federal rule is inapplicable or invalid.” *Shady Grove*, 559 U.S. at 398, 130 S.Ct. 1431 (citing *Hanna*, 380 U.S. at 469-71, 85 S.Ct. 1136).

Almost as soon as we held that California’s anti-SLAPP statute could apply in federal court, we were forced to conclude that various aspects of the anti-SLAPP statute could not, in fact, apply in federal court after all. The last twenty-five years of case law in this area from the Ninth Circuit—including today’s decision—has therefore revolved around a central project: steadily holding that critical features of California’s anti-SLAPP statute do not govern in federal court. Everything since *Newsham* has amounted to a retreat from that precedent.

Our decision in *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001), was the opening blow. There, we held that the anti-SLAPP statute’s automatic stay of discovery, *see* Cal. Civ. Proc. Code § 425.16(g), conflicts with Rule 56 because while the anti-SLAPP statute “limits discovery and makes further discovery an exception,” Rule 56 “ensures that adequate discovery will occur before summary judgment is considered.” *Metabolife*, 264 F.3d at 846 (quotations omitted). Thus, the “discovery-limiting aspects” of California’s anti-SLAPP statute do not apply in federal court. *Id.* (quotations omitted).

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As Chief Judge Kozinski explained, *Metabolife*'s holding was "clearly correct," but it "crippled the anti-SLAPP statute" by subjecting defendants to the usual rigors of federal court discovery, contrary to the statute's objective of halting—early on and with minimal expense—those claims that have no "reasonable probability" of success. *Makaeff*, 715 F.3d at 274 (Kozinski, C.J., joined by Paez, J., concurring). From almost the very beginning of our anti-SLAPP case law, we were already constructing a version of the anti-SLAPP motion that was a "far different (and tamer) animal than its state-court cousin." *Id.* at 275. But although "*Metabolife* diminished some of the tension between the state and federal schemes," it did so "at the expense of depriving the state scheme of its key feature: giving defendants a quick and painless exit from the litigation." *Id.*; see also *Makaeff*, 736 F.3d at 1189 (Watford, J., dissenting from the denial of rehearing en banc).

As the years wore on, we discovered more areas of incompatibility between the anti-SLAPP statute and federal procedure, requiring us to make even more adjustments to the statute. For example, we concluded that "granting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment." *Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004). Similarly, the anti-SLAPP statute requires that anti-SLAPP motions generally be filed within 60 days of the service of the complaint or counterclaims. Cal. Civ. Proc. Code § 425.16(f). But we held that this timing rule "directly collide[s] with the more permissive" timing rule

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under Rule 56. *See Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016). As a result, for anti-SLAPP motions that sound in Rule 56, we allow the filing of the motion “at any time until 30 days after the close of all discovery.” *Id.* (quoting Fed. R. Civ. P. 56(b)). Litigants in federal court can thus bring anti-SLAPP motions much later in litigation, following discovery that the anti-SLAPP statute would generally not permit in the first place.

We had to adjust the rules for interlocutory appeals, too. After initially holding that the denial of an anti-SLAPP motion is immediately appealable on a collateral basis, *see Batzel*, 333 F.3d at 1024, we were then required to conclude that, as a result of Federal Rule of Civil Procedure 54(b), a plaintiff cannot appeal the grant of such a motion as to some but not all defendants, even though such an order would be immediately appealable in California state court. *See Hyan v. Hummer*, 825 F.3d 1043, 1047 (9th Cir. 2016) (per curiam) (citing Cal. Civ. Proc. Code § 425.16(i)). Once again, we “pulled another tooth” from the anti-SLAPP statute to harmonize it with federal procedural law. *Travelers Cas. Ins. Co.*, 831 F.3d at 1186 (Kozinski, J., joined by Gould, J., concurring).

C

As our hybrid version of California’s anti-SLAPP statute became increasingly bespoke, many of our colleagues issued or joined separate writings calling for the reversal of our precedents allowing state-law anti-SLAPP motions in federal court. And numerous other circuits broke with our approach.

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Writing in 2013, Chief Judge Kozinski, joined by Judge Paez, described *Newsham* as “a big mistake,” explaining that “[f]ederal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof.” *Makaeff*, 715 F.3d at 275 (Kozinski, C.J., joined by Paez, J., concurring). California’s anti-SLAPP statute “creates no substantive rights” and “merely provides a procedural mechanism for vindicating existing rights.” *Id.* at 273. But as Chief Judge Kozinski wrote, the Federal Rules of Civil Procedure already “provide an integrated program of pre-trial, trial and post-trial procedures designed to ensure ‘the just, speedy, and inexpensive determination of every action and proceeding.’” *Id.* at 274 (quoting Fed. R. Civ. P. 1). The anti-SLAPP statute “cuts an ugly gash through this orderly process,” permitting the premature dismissal of claims without discovery; “chang[ing] the standard for surviving summary judgment by requiring a plaintiff to show a ‘reasonable probability’ that he will prevail, rather than merely a triable issue of fact”; and allowing otherwise forbidden interlocutory appeals. *Id.*

But our efforts to smooth over the differences created new problems. Once we concluded in *Metabolife* that the discovery-limiting features of the anti-SLAPP statute could not apply in federal court, Chief Judge Kozinski went on to explain, what remained was “a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed.” *Id.* at 275. In a separate concurring opinion in the same case, Judge Paez made

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similar points. *See id.* (Paez, J., joined by Kozinski, C.J., concurring). He too recognized that “California’s anti-SLAPP statute is ‘quintessentially procedural,’ and its application in federal court has created a hybrid mess that now resembles neither the Federal Rules nor the original state statute.” *Id.*

Later in 2013, an en banc vote to reassess the issue failed, but not without attracting a powerful dissent by Judge Watford who, joined by Chief Judge Kozinski, Judge Paez, and Judge Bea, added to the growing movement against our anti-SLAPP precedents. *See Makaeff*, 736 F.3d at 1188 (Watford, J., joined by Kozinski, C.J., and Paez and Bea, JJ., dissenting from the denial of rehearing en banc). Focusing on the legal standards for ending a lawsuit before trial, Judge Watford explained that California’s anti-SLAPP statute conflicts with Rules 12 and 56, which collectively “establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court.” *Id.* Under *Shady Grove*, the anti-SLAPP statute therefore “impermissibly supplements the Federal Rules’ criteria for pre-trial dismissal of an action.” *Id.*

For instance, to survive dismissal under Rule 12(b) (6), a plaintiff need only “allege facts stating a claim that is ‘plausible on its face.’” *Id.* at 1188-89 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). But as Judge Watford observed, California’s anti-SLAPP statute “impose[s] a probability requirement at the pleading stage” that “effectively stiffens the Rule 12 standard for testing the legal sufficiency of a claim.” *Id.* at 1189; *see also id.*

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(“Any attempt to impose a probability requirement at the pleading stage would obviously conflict with Rule 12. Yet that is exactly what California’s anti-SLAPP statute does.”); *Travelers Cas. Ins. Co.*, 831 F.3d at 1183 (Kozinski, J., joined by Gould, J., concurring) (explaining that “California’s anti-SLAPP law directly conflicts with Federal Rule 12, which provides a one-size-fits-all test for evaluating claims at the pleading stage”).

Judge Watford further explained how “[s]imilar problems plague the interaction between California’s anti-SLAPP statute and Rule 56.” *Makaeff*, 736 F.3d at 1189 (Watford, J., dissenting from the denial of rehearing en banc). Summary judgment is proper only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). But “[t]he anti-SLAPP statute eviscerates Rule 56 by requiring the plaintiff to prove that she will probably prevail if the case proceeds to trial—a showing considerably more stringent than identifying material factual disputes that a jury could reasonably resolve in the plaintiff’s favor.” *Makaeff*, 736 F.3d at 1189 (Watford, J., dissenting from the denial of rehearing en banc). For these reasons, Judge Watford called on us to “revisit—and reverse—our precedent permitting application of state anti-SLAPP statutes in federal court.” *Id.* at 1190.

Although the en banc call in *Makaeff* failed, Judge Watford’s views were largely vindicated in *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018), in a way that

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only further cemented the strikingly different version of California’s anti-SLAPP statute that we permit in federal court. The anti-SLAPP statute’s heightened “probability” requirement was a cornerstone of its protections for anti-SLAPP defendants. But in *Planned Parenthood*, we effectively expunged that “probability” standard “to prevent the collision of California state procedural rules with federal procedural rules.” *Id.* at 833. Instead, we held that (1) “when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated,” and (2) “when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply,” and, in such a case, “discovery must be allowed.” *Id.* at 834. Echoing Chief Judge Kozinski’s and Judge Watford’s separate writings, *Planned Parenthood* explained that a “contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure while in a federal district court.” *Id.*

As we continued to strip away various defining features of the anti-SLAPP law when utilized in federal court, members of this court continued to criticize our entire project of allowing anti-SLAPP motions in federal litigation. Writing in 2016, Judge Gould took “issue with circuit precedent permitting defendants in federal court to take advantage of California’s anti-SLAPP law,” opining that “an anti-SLAPP motion has no proper place in federal court in light of the Federal Rules of Civil Procedure.”

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Travelers Cas. Ins. Co., 831 F.3d at 1186 (Gould, J.). More recently, Judge McKeown similarly expressed concern with our case law, because an anti-SLAPP motion “is wholly grounded in th[e] state’s procedural law, yet we have infused it with substantive significance.” *Martinez v. ZoomInfo Techs., Inc.*, 82 F.4th 785, 794 (9th Cir. 2023) (McKeown, J., concurring), *vacated*, 90 F.4th 1042 (mem.) (9th Cir. 2024).

The other circuits, meanwhile, have by now come out firmly against us. *See id.* at 795 (noting that “[o]ur jurisprudence on anti-SLAPP statutes places us in the minority among our sister circuits” because other circuits “do not recognize the applicability of SLAPP statutes’ provisions for motions to strike or dismiss”); *Planned Parenthood*, 890 F.3d at 836 (Gould, J., concurring) (explaining that “the use of anti-SLAPP procedure in federal courts has been squarely rejected” in other circuits). At this time, and after considering similar anti-SLAPP laws in other states, the Second, Fifth, Tenth, Eleventh, and D.C. Circuits have all concluded that state anti-SLAPP statutes do not apply in federal court. *See Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (op. of Kavanaugh, J.); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1347 (11th Cir. 2018); *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019); *La Liberte v. Reid*, 966 F.3d 79, 87-88 (2d Cir. 2020).

Representative of these decisions is then-Judge Kavanaugh’s opinion for the D.C. Circuit in *Abbas*. Relying

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on the separate writings from Chief Judge Kozinski and Judge Watford in *Makaeff*, *Abbas* held that the District of Columbia’s anti-SLAPP statute did not apply in federal court because under *Shady Grove*, “Federal Rules of Civil Procedure 12 and 56 ‘answer the same question’ about the circumstances under which a court must dismiss a case before trial.” *Abbas*, 783 F.3d at 1333-34. The D.C. anti-SLAPP statute could not apply in federal court because it “conflict[ed] with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial.” *Id.* at 1334; *see also id.* (citing the separate writings by Chief Judge Kozinski and Judge Watford in *Makaeff*); *Carbone*, 910 F.3d at 1354 (holding that Georgia’s anti-SLAPP statute cannot apply in federal court under *Shady Grove* because “the Federal Rules and the Georgia anti-SLAPP statute address the same question: whether a complaint states a valid claim supported by sufficient evidence to warrant a trial on the merits”); *Klocke*, 936 F.3d at 245 (holding that Texas’s anti-SLAPP statute does not apply in federal court and “find[ing] most persuasive the reasoning of the D.C. Circuit” in *Abbas*); *La Liberte*, 966 F.3d at 87 (“Reid urges us to follow the Ninth Circuit, which holds that California’s anti-SLAPP statute and the Federal Rules ‘can exist side by side . . . without conflict.’ We disagree—as do a number of Ninth Circuit judges.” (quoting *Newsham*, 190 F.3d at 972)). Although they have yet to carry the day in this court, the separate writings of Chief Judge Kozinski and Judge Watford have proven highly influential nationwide, persuading the other circuits that have considered the issue.

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Only the First Circuit agrees with us that a state anti-SLAPP statute can apply in federal court. *See Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010). But it reached that conclusion in 2010, back when we were the only circuit to have weighed in on the issue and before various judges on our court began to express disagreement with our precedent. Our court, like the First Circuit, is thus an outlier. But given our circuit's vastly greater caseload, allowing anti-SLAPP motions to be filed in our district courts has a profoundly greater effect here.

II**A**

This case presented a golden opportunity for the en banc court to fix our mistaken precedent and hold that California's anti-SLAPP statute does not apply in federal court. There is really nothing new to think about here. Chief Judge Kozinski, Judge Watford, our sister circuits, and many others have identified the clear path for holding that under *Shady Grove* and *Hanna v. Plumer*, California's anti-SLAPP statute cannot apply in federal court, where the Federal Rules of Civil Procedure reign. There is little I can do to improve upon the sound reasoning of the many judges from this circuit and elsewhere who have weighed in to explain this point. In my respectful view, we do a disservice to the law by keeping our patently incorrect anti-SLAPP case law on the books, while leaving in place a lopsided circuit split in which we spearhead the minority view.

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In taking the minimalist approach of holding that the denial of an anti-SLAPP motion is no longer immediately appealable under the collateral order doctrine, the majority opinion leaves anti-SLAPP practice in this circuit even more incoherent than we found it. The four core pillars supporting the anti-SLAPP statute's overarching objective of "resolv[ing] these lawsuits early," *Newport Harbor*, 230 Cal.Rptr.3d 408, 413 P.3d at 651, are (1) stays of discovery, (2) heightened "probability" of success requirements for plaintiffs, (3) interlocutory appeals, and (4) attorneys' fees for successful anti-SLAPP motions. Our decision in *Metabolife* nixed the first. *See* 264 F.3d at 846. *Planned Parenthood* eliminated the second. *See* 890 F.3d at 833-34. Today's decision cancels the third. So we have now stripped away every major procedural aspect of the statute geared toward the early termination of claims. There may be other more minor discrepancies that we have yet to resolve between state anti-SLAPP procedure and the Federal Rules, but one can be assured that if and when those issues arise, the Federal Rules will prevail, just as they have in our past cases. So all that really remains after today's decision is the attorneys' fees provision.

What the majority has therefore left us with is a fee-shifting statute for anti-SLAPP motions that merit this label in name only. They are really just motions to dismiss under Rule 12(b)(6) or summary judgment motions under Rule 56. They are subject to the same standards as those two types of motions. *See Planned Parenthood*, 890 F.3d at 833-34. They follow the same discovery processes as those motions, just as the Federal Rules would normally

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allow. *See Metabolife*, 264 F.3d at 846. These types of motions would not have fee-shifting associated with them, absent an attorneys' fees provision in some other relevant substantive state or federal law. But even though we have—out of necessity to avoid conflict with federal procedural rules—completely reformed the state anti-SLAPP legal standards, the state anti-SLAPP discovery processes (or lack thereof), and the state anti-SLAPP rules for interlocutory appeals, after today's decision, we will still award attorneys' fees to a successful anti-SLAPP movant.

There is no license for this. It is true that under the *Erie* doctrine, federal courts sitting in diversity apply attorneys' fees provisions that are part of substantive state law. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *overruled by statute on other grounds, as recognized in Lackey v. Stinnie*, 604 U.S. 192, 205, 145 S.Ct. 659, 221 L.Ed.2d 63 (2025); *Alaska Rent-A-Car, Inc. v. Avis Budget Grp.*, 738 F.3d 960, 973 (9th Cir. 2013); *In re Larry's Apartment, L.L.C.*, 249 F.3d 832, 837-39 (9th Cir. 2001). But even assuming it would be proper to regard the anti-SLAPP statute's fee-shifting provision as part of state substantive law, as opposed to state procedural law, it is wholly improper to apply a state attorneys' fees provision to a state law that we have completely rewritten. The attorneys' fees provision in the anti-SLAPP statute is part of an integrated statutory scheme. There is simply no basis for allowing fee-shifting for a revamped anti-SLAPP law that bears no resemblance to the statute as enacted. There is, in effect, no underlying statute to which the attorneys' fee provision could even apply.

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To this point, every other circuit to consider the issue has held that when a state anti-SLAPP statute cannot apply in federal court, its attorneys' fees provision is inoperative. As then-Judge Kavanaugh explained, when an anti-SLAPP statute "does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)," "attorney's fees under the Anti-SLAPP Act are not available." *Abbas*, 783 F.3d at 1337 n.5. Or as the Fifth Circuit put it, the fee-shifting provisions in an anti-SLAPP law "are not applicable apart from the burden-shifting early dismissal framework." *Klocke*, 936 F.3d at 247 n.6; *see also La Liberte*, 966 F.3d at 88-89 (explaining that because the California anti-SLAPP statute "awards attorneys' fees *only* to 'a prevailing [party] on a special motion to strike,'" a plaintiff may not recover fees "under the anti-SLAPP statute if she later prevails by other means" (quoting Cal. Civ. Proc. Code § 425.16(c)(1)).

The logic of these decisions applies as well to the current state of Ninth Circuit case law, placing us in conflict with our sister circuits. Federal defendants who prevail on an anti-SLAPP motion in the Ninth Circuit are not truly prevailing on that motion as the California legislature conceived it. Instead, they are winning on some "hybrid mess" of a motion, *Makaeff*, 715 F.3d at 275 (Paez, J., concurring), that, after today's decision, resembles its state court counterpart even less. The Supreme Court "since 1796 . . . has maintained that 'the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts.'" *Lackey*, 604 U.S. at 199, 145 S.Ct. 659 (quoting

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Alyeska Pipeline, 421 U.S. at 249, 95 S.Ct. 1612). Today's decision results in that very form of unauthorized fee-shifting.

There is also every reason to think that the regime that remains in place after today's decision will lead to attorneys' fees questions that would never arise under the statute as enacted. Again, the core features of California's anti-SLAPP law were designed to "provide a mechanism for the *early* termination of claims" that fell within the statute's ambit. *Newport Harbor*, 230 Cal.Rptr.3d 408, 413 P.3d at 653 (quoting *Lam*, 111 Cal. Rptr. 2d at 589). But with generally no discovery, defendant-friendly legal standards, and interlocutory appeals, California ensured that anti-SLAPP motions would be resolved expeditiously and, as a result, less expensively. *See id.*, 230 Cal.Rptr.3d 408, 413 P.3d at 655 (explaining that the anti-SLAPP statute provides "a means for the prompt and relatively inexpensive resolution of lawsuits that threaten free speech").

But now consider the fees issue in federal court. With discovery, *see Metabolife*, 264 F.3d at 846, more plaintiff-friendly legal standards, *see Planned Parenthood*, 890 F.3d at 833-34, and now no interlocutory appeals, the cost of litigating an anti-SLAPP motion in federal court will surely be much greater than it would have been in California state court. The denial of interlocutory appeals, in particular, is likely to play a major role in increasing litigation costs, because the effect of those appeals was not only a quick answer on appeal, but typically a stay of proceedings in district court. Now imagine that an

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anti-SLAPP motion is denied, there is no interlocutory appeal, and the parties litigate the case to final judgment, only for the court of appeals to conclude years later that the anti-SLAPP motion should have been granted at the outset. How should fees be assessed in that situation? After today's decision, we can expect a wave of new issues relating to outsized fee awards, made possible by the majority's decision to retain the statute's sole remaining core feature—fee-shifting—but to inter the rest.

It would have been far better to avoid these issues entirely by aligning our law with the dominant and clearly correct position that the anti-SLAPP statute does not apply in federal court. The majority opinion is already dismissing stare decisis concerns and overruling decades of past precedent that permitted interlocutory appeals of the denial of anti-SLAPP motions. The effects of today's decision will already be significant. Why not just finish the job? The issue matters not just to prevent judicially unauthorized fee shifting, but because district courts are constantly confronted with the additional burden of parasitical anti-SLAPP motions, which often raise nettlesome questions about the interaction between state and federal procedure. We could have restored the rule of law and made everyone's lives much easier by returning to the basic proposition that unless Congress specifies otherwise, it is the Federal Rules that "govern the procedure in all civil actions and proceedings in the United States district courts." Fed. R. Civ. P. 1.

*Appendix A***B**

There are a few common objections to the majority position that nearly every circuit but this one has adopted. These objections do not stand up, as the other circuits have rightly concluded.

First, some may argue that federal courts should apply state anti-SLAPP statutes because those laws serve the important and beneficial purpose of protecting defendants from lawsuits that threaten their free speech rights. This argument fails because it is not up to us to devise greater procedural protections than the law confers. As the Second Circuit has explained, “[t]he idea that the more stringent requirement of the anti-SLAPP standard is a beneficial ‘supplement’ to the Federal Rules is a policy argument—and fatal, because the more permissive standards of the Federal Rules likewise reflect policy judgments as to what is sufficient.” *La Liberte*, 966 F.3d at 88.

Congress can adjust the rules governing litigation, including the pleading standards. It has done so, for example, for fraud claims, *see* Fed. R. Civ. P. 9(b), and for violations of the securities laws, *see* Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995); *Tellabs, Inc v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). As the Supreme Court has explained, Congress “has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain

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instances.” *Shady Grove*, 559 U.S. at 400, 130 S.Ct. 1431. In the case of anti-SLAPP statutes, moreover, it is not necessarily all upside. California courts have themselves expressed concern that anti-SLAPP motions “present[] the possibility for abuse.” *Newport Harbor*, 230 Cal. Rptr.3d 408, 413 P.3d at 655 (quoting *Platypus Wear, Inc. v. Goldberg*, 166 Cal.App.4th 772, 83 Cal. Rptr. 3d 95, 103 (2008)). It is up to Congress, not the courts, to decide whether the perceived benefits of an anti-SLAPP statute outweigh the costs.

Second, and related, some argue that if we do not apply the anti-SLAPP statute, plaintiffs who want to silence their critics through lawsuits will engage in forum-shopping in federal court. But when “Federal Rules 12 and 56 answer the same question as the Anti-SLAPP Act’s special motion to dismiss provision,” *Abbas*, 783 F.3d at 1336, that is the end of the matter. Nor can there be any doubt that Rules 12 and 56 are valid under the Rules Enabling Act. *See, e.g., Klocke*, 936 F.3d at 247-48; *Carbone*, 910 F.3d at 1356-57; *Abbas*, 783 F.3d at 1336-37. If forum-shopping is the result of not applying the anti-SLAPP statute in federal court, that is “the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.” *Shady Grove*, 559 U.S. at 416, 130 S.Ct. 1431 (plurality op.).

In any event, the concerns of forum-shopping are surely more imagined than real. The anti-SLAPP statute does not create new substantive rights; it protects existing ones. *See Makaeff*, 715 F.3d at 273 (Kozinski, C.J., joined by Paez, J., concurring). There is no reason to believe

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that federal courts are incapable of dealing with plaintiffs who seek to use litigation to chill speech. *See Los Lobos Renewable Power*, 885 F.3d at 673 n.8 (holding that New Mexico’s anti-SLAPP statute does not apply in federal court but cautioning that “[a]nyone who believes that a federal district court is ill-equipped to deal swiftly and harshly with the sort of lawsuits described in [the anti-SLAPP law] is seriously mistaken” and “in for a rude awakening”).

Of course, if the forum-shopping concerns were so overriding as to carry the day, then today’s decision—and our multi-decade endeavor of paring back the anti-SLAPP statute when invoked in federal court—are themselves unjustified. To avoid conflicts with federal procedural rules, our case law already weakens the protections of the anti-SLAPP statute for lawsuits filed in federal court. If forum shopping is the predominant concern, the majority should be overruling *Metabolife* and *Planned Parenthood*, not further weakening the anti-SLAPP statute by removing the protections associated with interlocutory appeals. Although it is questionable whether anyone would choose a federal forum based on the anti-SLAPP decisional law alone, the incentives for forum shopping in federal court on this basis already exist, and they will be even stronger after today’s decision. But we have never thought those concerns sufficient. And there is no indication in our multi-decade experiment with the anti-SLAPP laws that plaintiffs have specifically selected the federal courts on the theory that they are less protective of free speech interests.

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Third, and another variation on the above two points, some will argue that what California has done through its anti-SLAPP statute is effectively create a cause of action, akin to abuse of process, which federal courts are bound to respect under *Erie*. But the difficulty here is that California did not create a cause of action; it instead adopted a set of procedures that answer the same question as the Federal Rules of Civil Procedure. Other circuits have had little difficulty rejecting this same argument. As the Eleventh Circuit has explained, “the problem with the argument” is that “the means by which the [anti-SLAPP statute] pursues its special purpose is by *winnowing claims and defenses in the course of litigation*, just like Rules 12 and 56.” *Carbone*, 910 F.3d at 1354. It is “irrelevant” that the anti-SLAPP statute seeks to protect speech interests because it “advances that end by imposing a requirement on a plaintiff’s entitlement to maintain a suit over and above the requirements contemplated by the Federal Rules that control the same question.” *Id.*; *see also Abbas*, 783 F.3d at 1335 (“Had the D.C. Council simply wanted to permit courts to award attorney’s fees to prevailing defendants in these kinds of defamation cases, it easily could have done so. But the D.C. Council instead enacted a new provision that answers the same question about the circumstances under which a court must grant pre-trial judgment to defendants.”).

It thus proves nothing to observe that California’s anti-SLAPP statute promotes substantive interests. All procedural rules can be said to do that in some way or another. *See Shady Grove*, 559 U.S. at 404, 130 S.Ct. 1431 (explaining that “many state rules ostensibly addressed

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to procedure” could be recharacterized as “substantive,” and that “[p]leading standards, for example, often embody policy preferences about the types of claims that should succeed”). Acknowledging the substantive motivations behind the anti-SLAPP statute does not change the fact that it is, as the California Supreme Court described it, “a procedural device.” *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 39 Cal.4th 192, 46 Cal.Rptr.3d 41, 138 P.3d 193, 198 (2006). But a state procedural device has no place in federal litigation.

C

Drawing on the same three points above, Judge Bennett’s concurring opinion would conclude that, stripped down to its fee-shifting provision, California’s anti-SLAPP statute applies in federal court. But Judge Bennett’s concurrence is mistaken for the reasons I have just explained. And it would only perpetuate the lopsided circuit split that has emerged after nearly every other circuit to address the issue has disagreed with us. Contrary to Judge Bennett’s belief that the other circuits “framed the question differently” than he does, Bennett Concurrence at 706 n.4, the Second, Fifth, Tenth, Eleventh, and D.C. Circuits simply disagree with his reasoning. And three of these circuits have specifically rejected the notion that an anti-SLAPP attorneys’ fee provision could carry forward without the rest of the statute. *See La Liberte*, 966 F.3d at 88-89; *Klocke*, 936 F.3d at 247 n.6; *Abbas*, 783 F.3d at 1337 n.5.

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The core premise of Judge Bennett’s concurrence is that the anti-SLAPP statute “create[s] a substantive right.” Bennett Concurrence at 704. But as the Eleventh Circuit explained, “this argument is a nonstarter” because the anti-SLAPP statute “creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights.” *Carbone*, 910 F.3d at 1355 (quoting *Makaeff*, 715 F.3d at 273 (Kozinski, C.J., concurring)); see also *Klocke*, 936 F.3d at 247. Judge Bennett’s position is also at odds with the California Supreme Court’s own repeated description of the anti-SLAPP statute as “a procedural device,” *Kibler*, 46 Cal.Rptr.3d 41, 138 P.3d at 198, and “procedural statute,” *Soukup v. Law Offices of Herbert Hafif*, 39 Cal.4th 260, 46 Cal.Rptr.3d 638, 139 P.3d 30, 43 (2006).

The only reason that Judge Bennett can even suggest otherwise is because our cases have now rejected various aspects of the anti-SLAPP law as inconsistent with the Federal Rules of Civil Procedure. But contrary to his assertion that we have “reconciled” the anti-SLAPP statute with Rules 12 and 56, Bennett Concurrence at 705 n.3, 706-08, 708 n.6, no reconciliation was accomplished, nor was it even possible: we simply rewrote the anti-SLAPP statute wholesale. The fact that we had to do that should have led us to conclude that the anti-SLAPP statute does not apply in federal court at all. It does not justify Judge Bennett’s effort to re-label as substantive a reconstructed, federal-court-only anti-SLAPP statute that looks nothing like the anti-SLAPP statute that applies in California state court. Judge Bennett’s position thus has no foothold in the statute he would purport to

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apply. And we have no authority to order fee-shifting “independent of any statute.” *Lackey*, 604 U.S. at 199, 145 S.Ct. 659 (quoting *Alyeska Pipeline*, 421 U.S. at 249, 95 S.Ct. 1612).

* * *

We should have held that California’s anti-SLAPP statute does not apply in federal court. When the issue presents itself again, which it surely will, I hope we will end our confusing efforts to meld federal and state procedural law. No authority permits us to blend these two bodies of law as we have, an endeavor that has bedeviled federal practice and left in its wake a version of the anti-SLAPP statute that bears no resemblance to the real thing.

**APPENDIX B — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA, FILED APRIL 17, 2024**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 3:21-cv-01909-RBM-VET

GOPHER MEDIA LLC, *et al.*,

Plaintiffs,

v.

ANDREW MELONE, *et al.*,

Defendants.

Signed April 17, 2024

ORDER:

**(1) DENYING PLAINTIFFS AND
COUNTERDEFENDANTS' MOTION TO DISMISS
DEFENDANTS AND COUNTERCLAIMANTS'
THIRDA MENDED COUNTERCLAIMS AND STRIKE
PORTIONS THEREOF [FRCP 12(B)(6); 12(F)]**

**(2) STRIKING PLAINTIFFS AND
COUNTERDEFENDANTS' SPECIAL MOTION TO
STRIKE/ANTI-SLAPP MOTION (CCP SECTION
425.16) AS TO COUNTERCLAIMANTS' THIRD**

*Appendix B***AMENDED COUNTERCLAIMS AND MOTION TO STRIKE PORTIONS THEREOF****[Docs. 78, 79]**

Pending before the Court is Gopher Media LLC, doing business as Doctor Multimedia (“DMM”), and Ajay Thakore’s (collectively, the “Plaintiffs”) motion to dismiss Andrew Melone and AGFM Family Enterprises, LLC, doing business as American Pizza Manufacturing (“APM”)’s (collectively, the “Defendants”) third amended counterclaims (“TACC”) and strike portions thereof [FRCP 12(b)(6); 12(f)] (“MTD”). (Doc. 78-1.) The Defendants filed an opposition to Plaintiffs’ MTD (“Opp. to MTD”). (Doc. 81.) Plaintiffs filed a reply brief in response to Defendants’ Opposition (“Reply to MTD”). (Doc. 82.)

Moreover, pending before the Court is Plaintiffs’ special motion to strike/anti-SLAPP motion (CCP Section 425.16) as to Defendants’ TACC and motion to strike portions thereof (“Anti-SLAPP Motion”). (Doc. 79-1.) Defendants filed an opposition to Plaintiffs’ Anti-SLAPP Motion. (“Opp. to Anti-SLAPP Motion”). (Doc. 83.) Plaintiffs filed a reply brief in response to Defendants’ Opposition (“Reply to Anti-SLAPP Motion”). (Doc. 84.) Defendants also filed an objection and request to strike Plaintiffs’ evidence submitted in the reply (“Objection to Reply to Anti-SLAPP Motion”). (Doc. 85.)

In their MTD, Plaintiffs argue Defendant Melone does not have standing to bring a trade libel claim (First

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Cause of Action). (Doc. 78-1 at 12-14.)¹ Plaintiffs argue Defendants' trade libel claim fails because they do not allege special damages, the statements at issue are not false statements of fact, and the statements do not concern the quality of APM's products or services. (*Id.* at 14-24.) Plaintiffs also argue Defendants' defamation claim (Second Cause of Action) fails because the statute of limitations has run on the claim. (*Id.* at 24-25.) Plaintiffs argue the defamation claim fails because the common interest privilege applies, Defendants are public figures subject to the actual malice standard, the alleged statements do not appear to have any link to Plaintiffs, and the statements are not false statements of fact. (*Id.* at 25-30.) Plaintiffs also argue Defendants' Unfair Competition Law ("UCL") claim (Third Cause of Action) fails because Defendants are neither aggrieved customers nor competitors of Plaintiffs. (*Id.* at 30-31.) Lastly, Plaintiffs contend Defendants' declaratory relief claim (Fourth Cause of Action) is not pled with specificity as to future harm, is vague, and seeks relief for future, speculative conduct of third parties not named in the complaint. (*Id.* at 31-33.)

In their Anti-SLAPP Motion, Plaintiffs first argue consumer reviews of publicly offered products or services implicate issues of public interest under the first Anti-SLAPP prong and are not commercial speech subject to an Anti-SLAPP exception. (Doc. 79-1 at 12-14.) Plaintiffs argue Defendants cannot prevail on their trade libel (First Cause of Action) or defamation (Second Cause

1. The Court cites the CM/ECF pagination unless otherwise noted.

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of Action) claims because the statements at issue are not false statements of fact, are not ‘of and concerning’ Defendants, there is no admissible evidence supporting damages, and the term ‘take-n-bake’ is not synonymous with Defendants. (*Id.* at 14-17, 18, 20-26.) Plaintiffs additionally argue Defendants must prove actual malice because they are public figures, but even if they are not public figures, they fail to prove negligence. (*Id.* at 17-18.) Plaintiffs also argue there is no admissible evidence they had anything to do with the alleged fake reviews. (*Id.* at 19-20.) Plaintiffs argue there is no probability of success on the trade libel claim because trade libel can only concern one’s business or products, not personal reputation, and Defendants have no proof of special damages. (*Id.* at 26-28.) Plaintiffs also argue Defendants failed to identify particular purchasers who refrained from dealing with Defendants due to the allegedly false trade libel. (*Id.* at 27-28.) Plaintiffs argue the statute of limitations has run on the new defamation claim (Second Cause of Action). (*Id.* at 28.) Plaintiffs argue Defendants cannot prevail on the UCL claim (Third Cause of Action) because Defendants are not aggrieved customers or competitors of Plaintiffs and there are insufficient allegations of Plaintiffs’ ties to alleged vandalism in the TACC. (*Id.* at 28-30.) Lastly, Plaintiffs argue the declaratory relief claim (Fourth Cause of Action) fails because it seeks to affect uncertain future conduct of third parties not named in the complaint. (*Id.* at 30-31.)

The Court finds the matter suitable for determination on the papers and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below,

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Plaintiffs' MTD (Doc. 78-1) and Plaintiffs' Anti-SLAPP Motion are **DENIED**.

I. BACKGROUND

The facts alleged in Defendants' TACC are as follows.

A. Inception of Dispute

The City of San Diego converted the parking spaces outside of Defendant APM into 15-minute parking zones. (TACC ¶ 9.) Beginning in October 2020, Plaintiff Thakore, on a daily or weekly basis, illegally parked his luxury high-end vehicles outside of Defendant APM. (*Id.*) Upon information and belief, Plaintiff Thakore was unhappy with the parking zone changes because it “somehow impeded his ability to frequent other La Jolla business establishments, mainly the neighboring Carino’s Restaurant and Verde’s El Rancho.” (*Id.* ¶ 10.) Defendants believe Plaintiff Thakore has a financial, personal, or some other substantial interest or relationship in Carino’s due to his “multi-hour visits to the restaurant and his promotion of Carino’s in his targeted attacks against [Defendant] APM.” (*Id.*) “Former [DMM] employee, Andrew Hoffman, stated under oath that Thakore has a 25% ownership interest in Carino’s, an APM competitor.” (*Id.* ¶ 31.)

B. Fake Negative Reviews

On August 12 and 24, 2021, Plaintiff Thakore used Plaintiff DMM “to post more than a hundred fake negative

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reviews against [Defendant APM], its employees, and [Defendant] Melone personally on Google and Yelp.” (*Id.* ¶ 11.) Many of the reviews “originated from [Plaintiff DMM] and employees within the company or included [Plaintiff DMM’s] company logo in their review.” (*Id.*) “Three former [DMM] employees confirmed that [Plaintiffs] provided bonuses to employees who wrote fake reviews about APM, among others.” (*Id.* ¶ 39.) The reviews caused Defendant APM’s Google rating to drop from 5 to 2.9 stars during its busy summer season. (*Id.* ¶ 11.) Before these reviews, Defendant APM received an average of 6 reviews per month, and very few, if any, were negative. (*Id.*) A private investigation confirmed that more than 140 false reviews were posted during this time; many reviewers who posted multiple reviews had public ties to Plaintiffs. (*Id.*) Google representatives who assisted in removing the fake reviews told Defendants they recognized Plaintiffs as “past offenders of posting false reviews, which Google relied on to expedite the removal of the false reviews.” (*Id.* ¶ 15.)

The falsity of the reviews is evidenced by claims such as “[Defendant] APM selling burnt pizza when the business does not even cook the pizza (since it is meant to take home and cook).” (*Id.* ¶ 11.) Other false statements included claiming Defendant APM “smelled like old fish inside,” “[t]he owner laughed at me when I said my name for the order. No respect for humans or animals here,” and “[w]orst pizza ever, I got food poisoning.” (*Id.*)

Upon information and belief, Plaintiff Thakore “paid or otherwise encouraged employees and agents of

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[Plaintiff DMM] to post the negative reviews.” (*Id.* ¶ 12.) At least one former Plaintiff DMM employee informed Defendants that Plaintiff DMM encouraged this behavior, and Plaintiff Thakore engaged in the conduct in the past. (*Id.*) In 2019, a separate lawsuit alleging similar payments and encouragement to post false reviews was filed against Plaintiffs in the Superior Court of California, County of San Diego (*Marinkovich, et al. v. Thakore, et al.*, Case No. 37-2019-00063378). (*Id.*)

On August 14, 2021, Defendant Melone asked Plaintiff Thakore to take down the reviews, and Plaintiff Thakore responded “this is only the beginning.” (*Id.* ¶ 13.) On August 20, 2021, Plaintiff Thakore approached Defendant Melone and said “How do you like those reviews? Get ready. There’s [sic] 1,000 more where those came from.” (*Id.* ¶ 14.)

C. Storefront

At times, Plaintiff Thakore “would sit in his vehicle outside of [Defendant APM] while blowing marijuana smoke into the restaurant and toward its employees and customers.” (*Id.* ¶ 16.) On at least one occasion, he “threw marijuana paraphernalia at an [APM] employee who was also a minor.” (*Id.*)

At other times, Plaintiff Thakore would display messages on his vehicle attacking Defendant APM, including on September 26, 2021, putting a sign on his Ferrari that read “[o]nly losers get Take N Bake pizza.” (*Id.* ¶ 17.) Between September 29 and October 2,

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2021, Plaintiff Thakore parked his Maybach in front of Defendant APM with the sign “Take N Bake Pizza Sucks.” (*Id.* ¶ 18.) On October 4, 2021, he parked his Ford Raptor in front of Defendant APM for several days displaying “gun scopes” over the sign “Take N Bake Pizza” and leveled false accusations of racism targeting Defendant APM. (*Id.* ¶ 19.) On at least two occasions on October 3 and 9, 2021, Defendants are informed and believe Plaintiff Thakor commissioned planes to fly over Defendant APM with messages including “Carinos Pizza is Better Than Take-n-Bake” and “Just Say No to Take-n-Bake Pizza.” (*Id.* ¶ 20.) On one occasion, Plaintiff Thakore disrupted Defendant APM’s business by parking all of his cars in front of the store to block customer parking and honked his horn for 30 seconds two times during business hours. (*Id.* ¶ 25.)

D. Payment to Harass

On multiple occasions, Plaintiff Thakore paid individuals to harass Defendant APM on Instagram, including by ordering from Carino’s pizza and mentioning Defendant APM “sucks” in exchange for \$100 worth of free food. (*Id.* ¶ 21.) Consequently, on one occasion, Defendant APM received seven calls in five minutes with messages such as “[y]our pizza fucking sucks,” “[f]uck you for kicking dogs and being racist,” and “I’ll never come eat at your restaurant, ever.” (*Id.* ¶ 22.) The messages pertained to inflammatory and objectively false statements Plaintiff Thakore posted to social media, including that Defendant APM “[k]icks handicapped dogs, uses frozen crust, hates anyone of color, despises the first amendment and gets

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sued for 10 million dollars. If you support Take n Bake pizza you support animal abuse, racism and frozen crust” and that “he” at “Take n Bake” called Plaintiff Thakore a “sandn***er.” (*Id.* ¶ 23.)

E. Customer Harassment

On October 5, 2021, an APM customer entered Defendant APM crying, asking to use their business phone after she confronted Plaintiff Thakore about the derogatory/inflammatory vehicle wraps. (*Id.* ¶ 24.) The customer explained Plaintiff Thakore and his associate “retaliated by accosting and taking her phone away from her. She called the police and filed a report.” (*Id.*)

F. Conduct After Filing of This Case (Complaint Filed November 9, 2021)

On November 10, 2021, Plaintiff Thakore parked in front of Defendant APM and opened a briefcase with thousands of dollars, dumping it on the sidewalk in front of customers and stating, “[t]his is suit money motherf***er!” (*Id.* ¶ 26.) On December 8, 2021, while Defendant Melone was speaking with customers, Plaintiff Thakore yelled “[y]ou’re going down b***ch!” (*Id.* ¶ 27.)

G. Plaintiff Thakore’s Criminal History

Plaintiff Thakore’s increasingly volatile conduct is concerning given his criminal history. (*Id.* ¶ 28.) On August 23, 2019, Plaintiff Thakore pled guilty to making a criminal threat (Cal. Penal Code § 422) and vandalism (Cal. Penal Code § 594). (*Id.*)

*Appendix B***H. Response to Counterclaims (Initial Counterclaims filed January 3, 2021)**

When Defendants filed their initial counterclaims in this matter, “[Defendant] APM experienced a series of attacks and vandalism at its store.” (*Id.* ¶ 29.) On January 12, 2022, Defendant APM’s sign was slashed, and a police report was filed. (*Id.*) On February 11, 2022, the day after Plaintiff Thakore accused Defendant APM of calling the police on him for illegally parking in front of the store, Defendant APM’s window was smashed. (*Id.*) Several weeks later, Defendant APM was vandalized when an individual appearing identical to the individual who smashed Defendant APM’s window spray painted graffiti on its wall. (*Id.*) Defendants believe these incidents occurred at the direction of or in coordination with Plaintiffs. (*Id.*)

I. Damages

Defendants have suffered direct financial loss and pecuniary reputational damages totaling \$955,239, including \$140,214 in net lost profits, \$48,825 for costs to repair vandalism, \$16,200 in increased insurance premiums, \$615,000 to repair Defendant APM’s products, goods and services, and more than \$215,662 in attorneys’ fees and costs. (*Id.* ¶ 30.)

J. Carino’s Promotion

Plaintiffs “engaged in multiple, weeklong promotions with Carino’s designed to disrupt and disparage APM’s

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Take-n-Bake pizza business, including an offer to Carino's customers who were told they would get free food from Carino's with the passwords 'Take-n-Bake sucks' or 'Fuck take-n-Bake.'" (*Id.* ¶ 32.) "During one of Plaintiffs' Carino promotions on October 9, 2022, [Plaintiff] Thakore, together with [DMM] employee Ryan Mann, offered customers standing in line at APM \$1,000 to leave and go to Carino's, with at least two of the customers accepting the payment. When others refused, Thakore threw a glass into the street and called them 'poor.'" (*Id.* ¶ 33.) "When Carino's ran out of food, [Plaintiff] Thakore posted on an Instagram story that his credit card is open at Pizza on Pearl (another nearby pizza competitor), and that drinks are free at Verdes Ranchero (neighboring Mexican restaurant) as long as people promised never to go to 'Take-n-Bake' because 'That Guy Fucking Sucks.'" (*Id.* ¶ 34.) "In his deposition and under oath, [Plaintiff] Thakore repeatedly refused to outright deny paying prospective APM customers to not eat at [Defendant] APM, saying only that he could 'not recall' doing such a thing." (*Id.* ¶ 35.)

K. Further Vandalism

"During the October 9, 2022, incident, [Plaintiff] Thakore's statements and conduct incentivized vandalism of [Defendant] APM by minors and others, including through inappropriate acts of intoxicated, drug induced behavior." (*Id.* ¶ 36.) "A woman informed [Defendant] Melone that her minor son and his group of minor friends were approached by Thakore, who offered them money to 'fuck up APM.' The mother informed [Defendant]

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Melone that her son’s friends accepted the payment and vandalized [Defendant] APM.” (*Id.* ¶ 37.) “In addition to the vandalism alleged above, [Defendant] APM has been vandalized on several more occasions, including July 15, 2022, and September 24, 2022, which occurred immediately after milestone events in this lawsuit, leaving the business covered in graffiti, broken glass, and higher insurance premiums.” (*Id.* ¶ 38.)

L. Litigation Threats

“Through lawsuits and/or threatened litigation and other mean[s], [Plaintiffs] have attempted to intimidate witnesses favorable to [Defendants], including APM customers, APM employees, and community members who have drawn [Plaintiff] Thakore’s ire, such as Austin Green, Ava Dallal, Rachelle Estrella, Mateen Golchin, Kyle Webster, Gabriel Wilson, Ian Dohm, Catherine Cox, Micah Whorton, Daniel Goodrich, Alex Yerbury, Jeff Chang, Angela Chang, Jason Brown, Michael Barry, Ray Higgins, David Odmark, Lori Sutherland, Avery [Last Name Unknown][,] and friends and associates of Avery who were paid by Thakore to not order food from [Defendants’] business.” (*Id.* ¶ 40.)

M. First Counterclaim—Trade Libel

Plaintiffs made provably false statements disparaging Defendants’ products, services, and business practices, including “a false review stating that APM sold burnt pizza when the business does not even cook the pizza (since it is meant to take home and cook); that Defendant

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APM ‘smelled like old fish inside,’ that a customer ‘got food poisoning’ from Defendant APM; that ‘[t]he owner laughed at me when I said my name for the order;’ a post with a picture of Defendant APM’s store and a statement that it ‘[k]icks handicapped dogs;’ and a post stating ‘he’ called Plaintiff Thakore a ‘sandn***er’ as he walked by ‘Take N Bake.’” (*Id.* ¶ 42.) “[Plaintiffs] have deprived [Defendants] of a market that they would otherwise would have found. Because of the prolific and online nature of [Plaintiffs’] actions, as well as [Plaintiffs’] intimidation of witnesses and refusal to identify witnesses in discovery, [Defendants] are unable to identify each and every one of the specific customers who have been dissuaded from purchasing goods and services from [Defendant] APM due to [Plaintiffs’] conduct.” (*Id.* ¶ 50.) “Although [Defendants’] business had just opened to the public in July 2020, months before [Plaintiffs] began their campaign of harassment, the trajectory of [Defendants’] sales following [Plaintiffs’] disparaging comments was substantially less than what [Defendants] would have earned but for [Plaintiffs’] disparaging comments.” (*Id.* ¶ 51.) Defendants’ expert “estimated that [Defendant] APM’s average monthly sales would have increased by 12.9 percent from \$36,768 per month in 2020 to \$41,510 per month in 2021 totaling \$498,125 for the 12 months ending December 31, 2021. Discounting increased expenses for the lost sales, Ms. Mangan estimated that [Defendant] APM’s lost net profits from August 1, 2021, through December 31, 2025, equal \$140,214.” (*Id.* ¶ 52.) “Given the expected sales of [Defendants] given the market conditions that existed, there are no other reasonable explanations or other causes for [Defendants’] loss of net profits.” (*Id.* ¶ 53.)

*Appendix B***N. Second Counterclaim—Defamation**

Plaintiffs made the same provably false statements underlying the trade libel claim “publicly to individuals other than [Defendants], including on popular internet platforms like Google and Yelp, and to pedestrians and drivers who pass [Defendant] APM’s storefront along La Jolla Blvd., all of whom would reasonably understand that the statements, including any references to Take N Bake and [Defendant] APM’s owner, were about [Defendants].” (*Id.* ¶ 60.) “[T]he statements tended to injure [Defendants] in their business, occupation, private life, and their professional reputation, and exposed [Defendants] to hatred, contempt, ridicule, and shame, and/or have discouraged others from associating or dealing with [Defendants] in the form of lost business, harassment, and vandalism.” (*Id.* ¶ 61.) “Independent of [Defendant] APM, [Plaintiffs’] disparaging attacks will stick with [Defendant] Melone in his personal life and whatever future endeavor he may pursue, causing him reputational and emotional harm. Likewise, in the close-knit community of La Jolla, where residents associate [Defendant] APM with [Defendant] Melone, the reputation of [Defendant] Melone’s business services has been diminished.” (*Id.* ¶ 66.)

O. Third Counterclaim—Unfair Business Competition

“[Plaintiffs’] actions were unlawful in part because, as set forth above and further described in [Defendants’] claims for trade libel and defamation, [Plaintiffs] violated

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California Civil Code section 43 (“every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations”), Section 43 (defamation), Section 45 (libel), and Section 46 (slander).” (*Id.* ¶ 73.) “[Plaintiffs’] actions were also unlawful in part because, as described above, [Plaintiffs’] were responsible for a series of vandalism attacks to [Defendants’] storefront in violation of Civ. Code section 1708[.]” (*Id.* ¶ 74.)

P. Fourth Counterclaim—Declaratory Relief

“An actual controversy exists between [Defendants] and [Plaintiffs] as set forth in this Counterclaim giving rise to questions about the parties’ rights and obligations, including [Plaintiffs’] disparaging and defamatory conduct to [Defendants]; harassment towards [Defendants’] employees and customers; and vandalism to [Defendant] APM’s storefront. These controversies are definite and concrete, real and substantial, and subject to specific relief.” (*Id.* ¶ 78.) “Pursuant to the Declaratory Judgment Act 28 U.S.C. § 2201, [Defendants] seek a declaration that [Plaintiffs] must cease all unlawfully disparaging and defamatory conduct toward [Defendants], to cease all harassing conduct toward [Defendant] APM’s employees and customers, and to cease all actions that cause or contribute to the vandalism of [Defendants’] property.” (*Id.* ¶ 79.)

*Appendix B***II. LEGAL STANDARD****A. Motion to Dismiss**

“A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). An action may be dismissed for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

B. Law of the Case

“The law of the case doctrine provides that ‘a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.’” *United States v. Cuddy*, 147 F.3d

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1111, 1114 (9th Cir. 1998) (quoting *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)). “The law of the case doctrine does not . . . bar a court from reconsidering its own orders before judgment is entered or the court is otherwise divested of jurisdiction over the order.” *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018). “[W]hen an original complaint is dismissed without prejudice, the filing of an amended complaint does not ask the court to reconsider its analysis of the initial complaint. The amended complaint is a new complaint, entitling the plaintiff to judgment on the complaint’s own merits; we do not ask whether the plaintiff is ‘precluded’ or ‘barred’ by the prior ruling.” *Id.* at 1043. However, “[i]f the district court determines the amended complaint is substantially the same as the initial complaint, the district court is free to follow the same reasoning[.]” *Id.* “The district court may decide the second motion to dismiss in the same way it decided the first, but permitting the filing of an amended complaint requires a new determination.” *Id.*

The law of the case doctrine does not apply to Defendants’ TACC, which is a new complaint, entitling Defendants to judgment on the complaint’s own merits. *See Askins*, 899 F.3d at 1043. However, as explained throughout this Order, the Court relies on its reasoning in resolving Plaintiffs’ prior motion for judgment on the pleadings concerning the parties’ substantially similar arguments and factual allegations. Otherwise, the Court analyzes any new factual allegations and related arguments for the first time in this Order.

*Appendix B***III. DISCUSSION****A. Format and Page Limits**

Under Civil Local Rules 5.1(a), “[e]ach document filed, including exhibits where practicable, must be in English, plainly written, or typed in double space on one side of the document, line numbered in the left margin with not more than 28 lines per page, and letter size.” Under Civil Local Rule 7.1(h), “[b]riefs or memoranda in support of or in opposition to all motions noticed for the same motion day must not exceed a total of twenty-five (25) pages in length, per party, for all such motions without leave of the judge who will hear the motion. No reply memorandum will exceed ten (10) pages without leave of the judge.”

Plaintiffs’ MTD (Doc. 78-1) and Plaintiffs’ Anti-SLAPP Motion (Doc. 79.1.) violate Civil Local Rules 5.1(a) by exceeding the 28 line per page limit and therefore also violate Civil Local Rule 7.1(h)’s 25-page limit given all 25 pages are used in full in both motions. Plaintiffs did not seek leave of the Court to file an oversized brief for either motion. The parties are warned that, going forward, any document that fails to comply with Civil Local Rules 5.1(a) or 7.1(h), or any other Civil Local Rules, will not be considered by the Court. In the event a noncompliant document is filed, opposing counsel should immediately file a motion to strike the noncompliant document with the Court and not respond or otherwise oppose the noncompliant document. The Court will rule on whether the document complies and, if not, whether sanctions are appropriate. If the Court finds the document is compliant, it will reset the briefing

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schedule. Any effort to use a motion to strike a compliant document as a delay tactic will not be tolerated.

B. Motion to Dismiss**1. Extrinsic Evidence**

Plaintiffs cite extrinsic evidence in their MTD. (*See* Doc. 78-1.) Defendants object to Plaintiffs' use of extrinsic evidence at the pleading stage. (Doc. 81 at 10-11.) "A court may . . . consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Plaintiffs do not provide any basis in their moving brief for the Court to consider their attached exhibits on a motion to dismiss. The Court declines to consider Plaintiffs' new argument raised in reply that such matters were incorporated by reference into the TACC. (*See* Doc. 82 at 2-6.) *See Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966, 975 (S.D. Cal. 2015) ("An argument first raised in a reply brief need not be considered.") (citing *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007)).² The Court also declines Plaintiffs' request that the Court convert their MTD into a motion for summary judgment. (Doc. 82 at 6.) *See Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 925 n.6 (9th Cir. 2011) ("The district court had discretion

2. The Court will not entertain new arguments raised for the first time in Reply briefs.

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not to convert the motion for judgment on the pleadings into a summary judgment motion.”). Accordingly, Defendants’ objection is **SUSTAINED**. The Court will not consider extrinsic evidence at the pleading stage not properly incorporated by reference or judicially noticed.

2. Trade Libel—First Counterclaim³**a) Defendant Melone’s Standing**

Plaintiffs argue Defendant Melone does not have standing to bring a trade libel claim as an individual, but only as an owner of Defendant APM, and that no allegedly false statement concerned Defendant Melone. (Doc. 78-1 at 12-14.) Defendants respond the Court has already ruled Defendant Melone has standing to bring a trade libel claim for false statements about Defendant APM, that certain statements refer to Defendant Melone as the sole owner of Defendant APM, and that they “do not assert Melone’s reputational harm as an element of damages under their trade libel claim.” (Doc. 81 at 14-15.)

The Court previously determined that Defendant Melone, as the owner of Defendant APM, “has standing to sue for trade libel concerning false statements about Defendant APM.” (Doc. 71 at 10-11.) The Court also

3. The Court denies Plaintiffs’ request that it rule on whether every alleged statement in the TACC is a false statement of fact or an opinion. (Doc. 78 at 2-3.) Defendants identify the alleged false statements that they are proceeding on for their trade libel and defamation claims (*see* TACC ¶¶ 42-43, 58-59), and the Court need not go further.

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determined those alleged false statements include certain statements concerning the character of APM's business and, by extension, the conduct of its owner, Defendant Melone, or that of his employees. (*Id.* at 14-15, 15 n.4, n.5.; TACC ¶¶ 11 ("The owner laughed at me when I said my name for the order"), 23 ("I just walked by Take n Bake and he called me a sandn***er".)) While Defendant Melone does not have standing as an individual to sue for trade libel concerning his personal reputation, he does have standing as an owner of Defendant APM to sue for statements concerning the quality of its products and the character of its business.

b) False Statements

Plaintiffs argue all the statements alleged to be trade libel are not false statements but rather opinions, advertisements, commercial speech, or hyperbole. (Doc. 78-1 at 18-24.) Defendants respond the Court previously identified the allegedly false statements actionable for trade libel. (Doc. 81 at 16.) Defendants contend the opinions in the TACC provide context to those alleged false statements, but Defendants will not seek damages for those opinions. (*Id.* at 15-18.)

The Court previously determined which writings are alleged false statements about the quality of Defendants' goods and the character of their business, and those statements that are non-actionable opinions. (Doc. 71 at 13-16.) Defendants' trade libel claim properly proceeds only as to those statements the Court identified as alleged false statements. (*See* TACC ¶ 42.)

*Appendix B***c) Special Damages**

Plaintiffs argue Defendants failed to allege special damages, including by identifying particular customers and transactions of which Defendants were deprived due to Plaintiffs' trade libel. (Doc. 78-1 at 14-18.) Plaintiffs further argue the expert reports attached to the TACC should be stricken and not considered because they are improperly attached, and the Court should also not consider the statements in the TACC derived from those reports. (*Id.* at 15-16.) Defendants respond they have sufficiently alleged a loss of market or general business loss caused by Plaintiffs' conduct under the Restatement (Second) of Torts Section 633, Comment (h). (Doc. 81 at 18-20.) Defendants also respond the TACC does not rely on expert reports but incorporates expert findings to support their market loss theory. (*Id.* at 21-24.)

Plaintiffs' motion to strike the expert reports attached to the TACC is **DENIED** as Plaintiffs do not address the standard to strike from a pleading under Federal Rule of Civil Procedure 12(f). While the Court will disregard Defendants' expert reports attached to the TACC, the Court will consider the non-conclusory allegations in the TACC derived from expert reports pertaining to Defendants' market loss or general business loss theories of special damages. *See Jiaxing Super Lighting Elec. Appliance Co. v. Bruggeman*, Case No. 21-CV-08489-MMC, 2023 WL 4628974, at *4 (N.D. Cal. July 18, 2023) ("Although [m]ost district courts within the circuit have concluded that it is inappropriate to consider an expert affidavit [attached to the complaint] on a motion to dismiss

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under Rule 12(b)(6), plaintiffs may include [an] expert’s nonconclusory assertions within specific paragraphs in the complaint.”) (internal quotation marks and citations omitted); *In re Resonant Inc. Sec. Litig.*, Case No. CV 15-1970 SJO (VBKx), 2016 WL 6571267, at *5 (C.D. Cal. July 11, 2016) (“Because expert testimony is not barred from being plead directly into a complaint, the Court does not strike Dr. Phinney’s expert opinion from the SAC itself.”) (internal citation omitted).

As the Court previously explained, “the plaintiff can proceed on a theory of loss of market or general business loss where they can plead the loss with reasonable certainty and eliminate other causes.” (Doc. 71 at 17) (citing *Bilinski v. Keith Haring Found., Inc.*, 632 F. App’x 637, 641-42 (2d Cir. 2015); Restatement (Second) of Torts, Section 633, Comment (h).) To adequately plead general business loss, Defendants must allege facts “showing an established business, the amount of sales for a substantial period preceding the publication, the amount of sales subsequent to the publication, [and] facts showing that such loss in sales were the natural and probable result of such publication.” *Homeland Housewares, LLC v. Euro-Pro Operating LLC*, No. CV 14-03954 DDP (MANx), 2014 WL 6892141, at *4 (C.D. Cal. Nov. 5, 2014) (quoting *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1047 (C.D. Cal. 1998)). Under Restatement (Second) of Torts Section 633, “(1) [t]he pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of

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vendibility or value caused by disparagement, and (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.”

Defendants have adequately pled special damages in the form of loss of market or general business loss. Specifically, Defendants pled they suffered direct financial loss and pecuniary reputational damages totaling \$140,214 in net lost profits and 615,000 to repair Defendants APM’s products, goods, and services. (*See* TACC ¶¶ 30, 51-52.) They also pled that given expected sales and market conditions, there are no other reasonable explanations or causes for their loss of net profits apart from Plaintiffs’ alleged trade libel. (*See id.* ¶ 53.) *See Franklin Fueling Sys., Inc. v. Veeder-Root Co.*, Civ. No. S-09-580 FCD/JFM, 2009 WL 2462505, at *6 (E.D. Cal. Aug. 11, 2009) (finding special damages adequately pled where plaintiff alleged it suffered lost sales decreasing its market share from 95% to 50-75% and that the decrease in sales and market shares was due to defendant’s dissemination of false marketing materials). However, Defendants may not proceed to recover special damages for trade libel for attorney’s fees and costs. (*See* TACC ¶ 30.) *See* Restatement (Second) of Torts, Section 633(1)(a)-(b); *see also Robinson v. HSBC Bank USA*, 732 F. Supp. 2d 976, 986 (N.D. Cal. 2010) (“If a claim for attorney[’]s fees and costs of suit could qualify as pecuniary or special damages for purposes of pleading a trade libel claim, then each and every false statement would be actionable without a showing that the false statement caused damage to an individual’s trade or property.”). Additionally, Defendants may not proceed

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to recover special damages for trade libel for the costs to repair vandalism and increased insurance premiums as Defendants have not explained how such damages derived from Plaintiffs' alleged trade libel.

Thus, Plaintiffs' MTD is **DENIED** as to Defendants' trade libel claim.

3. Defamation—Second Counterclaim

“Defamation constitutes an injury to reputation; the injury may occur by means of libel or slander.” *Shively v. Bozanich*, 31 Cal. 4th 1230, 1242 (2003). “The tort of defamation ‘involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.’” *Redfearn v. Trader Joe’s Co.*, 20 Cal. App. 5th 989, 1007 (2018) (quoting *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007)). “Publication, which may be written or oral, is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made.” *Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1179 (2000). “The publication must be an intentional publication of a statement of fact.” *Redfearn*, 20 Cal. App. 5th at 1007 (citing *J-M Mfg. Co. v. Phillips & Cohen LLP*, 247 Cal. App. 4th 87, 97 (2016)). “It is an essential element of defamation that the publication be of a false statement of fact rather than opinion.” *Ringler Assocs. Inc.*, 80 Cal. App. 4th at 1181.

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“The dispositive question for the court is whether a reasonable factfinder could conclude that the published statements imply a provably false factual assertion.” *Moyer v. Amador Valley J. Union High Sch. Dist.*, 225 Cal. App. 3d 720, 724 (1990). “Courts analyze this issue using a totality of circumstances test—a review of the meaning of the language in context and its susceptibility to being proved true or false.” *Gallagher v. Philipps*, 563 F. Supp. 3d 1048, 1079 (S.D. Cal. 2021) (internal quotation marks and citations omitted). “The defamatory statement must specifically refer to, or be of and concerning, the plaintiff.” *Id.* (internal quotation marks and citations omitted). “Under California law, the defamatory statement must be specifically identified, and the plaintiff must plead the substance of the statement. Even under the liberal federal pleading standards, general allegations of the defamatory statements that do not identify the substance of what was said are insufficient.” *Erhart v. BofI Holding, Inc.*, 269 F. Supp. 3d 1059, 1083 (S.D. Cal. 2017). “The existence of a privilege is an affirmative defense that may be raised by demurrer only if the facts alleged in the complaint demonstrate the existence of a privilege.” *Gallagher*, 563 F. Supp. 3d at 1079.

a) Statute of Limitations

Plaintiffs argue the one-year statute of limitations has run on Defendants’ defamation claim for statements made in 2020 or 2021 and the claim is based on new allegations, so the relation back doctrine does not apply. (Doc. 78-1 at 24-25.) Defendants respond the allegations in the TACC underlying their defamation claim are identical to those

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underlying their trade libel claim and asserted in their original counterclaim filed in January 2022 based on conduct beginning in or around August 2021. (Doc. 81 at 25-26.)

Under Federal Rule of Civil Procedure 15(c)(1)(A) and (B), “[a]n amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; [or] (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.”

“An amended claim arises out of the same conduct, transaction, or occurrence if it ‘will likely be proved by the ‘same kind of evidence’ offered in support of the original pleading.” *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (quoting *Percy v. S.F. Gen. Hosp.*, 841 F.2d 975, 978 (9th Cir. 1988)). “To relate back, the original and amended pleadings [must] share a common core of operative facts so that the adverse party has fair notice of the transaction, occurrence, or conduct called into question.” *Id.* (internal quotation marks and citations omitted).

The Court concludes Defendants’ defamation claim relates back to the date of the original counterclaims—which were timely filed on January 3, 2022 for conduct beginning in August 2021. Each of the statements Defendants assert are defamatory were contained in Defendants’ original counterclaims. (*See* TACC ¶¶ 11, 23, 58; Doc. 14 ¶¶ 11, 23.)

*Appendix B***b) False Statements**

Plaintiffs argue all the allegedly defamatory statements are not false statements but rather opinions. (Doc. 78-1 at 27-30.) Plaintiffs argue Defendants do not allege the “who, what, and when” of the alleged false statements at issue. (*Id.* at 27.) Defendants respond that the Court already identified false statements of fact pertaining to the trade libel claim that also apply in the defamation context. (Doc. 81 at 26.) Defendants respond the TACC identifies when Defendants became aware of Plaintiff Thakore’s social media statements and the hundreds of false reviews posted by Plaintiff DMM’s employees and others, specifically at the behest of Plaintiff Thakore. (*Id.* at 27-28.)

As explained *supra* at III.B.2.b, Defendants are proceeding with their trade libel claim based on the alleged false statements the Court previously identified as subject to proof of falsehood in its prior order granting Plaintiffs’ motion for judgment on the pleadings. As the Court previously explained, these statements are of and concerning Defendants. (*See* Doc. 71 at 14, 15 n.4, n.5.) *See KM Strategic Mgmt., LLC v. Am. Cas. Co. of Reading PA*, 156 F. Supp. 3d 1154, 1167 (C.D. Cal. 2015) (“The statement also must specifically refer to or concern the defamed plaintiff in some way.”) (citing *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986)). Additionally, Defendants specifically identify and plead the substance of these statements. (*See* TACC ¶¶ 11, 23.) *See Erhart*, 269 F. Supp. 3d at 1083. These same statements also underly Plaintiffs’ defamation claim. (*See* TACC ¶ 58.) Accordingly,

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Plaintiffs have specifically identified alleged statements subject to proof of falsehood ‘of or concerning’ Defendants for their defamation claim.

c) Direct and Vicarious Liability

Plaintiffs argue none of the alleged false statements appear to be from them and most do not appear to have any link to them. (Doc. 78-1 at 27.)⁴ Defendants respond the TACC identifies Plaintiff Thakore’s social media statements and the hundreds of false reviews posted by Plaintiff DMM’s employees and others specifically at the behest of Plaintiff Thakore. (Doc. 81 at 27-28.) Defendants add that Plaintiff Thakore’s tasking Plaintiff DMM’s employees with authoring fake reviews and paying them for their efforts make him culpable for the defamatory nature of their comments. (*Id.* at 28.)

“One who takes a responsible part in a publication of defamatory material may be held liable for the publication.” *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 712 (2007). “[U]nder California law [a party] may be held liable for defamatory statements made by its employees under the doctrine of respondeat superior. Respondeat superior liability is triggered if the defamation occurred within the scope of the employee’s employment.” *Rivera v. Nat’l R.R. Passenger Corp.*, 331 F.3d 1074, 1080 (9th Cir. 2003) (citing *Farmers Ins. Group*

4. Defendants allege that Plaintiff DMM is the alter ego of Plaintiff Thakore where Plaintiff Thakore “completely controlled, dominated, managed, and operated Doctor Multimedia to suit his convenience.” (TACC ¶ 6.)

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v. County of Santa Clara, 11 Cal. 4th 992, 1004 (1995)). “As an alternate theory to respondeat superior, an employer may be liable for an employee’s act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort.” *Baptist v. Robinson*, 143 Cal. App. 4th 151, 167 (2006).

Defendants allege Plaintiff DMM is a digital marketing company that “handles social media and reputation management.” (TACC ¶ 4.) Defendants allege Plaintiff Thakore used Plaintiff DMM “to post more than a hundred fake negative reviews against American Pizza Manufacturing, its employees, and Melone personally on Google and Yelp” on August 12 and 24, 2021. (*Id.* ¶ 11.) Defendants allege “[m]any of the reviews originated from [Plaintiff DMM] and employees within the company or included [Plaintiff DMM’s] company logo in their review” and a private investigation found “many of the reviewers who posted multiple reviews had public ties to Thakore and his businesses.” (*Id.*) Defendants allege Plaintiff Thakore “paid or otherwise encouraged employees and agents of [Plaintiff DMM] to post the negative reviews” and three former Plaintiff DMM employees confirmed they were paid bonuses to write fake reviews about Defendant APM. (*Id.* at ¶¶ 12, 39.) Defendants also allege Plaintiff Thakore posted false statements concerning Defendants on social media. (*See id.* ¶ 23.)

Plaintiff Thakore can be held directly liable for alleged false statements posted to his social media account of and concerning Defendants. *See Overstock.com, Inc.*, 151 Cal. App. 4th at 712. And Plaintiffs can be held directly

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liable for using and encouraging their employees to post fake reviews containing alleged false statements about Defendants in exchange for bonus payments. *See Baptist*, 143 Cal. App. 4th at 167.

d) Common Interest Privilege

Plaintiffs argue that the common interest privilege applies to consumer information and public criticism of a matter of public interest. (Doc. 78-1 at 26.) Defendants respond Plaintiffs' statements do not qualify because they were made with malice to retaliate against Defendants and with the intent to harm Defendants. (Doc. 81 at 26-27.)

Under California Civil Code § 47(c), “[a] privileged publication or broadcast is one made . . . [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.” “The privilege applies where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest, which must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business[,] or similar relationship or [where] the defendant is protecting his [or her] own pecuniary interest.” *Cornell v. Berkeley Tennis Club*, 18 Cal. App. 5th 908, 949 (2017) (internal quotation marks and citations omitted). “[D]efendant generally bears the initial burden

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of establishing that the statement in question was made on a privileged occasion, and thereafter the burden shifts to plaintiff to establish that the statement was made with malice.” *Taus v. Loftus*, 40 Cal. 4th 683, 721 (2007).

Plaintiffs have failed to explain what purported common interest they share with the recipients of the alleged false statements in online reviews of Defendant APM and in Plaintiff Thakore’s Instagram posts and how the communications were reasonably calculated to protect or further that interest. Thus, the Court finds the common interest privilege does not apply.

e) Public Figure Actual Malice Standard

Relying on extrinsic evidence, Plaintiffs argue Defendants “are public figures that are subject to criticism by the public.” (Doc. 78-1 at 26.) Defendants respond that Plaintiffs invoke no authority for that position and rely on extrinsic evidence. (Doc. 81 at 27.) Defendants also respond, even if the Court considered the extrinsic evidence, simply being a restaurant owner and being interviewed about the business does not make the business or its owner a public figure. (*Id.* (citing *Vegod Corp. v. Am. Broad. Cos.*, 25 Cal. 3d 763, 769-70 (1979))).

A public figure designation arises in two situations, “[i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a

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public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). “A public figure in a defamation case cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not.” *Kaelin v. Globe Commc’ns Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998) (internal quotation marks and citations omitted).

As explained *supra* III.B.1, the Court will not consider extrinsic evidence on a motion to dismiss that was not properly incorporated by reference or judicially noticed. The TACC does not allege Defendants are public figures or allege any information from which the Court could infer as much. Accordingly, Plaintiffs have not proved Defendants are public figures subject to the actual malice standard for defamation.

Thus, Plaintiffs’ MTD is **DENIED** as to Defendants’ defamation claim.⁵

5. The Court declines to consider Plaintiffs’ new argument raised in their reply that the new defamation claim is highly prejudicial and was filed after the Rule 16 deadline. (*See* Doc. 82 at 6-8.) *See Chu*, 215 F. Supp. 3d at 975 (“An argument first raised in a reply brief need not be considered.”). The Court addressed Defendants’ request for leave to amend to add the new defamation claim in its prior Order on Plaintiffs’ motion for judgment on the pleadings as to the SACC and concluded Defendants did engage in undue delay in seeking to add the claim, but that Plaintiffs did not meet their burden to demonstrate undue prejudice. (*See* Doc. 71 at 33-34.)

*Appendix B***4. Unfair Competition—Third Counterclaim**

Plaintiffs argue neither Defendant has alleged facts establishing they are either members of the consuming public or competitors entitled to invoke the protections of Business & Professions Code § 17200, otherwise known as the UCL. (Doc. 78-1 at 30-31.) Defendants respond that they are not bringing a representative claim that is contractually based that would require establishing they are a consumer or competitor. (Doc. 81 at 29-31.)

As the Court previously explained, standing for UCL claims is simply restricted to persons, including corporations, who have suffered injury in fact and lost money or property because of unfair competition and is not restricted to aggrieved customers or competitors of Plaintiffs. (*See* Doc. 71 at 24-26.) Additionally, Defendants adequately allege they “suffered economic injury from [Plaintiffs’] unlawful and disparaging conduct in the form of lost profits, costs to repair [Defendants’] reputation, and property damage.” (TACC ¶ 75.)

Moreover, under the unlawfulness prong for a UCL claim, Defendants now sufficiently allege predicate violations, including through their trade libel and defamation claims, Plaintiffs’ violations of California Civil Codes § 43, 45, and 46, as well as § 1708 for their allegations of vandalism directed or coordinated by Plaintiffs. (Doc. 81 at 28-29.) Plaintiffs do not respond to Defendants’ argument under the unlawfulness prong.

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Accordingly, Plaintiffs' MTD is **DENIED** as to Defendants' UCL claim.

5. Declaratory Relief—Counterclaim Four

Plaintiffs argue Defendants' declaratory relief claim is not pled with the specificity required by law as all of the alleged conduct occurred three years ago and there is no specificity as to alleged future harm. (Doc. 78-1 at 31-32.)

Plaintiffs argue Defendants seeks relief for “unknown, speculative future conduct of third parties who are not named in the complaint and would involve the very sort of speculative, hypothetical factual scenario that would render such a judgment a prohibited advisory opinion.” (*Id.* at 32.) Plaintiffs argue, if Defendants' other causes of action are dismissed, this claim must be as well; they also argue this claim is duplicative of those claims and any order concerning the broad future hypothetical conduct would operate as an unconstitutional prior restraint. (*Id.* at 32-33.) Defendants respond they are only required to satisfy the Article III actual controversy standard for declaratory relief, which they do, and the most recent alleged vandalism took place in October 2022. (Doc. 81 at 31-32.) Defendants “seek a declaration that [Plaintiffs] must cease all unlawfully disparaging and defamatory conduct toward Counterclaimants, to cease all harassing conduct toward [Defendant] APM's employees and customers, and to cease all actions that cause or contribute to the vandalism of [Defendants'] property.” (TACC ¶ 79.)

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Under the Declaratory Judgment Act, “[c]ourts conduct a two-part analysis to determine if declaratory relief is appropriate under the circumstances: (1) the court determines whether an ‘actual controversy’ exists between the parties as required by Article III of the Constitution; and (2) the court considers, in its discretion, whether its jurisdiction should be extended over the actual controversy.” *Dias v. Spartan Micro, Inc.*, Case No. 8:22-cv-00834-JVS (KES), 2022 WL 17216820, at *7 (C.D. Cal. Sept. 14, 2022).

“Article III requires that there be a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Id.* at *8 (quoting *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991)). “The dispute must be (1) ‘definite and concrete, touching the legal relations of parties having adverse legal interests’; (2) ‘real and substantial’; and (3) ‘admit[ting] of specific relief through a decree of a conclusive character, as distinguishable from an opinion advising what the law would be upon a hypothetical state of facts.’” *Id.* (quoting *In re Adobe Sys., Inc. Priv. Litig.*, 66 F. Supp. 3d 1197, 1221 (N.D. Cal. 2014)). “Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

“The district court’s discretion to hear declaratory actions over which it has jurisdiction is guided by the

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Supreme Court's announcements in *Brillhart*." *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 672 (9th Cir. 2005). "The *Brillhart* factors are non-exclusive and state that, [(1)] [t]he district court should avoid needless determination of state law issues; [(2)] it should discourage litigants from filing declaratory actions as a means of forum shopping; and [(3)] it should avoid duplicative litigation." *Id.* (quotation marks and citations omitted). The Ninth Circuit has also identified additional considerations, including:

whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a 'res judicata' advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems. In addition, the district court might also consider the convenience of the parties, and the availability and relative convenience of other remedies.

Id. (citation omitted).

The Court will not dismiss Defendants' declaratory relief claim at this stage. Based on the alleged factual and legal assertions of harassment, defamation, and vandalism by Plaintiffs or others at Plaintiffs' direction, Defendants have established a substantial controversy

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between the parties with adverse legal interests “of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co.*, 312 U.S. at 273. Regarding immediacy, the Court is concerned that some of the alleged misconduct arises out of milestones in this judicial proceeding or otherwise during this proceeding, including alleged vandalism as recently as October 2022. Additionally, none of the *Brillhart* factors, or other factors impacting this Court’s discretion to decline to entertain a declaratory relief claim, are implicated in this case, nor have the parties addressed these factors. If Defendants succeed on any of their other claims but do not prove any damages, “declaratory relief [may] serve a useful purpose in clarifying and settling the legal relations between the parties and afford relief from their controversy.” *Gardner v. Reille*, Case No. 20-CV-01148-JSW, 2022 WL 19835361, at *3 (N.D. Cal. Jan. 11, 2022) (declining to dismiss declaratory relief claim where if plaintiff proved Eighth Amendment violation and no damages, declaratory relief may be appropriate).

Thus, Plaintiffs’ MTD is **DENIED** as to Defendants’ declaratory relief claim.

C. Anti-SLAPP Motion

Recently, the Ninth Circuit explained that “[i]n order to prevent the collision of California state procedural rules with federal procedural rules, we will review anti-SLAPP motions to strike under different standards depending on the motion’s basis.” *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir.

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2018). “In defending against an anti-SLAPP motion, if the defendants have urged only insufficiency of pleadings, then the plaintiff can properly respond merely by showing sufficiency of pleadings, and there’s no requirement for a plaintiff to submit evidence to oppose contrary evidence that was never presented by defendants.” *Id.* “[O]n the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 [summary judgment] standard will apply.” *Id.*

In their Anti-SLAPP Motion, Plaintiffs do not explain which challenges concern the legal sufficiency of the pleadings in the TACC and which challenges concern the factual sufficiency of Defendants’ claims. (*See* Doc. 79-1.) The Court will do its best to determine which challenges concern the legal sufficiency of the TACC subject to the motion to dismiss standard and which concern the factual sufficiency of Defendants’ claims subject to the summary judgment standard. However, before proceeding to the merits, the Court must consider the timeliness of Plaintiffs’ Anti-SLAPP Motion.

1. Timeliness**a) Case Law**

In *Sarver v. Chartier*, the defendants filed an anti-SLAPP motion almost a year after the plaintiff filed his complaint. 813 F.3d 891, 900 (9th Cir. 2016). The plaintiff argued that, under California Code of Civil Procedure § 425.16(f), an anti-SLAPP motion “may be filed within

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60 days of the service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper” and that the district court abused its discretion in accepting the motion after the 60-day deadline. *Id.* The Ninth Circuit held that “the timing controls imposed by section 425.16(f) directly collide with the more permissive timeline Rule 56 provides for the filing of a motion for summary judgment” and “decline[d] to apply the statute’s 60-day timeframe in federal court[.]” *Id.*

Subsequently, in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, the California Supreme Court explained that “Section 425.16 provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity.” 4 Cal. 5th 637, 642 (2018) (internal quotation marks and citations omitted). The California Supreme Court held that “section 425.16, subdivision (f), should be interpreted to permit an anti-SLAPP motion against an amended complaint if it could not have been brought earlier, but to prohibit belated motions that could have been brought earlier (subject to the trial court’s discretion to permit a late motion). This interpretation maximizes the possibility the anti-SLAPP statute will fulfill its purpose while reducing the potential for abuse.” *Id.* at 645. The California Supreme Court went on to explain that “limiting an anti-SLAPP motion to new causes of action can make the process more efficient. Claims unaffected by the anti-SLAPP motion might be able to go forward. Moreover, a rule limiting the anti-SLAPP motion to new causes of action can streamline the resolution of the motion and any ensuing appeal by limiting the number of issues to be resolved.” *Id.* at 646.

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In *Clifford v. Trump*, the district court explained:

No court in this Circuit, or the Fifth Circuit, has ruled on whether an anti-SLAPP motion, brought as a motion to dismiss as opposed to a motion for summary judgment, is subject to the 60-day deadline. To be sure, federal courts have held that the 60-day deadline in California's anti-SLAPP statute does not apply to anti-SLAPP motions that are analogous to motions for summary judgment. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (citing *Rogers v. Home Shopping Network, Inc.*, 57 F.Supp.2d 973, 982 (C.D.Cal.1999)). The 60-day deadline is a procedural rule under the *Erie* doctrine that conflicts with Federal Rule of Civil Procedure 56. *See Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016). This is because the 60-day deadline seeks to limit discovery and allow for anti-SLAPP motions at an early stage of litigation, while Rule 56 seeks to promote discovery, requiring motions for summary judgment after litigation has proceeded for some time. *See id.* As analyzed above, however, Mr. Trump's anti-SLAPP motion is analogous to a motion to dismiss, not a motion for summary judgment. The discovery rationale that underpins a case like *Metabolife International* does not exist here.

339 F. Supp. 3d 915 (C.D. Cal. 2018).

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In *Novel v. Los Angeles Cnty. Sheriff's Dep't* (“*Novel I*”), after the plaintiff filed an amended complaint, the district court, relying on *Newport Harbor Ventures, LLC*, found defendants’ anti-SLAPP motion untimely, explaining that the defendants failed to identify “any new allegations that make the previously pleaded slander per se claim subject to a new anti-SLAPP motion, nor can the Court discern any.” Case No. 2:19-cv-01922-RGK-AGR, 2020 WL 2089488, at *3 (C.D. Cal. Feb. 19, 2020). On reconsideration, the defendants argued the 60-day time limit did not apply in light of *Sarver*. *Novel v. Los Angeles Cnty. Sheriff's Dep't et al.* (“*Novel II*”), Case No. 2:19-cv-01922-RGK-AGR, 2020 WL 3884437, at *2 (C.D. Cal. Mar. 30, 2020). Relying on *Clifford*, the district court in *Novel II* found the Defendants’ anti-SLAPP motion was analogous to a motion to dismiss, not a motion for summary judgment invoking the discovery rationale underpinning *Metabolife* and *Sarvier*, and thus denied the motion for reconsideration. *Id.*

b) Analysis

Defendants filed their initial counterclaims on January 3, 2022. (Doc. 14.) Those counterclaims identified each of the alleged false statements at issue as well as Defendants’ trade libel, UCL, and declaratory relief claims. (*See id.* ¶¶ 11, 23, 29-38, 55-60.) Plaintiffs filed an answer rather than a motion to dismiss the initial counterclaims and did not file an anti-SLAPP motion then. (Doc. 18.) Defendants filed their first and second amended counterclaims on May 18, 2022 and June 7, 2022. (Docs. 34, 36.) Again, Plaintiffs filed an answer to the second amended counterclaims

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rather than a motion to dismiss the initial counterclaims and did not file an anti-SLAPP motion. (Doc. 37.) Discovery in this case was completed in December 2022. (Doc. 51.) Pretrial motions in this case, including motions for summary judgment, were due on May 1, 2023. (Doc. 53.) On that date, Plaintiffs filed a motion for judgment on the pleadings challenging, *inter alia*, Defendants' trade libel, UCL, and declaratory relief claims. (Doc. 56.) Plaintiffs did not file a motion for summary judgment and did not file an anti-SLAPP motion. On December 19, 2023, the Court granted Plaintiffs' motion for judgment on the pleadings, giving Defendants leave to amend their counterclaims. (Doc. 71.) Defendants filed the TACC on January 12, 2024, adding a defamation claim. (Doc. 72.) On February 2, 2024, Plaintiffs filed the instant Anti-SLAPP motion. (Doc. 79-1.)

Each of the alleged false statements subject to Plaintiffs' Anti-SLAPP Motion and Defendants' trade libel, UCL, and declaratory relief claims were in Defendants' initial counterclaims filed on January 3, 2022. (Doc. 14 ¶¶ 11, 23, 29-38, 55-60.) The alleged false statements and claims were also contained in Defendants' second amended counterclaims. (Doc. 36 ¶¶ 11, 23, 30-40, 58-64.) Plaintiffs did not file an anti-SLAPP motion attacking either the initial or second amended counterclaims before the pretrial motion deadline passed.

Thus, to the extent that Plaintiffs challenge the legal sufficiency of the trade libel claim and the UCL and declaratory relief claims concerning that underlying trade libel, those arguments are untimely. *See Newport Harbor*

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Ventures, LLC, 4 Cal. 5th at 646 (explaining anti-SLAPP motion for amended complaint limited to new causes of action); *Novel I*, 2020 WL 2089488, at *3 (failure to identify new allegations in amended complaint making previously pleaded claim subject to a new anti-SLAPP motion rendered anti-SLAPP motion untimely); *Novel II*, 2020 WL 3884437, at *2 (finding where anti-SLAPP motion is analogous to motion to dismiss, the discovery rationale underpinning *Metabolife* and *Sarvier* do not apply). The Court also determines there is not good cause to allow Plaintiffs to challenge the legal sufficiency of these claims in an anti-SLAPP motion at this stage given they had many prior opportunities to do so at the pleading stage, during/after the completion of discovery, and before the pretrial motion deadline.

The Court now considers whether Plaintiffs' challenges, if any, to the factual sufficiency of Defendants' trade libel and related UCL and declaratory relief claims are timely. In *Sarver*, the Ninth Circuit concluded that § 425.16(f)'s 60-day time limit directly collided with the more permissive timeline provided in Rule 56 for summary judgment and thus declined to apply that timeline in federal court. 813 F.3d at 900. The Court finds that the discovery rationale underlying Rule 56 in *Sarver* is inapplicable here where discovery was completed in December 2022 and the Federal Rules are better served in this case by requiring compliance with the deadlines those rules impose. Under Rule 56(b), "[u]nless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The Court reset the deadline for

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pretrial motions to May 1, 2023 following the conclusion of discovery in December 2022. (Doc. 53.) Plaintiffs chose not to file an anti-SLAPP motion concerning the SACC before the May 1, 2023 deadline for pretrial motions. Instead, they filed a motion for judgment on the pleadings. Plaintiffs waited until Defendants filed the TACC and then brought their Anti-SLAPP Motion on February 2, 2024, long past the completion of discovery and the deadline for pretrial motions. Thus, consistent with the deadlines imposed by the Federal Rules, the Court finds Plaintiffs' Anti-SLAPP Motion challenging the factual sufficiency of the trade libel and the UCL and declaratory relief claims deriving from the trade libel untimely. The Court also concludes there is not good cause to allow Plaintiffs to challenge the factual sufficiency of these claims in an anti-SLAPP motion at this stage given their failure to do so following the completion of discovery and before the pretrial motion deadline.

Additionally, the SACC contained vandalism allegations against Plaintiffs. (Doc. 36 ¶ 29.) Thus, to the extent Defendants' UCL and declaratory relief claims concern allegations of vandalism, Plaintiffs' challenges are untimely for the reasons discussed above. The Court also questions whether allegations of vandalism could even be subject to an anti-SLAPP motion. *United States v. Griefen*, 200 F.3d 1256, 1262 (9th Cir. 2000) (“[V]andalism can hardly be characterized as activity protected by the First Amendment.”) (citing *United States v. Albertini*, 472 U.S. 675, 686 (1985)); see also *In re Michael M.*, 86 Cal. App. 4th 718, 729 (2001) (“[I]t is untenable that conduct such as vandalism is protected by the First Amendment

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merely because those engaged in such conduct intend thereby to express an idea.”).

However, given Defendants’ addition of a new defamation claim in the TACC, and reliance on defamation in the UCL and declaratory relief claims, the Court finds good cause to consider Plaintiffs’ Anti-SLAPP motion as to the defamation claim and the portions of the UCL and declaratory relief claims deriving from that defamation. *See Newport Harbor Ventures, LLC*, 4 Cal. 5th at 646 (explaining rule limiting anti-SLAPP motion to new causes of actions); *Novel I*, 2022 WL 2089488, at *3 (explaining only new allegations making a previously pleaded claim subject to a new anti-SLAPP motion would be timely). Thus, Plaintiff’s Anti-SLAPP Motion can proceed only as to Defendants’ defamation claim and Defendants’ UCL and declaratory relief claims concerning the defamation.

2. Merits for Remaining Claims

As explained above, under California’s Anti-SLAPP statute, California Code of Civil Procedure § 425.16(b)(1), “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” “The phrase ‘act . . . in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’

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is defined by four specific categories of communications.” *Hilton*, 599 F.3d at 903 (citing Cal. Civ. Proc. Code § 425.16(e)(1)-(4)). As relevant here, in their Anti-SLAPP Motion, Plaintiffs state “[a] protected act includes ‘any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.’ (Cal. Code Civ. Proc. § 425.16(e).” (Doc. 79-1 at 11.) The Court therefore understands Plaintiffs to argue the statements at issue were made in a place open to the public or a public forum in connection with an issue of public interest under § 425.16(e)(3).⁶

“California courts evaluate a defendant’s anti-SLAPP motion in two steps. First, the defendant moving to strike must make ‘a threshold showing . . . that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant’s] right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in [subsection (e) of] the statute.” *Hilton*, 599 at 903 (quoting *Equilon Enters., LLC*, 29 Cal. 4th at 58). “Second, [i]f the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient

6. In Plaintiffs’ Reply to Anti-SLAPP Motion, they argue the counterclaims are subject to § 425.16(e)(4) for the first time. The Court will not consider this new argument in a reply brief. *See Chu*, 215 F. Supp. 3d at 975 (“An argument first raised in a reply brief need not be considered.”). But even if the Court did consider that new argument, the outcome on the public interest prong would be the same.

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and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *Id.* (internal quotation marks and citations omitted). “[T]hough the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” *Id.* (internal quotation marks and citations omitted).

a) Step 1—Public Interest

“At the first step, ‘the moving defendant must make a *prima facie* showing that the plaintiff’s suit arises from an act in furtherance of the defendant’s constitutional right to free speech.’” *Gunn v. Drage*, 65 F.4th 1109, 1118 (9th Cir. 2023) (quoting *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013)). “In making a *prima facie* showing, the ‘moving defendant bears the burden of identifying all allegations of protected activity[] and the [plaintiffs’] claims for relief supported by them.’” *Id.* (*Baral v. Schnitt*, 1 Cal. 5th 376, 396 (2016)).

The Court concludes Plaintiffs’ alleged false statements were made in a public forum, i.e., the Internet. *See Chaker v. Mateo*, 209 Cal. App. 4th 1138, 1146 (2012) (“The Internet is a classic public forum[.]”). However, the more complicated question is whether Plaintiffs’ alleged false statements were made in connection with an issue of public interest. Plaintiffs appear to argue that consumer-type reviews of publicly offered products or services implicate

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matters of public interest. (Doc. 79-1 at 12-13.) Defendants respond that the statements were not concerning an issue of public interest. (Doc. 83 at 14-22.)

i. Case Law

In *Wilbanks v. Wolk*, the defendant, acting as a consumer watchdog, established a website presenting information about viatical settlements and those who broker life insurance policies. 121 Cal. App. 4th 883, 889 (2004). The defendant posted on her website that plaintiff was being investigated by the California Department of Insurance and warned consumers that plaintiff's company was under investigation, provided incompetent advice, and was unethical. *Id.* at 890. The Court of Appeal found that the defendant's comments were not about a plaintiff in the public eye, the plaintiff's business practices did not affect a large number of people, and their business practices were not a topic of widespread public interest. *Id.* at 898. However, the Court of Appeal explained that consumer information, "at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest." *Id.* Specifically, the Court of Appeal elaborated "[t]hat the information provided here is in the nature of consumer protection information distinguishes this case from others recognizing that a publication does not become connected with an issue in the public interest simply because it is widely disseminated, or because it can be used as an example of bad practices or of how to combat bad practices." *Id.* at 900. The Court of Appeal concluded that "[i]n the context of information ostensibly provided to

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aid consumers choosing among brokers, the statements, therefore, were directly connected to an issue of public concern.” *Id.*

In *Chaker*, the plaintiff alleged the defendant posted derogatory statements about him and his forensics business on a website where the public comments on the reliability and honesty of various providers of goods and services and a social networking site with an open forum for public comment. 209 Cal. App. 4th at 1142. The Court of Appeal concluded the statements were of public interest because they “plainly fall within in the rubric of consumer information about Chaker’s ‘Counterforensics’ business and were intended to serve as a warning to consumers about his trustworthiness.” *Id.* at 1146. The Court of Appeal also concluded the plaintiff’s decision to join one of the websites and post a profile generating responses from the community means he recognized the website participants’ interest in knowing about his character before engaging with him on the website. *Id.* at 1146-47.

In *Jeppson v. Ley*, the defendant neighbor’s dog killed the plaintiff neighbor’s cat. 44 Cal. App. 5th 845, 848 (2020). The parties settled for \$2,000 and the settlement agreement contained a mutual non-disparagement provision. *Id.* Subsequently, on the neighborhood website Nextdoor.com, the defendant wrote a blog post about the plaintiff facing trespassing and vandalism allegations and being subject to a restraining order forcing him to relinquish guns. *Id.* at 848-49. Under the public interest prong, the Court of Appeal found the speech did not directly affect a large number of persons and was not

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a topic of widespread public interest on the internet where “the speaker’s words are merely an effort to gather ammunition for another round in the speaker’s neighborhood wrangle.” *Id.* at 856.

In *Woodhill Ventures, LLC v. Yang*, the defendant hired a bakery to make a birthday cake for his young son. 68 Cal. App. 5th 624, 627 (2021). The cake contained candy pills made of icing that looked realistic and the bakery denied knowing the cake was for a child as opposed to a pharmacy school graduate. *Id.* at 627-28. After calling the bakery, the defendant, who had a large social media following, posted on Instagram and Twitter about the incident with the bakery, making statements such as that the young child’s cake had prescription pills on it, and described the incident on his podcast two days later. *Id.* at 628-29. His followers conveyed harsh messages and threats to the bakery. *Id.* at 629.

The Court of Appeal examined each of the categories of statements or conduct qualifying as public interest, including 1) “[s]tatements or conduct that concern a person or entity in the public eye,” 2) “[s]tatements or conduct that could directly affect a large number of persons beyond the direct participants,” and 3) “[s]tatements or conduct involving a topic of widespread interest.” *Id.* at 631-32 (citing *Rand Res., LLC v. City of Carson*, 6 Cal. 5th 610, 621 (2019)). In evaluating defendant’s anti-SLAPP motion, the Court of Appeal found the social media posts were not concerning an issue of public interest. *Id.* at 632-33. Regarding a topic of widespread interest, the defendant argued his statements concerned candy confusion or

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children mistakenly eating pills believed to be candy. *Id.* at 632. The Court of Appeal explained “[a]gile thinkers always can create some kind of link between a statement and an issue of public concern. All you need is a fondness for abstraction and a knowledge of popular culture. . . . This pervasive potential means there must be some degree of closeness between the challenged statements and the asserted public interest.” *Id.* at 632 (internal quotation marks and citations omitted). The Court of Appeal held “while ‘candy confusion’ might be an issue of public interest, [defendant’s] statements did not discuss the danger of children confusing medications for candy. That was not [defendant’s] point. [Defendant’s] statements did not seek public discussion of anything. They aimed to whip up a crowd for vengeful retribution. They were an unprotected effort ‘to gather ammunition’ in his spat with [the bakery].” *Id.* at 632-33.

Regarding the public eye, the Court of Appeals concluded as to the bakery that “[m]ere mentions in national publications do not make Big Sugar a business in the public eye. Despite its name, Big Sugar is a small business. It has two shops in Los Angeles. That is all.” *Id.* at 634.

Regarding statements or conduct that could directly affect a large number of persons beyond the direct participants, the defendant argued the statements provided consumer protection information. *Id.* The Court of Appeal rejected that argument for various reasons, including that the defendant’s “quest for revenge did not give consumers information beyond his complaints about

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his one cake order.” *Id.* The Court of Appeal held “an attempt to exact a personal revenge’ by causing others to ostracize the target is not a protected public interest statement.” *Id.* at 635 (citing *Wilbanks*, 121 Cal. App. 4th at 900). The Court of Appeal also rejected the reasoning in *Chaker*:

Chaker does not follow the pattern of the cases we have just mentioned. The comments did not relate to a single transaction, or indeed to any transactions. Rather they seemed to express Wendy Mateo’s animosity and desire to sully Chaker’s reputation. We are uncertain her personal animosity was of public interest. To the extent *Chaker* can be read to protect any review of a person or business, we respectfully disagree.

Id. at 636.

ii. Analysis

The Court finds this case is far more similar to *Jeppson* and *Yang* than *Wilbanks* and does not find the reasoning in *Chaker* persuasive. Here, Plaintiffs’ statements arise out of a private dispute with Defendant APM beginning when the City of San Diego added 15-minute parking spaces outside of Defendant APM. (*See* TACC ¶¶ 1, 9.) Unhappy with the change, Defendants allege Plaintiff Thakore used employees of his company, Plaintiff DMM, to post fake reviews on Google and Yelp concerning Defendant APM’s business, including several of the alleged false statements at issue. (*See id.* ¶¶ 10-12.) When Defendant

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Melone asked Plaintiff Thakore to take down the fake reviews, Plaintiff Thakore allegedly stated no one tells him what to do, “this is only the beginning,” and said on another occasion “[h]ow do you like those reviews? Get ready. There’s [sic] 1,000 more where those came from.” (*Id.* ¶¶ 13-14.) On other occasions as part of this personal feud, Plaintiff Thakore made Instagram posts containing other alleged false statements at issue about Defendants. (*See id.* ¶ 23.)

Unlike the plaintiff in *Wilbanks*, Plaintiffs were not supplying the public with consumer protection information about Defendants. Based on the allegations of an orchestrated campaign to post fake reviews about Defendant APM due to a personal dispute about parking spaces, it is unclear to the Court that Plaintiffs or any person acting on their behalf had ever been a consumer of Defendant APM. But even if some were, as the Court of Appeal in *Yang* explained, “an attempt to exact a personal revenge’ by causing others to ostracize the target is not a protected public interest statement.” 68 Cal. App. 5th at 635 (citing *Wilbanks*, 121 Cal. App. 4th at 900). Nor did Plaintiffs’ statements concern a topic of widespread interest. Rather, Plaintiffs’ statements “did not seek public discussion of anything. They aimed to whip up a crowd for vengeful retribution. They were an unprotected effort ‘to gather ammunition’ in his spat with [Defendants].” *Id.* at 632-33. The Court also agrees with *Yang*’s rejection of the reasoning in *Chaker*. The Court fails to see how the defendant’s personal animosity in *Chaker*, expressed in a public review of the plaintiff’s business services, concerned a matter of public interest. *See id.* at 636.

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Finally, in their Reply to Anti-SLAPP Motion, Plaintiffs argue for the first time that their speech is of public interest because Defendants are public figures. (Doc. 84 at 7-8.)⁷ Therefore, the Court need not consider this new argument raised in a reply brief. *See Chu*, 215 F. Supp. 3d at 975 (“An argument first raised in a reply brief need not be considered.”). In any event, the Court rejects the argument that Defendants, a restaurant and restaurant owner, even if they appear in articles concerning their goods and services on occasion, are in the public eye. *See Yang*, 68 Cal. App. 5th at 624 (“[m]ere mentions in national publications do not make Big Sugar a business in the public eye. Despite its name, Big Sugar is a small business. It has two shops in Los Angeles. That is all.”); *c.f. Rancho La Costa, Inc. v. Superior Ct.*, 106 Cal. App. 3d 646, 660-61 (Ct. App. 1980) (rejecting argument that resort corporation selling services to the public and that employed media to advertise its services converted the corporation into a public figure).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs’ MTD and Anti-SLAPP Motion are **DENIED**. Accordingly, the Court resets the remaining pretrial dates and deadlines as follows:

7. To be clear, while Plaintiffs did argue in their Anti-SLAPP Motion that Defendants were public figures subject to the actual malice standard, they did not pursue a public eye argument when analyzing the “issue of public interest” prong. (*See* Doc. 79-1 at 17-18.)

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1. Plaintiffs must lodge the proposed final pretrial conference order **on or before July 12, 2024**

2. The final pretrial conference is set for **Thursday, July 18, 2024 at 1:30 p.m.**

IT IS SO ORDERED.

DATE: April 17, 2024

/s/ Ruth Bermudez Montenegro
HON. RUTH BERMUDEZ MONTENEGRO
UNITED STATES DISTRICT JUDGE

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**APPENDIX C — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED MARCH 3, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2626
D.C. No. 3:21-cv-01909-RBM-VET

GOPHER MEDIA LLC, A NEVADA LIMITED
LIABILITY CORPORATION FORMERLY KNOWN
AS LOCAL CLICKS DOING BUSINESS AS
DOCTOR MULTIMEDIA AND AJAY THAKORE,
AN INDIVIDUAL,

Plaintiffs-Appellants,

v.

ANDREW MELONE, AN INDIVIDUAL AND
AMERICAN PIZZA MANUFACTURING,
A CALIFORNIA BUSINESS ENTITY ALSO
KNOWN AS AMERICAN PIZZA MFG.,

Defendants-Appellees.

Filed March 3, 2025

ORDER

MURGUIA, Chief Judge:

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Appendix C

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be heard en banc pursuant to Federal Rule of Appellate Procedure 40(c) and Circuit Rule 40-3.