

No. 25-1067

IN THE
Supreme Court of the United States

GOPHER MEDIA LLC, ET AL.,
Petitioners,

v.

ANDREW MELONE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Ninth Circuit did not pass upon the question of whether state anti-SLAPP statutes apply in federal court at all. Under this Court's recent decision in *Berk v. Choy*, 146 S. Ct. 546 (2026), they almost certainly do not.

Instead, the only question presented is whether this Court should decide a logically subsequent question: Whether a federal court's denial of an anti-SLAPP motion to strike under California law is immediately appealable as a collateral order.

CORPORATE DISCLOSURE STATEMENT

American Pizza Manufacturing has no parent company and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In the decision below, a unanimous eleven-judge panel of the Ninth Circuit held that the denial of an anti-SLAPP motion under California law is not immediately appealable as a collateral order. The petition asks the Court to take up that question. But this petition is a particularly unsuitable vehicle to do so because it does not present a critical antecedent question that was not passed upon below: Whether state anti-SLAPP statutes apply in federal court at all or if, instead, they conflict with the Federal Rules of Civil Procedure. If these statutes do not even apply in federal court, then whether a litigant who loses an anti-SLAPP motion can immediately appeal that ruling is a question about nothing.

In fact, the circuits overwhelmingly hold that state anti-SLAPP statutes do not apply in federal court. And that conclusion is confirmed by the Court's recent decision in *Berk v. Choy*, 146 S. Ct. 546 (2026), which held that a state law that is inconsistent with the Federal Rules cannot apply in federal court. The lower courts should have the opportunity to apply the Court's guidance in *Berk* in the first instance, the result of which almost certainly will be to obviate any need for the Court to opine on whether the denial of an anti-SLAPP motion is immediately appealable. The Court should not reach out to resolve an issue of vanishing practical significance.

The petition does not merit the Court's attention for the further reason that the division of authority it identifies is shallow and dwindling. Two circuits agree with the decision below that the denial of an

anti-SLAPP motion is not immediately appealable. Petitioners say that four circuits take an approach different from the decision below, but two in fact are aligned or have subsequently held that state anti-SLAPP statutes do not apply in federal court, and the remaining two are actively reconsidering their precedent or have reason to do so soon.

Moreover, there is no good cause to grant the petition because the Ninth Circuit's unanimous en banc decision is correct. The court applied the undisputed collateral-order factors and correctly concluded that, when a district court denies an anti-SLAPP motion, that issue is not "completely separate from the merits," *GEO Group, Inc. v. Menocal*, 146 S. Ct. 774, 781 (2026), because it requires review of the merits. Nor does the denial of an anti-SLAPP motion mean that any issue will evade effective review "on appeal from a final judgment." *Id.* On the contrary, a defendant improperly subjected to a "SLAPP" suit (a strategic lawsuit against public participation) can obtain full review of a final judgment and recompense for their trouble in the form of attorneys' fees. Petitioners contend otherwise based on their view that the anti-SLAPP statute should be understood to confer immunity from having to stand trial, but California takes the opposite view of its own statute. Petitioners' disagreement with California law does not raise a federal question.

Finally, the facts of this case make it a particularly unsympathetic vehicle for review. It involves a sustained, bad-faith campaign of harassment waged by Petitioner Ajay Thakore of Gopher Media, a wealthy influencer and online personality, against

Respondent Andrew Melone and his small pizza restaurant. That harassment included hundreds of fake online reviews, multiple instances of vandalism, and eventually this frivolous lawsuit. The district court correctly rejected Petitioners' effort to mischaracterize this harassment as protected speech on public issues, and it denied their anti-SLAPP motion to dismiss the counterclaims that Melone eventually felt compelled to assert.

Petitioners' interlocutory appeal is a transparently dilatory tactic intended to further burden Melone and his small business with expensive litigation. Those efforts should not be aided by prolonging this appeal through briefing and argument on the merits of a question that is unsuitable for review.

The petition should be denied.

STATEMENT OF THE CASE

The petition provides no factual background, *see* Pet. 10, perhaps because the facts reflect so poorly on Petitioners. The basic facts, which the Ninth Circuit gently suggested are "odd," Pet. App. 4a, are as follows.

Thakore begins a quarrel with Melone over parking spaces in San Diego, which escalates into a campaign of harassment

Thakore owns Petitioner Gopher Media LLC, a "digital marketing agency." Pet. App. 4a, 57a. Thakore promotes a lavish lifestyle on social media. Pet. App. 57a-59a. He also has an extensive criminal

history. Pet. App. 60a. Melone operates Respondent American Pizza Manufacturing (also referred to as APM), a “take-n-bake” restaurant in the La Jolla neighborhood of San Diego. Pet. App. 3a-4a. American Pizza Manufacturing serves uncooked pizzas and pasta that customers take home and bake themselves. Pet. App. 3a-4a.

In late 2020, American Pizza Manufacturing opened in San Diego and worked with the city to convert the parking spaces immediately outside the shop into 15-minute parking zones to make it easier for customers to park briefly and retrieve takeout food. Pet. App. 4a, 56a. Thakore was unhappy because this “impeded his ability” to park outside American Pizza Manufacturing while he “frequent[ed] other La Jolla business establishments,” including a competing restaurant that he partially owns. Pet. App. 4a, 56a. In retaliation, Thakore began illegally parking his Ferrari and other luxury vehicles in the 15-minute spaces and red zones outside American Pizza Manufacturing, sometimes for hours at a time, preventing American Pizza Manufacturing’s customers from using the spaces. Pet. App. 58a-59a.

Thakore’s unhappiness escalated into a campaign of harassment. Starting in August 2021, Thakore used his marketing company to flood the internet with more than 140 fake reviews of American Pizza Manufacturing on Google and Yelp, attacking the quality of its food and the sanitation of the premises, and accusing its staff of racism and animal abuse. Pet. App. 56a-60a. The reviews were transparently false. One review claimed that American Pizza Manufacturing sold “burnt pizza” even though the take-n-bake

business does not cook or even heat its pizzas. Pet. App. 57a.

Thakore paid his employees to post these reviews. They “originated from [Gopher Media] and employees within the company or included [Gopher Media’s] company logo in their review.” Pet. App. 57a. Three former employees confirmed under oath that Thakore provided bonuses to employees who wrote fake reviews about American Pizza Manufacturing. Pet. App. 57a. And Google representatives who assisted in removing the fake reviews told Respondents that Thakore and his associates were “past offenders of posting false reviews.” Pet. App. 57a.

The review-bombing was devastating for American Pizza Manufacturing, which relied heavily on its online profile during the pandemic. American Pizza Manufacturing’s Google rating plummeted from 5 stars to 2.9 stars. Pet. App. 57a. When Melone asked Thakore to remove the reviews, Thakore responded that “this is only the beginning.” Pet. App. 58a. He continued: “How do you like those reviews? Get ready. There’s 1,000 more where those came from.” Pet. App. 58a.

Thakore intensifies his harassment campaign

Thakore followed through on his threat. He falsely announced to his thousands of social-media followers that Melone had called him a racial slur and that American Pizza Manufacturing “[k]icks handicapped dogs, uses frozen crust, hates anyone of color, [and] despises the first amendment.” Pet. App. 59a-60a. He also posted that “[i]f you support Take n Bake

pizza you support animal abuse, racism and frozen crust.” Pet. App. 59a-60a.

Moreover, Thakore “paid individuals to harass Defendant APM on Instagram,” including offering them “\$100 worth of free food” in exchange for posting that “APM ‘sucks.” Pet. App. 59a. At one point, “APM received seven calls in five minutes with messages such as ‘[y]our pizza f**king sucks,’ ‘[f]**k you for kicking dogs and being racist,’ and ‘I’ll never come eat at your restaurant, ever.’” Pet. App. 59a.

Thakore also brought his campaign against Melone and American Pizza Manufacturing from the digital into the physical world. He parked expensive cars, including a Ferrari and a Maybach, in front of American Pizza Manufacturing displaying signs reading “Only losers get Take N Bake pizza” and “Take N Bake Pizza Sucks.” Pet. App. 58a-59a. Thakore commissioned airplanes to fly over La Jolla with banners insulting American Pizza Manufacturing. Pet. App. 59a. And on at least one occasion, Thakore stood outside American Pizza Manufacturing with a Gopher Media employee and offered customers waiting in line \$1,000 to leave. Pet. App. 62a.

Thakore also paid minors to “f**k up APM,” resulting in acts of vandalism. Pet. App. 62a-63a. American Pizza Manufacturing’s storefront has repeatedly been vandalized, “leaving the business covered in graffiti [and] broken glass” and facing “higher insurance premiums.” Pet. App. 63a.

Petitioners sue Respondents, who bring counterclaims that Petitioners unsuccessfully move to strike under California’s anti-SLAPP statute

Petitioners eventually extended their harassment into the courtroom. Thakore and Gopher Media sued Melone and American Pizza Manufacturing, seeking \$10 million in damages based on claims similar to the ones they had advanced in the ongoing harassment campaign. Specifically, the complaint alleged that Melone “called Thakore a racial slur, tried to intimidate Thakore from parking in front of APM, and kicked Thakore’s handicapped dog.” Pet. App. 4a. The complaint also alleged that American Pizza Manufacturing had misrepresented its food as fresh. Pet. App. 4a.

Melone and American Pizza Manufacturing responded with counterclaims asserting that Thakore’s harassment campaign and orchestration of fake online reviews constituted defamation, trade libel, and unfair business practices. Pet. App. 4a. More than two years later, and with trial looming, Thakore and Gopher Media filed an anti-SLAPP motion to strike Respondents’ countercomplaint under California Civil Procedure Code § 425.16. In that motion, Petitioners asserted that the fake online reviews and social-media harassment constituted speech about public issues protected by the First Amendment, and that the countercomplaint should be dismissed because it was a strategic lawsuit targeting this protected speech. Pet. App. 5a.

The district court denied Thakore and Gopher media’s anti-SLAPP motion and permitted Respondents’ counterclaims to go forward, determining that Thakore’s “revenge” campaign was not protected speech. Pet. App. 105a. Petitioners’ motion failed at the first step of California’s anti-SLAPP test, which asks whether the complained-of acts “were taken ‘in furtherance of the [defendants’] right of petition or free speech under the United States or California Constitution in connection with a public issue.’” Pet. App. 98a (quoting *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010)).

The district court reasoned that Petitioners’ actions were directed at carrying out a private quarrel, not at contributing to public discourse. Pet. App. 98a-105a. The “statements ar[o]se out of a private dispute with ... APM.” Pet. App. 104a. Unlike statements that “supply[] the public with consumer protection information,” Thakore’s statements reflected “an orchestrated campaign to post fake reviews about Defendant APM due to a personal dispute.” Pet. App. 105a. Those statements neither “concern[ed] a topic of widespread interest” nor “s[ought] public discussion of anything,” but instead “aimed to whip up a crowd for vengeful retribution.” Pet. App. 102a-103a, 105a (quoting *Woodhill Ventures, LLC v. Yang*, 283 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2021)).

Such “an attempt to exact a personal revenge’ by causing others to ostracize the target is not a protected public interest statement.” Pet. App. 104a-105a (quoting *Woodhill Ventures*, 283 Cal. Rptr. 3d at 515). The district court also “question[ed] whether allegations of vandalism could even be subject to an anti-

SLAPP motion,” because “it is untenable that conduct such as vandalism is protected by the First Amendment.” Pet. App. 96a-97a (quoting *In re Michael M.*, 104 Cal. Rptr. 2d 10, 18 (Cal. Ct. App. 2001)).

On appeal, the Ninth Circuit sitting en banc holds that orders denying anti-SLAPP motions are not immediately appealable

In 2024, Thakore and Gopher Media appealed the interlocutory denial of the anti-SLAPP motion to the Ninth Circuit. Following briefing and oral argument, the three-judge panel ordered supplemental briefing on whether the case should be heard en banc to reconsider *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), which permitted interlocutory appeals of orders denying anti-SLAPP motions. The panel “refrained from issuing a decision,” and the full court “agreed that th[e] case should be decided en banc so that [the] governing precedent could be reconsidered.” Pet. App. 5a-6a.

Sitting en banc, the Ninth Circuit unanimously held that the denial of a motion to strike under California’s anti-SLAPP statute is not immediately appealable as a collateral order. Pet. App. 1a-3a. The court explained that a district court’s decision “fall[s] into th[e] narrow class of appealable nonfinal orders” only when it “[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment.” Pet. App. 6a (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949)).

The court further explained that, when a court denies an anti-SLAPP motion, the issues it resolves are not “completely separate from the merits.” Pet. App. 3a. On the contrary, given the inquiry that California’s anti-SLAPP statute requires, “the denial of an anti-SLAPP motion is not conceptually distinct from the merits of a plaintiff’s claims.” Pet. App. 10a (quotation marks omitted). Specifically, a court must examine the “content” and “context” of a claim and then evaluate whether the party asserting the claim has established a probability of success on the merits. Pet. App. 9a-10a (citing Cal. Civ. Proc. Code § 425.16(b)(1)). That being so, “[o]ur experience with anti-SLAPP cases over the [past] 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.” Pet. App. 9a (citation modified).

Moreover, under the third prong of the *Cohen* test, anti-SLAPP denials are not “effectively unreviewable on appeal from a final judgment.” Pet. App. 3a. Although there is some cost to “having to defend a meritless action” at trial, this cost “does not render the decision ‘effectively unreviewable’ for purposes of the collateral order doctrine.” Pet. App. 11a. That is especially so because California law permits “a defendant [who] successfully challenges the denial of an anti-SLAPP motion on appeal after a final judgment” to recover “the attorneys’ fees required to defend against the SLAPP-related appeal.” Pet. App. 11a n.4 (citing Cal. Civ. Proc. Code § 425.16(c)(1)). Ultimately, then, there is no cost at all. And certainly “deferring review of these motions until final judgment will not so imperil” a moving party’s interests “as to justify the cost

of allowing immediate appeal of the entire class of relevant orders.” Pet. App. 11a (quotation marks omitted).

The court expressly did not decide the threshold, logically antecedent question of whether “the California anti-SLAPP statute applies in federal court” in the first place. Pet. App. 3a n.2, 5a. Judges Bress, Collins, Lee, and Bumatay concurred separately to explain that, under “the overwhelming majority view ..., California’s anti-SLAPP statute is a state procedural device that does not apply in federal court.” Pet. App. 25a.

REASONS THE PETITION SHOULD BE DENIED

I. This Case Is A Poor Vehicle For Considering The Question Presented Because It Does Not Present A Critical Threshold Question, Which Very Likely Moots The Question Presented.

A. The Ninth Circuit did not decide the antecedent question of whether California’s anti-SLAPP law applies in federal court.

The sole question passed upon below and presented here is whether an order denying a California-law anti-SLAPP motion is immediately appealable in federal court. *See* Pet. i. But that question matters only if an anti-SLAPP statute like California’s applies in federal court in the first place. The Ninth Circuit did not rule on that antecedent question.

That being so, granting the petition would waste the Court’s resources. If the answer to the antecedent question is that state anti-SLAPP statutes do not apply in federal court, then the question presented here is of no significance. After all, if federal courts cannot entertain anti-SLAPP motions to begin with, then there can be no order to appeal. And it is “[b]etter ... to answer a question that does matter” than one that very well may not. *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366, 376 (2024) (Gorsuch, J., dissenting).

The Court should not decide the collateral-order question raised here without first considering, in an appropriate case, the foundational, threshold question of whether a state anti-SLAPP statute applies in federal court at all.

B. After *Berk v. Choy*, it is highly unlikely that California’s anti-SLAPP statute applies in federal court.

1. It would be especially inadvisable to expend the Court’s resources addressing the question presented because the Court’s recent decision in *Berk v. Choy* indicates that California’s anti-SLAPP statute does not apply in federal court at all. Whether an anti-SLAPP order is immediately appealable thus has no practical importance. The Court therefore need not address the question presented until *Berk* has percolated in the circuits, and then only if a division of authority arises about whether anti-SLAPP statutes like California’s apply in federal court.

Directly relevant here, *Berk* addressed the circumstances under which a state law conflicts with the Federal Rules of Civil Procedure. When a Federal Rule “answers [a] disputed question,” that rule “displaces contrary state law even if the state law would qualify as substantive” under the *Erie* doctrine. 146 S. Ct. at 552. Specifically at issue in *Berk* was a Delaware law that requires complaints pleading medical-malpractice claims to be accompanied by an “affidavit of merit” from a medical professional. *Id.* at 551-52. The Court held that this law is displaced by the Federal Rules, which do not require a complaint to be accompanied by an affidavit or other “evidence of the claim.” *Id.* at 553. Instead, Rule 8 “requir[es] no more than a statement of the claim” for a case to proceed. *Id.* And Rule 12 “reinforces the point” by “provid[ing] only one ground for dismissal based on the merits: ‘failure to state a claim upon which relief can be granted.’” *Id.* (quoting Fed. R. Civ. P. 12(b)(6)). Because the Federal Rules and the Delaware law “address the same issue” but give different answers about what information “a plaintiff must provide about the merits of his claim at the outset of litigation,” Delaware’s law “does not apply in federal court.” *Id.* at 555, 557.

Anti-SLAPP laws like California’s conflict with the Federal Rules for the same reason. California’s anti-SLAPP law requires courts to “strike” (i.e., dismiss) specified claims unless the plaintiff “establishe[s] that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code § 425.16(b)(1). But the Federal Rules prescribe when federal courts may dismiss claims before trial, and those rules do not require plaintiffs to prove a

likelihood of success on the merits at any point before trial. *See* Fed. R. Civ. P. 12, 56. Because the central motion-to-strike provision of California’s anti-SLAPP law conflicts with the Federal Rules on the question of when a plaintiff gets a trial on her claim, *Berk* dictates that the anti-SLAPP law cannot apply in federal court. *See Berk*, 146 S. Ct. at 557.

2. Indeed, even before *Berk*, the strong majority view has been that state anti-SLAPP laws do not apply in federal court. *See* Pet. App. 44a (Bress, J., concurring in the judgment). Academics and other commentators have also argued that anti-SLAPP laws cannot apply in federal proceedings. *See, e.g.*, Gleisy Sopena, *Attorney-Fee Shifting is the Solution to SLAPPING Meritless Claims Out of Federal Courts*, 16 Fla. Int’l L. Rev. 833, 848-51 (2022); Jack B. Harrison, *Erie SLAPP Back*, 95 Wash. L. Rev. 1253, 1307-10 (2020).

In *Abbas v. Foreign Policy Group, LLC*, the D.C. Circuit confronted the motion-to-strike provision of D.C.’s anti-SLAPP law, which, like California’s anti-SLAPP law, requires a plaintiff to show “that ‘the claim is likely to succeed on the merits’” to avoid dismissal. 783 F.3d 1328, 1332-33 (D.C. Cir. 2015) (quoting D.C. Code § 16-5502(b)). Then-Judge Kavanaugh explained that this “special motion to dismiss” provision conflicts with Rules 12 and 56, which “establish the standards for granting pre-trial judgment to defendants in cases in federal court.” *Id.* at 1333-34. Because “the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal,” the anti-SLAPP law’s

“additional hurdle ... to get to trial” cannot apply in federal court. *Id.* at 1334.

Multiple courts of appeals have followed this same reasoning in holding that substantively similar anti-SLAPP statutes cannot apply in federal court. *See La Liberte v. Reid*, 966 F.3d 79, 87-88 (2d Cir. 2020) (California’s anti-SLAPP statute; “federal courts must apply Rules 12 and 56 instead of California’s special motion to strike”); *Klocke v. Watson*, 936 F.3d 240, 245-48 (5th Cir. 2019) (Texas’s anti-SLAPP statute); *Carbone v. CNN, Inc.*, 910 F.3d 1345, 1349, 1356 (11th Cir. 2018) (Georgia’s anti-SLAPP statute); *see also Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018) (New Mexico’s anti-SLAPP law does not apply in federal court because it is purely procedural).

In view of *Berk*’s clear guidance, other circuits likely will reach the same conclusion. Before *Berk*, only the First and Ninth Circuits went the other way on the question of whether state anti-SLAPP statutes can apply in federal court. *See Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010); *United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th Cir. 1999). After *Berk*, these courts will have occasion to revisit that precedent, which already was on shaky footing. *See* Pet. App. 32a-37a (Bress, J., concurring in the judgment) (collecting authorities). There is no good cause to take up and decide whether an anti-SLAPP ruling is immediately appealable for a statute that likely does not apply in federal court at all.

C. Petitioners offer no sound reason for the Court to address this likely academic question.

Petitioners only obliquely acknowledge this serious difficulty for their petition, and they offer no good reason for the Court to reach out to decide a question that is unlikely to have any continued relevance.

First, they contend that the *absence* of the antecedent issue here makes the petition a *more* attractive vehicle “without the added complexity.” Pet. 18-19. As discussed above, that has matters backwards. It makes no sense to decide the appealability question until the Court has decided whether anti-SLAPP laws apply in federal court at all.

Next, Petitioners argue that California’s anti-SLAPP law does apply in federal court because of its fee-shifting provision. They say that, because California’s anti-SLAPP law includes “fee-shifting liability,” as did the state law at issue in *Cohen*, California’s anti-SLAPP law “applies in federal court under *Berk*.” Pet. 19. But the fee-shifting provision of California’s anti-SLAPP law has nothing to do with either the question presented or the antecedent question of whether the motion-to-strike provision conflicts with the Federal Rules. That is because the mere existence of a fee-shifting provision does not erase the conflict between the state law’s motion-to-strike provision and the Federal Rules.

Finally, Petitioners suggest that, “[i]f 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*.” Pet. 19 n.7. This would be a highly irregular way to proceed. Whether the California anti-SLAPP law applies in federal court was not passed on below. So Petitioners’ suggestion amounts to asking the Court to remand the case to the en banc Ninth Circuit for it to issue an advisory opinion on a question it did not previously address, further delaying a case that Petitioners initiated in 2021. Instead, the petition should simply be denied. If and when there is a division of authority following *Berk* on the question of whether state anti-SLAPP statutes apply in federal court, the Court may choose to grant review in a case that actually presents that question.

II. The Alleged Split Is Shallow, Overstated, And Likely To Resolve Itself.

According to the petition, of the “[s]ix circuits [that] have addressed whether orders denying anti-SLAPP rights are immediately appealable,” “[t]hree hold yes,” “[t]wo hold yes and no,” and “[o]ne holds no.” Pet. 11. That characterization misstates the holdings of multiple courts and vastly overstates any circuit conflict. In fact, there is only one appellate court—the First Circuit—that has held that an anti-SLAPP denial is immediately appealable and where that conclusion has not been called into question or rendered academic. And the First Circuit’s holding was narrow in a way that differentiates it from other cases. This minimal division of authority is not nearly robust enough to merit this Court’s attention, particularly given the factors discussed above.

A. The petition mistakenly asserts that the Second and Ninth Circuits are “internally divided” on the question presented. On the contrary, both courts squarely reject Petitioners’ position.

Second Circuit. In characterizing the Second Circuit as “internally divided,” Pet. 13-14, the petition cites *Ernst v. Carrigan*, 814 F.3d 116, 119 (2d Cir. 2016), which concerned the appealability of an anti-SLAPP order under Vermont law, and *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 151 (2d Cir. 2013), which involved California’s anti-SLAPP statute. Far from being subject to internal division, the Second Circuit has squarely held that the denial of an anti-SLAPP motion like Petitioners’ is not immediately appealable.

The Second Circuit first decided *Liberty Synergistics*, which addressed a very different question from the one presented here. There, the question was “whether *any* plaintiff may invoke California’s anti-SLAPP rule *following a consensual forum transfer*.” 718 F.3d at 148 (second emphasis added). The court viewed *that* question as “completely separate from the merits” within the meaning of the *Cohen* factors. *Id.* at 148-49. The court expressly declined to address the question presented here: whether an anti-SLAPP denial is appealable on the merits. *Id.* at 150 n.11. But the Second Circuit subsequently addressed that question in *Ernst*. And, contrary to Petitioners’ intimation, nothing about *Ernst* depended on a distinction between Vermont law and California law. Rather, after explaining that *Liberty Synergistics* was not controlling for the reasons just noted, *Ernst* held “that orders passing on the merits of an anti-SLAPP motion do not

fall within the collateral order doctrine.” 814 F.3d at 122.¹

Ninth Circuit. Strangely, Petitioners claim that the Ninth Circuit—notwithstanding its unanimous en banc decision—also is “internally divided.” Pet. 13. Specifically, Petitioners cite previous panel decisions involving the appealability of orders denying motions to dismiss pursuant to Nevada’s and Oregon’s anti-SLAPP laws. Pet. 13. To state the obvious, the en banc court’s decision on the question of appealability resolves rather than creates “division.” That is particularly true because “California’s and Nevada’s statutes share a near-identical structure for anti-SLAPP review.” *Coker v. Sassone*, 432 P.3d 746, 749 n.3 (Nev. 2019); accord *Schwern v. Plunkett*, 845 F.3d 1241, 1244 (9th Cir. 2017) (“Oregon used California’s anti-SLAPP law as a model for its legislation.”).²

B. In the remaining circuits that Petitioners invoke, the question of appealability has become academic or is uncertain in light of intervening developments. Any remaining division of authority is therefore not sufficiently robust to merit the Court’s attention.

¹ Moreover, the Second Circuit later held that California’s anti-SLAPP law does not apply in federal court. See *La Liberte*, 966 F.3d at 87-88. So the question of appealability also is academic.

² Petitioners acknowledge that the Tenth Circuit agrees with the Ninth Circuit that denials of anti-SLAPP motions are not immediately appealable. See Pet. 14 (citing *Coomer v. Make Your Life Epic LLC*, 98 F.4th 1320, 1325 (10th Cir. 2024) (Colorado statute)).

Federal Circuit. Petitioners assert that the Federal Circuit “reached the opposite conclusion [from the decision below] in *IQE PLC v. Newport Fab, LLC*, 155 F.4th 1370 (Fed. Cir. 2025).” Pet. 11-12. But they neglect to mention that *IQE* rested overwhelmingly on the same Ninth Circuit panel precedent that the en banc court overruled here. See 155 F.4th at 1377 (citing *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) and *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015-16 (9th Cir. 2013), *overruled at* Pet. App. 3a, 8a). Moreover, *IQE* was issued just six days after the decision below and did not mention that decision. It seems likely that the *IQE* panel was not aware of the changes in Ninth Circuit precedent when it issued its opinion. The appellee in *IQE* therefore has sought panel and en banc rehearing. *IQE PLC v. Newport Fab, LLC*, No. 24-1124, Dkt. 38 (Fed. Cir. Nov. 13, 2025). That petition remains pending as of this filing.

Because the Federal Circuit may reassess *IQE* in light of the Ninth Circuit’s ruling in this case, its decision does not presently establish a conflict of the sort that warrants this Court’s review. And even if the Federal Circuit denies rehearing in *IQE*, in a future case it will need to consider whether state anti-SLAPP laws apply in federal court in light of *Berk* and the growing consensus that they do not. *Supra* 13-16.

Fifth Circuit. Petitioners invoke two cases from the Fifth Circuit holding that “denials of anti-SLAPP rights under Texas and Louisiana law” are immediately appealable. Pet. 12 (citing *NCDR, LLC v. Mauze & Bagby, PLLC*, 745 F.3d 742 (5th Cir. 2014) (Texas); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009) (Louisiana)). But the Fifth Circuit has

since held that the motion-to-strike provision of Texas’s anti-SLAPP law “cannot apply in federal court” because it “imposes additional requirements beyond those found in Rules 12 and 56.” *Klocke*, 936 F.3d at 245. That same reasoning applies to Louisiana’s anti-SLAPP law, which has a motion-to-strike provision that also requires the plaintiff “to demonstrate a probability of success” to avoid dismissal. *See Henry*, 566 F.3d at 170 (addressing La. Code Civ. Proc. art. 971(A)(1)). Because federal courts in the Fifth Circuit cannot entertain anti-SLAPP motions in the first place, there is no currently operative right to bring an immediate appeal.

First Circuit. That leaves only the First Circuit, which held that a denial of a special motion to dismiss under Maine’s anti-SLAPP law was immediately appealable. *Franchini v. Inv.’s Bus. Daily*, 981 F.3d 1 (1st Cir. 2020). But *Franchini*’s holding was narrow, as it presented a question of state law—whether certain conduct constituted petitioning activity, *see id.* at 10—which was separate from the case’s ultimate merits, *see id.* at 7. Moreover, *Franchini* relied on the Ninth Circuit’s now-overruled decision in *Batzel*, as well as the Second Circuit’s *Liberty Synergistics* decision that does not actually resolve the question presented. *Id.* at 8 n.6. So, if presented with this question again, the First Circuit may well reconsider its precedent. And like the Federal Circuit, the First Circuit must assess the antecedent question of whether, under *Berk*, anti-SLAPP laws apply in federal court to begin with.

The Court should not intervene to address this shallow split that has little significance after *Berk*.

III. The Decision Below Is Correct.

Finally, the petition should be denied because the Ninth Circuit’s decision is correct. Under the collateral-order doctrine, “[a] pre-judgment order, to get immediate review, 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.” *GEO Grp.*, 146 S. Ct. at 781 (citation modified). The Ninth Circuit correctly concluded that the anti-SLAPP denial in this case fails the second and third factors.

A. An anti-SLAPP denial does not resolve a question “completely separate from the merits.”

California’s anti-SLAPP statute asks whether the “cause of action ... aris[es] from any act of [the movant] in furtherance of [their] right of petition or free speech.” Cal. Civ. Proc. Code § 425.16(b)(1). In addition, a court must “determine[]” whether “the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” *Id.* This inquiry, as the Ninth Circuit explained, “necessarily involves reviewing the ‘content’ and ‘context’ of the factual allegations in a plaintiff’s complaint” and assessing the merits and the plaintiff’s likelihood of success. Pet. App. 9a-10a.

That analysis is plainly not “completely separate from the merits.” *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988). To the contrary, as the Ninth Circuit explained, it is “inextricably intertwined” with

them. Pet. App. 9a (citation omitted). After all, California’s statute was “based on the need to ‘screen out *meritless* cases at an early stage,’” “subject[ing] to potential dismissal only those actions in which the plaintiff cannot ‘state[] and substantiate[] *a legally sufficient claim.*’” *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 744 (Cal. 2003) (emphases added) (citation omitted). And when a court is called on to determine “whether the evidence could support a finding that particular conduct occurred,” the basic merits are at issue. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

Here, for instance, the parties’ Ninth Circuit briefs focused on the alleged defamatory statements and whether they were actionable under California law and the First Amendment. *See, e.g.*, No. 24-2626, Opening Br. 55-84, Dkt. 29 (9th Cir.). Whether the claims were subject to pretrial dismissal under the anti-SLAPP law depended heavily on whether the claims had merit.

An order denying an anti-SLAPP motion fails the second collateral-order factor and cannot be the subject of an interlocutory appeal.

B. An anti-SLAPP denial is effectively reviewable on appeal from final judgment.

As the California Supreme Court has explained, an anti-SLAPP motion is a “procedural device for screening out meritless claims.” *Jarrow*, 74 P.3d at 743. In that sense, assessing an anti-SLAPP motion is similar in kind to assessing a motion to dismiss under Rule 12 or a motion for summary judgment under

Rule 56 (notwithstanding the different standards that, as discussed above at 13-16, render the anti-SLAPP statute inapplicable in federal court). See *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188-89 (9th Cir. 2013) (Watford, J., dissenting from the denial of rehearing en banc) (A “Rule 12(b)(6) motion to dismiss” is “the closest Rule 12 analog to an anti-SLAPP motion to strike.”); *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 966 (Cal. 2005) (“Section 425.16 ... establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation.”). Yet denials of Rule 12 and Rule 56 motions ordinarily are not immediately appealable, and no one suggests that the denial of such motions is “effectively unreviewable” after final judgment.

Moreover, even if one conceived of the California anti-SLAPP statute as allowing a defendant to avoid the burdens of litigation, that goal can be fully vindicated following final judgment. That is because, under the California statute, “[i]f 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.” Pet. App. 11a n.4 (citing Cal. Civ. Proc. Code § 425.16(c)(1)). Thus, after final judgment, the party who lost a pretrial anti-SLAPP motion can both vindicate their substantive legal rights and recover the costs of litigating the case through final appeal. That makes the pretrial denial not only “reviewable” after final judgment but fully and “effectively” so. And if there were some modest remaining cost, that is the inevitable effect of “the strong bias of [28 U.S.C.] § 1291 against piecemeal

appeals,” which “almost never operates without some cost.” *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994).

C. Petitioners’ counterarguments are unpersuasive.

1. Petitioners principally argue that an immediate appeal is necessary because the anti-SLAPP statute confers immunity from trial. Pet. 14-17. But California courts characterize “anti-SLAPP protection in a way that casts doubt on [the] analogy between anti-SLAPP protection and immunity defenses.” Pet. App. 12a. In fact, California courts have held that the anti-SLAPP statute “does not provide ... ‘a substantive immunity from suit.’” Pet. App. 13a (citing *Jarrow*, 74 P.3d at 743-44). *Jarrow* recognized that “the anti-SLAPP statute neither constitutes—nor enables courts to effect—any kind of ‘immunity.’” 74 P.3d at 743-44 (citation omitted). To the extent Petitioners disagree with California courts’ analysis of California law, that is not a federal question. In any event, none of the state-court cases Petitioners cite attaches an “immunity” label to anti-SLAPP motions. See Pet. 16-17 n.6 (citing cases).

2. Next, Petitioners ask for a GVR in light of *GEO Group*, suggesting that that decision changed the standard for assessing whether an issue is immediately appealable. Pet. 19. On the contrary, *GEO Group* applied *Cohen*’s familiar three-factor test for the collateral-order doctrine. See 146 S. Ct. at 781-83. In so doing, the Court noted that immediate appealability frequently “turn[s] on whether the defendant has asserted a defense to liability or instead an

immunity from suit.” *Id.* at 781. But that is nothing new. *See id.* at 783 & n.3. And the Court’s consideration of that immunity issue itself hewed to the three-factor *Cohen* analysis—for instance, assessing whether the claimed immunity had the qualities of a merits defense (which is reviewable on appeal from final judgment) or a true immunity from trial (which may not be). *Id.* at 781-86.

That analysis only confirms the Ninth Circuit’s conclusion that an anti-SLAPP denial is akin to a merits defense and fully reviewable on appeal from final judgment. An anti-SLAPP motion “advances some reason why ... under the law [the movant] did nothing wrong.” *See id.* at 782. And—as the California courts have confirmed, *supra* 25—the anti-SLAPP law does not confer a right that is “irretrievably lost once trial occurs, even supposing” an anti-SLAPP movant “were to prevail on the merits.” *GEO Grp.*, 146 S. Ct. at 783.³

3. Finally, Petitioners claim that the Ninth Circuit was improperly concerned about caseload. Pet. 17. But ensuring efficient docket management, and mitigating litigation delays, are core concerns that

³ Even if the anti-SLAPP statute were characterized as a grant of immunity, that would not be dispositive. That is clear from *Johnson v. Jones*, which held that even denials of qualified immunity are not always immediately appealable. *See* 515 U.S. 304, 317-18 (1995) (defendant may not immediately appeal a summary-judgment order that simply finds a genuine issue of fact for trial). Petitioners (at 15) criticize the Ninth Circuit’s treatment of *Johnson*, but the en banc court correctly cited *Johnson* for the modest proposition that “not every district court decision denying immunity is entitled to an interlocutory appeal under the collateral order doctrine.” Pet. App. 13a.

animate the collateral-order doctrine. The final-judgment rule “minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice.” *Microsoft Corp. v. Baker*, 582 U.S. 23, 36-37 (2017). And under Petitioners’ rule, when a court denies a meritless anti-SLAPP motion, the moving party could bog down the case for months or even years by immediately appealing. That is precisely what has happened here. When Petitioners took an interlocutory appeal, discovery had been closed for more than a year and the parties were preparing for trial, but the appeal brought proceedings in the district court to a halt.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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