

No. 25-1067

In the Supreme Court of the United States

GOPHER MEDIA LLC, A NEVADA LIMITED
LIABILITY CORPORATION, FKA LOCAL CLICKS,
DBA DOCTOR MULTIMEDIA, *ET AL.*,
Petitioners,

v.

ANDREW MELONE, *ET AL.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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Note

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

REPLY BRIEF

The petition presents a single, recurring question: whether a pretrial order denying anti-SLAPP rights is immediately appealable under the collateral-order doctrine. Denials of anti-SLAPP rights qualify for collateral-order appeal because their “essence” is to protect speech from “all the usual ‘burdens of litigation,’ including trial.” *GEO Grp., Inc. v. Menocal*, 607 U.S. ___, 146 S. Ct. 774, 782 (2026). Days after the en banc Ninth Circuit’s decision below joined the Second and Tenth Circuits in holding such denials are not immediately appealable, the Federal Circuit joined the First and Fifth Circuits in reaching the opposite conclusion. *IQE PLC v. Newport Fab, LLC*, 155 F.4th 1370, 1377-78 (Fed. Cir. 2025). This Court has since confirmed that immediate appealability “generally turn[s]” on a question the Ninth Circuit never answered: “whether the defendant has asserted a defense to liability or instead an immunity from suit.” *GEO Grp.*, 146 S. Ct. at 781-82. The Ninth Circuit conditioned appealability instead on whether “fact-based issues [are] entangled in the immunity determination.” App.13a.

1. Respondents hardly dispute that the petition meets all the traditional criteria for certiorari. They do not dispute that there is a circuit conflict on the question presented (Pet.11-14)—they only characterize it as “shallow, overstated, and likely to resolve itself.” Opp.17 (capitalization omitted). They do not dispute that the decision below denied appealability without answering the question appealability “turn[s] on” under this Court’s precedent. Pet.14-17 (citing *GEO Grp.*, 146 S. Ct. at 781-82). And they do not dispute the importance of the speech and petitioning rights protected by anti-SLAPP laws; they never explain how the speech-chilling effects of litigation can be

undone after years of discovery, trial, and ordinary appeal. Pet.17-18.¹

2. Respondents’ principal contention is that this case is a “[p]oor [v]ehicle” because it does not squarely present another, related question: whether anti-SLAPP laws apply in federal court under *Erie* and its progeny, including *Berk v. Choy*, 607 U.S. 187 (2026). Respondents speculate it is “highly unlikely” that anti-SLAPP laws will apply in federal court after *Berk*, rendering the appealability question of “no practical importance.” Opp.12.

Respondents’ vehicle arguments do not warrant denying the petition. Rather than let the confusion linger, the Court *can*, if it wishes, resolve both anti-SLAPP applicability and appealability together. As the petition notes (at 19 n.7), the Court can grant the petition, vacate the decision below, and remand for consideration of the anti-SLAPP law’s applicability in view of *Berk*. Respondents answer that this would be “highly irregular” because the Ninth Circuit’s decision on remand would amount to “an advisory opinion on a question it did not previously address.” Opp.17. But the Ninth Circuit *did* address applicability: it granted en banc hearing and requested full briefing and argument on the issue, App.5a-6a; it split 7-4 on whether to overrule its own precedent upholding

¹ Respondents claim a successful appellant may recover fees for the SLAPP-related appeal. Opp.24-25. But a post-judgment fee award does not restore the years of litigation, discovery burdens, trial preparation, chilled speech, and settlement leverage the statute was designed to prevent. If monetary reimbursement after final judgment were enough to remedy the burdens of litigation, qualified immunity would not be immediately appealable either. Yet it is. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

California’s anti-SLAPP statute in federal court, App.3a n.2; App.24a-51a; it issued an 11-page concurrence arguing that the statute applies in federal court, App.14a-24a; and it issued a 28-page concurrence arguing it does not, App.24a-51a. Addressing applicability again on remand with the benefit of *Berk* would not be “advisory” (Opp.17), moreover, as applicability logically precedes appealability and is now disputed.

Alternatively—and perhaps more efficiently—the Court can settle the applicability question *now* without a GVR by consolidating this case with a pending petition out of the Ninth Circuit raising applicability directly. *See Wealthy, Inc. v. Cornelia*, No. 25-1329 (petition filed May 26, 2026). *Wealthy* asks whether the Nevada anti-SLAPP statute applies in federal court. The underlying Ninth Circuit decision recognized that statute as indistinguishable from California’s in all relevant respects:

Nevada’s and California’s anti-SLAPP statutes are similar in structure, purpose, and language and ‘share a near identical structure for anti-SLAPP review.’ In fact, the Nevada legislature specifically states in its declaration regarding the plaintiff’s burden of proof for anti-SLAPP special motions that the standard is the same standard required by California’s statute.

Wealthy, Inc. v. Mulvehill, 2026 WL 544972, at *4 n.3 (9th Cir. Feb. 25, 2026) (citing NEV. REV. STAT. §41.665); *compare* NEV. REV. STAT. §§41.660, 41.670, *with* CAL. CIV. PROC. CODE §§425.16(b), 425.16(c). Consistent with circuit precedent upholding California’s anti-SLAPP statute in federal court, the Ninth Circuit upheld Nevada’s anti-SLAPP statute in federal court

notwithstanding *Berk*. See *Wealthy*, No. 25-1329, Pet.App.9a-11a (panel decision); *id.* at 46a-48a (denying rehearing). Accordingly, if the Court considers it necessary to address applicability, Petitioners respectfully request that the Court either consolidate this petition with *Wealthy* or hold this petition pending *Wealthy*'s disposition. Either course is preferable to denying review and perpetuating the undisputed disarray.

3. *Berk* leaves little question that anti-SLAPP laws *do* apply in federal court. At least one federal court in the Ninth Circuit has already recognized as much. See *Left v. Anson Funds Mgmt. LP*, 2026 WL 1365637, at *8-9 (C.D. Cal. Mar. 31, 2026) (concluding that “*Berk* appears to be simply an application of existing Supreme Court precedent, not a new rule of law” and “[i]t does not appear ... that anything in *Berk* would change the Ninth Circuit’s theory or reasoning on this question”). As the petition explains (at 18-19), *Berk* expressly distinguished the state law it held inapplicable from the one this Court held both applicable and appealable in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)—“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.” *Berk*, 607 U.S. at 195. Respondents assert that fee-shifting “has nothing to do with” applicability because it “does not erase the conflict between the state law’s motion-to-strike provision and the Federal Rules.” Opp.16. But the mere fact that “a procedure [was] prescribed” to effectuate fee-shifting liability in *Cohen* did “not determine that it [was] not applicable” in federal court. 337 U.S. at 555-56. Just as the bond mechanism

incidental to the state fee-shifting law in *Cohen* did not “conflict with” federal rules that otherwise “deal[t] with plaintiff’s right to maintain such an action in federal court,” so also the motion-to-strike mechanism incidental to anti-SLAPP fee-shifting does not conflict with Rules 12 and 56. *Id.* at 556. Indeed, beyond *Cohen* and *Berk*, this Court has repeatedly confirmed that state laws “permit[ting] a prevailing party in certain classes of litigation to recover fees” apply in federal court as a form of “statutory liability.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 259 n.31 (1975) (“[A] state statute requiring an award of attorneys’ fees should be applied in ... federal courts: ‘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.’”) (quoting *Sioux Cty. v. Nat’l Surety Co.*, 276 U.S. 238, 243 (1928)). Because *Berk* does not disturb these precedents, it does not disturb Ninth Circuit precedent upholding the application of similar fee liability under anti-SLAPP laws.

4. The record refutes Respondents’ attempt to play down the circuit split as “shallow,” “overstated,” and “likely to resolve itself.” Opp.17-21. Respondents claim the Federal Circuit’s conflicting decision in *IQE* “rested overwhelmingly” on Ninth Circuit precedent overruled by the decision below. Opp.20. But the Federal Circuit made clear it was “*not* bound by the Ninth Circuit’s caselaw on this matter” and “consider[ed] *de novo* whether [it] ha[d] jurisdiction.” *IQE*, 155 F.4th at 1376, 1376 n.3. It independently concluded that denials of California anti-SLAPP rights are immediately appealable as “a matter of Federal Circuit law.” *Id.* at 1377-78. Those

opposite dispositions present a square conflict on the question presented. And Respondents never dispute that *IQE* joined the First and Fifth Circuits in holding that anti-SLAPP rights confer immunity from suit—the question this Court held dispositive in *GEO Group*, and the decision below held non-dispositive. See Pet.11-13 (citing *IQE*, 155 F.4th at 1377-78; *Franchini v. Investor’s Business Daily*, 981 F.3d 1, 7 (1st Cir. 2020); *NCDR, LLC v. Mauze & Bagby, PLLC*, 745 F.3d 742, 748, 750-52 (5th Cir. 2014); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 176-78 (5th Cir. 2009)).

5. Respondents do not genuinely dispute that anti-SLAPP protections are in the nature of immunity from the burdens of litigation. Pet.7-9, 17-18. They follow the decision below in citing *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737 (Cal. 2003), for the proposition that California’s anti-SLAPP statute “neither constitutes—nor enables courts to effect—any kind of ‘immunity.’” Opp.25; accord App.13a. But Respondents offer no response to the petition’s contextualization of *Jarrow*’s statements (Pet.16-17 n.6), which merely acknowledged that anti-SLAPP protections do not extend to protected speech that fails to overcome a plaintiff’s step-two showing of probable success. Nor do Respondents address the nearly two decades of subsequent California Supreme Court precedent expressly holding that the anti-SLAPP statute provides immunity from the burdens of litigation. Pet.16-17 n.6 (citing *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 13 P.3d 650, 653 (Cal. 2018); *Barry v. State Bar of Cal.*, 386 P.3d 788, 792 (Cal. 2017); *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 966 (Cal. 2005)).

6. Respondents also suggest immediate appeals would “bog down” cases and invite “harassment and delay.” Opp.27. But this Court has never held that docket pressures override appellate jurisdiction. The final-judgment rule yields to the collateral-order doctrine precisely because some rights—immunities from suit—are too important to deny review. *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (Scalia, J.). The Ninth Circuit’s caseload concerns cannot override immediate-appeal rights.

7. Respondents devote much of their brief to disputed factual allegations designed to make Petitioners appear unsympathetic. Opp.3-8. Those allegations have no bearing on the question presented because “[a]ppeal rights cannot depend on the facts of a particular case.” *Behrens*, 516 U.S. at 311. The en banc Ninth Circuit expressly stated that its decision “d[id] not turn on the particular factual allegations here.” App.3a. The question presented is purely legal and categorical: whether federal orders denying anti-SLAPP rights are immediately appealable.

8. At minimum, *GEO Group* warrants a GVR. Respondents say *GEO Group* is “nothing new,” Opp.25-26, but the Ninth Circuit decided this case before *GEO Group* and rested its analysis on a premise *GEO Group* squarely undermines: that mere factual entanglement defeats collateral-order review regardless of whether the asserted right is immunity from suit. *GEO Group* confirms that the immunity-versus-defense question generally controls appealability under all three *Cohen* conditions. 146 S. Ct. at 781-82. The Ninth Circuit did not answer that question.

A GVR is appropriate where intervening developments reveal a reasonable possibility that the lower

court's decision rests on a premise it would reject on reconsideration. Pet.19. Here, the Ninth Circuit's premise was that fact-based issues could decide appealability even if the statute conferred immunity. *GEO Group* says the analysis generally turns on whether the asserted right is immunity from suit. That is enough for plenary review—and certainly enough for a GVR.

CONCLUSION

The Court should grant the petition. Alternatively, the Court should grant, vacate, and remand for further consideration in light of *GEO Group* and/or *Berk*.

Respectfully submitted,

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