Supreme Court, U.S.
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No. 18-582

In The Supreme Court of the United States

STEPHEN YAGMAN,

Petitioner,

vs.

MICHAEL J. COLELLO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state anti-SLAPP statute be used to dismiss a claim in federal court, when its application is contrary to the Rules Enabling Act, 28 U.S.C. § 2072, Federal Rules of Civil Procedure 12(b)(6) and 56, and Supreme Court precedent, established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)?

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Stephen Yagman, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum disposition of the Ninth Circuit in *Yagman v. Edmondson*[1]; *Colello* is reported at 723 Fed.Appx. 463 (9th Cir. 2018), and reproduced in the appendix hereto ("App.") at 1a.[2] The subject minute order of the District Court for the Central District of California is not reported and is reproduced at App. 4a.

STATEMENT OF JURISDICTION

Panel rehearing with a suggestion for rehearing en banc was denied on October 4, 2018, App. 11a, this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1),

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[1] Petitioner sued both defendants Edmondson and Colello, who is the only respondent, and the case against Edmondson was dismissed after it was settled. The remaining defendant is respondent Colello. Colello is a former legal client of petitioner, who allegedly defrauded, extorted, and converted petitioner's funds. *See infra*.

[2] The district court dismissed, and the Ninth Circuit upheld the dismissal of, another, federal claim that is not in issue on this petition.

and this petition timely is filed, within 90 days of issuance of the denial of rehearing. Jurisdiction in the court of first instance, the United States District Court for the Central District of California, was based on 28 U.S.C. § 1332 (diversity jurisdiction).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Cal. Civ. Proc. Code § 425.16. Anti-SLAPP motion

(a) The Legislature finds and declares that there has been 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(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.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other

official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) 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, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff"

includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

INTRODUCTION

Based on diversity of citizenship, petitioner sued respondent, *inter alia*, for fraud, extortion, and conversion. Respondent moved under California's anti-SLAPP statute for dismissal of petitioner's state law claims and the district court granted that motion. App.

4a. Petitioner timely appealed, his appeal was denied, and petitioner sought rehearing en banc, which also was denied.

Petitioner contends that the district court and the appeals court erred as a matter of law by applying the anti-SLAPP statute, and that its application was in violation of federal law and also resulted in a circuit split that warrants granting certiorari. Petitioner contends that the District of Columbia Circuit's decision in *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-37 (D.C.Cir. 2015), should be followed to resolve the circuit split on the question presented in this petition.

STATEMENT OF THE CASE

Respondent Colello is a former law client of petitioner. Respondent prevailed in a mandatory legal fees arbitration he initiated against petitioner, from which award in arbitration petitioner sought de novo review, under California law in a California state court. Respondent in that action cross-complained against petitioner. Petitioner prevailed both on his claim against respondent and against respondent on respondent's cross-complaint against petitioner, and petitioner obtained a final judgment against respondent. Petitioner then, in the underlying federal action, sought equitable relief to enforce his state-court judgment against respondent and damages.

Petitioner alleged that respondent used wrongful means to come into possession of and to retain funds that were the property of petitioner, and that respondent and his legal counsel, former defendant Edmondson, accomplished this by using false statements and wrongful means to convince a New York federal judge to permit Edmondson and respondent to hold petitioner's funds in trust, which funds they both refused and continue to refuse to remit to petitioner.

Respondent contended that his use of the federal court to resist payment of the judgment against him to petitioner brought him within the protection of California's anti-SLAPP statute because it constituted "[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" and therefore was "subject to a special motion to strike" under Cal. Civ. Proc. Code § 425.16(b)(1), since it was "any written or oral statement or writing made before a . . . judicial proceeding," or was "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law," pursuant to § 425.16(e).

When petitioner sued to get the funds and for damages, his action was dismissed based on the anti-SLAPP statute.

SUMMARY OF ARGUMENT

Anti-SLAPP statutes have no proper place in federal practice, for the reasons articulated in *Abbas*, *see infra*, and the Court should follow *Abbas* to resolve the circuit split and to abolish use of anti-SLAPP motions in federal courts.

ARGUMENT

The issue presented is exceptionally important (1) to insure the primacy and application of the Federal Rules of Civil Procedure to govern procedure in federal practice and (2) to maintain uniformity of and adherence to federal law and controlling precedents in all of the federal courts.

1. CALIFORNIA'S ANTI-SLAPP STATUTE SHOULD NOT BE APPLIED IN FEDERAL COURT.

The term "SLAPP," "***S***trategic ***L***awsuit ***A***gainst ***P***ublic ***P***articipation," was coined[3] in 1996 to characterize a civil lawsuit filed by a corporation against a non-government individual or organization on a substantive issue of some political interest or social significance, whose aim was to shut down critical speech by intimidating critics into silence and draining their resources, to deflect discussions on corporate social

[3] Coined by Prof. George W. Pring, Univ. of Denver, Sturm College of Law, and Prof. Penelope Canan, Univ. of Cent. Fla., in *SLAPPs: Getting Sued for Speaking Out* (Temple Univ. Press, 1996).

responsibility, and by masquerading as ordinary civil lawsuits, to convert matters of public interest into technical, private disputes. *See generally SLAPPs: Getting Sued for Speaking Out* (Temple Univ. Press, 1996).

California and, so far, 29 other American states, one district, and one territory[4] have enacted so-called anti-SLAPP statutes, to facilitate the dismissal of SLAPP actions.[5]

California's anti-SLAPP statute is Cal. Civ. Proc. Code § 425.16(b)(1) (West 2018), and it provides that (1) "a special motion to strike" may be made as to "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" and (2) "unless [on such a motion] the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim," the claim is to be stricken/dismissed. In federal practice, its application ignores

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[4] Jurisdictions that have enacted anti-SLAPP statutes are: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Tennessee, Utah, Vermont, Washington, District of Columbia and Guam. The Supreme Courts of New Hampshire, Minnesota, and Washington all have held their states' anti-SLAPP statutes to be unconstitutional under state law.

[5] On at least three occasions, bills were introduced in Congress to make anti-SLAPP motions a part of federal law. *See* Free Press Act of 2017, H.R. 3228, 115th Cong. (2017); Speak Free Act of 2015, H.R. 2304, 114th Cong. § 4202 (2015); Free Press Act of 2012, S.3493, 112th Cong. (2012). All died in committee.

the Rules Enabling Act, and is in direct conflict with Fed. R. Civ. P. 12(b)(6) and 56.

Respondent admitted that California's anti-SLAPP statute is procedural, "Section 425.16 sets out a *procedure* for the trial court to evaluate the merits of the lawsuit, using summary judgment-like procedure[,]" Mot. for Summ. Judg. at 5:1-3, Doc. 69-1 (emphasis added and citing *Kibler v. Northern Inyo County Local Hosp. Dist.*, 39 Cal. 4th 192, 197 (2006)). Thus, the statute is preempted from application in federal court by the Rules Enabling Act, 28 U.S.C. § 2072, and because, in federal court, federal, and not state, procedure is followed, under the Federal Rules of Civil Procedure.

Application of this statute has no place in federal courts because it is in clear and irreconcilable conflict with Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, and also it violates the final judgment rule (because its wholesale importation into federal practice permits otherwise impermissible interlocutory appeals). *See Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018) (Judges Gould and Murgia, concurring, "challeng[ing] the appropriateness of our court reviewing denials of anti-SLAPP motions to strike on interlocutory appeal[,]" and "respectfully suggest[ing] that we should take this opportunity to fix this error in our circuit's precedent with a call of the case en banc."). *Id.* at 835, 838. Under the anti-SLAPP statute, federal judges impermissibly go beyond the "plausibility" standard that governs Rule 12(b)(6) motions and impermissibly weigh facts, in violation of Rule 56.

The purpose of anti-SLAPP statutes is to deter lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech." § 425.16(a); *see also Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001) (explaining that the anti-SLAPP statute "was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation")[6]; *Club Members for an Honest Election v. Sierra Club*, 45 Cal.4th 309, 86 Cal.Rptr.3d 288, 196 P.3d 1094, 1098 (2008) (stating that the anti-SLAPP statute provides for the "early dismissal of unmeritorious claims [that] interfere with the valid exercise of the constitutional rights of freedom of speech and petition").

To prevail on an anti-SLAPP motion to strike, a defendant first must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech. *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010). An "act in furtherance" includes, among other things, "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *See id.*; § 425.16(e)(4). If the defendant makes the required showing, *the plaintiff then must demonstrate a probability of prevailing* on the challenged claim. *Mindys Cosmetics, Inc.*, 611 F.3d

[6] The Court rejected the grafting of additional procedural protections onto the First Amendment, lest it result in "a form of double counting." *Calder v. Jones*, 465 U.S. 783, 790-91 (1984).

at 595. If the plaintiff cannot meet the minimal burden of "stat[ing] and substantiat[ing] a legally sufficient claim," then the claim is stricken pursuant to the statute. *Navellier v. Sletten*, 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703, 708 (2002). This is directly contrary to and violates Rule 12(b)(6)'s plausibility standard, because it impermissibly increases it.

An anti-SLAPP motion has no proper place in federal court, in light of Federal Rules of Civil Procedure 12(b)(6) and 56, and it is time to correct the mistaken decisions of the Ninth Circuit in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999) (holding that there is no direct conflict between the state anti-SLAPP statute and the federal rules); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (same); and the instant matter, all of which held that California's anti-SLAPP statute was applicable in federal diversity actions. *Cf. In re Gawker Media, LLC*, 571 B.R. 612 (S.D.N.Y. 2017) (in context of a creditor's objection to the treatment of his defamation claims against Gawker in the liquidation plan, holding that California's anti-SLAPP statute conflicts with the Federal Rules of Civil Procedure and may not be raised in federal court).

2. CALIFORNIA'S ANTI-SLAPP STATUTE INTERFERES WITH THE FEDERAL RULES OF CIVIL PROCEDURE.

The Court long has held that federal courts may *not* apply state statutes that interfere with the operation

of the Federal Rules of Civil Procedure. In *Hanna v. Plummer*, 380 U.S. 460 (1965), the Court established the governing test that "[w]hen a situation is covered by one of the Federal Rules," a federal court must apply the Federal Rule, notwithstanding the existence of a conflicting state statute. *Id.* at 471. It is the Federal Rule that governs so long as it "transgresses neither the terms of the [Rules] Enabling Act nor constitutional restrictions." *Ibid.*; *see also Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4510, p. 293 (2d ed.1996). Only *if* the Federal Rule is *in*applicable or invalid must the court "wade into *Erie*'s murky waters." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Here, since Federal Rules are applicable, *Shady Grove* governs and dictates that there be no journey into *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

The Court's decision in *Shady Grove* illuminates how this conflict analysis should proceed. That case concerned a challenge to a New York statute precluding class certification of any action seeking penalties or statutory minimum damages. *Id.* at 396-97 & n.1. The Court held that the statute conflicted with Federal Rule of Civil Procedure 23. The conflict arose because Rule 23 sets out "a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," while the New York statute "attempts to answer the same question – *i.e.*, it states that Shady Grove's suit 'may *not* be maintained as a class action' (emphasis added) because of the relief it

seeks." *Id.* at 398-99. The Court found a conflict between the two provisions because it viewed Rule 23 as establishing an exclusive set of criteria governing class certification that states may not supplement. *See id.* at 398-400. Here, Rules 12(b)(6) and 56 provide the exclusive criteria for decision but the district court instead applied the anti-SLAPP statute.

Viewed through *Shady Grove*'s lens, California's anti-SLAPP statute conflicts with Federal Rules 12(b)(6) and 56. Taken together, those rules establish the *exclusive criteria* for testing the legal and factual sufficiency of every claim in federal court. *See Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring) ("The Federal Rules aren't just a series of disconnected procedural devices. Rather, the Rules provide an integrated program of pretrial, trial and post-trial procedures. . . ."). California's anti-SLAPP statute impermissibly supplements, and is in conflict with, the Federal Rules' criteria for pretrial dismissal of an action.

The first conflict is with Rule 12(b)(6), which provides the *sole* means of challenging the legal sufficiency of a claim before discovery commences. To survive a Rule 12(b)(6) motion to dismiss – the closest Rule 12 analog to an anti-SLAPP motion to strike – a plaintiff must allege facts stating a claim that is merely "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This standard "does *not* impose a probability requirement at the pleading stage[,]" *id.* at 556 (emphasis added), but the anti-SLAPP statute *does impose* a probability requirement that is in direct conflict

with the Rule 12(b)(6) standard. Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is *improbable*." *Ibid.* (emphasis added); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("The plausibility standard is not akin to a probability requirement. . . .") (internal quotation marks omitted).

Any attempt to impose a probability requirement at the pleading stage obviously is in conflict with Rule 12(b)(6). Yet, that is exactly what application of California's anti-SLAPP statute does. A probability requirement bars an action from proceeding beyond the pleading stage "unless the court determines that 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) (emphasis added). By forcing a plaintiff to establish that success is not merely plausible, but is probable, the anti-SLAPP statute effectively contravenes and increases the Rule 12(b)(6) "plausibility" standard/burden for testing the legal sufficiency of a claim. Just as the New York statute in *Shady Grove* impermissibly barred class actions, when Rule 23 would permit those actions, so too does California's anti-SLAPP statute bar claims at the pleading stage, when Rule 12(b)(6) would allow those claims to proceed.

Similar problems infect and plague the interaction between California's anti-SLAPP statute and Rule 56. Special motions to strike under the anti-SLAPP statute almost invariably, as here, require consideration of matters outside the pleadings, and in

those circumstances the Federal Rules state that "the motion *must* be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d) (emphasis added). Under Rule 56, a party is entitled to summary judgment *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).

Moreover, to avoid summary judgment under Rule 56, the non-movant need only "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (internal quotation marks omitted). The anti-SLAPP statute renders Rule 56 inoperative, by requiring a plaintiff to prove, at the pleading stage, that she or he *probably* will prevail if the case proceeds to trial – a showing that is considerably more stringent than merely identifying material factual disputes that a jury could reasonably resolve in the plaintiff's favor. It nullifies the Seventh Amendment right to trial by jury in all civil matters in which the amount in controversy is more than $10, excluding interest and costs.

The Ninth Circuit's decision in *Metabolife International, Inc.* further highlights the conflict between the anti-SLAPP statute and Rule 56. California's anti-SLAPP statute mandates a stay of all discovery, pending a court's resolution of a motion to strike. § 425.16(g). In *Metabolife*, the court held that "the discovery-limiting aspects of § 425.16(f) and (g) collide with the discovery-allowing aspects of Rule 56," and it therefore refused to apply the statute's discovery provisions in

federal court. *Metabolife*, 264 F.3d at 846 (internal quotation marks omitted). At the same time, however, the court allowed the motion-to-strike regime to stand. As then-Chief Judge Kozinski noted, the resulting amalgamation of anti-SLAPP and Rule 56 procedures "crippled" the anti-SLAPP statute, leaving "a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed." *Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring). *Cf. Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729 (7th Cir. 2014) (the court refused to apply Washington State's anti-SLAPP law, on the ground that its procedural part could not be separated from its substantive part, because some aspects of the statute were substantive, since federal courts must apply the whole of a state law in diversity litigation). *See also Carbone v. Cable News Network, Inc.*, 2017 WL 5244176 (N.D.Ga. 2017) (refusing to apply Georgia anti-SLAPP statute on same ground as in *Intercon Solutions, Inc.*, and relying on Judge Kozinski's concurrence in *Makaeff*.[7] Appeal pending, 17-10812, argument scheduled for Nov. 8, 2018).

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[7] The Eleventh Circuit previously recognized the primacy of the Federal Rules and prevented the previous incarnation of Georgia's anti-SLAPP statute from "spread[ing] like kudzu through the federal vineyards[,]" as Judge Kozinski opined in *Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1182 (9th Cir. 2016). *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1357-62 (11th Cir. 2014). Since anti-SLAPP statutes vary from state to state, this creates additional concerns, with inconsistent outcomes among the federal district courts and courts of appeals.

California's anti-SLAPP statute creates the same conflicts with the Federal Rules that animated the Court's ruling in *Shady Grove*. That intervening decision should have led the Ninth Circuit to revisit – and reverse – its precedent, that permits application of state anti-SLAPP statutes in federal courts, but it failed to do so.

Other circuits have recognized the anti-SLAPP problem. When the Ninth Circuit last considered the place of anti-SLAPP motions in federal court, some of its judges at that time saw unanimity among other circuits and were reluctant to create a circuit split. *See Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013) (*Makaeff II*) (Wardlaw and Callahan, JJ., concurring in the denial of rehearing en banc).

In 2015, the District of Columbia Circuit reached the long-overdue conclusion that anti-SLAPP motions do *not* belong in federal court, because they directly conflict with the Federal Rules of Civil Procedure. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015). Thus, there now is a circuit split, in which the Ninth Circuit is on the wrong side, and this Court should follow the District of Columbia Circuit's lead in refusing to incorporate state-created procedures into the well-worn and tried Federal Rules of Civil Procedure.

In *Abbas*, the court held:

> The first issue before the Court is whether a federal court exercising diversity jurisdiction may apply the D.C. Anti-SLAPP

Act's[8] special motion to dismiss provision. The answer is no. Federal Rules of Civil Procedure 12 and 56 establish the standards for granting pre-trial judgment to defendants in cases in federal court. A federal court must apply those Federal Rules instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision.

A federal court exercising diversity jurisdiction should not apply a state law or rule if (1) a Federal Rule of Civil Procedure "answer[s] the same question" as the state law or rule. . . . [Citations omitted.]

[The] Federal Rules answer th[e] question differently [than the anti-SLAPP statute because t]hey do not require a plaintiff to show a likelihood of success on the merits.

That difference matters.

* * *

Rules 12 and 56 help form "an integrated program" for determining whether to grant pre-trial judgment in cases in federal court. *Makaeff v. Trump University, LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Watford, J., dissenting from denial of rehearing en banc) (Rules 12 and 56 "establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court.").

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[8] The D.C. Anti-SLAPP Act is virtually the same as the California anti-SLAPP statute.

> In short, unlike the District of Columbia Circuit Anti-SLAPP Act, the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal. Under *Shady Grove*, therefore, we may not apply the District of Columbia Anti-SLAPP Act's special motion to dismiss provision.
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> * * *
>
> A federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the District of Columbia Circuit's Anti-SLAPP Act's special motion to dismiss provision.

Id. at 1333-37 (footnotes omitted).

Similarly, the Seventh Circuit has done away with anti-SLAPP motions in federal courts. In *Intercon Solutions, Inc.*, the court, in its refusal to apply Washington State's anti-SLAPP law, held as follows:

> Federal rules prevail in federal court. *See, e.g.*, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 . . . (2010); *Walker v. Aramco Steel Corp.*, 446 U.S. 740 . . . (1980); *Hanna v. Plummer*, 380 U.S. 460 . . . (1965). . . .
>
> At oral argument on this appeal, members of the panel expressed skepticism about appellate jurisdiction, noting that state statutes cannot expand (or contract) federal jurisdiction and the Supreme Court has been

> unwilling in recent years to expand the scope of the collateral-order doctrine. [Citation omitted.]
>
> * * *
>
> Federal courts apply the whole of a state statute . . . in diversity litigation. *Erie R.R. v. Tompkins*, 304 U.S. 64 . . . (1938).

Id. at 731-32. *Cf. Planned Parenthood Federation of America, Inc.* (seeking to separate California's anti-SLAPP statute into procedural and substantive parts).

Presently, the First, Second, Fifth, and Ninth Circuits are on the wrong side of a circuit split with the Seventh, Eleventh, and District of Columbia Circuits.

Here, as in *Intercon Solutions, Inc.*, because California's anti-SLAPP statute *cannot be divided into procedural and substantive parts*, nor can the two parts be "disentangled," *id.* at 732, the statute cannot be applied in federal courts.

The argument an anti-SLAPP statute somehow does not "test the sufficiency of the complaint[,]" while Rule 12(b)(6) does, is not persuasive. *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010). In fact, the court in *Henry v. Lake Charles American Press, LLC*, 566 F.3d 164, 181 (5th Cir. 2009), simply *assumed* the applicability of Louisiana's anti-SLAPP statute in federal court, without analysis of any kind, a decision upon which no other court possibly could base its own decision.

Then-Judge, now-Justice Kavanaugh's thorough, scholarly analysis in *Abbas* should be highly persuasive. Unlike the Fifth Circuit in *Henry*, Judge Kavanaugh begins with an analysis of District of Columbia Circuit's anti-SLAPP statute and whether it has any place in federal court; and, unlike the Ninth Circuit in *Newsham*, he applied the correct legal standard, as elucidated by the Court in *Shady Grove* and *Hanna*. *Abbas*, 783 F.3d at 1333. Finally, unlike the First Circuit in *Godin*, *Abbas* notes that while both the anti-SLAPP statute and Rule 12(b)(6) "establish[] the circumstances under which a court must dismiss a plaintiff's claim before trial[,]" Rule 12(b)(6) "do[es] not require a plaintiff to show a likelihood of success on the merits" that is demanded by the anti-SLAPP statute. *Id.* at 1333-34. In this way, *Abbas* shows that the two are in irreconcilable conflict and cannot coexist. As in the District of Columbia Circuit, here, the anti-SLAPP statute impermissibly "set[s] up an additional hurdle a plaintiff must jump over to get to trial" in federal court. *Id.* at 1334. This is impermissible.

Thus, because Rule 12(b)(6) both "answers the same questions" as California's anti-SLAPP statute, and is valid under the Rules Enabling Act and the United States Constitution, "[a] federal court exercising diversity jurisdiction . . . must apply" the federal rule on dismissal and not the special anti-SLAPP motion to strike provision. *Abbas*, 783 F.3d at 1337. Respondent's motion to strike based on California's anti-SLAPP law should have been denied. *See also Carbone* (same), *supra*.

Federal courts in diversity cases apply state law only to *substantive* questions. *See Erie*, 304 U.S. at 78-79. Procedural questions are different. When state law directly conflicts with one of the Federal Rules, the outcome is simple: the Federal Rules prevail. *Cf.* 42 U.S.C. § 1988(a) (state law is assimilated into federal only when state law is not inconsistent with federal law: "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said [federal] courts in the trial and disposition of the cause. . . .").

California's anti-SLAPP statute directly conflicts with Federal Rule 12(b)(6), which provides a one-size-fits-all test for evaluating claims at the pleading stage. To survive a 12(b)(6) motion to dismiss, a plaintiff's complaint only need state a claim that is "plausible on its face." *Twombly*, 550 U.S. at 570. California, on the other hand, gives defendants a "special motion to strike" any claims that arise from protected speech activities. § 425.16(b)(1). To survive this special motion, a plaintiff must show that he has a reasonable "probability" of succeeding on the underlying claim. *Ibid.* This requires demonstrating that the claim is legally sufficient *and* that it is "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811,

123 Cal.Rptr.2d 19, 50 P.3d 733, 739 (2002) (citations omitted).

"Probability" sets a much higher bar than does "plausibility." California's special motion to strike requires supporting evidence at the pleading stage, while Rule 12(b)(6) does not require this. That is a problem, but not a dilemma, because it can be solved, since the Court has decided that the plausibility standard *alone* strikes the right balance between avoiding wasteful litigation and giving plaintiffs a chance to prove their claims. *See Twombly*, 550 U.S. at 556; *see also Ashcroft* 556 U.S. at 679.

The plausibility standard is not a floor or a ceiling from which a court is free to depart. Use of California's pleading standard in federal court means that some plaintiffs with *plausible* claims will have their cases dismissed before they have had a chance to gather their supporting evidence. It is obvious that the two standards are in direct conflict, and are irreconcilable. They need Alexander the Great's Gordian Knot solution: sever anti-SLAPP practice from federal practice.

This was not obvious to the Ninth Circuit. In *United States ex rel. Newsham*, 190 F.3d at 970-73, the Ninth Circuit erroneously reasoned that Rule 12(b)(6) and California's anti-SLAPP statute were in harmony, because a defendant still could bring a Rule 12(b)(6) motion if his or her special motion to strike was unsuccessful. *Id.* at 972. But there is no point to this. If a plaintiff survives an anti-SLAPP motion by showing that his or her claim is legally sufficient, *and* has a

probability of success, how could he or she lose on a Rule 12(b)(6) motion, that requires him or her to show mere plausibility?

Anti-SLAPP motions to strike have the merits painted all over them. California's statute asks for a determination of whether "there is a probability that the plaintiff will prevail on the claim." § 425.16(b)(1). This can mean only one thing: evaluation of the merits, and that is impermissible under Rule 12(b)(6).

Appellate experience with such cases has shown that they require an "exhaustive analysis of the merits," *see Makaeff*, 736 F.3d at 1190 (Watford, J., dissenting from the denial of rehearing en banc), as did the instant action.

The Ninth Circuit made erroneous decisions in *Newsham*, *Batzel*, and in the instant case, and it improvidently declined to grant rehearing en banc in *Makaeff*, in order to reverse *Newsham* and *Batzel*. This Court should adopt the principles set forth in both *Abbas* and *Intercon Solutions, Inc.*, and in the dissents of the Ninth Circuit judges in *Makaeff*, and remove from federal practice California's and other states' anti-SLAPP statutes.

3. THE PETITION SHOULD BE GRANTED TO RESOLVE A CIRCUIT SPLIT.

There is a circuit split among the First, Second, Fifth, and Ninth Circuits, on the one hand, the Seventh, Eleventh, and District of Columbia Circuits, on

the other hand. *See Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010) (Maine anti-SLAPP statute applies in federal court); *Chandok v. Klessig*, 632 F.3d 803 (2d Cir. 2011) (applying New York anti-SLAPP statute, without discussing its intersection with federal law); *Henry v. Lake Charles American Press, LLC*, 566 F.3d 164, 181 (5th Cir. 2009) (assuming the applicability of Louisiana's anti-SLAPP statute in federal court, without analysis of any kind); *United States ex rel. Newsham v. Lockheed Missles & Space Co.*, 190 F.3d 963 (9th Cir. 1999) (holding that there is no direct conflict between the California anti-SLAPP statute and the federal rules); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (same); *Gardner v. Martino*, 563 F.3d 981 (9th Cir. 2009) (holding Oregon anti-SLAPP statute to be available in federal court); *Yagman v. Edmondson*, 723 Fed.Appx. 463 (9th Cir. 2018) (the instant matter), all *pro*; and *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729 (7th Cir. 2014) (Washington state's anti-SLAPP statute held to be inapplicable in federal court); *Royalty Network v. Harris*, 756 F.3d 1351 (11th Cir. 2014) (Georgia anti-SLAPP statute does not apply in federal court because its verification requirement conflicts with Fed. R. Civ. P. 11, which does not require verification of pleadings); *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 333-37 (D.C.Cir. 2015) (D.C. anti-SLAPP statute inapplicable in federal court), all *con*.

Several federal civil rules, including Rules 8, 9, 11, 12, and 56, govern federal pleading and the disposition of an action prior to trial, they more than adequately,

and exclusively, together operate efficiently and fairly to deal with the procedural aspects of a claim, as required by Rule 1, and cover the same areas as California's anti-SLAPP procedures.

The question that has divided the circuit and district courts is whether some or all of the relevant Federal Rules of Civil Procedure are in conflict with the procedural provisions of anti-SLAPP statutes, and whether anti-SLAPP statutes operate effectively to displace or render nugatory those federal rules.

In *Newsham*, the first case in which the Ninth Circuit held an anti-SLAPP motion to be appropriate in federal court, the Ninth Circuit incorrectly concluded that there was no "direct collision" between the special motion to strike and the mandatory fee-shifting provisions under the California anti-SLAPP statute on the one hand, and Rules 12 or 56 of the Federal Rules of Civil Procedure on the other. 190 F.3d at 972. If the special motion is denied, motions under Rule 12 and Rule 56 still could be made. *Ibid.* Furthermore, the anti-SLAPP statute served an interest not directly addressed by the Federal Rules: protection of the constitutional rights to freedom of speech and petition for redress of grievances. *Id.* at 973 (citation omitted).

In *Metabolife Int'l, Inc.*, however, the court recognized that the discovery-limiting aspects of section 425.16(f) and (g) of the California anti-SLAPP statute collided with the discovery-allowing aspects of Rule 56, and should not be applied in federal court, but it did not overrule *Newsham*. *Id.* at 846; *accord Rogers v.*

Home Shopping Network, Inc., 57 F.Supp.2d 973, 980 (C.D.Cal. 1999).

In *Godin*, the First Circuit upheld the special motion procedures contained in Maine's anti-SLAPP statute. According to the First Circuit, Rules 12(b)(6) and 56 (as well as Maine's analogous procedural rules) apply generally, while the anti-SLAPP statute provides special procedures in a limited class of cases involving petitioning activity. 629 F.3d at 88. In addition, Rule 12(b)(6) tests the legal sufficiency of the complaint, while the anti-SLAPP statute provides a different mechanism to dismiss the complaint, on an entirely different basis. *Id.* at 89. Similarly, the fact-finder does not evaluate material factual disputes under Federal Civil Rule 56, but the anti-SLAPP statute requires the court to consider whether the defendant's conduct had a reasonable basis in the law, and whether the conduct caused the plaintiff's injury. *Ibid.* Moreover, the anti-SLAPP statute "alters what plaintiffs must prove to prevail" and provides substantive legal defenses which are not the province of the Federal Civil Rules. *Ibid.* Finally, the stay of discovery except for good cause under Maine law is consistent with the burdens imposed on the opponent of a summary judgment motion under Federal Civil Rule 56(d) (formerly Rule 56(f)). *Id.* at 90.

Curiously, other decisions have seized on the same procedural differences as *Godin*, and pointed to those differences in reaching *the opposite conclusion* – that a direct conflict existed between the Federal Rules and the particular anti-SLAPP statute at issue. For

example, even within the Ninth Circuit, several judges have expressed the view that *Newsham* was wrongly decided, even while acknowledging that it is Ninth Circuit law.

In *Makaeff*, then-Chief Judge Kozinski stated, in a concurring opinion, that the California anti-SLAPP statute directly collided with the Federal Rules of Civil Procedure:

> The California anti-SLAPP statute cuts an ugly gash through this orderly process. Designed to extricate certain defendants from the spiderweb [*sic*] of litigation, it enables them to test the factual sufficiency of a plaintiff's case prior to any discovery; it changes 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; it authorizes attorneys' fees against a plaintiff who loses the special motion by a standard far different from that applicable under Federal Rule of Civil Procedure 11; and it gives a defendant who loses the motion to strike the right to an interlocutory appeal, in clear contravention of Supreme Court admonitions that such appeals are to be entertained only very sparingly because they are so disruptive of the litigation process.

Id. at 274 (Kozinski, C.J., concurring); *accord Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1188-89 (9th Cir. 2013) ("*Trump en Banc*") (Watford, J., dissenting from denial of hearing en banc). In addition, after

Metabolife "crippled" the discovery-limiting provisions of the California anti-SLAPP statute at the expense of a quick and inexpensive termination of an anti-SLAPP suit, it created a "hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed." *Makaeff v. Trump University, LLC*, 715 F.3d at 275 (Kozinski, C.J., concurring); *accord Trump en Banc*, 736 F.3d at 1189 (Watford, J., dissenting from denial of rehearing *en banc*).

In his concurrence in *Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179 (9th Cir. 2016), joined by Judge Gould, Judge Kozinski concluded that the California anti-SLAPP statute directly conflicted with Rule 12(b)(6). *Id.* at 1183-84 (Kozinski, J., concurring). The Rule 12(b)(6) standard requires the plaintiff to state a claim that is plausible on its face. *Id.* at 1183. The California statute requires the plaintiff to demonstrate only "that the claim is legally sufficient and 'supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *Ibid.* (quoting *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 123 Cal.Rptr.2d 19, 50 P.3d 733, 739 (2002)). "'Probability' is a much higher bar than 'plausibility.'" *Ibid.* Additionally, the California special, anti-SLAPP motion requires supporting evidence (normally the province of Rule 56), while Rule 12 does not. *Ibid.* Rule 12's plausibility standard "*alone* strikes the right balance between avoiding wasteful litigation and giving plaintiffs a chance to prove their claims," and "[u]sing California's standard in federal court means that some plaintiffs with plausible claims

will have their cases dismissed before they've had a chance to gather supporting evidence. It's obvious that the two standards conflict." *Id.* at 1183-84 (emphasis in original) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

Judge Gould's separate concurrence stated that he was persuaded to the same view by Judge Kozinski's concurrence and the District of Columbia Circuit's opinion in *Abbas*, which construed the District of Columbia's anti-SLAPP statute, District of Columbia Code § 16–5502. *Id.* at 1186 (Gould, J., concurring); *see also Abbas*, 783 F.3d at 1332-33. The District of Columbia's special, anti-SLAPP motion requires defendants to make a *prima facie* showing that the claim arises from a protected activity. District of Columbia Code § 16–5502(b). If the showing is made, then the "motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." *Ibid.* While the filing of the special, anti-SLAPP motion operates to stay discovery, the court may order specified discovery if it will enable the plaintiff to defeat the motion and is not unduly burdensome, but it may shift the defendant's cost of compliance to the plaintiff. *Id.* at § 16–5502(c). A separate provision authorizes non-mandatory fee shifting. District of Columbia Circuit Code § 16–5504.

In *Abbas*, the court concluded, primarily for the reasons articulated by Judge Kozinski and the other Ninth Circuit "dissenters," that the District of

Columbia anti-SLAPP statute conflicted with Fed. R. Civ. P. 12 and 56, particularly in light of the additional hurdle placed on the plaintiff to survive dismissal and get to trial. *See Abbas*, 783 F.3d at 1334-36 (discussing conflict and citing Judge Kozinski's concurrence in *Makaeff* and Judge Watford's dissent in *Trump en Banc*).

Based on the foregoing, it should be concluded that the special motion procedures of anti-SLAPP statutes conflict, at least, with the procedures set forth in Fed. R. Civ. P. 12 and 56, for the reasons expressed by Judge Kozinski in his concurrences and the decisions in *Abbas* and *Rogers*.

At bottom, the application of California's, or any other jurisdictions', anti-SLAPP statutes would require a federal court to dismiss a lawsuit that otherwise would not be subject to dismissal or judgment, respectively, under Federal Rules 12 and 56. Furthermore, the special motion requires courts to evaluate the facts and to make factual findings in determining whether the plaintiff has shown a probability of success. Thus, a court must decide disputed factual issues without the benefit of a trial and its attendant protections, not the least of which is the ability to cross-examine witnesses. It is not surprising that the highest courts of three states, Minnesota, New Hampshire, and Washington, have concluded that the comparable anti-SLAPP statutes violate the right to a jury trial under those particular states' constitutions, and have declared them to be unconstitutional, on state grounds. *Leiendecker v. Asian Women of United Minnesota*, 895 N.W. 623, 2017

WL 2267289 (Minn. Supreme Court 2017) (holding Minnesota anti-SLAPP statute unconstitutional because it violates the right to jury trial by requiring judges to resolve disputed factual issues); *Opinion of the Justices (SLAPP Suit Procedure)*, 138 N.H. 445, 641 A.2d 1012, 1015 (1994); *Davis v. Cox*, 183 Wash.2d 269, 351 P.3d 862, 874 (2015) (*en banc*).

Accordingly, the Court should grant the petition and ultimately should conclude that even though the California anti-SLAPP statute (and other states' anti-SLAPP statutes) is partly substantive under *Erie*, the application of anti-SLAPP special motion procedures conflicts with Rules 12 and 56, and they may not be applied in federal practice.

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be granted, and the use of anti-SLAPP statutes should be prohibited in federal courts.

Respectfully submitted,

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