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# A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts

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— Note —

A SLAPP BACK ON TRACK: HOW  
*SHADY GROVE* PREVENTS THE  
 APPLICATION OF ANTI-SLAPP LAWS  
 IN FEDERAL COURTS\*

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\* As this Note was going to press, the Court of Appeals for the District of Columbia decided *Abbas v. Foreign Policy Group, LLC*, No. 13-717 (D.C. Cir. Apr. 24, 2015), using the analysis that this Note puts forward to find that the District of Columbia’s anti-SLAPP statute cannot apply in federal court.

## INTRODUCTION

In 2011, WorldNetDaily.com and its CEO, Joseph Farah, posted more than sixty “internet items” and forty-seven articles questioning the validity of President Barak Obama’s birth certificate.<sup>1</sup> Following the release of the President’s long-form birth certificate, Farah and his company fanned the flames by advertising WorldNetDaily.com’s upcoming publication of a book by Dr. Jerome Corsi entitled, “Where’s the Birth Certificate? The Case That Barak Obama Is Not Eligible to Be President.”<sup>2</sup> Following the book’s release, Esquire Magazine poked fun at the book and satirically claimed that Farah changed his mind because publishing the book would make him and his company look like “idiots.”<sup>3</sup> Farah, not finding the humor in the matter, sued Esquire Magazine for “more than \$100 million in actual and compensatory damages and more than \$20 million in punitive damages,” alleging, among other claims, defamation.<sup>4</sup> Esquire responded by moving to dismiss Farah’s claim under the District of Columbia’s anti-SLAPP law.<sup>5</sup>

The District Court for the District of Columbia applied the anti-SLAPP statute without question<sup>6</sup> and only inquired whether Esquire Magazine’s blog post was protected speech under the statute.<sup>7</sup> Ultimately, the court concluded that Esquire’s comments were the type of speech protected under the anti-SLAPP act and dismissed Farah’s complaint.<sup>8</sup>

However, the court noted that “the rationale that applie[d] to the motion . . . under the D.C. [a]nti-SLAPP Act also applie[d] to Defendants’ motion to dismiss [for] failure to state a claim.”<sup>9</sup> While the rationale for Rule 12(b)(6) and the anti-SLAPP motion to dismiss may

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1. Farah v. Esquire Magazine, Inc., 863 F. Supp. 2d 29, 32 (D.D.C. 2012).
  2. *Id.* at 31.
  3. *See id.* at 33–34 (placing a blog post next to a picture of the Corsi book claiming that Farah said, among other things, “I mean, we’ll do anything to hurt Obama, and erase his memory, but we don’t want to look like [idiots].”).
  4. *Id.* at 34–35.
  5. *Id.* at 31, 35.
  6. *See id.* at 35–39 (addressing only the merits of Esquire Magazine’s claims under the District of Columbia’s anti-SLAPP statute). *See generally* D.C. CODE § 16-5501 (LexisNexis 2012) (allowing individuals to file a special motion to dismiss when a SLAPP lawsuit has been brought against them based on their statements about matters of public concern).
  7. *Farah*, 863 F. Supp. 2d at 38.
  8. *Id.* at 39.
  9. *Id.*

have been similar, there are important differences between the two. Namely, the anti-SLAPP motion imposes a different burden of proof on both the defendant and the plaintiff.<sup>10</sup> Furthermore, a Rule 12(b)(6) motion considers the pleadings alone, whereas an anti-SLAPP motion allows a court to examine affidavits apart from the pleadings. This should have raised a red flag for the court to perform a conflict of law analysis to determine whether the anti-SLAPP statute motion to dismiss or Rule 12(b)(6) was appropriate. After all, presenting evidence and the burden of proof are important procedural rights.<sup>11</sup>

Unfortunately, the district court did not perform a conflict of law analysis. The court considered the anti-SLAPP statute's applicability in federal court as an afterthought, dismissing any conflict of law analysis in a footnote.<sup>12</sup> This could be taken as an indication that anti-SLAPP statutes are consistently applied by federal courts sitting in diversity; however, that is not the case. In fact, just four months before the decision in *Farah*, the same district court refused to apply the exact same anti-SLAPP statute due to a conflict with the Federal Rules of Civil Procedure in *3M Company v. Boulter*.<sup>13</sup>

Much like in *Farah*, the plaintiff in *3M* alleged the defendant engaged in a "campaign of harassment," and the defendant, Boulter, responded that the plaintiff's lawsuit was frivolous.<sup>14</sup> The district court in *3M* resolved the issue by following the conflict of law analysis adopted by the Supreme Court's plurality in *Shady Grove Orthopedic Associates v. Allstate Insurance Company*.<sup>15</sup> The *3M* court concluded that the District of Columbia's anti-SLAPP statute impermissibly conflicted with Federal Rules of Civil Procedure 12 and 56 and, therefore, did not apply in federal court.<sup>16</sup> What is even more interesting

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10. See D.C. CODE § 16-5503(b) (LexisNexis 2012) ("If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.").
  11. *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009).
  12. *Farah*, 863 F. Supp. 2d at 36 n.10.
  13. 842 F. Supp. 2d 85, 93 (D.D.C. 2012). *Compare 3M*, which was decided on February 2, 2012, *with Farah*, which was decided on June 4, 2012 (demonstrating federal courts' confusion over whether to apply anti-SLAPP laws).
  14. See *3M*, 842 F. Supp. 2d at 89–92, 102.
  15. 130 S. Ct. 1431 (2010).
  16. See *3M*, 842 F. Supp. 2d at 101–07 (applying the analysis in *Shady Grove* to find a direct conflict and determining that the state statute could not apply in federal court).

is that the defendants' 12(b)(6) motion to dismiss was subsequently denied by the district court.<sup>17</sup> The same motion to dismiss was not applied in *Farah* because the defamation claim was meritless under the District of Columbia's anti-SLAPP statute.<sup>18</sup> Unlike *Farah*, the court in *3M* found not only that the plaintiff's claim had merit, but also that the plaintiff had actually stated a claim for which relief could be granted. However, if the plaintiff's claim in *3M* had been considered under the anti-SLAPP statute, the motion would have been subject to a higher burden of proof and litigated with less evidence, likely resulting in the dismissal of the claim.

These conflicting opinions reflect the confusion of federal courts in determining whether anti-SLAPP statutes apply in federal court. In this context, the importance of *Shady Grove*, the most recent progeny of *Erie Railroad v. Tompkins*,<sup>19</sup> cannot be underestimated. The plurality in *Shady Grove* gave the Federal Rules of Civil Procedure increased prominence over a possibly conflicting state law. This Note seeks to identify and resolve the confusion that has perplexed federal courts when deciding whether anti-SLAPP statutes are preempted by the Federal Rules of Civil Procedure. Ultimately, because *Shady Grove*'s plurality should be applied, anti-SLAPP statutes cannot apply in federal court as they conflict with the Federal Rules of Civil Procedure. Moreover, the conflict between the anti-SLAPP statute and federal rules is critical. Anti-SLAPP statutes require that in order to defeat a motion, a plaintiff satisfy a heightened standard of proof while simultaneously depriving the plaintiff of evidence available to meet that standard.

Part I of this Note will discuss the problems that led to anti-SLAPP statutes and evaluates their purpose and how they function. Part II of this Note will examine the evolution of conflict of law analysis under *Erie*, what role *Shady Grove*'s plurality plays in that analysis, and how it has been applied by federal courts. Lastly, Part III observes what happens when federal courts follow the plurality in *Shady Grove*; anti-SLAPP statutes cannot apply in federal court because they directly conflict with Federal Rules of Civil Procedure 12(d) and 56.

## I. WHAT IS AN "ANTI-SLAPP" LAW?

This section gives some general insight into the purpose and function of anti-SLAPP laws before discussing the legal complexities surrounding their application in federal courts. First, this section looks at what a SLAPP is. Second, this section discusses how anti-SLAPP

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17. *Id.* at 117.

18. *Id.* See also *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 32 (D.D.C. 2012).

19. 304 U.S. 64 (1937).

statutes solve that problem. Identifying the purpose and functions of anti-SLAPP statutes make the reasons why they may not apply in federal court evident.

A. *The Problems That Created Anti-SLAPP Laws*

A SLAPP is a “strategic lawsuit against public participation.”<sup>20</sup> In a SLAPP, the plaintiff typically sues “without substantial merit . . . to ‘stop citizens from exercising their political rights or to punish them for having done so.’”<sup>21</sup> The plaintiff’s goal is not win the lawsuit but to “foist[] upon the target the expenses of a defense.”<sup>22</sup> The plaintiff does this by first filing a complaint or counterclaim against a party because of their communication to the general public on an issue that involves public interest.<sup>23</sup> The plaintiffs in SLAPPs rarely win in court but instead achieve their purpose by leaving the defendants “devastated and depoliticized”<sup>24</sup> and “chilling” the defendant’s constitutional rights to freedom of speech and petition.<sup>25</sup> For the plaintiff, it is a simple cost-benefit analysis: the plaintiff can easily shoulder the cost of litigation and highly values an opportunity to silence the defendant; the defendant cannot easily bear the cost of litigation, so the threat of any suit is enough to deter her.<sup>26</sup>

In response to the “disturbing increase” in SLAPPs, many state legislatures passed laws to “encourage continued participation in matters of public significance” and stop the “abuse of the judicial process.”<sup>27</sup> These became known as anti-SLAPP statutes, and to date, twenty-eight states, the District of Columbia, and Guam have them.<sup>28</sup> Anti-SLAPP statutes give defendants an opportunity to dispose of litigation

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20. George Pring first coined the term “SLAPP.” See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3 (1989).
  21. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992) (quoting Pring, *supra* note 20, at 5–6).
  22. *Id.*
  23. Pring, *supra* note 20, at 8.
  24. *Id.*
  25. See *id.* at 9; *Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1033 (N.D. Ill. 2013).
  26. For a thorough discussion on the financial, emotional, and personal effects of SLAPPs on defendants, see GEORGE W. PRING & PENELOPE CANAN, *SLAPPs: GETTING SUED FOR SPEAKING OUT* 1–8 (1996).
  27. LA. CODE CIV. PROC. ANN. art. 971(2) (2005).
  28. See *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited Jan. 22, 2014) (listing every state and territory with anti-SLAPP legislation).

before it even starts by “screen[ing] meritless claims pursued to chill one’s constitutional rights under the First Amendment.”<sup>29</sup>

*B. How an Anti-SLAPP Law Works*

Although anti-SLAPP statutes are not exactly the same in every state, they do share characteristics that make them easy to identify.<sup>30</sup> In particular, anti-SLAPP statutes invariably protect the rights of litigants by creating a motion to dismiss a frivolous claim early in litigation. As discussed in this section, the anti-SLAPP statute protects those rights by (1) conferring immunity to the anti-SLAPP plaintiff under the First Amendment, (2) providing that immunity through a motion to dismiss the anti-SLAPP defendant’s claim, and (3) shifting the burden to the anti-SLAPP defendant to show that her lawsuit is not frivolous. Federal courts determining whether federal rules preempt anti-SLAPP statutes have focused on all three aspects.

Anti-SLAPP statutes aim to protect a defendant’s rights under the First Amendment to petition and speak out for a public purpose.<sup>31</sup> The idea behind anti-SLAPP regimes is to allow a defendant to dismiss a case and become entirely immune from litigating the claim.<sup>32</sup> This permits would-be defendants to “continue[] participation in matters of

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29. *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 169 (5th Cir. 2009).

30. In fact, some are given away by their title. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-752 (2013) (“Strategic lawsuits against public participation; motion to dismiss”); DEL. CODE ANN. tit. 10, § 8136 (2013) (“Actions involving public petition and participation”); MD. CODE ANN. CTS. & JUD. PROC. § 5-807 (LexisNexis 2013) (“Strategic lawsuits against public participation”).

31. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(e)(4) (West 2013) (protecting “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”). *See also* Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 832 (2000) (describing the purpose of California’s anti-SLAPP regime). When referring to SLAPP litigation, this Note uses the term “defendant” and “plaintiff” to mean a SLAPP plaintiff and a SLAPP defendant, respectively. These are not always the typical plaintiff or defendant, as an anti-SLAPP motion to dismiss can be filed by the plaintiff in response to a counterclaim by the defendant.

32. *See Henry*, 566 F.3d at 177; *Godin v. Schencks*, 629 F.3d 79, 85 (1st Cir. 2012) (explaining that “[t]here is a ‘crucial distinction between a right not to be tried and a right whose remedy requires dismissal of charges’” and finding that anti-SLAPP laws create a right not to be tried) (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989)). *See also* Katelyn E. Saner, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 DUKE L.J. 781, 791 (2013) (“States enact anti-SLAPP laws with the goals of shielding defendants from litigating against meritless claims and encouraging protected speech.”).

public significance” by preventing the chilling effect of SLAPPs.<sup>33</sup> The anti-SLAPP statute typically embodies these goals in the text of the statute itself, including legislative findings or the purpose of the statute.<sup>34</sup> The inclusion of an anti-SLAPP statute’s purpose in the text of the statute itself has had a significant influence on federal courts reviewing the statute’s applicability.<sup>35</sup>

Anti-SLAPP statutes achieve immunity for defendants by allowing them to file a motion to dismiss the plaintiff’s claim early on in the litigation.<sup>36</sup> Consequently, the aims of an anti-SLAPP statute are accomplished almost entirely through procedure. The motion involves a burden-shifting scheme, a timing deadline, parameters on what information can be considered, and a determination of litigation expenses. The motion itself is typically characterized as a “motion for summary judgment,” “special motion to strike,” “motion to dismiss,” or “judgment on the pleadings.”<sup>37</sup> Some anti-SLAPP statutes avoid

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33. *Henry*, 566 F.3d at 169.

34. *See, e.g.*, N.M. STAT. ANN. § 38-2-9.2 (2013) (“The legislature declares that it is the public policy of New Mexico to protect the rights of its citizens to participate in quasijudicial proceedings before local and state governmental tribunals.”); IND. COD ANN. § 34-7-7-1(a) (West 2013) (“This chapter applies to an act in furtherance of a person’s right of petition or free speech under the Constitution of the United States or the Constitution of Indiana in connection with a public issue or an issue of public interest.”).

35. *See, e.g., Henry*, 566 F.3d at 170; *Godin*, 629 F.3d at 82; U.S. *ex rel.* *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970–71 (9th Cir. 1999).

36. *See Godin*, 629 F.3d at 85 (finding that anti-SLAPP laws grant the defendant the “right not to be tried,” not a “remedy [that] requires the dismissal of charges”). *See generally* PRING & CANAN, *supra* note 26, at 143–67 (recommending a prevention strategy as the means by which the judiciary systems should manage SLAPPs).

37. *See* ARIZ. REV. STAT. ANN. § 12-752(A) (2013) (“[T]he defending party may file a motion to dismiss the action under this section.”); ARK. CODE ANN. § 16-63-507(a)(1) (West 2013) (allowing special discovery “upon the filing of a motion to dismiss or a motion to strike under § 16-63-506”); CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2014) (declaring frivolous claims “shall be subject to a special motion to strike”); DEL. CODE ANN. tit. 10, § 8137 (2013) (allowing SLAPP defendants to file “[a] motion to dismiss”); D.C. CODE § 16-5502(a) (LexisNexis 2013) (describing the circumstances in which “[a] party may file a special motion to dismiss”); FLA. STAT. ANN. § 768.295(5) (West 2013) (“A person or entity may petition the court for an order dismissing the action or granting final judgment in favor of that person or entity.”); GA. CODE ANN. § 9-11-11.1(d) (2014) (allowing special discovery “upon the filing of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section”); HAW. REV. STAT. § 634F-2 (West 2013) (“The motion shall be treated as a motion for judgment on the pleadings.”); 735 ILL. COMP. STAT. ANN. 110/10 (West 2013)



using such language and instead merely entitle the defendant to immunity, even though the defendant needs to file a motion to assert that immunity.<sup>38</sup> In doing so, such motions track, at least in name, Federal Rules of Civil Procedure 12(b)(6) and 56.

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(“‘Motion’ includes any motion to dismiss, for summary judgment, or to strike, or any other judicial pleading filed to dispose of a judicial claim.”); IND. CODE ANN. § 34-7-7-9(a)(1) (West 2011) (“If a person files a motion to dismiss under this chapter, the court in which the motion is filed shall . . . [t]reat the motion as a motion for summary judgment.”); LA. CODE CIV. PROC. ANN. art. 971(A)(1) (Supp. 2015) (declaring that frivolous claims “shall be subject to a special motion to strike”); ME. REV. STAT. tit. 14, § 556 (2013) (being subject to a frivolous lawsuit, “the moving party may bring a special motion to dismiss”); MD. CODE ANN. CTS. & JUD. PROC. § 5-807(d) (West 2013) (granting SLAPP defendants permission to file a “[m]otion to dismiss or stay proceedings”); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000) (being the case that some parties to litigation are harassed by meritless claims, “said party may bring a special motion to dismiss”); MINN. STAT. ANN. § 554.01(4) (West 2010) (“‘Motion’ includes any motion to dismiss, motion for summary judgment, or any other judicial pleading filed to dispose of a judicial claim.”); MO. REV. STAT. § 537.528(1) (2013) (“[A SLAPP plaintiff’s claim] is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion.”); NEB. REV. STAT. § 25-21,245 (2009) (“A motion to dismiss based on a failure to state a cause of action shall be granted.”); NEV. REV. STAT. § 41.660(3)(a) (2013) (“If a special motion to dismiss is filed pursuant to a subsection 2, the court shall: Treat the motion as a motion for summary judgment . . . .”); N.M. STAT. ANN. § 38-2-9.1(A) (West 2010) (“[a SLAPP claim shall be] subject to a special motion to dismiss, motion for judgment on the pleadings, or motion summary judgment”); N.Y. C.P.L.R. 3211(g) (McKinney Supp. 2014) (granting a motion to dismiss and referencing N.Y. CIV. RIGHTS LAW §70-a (McKinney 2009), which is the anti-SLAPP statute for New York); OR. REV. STAT. § 31.150(1) (2013) (“A defendant may make a special motion to strike against a claim . . . treated as a motion to dismiss.”); TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West Supp. 2014) (allowing a party to “file a motion to dismiss the legal action” if it is meritless); UTAH CODE ANN. § 78B-6-1403(1)(b) (West 2009) (permitting a party who is subject to a SLAPP to make “a motion for judgment on the pleadings”); VT. STAT. ANN. tit. 12, § 1041(a) (Supp. 2013) (“A defendant . . . may file a special motion to strike under this section.”); WASH. REV. CODE § 4.24.525(4)(b) (Supp. 2013) (“A moving party bringing a special motion to strike a claim under this subsection.”).

38. See 27 PA. CONS. STAT. ANN. § 8303 (West 2009) (“A person who wishes to raise the defense of immunity from civil liability under this chapter may file a motion with the court requesting the court to conduct a hearing to determine the preliminary issue of immunity.”); R.I. GEN. LAWS ANN. § 9-33-2(c) (West 2013) (“The immunity established by this section may be asserted by an appropriate motion or by other appropriate means under the applicable rules of civil procedure.”); TENN. CODE ANN. § 4-21-1003(a) (2011) (“Any person who in

This motion to dismiss must be filed in a very specific amount of time. In some jurisdictions, like Arkansas, if the special motion to dismiss is not filed contemporaneously with the pleading, the ability to file an anti-SLAPP motion to dismiss is waived.<sup>39</sup> On the other hand, Arizona allows a defendant up to ninety days, or any other time the court thinks is prudent after receiving the complaint, to file a special motion to dismiss.<sup>40</sup> Ideally, this serves to protect the defendant from litigating meritless claims in which she would incur a great deal of expenses.<sup>41</sup> Such an expedited motion also creates an issue over what information a court may consider and what the burden of proof will be. This is true especially since the motion to dismiss requires some inquiry into the merits of the claim.

When a defendant files a motion under an anti-SLAPP statute, the plaintiff's complaint is dismissed "unless the court determines that the plaintiff has established that the plaintiff will prevail on the claim."<sup>42</sup> Usually, the defendant's initial burden in filing the special motion to dismiss is only a "prima facie" showing that the suite "arises from any act by the citizen party 'in furtherance of the person's right of petition or free speech . . . in connection with a public issue.'"<sup>43</sup> In evaluating whether the defendant satisfies this burden, the court considers the pleadings and affidavits supporting the contentions of the opposing

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furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency." Oklahama's defamation statute excludes the types of communications protected by anti-SLAPP statutes from the types of communications that would subject a person to liability. A defendant needs to use a motion to assert this liability; a plaintiff needs to prove that the alleged communication by defendant is not included in specified, protected communication. *See* OKLA. STAT. tit. 12, § 14431.1 (2013) (defining a privileged communication).

39. *See* ARK. CODE ANN. § 16-63-505 (West 2013).
40. *See* ARIZ. REV. STAT. ANN. § 12-752(C) (Supp. 2013).
41. *See, e.g.*, N.M. STAT. ANN. § 38-2-9.1(A) (West 2010) (requiring courts considering anti-SLAPP motions to dismiss "on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation"). *See also* PRING & CANAN, *supra* note 26, at 26 (describing the most effective means of managing SLAPPs and protecting defendants).
42. CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2014).
43. U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 971 (9th Cir. 1999) (quoting CAL. CIV. PROC. CODE § 425.16(b)(1)).

sides.<sup>44</sup> Alternatively, some jurisdictions allow for special discovery and a hearing on the motion.<sup>45</sup> Considering such information in addition to

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44. See ARIZ. REV. STAT. ANN. § 12-752(B) (Supp. 2013) (“In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating facts on which the liability or defense is based.”); CAL. CIV. PROC. CODE § 425.16(b)(2) (West Supp. 2014) (“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.”); FLA. STAT. ANN. § 720.304(4)(c) (West 2013) (“The petitioner may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the governmental entity’s, business organization’s, or individual’s lawsuit has been brought in violation of this section.”); HAW. REV. STAT. § 634F-2(4)(A) (West 2013) (“Without leave of court, have seven days to amend its pleadings to be pled with specificity, and shall include such supporting particulars as are peculiarly within the supporting pleader’s knowledge”); IND. CODE ANN. § 34-7-7-9(c) (2011) (“The court shall make its determination based on the facts contained in the pleadings and affidavits filed and discovered under the expedited proceeding.”); LA. CODE CIV. PROC. ANN. art. 971(A)(2) (Supp. 2015) (“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.”); ME. REV. STAT. tit. 14, § 556 (2013) (“In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based.”); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000) (“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.”); N.Y. C.P.L.R. 3211(g) (McKinney Supp. 2014) (requiring adequate evidence to be submitted to the court, including affidavits); OR. REV. STAT. § 31.150(4) (2013) (“In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.”); TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West Supp. 2014) (“In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.”); UTAH CODE ANN. § 78B-6-1403(1)(a) (West 2009) (allowing the defendant to file affidavits “detailing his belief that the action is designed” to chill his right to public participation); VT. STAT. ANN. tit. 12, § 1041(e)(2) (Supp. 2013) (“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.”); WASH. REV. CODE § 4.24.525(4)(c) (Supp. 2013) (“In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.”).
45. See ARK. CODE ANN. § 16-63-507(a)(2)–(b) (West 2013) (requiring a hearing and allowing discovery for purposes of that hearing if necessary); D.C. CODE §§ 16-5502(c)(1), (d) (LexisNexis Supp. 2014) (permitting special discovery where not doing so would be “unduly burdensome” and allowing “expedited hearing[s]”); GA. CODE ANN. § 9-11-11.1(d) (West 2014) (granting special discovery or hearings); 735 ILL. COMP. STAT. ANN. 110/20(a)–(b) (West 2013) (during suspended discovery there may

the pleadings mimics Federal Rule of Civil Procedure 12(d).<sup>46</sup> In any event, if the defendant satisfies the initial burden required by the anti-SLAPP motion to dismiss, the plaintiff must then establish by a “reasonable probability” that she will prevail on the merits.<sup>47</sup> Typically, the prevailing party obtains attorney’s fees and any costs incurred in filing or responding to the special motion to strike.<sup>48</sup> The problem in federal courts is that, as observed above, some provisions in the anti-SLAPP statutes resemble provisions of federal rules, and there is long history of barring the application of such state laws in federal courts.

## II. FEELING THE TENSION BETWEEN THE FEDERAL RULES OF CIVIL PROCEDURE AND STATE LAWS

As already observed, anti-SLAPP laws provide important protection for litigants who do not have the means to defend themselves against frivolous law suits and deter plaintiffs from wasting judicial resources. What makes anti-SLAPP statutes so unique is they are simultaneously substantive and procedural. The trouble is that there is

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be hearings and special discovery); MD. CODE ANN. CTS. & JUD. PROC. § 5-807(d)(1) (West 2013) (requiring a court to hold a hearing on the motion as soon as possible); MINN. STAT. ANN. § 554.02 Subd. 2(1) (West 2010) (permitting special discovery if good cause is shown); MO. REV. STAT. § 537.528(1) (2013) (subjecting a claim “to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion”); NEB. REV. STAT. § 25-21,245 (2013) (“The court shall expedite and grant preference in the hearing of such motion.”); 27 PA. CONS. STAT. ANN. § 8303 (West 2009) (requiring a hearing following the motion); R.I. GEN. LAWS ANN. § 9-33-2(b) (West 2013) (allowing for special discovery and hearing for “good cause”).

46. FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”).
47. *Newsham*, 190 F.3d at 971.
48. See e.g., CAL. CIV. PROC. CODE § 425.16(c)(2) (West Supp. 2014) (“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 . . . .”); D.C. CODE § 16-5504(b) (LexisNexis Supp. 2014) (“The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.”); UTAH CODE ANN. § 78B-6-1405(a)–(b) (West 2013) (awarding “reasonable attorney fees” and “other compensatory damages” upon a success anti-SLAPP motion to dismiss).

a federal doctrine, the *Erie* Doctrine, according to which “state substantive law and federal procedural law apply in diversity cases.”<sup>49</sup> Determining when to apply state substantive law and federal procedural law has created problems for federal courts since *Erie*’s inception.<sup>50</sup> This doctrine and the bifurcated nature of anti-SLAPP statutes has prevented federal courts from coming to a consensus on whether anti-SLAPP statutes apply in federal diversity cases. In order to understand some of these complexities, this Note first explores the evolution of the *Erie* doctrine and its progeny, culminating in *Shady Grove*.

A. *What Shady Grove Actually Contributed and Took Away from the Erie Doctrine*

Contrary to the opinion of some scholars,<sup>51</sup> *Shady Grove*’s plurality announced a workable and consistent modification to conflict of law analysis under the Rules Enabling Act (REA).<sup>52</sup> When a federal court is evaluating a state law that seems to conflict with that federal rule, there are two potential steps to the analysis. The first step is an analysis of the state law under the REA, and depending on the outcome of that analysis, the second step is an evaluation of the law under the Rules of Decision Act (RDA).<sup>53</sup> This Note focuses on REA analysis, as this was the center of the discussion in *Shady Grove*. Since Justice Scalia’s plurality in *Shady Grove* was the only opinion of the Court consistent with *Hanna v. Plumer*,<sup>54</sup> which crystalized REA analysis, it is important to understand the evolution of REA conflict of law analysis to understand how *Shady Grove* affects the status of anti-SLAPP laws in federal courts.<sup>55</sup>

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49. Donald L. Doernberg, “*The Tempest*”: *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1151 (2011).
50. See *id.* at 1150 (“Unfortunately, *Erie* left difficult problems in its wake.”).
51. See, e.g., Saner, *supra* note 32, at 785; Doernberg, *supra* note 49, at 1208.
52. 28 U.S.C. § 2072 (2012). The structure of this analysis is also referred to as *Hanna* analysis since it derives from *Hanna v. Plumer*, 380 U.S. 460 (1965).
53. 28 U.S.C. § 1652 (2012). This is also generally known as *Erie* analysis since it actually determines whether the state law is substantive in nature. See *Hanna*, 380 U.S. at 469. The plurality in *Shady Grove* never reached analysis under the RDA and even the concurrence did not add anything substantial to *Erie* doctrine when a state law passes muster under the REA. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).
54. 380 U.S. 460 (1965).
55. Kevin M. Clermont, *Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1013 (2011).

1. The Evolution of REA Analysis Before *Shady Grove*

In *Erie Railroad Co. v. Tompkins*,<sup>56</sup> Justice Brandeis wrote an opinion that overruled the Supreme Court's previous decision in *Swift v. Tyson*.<sup>57</sup> *Swift* had determined, under the RDA, that general federal common law preempts state common law in federal courts sitting in diversity.<sup>58</sup> Under *Erie*, the new interpretation of the RDA became that "there is no general federal common law," and so state common law generally controls in federal diversity cases.<sup>59</sup> Since state statutory law and common law are substantive, *Erie* commands federal courts to apply those state and federal procedural laws to federal diversity cases.<sup>60</sup> At first, *Erie* looked like it had announced a clear command for federal courts to apply state law, but the line between procedure and substance became variable.<sup>61</sup> Courts applying *Erie* did not help by neglecting to give an explanation about how substance differs from procedure.<sup>62</sup> Adding to the confusion, the Supreme Court of the United States has been working backwards somewhat in developing the analysis, causing "unguided" decisions.<sup>63</sup>

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56. 304 U.S. 64 (1938).

57. 41 U.S. 1 (1842).

58. *See id.*

59. *Erie*, 304 U.S. at 78. *See also* Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 878 (2011) ("*Erie* itself commanded that federal courts apply state substantive law, rather than 'federal general common law,' to claims that lie within diversity jurisdiction.>").

60. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 696 (1974) ("Originally it was believed that *Erie* simply commanded the application of state law to substantive issues, but permitted federal courts to handle procedure problems their own way."); *see also* Hanna v. Plumer, 380 U.S. 460, 465 (1965).

61. *See Erie*, 304 U.S. at 92 (Reed, J., concurring); *Sibbach v. Wilson*, 312 U.S. 1, 6 (1940); *Hanna*, 380 U.S. at 471; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1450 (2010) (Stevens, J., concurring).

62. *See S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 311 (7th Cir. 1995) ("[A]t least for the purpose of making out the scope of the *Erie* decision, the terms 'substance' and 'procedure' are conclusions rather than algorithms.>").

63. *See Hanna*, 380 U.S. at 471; *Shady Grove*, 130 S. Ct. at 1456–57 (Stevens, J., concurring). For a more thorough discussion on the various aspects of the conflict of law analysis and the evolution of *Erie* doctrine prior to *Shady Grove*, see Lisa Litwiller, *A SLAPP in the Face: Why Principles of Federalism Suggest That Federal District Courts Should Stop Turning the Other Cheek*, 1 J. CT. INNOVATION 67, 73–83 (2008).

The first challenge to *Erie* came in *Sibbach v. Wilson*.<sup>64</sup> Just before *Sibbach*, Congress had passed the REA.<sup>65</sup> The REA gives the Supreme Court the ability to promulgate rules of procedure so long as those rules do not infringe on substantive rights.<sup>66</sup> Shortly thereafter, the Federal Rules of Civil Procedure went into effect.<sup>67</sup> *Sibbach* asked whether, and under what circumstances, the Federal Rules of Civil Procedure could be invalid under the REA.<sup>68</sup> Justice Roberts decided this issue by refusing to equate the term “substantive right” in the REA with the notion of an “important right.”<sup>69</sup> Indeed, since every Federal Rule of Civil Procedure embraces “important rights,” the test for validity could not be whether the rule changes “important rights,” because procedural rules will always affect “important rights.”<sup>70</sup> The test for whether a federal rule was valid under the REA was and is “whether a rule really regulates procedure.”<sup>71</sup> This means that if a rule regulates procedure at all, it will be valid under the REA.<sup>72</sup> The decision in *Sibbach* has since become the tail of REA analysis, and its test is all but a foregone conclusion because the Supreme Court has rejected every challenge to a rule under the REA.<sup>73</sup>

The next contribution to REA analysis came in *Hanna v. Plumer*,<sup>74</sup> in which Chief Justice Warren backtracked a bit.<sup>75</sup> *Hanna* determined

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64. *Sibbach*, 312 U.S. at 1.

65. *Id.* at 7; *see* 28 U.S.C. § 2072 (2012).

66. *See* 28 U.S.C. §§ 2072(a)–(b) (2012).

67. *See* Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1051 (2011) (observing that the Federal Rules of Civil Procedure went into effect September 16, 1938).

68. *See Sibbach*, 312 U.S. at 9 (“The contention of the petitioner, in final analysis, is that Rules 35 and 37 are not within the mandate of Congress to this court.”).

69. *See id.* at 13.

70. *See id.*

71. *Id.* at 14.

72. *See* Ides, *supra* note 67, at 1054 (concluding that *Sibbach*’s admission that Rule 35 did regulate procedure while contesting that it regulated other rights led the court to find that the rule was valid).

73. *See* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (“Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us.”).

74. 380 U.S. 460 (1965).

75. Prior to *Hanna*, there were several very influential opinions on RDA analysis. One of the most notable is *Guaranty Trust Co. v. York*, 356 U.S. 525 (1958), which produced the outcome determinative test. According to this test, if the application of the federal rule would change the outcome of the case, the state law applied. *Id.* at 108–09. But keep in mind that

that a federal rule applies any time it is broad enough to cover the issue in dispute.<sup>76</sup> The Court found that there are two different “lines of cases” under *Erie* that are meant to “control very different sorts of decisions.”<sup>77</sup> One of these types of cases is evaluated under the REA, while the other type is evaluated under RDA.<sup>78</sup> According to *Hanna*, a court should first conduct analysis under the REA by asking whether the federal rule is broad enough in scope to clash with the state law.<sup>79</sup> If the scope of the federal rule is not broad enough to control, then the court will conduct the RDA analysis.<sup>80</sup> If the scope of the rule and the scope of the state law overlap, the inquiry moves to the *Sibbach* test of whether the federal rule “really regulates procedure.”<sup>81</sup>

To sum up, REA analysis uses a two-step inquiry. The first inquiry is whether there is an “unavoidable” or “direct” conflict between the scope of the state law and the federal rule. If there is a direct collision, then REA asks the second question: whether the federal rule in question

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this is not the same test for procedure and substance under the REA. *York* was later modified by *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), which, instead of performing an outcome determinative test, balanced state and federal interests. If the state had a compelling interest for having the law apply in federal courts and federal interest is not equally compelling, then the state law applies in federal court. *Id.* at 538–40.

76. See *Hanna*, 380 U.S. at 470 (“But the holding of each [case where a federal rule did not preempt a state law] was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.”).

77. *Id.* at 471.

78. *Id.*; see also Ely, *supra* note 60, at 722–23.

79. Methods of interpretation for the scope of the state law and the federal rule have also been variable. In *Hanna*, the conflict was based on the use of a state law to require in-hand service of process as opposed to Rule 4(d)(1), which does not. See *Hanna*, 380 U.S. at 461–62 (noting the language of MASS. GEN. LAWS ANN. ch. 197, § 9 (1958) and FED. R. CIV. P. 4(d)(1)). Warren’s reading of the state law’s scope was limited to its procedural effects, which would have only altered “the way in which process was served.” *Id.* at 469. In a subsequent case, Justice Marshall read in two substantive state policies into the scope of the state law: to give the defendant “peace of mind” and prevent the unfairness of making a defendant litigate an old claim. *Walker v. Armco Steel*, 446 U.S. 740, 751 (1979). But in *Burlington N. R.R. Co. v. Woods*, Marshall interpreted the state scope only for its procedural effect of depriving the Court of discretion whether to impose a monetary penalty on frivolous appeals. 480 U.S. 1, 7 (1986). Thus there was no clear way to interpret the scope of a state statute for the purpose of REA analysis before *Shady Grove*.

80. *Hanna*, 380 U.S. at 471.

81. *Id.* at 464, 470.



is valid under the REA. If it is, and it always is, then the federal rule preempts the state law. This is how the analysis was understood up until 2010, when the Supreme Court issued its opinion in *Shady Grove*.

2. Giving the Federal Rules More Bite: *Shady Grove*

This section discusses how the plurality in *Shady Grove* modifies the *Erie* doctrine. The plurality in *Shady Grove* should be accepted as the most recent progeny of *Erie* because it is the only opinion of the Court consistent with *Hanna*. Before *Shady Grove*, state law could only limit a federal rule's power to preempt with "stubby" teeth.<sup>82</sup> *Shady Grove* took those teeth from stubs to near nonexistence in three ways. First, Justice Scalia's opinion affirmed *Hanna*. Second, *Shady Grove*'s plurality broadened the scope of federal rules. Third, the plurality narrowly interpreted the possibly conflicting state law.

The dispute in *Shady Grove* arose out of a New York state law that prohibited "class action in suits seeking penalties or statutory minimum damages."<sup>83</sup> *Shady Grove* claimed that Allstate Insurance owed unpaid statutory interest to itself and a class of others.<sup>84</sup> If the statutory interest was barred from consideration under New York state law, then *Shady Grove*'s claim would fall short of the amount in controversy requirement for federal diversity jurisdiction.<sup>85</sup> Under Rule 23 of the Federal Rules of Civil Procedure, there is no bar on accepting a claim based on statutory interest.<sup>86</sup> If the New York law controlled the suit, then *Shady Grove* would not be able to proceed as a class action; but if the New York law did not control, then a federal court could have jurisdiction over the matter under Rule 23.<sup>87</sup>

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82. Clermont, *supra* note 55, at 994.

83. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1436 (2010). *See generally* N.Y. C.P.L.R. 901(b) (McKinney 2006) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recover thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").

84. *Shady Grove*, 130 S. Ct. at 1436–37.

85. *Id.* at 1437 ("Shady Grove conceded that its individual claim (worth roughly \$500) fell far short of the amount in controversy requirement for individual suits under 28 U.S.C. § 1332(a)."). *See generally* 28 U.S.C. § 1332(a) (2012) (requiring that the amount in dispute be in excess of \$75,000 for federal diversity jurisdiction).

86. *See* FED. R. CIV. P. 23; *Shady Grove*, 130 S. Ct. at 1437.

87. *Shady Grove*, 130 S. Ct. at 1437. *See also* N.Y. C.P.L.R. 901(b) (McKinney 2006).

First, Justice Scalia applied the REA analysis announced in *Hanna*.<sup>88</sup> Second, Scalia gave great breadth to the federal rule by analyzing it according to its plain language. Rule 23 allows a litigant to *maintain* an action if certain preconditions are satisfied.<sup>89</sup> A plaintiff, not a court, has discretion to decide whether to bring suit,<sup>90</sup> and as long as the plaintiff satisfies the conditions set out in Rule 23, she may bring the action.<sup>91</sup> Justice Scalia went a step further and determined that a federal rule is only qualified by an act of Congress or by the rule's own language because otherwise a court could determine whether a plaintiff could sue.<sup>92</sup> Since neither an act of Congress nor the text of Rule 23 made it subject to state law "certification," it would be impermissible for the state law requiring certification to modify Rule 23.<sup>93</sup> Furthermore, the Court could not agree with Allstate's contention that there is a difference between "certifying" and "maintaining" an action.<sup>94</sup>

The thrust of this reading of the federal rule is one that prevents the federal rule from being qualified by a state law if the federal rule or Congress does not explicitly allow for such a limitation. This interpretation was strengthened by the fact that Congress had created specific exceptions to Rule 23.<sup>95</sup> If Rule 23 did not apply generally, there would be no need to create such exceptions.<sup>96</sup>

Third, Justice Scalia did not choose a favorable reading of the New York law. Scalia refused to read the purpose of the state law into the scope and cautioned future courts not to do so.<sup>97</sup> In fact, the plurality discerned the scope of the state law based only on its procedural

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88. See *Shady Grove*, 130 S. Ct. at 1442–44 (reviewing *Erie* and its progeny and concluding that the Court must apply the "direct collision" test announced in *Hanna*).

89. See FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.").

90. *Shady Grove*, 130 S. Ct. at 1438.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* See 8 U.S.C. § 1252(e)(1)(B) (2012) (preventing a court from certifying a class in "action for which judicial review is authorized under a subsequent paragraph of this subsection").

96. *Shady Grove*, 130 S. Ct. at 1438.

97. See *id.* at 1444 ("[T]he substantive nature of New York's law, or its substantive purpose, *makes no difference.*").

effects.<sup>98</sup> This happened in spite of the urgings of Justice Stevens to consider state “interests” and “policies” in order to adopt a reading that could save the state law.<sup>99</sup> Indeed, the plurality’s reading of the state law was not the *only possible* reading. The New York law prevented a plaintiff from maintaining a class action “seeking statutory penalties.”<sup>100</sup> The law could have been viewed as a bar on damages, which is a recognized matter of substance.<sup>101</sup> Still, Scalia determined that the New York law “prevent[ed] the class actions it covers from coming into existence at all.”<sup>102</sup> Thus, the state law impermissibly limited the federal rule.

Even more damaging, the framers of the New York law modeled it after Rule 23. The New York state law tracked Rule 23 in one part and in another part “impose[d] additional requirements.”<sup>103</sup> The imposition of additional requirements while utilizing the language of Rule 23 made it evident that the New York law was meant to limit the cases that could be “maintained” under Rule 23.<sup>104</sup> Echoing precedent, Scalia observed that the New York law would leave to the court’s discretion whether a plaintiff can bring a class action suit, whereas Rule 23 allows for a class action to be brought automatically.<sup>105</sup>

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98. *Id.* at 1439 (finding that the text of Section 901(b) and Rule 23 overlapped in scope by tracking the same issues in one section but then trying to diverge in another). Ginsburg argued that if the province of the New York law was traditionally that of substance, then the federal rule should yield. *See id.* at 1461–62 (Ginsburg, J., dissenting). The dissent took particular note of *Palmer v. Hoffman*, 318 U.S. 109 (1943). In *Palmer*, the Court ruled that “[r]ule 8(c) covers only the manner of pleading. The question of burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship . . . must apply.” *Id.* at 117 (citation omitted).
99. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring) (finding that if the state law could be “reasonably interpreted to avoid [an] impermissible result,” then there is a “sensitivity” to state interests and policies).
100. *Id.* at 1439 (plurality opinion). *See also* N.Y. C.P.L.R. 901(b) (McKinney 2006).
101. *See Shady Grove*, 130 S. Ct. at 1465 (Ginsburg, J., dissenting).
102. *Id.* at 1439 (plurality opinion).
103. *Id.*
104. *Id.*
105. *See id.* (satisfying the criteria of Rule 23 automatically enables a plaintiff to bring a class action suit in federal court; under N.Y. C.P.L.R. 901(b), there are preconditions that must be satisfied before the criteria of Rule 23 are even addressed). *See also* Walker v. Armco Steel, 446 U.S. 740, 750 n.9 (1979) (“This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a ‘direct collision’ with state law. The Federal Rules should be given their plain meaning.”).

At the end of Justice Scalia's analysis, the plurality inquired whether Rule 23 functions to "abridge, enlarge or modify any substantive right" in contravention of the REA.<sup>106</sup> In keeping with its formalist tradition,<sup>107</sup> the Court asked whether the federal rule "really regulates procedure."<sup>108</sup> This inquiry is limited to whether the federal rule "governs only 'the manner and the means' by which the litigants' rights are 'enforced,'" or if the rule will alter the "rules of decision by which [the] court will adjudicate [those] rights."<sup>109</sup> If the rule alters the rules of decision, it is not valid under the REA. Every decision before the Supreme Court that had considered this question had rejected the challenge to the Federal Rules of Civil Procedure; *Shady Grove* was no exception.<sup>110</sup>

Although this analysis may seem prejudiced against state laws, it was the only opinion in *Shady Grove* that squared with REA analysis and *Hanna*. The rule that should emerge from the fractured opinions in *Shady Grove* is whatever rule comprises the "narrowest grounds" upon which the concurring members of the Court agree.<sup>111</sup> Courts and scholars since *Shady Grove* have argued that Justice Stevens's concurrence most accurately depicts the narrowest rule of *Shady Grove*.<sup>112</sup> This is incorrect because on its "narrowest grounds," *Shady Grove* affirmed *Hanna*,<sup>113</sup> whereas Justice Stevens's concurrence does not.

Justice Stevens, in his concurrence, advocated that a direct conflict between a state law and a federal rule could be resolved in favor of the state law.<sup>114</sup> This could take place when the state law is "so bound up

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106. *Shady Grove*, 130 S. Ct. at 1442 (quoting 28 U.S.C. § 2072(a) (2012)).

107. See Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 974 (2011) (describing the question "whether a federal rule really regulates procedure" as a formalistic approach).

108. *Shady Grove*, 130 S. Ct. at 1442.

109. *Id.* (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 439, 446 (1945)).

110. *Id.* at 1443.

111. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

112. See, e.g., Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 387–88 (2014) (discussing various views on the opinions in *Shady Grove*); *Godin v. Schencks*, 629 F.3d 79, 87 (1st Cir. 2012) (applying Justice Stevens's concurrence to determine whether the applicability of anti-SLAPP statutes in federal courts).

113. See *Clermont*, *supra* note 55, at 1013 ("*Shady Grove* may not say much for eternity, but it does say that the unadorned *Sibbach-Hanna* test, so protective of the Federal Rules, is the law.>").

114. See *Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring) (arguing that a direct collision "does not mean . . . that the federal rule always governs").

with [or sufficiently intertwined with a substantive] state-created right or remedy that it defines the scope of that substantive right or remedy.”<sup>115</sup> A court would determine this in a two-step analysis. First, a court would analyze whether the federal rule leaves “no room for the operation” of the state law.<sup>116</sup> The second step, which Stevens admitted is substantially similar to the first, would be whether there is a direct collision between the state law and the federal rule.<sup>117</sup>

Plainly, this test would *not* affirm the REA analysis announced in *Hanna*: first, whether a federal rule and a state law directly conflict, and second, whether applying the federal rule would violate the REA.<sup>118</sup> Therefore, Justice Stevens’s concurrence cannot constitute the “narrowest grounds” of the Court’s decision. Moreover, Justice Stevens’s reasoning actually violates *Hanna*. The crux of Justice Stevens’s analysis is whether the state law is substantive<sup>119</sup>—an analysis the Court in *Hanna* did not apply.<sup>120</sup> Moreover, Justice Scalia’s reasoning for rejecting an analysis of the substantive scope or purpose of a state law, for the purposes of REA analysis, makes sense within the Court’s ruling in *Hanna*.

If the purpose of every state law defends the scope of that law, for the purposes of REA analysis, the result would be incoherent. For example, the federal rules could preempt a state law in a certain jurisdiction where the state law did not have a substantive scope, but an identical state law in another jurisdiction would apply in federal court because its purpose was substantive. Scalia categorically ruled this out.<sup>121</sup> To do otherwise requires courts to decide the substance of the law and the scope. This would make REA analysis turn on whether the

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115. *Id.* at 1450.

116. *Id.* at 1451 (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 45 (1987)).

117. *Id.* at 1452.

118. *Hanna v. Plumer*, 380 U.S. 460, 464 (1964).

119. *Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring) (“A state procedural rule, though undeniably procedural in the ordinary sense of the term, may exist ‘to influence substantive outcomes, . . . and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy.’”) (citations omitted).

120. *See Hanna*, 380 U.S. at 470 (holding that the question of whether a federal rule displaces state law is determined based on the existence of a direct collision); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1979) (observing analysis under *Hanna* starts with the existence of a direct collision between the federal rule and the state law).

121. *See Shady Grove*, 130 S. Ct. at 1444 (“A Federal Rule of Civil Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effects frustrate a state substantive law (or a state procedural law enacted for substantive purposes).”).

state law is substantive or procedural; something the Supreme Court has forbidden.<sup>122</sup>

B. *How Shady Grove Has Been Applied in  
Federal Courts Examining Anti-SLAPP Statutes*

Federal courts sitting in diversity have yet to agree on whether the *Erie* Doctrine requires that federal rules preempt anti-SLAPP laws. Although the majority of federal courts that have addressed the issue have found that anti-SLAPP laws are not preempted by federal rules, none of those courts agree on why. Generally these decisions fall into three categories: (1) those that did not apply *Shady Grove*, (2) those that misapplied *Shady Grove*, and (3) those that tracked *Shady Grove*. When the opinions are divided in this way, there appears to be a trend that anti-SLAPP laws are preempted by federal rules when a federal court's analysis tracks the plurality in *Shady Grove*.

1. Circuit Court Decisions

The Ninth Circuit was the first circuit court to tackle the issue in *United States ex rel Newsham v. Lockheed Missiles & Space Company*.<sup>123</sup> *Newsham* took place well over ten years before *Shady Grove* was decided; consequently it did not apply *Shady Grove*'s contribution to REA analysis. The case involved more than a decade of litigation over complex legal issues and one claim that provoked the plaintiffs to file a motion under California's anti-SLAPP statute.<sup>124</sup> Lockheed, the defendant, filed a counterclaim to the plaintiff's original claim that the plaintiffs "breached duties imposed by fiduciary obligations and loyalty, as well as contract and statute, and breached the implied covenant of good faith."<sup>125</sup> Judge Bryan, writing the opinion, looked to whether Federal Rules of Civil Procedure 12(b)(6)

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122. See, e.g., *Hanna*, 380 U.S. at 470 (holding that *Erie* commands that the Federal Rule displace state substantive law when "the scope of the Federal Rule was not as broad as the losing party" urges); *Shady Grove*, 130 S. Ct. at 1444 ("[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the federal rule."); *Walker*, 446 U.S. at 749 (observing that analysis under *Hanna* starts with the existence of a direct collision between the federal rule and the state law); *Intercon Solutions, Inc. v. Basel Action Net.*, 969 F. Supp. 2d 1026 (N.D. Ill.2013) ("[T]he courts reached their holdings by essentially doing exactly what *Shady Grove* advised against—diving into *Erie*'s murky waters to determine whether the state law in question [*sic*] procedural or substantive without ever assessing in the first place whether the Federal Rules provide an answer to the question.").

123. 190 F.3d 963 (9th Cir. 1999).

124. CAL. CIV. PROC. CODE § 425.16 (West 2013).

125. *Newsham*, 190 F.3d at 967.

and 56 “directly conflicted” with the motion to “strike” in California’s anti-SLAPP law.<sup>126</sup>

The Ninth Circuit in *Newsham* found no “direct collision” between a federal rule and California’s anti-SLAPP statute.<sup>127</sup> The court’s analysis was guided by *Walker v. Armco Steel*<sup>128</sup> and turned on whether the federal rules and the anti-SLAPP motion to strike could “exist side by side . . . each controlling its own intended sphere of coverage without conflict.”<sup>129</sup> The court acknowledged that the federal rules and California’s anti-SLAPP law’s motion to strike served the similar purpose of expediting the “weeding out of meritless claims before trial.”<sup>130</sup> But the court gave two reasons why this overlap in purpose was not a direct collision. First, there was “no indication” that the federal rules in question were intended to “weed[] out meritless claims” through “pretrial procedures.”<sup>131</sup> Second, the anti-SLAPP statute was made for “the protection of the ‘constitutional right of freedom of speech and petition,’” which the federal rules do not address.<sup>132</sup> Moreover, an unsuccessful motion to strike under California’s anti-SLAPP statute would not, in any way, prohibit subsequent motions under Federal Rules of Civil Procedure 12 and 56, and so the court found that the federal rules and the state statute governed independent spheres and could coexist.<sup>133</sup> Had the court been able to apply *Shady Grove*, the analysis would have given the federal rules a broad scope, increasing the likelihood of a direct collision. In particular, it falls within the broad authority of Rules 56 and 12(b)(6) to dismiss frivolous claims before trial, despite the Ninth Circuit’s conclusion to the opposite.<sup>134</sup> Furthermore, narrowing the scope of the state statute to the protection of constitutional rights does not remove it from the scope of a federal rule if the federal rule applies generally.<sup>135</sup> Since the court could not apply *Shady Grove*, it found no direct collision in its REA analysis and

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126. *Id.* at 972 (relying on the standard established in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980)).

127. *Id.* at 972.

128. 446 U.S. 740 (1979).

129. *Id.* at 752.

130. *Newsham*, 190 F.3d at 972.

131. *Id.*

132. *Id.* at 973 (citing CAL. CIV. PROC. CODE § 425.16(a)).

133. *Id.* at 972.

134. EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 1.1 (2014) (describing Rule 12(b) and 56 as the primary vehicle for dismissing frivolous claims).

135. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (understanding the broad scope of Rule 23 as colliding with the narrow scope of the New York state law).

went on to apply RDA analysis, ultimately finding that the anti-SLAPP statute applied in federal court.<sup>136</sup>

In 2009, just before *Shady Grove*, the Fifth Circuit in *Henry v. Lake Charles American Press LLC*<sup>137</sup> determined that anti-SLAPP laws do apply in federal courts.<sup>138</sup> This also places *Henry* in the category of cases that did not apply *Shady Grove*. Not only did *Henry* not apply *Shady Grove*, but it also did not conduct any sort of conflict of law analysis at all when evaluating the applicability of Louisiana's anti-SLAPP statute in federal court.<sup>139</sup> According to the Fifth Circuit, "Louisiana law, including the *nominally-procedural* [anti-SLAPP statute], governs this diversity case."<sup>140</sup> While Louisiana's anti-SLAPP statute actually may apply in federal court, the Fifth Circuit's conclusory finding on the issue has proven to be unhelpful. In the first place, concluding that the anti-SLAPP statute was substantive violates principles of REA analysis announced before *Shady Grove*.<sup>141</sup> What is worse is that the court's lack of analysis culminated in declaring that the anti-SLAPP statute creates a right to prevail in trial and "creates a right not to stand trial" that is, effectively, unreviewable.<sup>142</sup> In other words, the Fifth Circuit determined that Louisiana's anti-SLAPP law creates a whole new right. If an anti-SLAPP law creates a new right, it could not be a right contemplated by any existing federal rule. Subsequently, the view that anti-SLAPP statutes create the right of immunity from trial has proven to be pervasive in district courts and circuit courts.

The First Circuit was the first circuit court to address applicability of anti-SLAPP laws in federal courts after *Shady Grove*. In doing so, it applied *Shady Grove* but relied heavily on Justice Stevens's concurrence and the court in *Henry*, placing it in the "misapplied *Shady Grove*"

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136. *Newsham*, 190 F.3d at 973.

137. 566 F.3d 164 (5th Cir. 2009).

138. *Id.*

139. *See* LA. CODE CIV. PROC. ANN. art. 971 (Supp. 2014).

140. *Henry*, 566 F.3d at 168–69 (emphasis added). What is even more surprising is that neither decision in the antecedent district court conducted a conflict of law analysis or inquired into the nature of the anti-SLAPP statute. *See Henry v. Lake Charles Am. Press, LLC*, No. 2:06 CV 1513, 2008 WL 398506 (W.D. La. Feb. 12, 2008); *Henry v. Lake Charles Am. Press, LLC*, No. 2:06 CV 1513, 2007 WL 3341317 (W.D. La. Nov. 7, 2007).

141. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 470 (1964) (holding that *Eric* commands that the Federal Rule displace state substantive law); *Shady Grove*, 130 S. Ct. at 1444 ("It is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the federal rule."); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1979) (observing that analysis under *Hanna* starts with the existence of a direct collision between the federal rule and the state law).

142. *Henry*, 566 F.3d at 178 n.\*.



category. *Godin v. Schencks*<sup>143</sup> echoed the court in *Henry* by distinguishing between a law creating the right to prevail in trial and a law which creates the right not to be tried at all; Maine's anti-SLAPP statute was the latter.<sup>144</sup> The court believed that if it did not have the authority to review this type of right, the right's value would be destroyed.<sup>145</sup>

The rules at issue in *Godin* were Federal Rules of Civil Procedure 56 and 12.<sup>146</sup> The court decided that Rules 12 and 56 governed "general" federal procedure and applied to all "categories of cases."<sup>147</sup> Rule 56 specifically works for a party to secure judgment before trial after the fact finder has evaluated the material facts and determined that they do not present a disputed issue.<sup>148</sup> This reading seems to give federal rules broad authority under *Shady Grove*, since there is no category of case in which the federal rules would not apply.

Despite this reading of the federal rules, the First Circuit did not find a direct collision with Maine's anti-SLAPP statute. The court read a motion under Maine's anti-SLAPP statute to govern "special procedures for state claims based on a defendant's petitioning activity."<sup>149</sup> This violated *Shady Grove* because instead of avoiding an inquiry into the state law's substantive or procedural nature, the First Circuit gave the issue center stage in its analysis. The court determined that a special motion to dismiss under Maine's anti-SLAPP statute is so "intertwined with a state right or remedy that it functions to define the scope of the state created right," it cannot be displaced by Rule

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143. 629 F.3d 79 (1st Cir. 2010). Interestingly, the First Circuit in *Godin* did not even address the decision in *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 314 (D. Mass. 2003), the District of Massachusetts being a district court in the First Circuit, which had not applied Massachusetts's anti-SLAPP statute because it conflicted with the Federal Rules of Civil Procedure. See *id.* at 312. By contrast, *Godin* relied on *Shady Grove* in concluding that anti-SLAPP statutes must apply in federal courts, albeit the court relied heavily on Justice Steven's concurrence. See *Godin*, 629 F.3d at 79. While it may seem that these decisions damage this Note's conclusion, the opposite is true. Had the First Circuit applied the plurality of *Shady Grove* and stayed away from an evaluation of the substance of Maine's anti-SLAPP statute, the conclusion of *Godin* likely would have been in conformity with *Stuborn*.

144. *Godin*, 629 F.3d at 85.

145. *Id.*

146. *Id.* at 86.

147. *Id.* at 88.

148. *Id.* at 89.

149. *Id.* at 88.

12(b)(6) or Rule 56.”<sup>150</sup> Moreover, Maine’s anti-SLAPP statute requires a court to consider whether a claim has a “reasonable basis in fact or law” and “actual injury,” whereas Rule 56 does not.<sup>151</sup> But this is also dubious according the broad authority given to federal rules under *Shady Grove*, since summary judgment does require an inquiry into the facts underlying the case.<sup>152</sup> The First Circuit further ran afoul of *Shady Grove* by determining that the anti-SLAPP statute had a substantive scope by providing a substantive defense.<sup>153</sup> Finding no direct collision, the First Circuit went on to apply the anti-SLAPP statute and dismiss the case.<sup>154</sup>

Other circuit courts have addressed the applicability of anti-SLAPP statutes in federal court. Unfortunately, there is little this Note can draw from those opinions. In *Royalty Network, Inc. v. Harris*,<sup>155</sup> the Eleventh Circuit deviated from the trend of applying anti-SLAPP statutes in federal courts because Georgia’s version of law impermissibly conflicted with Federal Rule of Civil Procedure 11.<sup>156</sup> However, this conflict is largely due to the unique requirement of Georgia’s anti-SLAPP statute that a plaintiff file a written verification contemporaneous with the complaint, certifying that the complaint is not meant to “suppress a person’s or entity’s right of free speech.”<sup>157</sup> Based on this requirement, the Eleventh Circuit found that Georgia’s anti-SLAPP statute impermissibly conflicted with Rule 11, which generally does not require a pleading to be “verified or accompanied by an

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150. *Id.* at 89 (quoting *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring)).

151. *Id.*

152. *See* BRUNET ET AL., *supra* note 134, at § 1.1 (noting that Rule 56 exists to screen out claims that are facially adequate but are not substantiated by facts underlying those claims). *See* FED. R. CIV. P. 56(a) (“The court shall grant summary judgment 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.”)

153. *Godin*, 629 F.3d at 89.

154. *Id.* at 92.

155. 756 F.3d 1351 (11th Cir. 2014).

156. *See id.* at 1361.

157. *Id.* at 1359. *See generally* GA. CODE ANN. § 9-11-11.1(b) (West 2014) (requiring both a plaintiff and her attorney to submit a written verification that the claim “to the best of their knowledge, . . . is not interposed for any improper purpose such as to suppress a person’s or entity’s right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation,” if the “claim asserted against a person or . . . could reasonably be construed as an act in furtherance of the right of free speech”).

affidavit.”<sup>158</sup> The Eleventh Circuit did not conduct a rigorous REA analysis under *Shady Grove* because it frankly did not need to; the conflict between the federal rule and the state law was readily apparent.<sup>159</sup> This puts *Royalty Network* in the “did not apply *Shady Grove*” category.

The Second Circuit also recently gave consideration to whether anti-SLAPP statutes conflict with the federal rules of civil procedure.<sup>160</sup> Unfortunately, the court in *Adelson v. Harris* left much to be desired in evaluating Nevada’s anti-SLAPP statute.<sup>161</sup> The court avoided conducting any sort of conflict of law analysis and instead leaned on *Godin, Henry, and Newsham*.<sup>162</sup> Based on the conclusions in those cases, the Second Circuit came to the following conclusions:

- (1) [The Nevada Statute] would apply in state court had suit been filed there;
- (2) is substantive within the meaning of Erie, since it is consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity; and
- (3) does not squarely conflict with a valid federal rule.<sup>163</sup>

That comprised the beginning and the end of the Second Circuit’s conflict of law analysis, making it one of the courts that “misapplied *Shady Grove*.” Making matters worse, *stare decisis* has counseled the few circuit courts that have already decided the issue to avoid any REA analysis and apply anti-SLAPP statutes in federal courts.<sup>164</sup>

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158. FED. R. CIV. P. 11(a).

159. See *Royalty Network*, 756 F.3d at 1359 (“Based on the plain text of the state law and the federal rule, it is apparent that the federal rule is broad enough to cover the issue and that the two directly conflict.”).

160. See *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014).

161. See *id.* at 809 (“We, therefore, decide it as a threshold matter on the facts of this case. While our Circuit has not previously examined the issue, the specific state anti-SLAPP provisions applied by the district court . . . seem to us unproblematic.”).

162. See *id.* (discussing cases in other circuits deciding the same issue).

163. *Id.*

164. See, e.g., *NCDR, LLC v. Mauze & Bagby, PLLC*, 745 F.3d, 742, 752–53 (5th Cir. 2014) (assuming that Texas’s anti-SLAPP statute applies in federal court because the defendant has not raised a possible conflict with the rules of civil procedure as an issue prior to appearing before the Fifth Circuit); *Makaeff v. Trump University, LLC*, 715 F.3d 254, 261 (9th Cir. 2013) (applying California’s anti-SLAPP statute without any inquiry into a conflict with the federal rules of procedure); *Lynch v. Christie*, 486 Fed. Appx. 884, 885 (1st Cir. 2012) (remanding to the lower court without reaching the issue of the court’s jurisdiction over an interlocutory appeal, let alone the anti-SLAPP statute’s applicability). Perhaps the most

Overall, no circuit court that has had the opportunity to decide whether anti-SLAPP statutes apply in federal courts has given *Shady Grove* its due weight. Rather, the decisions of the circuit courts have been confusing—looking at the substantive rights anti-SLAPP statutes are intended to protect. However, “what matters is the law the Legislature *did* enact,” not the law it intended to enact.<sup>165</sup> Even the federal rules have been somewhat neglected, as none of the circuit courts addressed a possible conflict with Rule 12(d), a rule to which district courts have paid a good amount of attention. Those reasons necessitate a new analysis to ascertain whether there really is a conflict.

## 2. District Court Decisions

The most prominent approach by district courts has been to apply anti-SLAPP statutes in federal courts, relying on previous decisions of circuit courts.<sup>166</sup> On one hand, the doctrine of *stare decisis* urges the district courts to follow the decision of circuit courts under which they sit.<sup>167</sup> At the same time, *stare decisis* does not bind all district courts to follow the decision of the circuit courts that have decided the applicability of anti-SLAPP laws. Still, most district courts have followed the circuit court decisions above as persuasive, failing to rectify the analysis.<sup>168</sup>

Other district courts have been confused about how to start analysis under the REA, so they begin with an inquiry into the substantive nature of the anti-SLAPP statute—an analysis that the

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surprising case is *Sherrod v. Breitbart*, 720 F.3d 923 (1st Cir. 2013), in which the Court of Appeals for the District of Columbia did not address the potential conflict between the District of Columbia’s anti-SLAPP statute and the federal rules of civil procedure despite the lower court’s finding a conflict and denying the statute’s motion to dismiss on that basis. *Id.* at 934.

165. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010).

166. *See, e.g., Louisiana Crisis Ass’t Ctr. v. Marzano-Lesnevich*, 878 F. Supp. 2d 662 (E.D. La. 2012) (holding that Louisiana’s anti-SLAPP statute could be used to strike claims and theories of relief); *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090 (C.D. Cal. 2004) (utilizing the decision in *Newsham* to apply California’s anti-SLAPP statute); *Bargantine v. Mechanics Cooperative Bank*, No. 13-11132-NMG, 2013 WL 6211845 (D. Mass. Nov. 26, 2013) (using *Godin* to apply Massachusetts’s anti-SLAPP statute); *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 254 (D.D.C. 2013) (following *Henry, Newsham, and Godin*).

167. *See* BLACK’S LAW DICTIONARY 1537 (9th ed. 2009) (“Vertical Stare Decisis: The doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction.”).

168. *See, e.g., Boley*, 950 F. Supp. 2d at 254; *Adelson v. Harris*, No. 12 Civ. 6052(JPO), 2013 WL 5420973, at \*20 n.21 (S.D.N.Y. Sept. 30, 2013); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 n.10 (D.D.C. 2012).

Supreme Court has specifically contemplated and abandoned.<sup>169</sup> Not surprisingly, courts that take this approach follow *Godin* and *Henry* in coming to the conclusion that anti-SLAPP laws “create[] a new category” of rights or immunities related to a defendant’s first amendment claims.<sup>170</sup> Reading in such substantive rights or intent violates the plurality opinion in *Shady Grove*.<sup>171</sup> But since the party that files a special motion to dismiss under an anti-SLAPP statute is invoking a substantive right, the anti-SLAPP law unquestionably applies in federal courts.<sup>172</sup> These types of cases are similar to cases that apply anti-SLAPP statutes based solely on *stare decisis* because *Godin* and *Henry* heavily influence the determinations on the substance of anti-SLAPP statutes in both situations. These two closely related views have comprised the majority of decisions in federal courts, so anti-SLAPP laws are typically applied in federal courts.<sup>173</sup>

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169. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 470 (1964) (holding that *Erie* commands that the Federal Rule displace state substantive law); *Shady Grove*, 130 S. Ct. at 1444 (“[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the federal rule.”); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1979) (observing analysis under *Hanna* starts with the existence of a direct collision between the federal rule and the state law); *Intercon Solutions, Inc. v. Basel Action Net.*, 969 F. Supp. 2d 1026, 1053 (N.D. Ill. 2013) (“[T]he courts reached their holdings by essentially doing exactly what *Shady Grove* advised against—diving into *Erie*’s murky waters to determine whether the state law in question [is] procedural or substantive without ever assessing in the first place whether the Federal Rules provide an answer to the question.”).
170. *Trudeau v. ConsumerAffairs.com, Inc.*, No. 10 C 7193, 2011 WL 3898041, at \*5 (N.D. Ill. Sept. 6, 2011). While the District Court of Massachusetts did analyze the procedural or substantive nature of Massachusetts’s anti-SLAPP statute, it did so for the sole purpose of finding whether there was a “direct conflict” with a federal rule. See *Stuborn Ltd. P’ship v. Bernstein*, 245 F. Supp. 2d 312, 315–16 (D. Mass. 2003).
171. See *Shady Grove*, 130 S. Ct. at 1440 (“[W]hat matters is the law the Legislature *did* enact.”). Giving weight to the substantive scope of the anti-SLAPP statute would be a violation of *Shady Grove*. See *id.* at 1444 (finding that the “substantive nature” or the “substantive purpose” of a state law “*makes no difference*” for the purpose of REA analysis) (emphasis in original).
172. See *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 n.10 (D.D.C. 2012) (finding persuasive the view that anti-SLAPP laws are substantive and therefore apply in federal court); *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012) (deciding that the D.C. anti-SLAPP must be substantive and therefore cannot apply retroactively but would otherwise).
173. *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 254 (D.D.C. 2013) (deciding not to follow courts which preempt anti-SLAPP statutes with federal rules because such cases “conflict[] with the weight of authority”).

Since *Shady Grove*, courts that have applied Justice Scalia's plurality have determined that the anti-SLAPP statutes and the Federal Rules of Civil Procedure answer the same question. These courts have not considered the substantive purpose or grant of immunity in their analysis. Instead, in evaluating the scope of the anti-SLAPP statutes, the district courts tracked *Shady Grove* and only considered the anti-SLAPP statutes' procedural effects.<sup>174</sup> Those courts have paid a good deal of attention to Federal Rule of Civil Procedure 12(d).<sup>175</sup> Rule 12(d) requires that motions under 12(b)(6) be treated as a motion for summary judgment where information extrinsic to the pleadings is submitted to the court.<sup>176</sup> Generally, anti-SLAPP statutes require courts to consider affidavits supporting the underlying facts in deciding a special motion to dismiss.<sup>177</sup> Courts have determined that since a special motion to dismiss under a state anti-SLAPP law and Rule 12(d) control the same issue because both require courts to consider information extrinsic to the pleadings along with the pleadings themselves.<sup>178</sup> The anti-SLAPP statutes impermissibly conflict with Rule 12(d) because anti-SLAPP statutes require courts to consider matters outside the pleadings, whereas Rule 12(d) does not.<sup>179</sup> One district court even found that anti-SLAPP statutes collide with Federal Rules 12(b)(6) and 56 because those rules use procedural mechanisms to dismiss frivolous claims.<sup>180</sup> Since the federal rules in question are

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174. See *Intercon*, 969 F. Supp. 2d at 1044, 1047 (observing that anti-SLAPP statutes deprive the court of discretion in considering matters outside the pleadings); *3M v. Boulter*, 842 F. Supp. 2d 87, 102 (D.D.C. 2012) (taking notice of the heightened evidentiary standard in the anti-SLAPP statute as opposed to summary judgment).

175. See *3M*, 842 F. Supp. 2d at 96 (discussing the purpose and scope of Rule 12(d) as directly conflicting with anti-SLAPP laws); *Intercon*, 969 F. Supp. 2d at 1043–45 (considering Rule 12(d) applies to anti-SLAPP cases and preempts the state statute in question). See generally FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”). For further discussion on Rule 12(d), see *infra* Part III.B.

176. FED. R. CIV. P. 12(d).

177. See, e.g., *Intercon*, 969 F. Supp. 2d at 1047 (“Defendant’s Special Motion to Strike asks this Court to evaluate hundreds of pages of material outside of the pleadings, including declarations, affidavits, and exhibits.”). See also statutes, *supra* notes 44–45, and accompanying text.

178. See *Intercon*, 969 F. Supp. 2d at 1044; *3M*, 842 F. Supp. 2d at 96.

179. *Intercon*, 969 F. Supp. 2d at 1044, 1048; *3M*, 842 F. Supp. 2d at 97.

180. See *3M*, 842 F. Supp. 2d at 100 (“We think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.”).

always valid under the REA, the anti-SLAPP is preempted in federal courts.<sup>181</sup> While this is the minority view, it is the only result in district courts that is consistent with the holding in *Shady Grove*.<sup>182</sup>

### III. HOW TO DETERMINE WHETHER ANTI-SLAPP STATUTES AND FEDERAL RULES DIRECTLY COLLIDE ACCORDING TO *SHADY GROVE*

For the purposes of REA analysis, the application of an anti-SLAPP statute in federal court depends almost entirely on whether there is a direct collision. Finding whether there is a direct collision requires three steps. First, determine the procedural scope of the anti-SLAPP statute in lieu of its procedural functions. Second, determine the procedural scope of the federal rule. Finally, if the anti-SLAPP motion limits the applicability of the federal rule, then they are in direct conflict. There is the additional last step of REA analysis, whether the rule really regulates procedure, but it is a forgone conclusion, since every challenge to the validity of the Federal Rules of Civil Procedure has been rejected.<sup>183</sup> Thus, this Note only focuses on the three steps of REA analysis outlined above for the purpose of determining whether anti-SLAPP statutes apply in federal courts.

#### A. *The Scope of Anti-SLAPP Motions to Dismiss*

Without a doubt, anti-SLAPP statutes protect important substantive rights. At the same time, they have very pronounced procedural mechanisms, which affect other important rights, as discussed supra Part I.B. Applying the command of *Shady Grove*, courts should

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181. See *id.* at 110–11 (discussing Federal Rules of Civil Procedure 12 and 56 under the REA); *Intercon*, 969 F. Supp. 2d at 150–53 (determining that the fact that the federal rules are procedural controls).

182. See *Intercon*, 969 F. Supp. 2d at 1053 (“Furthermore, not one of the district court cases cited by Defendants looked to the history of Rule 12 or considered the Advisory Committee’s notes to the 1946 amendments to determine whether, under *Shady Grove*, the Federal Rules of Civil Procedure answer the question in dispute.”); *3M*, 842 F. Supp. 2d at 107 (“Instead of first interpreting the scope and meaning of the federal rules, as was done in *Shady Grove* and other cases, the First Circuit appears to have found no conflict based on a side-by-side comparison of the federal rules and the Maine statute.”). This is not to say that an analysis of Rule 12(d) under *Shady Grove* is the analysis that will result in the federal rules preempting anti-SLAPP statutes in federal courts. Such was the case in *Stuborn Ltd. Partnership v. Bernstein*, 245 F. Supp. 2d 312, 315–16 (D. Mass. 2003). There, the court determined that Federal Rule of Civil Procedure 12(b)(6) preempted Massachusetts’s anti-SLAPP statute in federal court by relying on *Hanna*.

183. See *Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (“Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us.”).

avoid an inquiry into the underlying purpose and substantive rights protected by a state law. This means the scope of the anti-SLAPP statute must be viewed for its procedural functions *alone* in order to ascertain whether the scope of the anti-SLAPP statute is the same as the scope of a federal rule.<sup>184</sup> Those most pronounced procedural functions of anti-SLAPP statutes have already been discussed: expediting motions to dismiss frivolous claims;<sup>185</sup> considering affidavits and the pleadings for the purpose of deciding the motion;<sup>186</sup> and staying discovery.<sup>187</sup> These are the functions most pertinent to determining whether anti-SLAPP statutes overlap in scope with federal rules, and subsequently, whether there is an impermissible conflict between the two.

*B. Determining the Existence of a Direct Conflict Between the Federal Rules of Civil Procedure and Anti-SLAPP Statutes*

Although, the Federal Rules of Civil Procedure have been a recurring theme throughout this Note, they have yet to be given due consideration. While this Note must address the most basic procedural scope of Federal Rules of Civil Procedure, they will not be fully discussed. At the very least, the scope of the three Rules that reappear in cases deciding the applicability of anti-SLAPP statutes in federal courts needs to be brought out in order to understand if they overlap with anti-SLAPP statutes. Thus, this section discuss whether anti-SLAPP laws impermissibly limit Federal Rules of Civil Procedure 12(b)(6), 56, and 12(d). The conclusion is that while anti-SLAPP motions to dismiss do not likely conflict with Rule 12(b)(6), they almost certainly directly collide with Rules 56 and 12(d).

Despite similarities between Rule 12(b)(6) and anti-SLAPP motions to dismiss, the two do not share an overlapping scope and so do not conflict. While both function to dismiss frivolous claims, they do so in very different ways. A Rule 12(b)(6) motion makes a very limited inquiry, if any at all, into the merits of a claim.<sup>188</sup> In fact, Rule 12(b)(6)

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184. See *supra* notes 120–122, and accompanying text.

185. See statutes, *supra* note 37–38, and accompanying text.

186. See statutes, *supra* notes 44–45, and accompanying text.

187. See statutes, *supra* note 45, and accompanying text.

188. See FED. R. CIV. P. 12(b)(6) advisory committee's note ("Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. . . . The Committee entertains the view that on motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter . . ."). See also *U.S. v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003) (allowing the attachment of materials outside the



does not function to “attack the merits of the case; it merely challenges the pleader’s failure to state a claim properly.”<sup>189</sup> Conversely, an anti-SLAPP motion to dismiss inquires into the merits of the case in two ways. First, courts must determine whether the defendant’s alleged act of defamation was in “furtherance of a protected right.”<sup>190</sup> Second, the burden then shifts to the plaintiff to show a “reasonable probability of prevailing on the merits of its claims.”<sup>191</sup> Even if Rule 12(b)(6) is given the maximum scope per *Shady Grove*, the function of weeding out claims that are frivolous because of a failure to plead properly is wholly different from an anti-SLAPP motion to dismiss claims that are frivolous by examining the merits supporting the pleadings. Therefore, 12(b)(6) motions and anti-SLAPP motions to dismiss are coextensive, “each controlling its own intended sphere of coverage without conflict.”<sup>192</sup>

Determining whether anti-SLAPP motions to dismiss directly conflict with summary judgment is more difficult. Much like anti-SLAPP motions to dismiss, summary judgment is a tool for dismissing frivolous claims.<sup>193</sup> Unlike a motion under 12(b)(6), summary judgment inquires into the merits underlying a claim based on material outside the pleadings to discover whether there is a disputed issue of material fact between the parties.<sup>194</sup> In this way, summary judgment overlaps in scope with anti-SLAPP statutes, which require the same sort of investigation into the merits based on evidence outside the pleadings.<sup>195</sup> Still, there is a difference between the two.

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pleadings on a 12(b)(6) motion to dismiss because the materials were referred to in the pleadings).

189. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1366 (3d ed. 2004). In fact, Rule 12(b)(6) is “a procedural vehicle for the resolution of purely legal disputes.” BRUNET ET AL., *supra* note 134, § 1.1. However, there has been debate over the degree of factual pleading required in the complaint to make it immune from a 12(b)(6) motion to dismiss. Compare *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–63 (2007) (requiring that the facts pleaded in the complaint need to make the claim “plausible”) with *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (finding that a complaint must plead facts creating a “reasonable inference”).

190. Litwiller, *supra* note 63, at 72.

191. *Id.*

192. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1979).

193. See BRUNET ET AL., *supra* note 134, § 1.1 (observing that summary judgment “holds center state” in dismissing frivolous claims before trial in which “there is no genuine issue as to any material fact”).

194. See FED. R. CIV. P. 56(c).

195. See Litwiller, *supra* note 63, at 72.

Where a motion for summary judgment looks to dismiss frivolous cases generally,<sup>196</sup> anti-SLAPP motions “apply only to suits challenging the defendants’ exercise of their constitutional petitioning rights.”<sup>197</sup> But the generality of summary judgment is what places the issues governed by anti-SLAPP statutes in its scope. *Shady Grove* placed particular emphasis on the general application for Rule 23 when deducing its scope.<sup>198</sup> The breadth of the federal rule does not exclude its application in cases of a particular nature. To the contrary, because the federal rule governs generally, the particularized scope of the state law puts the state law’s scope in a subset of the general scope of the federal rule.<sup>199</sup> Therefore, because summary judgment applies generally, it must also apply to specific cases where anti-SLAPP statutes protect a defendant’s right to petition. The mistake of *Godin, Newsham*, and the courts that followed them was assuming that the scope of anti-SLAPP statutes are separate from the scope of the federal rules, since an anti-SLAPP statute is only concerned with specific cases. Because the specific cases governed by anti-SLAPP statutes are in a broader category of cases covered by the Federal Rules of Civil Procedure, the two answer the same question.<sup>200</sup>

The overlap in scope is amplified because of how anti-SLAPP motions to dismiss mirror the construction of summary judgment.<sup>201</sup> Of course, both the anti-SLAPP statute and summary judgment function to dismiss actions, but the way they do so shows how they overlap. Summary judgment dismisses not just on the pleadings, but on “depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials.”<sup>202</sup> Anti-SLAPP motions to dismiss also require a court to look at up to hundreds of “affidavits” and similar documents.<sup>203</sup> No other Federal Rule of Civil Procedure dismisses a case before trial based on the evidence supporting the factual basis of a claim; anti-SLAPP motions mirror *only* Rule 56 in that regard. This indicates that the framers of anti-SLAPP motions had summary judgment in mind when

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196. See *Godin v. Schencks*, 629 F.3d 79, 88 (2010) (noting that summary judgment is a “general federal procedure[] governing all categories of cases”).

197. *Id.*

198. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010).

199. *Id.*

200. *Id.* at 1434.

201. *Id.* at 1439 (finding that Rule 23 and N.Y. C.P.L.R. 901(b) share the same scope because language in 901(b) tracked the language of Rule 23).

202. FED. R. CIV. P. 56(c).

203. See statutes, *supra* note 44, and accompanying text.

crafting the scope.<sup>204</sup> In fact, some anti-SLAPP motions require a court to consider the motion as one for summary judgment, albeit subject to less evidence and on an expedited basis.<sup>205</sup> This means that under *Shady Grove*, the scope of an anti-SLAPP statute and summary judgment overlap.

Because anti-SLAPP motions to dismiss and summary judgment govern the same issues—the dismissal of frivolous claims—REA analysis next asks whether the anti-SLAPP statute impermissibly limits the use of summary judgment. Here, anti-SLAPP statutes do limit the application of summary judgment. Claims that would otherwise be subject to summary judgment are dismissed according to a burden of persuasion, not production. Summary judgment makes an inquiry into “whether a party possesses sufficient evidence to go to trial in the first place”—a matter that “is concerned exclusively with the burden of production.”<sup>206</sup> Comparatively, anti-SLAPP motions to dismiss require the defendant to make a “prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.”<sup>207</sup> The burden then shifts to the plaintiff to show that “the claim is likely to succeed on the merits.”<sup>208</sup> This burden-shifting process requires the litigant to convince the court of particular factual assertions, which is a burden of *persuasion*.<sup>209</sup> This means that claims that would satisfy the burden of production but not of persuasion at such an early stage of litigation are dismissed according to anti-SLAPP statutes. These claims, given due consideration and evaluated according to the burden of production under summary judgment, may have a fighting chance, whereas they would not according to the burden of persuasion under anti-SLAPP statutes. Furthermore, “a State cannot limit [the criteria of a federal rule] by structuring one part of its statute to track [the federal rule] and enacting another part which imposes additional requirements.”<sup>210</sup> Thus, the application of summary judgment is limited by the heightened standard of proof, creating a direct conflict.<sup>211</sup>

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204. See *Shady Grove*, 130 S. Ct. at 1438–42.

205. See, e.g., 735 ILL. COMP. STAT. ANN. 110/10 (West 2003); IND. COD ANN. § 34-7-7-9(a)(1) (West 2011); MINN. STAT. ANN. § 554.01(4) (West 2013); MO. REV. STAT. § 537.528(1) (2013).

206. BRUNET ET AL., *supra* note 134, § 5.1.

207. E.g., D.C. CODE § 16-5502(b) (2013).

208. *Id.*

209. BLACK’S LAW DICTIONARY 223 (9th ed. 2009).

210. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010).

211. The First Circuit addressed this issue and found that “it is long settled that the allocation of proof is substantive in nature and controlled by state law.” *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010). The First

Finally, the collision between Federal Rules of Civil Procedure and anti-SLAPP statutes is most pronounced in Rule 12(d). It is notable that this is perhaps the most under-discussed federal rule in cases determining whether federal rules preempt anti-SLAPP statutes.<sup>212</sup> Rule 12(d) is not a motion like a 12(b)(6) or summary judgment; it is a conversion rule.<sup>213</sup> When a movant makes a 12(b)(6) motion or a similar motion<sup>214</sup> and the court considers material outside the pleadings for the purposes of that motion, Rule 12(d) converts that motion to dismiss to a motion for summary judgment.<sup>215</sup> Similarly, anti-SLAPP statutes require courts to consider the pleadings, affidavits, and other evidence external to the pleadings in determining whether to grant the motion to dismiss.<sup>216</sup> By giving the federal rule broad authority and looking only at the procedural functions of anti-SLAPP statutes, one can see that the two address exactly the same issue: what courts should do when considering materials outside the pleadings on a motion to dismiss.<sup>217</sup> However, they address the issue in a way that brings them into conflict.

Anti-SLAPP statutes impermissibly limit the application of Rule 12(d) by depriving the court of discretion and not converting the motion into summary judgment. Rule 12(d) leaves the court discretion whether to consider material extraneous to the pleadings in the first

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Circuit relied on a Supreme Court case that dealt with the allocation of the burden of proof in a case involving contributory negligence as an affirmative defense, as opposed to the pleading standard in Rule 8(c). *See* *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943). The difference in anti-SLAPP cases is that the anti-SLAPP motion to dismiss does not just allocate the burden between the parties, but raises the burden from “production” to “persuasion,” which the Supreme Court has ruled is impermissible. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002).

212. Not one of the circuit court opinions has addressed this issue. Of the district courts that have addressed the issue in any detail, all have found that anti-SLAPP statutes and Rule 12(d) directly conflict. *See Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1041–48 (N.D. Ill. 2013); *3M v. Boulter*, 842 F. Supp. 2d 85, 101–04 (D.D.C. 2012).

213. *WRIGHT & MILLER*, *supra* note 189, § 1366.

214. *See id.* (“Although the conversion provision in Rule 12(b) expressly applies only to the defense described in Rule 12(b)(6), it is not necessary that the moving party actually label the motion as one under that provision in order for it to be converted into a motion for summary judgment. The element that triggers the conversion is a challenge to the sufficiency of the pleader’s claim supported by extra-pleading material. As many cases recognize, it is not relevant how the defense actually is denominated in the motion.”).

215. *See* FED. R. CIV. P. 12(d).

216. *See* statutes, *supra* note 44, and accompanying text.

217. *Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010).

place.<sup>218</sup> In stark contrast, anti-SLAPP motions to dismiss *require* the court to consider such materials.<sup>219</sup> In so doing, anti-SLAPP motions to dismiss deprive the court of discretion whether to consider materials extraneous to the pleadings on a motion to dismiss.<sup>220</sup> This deprivation of discretion is something that *Shady Grove* expressly prohibited.<sup>221</sup> Furthermore, the anti-SLAPP motion to dismiss requires burden shifting and heightened standards of proof in a way that does not resemble summary judgment, as discussed above.<sup>222</sup> This again brings the anti-SLAPP statute into direct conflict with Rule 12(d) because Rule 12(d) requires the motion to be converted to a motion for summary judgment.<sup>223</sup> Rule 12(d) does not permit “resolution of disputes on the basis of affidavits and other pretrial data when there is a material issue of fact that justifies a trial.”<sup>224</sup> But that is exactly what anti-SLAPP motions to dismiss do. This requires the court to place a higher “procedural burden” on the plaintiff than would be required by converting the motion under Rule 12(d).<sup>225</sup> Effectively, this restricts the plaintiff’s right to maintain an action under the Federal Rules of Civil Procedure and is a direct collision.<sup>226</sup> Accordingly, the anti-SLAPP statute cannot apply in federal court.

## CONCLUSION

By tracking *Shady Grove*, giving breadth to the federal rules, and looking at the anti-SLAPP statutes for the procedural effects alone, the

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218. See FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are *presented to and not excluded by the court* . . . .”) (emphasis added). See also *Intercon*, 969 F. Supp. 2d at 1047 (“Rule 12(d) grants the trial court discretion in determining whether . . . to accept materials outside of the pleadings.”).

219. See statutes, *supra* note 44, and accompanying text.

220. See *Intercon*, 969 F. Supp. 2d at 1047.

221. See *Shady Grove*, 130 S. Ct. at 1438 (finding that the New York law limited the application of Rule 23 by requiring that certain conditions be satisfied before bringing a class action suit, whereas “[t]he discretion suggested by Rule 23’s ‘may’ is discretion residing in the plaintiff. He may bring his claim in a class action if he wishes”). See also *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987) (“Thus, the Rule’s discretionary mode of operation unmistakably conflicts with the mandatory provision of [the state] statute.”).

222. See statutes, *supra* note 44, and accompanying text.

223. See FED. R. CIV. P. 12(d) (“[T]he motion *must* be treated as one for summary judgment under Rule 56.”) (emphasis added).

224. WRIGHT & MILLER, *supra* note 189, § 1366.

225. *Intercon*, 969 F. Supp. 2d at 1048.

226. See *id.*; *Shady Grove*, 130 S. Ct. at 1439 n.4.

collision between the Federal Rules of Civil Procedure and anti-SLAPP statutes is readily apparent. Since the second step of REA analysis, whether the Federal Rules of Civil Procedure is valid under the REA, is a forgone conclusion,<sup>227</sup> there is no need to discuss what would happen with anti-SLAPP statutes under that part of the analysis. For that reason, anti-SLAPP motions to dismiss cannot apply in federal court.

The plurality in *Shady Grove* gave sweeping authority to the Federal Rules of Civil Procedure in the face of possibly conflicting state laws. Essentially, the federal rules are given a textual interpretation, and absent an act of Congress or language in the rule itself, state law cannot limit the rule. The scope of the state statute is not given a substantive interpretation but is read in terms of its procedural functions only. This is why all the important substantive rights of anti-SLAPP statutes are not supposed to be considered under REA analysis. Further, the Federal Rules of Civil Procedure protect important procedural rights of litigants.<sup>228</sup> The burden of proof placed on litigants by the Federal Rules of Civil Procedure and a litigant's access to materials through discovery to satisfy those burdens are rights that cannot be displaced by a conflicting state law.

This does not leave substantive rights of anti-SLAPP motions to dismiss with no chance in federal courts. According to *Shady Grove*, a federal rule can be limited where Congress passes legislation to do so.<sup>229</sup> The important rights protected under anti-SLAPP statutes would undoubtedly apply in federal court if Congress enacted a federal anti-SLAPP statute.<sup>230</sup> Further discussion on that topic is not within the purview of this Note, but unless Congress does pass such a law, anti-SLAPP statutes should not apply in federal courts according to *Shady Grove*.

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227. See *Shady Grove*, 130 S. Ct. at 1442 (“Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us.”).

228. See *Intercon*, 969 F. Supp. 2d at 1048.

229. See *Shady Grove*, 130 S. Ct. at 1438–39 (reviewing specific exceptions to Rule 23).

230. See Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 853–54 (2010) (describing the benefits of adopting a federal anti-SLAPP statute).

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