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SLAPP-ed Around: Examining the Use of State Anti-SLAPP Laws in Federal Courts

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NOTE

SLAPP-ED AROUND: EXAMINING THE USE OF STATE ANTI-SLAPP LAWS IN FEDERAL CASES

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ABSTRACT

This Note explains Strategic Lawsuits Against Public Participation (SLAPPs) and examines the applicability of state anti-SLAPP laws in federal cases. Currently, the United States Courts of Appeals are split on this issue, and the United States Supreme Court has not granted certiorari to any cases that have addressed this issue. This Note reviews the jurisprudence related to the application of state anti-SLAPP laws in federal court. The author further examines what the various United States Courts of Appeals have held about the applicability of anti-SLAPP laws and the rationales of each decision. Based on this information, this Note argues that if the U.S. Supreme Court were to hear this issue, it should reject the applicability of the procedural portions of anti-SLAPP laws in federal court.

I. INTRODUCTION

The First Amendment protections of freedom of speech and freedom to petition are two of the rights Americans hold most dear. The power to communicate one's opinions about politics, current events, and people is a powerful tool that preserves freedom and accountability. However, it has also long been recognized that free speech has limits, as Americans are not permitted to defame others, spread military secrets, or, as Justice Holmes put it, "falsely shouting fire in a crowded theater."[1]

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[1] Schenck v. United States, 249 U.S. 47, 53 (1919).

Controversy has always arisen regarding what speech is protected and what is barred under the First Amendment. Recently, a phenomenon called strategic lawsuits against public participation (also known as a "SLAPP") has further muddled the issue. Correspondingly, the rise in anti-SLAPP statutes, along with the recent Supreme Court decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, has led to a circuit split that needs to be resolved.

SLAPPs work primarily by the plaintiff attempting to drag out the legal process as a way to force the defendant to settle the case and cease the speech or petitioning activity. The goal is to outspend or inconvenience a defendant enough to stop fighting what otherwise is a frivolous lawsuit. Many state legislatures have determined that such litigation is unfair and threatens free speech rights. These laws often aim to short-circuit the litigation cycle via provisions for special motions to dismiss that are filed early in the case. While these laws have worked well at the state court level, the substantive provisions of many of these laws have created issues in federal courts sitting under diversity jurisdiction. Different interpretations of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company* have led to a circuit split regarding the applicability of anti-SLAPP measures in federal court.

II. BACKGROUND

SLAPPs are lawsuits that target speech and petitioning activity in the public square.[2] These suits must relate to comments made in the "public interest" and often target individuals who speak out against a group, politician, or corporation in a true but damaging manner.[3] The group that was damaged by the speech then files a lawsuit, usually for defamation. Although the defendants usually will prevail on the merits, the goal of the party filing the suit is to cost the one who spoke out time and money by defending the suit.[4] Many of these defendants settle the cases to avoid the

[2] Klocke v. Watson, 936 F.3d 240, 244 (5th Cir. 2019), *as revised* (Aug. 29, 2019) (quoting Tex. Civ. Prac. & Rem. Code § 27.002). *See also* Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 369-70 (2014).

[3] Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 370 (2014).

[4] *Id.*

time and expenses.[5] Those who do go to trial and win are nonetheless typically deterred from speaking out in the future.[6]

Beginning in 1989, state legislatures began passing legislation to try to discourage and prevent SLAPPs.[7] These laws aim to balance a defendant's First Amendment rights with a plaintiff's right to a remedy for tortious conduct. These laws typically include provisions for procedural actions such as special motions to dismiss that SLAPP defendants can file early in the case.[8] Many of these laws also include provisions allowing victorious defendants to recover attorney's fees from the plaintiff.[9] These measures help deter SLAPP suits and provide a means for plaintiffs to demonstrate that their claims are legitimate.

The District of Columbia passed one such statute, found in D.C. Code Title 16 Chapter 55. The D.C. statute aims to protect "the right of advocacy on issues of public interest" for statements "made in a place open to the public or a public forum."[10] This statute allows SLAPP targets to file a special motion to dismiss so long as they file the motion within forty-five days of being served with the suit.[11] To prevail, the moving party must 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."[12] However, much like a motion for an injunction, the motion is to be denied if the "responding party demonstrates that the claim is likely to succeed on the merits."[13] The statute further provides that all discovery proceedings are to be stayed upon the filing of the motion, with an exception for reasonable, targeted discovery for information the non-moving party could use to defeat the motion.[14] If the motion is granted, the suit is to be dismissed with prejudice.[15] If the moving party prevails, the court can award the cost of the litigation and reasonable

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[5] *Id.*

[6] *Id.*

[7] *Id.* at 375.

[8] Sydney Buckley, *Getting SLAPP Happy: Why the U.S. District Court for the District of Kansas Should Adopt the Ninth Circuit's Approach When Applying the Kansas Anti-SLAPP Law*, 68 U. KAN. L. REV. 791, 793 (2020).

[9] *Id.*

[10] D.C. Code § 16-5501(1) (West Supp. 2013).

[11] D.C. Code § 16-5502 (West Supp. 2013).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

attorney's fees against the non-moving party.[16] However, the statute also awards attorney's fees and costs to the non-moving party if the motion is "frivolous or is solely intended to cause unnecessary delay."[17] Thus, defendants are also dissuaded from abusing this statute. Other states have passed similar statutes.

A. Erie, Hanna, Shady Grove, *and the Applicability of State Law in Federal Courts*

In *Erie*, the U.S. Supreme Court held that federal courts had to apply state substantive law if no federal statute existed on the matter.[18] However, the Court later held in *Hanna v. Plumer* that federal procedural rules directly addressing an issue are to be applied by the federal courts.[19] Since anti-SLAPP laws are partially procedural, the federal courts have struggled to decide whether the laws apply in federal court. *Shady Grove* attempted to resolve the procedural-substantive divide, but the resulting plurality opinion simply created more confusion. The result was a split amongst the United States Circuit Courts of Appeals over the applicability of anti-SLAPP measures. To fully understand the split, one must first examine *Erie* and *Shady Grove*.

1. *Erie Railroad Co. v. Tompkins*

Erie is a seminal case that determined that federal common law is functionally extinct and that federal courts must apply state common law in the absence of a federal statute on the issue.[20] In *Erie*, the plaintiff, Tompkins, was walking parallel to a train track owned by the Erie Railroad.[21] A train came by, and an object protruding from a train car struck and injured Tompkins.[22] Tompkins filed suit in federal court alleging negligence.[23] He contended that he was a licensee on the railroad's property since he was on a

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[16] D.C. Code § 16-5504 (West Supp. 2013).
[17] *Id.*
[18] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[19] Hanna v. Plumer, 380 U.S. 460, 473-74 (1965).
[20] *Erie R. Co.*, 304 U.S. at 78.
[21] *Id.* at 69.
[22] *Id.*
[23] *Id.*

commonly used footpath.[24] The defendant, Erie Railroad, argued that he was a trespasser and that the railroad owed limited duties to trespassers.[25]

Although the case was being heard in a federal district court, the defendant argued that Pennsylvania common law should apply.[26] Pennsylvania common law held that individuals who walked beside railways were trespassers to whom railroads were not liable for injuries.[27] Tompkins argued that since no Pennsylvania statutory law existed, the matter was to be decided by the federal court as a "matter of general law."[28] This was the standard that had been set when the Supreme Court decided *Swift v. Tyson*. The trial judge agreed with the plaintiff, and the jury awarded judgment against the railroad.[29] The defendant appealed to the United States Court of Appeals for the Second Circuit, which affirmed the trial court. The defendant then appealed to the Supreme Court of the United States.

The Supreme Court reversed, holding that the district court erred in not applying Pennsylvania's common law and overruled *Swift*.[30] The Court explained that under *Swift*, federal courts hearing cases under diversity jurisdiction did not have to follow state common law.[31] Instead, the federal courts could substitute their own judgment on what the state common law should be and decide cases "as a matter of general law."[32] Before the *Erie* decision, *Swift* had long been criticized on a variety of grounds, the most notable of which was that it seemed contradictory to apply state statutory law but not state common law.[33]

The *Erie* Court noted *Swift* was defective since it created both legal uncertainty and federalism issues.[34] Further, *Swift* undermined the purpose of diversity jurisdiction, which was created to prevent in-state parties from having a "home field advantage" against out-of-state parties.[35] The *Erie* Court reasoned that *Swift*, in effect, discriminated in favor of non-citizens by giving

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[24] *Id.*
[25] *Id.* at 70.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 79-80.
[31] *Id.* at 71.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 74.
[35] *Id.*

them a way to circumvent unfavorable state common law.[36] The *Erie* Court overruled *Swift* and created the standard that in cases where there was no conflict with the U.S. Constitution or federal law, federal courts are to apply both state statutory and common law.[37] The Court also determined that "[t]here is no federal general common law."[38] After *Erie*, federal courts hearing state claims under diversity jurisdiction had to apply state common law. This decision would later be narrowed and clarified by its later cases.

2. *Hanna v. Plumer*

In the wake of *Erie*, there had been some confusion as to how conflicts between state and federal procedural rules were to be resolved. The case of *Hanna v. Plumer* later extended *Erie* by clarifying that the Federal Rules of Civil Procedure were to preempt state procedural rules in federal court.[39]

In *Hanna*, the petitioner lived in Ohio and filed a lawsuit in the District Court of the District of Massachusetts against a Massachusetts resident.[40] The suit arose from an automobile accident between the parties.[41] The petitioner properly served the respondent under Federal Rule of Civil Procedure 4(d)(1) by delivering a copy of the complaint to the respondent's wife while she was at the respondent's residence.[42] The respondent answered the complaint, alleging that he was improperly served under Massachusetts state law.[43]

The District Court granted the respondent's motion for summary judgment on the grounds of inadequate service.[44] The petitioner appealed, conceding that he did not comply with the state law and arguing that the Federal Rules were the applicable authority in this case.[45] The United States

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[36] *Id.*
[37] *Id.* at 78.
[38] *Id.*
[39] Hanna v. Plumer, 380 U.S. 460, 473-74 (1965).
[40] *Id.* at 461.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 461-62.
[44] *Id.* at 462.
[45] *Id.*

Court of Appeals for the First Circuit affirmed the District Court.[46] The United States Supreme Court granted certiorari.[47]

The Court first examined whether Rule 4(d)(1) complied with The Rules Enabling Act (in which Congress granted the Supreme Court the power to create uniform procedural rules for the federal judiciary) and determined that it did.[48] The Court noted that Rule 4(d)(1) directly regulates a procedure and thus would control in any case that did not conflict with state law.[49] However, the respondents argued that under *Erie*, substantive state law was to be applied and that substantive law also requires "that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case."[50] The Court rejected this reasoning. The Court explained that the purpose of diversity jurisdiction was to prevent "home cooking" or favoritism in state courts.[51] However, the *Erie* decision was based in part on the desire to reduce forum shopping.[52] The respondent's "outcome-determinative" interpretation went too far since essentially every procedural difference between state and federal law could determine the outcome of a case.[53] The Court also noted that it is an absurd suggestion that a plaintiff file in federal court and then demand to be bound entirely by state rules.[54]

The Court also focused on the deeper flaw in the respondent's argument: *Erie* had never been used to hold that a state law voided a Federal Rule but had only been used to apply state rules when they extended beyond the Federal Rules.[55] One of the goals of the Federal Rules of Civil Procedure was to "bring about uniformity in the federal courts by getting away from local rules."[56] Thus, the respondent's interpretation of *Erie* missed the mark.[57] The effect of *Hanna* was to firmly establish that federal courts hearing state claims are to apply state substantive law and federal procedural law. This set

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[46] *Id.* at 462-63.
[47] *Id.* at 463.
[48] *Id.* at 464. *See also* The Rules Enabling Act, 28 U.S.C. § 2072(a)-(b) (1958).
[49] *Hanna*, 380 U.S. at 464-65.
[50] *Id.* at 466.
[51] *Id.* at 467.
[52] *Id.*
[53] *Id.* at 468.
[54] *Id.* at 468-69.
[55] *Id.* at 470.
[56] *Id.* at 472.
[57] *Id.* at 473.

the stage for the issue of hybrid cases, which include both substantive and procedural legal components.

3. *Shady Grove Orthopedic Associates., P.A. v. Allstate Insurance Co.*

But what of state laws that include both procedural and substantive portions? *Shady Grove* addressed this issue and resulted in a plurality opinion wherein the justices curtailed parts of *Erie* and *Hanna* but disagreed on the rationale. This fractured opinion confused the lower courts regarding which opinion is controlling. This confusion led to the instant anti-SLAPP circuit split.

Shady Grove, the plaintiff, provided care for an auto injury victim and tendered a claim to Allstate, the defendant, for the patient's insurance benefits.[58] Allstate paid the claim, but not within the 30 days required under New York law.[59] Allstate refused to pay interest on the late payment.[60]

Shady Grove filed a class action suit under diversity jurisdiction in the Eastern District of New York.[61] Shady Grove filed the suit on behalf of other providers to whom Allstate also owed interest.[62] The district court dismissed the case for lack of jurisdiction, citing a New York law that barred suits seeking a "penalty" from being class actions.[63] Shady Grove appealed, noting that Federal Rule of Civil Procedure 23 allows such suits.[64] The United States Court of Appeals for the Second Circuit affirmed the district court.[65] Shady Grove appealed to the United States Supreme Court.[66]

The Supreme Court reversed, holding that federal rule should have been applied in place of the state rule. This was a plurality decision, with Justice Scalia's opinion holding that state procedural provisions could never

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[58] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 397 (2010) (plurality opinion).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 398.

[66] *Id.*

be applied in federal court.[67] Justice Steven's opinion held that there are situations where state procedural laws could be applied in federal courts.[68]

The late Justice Scalia wrote for the plurality.[69] Justice Scalia quickly dismissed the respondent's claim that the New York anti-SLAPP law and Federal Rule of Civil Procedure 23 do not conflict.[70] Allstate had argued that the two laws were different in substance and did not conflict, but Scalia noted that this argument relied solely on artificial distinctions and exceptions.[71] Both rules explained general principles for maintaining class actions.[72] The two rules conflicted, and the real question was which rule needed to be applied under *Erie*.[73]

Justice Scalia noted that Congress had authorized the Court to set its own rules of federal procedure so long as those rules did not abridge or alter substantive rights.[74] The test the Court has used when examining the Federal Rules is what the rule regulates: "the manner and means" by which rights are enforced and "the rules of decision by which [the] court will adjudicate [those] rights."[75] The first is a valid rule since it is procedural; the second is invalid since it alters rights and remedies.[76] Rule 23 only affects how claims can be joined in a class action, which is not substantive.[77] Justice Scalia further asserted that a Federal Rule of Civil Procedure could not be valid in some states and invalid in others simply because it could conflict with a state substantive law.[78]

Justice Stevens penned a concurring opinion that some view as controlling under *Marks v. United States* because four other justices agreed with his rationale but not his conclusion. Stevens began by noting that, in general, federal courts exercising diversity jurisdiction "apply state substantive law and federal procedural law."[79] He noted that correctly

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[67] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 39 (2010) (plurality opinion).

[68] *See id.* (Stevens, J., concurring).

[69] *Id.* at 397.

[70] *Id.* at 399.

[71] *Id.* at 399-406.

[72] *Id.*

[73] *Id.* at 406.

[74] *Id.* at 406-07.

[75] *Id.* at 407.

[76] *Id.*

[77] *Id.* at 408.

[78] *Id.* at 409.

[79] *Id.* at 417 (Stevens, J., concurring).

balancing whether a rule is procedural or substantive is often challenging.[80] Further, he differed with the plurality and noted that state procedural rules can become so intertwined with state substantive rules that they "influence substantive outcomes."[81] Stevens asserted that in these cases, federal courts ought to respect the procedural vehicles states have enacted to protect substantive rights.[82] This rationale was heavily influenced by the Court's decision in *Erie*.[83] Here, Stevens held that applying Rule 23 did not violate any substantive rights and thus could have been applied by the district court.[84]

III. *SHADY GROVE* AND THE ANTI-SLAPP CIRCUIT SPLIT

Since anti-SLAPP laws contain both substantive and procedural aspects, these laws have led to questions regarding the applicability of the procedural provisions of anti-SLAPP laws in federal diversity cases. Substantive provisions of anti-SLAPP laws always apply in federal court, just as any other substantive state law is applied. The Federal Circuits are split on this issue, meaning that some hold that procedural anti-SLAPP laws can apply in diversity cases, while others have ruled that they do not apply. A circuit split can only be solved by the Supreme Court ruling on the issue. However, at the time of this writing, the Court has refused to grant certiorari to any cases appealing this issue. The cases of *Godin v. Schencks* and *3M Co. v. Boulter* provide fitting examples of how the First Circuit and the D.C. Circuit have adopted contrary views on the applicability of anti-SLAPP statutes.

A. *The United States Court of Appeals for the First Circuit*

In one of the first anti-SLAPP cases heard after *Shady Grove*, *Godin v. Schnecks* used Justice Stevens's rationale and determined that Maine's anti-SLAPP law was intertwined with substantive rights and could be applied along with the Federal Rules.[85] Godin, the plaintiff, was hired as a school principal, but the school district soon began receiving complaints from the

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[80] *Id.* at 419.
[81] *Id.* at 419-20.
[82] *Id.* at 420.
[83] *Id.* at 423-24 (plurality opinion).
[84] *Id.* at 436.
[85] Godin v. Schencks, 629 F.3d 79, 92 (1st Cir. 2010).

defendants alleging that Godin was abusive to students.[86] The district conducted an investigation but found no support for the allegations.[87] Two days later, Godin was fired "due to budgetary cuts."[88]

Godin filed suit in the United States District Court for the District of Maine under a federal statute.[89] She also filed several state claims, including a defamation claim against the defendants.[90] The U.S. Court of Appeals for the First Circuit granted supplemental jurisdiction over these claims on appeal.[91] The defendants filed a special motion to dismiss under Maine's anti-SLAPP statute, arguing that the lawsuit was meant to quell their right to petition the government.[92] The district court denied the motion, holding that the Maine law conflicted with Rules 12 and 56 of the Federal Rules of Civil Procedure.[93] The defendants filed an interlocutory appeal to the First Circuit.[94]

The First Circuit held that the Maine law did not conflict with the federal rules and should have been applied.[95] The court acknowledged that while federal courts typically apply state substantive law and federal procedural law, substance and procedure often become intertwined.[96] The court noted that the Maine law was incredibly nuanced since the statute contained substantive and procedural sections.[97] Relying further on Justice Steven's concurrence, the court determined that Rules 12 and 56 were not broad enough to conflict with the Maine law.[98] The court noted that Rule 12(b) motions to dismiss and Rule 56 motions for summary judgment do not address the same topic as the Maine law.[99] Instead, the Maine law creates separate, supplemental grounds to dismiss the case.[100] The substantive and

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[86] *Id.* at 81.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 84.
[92] *Id.* at 81-82.
[93] *Id.* at 82.
[94] *Id.*
[95] *Id* at 92.
[96] *Id* at 85-86.
[97] *Id.*
[98] *Id* at 86-87.
[99] *Id* at 88.
[100] *Id.*

procedural aspects of the Maine law were sufficiently entwined for the state procedural law to substitute for the federal rule.[101]

Godin set a standard for allowing anti-SLAPP statutes to apply in federal courts. While the First Circuit held that the Maine law and the Federal Rules were aimed at slightly different situations, the court still found that the Maine law was so interwoven with a substantive right that it had to be applied under *Erie*. While this holding made proponents of anti-SLAPP laws optimistic, the District Court of the District of Columbia quickly refuted it.

B. *The United States Court of Appeals for the D.C. Circuit*

Soon after *Godin* was decided, the United States District Court for the District of Columbia examined D.C.'s anti-SLAPP law and determined that it was not applicable in federal court.[102] In *3M Co. v. Boulter*, the plaintiff 3M Company acquired a company called Acolyte to expand into the BacLite market.[103] After acquiring the company, 3M realized that BacLite was not a viable product in the U.S. market and asked its vendors for consent to stop marketing the product.[104] The plaintiff also offered the vendors money to stop the marketing, but the vendors refused, seeking more money.[105] The defendant vendors then began what 3M termed "a campaign of intimidation, coercion, and defamation."[106] This included a marketing blitz of press releases saying 3M had acted in bad faith, statements accusing 3M of being behind the deaths of MRSA victims, and a petition submitted to the FDA on behalf of the defendants.[107] The plaintiff filed suit in district court.[108] The defendants then filed special motions to dismiss under D.C. Code § 16-5502, D.C.'s anti-SLAPP law.[109] The plaintiff filed a cross-motion, arguing that the D.C. law does not apply in federal diversity cases.[110]

The court held that § 16-5502 was procedural, conflicted with the Federal Rules, and was not applicable.[111] Examining *Shady Grove*, the court

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[101] *Id.* at 89.
[102] 3M Co. v. Boulter, 842 F. Supp. 2d 85, 111 (D.D.C. 2012).
[103] *Id.* at 88.
[104] *Id.* at 89.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 90.
[108] *Id.* at 92.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 111.

noted that if a federal rule covers a dispute, it governs over the state rule.[112] The court heavily analyzed Justice Scalia's plurality opinion in *Shady Grove*, noting that the first inquiry is whether the federal rule covers the dispute.[113] The judge asserted that Rule 12(b) speaks to this dispute since the rule has been construed to mean that federal courts cannot dismiss a suit that is "sufficiently pled with detailed and plausible factual allegations based upon the court's own assessment of the weight of disputed evidence."[114] The D.C. law also attempts to answer the same question and thus conflicts with the federal rules.[115] Section 16-5502 allows defendants to defeat lawsuits based on the pleadings, thus altering the procedures established in Rules 12 and 56.[116] The D.C. statute requires the court to dismiss the case if there is a "prima facie showing that the claim he is seeking to dismiss 'arises from an act in furtherance of the right of advocacy on issues of public interest'."[117] This directly counters Rules 12 and 56.[118]

The judge further attacked the application of the D.C. statute because it stripped the federal court of its discretion in dismissing the suit with or without prejudice.[119] Section 16-5502(d) of the statute required that the suits be dismissed with prejudice if the motions were granted.[120] Federal Rules of Civil Procedure 12 and 56, however, gave the courts discretion in whether to dismiss a matter with prejudice.[121] The judge then explored the holding in *Godin* but disagreed with the First Circuit because the anti-SLAPP law made the court become a fact-finder, even if there was a genuine issue of material fact.[122] Further, the anti-SLAPP law includes procedural rules that conflict with the Federal Rules.[123] The D.C. law is not primarily substantive, and thus it is not to be applied in federal court.[124]

In *3M*, the court used Scalia's plurality from *Shady Grove* as its reasoning and came to a strikingly different conclusion from *Godin*. The

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[112] *Id.* at 94.
[113] *Id.* at 96.
[114] *Id.* at 101.
[115] *Id.*
[116] *Id.* at 102.
[117] *Id.*
[118] *Id.* at 103.
[119] *Id.* at 104.
[120] *Id.*
[121] *Id.* at 104-05.
[122] *Id.* at 108.
[123] *Id.*
[124] *Id.*

procedural nature of many anti-SLAPP statutes makes the laws fall into a murky area between the opinions in *Shady Grove*. Because of this, the circuits have split regarding which is the proper application of *Shady Grove* and over the procedural and substantive nature of anti-SLAPP laws. Both positions have their merits, meaning that this issue will only prove more judicially divisive as more states enact these measures.

IV. A SOLUTION: ADOPTING JUSTICE SCALIA'S APPROACH FROM *SHADY GROVE*

As states continue to pass and strengthen anti-SLAPP laws, further litigation about the applicability of these measures is sure to arise. The procedural provisions of anti-SLAPP laws should not be applicable in federal courts. Notably, Justice Scalia's rationale in *Shady Grove* only applies to procedural elements, not purely substantive elements that apply in federal court under *Erie*.[125] This means that substantive elements of state anti-SLAPP laws could still be applied. However, it is the procedural elements of anti-SLAPP laws that provide the most protection for defendants, so the failure to apply the procedural elements essentially renders the laws of no import. While state legislatures' desire to preserve First Amendment rights is admirable, and should be promoted, it is not within the federal judiciary's purview to apply procedural measures that conflict with the federal rules of procedure. The best solution for anti-SLAPP supporters is to pursue non-judicial remedies, such as petitioning Congress to pass a federal anti-SLAPP measure that includes similar procedural elements to the state laws.

After *Shady Grove*, seven circuits have examined this issue. Of these, the Seventh, Tenth, Eleventh, and D.C. Circuits have ruled that the procedural provisions of anti-SLAPP laws do not apply in federal court.[126] The First and Ninth Circuits have held that procedural aspects of anti-SLAPP laws do apply in federal cases.[127] The Fifth Circuit has ruled both ways

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[125] *See*, *e.g.*, Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014) (permitting the District Court's application of Nevada's anti-SLAPP law because the sections applied, such as civil immunity and fee shifting, were considered substantive under *Erie*).

[126] Buckley, *supra* note 7, at 804. *See, e.g.* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015); Intercon Sols., Inc. v. Basel Action Network, 791 F.3d 729, 732 (7th Cir. 2015); Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 673 (10th Cir. 2018); Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1347 (11th Cir. 2018).

[127] Buckley, *supra* note 7, at 804. *See*, *e.g.*, Godin v. Schencks, 629 F.3d 79, 91-92 (1st Cir. 2010); Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress, 890 F.3d 828, 835 (9th Cir. 2018), cert. denied, 139 S. Ct. 1446 (2019).

depending on the specific construction of each law.[128] While the majority of the Circuits have applied Justice Scalia's reasoning from *Shady Grove*, many authors who have previously written on this issue have advocated for the courts to adopt Justice Steven's view.[129] However, Justice Scalia's opinion in *Shady Grove* is the proper rationale to apply and should be used by future courts hearing this issue.

A majority of the United States Courts of Appeals have held that the procedural elements of anti-SLAPP laws are not applicable, and Justice Scalia's opinion in *Shady Grove* has led to signs that the Ninth and Fifth Circuits might reverse course and bar the application of these laws in federal cases. In *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, the Ninth Circuit held that anti-SLAPP laws were applicable.[130] However, concurring opinions in the cases of *Makaeff v. Trump University, LLC* and *Planned Parenthood Federation of America., Inc. v. The Center. for Medical Progress* questioned whether *Newsham* was decided correctly in light of Scalia's opinion in *Shady Grove*.[131] These cases show that the Ninth Circuit will likely switch to Scalia's view.

The shift in the Fifth Circuit has been more pronounced than that of the Ninth Circuit. In *Henry v. Lake Charles American Press, L.L.C.*, the Fifth Circuit held that anti-SLAPP laws were applicable.[132] A decade later, a three-judge panel reversed course in *Klocke v. Watson*.[133] In *Klocke*, the court did not apply the Texas anti-SLAPP law because it conflicted with federal procedural rules.[134] The *Klocke* court heavily relied on Justice Scalia's *Shady Grove* opinion.[135] While *Klocke* did not overturn *Henry*, it marked a clear shift toward the rationale adopted by Justice Scalia. The shift in these circuits

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[128] Buckley, *supra* note 7, at 804. *See, e.g.*, Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019); Lozovyy v. Kurtz, 813 F.3d 576, 582-83 (5th Cir. 2015).

[129] *See generally* Buckley, *supra* note 7; Quinlan, *supra* note 2.

[130] *See generally* U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999)

[131] *See generally* Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013); *see generally* Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 830-31 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018).

[132] *See generally* Henry v. Lake Charles American Press, LLC., 566 F.3d 164 (5th Cir. 2009).

[133] *See generally* Klocke v. Watson, 936 F.3d 240 (5th Cir. 2019), *as revised* (Aug. 29, 2019).

[134] *Id.* at 245.

[135] *Id.*

also highlights several concerns that have emerged regarding Justice Steven's approach from *Shady Grove*.

A. *The Ninth and Fifth Circuit Shifts: How* Shady Grove *Shifted Several Circuits Toward Justice Scalia's Approach*

These concerns are best avoided by following Justice Scalia's opinion in *Shady Grove*. Put succinctly, his view was that "[a] federal court exercising diversity jurisdiction should not apply a state law or rule if a Federal Rule of Civil Procedure 'answer[s] the same question' as the state law or rule."[136] The effectiveness of Justice Scalia's approach is demonstrated by post-*Shady Grove* shifts in anti-SLAPP jurisprudence by the Fifth and Ninth Circuits. Before *Shady Grove*, both circuits had applied anti-SLAPP laws in diversity suits. In cases heard after *Shady Grove*, both circuits curtailed the application of anti-SLAPP statutes and put the future of their applicability in doubt. Neither circuit has expressly overruled the cases holding anti-SLAPP laws applicable because there has yet to be an en banc review of these pre-*Shady Grove* cases. However, this shift towards curtailment reveals that the lower courts prefer Justice Scalia's view and is the better interpretation of *Shady Grove* in anti-SLAPP cases.

1. The United States Court of Appeals for the Ninth Circuit

In 1999, the Ninth Circuit made history with its decision in *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, the first case to apply a state anti-SLAPP law to a diversity case.[137] In *Newsham*, the court applied California's anti-SLAPP law which created a special motion to dismiss that shifts the burden to the plaintiff to show a "reasonable probability" that he will prevail on his claim if it goes to trial.[138] *Newsham* set the stage for future anti-SLAPP cases, and the Ninth Circuit is one of three courts of appeals that still applies anti-SLAPP laws in diversity cases, even in the wake of *Shady Grove*. However, the Ninth Circuit has curtailed *Newsham* in several recent cases, putting the future of *Newsham* in doubt.

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[136] Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1333 (D.C. Cir. April 24, 2015) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398-99 (2010)).

[137] *See generally*, U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999).

[138] *Id.* at 971.

In *Makaeff v. Trump University, LLC*, the Ninth Circuit once again applied California's anti-SLAPP statute.[139] Trump University was sued by former customer Tarla Makaeff for deceptive business practices, and Trump University counterclaimed for defamation.[140] Makaeff claimed that she had been overcharged for the services she had received and subsequently sent letters to her bank and the Better Business Bureau accusing Trump University of "grand larceny," "brainwashing techniques," and "felonious teachings" among other things.[141] These statements were the basis of Trump University's defamation counterclaim. Makaeff moved to dismiss the claim under California's anti-SLAPP statute, which shifted the burden to Trump University to show a reasonable probability that its claim would succeed.[142] The majority opinion ultimately applied the anti-SLAPP statute and focused on the issue of whether Trump University showed a reasonable probability its claim would succeed.[143] However, *Shady Grove* still showed signs of change in the Circuit, with two concurring justices writing that *Newsham* had been decided incorrectly in light of *Shady Grove*.

Chief Judge Kozinski concurred with the majority opinion, noting that it was correctly decided under the framework in *Newsham*.[144] Yet Kozinski also noted his belief that *Newsham* was wrong and needed to be reconsidered.[145] Judge Kozinski reiterated the standard outlined in *Erie* and *Shady Grove* that if "[a] federal procedural rule and [a] state substantive rule could coexist peaceably within their respective spheres . . . each could be given full effect."[146] Judge Kozinski suggested that the first step in analyzing this issue is to determine whether the state law was substantive or procedural.[147] If a state law is deemed substantive, then the court must analyze whether the state law conflicts with the federal rules.[148]

Judge Kozinski argued that *Newsham* did the opposite: the court decided that the California statute did not conflict with the Federal Rules but did not first determine if the California statute was procedural or

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[139] *See generally*, Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013).

[140] *Id.* at 258.

[141] *Id.* at 260.

[142] *Id.* at 260-61.

[143] *See generally* Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013).

[144] *Id.* at 272 (Kozinski, C.J., concurring).

[145] *Id.*

[146] *Id.* at 273.

[147] *Id.* (citing Walker v. Armco Steel Corp., 446 U.S. 740, 746, 749-50 (1980)).

[148] *Makaeff*, 715 F.3d at 273 (Kozinski, C.J., concurring) (citing Walker v. Armco Steel Corp., 446 U.S. 740, 746, 749-50 (1980)).

substantive.[149] Judge Kozinski reiterated that "state procedural rules have no application in federal court, no matter how little they interfere with the Federal Rules."[150] Here, Judge Kozinski determined that California's anti-SLAPP statute was purely procedural, and thus should not have applied in federal court.[151] He futher noted, "[t]he anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights."[152] The law provides for a special motion to dismiss, stays on discovery, and other procedural means but does not create any new rights.[153]

Judge Kozinski's attack on *Newsham* did not end there. Turning to the text of *Newsham* itself, he pointed out that *Newsham* conceded that the anti-SLAPP statute and the Federal Rules touched on the same areas, yet the *Newsham* court dismissed these concerns.[154] Kozinski did not mince words in his conclusion: "*Newsham* was a big mistake. Two other circuits have foolishly followed it . . . It's time we led the way back out of the wilderness."[155]

Judge Paez also concurred, noting his belief that *Newsham* was decided incorrectly.[156] He noted that California law was purely procedural and that *Newsham*'s application to anti-SLAPP laws in other states had created a "hybrid mess."[157] *Makaeff* was heard by a three-judge panel, rather than the full Ninth Circuit.[158] This meant that the judges could not overturn *Newsham*.[159] However, these concurring opinions reveal that *Shady Grove* has shifted the Ninth Circuit and put *Newsham*'s future in doubt.

This is further illustrated by the case of *Planned Parenthood Federation of America., Inc. v. The Center. for Medical. Progress*. The plaintiff, Planned Parenthood, alleged that the defendants, the Center for Medical Progress, fraudulently gained access to Planned Parenthood

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[149] *Makaeff*, 715 F.3d at 273 (Kozinski, C.J., concurring).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 274. *See also* U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999) ("This commonality of purpose, however, does not constitute a "direct collision" - there is no indication that Rules 8, 12, and 56 were intended to "occupy the field" with respect to pretrial procedures aimed at weeding out meritless claims.").

[155] *Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring).

[156] *Id.* at 275 (Paez, J., concurring).

[157] *Id.*

[158] *See generally* Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013).

[159] *Id.* at 275 (Kozinski, C.J., concurring).

meetings and used the information obtained therein to create misleading videos.[160] The defendants moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(6) and under California's anti-SLAPP statute.[161] The district court denied both motions, and the defendants appealed the denial of the motion made under the anti-SLAPP law.[162] The majority ultimately applied the anti-SLAPP law but focused on narrowing the interpretation of the statute so that its procedural provisions did not conflict with the Federal Rules.[163] The court noted that if the state rule were to conflict with the Federal Rules, then the Federal Rule would prevail.[164]

Judge Gould, who wrote for the majority, also wrote a separate concurring opinion to express his views on the appropriateness of the Ninth Circuit hearing interlocutory appeals on the denial of anti-SLAPP measures.[165] In his concurrence, Gould noted that multiple United States Courts of Appeals had flatly rejected the applicability of anti-SLAPP measures in federal court.[166] Gould stated that he was not writing to contend for "wholly removing anti-SLAPP motions practice in federal court," but he noted that one reason was to not further widen the inter-circuit split on the issue.[167] While neither the majority opinion nor the concurrence went so far as the concurring opinions in *Makaeff*, Gould's analysis further placed the future of the Ninth Circuit's anti-SLAPP jurisprudence in doubt.

2. The United States Court of Appeals for the Fifth Circuit

The Fifth Circuit decided the case of *Henry v. Lake Charles American Press, L.L.C.* in 2009, a year before *Shady Grove* was decided. In *Henry*, the Fifth Circuit determined that Louisiana's anti-SLAPP statute applied under Federal diversity jurisdiction and dismissed a suit under the statute.[168] A decade later, the Fifth Circuit decided *Klocke v. Watson*, holding that the Texas anti-SLAPP statute was not applicable in cases heard under

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[160] Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 830-31 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018).

[161] *Id.* at 831.

[162] *Id.*

[163] *Id.* at 833.

[164] *Id.* at 834

[165] *Id.* at 835 (Gould, J., concurring).

[166] *Id.* at 836.

[167] *Id.*

[168] Henry v. Lake Charles American Press, LLC., 566 F.3d 164, 168-69 (5th Cir. 2009).

diversity jurisdiction.[169] This decision represented an important shift away from *Henry* and was a victory for Justice Scalia's view.

In *Klocke*, the plaintiff-petitioner's son had been a student at the University of Texas at Arlington.[170] The defendant-respondent falsely accused the petitioner's son of homophobic harassment, leading UT-Arlington to launch a Title IX investigation.[171] During the investigation, the University allegedly violated due process protections required under Title IX, leading the University to punish the petitioner's son by refusing him permission to graduate.[172] Upon learning that he could not graduate, the petitioner's son committed suicide.[173] As the administrator of his son's estate, the petitioner sued his son's accuser for common law defamation.[174] The respondent then moved to dismiss the defamation claims under the Texas anti-SLAPP law.[175]

On appeal, the petitioner argued that the Texas law contained procedural provisions that conflicted with the Federal Rules of Civil Procedure and thus could not apply in this case.[176] The court agreed. The Texas anti-SLAPP law, known as the TCPA, provides that the defendant in any lawsuit that targets "the right of free speech, right to petition, or right of association" can file a special motion to dismiss to protect those substantive rights.[177] When this motion is filed, all discovery is suspended until the court rules on the motion to dismiss.[178] The motion to dismiss is to be granted if the defendant demonstrates by the preponderance of the evidence that the suit was brought in response to the defendant's exercise of the aforementioned rights.[179] The TCPA also employs a burden-shifting framework if the plaintiff can establish by clear and convincing evidence "a prima facie case for each essential element of the claim in question."[180]

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[169] *See generally* Klocke v. Watson, 936 F.3d 240 (5th Cir. 2019), *as revised* (Aug. 29, 2019).

[170] *Id.* at 242.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 242-43.

[175] *Id.* at 243.

[176] *Id.*

[177] Tex. Civ. Prac. & Rem. Code § 27.003(a).

[178] Tex. Civ. Prac. & Rem. Code § 27.003(b).

[179] Tex. Civ. Prac. & Rem. Code § 27.005(b).

[180] Tex. Civ. Prac. & Rem. Code § 27.005(c).

Finally, the law imposes attorney's fees and the possibility of monetary sanctions on the plaintiff if the defendant's motion to dismiss prevails.[181]

Relying on *Erie* and Justice Scalia's opinion in *Shady Grove*, the court agreed with the plaintiff that the Texas Statute "collide[d]" with and "answer[ed] the same question as Federal Rules of Civil Procedure 12 and 56."[182] The court found that the Texas statute and the Federal Rules answer the same question: "[w]hat are the circumstances under which a court must dismiss a case before trial?"[183] Further, "a state rule conflicts with a federal procedural rule when it imposes additional procedural requirements not found in the federal rules."[184] The court determined that the TCPA imposed additional requirements not present in the Federal Rules of Civil Procedure, such as the need for the court to make evidentiary determinations when hearing a motion to dismiss made under the TCPA.[185]

While the defendant argued the Federal Rules of Civil Procedure impose minimum requirements that the states can build on, the court disagreed.[186] The court relied on *Carbone v. Cable News Network, Inc.*, which had held that the Federal Rules of Civil Procedure are comprehensive, not minimum requirements.[187] The *Carbone* court also held that the Federal Rules of Civil Procedure "contemplate that a claim will be assessed on the pleadings alone or under the summary judgment standard [and that] there is no room for any other device for determining whether a valid claim supported by sufficient evidence [will] avoid pretrial dismissal."[188] The TCPA's evidentiary requirements needed to prevail on the special motion to dismiss ran afoul of the *Carbone* standard. The Fifth Circuit held that the TCPA conflicted with the Federal Rules of Civil Procedure. The Fifth Circuit also noted the practical conflict caused by the defendant's attempt to apply the Texas law instead of the Federal Rules of Civil Procedure, noting that the plaintiff "was understandably thrown off balance by this selective choice of procedure."[189] Being "thrown off balance" is quite reminiscent of Justice

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[181] Tex. Civ. Prac. & Rem. Code § 27.009(a).

[182] Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019), *as revised* (Aug. 29, 2019).

[183] *Id. See also* Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1333-34 (D.C. Cir. April 24, 2015) (noting that the D.C. anti-SLAPP statute "answered the same question" as the Federal Rules by setting circumstances under which a lawsuit must be dismissed before trial).

[184] *Klocke*, 936 F.3d at 245.

[185] *Id.* at 246.

[186] *Id.* at 247.

[187] Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1351 (11th Cir. 2018).

[188] *Id.*

[189] *Klocke*, 936 F.3d at 247.

Scalia's concern that the federal procedural rules were to be applied uniformly in all federal courts. Here, the defendant's use of the TCPA burdened the plaintiff by requiring heightened procedural standards not typically required in federal courts.

The court also addressed Justice Steven's concurrence in *Shady Grove*, noting that while the Texas statute was aimed at preserving substantive rights, it did not create any substantive rights and instead employed new procedural measures to preserve existing rights.[190] Finally, the court rejected the defendant's argument that the Fifth Circuit's previous ruling in *Henry* was instructive on the present case. The Fifth Circuit did not overturn *Henry* but noted that it was not applicable since each case examined different anti-SLAPP laws.[191] The court further noted that *Henry* was decided before the Supreme Court decided *Shady Grove* and implied that *Henry*'s outcome may have been different had it been decided after *Shady Grove*.[192]

Klocke represents a clear shift in the Fifth Circuit's anti-SLAPP jurisprudence following the decision in *Shady Grove*. The Court very explicitly relied on *Shady Grove* in its analysis and made clear that Justice Scalia's interpretation was the proper standard to apply. The *Klocke* court acknowledged Justice Steven's approach but noted that the TCPA protects but did not create any substantive rights. If the court had followed Justice Steven's approach, it would have then asked if the procedural protections created in the TCPA were so intertwined with substantive rights that the procedures were essentially substantive. Yet the court did not do this, instead focusing on whether the TCPA answered the same question as the Federal Rules. Scalia's view was simpler to apply, as it does not require courts to try to blur the line between procedural and substantive to see if they are intertwined. Instead, the court simply must determine if a state law creates a set of procedures that conflict with the Federal Rules. *Klocke* shows that the Fifth Circuit applies Scalia's view and that the future applicability of anti-SLAPP measures in the Fifth Circuit is severely in doubt. The Fifth Circuit should continue to apply Scalia's view, as should any court that takes up this issue.

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[190] *Id. See also* Makaeff v. Trump Univ., LLC, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring).

[191] *Klocke*, 936 F.3d at 248-49.

[192] *Id.* at 249.

B. *Concerns Behind Adopting the Justice Stevens Approach*

These cases highlight a variety of concerns behind applying Justice Stevens's approach to anti-SLAPP cases heard in federal court. The first is definitional: courts have struggled to firmly articulate when a procedural element becomes sufficiently intertwined with substantive elements to render the procedural element applicable in federal court.[193] The second concern is that Justice Steven's approach threatens the Federal Rules of Civil Procedure by invalidating them in certain situations. These concerns show that Justice Scalia's view is the better path forward.

1. Preemption of the Federal Rules

One of Justice Scalia's main concerns with Justice Steven's approach was that it would lead to the Federal Rules of Civil Procedure being preempted by state rules in certain contexts. Justice Scalia argued that the invalidation of the Federal Rules of Civil Procedure in certain cases would run counter to previous holdings by the Court and would defeat the purpose of the federal rules themselves. "A federal rule of procedure is not valid in some jurisdictions and invalid in others--or valid in some cases and invalid in others--depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes)."[194] To allow otherwise would lead to the federal procedural rules being invalidated in certain cases in certain jurisdictions. In the case of anti-SLAPP litigation, allowing anti-SLAPP laws to invalidate Federal Rules of Civil Procedure 12 and 56 interrupts the order and pace of the lawsuit, destroying the very purpose for which the Federal Rules were put in place.

Justice Steven's approach leads to an outcome that ultimately runs counter to the very purpose of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 1 states, "These rules govern the procedure in all civil actions and proceedings in the United States District Courts . . . to secure the just, speedy, and inexpensive determination of every act and proceeding."[195] The Federal Rules of Civil Procedure facilitate the speedy and inexpensive

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[193] *See generally* Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010) (holding that procedural aspects of the Maine anti-SLAPP measure were applicable because they were so intertwined with substantive elements).

[194] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 409 (2010) (plurality opinion).

[195] FED. R. CIV. P. 1.

legal process in the federal courts by providing a consistent process that is used in each federal court. This means that both plaintiffs and defendants in federal court always know what to expect procedurally. This is a factor in determining whether to file in, or remove a lawsuit to, federal court. Federal courts are meant to be consistent and fair; they help eliminate perceived local bias in state courts and seek to mitigate forum shopping. Invalidating any federal procedural rule that runs counter to a state "substantively procedural" rule destroys this consistency.

Justice Scalia was not the only one to recognize this truth. Chief Judge Kozinski of the Ninth Circuit acknowledged similar concerns. "The Federal Rules aren't just a series of disconnected procedural devices. Pre-discovery motions, discovery, summary adjudication, and trial follow a logical order and pace so that cases proceed smartly towards final judgment or settlement."[196] The Federal Rules were established to ensure a natural ebb and flow to each lawsuit brought in the federal courts. Allowing specially carved state procedural rules to apply destroys this ebb and flow and devalues the Federal Rules.

2. Definitional Issues

A second issue is that there is no clear standard for when a procedural aspect of a statute becomes sufficiently intertwined with a substantive right to be deemed substantive. Justice Stevens left no clear test in *Shady Grove*, nor did the First Circuit in *Godin*. The reason seems to be that there is no clear standard, test, or definition that can be set. Many judges have noted issues with parsing the procedural and substantive aspects of a law. Judge Jones of the Fifth Circuit noted, "Determining whether the state law is procedural or substantive may prove elusive."[197] Chief Judge Kozinski of the Ninth Circuit further noted, "[T]he distinction between substance and procedure is not always clear-cut."[198] The point is that determining whether a law is procedural or substantive can be tough on its own. Adding the extra step of determining if a procedural rule is rendered substantive merely adds to the problem. There are no set standards by which the courts can implement Justice Steven's approach. It cannot be applied consistently throughout the federal judiciary. This is why Justice Scalia's approach has

[196] Makaeff v. Trump Univ., LLC, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring).

[197] Klocke v. Watson, 936 F.3d 240, 244 (5th Cir. 2019), *as revised* (Aug. 29, 2019).

[198] *Makaeff*, 715 F.3d at 272 (Kozinski, C.J., concurring).

gained considerable traction throughout the circuits and should be applied in future cases about the applicability of state anti-SLAPP laws.

V. NON-JUDICIALLY CREATED REMEDIES

SLAPPs pose a variety of ethical and practical problems for the judiciary. These suits attack constitutional rights and use the legal system as a weapon rather than a forum of justice. While trying to apply state anti-SLAPP laws under *Shady Grove* is not an appropriate way to combat SLAPPs in federal court, there are other options. Two ways that SLAPPs could be reduced are sanctioning lawyers under judicial ethics canons or Congress passing a federal anti-SLAPP law. Either method would emphasize judicial restraint over judicial activism and avoid the separation of powers issues that Justice Steven's approach invoked.

A. *Legal Ethics*

The first method is targeting lawyers for violations of judicial ethics when they file SLAPPs. This could be done through Rule 3.1 of the American Bar Association's Model Rules of Professional Conduct and Federal Rule of Civil Procedure 11.

1. ABA Rule 3.1

ABA Rule 3.1 aims to prevent frivolous lawsuits by requiring lawyers to only file claims made in good faith. Rule 3.1 reads, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[199] The comment on the rule further explains that lawyers must "inform themselves about the facts of their client's cases and the applicable law and determine that they can make good faith arguments in support of their client's positions."[200]

There is some debate as to whether SLAPPS qualify as "frivolous" under the ABA definition. While some have argued that SLAPPs are by their very nature "non-meritorious actions," others have conceded that there is

[199] Model Rules of Prof. Conduct r. 3.1 (Am. Bar Ass'n 2020).
[200] Model Rules of Prof. Conduct r. 3.1 cmt. (Am. Bar Ass'n 2020).

typically a "subjective issue of fact" that the court must still resolve.[201] While there is room for debate about whether SLAPPs violate the letter of Rule 3.1, SLAPPs certainly violate the spirit of Rule 3.1. Notably, the comment to Rule 3.1 states, "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also *a duty not to abuse legal procedure*."[202]

The ultimate idea underlying Rule 3.1 is that the justice system is not to be used to abuse defendants. Often, the process is the punishment, and this sentiment underlies the goal of SLAPPs. The goal of SLAPPs is to use the court system to drag out the lawsuit and financially bleed people into either settling with the company or outright recanting their criticism of the business. Proponents of anti-SLAPP measures can use this principle and advocate for the ABA to release additional guidance and sanctions for lawyers who participate in SLAPPs. Rule 3.1 could be used to sanction lawyers who file frivolous SLAPPs, which would make other lawyers think twice before filing a SLAPP.

2. Federal Rule of Civil Procedure 11

While enforcement of the ABA Rules is left to state bar associations, the federal courts also have a remedy to counter frivolous actions. It is found in Federal Rule of Civil Procedure 11. Rule 11 states that every pleading, motion, and other papers must be signed by the attorney.[203] By signing, the lawyer certifies to the court that the filing "is not presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and that there is a "nonfrivolous argument" to be made.[204]

If Rule 11(b) is violated, the court can order sanctions to deter the behavior.[205] These sanctions can range from nonmonetary directives to a fine or even payment of the other party's attorney's fees.[206] This means that if a court determines that a lawyer is making filings simply to increase the cost of

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[201] Theodore Z. Wyman, *Applicability of State Anti-SLAPP Statutes in Federal Diversity Cases*, 45 A.L.R. FED. 3d Art. 4 intro. (Originally published in 2019) (stating that SLAPPs are not meritorious by definition); *see also* Quinlan, *supra* note 2, at 370-71(noting that SLAPPs are usually based upon facts that must be adjudicated for a suit to prevail).

[202] Model Rules of Prof. Conduct r. 3.1 cmt. (Am. Bar Ass'n 2020) (emphasis added).

[203] FED. R. CIV. P. 11(a).

[204] FED. R. CIV. P. 11(b).

[205] FED. R. CIV. P. 11(c).

[206] FED. R. CIV. P. 11(c)(4).

the litigation for the defendant, the lawyer can be sanctioned for this action. Courts could impose fines on the lawyers who file SLAPP suits to discourage the practice.

B. *Congressional Action*

While these sanctions on lawyers could certainly help prevent SLAPPs at the federal level, the ultimate solution to stopping SLAPPs lies in passing federal legislation on the matter. This could take one of two forms: either passing a federal anti-SLAPP law directly into the U.S. Code or ordering the Supreme Court to amend the Federal Rules of Civil Procedure to include an anti-SLAPP rule. This would be the best means to combat federal anti-SLAPPs since it would create a uniform rule throughout the federal courts while also respecting the separation of powers.

The U.S. Constitution makes clear that it is Congress's job to legislate—not the judiciary's.[207] Further, Congress has the power to regulate the size, organization, and composition of the judiciary.[208] This means that it is Congress's job, not that of a judicially active court, to make rules and set guidelines for the federal courts. This power is seen throughout federal procedural law, such as how Congress defined federal court jurisdiction in 28 U.S.C. §§ 1331-32. Similarly, Congress could create a federal anti-SLAPP law that would bind federal courts. Such a law would operate the same as state protections but would apply at the federal level. This would allow Congress to craft specific protections to prevent and deter SLAPPs.

Similarly, Congress could amend the Rules Enabling Act and order the Supreme Court to adopt an anti-SLAPP procedure into the Federal Rules of Civil Procedure. In the Rules Enabling Act, Congress granted the Supreme Court the power to create uniform procedural rules for the federal judiciary, subject to certain conditions enumerated in the Act.[209] Congress could amend this Act and require the Supreme Court to develop a procedural rule to combat SLAPPs.

Either path would lead to a uniform federal anti-SLAPP rule that would apply in all federal courts. This would effectively end the anti-SLAPP circuit split since state anti-SLAPP measures would conflict with the new federal rule. Under *Erie* (and even *Shady Grove*) the federal rule would

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[207] U.S. CONST. art. I § 1.

[208] U.S. CONST. art. I § 8. *See also* U.S. CONST. art. III § 1.

[209] *See generally* The Rules Enabling Act, 28 U.S.C. § 2072 (1958).

preempt the state rule. This is the best solution for ensuring anti-SLAPP protections at the federal level.

VI. CONCLUSION

Anti-SLAPP laws have provided a novel way to protect First Amendment liberties while guarding against frivolous, abusive lawsuits. These goals are noble and just; most people would concur that the aims of these laws are worthwhile and good. Anti-SLAPP laws have been successfully applied in state courts and served the purpose for which they were created. Regrettably, state anti-SLAPP laws have created a sticky situation in the federal courts. The uncertainty left by *Shady Grove* resulted in a circuit split over the applicability of these measures in federal cases.

This split is best resolved by adopting Justice Scalia's view from *Shady Grove* and finding that these laws are not applicable in federal court. While the goals of these laws are certainly well-intentioned, it is not the duty of the federal courts to look merely at intentions. A full review of the jurisprudence surrounding anti-SLAPP laws shows that there are very legitimate concerns with applying the procedural aspects of these laws. The application of these laws threatens the Federal Rules of Civil Procedure, and Justice Steven's approach leaves too many questions about the often-fine line between procedural and substantive. Justice Scalia's view is simpler, easier to apply consistently, and gaining increasing traction throughout the circuits.

Future courts hearing this issue should not apply the state laws. While this may seem disappointing to anti-SLAPP proponents, there are still options to stop SLAPPs in the federal courts. However, these remedies are legislative, not judicial.