GETTING SLAPP-ED IN FEDERAL COURT: APPLYING STATE ANTI-SLAPP SPECIAL MOTIONS TO DISMISS IN FEDERAL COURT AFTER *SHADY GROVE*

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ABSTRACT

In recent years, dozens of states have enacted anti-Strategic Lawsuits Against Public Participation (SLAPP) laws to counter SLAPP suits, or lawsuits filed to silence a defendant who has spoken out against a plaintiff. The goal of a SLAPP suit is not to win on the merits, but rather to discourage the defendant's right to free speech through the prospect of ruinously expensive litigation. State anti-SLAPP laws provide for special motions to dismiss, which allow a defendant to file an expedited motion to dispose of the SLAPP suit before engaging in costly discovery.

It is well established that a federal court sitting in diversity applies state substantive law and federal procedural rules. Following the Supreme Court's opinion in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, however, it is unclear whether the state-level anti-SLAPP special motions to dismiss should apply in federal courts. This Note discusses* Shady Grove *and examines how two lower courts have struggled to make sense of* Shady Grove *in the context of state anti-SLAPP special motions to dismiss. This Note then proposes a more nuanced, two-pronged interpretation for determining the applicability of state laws in federal courts. Applying this interpretation, this Note argues that state anti-SLAPP special motions to dismiss should apply in federal courts.*

INTRODUCTION

On August 12, 2008, elementary-school principal Pat Godin filed an action under 42 U.S.C. § 1983[1] against the School Department

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Board of Directors and School Union of Fort O'Brien School in Machiasport, Maine.[2] Godin also included state claims of defamation and contract interference against several individual defendants.[3] The complaint alleged that Godin was terminated early from her employment contract after the school board received unsupported complaints about her inappropriate conduct toward students.[4] In response to Godin's § 1983 action and allegations, the individual defendants moved to dismiss Godin's claims[5] under the special motion procedures of Maine's anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) law.[6] The Maine law, like anti-SLAPP laws in twenty-eight other states,[7] was enacted to provide expedited review of lawsuits filed to chill defendants' exercise of their First Amendment rights.[8]

More than three years later on August 24, 2011, multinational corporation 3M filed a defamation lawsuit against Lanny Davis, a prominent Washington attorney and former advisor to President Clinton, and other corporate defendants.[9] The amended complaint alleged that Davis engaged in a smear campaign and "defamatory media blitz"[10] against 3M.[11] Davis and the other defendants allegedly published press releases claiming 3M acted dishonestly, created a website that republished these false statements, and coordinated "fake public demonstrations."[12] Like the individual defendants in

1. 42 U.S.C. § 1983 (2006).
2. Godin v. Schencks, 629 F.3d 79, 80–81 (1st Cir. 2010).
3. *Id.* at 81.
4. *Id.*
5. *Id.* at 81–82.
6. ME. REV. STAT. ANN. tit. 14, § 556 (2003 & Supp. 2012).
7. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection (last visited Oct. 23, 2013) (listing the states that have and have not enacted anti-SLAPP laws).
8. Plaintiffs file SLAPP suits to intimidate and silence a defendant who has spoken out against or criticized the plaintiff. *See infra* note 50 and accompanying text. The purpose of filing a SLAPP suit is not to win on the merits, but rather to burden the defendant with costly and time-consuming litigation. *See infra* notes 47–50 and accompanying text. In response to SLAPP suits, many states have passed anti-SLAPP laws with special motions to dismiss (special motions) that allow defendants to dispose of meritless lawsuits before engaging in costly discovery. *See supra* note 7. For a more extensive discussion of anti-SLAPP laws, see *infra* Part I.B.
9. 3M Co. v. Boulter, 842 F. Supp. 2d 85, 88 (D.D.C. 2012).
10. *Id.* at 90 (quotation marks omitted).
11. *Id.* at 90–91.
12. *Id.* at 90 (quotation marks omitted).

Godin v. Schencks,[13] Davis and the other defendants also moved to dismiss under the special motion procedure of the District of Columbia's anti-SLAPP law.[14]

These two cases hinged on the same issue: Should a federal court sitting in diversity apply state law or federal law?[15] More specifically, can a federal court invoke the state-level anti-SLAPP special motion to dismiss (special motion), or is the special motion trumped by a Federal Rule of Civil Procedure (FRCP) 12(b)(6)[16] motion to dismiss for failure to state a claim? The special motions in Maine and the District of Columbia are strikingly similar in that both grant expedited review of the legal validity of a plaintiff's claim.[17] But the cases came out differently. In *Godin*, the First Circuit held that the special motion *did* apply in federal court: the special motion did not conflict with Rule 12, and applying the special motion advanced litigant equality.[18] In *3M Co. v. Boulter*,[19] the District Court for the District of Columbia held that the special motion *did not* apply in federal court: the special motion conflicted with Rule 12, and Rule 12 was a valid exercise under the Rules Enabling Act (REA),[20] as it did not abridge, enlarge, or modify any substantive state rights.[21] The defendants in *Godin* could invoke state law to quickly dismiss Godin's claims; the defendants in *Boulter* could not invoke state law.[22] These two cases are difficult, if not impossible, to reconcile.

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13. Godin v. Schenks, 629 F.3d 79, 81–82 (1st Cir. 2010).

14. *Boulter*, 842 F. Supp. 2d at 92. The current version of the statute under which defendants filed their motion is D.C. CODE § 16-5502 (2001 & Supp. 2013).

15. *See Godin*, 629 F.3d at 86 ("The issue is whether Federal Rules of Civil Procedure 12(b)(6) and 56 preclude application of Section 556 in federal court."); *Boulter*, 842 F. Supp. 2d at 92 ("3M has filed a Motion to Strike Defendants' special motions to dismiss, claiming that the Act is *ultra vires* and, in any event, does not apply in a federal court sitting in diversity.").

16. FED. R. CIV. P. 12(b)(6). Throughout this Note, "Rule 12" is used to refer generally to Rules 12(b)(6) and 12(d). A motion to dismiss under Rule 12(b)(6) is limited to the pleadings, *id.*, whereas a motion to dismiss under Rule 12(d) includes affidavits and limited discovery outside the pleadings, FED. R. CIV. P. 12(d). For further discussion of Rules 12(b)(6) and 12(d), see *infra* note 158.

17. *See infra* Part I.C.

18. *See Godin*, 629 F.3d at 81–82, 92 (reversing the District Court of Maine and holding that "the Maine anti-SLAPP statute must be applied").

19. 3M Co. v. Boulter, 842 F. Supp. 2d 85 (D.D.C. 2012).

20. 28 U.S.C. § 2072 (2006).

21. *See Boulter*, 842 F. Supp. 2d. at 110–11 ("[T]he special motion to dismiss procedure under the [District of Columbia] [a]nti-SLAPP Act does not apply . . . .").

22. This Note loosely refers to the District of Columbia as a "state" and refers to the District of Columbia anti-SLAPP law as a "state law" with the recognition that the District of Columbia is not technically a state.

For over a century, courts have grappled with which law, state or federal, to apply in federal court.[23] It is well established that when a state law and federal rule conflict, a federal court sitting in diversity applies state substantive law and federal procedural rules.[24] When a state law and federal rule do not conflict, a federal court applies the state law so long as the state law advances litigant equality and there is no countervailing federal interest.[25] What is less certain is how to determine a conflict, and how to distinguish between substantive law and procedural rules. Despite numerous cases on these questions,[26] the Supreme Court has not come to a consensus. The Court has sometimes found conflict between a state law and federal rule and, stressing federal uniformity, has applied the federal rule.[27] Other times, the Court has not found conflict and, emphasizing state deference, has applied the state law.[28] As one commentator has

23. The first Supreme Court case on this question dates back to 1842. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

24. In broad strokes, when a state law and federal rule conflict, the federal law applies if it is a valid exercise under the REA. *See* Hanna v. Plumer, 380 U.S. 460, 463–64 (1965) ("We conclude that the adoption of Rule 4(d)(1) . . . neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service."). This means that the federal rule cannot "'abridge, enlarge or modify any substantive right.'" *Id.* at 464 (quoting 28 U.S.C. § 2072 (1958)); *see also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988) ("If Congress intended to reach the issue before the district court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter."). If the federal rule does abridge substantive rights, the state law applies. *See* Guar. Trust Co. v. York, 326 U.S. 99, 105 (1945) ("In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.").

25. Though this proposition may appear straightforward, there is much confusion about how to balance litigant equality and countervailing federal interests. Whereas the Supreme Court in *Hanna v. Plumer* focused on litigant equality, *see Hanna*, 380 U.S. at 467–69, the Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), stressed countervailing federal interests, *id.* at 537–38.

26. *E.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996); Walker v. Armco Steel Corp., 446 U.S. 740 (1980); *Hanna*, 380 U.S. 460; *Byrd*, 356 U.S. 525; *Guar. Trust Co.*, 326 U.S. 99; Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

27. *See, e.g.*, *Sibbach*, 312 U.S. at 6–9, 16 (holding that an order for physical examination under Rule 35 conflicted with an Illinois law forbidding such physical examination and that Rule 35 applied in federal court because "Congress has undoubted power to regulate the practice and procedure of federal courts").

28. *See, e.g.*, *Gasperini*, 518 U.S. at 419, 431 (holding that the federal standard for an excessive jury verdict did not conflict with the New York standard for excessiveness and that the New York standard applied in federal court because "*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court").

observed, figuring out which law applies is a confusing and "analytical[ly] fog[gy]" inquiry.[29]

At the same time, determining which law applies is of great importance to both federalism and individual rights. When a state passes a law intended to protect its citizens, how can that law apply in state court but not in federal court? How could the defendants in *Boulter* invoke the special motion to quickly dismiss 3M's claims in state court but not in federal court? Even more puzzling, how can courts reconcile the application of one state law in federal court, but not a nearly identical state law in another federal court? How could the defendants in *Godin* invoke the special motion in federal court, but not the defendants in *Boulter*?

Rather than clarify these questions, the most recent Court case on this issue has only added to the confusion. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[30] the Justices built upon existing precedent and set forth three different opinions—Justice Scalia's plurality, Justice Stevens's concurrence, and Justice Ginsburg's dissent—for determining which law applies in federal court.[31] Unsure about the divergent frameworks in the three opinions, lower courts—like the First Circuit in *Godin* and the District Court for the District of Columbia in *Boulter*—have invoked different approaches and come to different conclusions.[32] In an effort to shed light on and eradicate this confusion, this Note draws from the three opinions in *Shady Grove* and proposes a more nuanced, two-pronged interpretation for determining the applicability of state laws in federal courts sitting in diversity. This Note then applies this interpretation to state anti-SLAPP special motions and concludes that such special motions should apply in federal court.

Although many scholars have commented on the applicability of state laws in federal courts[33] and recognized that the three opinions in

29. 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, 1208 (2011).

30. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

31. *See infra* Part II. As discussed within, Justice Scalia's opinion commanded a majority in some parts and a plurality in others. *See infra* note 108.

32. *See infra* Part III.

33. *See generally, e.g.*, John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245 (2008).

Shady Grove are confusing,[34] only a handful have proposed a more workable approach.[35] The few scholars who have pressed further have not applied their respective interpretations to an existing conflict between a federal rule and state law. More specifically, no scholar has considered state anti-SLAPP special motions and their applicability in federal courts after *Shady Grove*.[36]

This Note proceeds in four Parts. Part I briefly explains SLAPP suits and state anti-SLAPP laws. Part II discusses *Shady Grove* and the Justices' three different approaches for determining which law applies in federal court. Part III examines how two lower courts, the First Circuit and District Court for the District of Columbia, have struggled to make sense of *Shady Grove* in the context of state anti-SLAPP special motions.

Shifting from the descriptive to the normative, Part IV draws from the Justices' three opinions in *Shady Grove* and proposes a more nuanced, two-pronged interpretation for determining the applicability of state laws in federal courts. When faced with a competing federal rule and state law, courts should first broadly construe the issue before the court and compare, side by side, the text of the federal rule and state law. If the federal rule leaves no operation for the state law, as is often the case, the court should find that the federal rule and state law conflict. Second, in considering whether the federal rule is valid under the REA, the court should give teeth to the substantive-rights proviso of the REA[37] and fully consider the state's purpose in enacting the law.[38] The state interest

34. *See* Doernberg, *supra* note 29, at 1208 ("At the end of the day, *Shady Grove* generates much heat but sheds little light . . . .").

35. *See generally* Stephen R. Brown, *For Lack of a Better Rule: Using the Concept of Transsubtantivity To Solve the* Erie *Problem in* Shady Grove, 80 U. CIN. L. REV. 1 (2011); Doernberg, *supra* note 29; Jeffrey Redfern, *Federal "Procedural" Rules Undermine Important State Interests in* Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010)*, 34 HARV. J.L. & PUB. POL'Y 393 (2011); *see also infra* note 38.

36. There is one published article on state anti-SLAPP laws and their general applicability in federal court; however, this article is from 2008 and is pre–*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. INNOVOVATION 67 (2008).

37. The substantive-rights proviso of the REA refers to the text of the REA stipulating that the federal rule "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006).

38. Among others, Professors Joseph P. Bauer and Jeffrey Redfern have argued that *Shady Grove* overstated the federal interest and failed to give sufficient weight to the state interest. *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, 960 (2011) (arguing that the majority in

should weigh heavily, especially when the state has a compelling rationale for protecting its citizenry; however, the state interest should also balance with the desire for a uniform system of federal procedure.

Embedded in Part IV is an application of this new interpretation to state anti-SLAPP special motions. Courts should deem that Rule 12 conflicts with the special motions, and, in balancing state and federal interests, Rule 12 impermissibly violates substantive state rights. State anti-SLAPP special motions should thus apply in federal courts sitting in diversity.

I. SLAPP SUITS AND ANTI-SLAPP LAWS

To understand how state anti-SLAPP special motions interact with Rule 12, it is imperative to first understand what a SLAPP suit is, and why and how state legislatures have worked to counteract them. This Part briefly discusses the history of SLAPP suits and the core provision of state anti-SLAPP laws: the special motion. This Part also details the Maine and District of Columbia anti-SLAPP laws, the state laws at issue in *Godin* and *Boulter*.

A. SLAPP Suits

SLAPP suits, or Strategic Lawsuits Against Public Participation, are not like traditional lawsuits, in which the goal is to obtain a legal or equitable remedy. First defined in 1988 by Professors Penelope Canan and George Pring,[39] SLAPP suits are filed with the intention of

Shady Grove went astray by "failing properly to identify and consider [the] state interests, as well as by *overstating* the federal interests at stake"); Redfern, *supra* note 35, at 402–03 ("A Federal Rule should not be applied in a case where it interferes with a state's legitimate ability to regulate the conduct of its own citizens.").

39. Professors Canan and Pring studied SLAPP suits throughout the 1980s and in 1988 published an article that "empirically test[ed] for the first time the prevailing political and judicial assumptions that SLAPPs 'chill,' or deter, citizen participation." Penelope Canan & George W. Pring, Research Note, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC. REV. 385, 386 (1988). In this article, Canan and Pring define SLAPP suits as: (1) "a civil claim for monetary damages," (2) "filed against nongovernmental individuals and institutions," (3) "based on advocacy before a government branch official or the electorate, and," (4) "on a substantive issue of some public or societal significance." *Id.* at 387 (emphases omitted) (footnotes omitted). Several scholars have questioned this definition of SLAPP suits. *See* Victor J. Cosentino, Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W.L. REV. 399, 401 (1993) (contending that Professors Canan and Pring's definition is too restrictive); Thomas A. Waldman, Comment, *SLAPP Suits: Weakness in First Amendment Law and in the Courts'*

intimidating the defendant with costly and time-consuming litigation.[40] The intention is not to win, but rather to discourage the defendant through the prospect of ruinously expensive litigation.[41] As one commentator has noted, "[I]t is through the legal process itself—dragging the unwitting target through the churning waters of litigation—that the SLAPP filer prevails."[42]

Given this objective, the typical SLAPP suit occurs after a defendant has spoken out against or criticized a plaintiff.[43] Shifting from the political arena to the judicial forum,[44] the angered plaintiff then files a lawsuit against the defendant.[45] For example, a developer might sue a local resident who has voted against the developer's zoning-board approval, or a candidate running for office might sue a vehement opponent. Or, as in *Boulter*, a large multinational company might sue to silence the dissenting media.[46] In the prototypical SLAPP suit, a plaintiff usually seeks a large—oftentimes untenable—amount of damages.[47] In a 1989 study of 228 SLAPP suits, the average damages award sought was a whopping $9 million.[48] Beyond damages, the hallmark of a SLAPP suit is that the plaintiff's claim almost

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Responses to Frivolous Litigation, 39 UCLA L. REV. 979 (1992) (arguing that Professors Canan and Pring's definition is too expansive).

40. George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 942 (1992).

41. *Id.*

42. Robert D. Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites*, 21 DEPAUL J. ART TECH. & INTELL. PROP. L. 221, 231 (2011).

43. Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 969–70 (1999).

44. *Id.*

45. *See* Pring & Canan, *supra* note 40, at 946–47 (listing the four elements of a SLAPP suit as: (1) a civil complaint or counterclaim; (2) filed against nongovernmental individuals and/or groups; (3) because of their communication to a government body, official, or the electorate; (4) on an issue of some public interest or concern).

46. *See* 3M Co. v. Boulter, 842 F. Supp. 2d 85, 90 (D.D.C. 2012) (reciting 3M's claim that the defendants schemed "to extract $30 million from 3M" in part by bombarding 3M with "sensational and false accusations . . . in the global media" (quotation marks omitted)).

47. *See* Cosentino, *supra* note 39, at 404 ("After the SLAPP is filed, citizens risk becoming personally accountable to the plaintiff for massive damages."); James E. Grossberg & Dee Lord, *California's Anti-SLAPP Statute*, COMM. LAW, Fall 1995, at 3, 4 ("SLAPP plaintiffs usually seek astronomical damages as part of their strategy of intimidation.").

48. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 25–26 (1989). Adjusted for inflation, this $9 million figure from 1989 is approximately $16.9 million in 2013 dollars. *See CPI Inflation Calculator*, BUREAU OF LAB. STAT., http://www.bls.gov/bls/inflation.htm (last visited Oct. 23, 2013).

always lacks merit[49]—the plaintiff is merely seeking to silence and harass the defendant for speaking out.[50]

Though the earliest SLAPP suit dates back to 1802,[51] the advent of the Internet as a new means for speaking out publicly has greatly increased the number of SLAPP suits.[52] There is a "growing trend of businesses and professionals suing consumers who gripe[] about them online."[53] For example, a towing company filed a SLAPP suit against a college student after the student made disparaging remarks about the company on Facebook.[54]

Concurrent with the recent explosion in voicing one's opinions on the Internet, SLAPP suits have become highly criticized and disfavored. First, SLAPP suits are criticized for the significant power differential between the plaintiff and the defendant. The plaintiff is typically more wealthy and can afford years of litigation,[55] whereas the defendant is often an ordinary "middle-class[,] . . . middle-of-the-road American[]."[56] As such, a SLAPP suit can deplete a defendant's resources. Second, SLAPP suits are criticized for threatening the core

49. *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 970 (9th Cir. 1999) ("The hallmark of a SLAPP suit is that it lacks merit . . . ."); Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 514 (1988) (remarking that SLAPP defendants win early dismissals in 68 percent of cases and win judgments in 83 percent of cases).

50. *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5–6 (1989) ("The apparent goal of SLAPPs is to stop citizens from exercising their political rights or to punish them for having done so.").

51. In *Harris v. Huntington*, 2 Tyl. 129 (Vt. 1802), Attorney Ebenezer Harris accused five citizens of "devising, writing, and publishing . . . libel" to prevent his re-election for justice of the peace and sought $5,000 in damages. *Id.* at 129–32. The Supreme Court of Vermont dismissed his complaint. *Id.* at 147.

52. *See* Zoe Tillman, *Getting SLAPPed: New D.C. Law Designed To Stop Suits That Use Financial Bullying*, NAT'L L. J., May 16, 2011, at 13, 16 ("'Companies and political figures who weren't used to being criticized have confronted the brave new world of the Internet by trying to shut people up.'" (quoting Paul Alan Levy, attorney with the Public Citizen Litigation Group)).

53. Richards, *supra* note 42, at 224.

54. Rex Hall, Jr., *Firm Sues WMU Student over Facebook Page: Towing Company Seeks $750,000 in Damages for Online Criticism*, GRAND RAPIDS PRESS, Apr. 14, 2010, at A6.

55. *See* Peter Blumberg, *Intent To Chill: Four Cases Before California's High Court Raise the Issue of Intent on the Part of Plaintiffs Who File SLAPP Suits*, S.F. DAILY JOURNAL, June 5, 2002 ("Your quintessential SLAPP suit is by a wealthy person or organization trying to defeat the other side . . . .").

56. Pring & Canan, *supra* note 40, at 940.

rights to free expression and free access to government.[57] One New York trial judge has suggested that "[s]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[58] Third, SLAPP suits are criticized for the onus they place on the judicial system. The thousands of SLAPP suits filed each year "waste judicial resources and clog the already overburdened court dockets."[59]

Traditional defenses and procedural remedies are ineffective mechanisms for resolving SLAPP suits.[60] For example, Rule 12 and Rule 56[61] motions are relatively useless in distinguishing a SLAPP suit from a legitimate tort claim.[62] The elements of a SLAPP suit and its nonmeritorious nature emerge at trial, but this is only after costly discovery and years of litigation.[63] Defendants can retaliate with either Rule 11[64] motions claiming frivolity, counterclaims, or SLAPP-back suits,[65] but these are also unsatisfactory. Such retaliation typically prolongs the litigation, is costly for defendants who might already be strapped for cash, and does little to alleviate the financial burden of a SLAPP suit.

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57. *See* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 848 (2010) (noting that many state anti-SLAPP laws are grounded in the core values of the First Amendment).

58. Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (App. Div. 1994).

59. Citizen Participation Act of 2009, H.R. 4364, 111th Cong. § 2 (2009). The Citizen Participation Act of 2009 was introduced in December 2009 to combat SLAPP suits on a federal level. The Act was not passed. *Bill Summary & Status: 11th Congress (2009–2010): H.R.4364*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.04364: (last visited Oct. 23, 2013).

60. *See* Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 450 (Ct. App. 1994) ("Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process[and] requests for sanctions) are inadequate to counter SLAPPs.").

61. FED. R. CIV. P. 56.

62. *See* Jennifer E. Sills, Comment, *SLAPPs (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 CONN. L. REV. 547, 552–69 (1993) (noting the difficulty of obtaining an early dismissal or summary judgment in SLAPP suits).

63. *See* Braun, *supra* note 43, at 972 (explaining that SLAPP suits "look like legitimate actions").

64. FED. R. CIV. P. 11.

65. A SLAPP-back suit is "an action whose aim is restitution for the injury of a SLAPP suit." Braun, *supra* note 43, at 990. Most often, SLAPP-back suits involve a claim of malicious prosecution. In California, for example, "the elements of malicious prosecution are that the prior action: (1) was commenced by or at the discretion of the defendant and was pursued to a legal conclusion in the malicious prosecution plaintiff's favor; (2) was brought (or continued) without probable cause; and (3) was initiated with malice." *Id.*

Prior to the enactment of anti-SLAPP laws by state legislatures, some courts, in recognizing the ineffectiveness of traditional defenses and procedural remedies, created judicial remedies to counteract the silencing of protected speech and costs imposed on defendants in SLAPP suits. The Colorado Supreme Court, for example, established a motion to dismiss in which the moving party was required to make a threshold showing about the merits of her opponent's motives.[66] Other judicial remedies included heightened pleading requirements,[67] shifting costs onto the plaintiff, and more stringent sanctions against frivolous lawsuits.[68] Although these judicial remedies helped reduce the economic harm to defendants, they were piecemeal solutions that oftentimes failed to thwart the plaintiff's goal of intimidating the defendant.

B. Anti-SLAPP Special Motions

To more effectively counteract the harms of SLAPP suits, twenty-nine states and two territories have passed anti-SLAPP laws.[69] When applied, these legislative solutions are more comprehensive and uniform than the aforementioned judicial remedies.

States enact anti-SLAPP laws with the goals of shielding defendants from litigating against meritless claims[70] and encouraging protected speech.[71] At the core of anti-SLAPP laws are special motions,[72] which provide a mechanism to prevent legal maneuvers that burden defendants and threaten statements relating to matters of

66. Protect Our Mountain Env't, Inc. v. Dist. Court, 677 P.2d 1361, 1370 (Colo. 1984) (en banc).

67. *See, e.g.*, Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1082–83 (9th Cir. 1976) (establishing a heightened pleading requirement).

68. *See* John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 407–09, 416–19 (1993) (discussing the various judicial remedies); Cosentino, *supra* note 39, at 413–14 (same).

69. *See supra* note 7 and accompanying text.

70. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(a) (West 2004) ("The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."); *id.* § 425.16(b)(1) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike . . . .").

71. *See, e.g.*, *id.* § 425.16(a) ("The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance . . . .").

72. Some states refer to these "special motions to dismiss" as "motions to strike." *E.g.*, WASH. REV. CODE ANN. § 4.24.525 (West 2005 & Supp. 2013).

public interest and public participation in democratic government. Like a Rule 12 motion, a special motion allows a defendant to file an expedited motion to dismiss the plaintiff's claim.[73] While the parties brief the special motion, discovery is automatically stayed.[74] In ruling on a special motion, courts engage in a two-step analysis to determine whether the plaintiff's claim has merit or is merely an attempt to silence or intimidate the defendant.

First, the defendant has the burden of demonstrating that the plaintiff's claim arises from the defendant's protected activities—that is, the defendant must show that the defendant's activities were in furtherance of the defendant's right to petition or free speech under the federal or state constitution.[75] For example, consider a tenant who sues her landlord for fraud and unlawful eviction. The landlord probably cannot prove that her activities—fraud and unlawful eviction—were in furtherance of the right to petition or free speech.[76]

Second, if the defendant meets this burden, the burden then shifts to the *plaintiff* to show that the plaintiff's claim is legally sufficient and that each element of the plaintiff's claim is supported by admissible evidence.[77] Many special motions also require a heightened burden of the plaintiff demonstrating success on the

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73. *See generally* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, 35 NEWS MEDIA & L., Summer 2011, at 1 (examining the anti-SLAPP law in each state and showing the variations among the laws); Emily Miller, *Anti-SLAPP Laws on Trial: Federal Courts Grapple with Applying State Libel Defense Laws*, REPS. COMMITTEE FOR FREEDOM OF PRESS, http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2012/anti-slapp-laws-trial (last visited Oct. 23, 2013) (delineating the common procedures included in anti-SLAPP laws).

74. *E.g.*, 735 ILL. COMP. STAT. ANN. 110/20(b) (West 2011 & Supp. 2013); WASH. REV. CODE ANN. § 4.24.525(5)(c).

75. *See, e.g.*, Rebecca Ariel Hoffberg, Note, *The Special Motion Requirements of the Massachusetts Anti-SLAPP Statute: A Real Slap in the Face for Traditional Civil Practice and Procedure*, 16 B.U. PUB. INT. L.J. 97, 106–10 (2006) (describing the procedural burdens in the Massachusetts anti-SLAPP law).

76. This example is drawn from *Clark v. Mazgani*, 89 Cal. Rptr. 3d 24 (Ct. App. 2009). In *Clark*, the landlord filed a special motion under California's anti-SLAPP law. *Id.* at 26. The lower court granted the special motion and dismissed the case, finding that the landlord's actions were based on her constitutionally protected rights of petition. *Id.* The appellate court reversed, indicating that the landlord had "not met her threshold burden of showing this [fraud and unlawful eviction] suit [was] based on protected activity." *Id.* at 30. This example is not illustrative of a typical SLAPP suit, in which a large, well-resourced corporation sues an individual. However, it is instructive of the defendant's burden of demonstrating that the plaintiff's claim arises from the defendant's protected activities.

77. *See, e.g.*, Hoffberg, *supra* note 75, at 106–10 (describing the procedural burdens in the Massachusetts anti-SLAPP law).

merits.[78] If the plaintiff meets this burden, the suit continues as it normally would, with either party free to file a Rule 12 or Rule 56 motion before advancing to trial.

Because it is notoriously difficult to distinguish a SLAPP suit from a legitimate tort suit without costly and time-consuming discovery,[79] special motions are lauded for quickly separating frivolous claims from meritorious claims.[80] There is the risk, however, that the plaintiff might not be able to prove the merits of her case on the pleadings alone. Easing the potential unfairness of an automatic discovery stay, many states permit plaintiffs to make limited discovery requests.[81]

Beyond the core provision of the special motions, the other provisions in anti-SLAPP laws vary somewhat by state.[82] In some states, successful defendants can recover attorneys' fees and costs, while losing defendants may get an immediate appeal.[83] Although these provisions are important to protecting speech on matters of public interest, they are secondary in importance to the special motions. If the plaintiff's claims are not dismissed at an early stage in the litigation, there is no need to consider the possibility of attorneys' fees or an immediate appeal. The special motion is thus the core of state anti-SLAPP laws.

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78. *See* Braun, *supra* note 43, at 994 ("For [a] claim to survive, a SLAPP filer must demonstrate . . . a reasonable probability of success on the merits.").

79. *See supra* notes 62–63 and accompanying text.

80. *See* Hoffberg, *supra* note 75, at 126 ("In a classic SLAPP suit that implicates the public interest, the anti-SLAPP statute enhances the legal system's receptivity to 'petitions' by quickly suppressing retaliatory tort claims that merely seek to thwart the right to petition the government for grievances."); Marnie Stetson, *Reforming SLAPP Reform: New York's Anti-SLAPP Statute*, 70 N.Y.U. L. REV. 1324, 1356 (1995) (explaining that the procedural remedies of New York's anti-SLAPP law "resolve quickly whether the suit is, in fact, a SLAPP[, and i]f it is, swift dismissal ends the chill to public participation before the filer can benefit from quieting the opposition").

81. *E.g.*, 735 ILL. COMP. STAT. ANN. 110/20(b) (West 2011 & Supp. 2013); WASH. REV. CODE ANN. § 4.24.525(5)(c) (West 2005 & Supp. 2013).

82. The scope of anti-SLAPP laws, however, varies substantially among states. California's anti-SLAPP law, for example, expansively protects "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." CAL. CIV. PROC. CODE § 425.16(e)(3) (West 2004 & Supp. 2013). The Pennsylvania anti-SLAPP law, on the other hand, is much narrower and protects only persons petitioning the government about environmental issues. 27 PA. CONS. STAT. ANN. §§ 7707, 8301 (West 2009).

83. *E.g.*, 735 ILL. COMP. STAT. ANN. 110/20(a); WASH. REV. CODE ANN. § 4.24.525(5)(d).

C. Anti-SLAPP Special Motions in Maine and the District of Columbia

At issue in *Godin* and *Boulter* were the special motions to dismiss in the Maine[84] and District of Columbia anti-SLAPP laws.[85] The laws were enacted in 1995[86] and 2011,[87] respectively, and broadly encompass all written or oral statements related to issues of public interest.[88] As with anti-SLAPP laws in other states,[89] the Maine and District of Columbia laws were intended as mechanisms to prevent legal maneuvers that burden defendants and threaten the right to petition. There is little legislative history surrounding the Maine law,[90] but the Council of the District of Columbia Committee on Public Safety and the Judiciary reported that the District of Columbia law was intended to "incorporat[e] substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP."[91] The substantive rights refer to the "defendant's ability to fend off lawsuits . . . aimed to punish or prevent the expression of opposing points of view."[92]

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84. ME. REV. STAT. ANN. tit. 14, § 556 (2003 & Supp. 2012).

85. D.C. CODE § 16-5502 (2001 & Supp. 2013).

86. An Act Protecting a Citizen's Right of Petition Under the Constitution, 1995 Me. Laws 780 (codified as amended at ME. REV. STAT. ANN. tit. 14, § 556).

87. Anti-SLAPP Act of 2010, 58 D.C. Reg. 741 (Jan. 19, 2011) (codified at D.C. CODE § 16-5502).

88. D.C. CODE § 16-5502; ME. REV. STAT. ANN. tit. 14, § 556.

89. For a more extensive analysis of anti-SLAPP laws in other states, see generally Braun, *supra* note 43; Sheri Coover, Note, *Pennsylvania Anti-SLAPP Legislation*, 12 PENN ST. ENVTL. L. REV. 263 (2004); Hoffberg, *supra* note 75; Stephen L. Kling, *Missouri's New Anti-SLAPP Law*, 61 J. MO. B. 124 (2005); Laura Long, Note, *SLAPPing Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right To Petition*, 60 OKLA. L. REV. 419 (2007); Edward W. McBride, Jr., Note, *The Empire State SLAPPs Back: New York's Legislative Response to SLAPP Suits*, 17 VT. L. REV. 925 (1993); Mark J. Sobczak, Comment, *SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. ILL. U. L. REV. 559 (2008); and Tom Wyrwich, Comment, *A Cure for a "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663 (2011).

90. *See* John G. Osborn & Jeffrey A. Thaler, *Maine's Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 ME. B.J. 32, 34 (2008) ("[The Maine law came] out of the legislature's Judiciary Committee without debate or written testimony and with the committee's unanimous support.").

91. Memorandum from Phil Mendelson, Chairman, Council of the D.C. Comm. on Public Safety and the Judiciary, to Councilmembers, Council of D.C., Report on Bill 18-893, "Anti-SLAPP Act of 2010," at 1 (Nov. 18, 2010), *available at* http://dcclims1.dccouncil.us/images/00001/20110120184936.pdf.

92. *Id.*

At the core of both laws are the special motions. Overall, the special motions follow the same general framework and are representative of special motions in other states. After the defendant files a special motion within a set time frame,[93] the court prioritizes the special motion and issues a ruling as quickly as possible.[94] In assessing the special motion, the court looks to the pleadings and supporting affidavits.[95] Discovery is automatically stayed unless good cause is shown and such discovery would not be unduly burdensome.[96]

The court first determines the threshold matter of whether the claim at issue is based on the defendant's exercise of her right to petition.[97] If it is, the plaintiff has an opportunity, but is not required, to show that the claim is legally valid. Under the Maine law, the court will grant the special motion unless the plaintiff "shows that [the defendant's] exercise of [the defendant's] right of petition was devoid of any reasonable factual support or any arguable basis in law and that the [defendant's] acts caused actual injury to the [plaintiff]."[98] Pursuant to the District of Columbia law, the court will grant the special motion unless the plaintiff shows "that the claim is likely to succeed on the merits."[99]

Although the burden language of the laws differs, the effect is the same. Both laws, upon a defendant's motion, shift the burden to the plaintiff to demonstrate the legal sufficiency of her claim. For example, take a situation in which a plaintiff files a complaint alleging that a defendant defamed her. Under the Maine law, the plaintiff has the burden of showing that the defendant's statements or actions were without a factual basis and caused injury to the plaintiff[100]—the

93. D.C. CODE § 16-5502(a); ME. REV. STAT. ANN. tit. 14, § 556.

94. The District of Columbia law requires the court to prioritize the special motion, D.C. CODE § 16-5502(d), whereas the Maine law gives the court some discretion over this decision, ME. REV. STAT. ANN. tit. 14, § 556.

95. ME. REV. STAT. ANN. tit. 14, § 556. The District of Columbia law does not have an explicit provision for this, but the District Court for the District of Columbia has looked to pleadings and supporting affidavits in determining whether D.C. Code § 16-5502 applies in federal court. *See* 3M Co. v. Boulter, 842 F. Supp. 2d 85, 100–04 (D.D.C. 2012) (discussing the court's procedure for handling special motions and holding that the District of Columbia's anti-SLAPP law did not apply in a federal court sitting in diversity).

96. D.C. CODE § 16-5502(c); ME. REV. STAT. ANN. tit. 14, § 556.

97. D.C. CODE § 16-5502(b); ME. REV. STAT. ANN. tit. 14, § 556.

98. ME. REV. STAT. ANN. tit. 14, § 556.

99. D.C. CODE § 16-5502(b).

100. ME. REV. STAT. ANN. tit. 14, § 556.

very elements of a defamation claim.[101] In other words, the onus is on the plaintiff to show that her defamation claim is legally valid. Similarly, under the District of Columbia law, the plaintiff has the burden of showing that her defamation claim is likely to succeed on the merits.[102] In other words, the effect of the two laws is the same: both shift the burden to the plaintiff and require the plaintiff to justify her claim.[103] The anti-SLAPP laws in Maine and the District of Columbia thus follow similar procedures and are representative of anti-SLAPP laws in other states.

II. AN OVERVIEW OF *SHADY GROVE*

The question of whether state or federal law applies in federal courts sitting in diversity has perplexed courts for over a century. It is well established that a federal court sitting in diversity applies state substantive law and federal procedural rules.[104] What is less certain is how to distinguish between substantive law and procedural rules. The most recent Supreme Court foray into this perplexing realm is *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*. At issue in *Shady Grove* was whether Rule 23,[105] which governs the prerequisites for maintaining a class action,[106] conflicts with a New York law restricting class actions in suits seeking penalties or statutory-minimum damages.[107] This Part summarizes the three

101. *See* Morgan v. Kooistra, 941 A.2d 447, 455 (Me. 2008) ("Defamation consists of: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.").

102. D.C. CODE § 16-5502(b).

103. Beyond the special motions, there are three subtle distinctions between the Maine law and the District of Columbia law. The distinctions are minor and should not lead to inferences that the Maine and the District of Columbia laws are significantly different. First, the Maine law permits courts discretion to give defendants more time to file a special motion, ME. REV. STAT. ANN. tit. 14, § 556, whereas the District of Columbia law sets a hard, nonnegotiable deadline, D.C. CODE § 16-5502(a). Second, the Maine law does not require courts to dismiss special motions with prejudice, ME. REV. STAT. ANN. tit. 14, § 556, whereas the District of Columbia law does require dismissal with prejudice, D.C. CODE § 16-5502(d). Third, the Maine law lacks a special motion to quash discovery orders, requests, or subpoenas which seek personal identifying information, ME. REV. STAT. ANN. tit. 14, § 556, whereas the District of Columbia law provides for a special motion to quash, D.C. CODE § 16-5503.

104. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938).

105. FED. R. CIV. P. 23.

106. *Id.*

107. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 396–97 (2010).

opinions in *Shady Grove*—Justice Scalia's plurality, Justice Stevens's concurrence, and Justice Ginsburg's dissent.[108] The three approaches provide significant insight, but not much guidance to lower courts in resolving whether state substantive law or federal procedural rules apply in federal court.

A. Justice Scalia's Really-Regulates-Procedure Approach

In *Shady Grove*, Justice Scalia opined that the state law and federal rule conflict, and that the federal rule applied because it "really regulates procedure."[109] Justice Scalia first looked to whether the state law and federal rule conflict.[110] He stressed that state laws and federal rules conflict when the text of the federal rule is sufficiently broad—that is, when the text of the federal rule "leaves no room for special exemptions based on the function or purpose of a particular state rule."[111] Justice Scalia characterized the issue before the Court as whether the suit could proceed as a class action.[112] Rule 23 permits this, but the New York law prevents it.[113] Thus, the laws "undeniably" both attempt to "answer the same question" and cannot operate alongside each other.[114]

After deeming that the state law and federal rule conflict, Justice Scalia questioned whether applying the federal rule was a valid exercise of the federal rulemaking power under the REA.[115] The REA grants the Court "the power to prescribe general [federal] rules of practice and procedure"[116] but stipulates that federal rules shall "not

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108. In *Shady Grove*, Justice Scalia filed an opinion in which Chief Justice Roberts and Justice Thomas joined in full. *Id.* at 395–96. Justice Sotomayor joined parts I, II-A, II-B, and II-D of Justice Scalia's opinion. *Id.* at 396. Justice Stevens filed an opinion concurring in part and concurring in the judgment. *Id.* at 416 (Stevens, J., concurring). Justice Ginsburg filed a dissenting opinion in which Justices Kennedy, Breyer, and Alito joined. *Id.* at 436 (Ginsburg, J., dissenting).

109. *Id.* at 411 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1940)) (quotation marks omitted).

110. *Id.* at 398–406 (majority opinion).

111. *Id.* at 412 (opinion of Scalia, J., joined by Roberts, C.J. and Thomas, J.). Justice Stevens's concurrence succinctly phrased this inquiry as whether the "scope of the federal rule is 'sufficiently broad' to 'control the issue' before the court, 'thereby leaving no room for the operation' of seemingly conflicting state law." *Id.* at 421 (Stevens, J., concurring) (quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)).

112. *Id.* at 398 (majority opinion).

113. *Id.*

114. *Id.* at 401.

115. *Id.* at 409.

116. 28 U.S.C. § 2072(a) (2006).

abridge, enlarge or modify any substantive right."[117] Justice Scalia interpreted a valid exercise of a federal rule under the REA as meaning that the federal rule must "really regulate[] procedure."[118] The substantive nature or purpose of the state law "makes no difference."[119] Even if the state law has practical effects on a party's rights and remedies, the state law "regulate[s] only the process for enforcing those rights."[120] Justice Scalia stressed the ease of administration and uniformity of this really-regulates-procedure approach,[121] even if it might be "hard to square" with the language of the REA.[122] Without further guidance, Justice Scalia concluded that Rule 23 really regulates the procedure of class actions and thus is valid under the REA.[123]

B. Justice Stevens's Sufficiently Interwoven Approach

Justice Stevens concurred with Justice Scalia's conclusion but disagreed with his methodology. Signing on to part of Justice Scalia's plurality opinion, Justice Stevens agreed that the New York law conflicts with Rule 23.[124] Justice Stevens also agreed that Rule 23 was a valid exercise of rulemaking authority under the REA.[125] Criticizing Justice Scalia's unfaithfulness to the text of the REA, however, Justice Stevens dismissed Justice Scalia's really-regulates-procedure approach.[126]

Writing alone, Justice Stevens interpreted a valid exercise of federal rulemaking as meaning that the federal rule cannot displace a state law that is procedural but "so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-

117. *Id.* § 2072(b).

118. *Shady Grove*, 559 U.S. at 410 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

119. *Id.* at 409 (emphasis omitted).

120. *Id.* at 407.

121. *See id.* at 413 (opinion of Scalia, J., joined by Roberts, C.J. and Thomas, J.) (noting that this procedural test was "driven by the very real concern that Federal Rules which vary from State to State would be chaos").

122. *Id.*

123. *See id.* at 408–09 (plurality opinion) (implying that Rule 23, which here turns ten thousand $500 claims into a single $5 million claim, does not substantially affect the plaintiffs' remedies and thus "really regulates procedure").

124. *Id.* at 401 (majority opinion).

125. *Id.* at 431–36 (Stevens, J., concurring).

126. *Id.* at 426–28.

created right."[127] Beyond examining the federal rule, Justice Stevens also looked at the substantive and extrinsic policy reasons behind the state law.[128] Justice Stevens emphasized that courts must determine "whether the state law actually is part of a State's framework of substantive rights or remedies,"[129] and that the federal rule is valid if it does not intrude into these substantive rights.[130] Justice Stevens also stressed that the "bar for finding an [REA] problem is a high one"[131] and requires more than a "mere possibility that a federal rule would alter a state-created right."[132] Without much explanation,[133] Justice Stevens reasoned that Rule 23 does not intrude on state substantive rights because the New York law is not "so bound up with [a] state-created right or remedy."[134] Rule 23 is thus a valid exercise of rulemaking authority.[135]

C. Justice Ginsburg's Relatively Unguided Approach

Justice Ginsburg dissented, urging that the state law and federal rule do not conflict, and that the state law applied because it advances litigant equality.[136] Like Justices Scalia and Stevens, Justice Ginsburg agreed that the first question is whether the federal rule leaves no room for the operation of the state law.[137] Unlike Justices Scalia and Stevens, however, Justice Ginsburg added a threshold inquiry—whether conflict between the state law and federal rule is "really

127. *Id.* at 423.

128. *See id.* at 429–36 (outlining the legislative history and possible interpretations of the New York law).

129. *Id.* at 419.

130. *See id.* at 424–25 (criticizing Justice Scalia for ignoring "the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies" and the "separation-of-powers presumption, and federalism presumption, that counsel against judicially created rules displacing state substantive law" (citations omitted)).

131. *Id.* at 432.

132. *Id.*

133. Justice Stevens did explain that although class certification could enlarge New York's limited damages remedy, this involved extensive speculation and thus was "just a possibility." *Id.* at 434–36.

134. *Id.* at 420, 434–36

135. *See id.* at 432 ("It is . . . hard to see how [the New York law] could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies.").

136. *Id.* at 445–51 (Ginsburg, J., dissenting).

137. *Id.* at 439.

necessary?"[138] Embracing a "vigilant[] read[ing] [of] the Federal Rules to avoid conflict with state laws,"[139] Justice Ginsburg stressed that, often, such conflict is unnecessary.[140] After examining the text of the federal rule *and* the purpose and legislative history of the New York law,[141] Justice Ginsburg found that Rule 23 and the New York law serve different goals: Rule 23 addresses certification of class actions, whereas the New York law focuses on remedies, specifically statutory-damages caps.[142] In avoiding conflict, Justice Ginsburg steered away from the REA analysis into a relatively unguided *Erie* analysis.[143]

Under this approach, Justice Ginsburg explained that if the state law is inseparably connected with an underlying substantive state right, this strongly supports applying the state law.[144] On the other hand, if applying state law would alter or disrupt an essential characteristic of the federal court system, this strongly supports applying the federal rule or practice.[145] She also stressed the advancement of litigant equality, or the twin aims of *Erie*—that is, the

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138. *Id.* at 437

139. *Id.* at 439.

140. *See id.* at 442 ("In sum, both before and after *Hanna*, the above-described decisions show, federal courts have been cautioned by this Court to 'interpre[t] the Federal Rules . . . with sensitivity to important state interests' and a will 'to avoid conflict with important state regulatory policies . . . .'" (first two alterations in original) (citation omitted) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 438 n.22 (1996))).

141. *See id.* at 437–39, 443, 448 n.7 (criticizing the plurality's interpretation of Rule 23 as "mechanical," "insensitive," and "relentless").

142. *See id.* at 447 ("Rule 23 describes a method of enforcing a claim for relief, while [the New York law] defines the dimensions of the claim itself."); *id.* at 446 ("The Court . . . finds conflict where none is necessary.").

143. The phrase "relatively unguided approach" or "relatively unguided *Erie* analysis" stems from an earlier case, *Hanna v. Plumer*. In *Hanna*, the Supreme Court stressed that when there is no federal rule or statute on point, "the typical, relatively unguided *Erie* choice" controls. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Justice Stevens's concurring opinion in *Shady Grove* briefly discussed this relatively unguided approach. *Shady Grove*, 559 U.S. at 416 (Stevens, J., concurring). Justice Ginsburg went into greater detail of this approach in *Shady Grove* but did not use the phrase "relatively unguided" to describe her framework. *Id.* at 452–58 (Ginsburg, J., dissenting).

144. *See id.* at 457–58 ("We have long recognized the impropriety of displacing, in a diversity action, state-law limitations on state-created remedies.").

145. *See id.* at 439 ("In our prior decisions in point, many of them not mentioned in the Court's opinion, we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest."); *see also* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958) (concluding that the constitutional right to a jury trial and the corresponding federal policy was an essential characteristic of the federal court system that outweighed a South Carolina law requiring a judge to decide whether an employer was immune from liability).

federal rule should apply only when it (1) will not lead to forum shopping and (2) avoids the inequitable administration of justice.[146]

In articulating this, Justice Ginsburg repeatedly emphasized "sensitivity to important state interests"[147] and deference to state regulatory interests.[148] Returning to the issue at hand, Justice Ginsburg reasoned that New York had a strong interest in prohibiting statutory damages in class actions and the New York law was inseparably connected with these important state rights; thus, she concluded the New York law should apply.[149]

D. Unanswered Questions

The three opinions in *Shady Grove* leave many questions unresolved. In determining whether the federal rule is "'sufficiently broad' to 'control the issue' before the [c]ourt,"[150] it is unclear how broadly courts should frame the issue and construe the federal rule. It is also unclear if courts should engage in an REA analysis, or in Justice Ginsburg's relatively unguided analysis. In an REA analysis, there is an open question as to whether Justice Scalia's characterization of federal rules as procedural if they really regulate procedure undercuts the text of the REA. There is also an open question as to what Justice Stevens meant by his murky wording of "sufficiently interwoven" with state rights.[151]

III. TWO DIVERGENT APPLICATIONS OF *SHADY GROVE*

This lack of guidance has resulted in a hodgepodge of rulings by lower courts.[152] Some lower courts have deemed that federal rules and state laws conflict and have adhered to Justice Scalia's really-

146. *See Shady Grove*, 559 U.S. at 438–39 (Ginsburg, J., dissenting) (emphasizing that federal courts must "apply state law when failure to do so would invite forum-shopping and yield markedly disparate litigation outcomes").

147. *Id.* at 442 (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)).

148. *See id.* at 438–43 (listing past decisions in which the Supreme Court deferred to state interests).

149. *See id.* 452–58 (describing New York's numerous state interests).

150. *Id.* at 421 (Stevens, J., concurring) (quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)).

151. *Id.* at 429.

152. *See* Jack E. Pace III & Rachel J. Feldman, *From Shady to Dark: One Year Later*, Shady Grove*'s Meaning Remains Unclear*, ANTITRUST, Spring 2011, at 75, 78–80 (summarizing how lower courts have reached different conclusions in cases involving similar facts).

regulates-procedure approach,[153] whereas others have followed Justice Stevens's sufficiently interwoven approach.[154] Still others have effectively embraced Justice Ginsburg's relatively unguided approach and avoided finding conflict.[155] This Part examines how two lower courts, the First Circuit and the District Court for the District of Columbia, have struggled to make sense of *Shady Grove* in the context of state anti-SLAPP laws.[156] Faced with the same legal question and a nearly identical state law, the two courts latched on to different approaches and came to different conclusions in interpreting *Shady Grove*.

A. Godin v. Schencks

The First Circuit in *Godin* declined to follow Justice Scalia's really-regulates-procedure approach or Justice Stevens's sufficiently interwoven approach in *Shady Grove* and instead drew from Justice Ginsburg's relatively unguided approach[157] to hold that Maine's anti-

153. *See, e.g.*, Jones v. United Parcel Serv., Inc., 674 F.3d 1187, 1206 (10th Cir. 2012) (finding conflict and examining the purposes of the federal rule); Durmishi v. Nat'l Cas. Co., 720 F. Supp. 2d 862, 876–77 (E.D. Mich. 2010) (same).

154. *See, e.g.*, Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 983–85 (10th Cir. 2010) (finding conflict and examining the purposes of the state law); Estate of C.A. v. Grier, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010) (same).

155. *See, e.g.*, All Plaintiffs v. All Defendants, 645 F.3d 329, 335–37 (5th Cir. 2011) (finding no conflict); Scottsdale Ins. Co. v. Tolliver, 636 F.3d 1273, 1278–80 (10th Cir. 2011) (same).

156. The District Court for the District of Columbia also examined this issue in *Sherrod v. Breitbart*, 843 F. Supp. 2d 83 (D.D.C. 2012). The defendant's special motion was denied, and the court held that the anti-SLAPP law was substantive and thus applicable in federal court. *Id.* at 85–86. The analysis was limited; the judge provided only a "statement of reasons" to explain his ruling. *Id*. at 84 & n.2. A few other courts have also considered this issue in the context of state anti-SLAPP laws, albeit with less analysis than the First Circuit or the District Court for the District of Columbia. *See, e.g.*, Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013); Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164 (5th Cir. 2009); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999); La. Crisis Assistance Ctr. v. Marzano-Lesnevich, 827 F. Supp. 2d 668 (E.D. La. 2011), *vacated on other grounds*, 878 F. Supp. 2d 662 (E.D. La. 2012); Trudeau v. ConsumerAffairs.com, Inc., No. 10 C 7193, 2011 WL 3898041 (N.D. Ill. Sept. 6, 2011); Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review, No. 10 C 6682, 2011 WL 2182106 (N.D. Ill. June 2, 2011).

157. The First Circuit did not explicitly follow Justice Ginsburg's approach but shared her reluctance to find unnecessary conflict amongst federal rules and state laws. *See* Godin v. Schencks, 629 F.3d 79, 86 (1st Cir. 2010) ("We conclude that neither [Rule] 12(b)(6) nor [Rule] 56, on a straightforward reading of its language, was meant to control the particular issues under Section 556 before the district court. Given this result we do not reach the next level question as to whether Rules 12(b)(6) and 56 comply with the Rules Enabling Act."). Like Justice Ginsburg, the court also looked to past cases and history in finding no conflict. *Id.* at 88.

SLAPP special motion does not conflict with Rule 12[158] and that the special motion should apply in federal court, as it advances litigant equality.[159]

Like Justice Ginsburg's narrow reading of Rule 23 in *Shady Grove*, the court narrowly read Rule 12 to avoid conflict with the special motion. Looking beyond the text of the anti-SLAPP law to its purpose and legislative history, the court found that the special motion applies to pretrial dispositions of claims based on a defendant's petitioning activity.[160] Rule 12, on the other hand, applies to pretrial dispositions of *all* claims.[161] The state legislature also created the special motion to supplement its procedural rules and "to provide added protections, beyond those in Rule[] 12."[162] The legislature did not intend the special motion "to displace the Federal Rules or have [them] cease to function."[163]

In finding no conflict between Rule 12 and the special motion, the court also stressed the different mechanisms and procedural burdens. It reasoned that Rule 12 and the special motion are both "mechanisms to efficiently dispose with meritless claims before trial."[164] However, the special motion provides a mechanism to specifically test whether a defendant's petitioning is the kind of activity that Maine has deemed should be protected.[165] In contrast, Rule 12 provides a mechanism to test for the sufficiency of a case

158. *Id.* at 92. The court focused its analysis on both Rules 12 and 56, recognizing that special motions can be limited to the pleadings or include matters presented outside the pleadings. *Id.* at 87–91. In cases in which special motions are limited to the pleadings, the special motions run up against Rule 12(b)(6) motions, which generally look only to the pleadings. *See id.* at 90 ("Some Section 556 motions, like Rule 12(b)(6) motions, will be resolved on the pleadings." (footnote omitted)). In cases in which special motions include affidavits and limited discovery outside the pleadings, the special motions run up against Rule 12(d) motions for matters outside the pleadings, which trigger Rule 56 motions. *See id.* ("In other cases, Section 556 will permit courts to look beyond the pleadings to affidavits and materials of record, as Rule 56 does."). For a discussion of the relationship between Rule 12(d) and Rule 56, see *infra* note 175.

159. *Id.* at 92. In reaching this conclusion, the court held that that there was appellate jurisdiction over the procedural question at issue. *Id.* at 84–85. The court reserved the question of whether there would be appellate jurisdiction over a ruling on the merits. *Id.* at 84.

160. *Id.* at 88.

161. *See id.* ("Rules 12(b)(6) and 56 do not purport to apply only to suits challenging the defendants' exercise of their constitutional petitioning rights.").

162. *Id.*

163. *Id.*

164. *Id.*; *see also id.* at 89 n.16 ("Such an abstracted framing of the breadth of the Federal Rules is inappropriate.").

165. *Id.* at 89.

before trial and allows for dismissal if sufficiency is found to be lacking.[166] Moreover, unlike Rule 12, the special motion imposes a higher onus on a plaintiff to show that the plaintiff's allegations about a defendant's conduct have a reasonable basis in law or fact, and that the defendant's conduct caused actual injury.[167] Given these different mechanisms and burdens, the court concluded that Rule 12 and the special motion could "exist side by side" and each could "control[] its own intended sphere of coverage."[168]

Continuing to draw from Justice Ginsburg's relatively unguided approach, the court emphasized that the special motion is inseparably connected with state rights and remedies.[169] The court did not elaborate on what these rights are but suggested that they encompass substantive state rights.[170] As the court noted, if there were a conflict between Rule 12 and the special motion, a "serious question might be raised under the [REA]"[171] and disregarding the special motion might violate substantive state rights.[172] Finally, the court emphasized that failing to apply the special motion would result in an inequitable administration of justice "between [the same] defense[s] asserted in state court and . . . federal court" and could lead to forum shopping.[173] The court held that the special motion must apply in federal court.[174]

166. *See id.* ("Rule 12(b)(6) serves to provide a mechanism to test the sufficiency of the complaint. Section 556, by contrast, provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis: that the claims in question rest on the defendant's protected petitioning conduct and that the plaintiff cannot meet the special rules Maine has created to protect such petitioning activity against lawsuits." (citation omitted) (citing Ashcroft v. Iqbal, 556 U.S. 662, 677–79 (2009))).

167. *Id.*

168. *Id.* at 91 (quoting United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999)) (quotation mark omitted).

169. *Id.* at 91–92.

170. *See id.* at 91 (noting that the special motion "substantively alters Maine-law claims that are based on a defendant's protected petitioning activity by shifting the burden to the plaintiff and altering the showing the plaintiff must make").

171. *Id.* at 90.

172. *See id.* at 89 ("Because Section 556 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 12(b)(6)." (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 423 (2011))).

173. *Id.* at 92.

174. *Id.* at 86.

B. 3M Co. v. Boulter

Conversely, the District Court for the District of Columbia in *Boulter* followed Justice Scalia's really-regulates-procedure approach to hold that the special motion conflicts with Rule 12, and that, given its procedural characteristics, Rule 12 should apply in federal court.[175]

Like Justice Scalia's emphasis on the text of Rule 23 and the New York law in *Shady Grove*, the court focused on the text of Rule 12 and the special motion and found that they address the same subject matter—whether a defendant can dismiss a plaintiff's claim.[176] Like Rule 12, the special motion "allows a defendant on a preliminary basis to deal a deathly blow to a plaintiff's claim on the merits based either on the pleadings or on matters outside the pleadings."[177] The court also recognized that the special motion imposes a higher procedural burden on plaintiffs to show that "the plaintiff is more likely than not to succeed on the merits."[178] The special motion thus "restricts 'the procedural right to maintain [an action]' established by the federal rules and squarely conflicts"[179] with Rule 12.[180]

After concluding that Rule 12 and the special motion conflict, the court looked to whether Rule 12 was a valid exercise of authority under the REA.[181] The court stressed that pleading standards and summary judgment rules are "classic examples of appropriate procedural rules,"[182] and Rule 12 thus really regulates procedure.[183] Straying slightly from Justice Scalia's approach, the court also looked to the purpose of the special motion. Without any meaningful analysis, the court concluded that the special motion does not

175. 3M Co. v. Boulter, 842 F. Supp. 2d 85, 111 (D.D.C. 2012). Like the First Circuit, the court focused on Rule 12(b)(6) for motions to dismiss that are limited to the pleadings and Rule 12(d) motions to dismiss that include matters asserted outside the pleadings. *Id.* at 103. The court devoted several pages to explaining that a 12(d) motion for matters outside the pleadings is "treated as a motion for summary judgment." *Id.* at 96–101.

176. *Id.* at 101–02.

177. *Id.* at 102.

178. *Id.* The court compared the procedural burden of the special motion to the burden of Rule 56 motions (via 12(d) motions). *Id.* The court did not consider the burden of 12(b)(6) motions, though it later paired Rule 12 and 56 motions together. *Id.*

179. *Id.* at 103 (first alteration in original) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 401 n.4 (2011)).

180. *Id.* at 101.

181. *Id.* at 110–11.

182. *Id.* at 110.

183. *See id.* ("Given the procedural characteristics of Rule 12(d) and Rule 56, they fall squarely within the proper scope of the Rules Enabling Act.").

"'serve[] the function of defining [state] rights or remedies'"[184] and is a procedural rule "clothe[d] in the costume of the substantive right of immunity."[185] Recognizing that this conclusion was contrary to the weight of authority,[186] the court nevertheless held that the special motion does not apply in federal court.[187]

* * *

Reconciling *Godin* and *Boulter* is difficult. In both cases, the plaintiffs alleged that the defendants made false statements against them. Perhaps sympathies lie more with Godin, a fired elementary-school principal, than 3M, a multinational company, but this should not determinatively sway the outcome. The claims themselves are comparable: *Godin* involved contract-interference and defamation claims and *Boulter* involved a defamation claim.[188] The state anti-SLAPP laws are similar: both are grounded in First Amendment rights and provide a mechanism to dismiss SLAPP suits early. Moreover, both laws, upon a defendant's motion, shift the burden onto the plaintiff to show that the plaintiff's claim is legally valid.[189]

IV. CLARIFYING *SHADY GROVE* IN THE CONTEXT OF ANTI-SLAPP LAWS

The puzzle thus becomes how to clarify the three opinions articulated in *Shady Grove* to align with precedent and also provide more guidance going forward. Drawing from the three respective opinions in *Shady Grove*, this Part sets forth a more nuanced, two-pronged interpretation for determining the applicability of state laws in federal courts sitting in diversity.

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184. *Id.* at 111 (second alteration in original) (quoting *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring)).

185. *Id.*; *see id.* at 110–11 ("[T]he D.C. Anti-SLAPP Act is codified with procedural matters in the D.C.Code [*sic*], and the Act applies to all claims, not just to claims brought under District law, seriously undermining any contention that the Act 'serves the function of defining [state] rights or remedies.'" (second alteration in original) (quoting *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring))).

186. *See id.* at 107–10 (distinguishing opinions from other courts, including the First Circuit in *Godin*).

187. *Id.* at 111.

188. Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010); *Boulter*, 842 F. Supp. 2d at 88.

189. For a more extensive overview of the Maine and District of Columbia anti-SLAPP special motion procedures, see *supra* Part I.C.

The first prong of the interpretation focuses on textual conflict between federal rules and state laws. When faced with a competing federal rule and state law, courts should broadly construe the issue before the court and compare, side by side, the text of the federal rule and state law. Federal rules and state laws should be deemed to conflict when the federal rule leaves no room for the operation of the state law. This ensures that the issue will not be narrowly construed and subsequently diverted toward the relatively unguided approach instead of the REA inquiry. The second prong of the interpretation focuses on the balancing of federal and state interests under the REA. Once a conflict is deemed to exist, in determining the validity of the federal rule, courts should look to the state's purpose in enacting the law. These state interests should weigh heavily but also balance with the federal interest in creating a uniform system of procedure. Unlike the Justices' one-sided foci on either federal or state interests in *Shady Grove*, this two-pronged interpretation ensures that both federal and state interests are given fair and balanced consideration.

This Part then uses this interpretation to determine how state anti-SLAPP special motions should be treated in federal courts. The text of Rule 12 and special motions are examined and the issue is construed broadly, such that Rule 12 is deemed to conflict with the special motions. Next, the state interests in enacting anti-SLAPP laws and the federal interests in uniformity are balanced. The state interests weigh more heavily than the federal interests, and thus, special motions—not Rule 12—should apply in federal courts sitting in diversity.

A. The First Prong: Textual Conflict

When faced with a federal rule and state law that are at odds, the first inquiry should be whether the federal rule is "'sufficiently broad' to 'control the issue' before the court, 'thereby leaving no room for the operation' of seemingly conflicting state law."[190] The three opinions in *Shady Grove* agreed on this, yet disagreed as to how to frame the issue and to discern the breadth of the federal rule. Broadly construing the issue before the court and then comparing side by side the "clear text"[191]—rather than the underlying purposes of the federal

190. *Shady Grove*, 559 U.S. at 421 (Stevens, J., concurring) (quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)).

191. *Id.* at 403 (majority opinion).

rule and state law—ensures that this first prong functions as a wide funnel that feeds into the second prong (the REA inquiry). Moreover, this shifts the bulk of the analysis—the purpose inquiry and balancing of state and federal interests—onto the second prong and enhances judicial economy.

Justice Scalia's opinion in *Shady Grove* broadly construed the issue before the Court: when a class action can be certified.[192] This is consistent with prior cases in which the Court has dictated that federal rules should *not* "be narrowly construed in order to avoid a 'direct collision' with state law."[193] Justice Scalia's opinion held that Rule 23 leaves no room for the operation of state law, as Rule 23 "unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action."[194] This holding harkens back to *Burlington Northern Railroad Co. v. Woods*,[195] in which the Court emphasized that examining the text is a quick and efficient way to compare state laws and federal rules. In *Burlington*, the Court parsed the text of an Alabama law and Rule 38[196] to conclude that Rule 38's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute."[197]

Dissenting in *Shady Grove*, Justice Ginsburg narrowly construed the issue before the Court to focus on the availability of remedies, rather than certifying a class action.[198] Justice Ginsburg looked to both the text and the *purpose* of the New York law.[199] As a result, this strained interpretation skirted the REA inquiry and passed into the relatively unguided approach[200] in which the state law is applied if it advances litigant equality and there is no countervailing federal interest.[201]

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192. *Id.* at 398.

193. Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980) (quoting Hanna v. Plumer, 380 U.S 460, 472 (1965)).

194. *Shady Grove*, 559 U.S. at 406.

195. Burlington N. R.R. Co. v. Woods, 480 U.S. 1 (1987).

196. FED. R. CIV. P. 38.

197. *Burlington N. R.R. Co.*, 480 U.S. at 7.

198. *See Shady Grove*, 559 U.S. at 447 (Ginsburg, J., dissenting) ("Rule 23 describes a method of enforcing a claim for relief, while [the New York law] defines the dimensions of the claim itself.").

199. *Id.*

200. *See* Hanna v. Plumer, 380 U.S 460, 471 (1965) (describing the *Erie* approach as "relatively unguided").

201. *Shady Grove*, 559 U.S. at 438–49 (Ginsburg, J., dissenting).

It is far preferable to assess the validity of federal rules under the REA, rather than the relatively unguided approach. Skirting the REA for the relatively unguided approach encourages courts to engage in clever interpretations that overweigh the true meaning of state laws. When a federal rule and state law are deemed not to conflict, the state regulatory interest almost always trumps.[202] As one commentator has noted, "The outcome of a[] . . . case should not depend on how far the language of a statute can be stretched."[203] These linguistic gymnastics can also twist the meaning of the federal rules, and "[the federal rules] should not suffer contortion by aggressively narrow readings."[204]

Moreover, conflating the text and purpose focuses prematurely on the underlying state and federal interests.[205] Focusing on these policy considerations too early leads to a haphazard approach that "is simply inadequate to protect substantive rights created by state law."[206] As Justice Scalia cautioned in *Shady Grove*, it is difficult and "arduous" for courts to discern all the state interests at this point in the analysis.[207] Looking into the minds of a legislature is taxing, and pinpointing a single purpose for a state law can prove impossible.[208] There is no real necessity to wade into this purpose inquiry in the first prong and identify some, but not all, of the state interests. At the second prong, as discussed below, there is an aggressive examination of the state and federal interests.[209] In the interest of judicial economy

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202. *See infra* notes 239–52.

203. Redfern, *supra* note 35, at 401.

204. Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1027 (2011).

205. Many past Supreme Court cases have narrowly interpreted the issue and mistakenly combined a textual examination with the underlying purposes of the federal rule and state law. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 422–24 (1996) (failing to broadly characterize the issue as the standard of review for an excessive jury award in assessing a conflict between Rule 59 and a New York law); Walker v. Armco Steel Corp., 446 U.S. 740, 742 (1980) (skewing the meaning of "commenced" in examining whether Rule 3 and an Oklahoma law conflict).

206. Redfern, *supra* note 35, at 401; *see Shady Grove*, 559 U.S. at 418 (plurality opinion) (stressing the Supreme Court's "sensitivity to important state interests and regulatory policies" (quoting *Gasperini*, 518 U.S. at 427 n.7) (quotation marks omitted)).

207. *Shady Grove*, 559 U.S. at 404.

208. *See id*. ("The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded.'" (citation omitted) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941))).

209. In this respect, this Note's proposed two-pronged interpretation is somewhat analogous to that of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),

it is preferable to create a firm line between the two prongs and refrain from looking at the state and federal interests twice.[210]

Thus, construing the issue broadly and examining only the text of the federal rule and state law encourage assessment of the federal rule under the REA, rather than the relatively unguided approach. This also ensures that the bulk of the analysis occurs at the second prong, enhancing judicial economy.

B. Applying the First Prong: Textual Conflict

Applying this first prong to state anti-SLAPP special motions, it is undeniable that Rule 12 and special motions have different breadths and procedural burdens that cause special motions to conflict with Rule 12.

First, Rule 12 and special motions both provide for expedited motions that test the legal sufficiency of a claim about a defendant's petitioning activity. Rule 12 indicates that a party, relying only on the pleadings, may move to dismiss for "failure to state a claim upon which relief can be granted."[211] Similarly, special motions—specifically the special motions in Maine and the District of Columbia—also allow a party to move to dismiss if the claim is based on the defendant's exercise of her right to petition.[212]

The First Circuit in *Godin* suggested that Rule 12 and special motions could coexist, as one tests the sufficiency of all claims whereas the other tests only whether a defendant's petitioning

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in the administrative law context. At the first prong, like in *Chevron*'s step one, the analysis is purely textual. *See id.* at 842–43 ("If the intent of Congress is clear [from the statute], that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). In contrast, at the second prong, like in *Chevron*'s step two, the analysis engages other tools of statutory interpretation—purpose and legislative history—and is more thorough. *See id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). Admittedly, it can be difficult to look at a text in the abstract and give it any definitive meaning without a purpositivist gloss. Courts have struggled with delineating the *Chevron* line and undoubtedly could also struggle with delineating this proposed two-pronged interpretation. *See generally, e.g.*, *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 395 (2007) (criticizing the "mess" that *Chevron* has created).

210. *See* Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907, 977 (2011) ("The waters of *Erie* will never be crystal clear . . . . But navigating them can be far simpler and more expeditious under the *Shady Grove* plurality approach . . . .").

211. FED. R. CIV. P. 12(b)(6).

212. D.C. CODE § 16-5502(b) (2001 & Supp. 2013); ME. REV. STAT. ANN. tit. 14, § 556 (2003 & Supp. 2012).

activity should be protected.[213] Broadly construed, the issue before the court was whether a defendant can dismiss a plaintiff's claim, specifically a plaintiff's claim about a defendant's petitioning activity. Rule 12 is sufficiently broad to control this issue. As in *Shady Grove*, Rule 12 covers a much wider breadth than special motions. In *Shady Grove*, the New York law applied only to some plaintiffs and Rule 23 applied to *all* plaintiffs.[214] Here, the special motion applies only to claims involving petitioning activity, and Rule 12 applies to *all* claims. The all-encompassing federal rule thus swallows up the special motions and prevents any coexistence. Rule 12 leaves no room for the operation of special motions.

Second, beyond the breadth of Rule 12 and special motions, the different procedural burdens of Rule 12 and special motions point toward conflict. Rule 12 places the onus on the moving party to demonstrate the legal insufficiency of the responding party's claim—that is, to show that the responding party has failed to state a claim.[215] Special motions shift this burden onto the nonmoving party (the plaintiff) to demonstrate the legal sufficiency of her claim.[216] As the District Court in *Boulter* noted, the burden shift in the special motion "restricts 'the procedural right to maintain [an action]' established by the federal rules."[217] These different procedural burdens preclude the coexistence of Rule 12 and the special motions.

Thus, adhering to the text and broadly construing the issue before the court, lower courts should deem that Rule 12 conflicts with state anti-SLAPP special motions. Rule 12 casts a wider net over the issue before the court, and the different procedural burdens of Rule 12 and special motions point toward conflict.

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213. *See* Godin v. Schencks, 629 F.3d 79, 89 (1st Cir. 2010) ("Rule 12(b)(6) serves to provide a mechanism to test the sufficiency of the complaint. Section 556, by contrast, provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis . . . ." (citation omitted)).

214. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co, 559 U.S. 393, 396–98 (2010) (noting that Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," whereas the "New York law prohibits class actions in suits seeking penalties or statutory minimum damages").

215. FED. R. CIV. P. 12(b)(6).

216. D.C. CODE § 16-5502(b); ME. REV. STAT. ANN. tit. 14, § 556.

217. 3M Co. v. Boulter, 842 F. Supp. 2d 85, 103 (D.D.C. 2012) (alteration in original) (quoting *Shady Grove*, 559 U.S. at 401 n.4).

C. The Second Prong: Balancing State and Federal Interests

Once a conflict is determined, the bulk of the analysis should address the validity of the federal rule under the REA. The REA grants the Supreme Court "the power to prescribe general [federal] rules of practice and procedure"[218] but stipulates that the federal rules "shall not abridge, enlarge or modify any substantive right."[219] Rather than characterizing federal rules as procedural or substantive, it is useful to look at the REA as a balancing of state and federal interests: a respect for state regulatory policies balanced with the desire for a uniform system of federal procedure. Balancing tests are neither perfect, nor equipped to provide bright-line rules.[220] They do, however, allow for flexibility and ensure adequate protection for continually evolving substantive rights.

Characterizing federal rules and state laws as either procedural or substantive, as Justices Scalia and Stevens do in *Shady Grove*, does not provide much guidance in determining the validity of the federal rule.[221] On a broad level, a substantive law is one that affects rights, remedies, and the outcome of lawsuits, whereas a procedural rule enforces the rights and remedies recognized by substantive law. Yet, "[t]he line between procedural [rules] and substantive law[s] is hazy"[222] as "matters of substance and . . . matters of procedure [are] difficult to distinguish and the two are not mutually exclusive categories."[223] Procedural rules invariably affect the outcome of

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218. 28 U.S.C. § 2072(a) (2006).

219. *Id.* § 2072(b).

220. As mentioned above, see *supra* note 25, courts engage in a balancing of state and federal interests when there is no conflict between a federal rule or practice and a state law, and the federal rule or practice involves a countervailing federal policy. Many commentators have criticized this balancing test because it produces confusing results. *See, e.g.*, CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 404–05 (6th ed. 2002) ("[T]here was considerable difficulty in applying the [balancing] test . . . stem[ming] from the fact that there is no scale . . . to say with assurance in a particular case that the federal interest asserted is more or less important than the interest in preserving uniformity of result with the state court."); Ely, *supra* note 33, at 709 (explaining that "lower courts . . . experienced considerable difficulty in applying" the balancing test set forth in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958)).

221. *See, e.g.*, Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) (struggling to delineate "procedural" from "substantive"); Debra Lyn Bassett, *Enabling the Federal Rules*, 44 CREIGHTON L. REV. 7, 9 (2010) (noting that no definitive line exists "between matters of substantive law and matters of procedural law").

222. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring).

223. Godin v. Schencks, 629 F.3d 79, 86 (1st Cir. 2010) (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 419–21 (2010) (Stevens, J., concurring)).

lawsuits, and all procedural rules are arguably bound up in substantive rights.[224] A state anti-SLAPP special motion, for example, can be characterized as either procedural or substantive. Procedurally, it provides a quick means of dismissal. Substantively, it protects defendants from burdensome litigation and encourages public participation in speech and petitioning activities.

Recognizing this conundrum, many commentators have advocated Justice Harlan's alternative understanding of a substantive law.[225] Harlan argued that a law was substantive if it affected "primary activity" outside the context of litigation[226]—that is, if it affected the way people lived their day-to-day lives.[227] This understanding does not help much in differentiating substantive laws from procedural rules. Arguably, all procedural rules affect "primary activity." For example, a statute of limitations could be characterized as a procedural rule. If a plaintiff is severely injured and does not file within the statute of limitations, this could affect the plaintiff's current financial situation (if she has to pay for medical expenses) and future income potential (if she can no longer work). Not filing the lawsuit thus affects her "primary activity." Similarly, one commentator has pointed out that a rule requiring eight-by-fourteen-inch paper for pleadings and motions, rather than eight-by-eleven-inch paper, might appear procedural on its face.[228] Yet, the size of the paper changes entitlements and values. The larger paper might be more expensive, or less sophisticated litigants might be unaware of the unconventional-size requirement such that substantive rights are affected.[229]

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224. *See* Glenn S. Koppel, *Reflections on the "Chimera" of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971, 984 (2009) (signaling a "[r]ecognition of the power of procedure to advance substantive agendas"). *But see* Ely, *supra* note 33, at 724 ("We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure. But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all." (footnote omitted)).

225. *See, e.g.*, Darrell N. Braman, Jr. & Mark D. Neumann, *The Still Unrepressed Myth of* Erie, 18 U. BALT. L. REV. 403, 442–44 (1989) (advocating Justice Harlan's view of substantive laws).

226. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

227. *See* Doernberg, *supra* note 29, at 1171 ("Justice Harlan appeared to view rules as substantive if they affect the way people live their day-to-day lives and conduct their worldly affairs in light of the law . . . .").

228. Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 891–92 (2011).

229. *Id.*

Moving beyond the confusing labels of procedural and substantive, the REA is better viewed as a balancing of federal and state interests. The REA encourages uniform federal procedure in granting Congress full "power to prescribe general [federal] rules of . . . procedure."[230] It then takes away some of this power and refuses to permit federal rules that "abridge, enlarge or modify any substantive right."[231] The REA thus tempers the federal interest in uniformity with a respect for state regulatory policies. Moreover, whereas Justices Scalia and Stevens characterized state laws and federal rules as procedural or substantive in *Shady Grove*, they in fact agreed, albeit subtly, that balancing state and federal interests was the "proper technique" in assessing the validity of a federal rule.[232]

Despite this agreement on balancing state and federal interests as the "proper technique," both Justices Scalia and Stevens failed to give meaningful consideration to the state interests.[233] Justice Scalia looked solely at the federal rules and found them valid if they "really regulate[] procedure."[234] This procedural test ignores the REA's limitation that federal rules "not abridge, enlarge or modify any substantive right."[235] Justice Stevens adhered more closely to the text of the REA and read its two requirements together, such that federal rules cannot be "so intertwined with . . . state right[s]."[236] He purported to focus on state laws and their relationship to state "substantive rights or remedies."[237] With hesitation, Justice Stevens noted that seemingly procedural rules—such as state laws that make it more difficult to bring or prove a claim, or define the amount of recovery—might be "bound up with . . . state-created right[s] [and]

230. 28 U.S.C. § 2072(a) (2006).

231. *Id.* § 2072(b).

232. Doernberg, *supra* note 29, at 1199–1200; *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 424–25 (2010) (Stevens, J., concurring) (noting "the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies").

233. *See* Bauer, *supra* note 38, at 955 (criticizing Justice Scalia in *Shady Grove* for "dismiss[ing states' rulemaking roles] with the back of [his] hand by his singular adoption of a federal standard to characterize the state law"); Doernberg, *supra* note 29, at 1203 (criticizing Justice Stevens in *Shady Grove* and noting that "[a]sking only whether a rule may have a substantive effect is not helpful").

234. *Shady Grove*, 559 U.S. at 411 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)) (quotation marks omitted).

235. 28 U.S.C. § 2072(b).

236. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring).

237. *Id.* at 419.

remed[ies]."[238] Yet, like Justice Scalia, Justice Stevens failed to give much meaningful weight to the state interests.

Several past Supreme Court decisions demonstrate that this balance ought to include a greater emphasis on state law. Although the Court has not yet invalidated a federal rule that conflicts with a state law,[239] the Court has suggested several times that certain federal rules might violate state substantive rights and thus be invalid.[240] In *Semtek International Inc. v. Lockheed Martin Corp.*,[241] the Court considered how dismissals under Rule 41(b)[242] foreclose future litigation, whereas under California law dismissals do not foreclose future litigation.[243] The Court held that there was no conflict between Rule 41(b) and the California law, but that, if there were a conflict, Rule 41(b) "would seem to violate" substantive rights.[244] Similarly, in *Kamen v. Kemper Financial Services, Inc.*,[245] the Court noted that reading Rule 23.1[246] as imposing a requirement on plaintiffs to seek direct relief from a corporation's directors would violate substantive rights.[247] The Court has thus expressed some willingness to defer to state substantive rights and invalidate federal rules.[248]

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238. *Id.* at 420; *see also id.* at 425 n.9 ("For example, statutes of limitations, although in some sense procedural rules, can also be understood as a temporal limitation on legally created rights; if this Court were to promulgate a federal limitations period, federal courts would still, in some instances, be required to apply state limitations periods.").

239. *See id.* at 407 (plurality opinion) (noting that upon finding conflict between a federal rule and state law, the Supreme Court has "rejected every statutory challenge to a Federal Rule that has come before [it]").

240. *See* Steinman, *supra* note 33, at 273 ("Supreme Court decisions in the last decade or so suggest that the substantive-rights provision may be a more robust check on federal rulemaking than it appeared to be for most of the twentieth century."); *see also* Bauer, *supra* note 38, at 985 ("The values which are reflected in the *Erie* doctrine, and in particular the importance of federalism, will be enhanced if the Court would take seriously, rather than merely pay lip-service to, the agreed benefits of identifying, and then deferring to, state interests.").

241. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

242. FED. R. CIV. P. 41(b).

243. *Semtek Int'l Inc.*, 531 U.S. at 502–04.

244. *Id.* at 503–04.

245. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991).

246. FED. R. CIV. P. 23.1

247. *See Kamen*, 500 U.S. at 96–97 ("In our view, the function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance,' not 'procedure.'").

248. *See also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–85 (2001) (suggesting that the no opt-out provision in Rule 23(b)(1)(B) would violate substantive state rights). In addition, several commentators have argued that federal summary-judgment and pleading standards have legal consequences that might violate substantive state rights. *See, e.g.*, Steinman, *supra* note 33, at 287–88 ("[A]t least in certain situations, current federal approaches to [motions for summary

Moreover, as discussed above, the Court has often narrowly interpreted the issue to avoid conflict between the federal rule and state law.[249] This pushes resolution into the relatively unguided approach and typically shows the Court's inclination toward deferring to state interests over federal interests.[250] In addition, as states have engaged in more litigation reform,[251] the Court has arguably paid more heed to state substantive rights that intersect with procedural mechanisms.[252]

Taking this willingness to defer to state substantive rights into consideration, courts should give teeth to Justice Stevens's state-centric, sufficiently interwoven approach and should fully consider the state's purpose in enacting the law, including an examination of the broader context against which the law was enacted. This is not to suggest that any law a state passes presumptively affects substantive state rights. With such a broad conception, all state laws would swallow the federal rules. Rather, it is imperative that there be an equitable balance among the interests of the state laws and federal rules. Deference to state rulemaking roles and the traditional goals of equitable administration should weigh heavily but also balance with federal concerns of uniformity.

In terms of state interests, states enact laws to regulate behavior and protect the substantive rights of their citizens. Without the ability to legislate, there are few other avenues for states to protect their citizens. Emphasizing the importance of state rulemaking in our federal system, the Court has cautioned that federal rules should

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judgment and pleading standards] impermissibly 'abridge, enlarge or modify . . . substantive right[s]' created by state law." (third and fourth alterations in original) (footnote omitted) (quoting 28 U.S.C. § 2072(b) (2006))). *But see, e.g.*, Jeffrey O. Cooper, *Summary Judgment in the Shadow of* Erie, 43 AKRON L. REV. 1245, 1263 (2010) (arguing that it is "difficult to imagine that the Supreme Court would invalidate [federal summary judgment standards]").

249. *See supra* Part IV.A.

250. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438–39 (1996) (holding that there was no conflict between Rule 59 and a New York law on the standard for reviewing excessive jury awards and concluding that the New York law applied).

251. *See* Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 693–94 (1993) (defining litigation reform as "the means by which aspects of the litigation process, including adjudicatory procedure, are altered, marginalized, reduced in importance, bypassed, eliminated or changed").

252. *See* John A. Lynch, Jr., *Federal Procedure and* Erie*: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 295–300 (2008) (discussing the Supreme Court's response to litigation reform in *Gasperini*).

"avoid conflict with important state regulatory policies."[253] In addition, the Court has stressed the importance of applying state law to avoid inequity in the administration of laws and to discourage forum shopping.[254] Given the prevalence of removal from state courts to federal courts, it is likely that a lawsuit may start out in state court and quickly move to federal court.[255] If the state court and federal court apply different laws, a litigant may obtain a different outcome in state court as opposed to in federal court *in the same state*.[256] This is unfair to the litigant, and tends to encourage plaintiffs to forum shop or file in a jurisdiction more favorable to plaintiffs. Even though perhaps there are federal interests in avoiding inequity in the administration of laws and discouraging forum shopping,[257] the resulting disparities are "precisely what obligate federal courts to adopt state-court practices."[258]

Although courts should heavily weigh this deference to state rulemaking authority and states' desire for the equitable administration of laws, courts should also consider the federal interest in creating a uniform system of procedural rules. The FRCP were enacted to coordinate procedure in federal courts and automatically apply in "all civil actions and proceedings in the [federal] district courts."[259] Stemming from this, Justice Scalia stressed the importance

253. *See* RICHARD H. FALLON, JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 593 (6th ed. 2009) (observing that "the Supreme Court, in a number of cases, has interpret[ed] the federal rules to avoid conflict with important state regulatory policies").

254. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

255. *See* Jill Curray & Matthew Ward, *Are* Twombly *&* Iqbal *Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH. L. REV. 827, 866–70 (2013) (analyzing the increase in removal from state to federal courts after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

256. *See* Lynch, *supra* note 252, at 327 ("A would-be plaintiff should not be able to frustrate a state's attempts to address its own problems in its own way by moving across a state line to create diversity."); Steinman, *supra* note 33, at 251–52 (noting that applying different rules in federal and state courts "leads to precisely the kind of forum shopping that *Erie* is supposed to forbid—plaintiffs craft lawsuits with an eye toward keeping them in state court, and defendants strive mightily to justify removal of such lawsuits to federal court").

257. *See generally* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865 (2013) (arguing that the twin aims of *Erie* serve federal jurisdictional goals).

258. Steinman, *supra* note 33, at 252 (emphasis omitted); *see also* Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) (stressing the importance of reducing inequality and noting that the "outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court").

259. FED. R. CIV. P. 1.

of efficient and predictable federal procedure in *Shady Grove*.[260] These are important considerations, but the FRCP were *not* exacted as the sole means of procedure. Federal uniformity interests are insufficient to justify application in all cases and must give way when they impinge upon state substantive rights. As a result, the FRCP—and federal rules generally—tolerate much interstate variation.[261]

Thus, in considering whether a federal rule abridges, enlarges, or modifies a state right, courts should abandon the procedural/substantive distinction and fully consider the state's purpose in enacting laws. The state's interests in protecting its citizenry and equitably administering laws should weigh heavily, especially when state constitutional rights are implicated. The state interests should also balance with the desire for a uniform system of federal procedure.

D. Applying the Second Prong: Balancing State and Federal Interests

Applying this second prong to state anti-SLAPP special motions, the state interests in enacting anti-SLAPP laws weigh more heavily than the federal interests. State anti-SLAPP laws are much more than procedural rules "clothe[d] in the costume of the substantive right of immunity."[262] Rather, anti-SLAPP laws and their accompanying special motions represent a deliberate choice to protect against litigation of meritless claims and to encourage freedom of speech. Thus, there are three reasons that special motions should apply in federal courts sitting in diversity.

First, states adopt anti-SLAPP laws to prevent ongoing litigation with no end goal. As discussed above, the SLAPP filer is not seeking a legal or equitable remedy but intends to silence and harass the defendant for speaking out.[263] The "David and Goliath power

260. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 404 (2010) ("The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded.'" (citation omitted) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941))).

261. *See* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1227 (2011) ("[T]he myriad local rules dealing with topics from the trivial to the vital suggest that the federal court system already tolerates a considerable amount of interstate and even intrastate variation.").

262. *See* 3M Co. v. Boulter, 842 F. Supp. 2d 85, 111 (D.D.C. 2012) (drawing the opposite conclusion).

263. *See supra* notes 39–50 and accompanying text.

difference"[264] between the parties oftentimes leads to financial bullying in which the defendant is forced to devote proportionally more resources and time to litigation than the plaintiff.[265] Anti-SLAPP laws work to counteract this, with special motions that allow defendants to quickly dispense of meritless SLAPP suits. As the *Boulter* court recognized, "There is no question that the special motion . . . operates greatly to a defendant's benefit."[266] Even if anti-SLAPP laws relieve some defendants of liability for which they are truly culpable,[267] in enacting anti-SLAPP laws, state legislatures have prioritized the prevention of unnecessary financial cost, as well as the immeasurable loss to a defendant's reputation and the psychological trauma of navigating the judicial system.[268] As the Council of the District of Columbia Committee on Public Safety and the Judiciary reported, anti-SLAPP laws are intended to "incorporat[e] *substantive* rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP."[269]

Second, states adopt anti-SLAPP special motions to encourage protected speech. The rights to free speech and petition, including the ability to engage in public debate and participate in government, are fundamental to preserving individual liberty and democracy.[270] On a national level, these rights are safeguarded in the First Amendment. Americans expect that when someone speaks out and expresses an unpopular or controversial opinion, there is a "national commitment" that this speech "should be uninhibited, robust, and wide-open."[271]

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264. Stuborn Ltd. P'ship. v. Bernstein, 245 F. Supp. 2d 312, 314 (D. Mass. 2003).

265. *See supra* notes 47–50, 55–56 and accompanying text.

266. *Boulter*, 842 F. Supp. 2d. at 102.

267. *See* Barbara Arco, Comment, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 633 (1998) (arguing that it is "illogical and inequitable to grant one right to [one party at] the exclusion of another [party]").

268. *See generally* MICHELANGELO DELFINO & MARY E. DAY, BE CAREFUL WHO YOU SLAPP (2002) (describing the psychological impact of a SLAPP suit on two self-employed research scientists).

269. *See* Memorandum from Phil Mendelson, Chairman, Council of the D.C. Comm. on Public Safety and the Judiciary, to Councilmembers, Council of D.C., *supra* note 91, at 2 (emphasis added).

270. *See* Barylak, *supra* note 57, at 845 (stressing public participation as essential to safeguarding liberty and "resolv[ing] . . . broad social problems").

271. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see also* FIONA J.L. DONSON, LEGAL INTIMIDATION: A SLAPP IN THE FACE OF DEMOCRACY 1 (2000) ("The right to free expression suggests that those who challenge both government and corporate policies

This protected speech is undermined and public participation is thwarted when wealth dominates access to government and the ability to question and criticize is silenced.[272] Most state constitutions derive from the First Amendment similar rights to free speech and petition. For example, the Maine Constitution sets forth that "[t]he people have a right . . . to request, of either department of the government by petition or remonstrance, redress of their wrongs or grievances."[273] SLAPP suits, in which the wealthy seek to quell this protected speech, thus run contrary to the core rights embodied in the First Amendment and many state constitutions.

This second goal distinguishes anti-SLAPP special motions from the New York law addressing class certification in *Shady Grove*. Whereas the New York law in *Shady Grove* involved the efficiency of litigation,[274] special motions involve not only efficiency but also the constitutional rights to free speech and petition. As such, the state has an even more compelling rationale for enacting anti-SLAPP special motions. More so than in *Shady Grove*, disregarding these state interests "encroaches dangerously on state sovereignty."[275] As the First Circuit conjectured in *Godin*, such disregard raises "a serious question . . . under the [REA]."[276]

Third, applying anti-SLAPP special motions in state court but not in federal court would lead to an inequitable administration of laws and would encourage forum shopping.[277] The First Circuit expressed this concern in *Godin* and noted that failing to apply the special motion would result in an inequitable administration of justice "between [the same] defense[s] asserted in state court and . . . federal court" and could lead to forum shopping.[278] This concern came to

should have the full protection of the law, so long as they express their opposition in a way that does not harm competing interests.").

272. *See* Braun, *supra* note 43, at 971–72 ("Institutions such as a free press and a reasonably neutral government do not work if people are afraid to use them.").

273. ME. CONST. art. I, § 15.

274. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 402 (2010) (noting that the New York law was designed to address "whether a class action may be maintained").

275. Litwiller, *supra* note 36, at 95.

276. Godin v. Schencks, 629 F.3d 79, 90 (1st Cir. 2010).

277. *See, e.g.*, United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) ("Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum.").

278. *Godin*, 629 F.3d at 92.

fruition after *Boulter*. The plaintiffs in *Dean v. NBC Universal*[279] voluntarily dismissed their case after initially filing in the District of Columbia Superior Court.[280] The plaintiffs then refiled in federal court, with the knowledge that *Boulter* did not permit anti-SLAPP special motions in federal court.[281] When special motions apply in one court but not in another, states are put in a hard place; the state's ability to effectively legislate and protect against SLAPP suits *within that state* is drastically reduced.

Overall, states have a strong interest in protecting their citizens against SLAPP suits and equitably administering laws. The interest is particularly strong when the state law is grounded in state constitutional rights. Federal uniformity concerns do not supersede these strong state interests. On balance, the compelling state interest in protecting citizens and equitably administering laws weighs more heavily than federal uniformity concerns. Thus, Rule 12, as applied to state anti-SLAPP specials motions, should be invalidated as abridging, enlarging, or modifying substantive state rights.

CONCLUSION

The three opinions in *Shady Grove* provide significant insight, but not much guidance to lower courts in resolving whether state law or federal law applies in federal courts sitting in diversity. As a result, the First Circuit in *Godin* and the District Court for the District of Columbia in *Boulter* employed different approaches and came to different conclusions. In *Godin*, the Maine anti-SLAPP special motion applied in federal court whereas in *Boulter*, the District of Columbia special motion did not apply in federal court.

Drawing on the diverging approaches in *Shady Grove*, this Note has attempted to clarify this confusion and advocate a more nuanced, two-pronged interpretation for determining the applicability of state laws in federal courts sitting in diversity. Under this interpretation, anti-SLAPP special motions—not Rule 12—should apply in federal courts. Special motions, like Rule 12, permit expedited review of the legal validity of a plaintiff's claim. There is invariable textual conflict

279. Dean v. NBC Universal, No. 1:12-cv-00283 (D.D.C. filed Feb. 21, 2012).

280. *See* Notice of Voluntary Dismissal Without Prejudice, Dean v. NBC Universal, No. 1:12-cv-00283 (D.C. Super. Ct. filed Mar. 15, 2012) (requesting voluntary dismissal without prejudice because "[t]he Complaint has been re-filed in the U.S. District Court for the District of Columbia due to the Court's recent decision in *3M v. Boulter*").

281. *See id.*

between Rule 12 and the special motions. Moreover, the special motions implicate substantive state rights. State legislatures, in enacting special motions, have granted heightened protection to defendants and consciously prioritized the defendant's right to free speech over the plaintiff's right of access to the judicial system.

Although only time will tell how the Supreme Court will interpret *Shady Grove* going forward, or how state legislatures might change anti-SLAPP laws, one hopes that two nearly identical state laws implicating substantive rights would apply with equal force in the federal courts of both states.