TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 37 | Number 3 Article 18

2021

SLAPPS Across America

Jack Toscano
Touro Law Center

SLAPPS ACROSS AMERICA

Jack Toscano[*]

ABSTRACT

The Supreme Court's landmark decision in *New York Times v. Sullivan* was meant to protect our fundamental right to free speech from defamation lawsuits. However, Strategic Lawsuits Against Public Participation, known as SLAPPS, continue to chill free speech through weak but expensive to defend defamation lawsuits. In response to SLAPPs many states have passed anti-SLAPP statutes that are meant to identify SLAPPs, quickly dismiss SLAPPS, and punish plaintiffs who bring SLAPPs. A difficult issue for federal courts throughout the country is whether these state anti-SLAPP statutes should apply in federal courts. This Note examines the Supreme Court opinions in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,* as well as various lower court opinions, and concludes that state anti-SLAPP statutes should not apply in federal court until Congress creates a federal anti-SLAPP statute.

I. INTRODUCTION

Free Speech is an essential part of American democracy.[1] But free speech like all other fundamental rights is not unlimited.[2] A traditional limit to free speech is defamation law. Defamatory publications were not viewed as protected by the First Amendment because of their little social value.[3] The exact formulation for defamation varied but generally required that: defendant must make

[*] J.D. Candidate, Touro College Jacob D. Fuchsberg Law Center, 2022. I would like to thank my Note Editor, Mike Petridis, my Faculty Advisor, Professor Laura Dooley for their assistance throughout this process. I would also like to thank my friends and family for their support during my law school career.

[1] *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis J., concurring).

[2] *Id.* at 373.

[3] Beauharnais v. People of State of Ill., 343 U.S. 250, 255–57 (1952).

(1) a defamatory statement (2) of and concerning the plaintiff (3) and published to a third party; truth would be a defense but it was the defendant's burden to prove truth and a good faith belief in the truth of the statements was not a defense regardless of the defendant's care in attempting to verify the statement's truth.[4]

This view of defamation law began to change in the Supreme Court's landmark case of *New York Times v. Sullivan*.[5] In *New York Times* the Supreme Court recognized the potential chilling effect of defamation law.[6] Defamation law can create a chilling effect on free speech by perpetuating "a system of censorship" where people remain silent rather than risk the threat of civil liability.[7] Requiring individuals to guarantee the truth of all of their statements would lead to self-censorship that would dampen the public debate guaranteed by the First Amendment.[8]

In response to this fear of self-censorship, *New York Times* and its progeny transformed the substantive law of a defamation claim by requiring Plaintiffs to prove more elements to make a successful defamation claim. Plaintiffs who are public figures must now in addition to the common law elements prove that the statements were made with actual malice, prove the defamatory statement was false, and, at a minimum in some cases, prove that the defamatory statement was made with negligence.[9] These substantive changes to defamation law make it much more difficult for plaintiffs to obtain a favorable verdict. However, many are still a concerned about frivolous lawsuits that cannot be dismissed in the early stages of litigation.[10]

---

[4] *See* Rod Smolla, Rights and Liabilities in Media Content § 6:1 (2d ed. 2020).
[5] 376 U.S. 254 (1964).
[6] *Id.* at 300 (Goldberg, J., concurring).
[7] *See* David A. Anderson, Note, Libel And Press Self-Censorship, 53 Tex. L. Rev. 424-25 (1975).
[8] *See New York Times*, 376 U.S. at 279.
[9] *New York Times*, 376 U.S. at 279-80; Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-77 (1986) (stating that plaintiffs have the burden of proving falsity in a defamation claim if they are a public figure or suing a media defendant for speech that is a matter of public concern); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (allowing states to define the standard of liability for defamation of private plaintiffs as long as it is not strict liability).
[10] Coalition of Supporters, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/coalition (last visited August 31, 2021) (listing organizations in favor of legislation against frivolous lawsuits targeting free speech rights).

Indeed, for some plaintiffs in a defamation action, the goal is not to prevail on the merits but to harass defendants and chill free speech.[11] This is known as a strategic lawsuit against public participation or SLAPP.[12] A SLAPP lawsuit often occurs when a wealthy public figure, files a meritless lawsuit in order to silence criticism and target the defendant's financial resources.[13] An excellent explanation and example of SLAPP lawsuits can be found in a segment by John Oliver where he talks about a SLAPP lawsuit by Bob Murray against HBO.[14]

The segment criticized Bob Murray, a coal mining executive, who was sued after several coal miners died following the collapse of a mine shaft.[15] The segment described Murray as "someone who looks like a geriatric Dr. Evil" and "arranged for a staff member to dress up in a squirrel costume and deliver the message 'Eat Shit, Bob!'"[16] The segment was a reference to a statement made by one of Murray's disgruntled employees.[17] Eventually, the lawsuit was dismissed, but it was still expensive and time-consuming for HBO due to the appeals process.[18] The lawsuit cost HBO $200,000 in legal fees and tripled its libel insurance despite the lawsuit's lack of merit.[19] This lawsuit was likely a SLAPP because it was filed by a wealthy public figure, in response to public criticism, specifically in a state without an anti-SLAPP law (West Virginia), and was generally without merit.[20]

---

[11] *See* Eric Simpson, Comment, *SLAPP-Ing Down the Right to A Jury Trial: Anti-Strategic Lawsuits Against Public Participation and the Seventh Amendment*, 48 U. TOL. L. REV. 169 (2016).

[12] Tyler J. Kimberly, Note, *A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts*, 65 CASE W. RES. L. REV. 1201, 1205 (2015).

[13] What is a SLAPP?, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/what-is-a-slapp (last visited April 10, 2020).

[14] *Last Week Tonight with John Oliver: SLAPP Suits* (HBO Television broadcast Nov. 21, 2019).

[15] *Id.*

[16] *Id.*

[17] *Id*.

[18] *Id.*

[19] *Id.*

[20] *See* The Marshall County Coal Co. v. Oliver, No. 17-C-124, 2018 WL 11243736, at *14 (W. Va. Cir. Ct. Mar. 15, 2018) (dismissing Murray's lawsuit at the motion to dismiss stage for failing to sufficiently plead any elements of a defamation claim).

In response to SLAPPs, states have gone beyond the substantive defamation law to protect defendants by enacting anti-SLAPP statutes.[21] Anti-SLAPP statutes seek to protect defendants by giving them extra procedural tools to quickly dismiss claims, allow defendants to appeal before a final judgment, recover attorney's fees, and limit discovery.[22] In essence anti-SLAPP statutes deter SLAPPs by limiting the monetary and time costs associated with defending SLAPPS, as well as punishing plaintiffs that try to use meritless lawsuits to silence their critics.

An example is California's Anti-SLAPP motion statute which allows a defendant to file a special motion to strike that must be granted when there is a lawsuit: (1) "arising from any act of that person in furtherance of the person's right of petition or free speech" and (2) the plaintiff fails to establish "there is a probability that the plaintiff will prevail."[23] This Note will focus on defamation, but anti-SLAPP statutes apply to any state claims arising from the exercise of free speech or the right of petition; anti-SLAPP motions are not limited to defamation claims and can sometimes even be applied to contract claims.[24] Essentially, this statute forces a plaintiff to prove that he or she can succeed in a lawsuit related to a defendant's free speech rights before full discovery is completed. If the anti-SLAPP motion to strike is granted the claims that it applies to are dismissed and the defendant is entitled to recover attorney's fees.[25]

Most defamation claims and other related claims that can be subject to anti-SLAPP statutes are tried in state courts because they arise under state law. Anti-SLAPP statutes do not apply to federal claims.[26] Sometimes, claims that can be subject to anti-SLAPP statutes are tried in federal courts due to either diversity jurisdiction or supplemental jurisdiction.[27] However, the federal circuits are split

---

[21] *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-SLAPP.org/your-states-free-speech-protection/ (last visited Sept. 19, 2020) (listing every state and territory with anti-SLAPP legislation).

[22] *See* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (detailing the D.C. anti-SLAPP statute).

[23] CAL. CIV. PROC. CODE § 425.16 (Deering 2021).

[24] *See* Navellier v. Sletten, 52 P.3d 703, 708-710 (Cal. 2002) (explaining the "arising from" prong of the anti-SLAPP statute and explaining how a breach of contract claim satisfied the prong).

[25] CAL. CIV. PROC. CODE § 425.16.

[26] In re Bah, 321 B.R. 41, 47 (B.A.P. 9th Cir. 2005).

[27] Eric Simpson, *supra* note 11, at 169.

as to whether they are required to apply state anti-SLAPP statutes. Based on the Supreme Court's reasoning in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[28] and *Sibbach v. Wilson & Co.*[29] state anti-SLAPP statutes should not be applied in federal court.[30] Together, these two cases explain when state procedural statutes cannot be applied in federal courts because of the *Erie R. Co. v. Tompkins*[31] doctrine.[32] Anti-SLAPP statutes directly conflict with Rule 8, Rule 12(b)(6), Rule 12(c), Rule 12(d), and Rule 56.[33] All of these rules regulate procedure as prescribed by the Rules Enabling Act.[34] Therefore anti-SLAPP statutes, as state procedural rules, should only be applied in state courts.

This Note will argue that anti-SLAPP statutes are not applicable in federal court because they are procedural rules and conflict with the Federal Rules of Civil Procedure. Part II of this Note will explore the Supreme Court's opinion in *Shady Grove* and the two potential tests for resolving conflicts between the Federal Rules of Civil Procedure and state statutes. Part III of this Note will explain the circuit split among the United States Circuit Courts of Appeal in determining whether to apply anti-SLAPP statutes in federal court. Part IV will explain why anti-SLAPP statutes should not be applied in federal court. Finally, Part V will consider the future of anti-SLAPP legislation.

---

[28] 559 U.S 393 (2010).

[29] 312 U.S. 1 (1941).

[30] *See Abbas*, 783 F.3d at 1337 (explaining that after applying the reasoning of *Shady Grove* and *Sibbach* that a federal court may not apply the D.C. anti-SLAPP statute).

[31] 304 U.S. 64 (1938).

[32] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010) (explaining that the federal rule governs if it "answers the question in dispute"); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (explaining that the validity of a federal rule depends on "whether a rule really regulates procedure.").

[33] Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1357 (11th Cir. 2018) (declining to apply anti-SLAPP statutes because they conflict with FRCP Rules 8, 12, and 56).

[34] *Id; see* 28 U.S.C. § 2072 (The Rules Enabling Act gives the Supreme Court the authority to promulgate rules of procedure, so long as those rules do not change any substantive rights.).

II. *SHADY GROVE'S* TEST FOR CONFLICTS BETWEEN STATE STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE

The *Erie* doctrine refers to a series of decisions by the Supreme Court that explain when state law must be applied in federal courts in diversity actions.[35] *Erie's* tenets dictate that when a federal law does not control, federal courts are bound by the decisions of a state's highest court and state statutes on matters of state substantive law, and there is no federal general common law.[36] In *Shady Grove*, the issue was the conflict between a New York statute and Federal Rule of Civil Procedure 23.[37] The conflict occurred when a federal court sitting in diversity heard a class action lawsuit.[38] The New York statute did not allow the lawsuit to continue because the statute contained an additional requirement that class action lawsuits may not be used to recover statutory penalties.[39] However, if Rule 23 was applied, the lawsuit could continue because it did not include a bar on class action lawsuits to recover statutory penalties.[40] The Court used the *Erie* doctrine framework to decide if Rule 23 or the New York statute should apply.[41] Parts I and II-A of *Shady Grove*, which held that New York's class action statute conflicts with Rule 23, had the support of five members of the Court rendering its opinion binding while the rest of the opinion failed to gain a majority.[42] The Supreme Court used a two-part test to answer the question.[43] The first part of the test examines whether the state statute and the federal rule "attempts to answer the same question."[44] First, the court identifies a procedural question.[45] Then it asks whether a federal rule answers the procedural question.[46] If the federal rule answers the procedural

---

[35] *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).
[36] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[37] *Shady Grove*, 559 U.S. at 397.
[38] *Id.*
[39] *Id;* N.Y. C.P.L.R. § 901 (McKinney 1975).
[40] *Shady Grove*, 559 U.S. at 398.
[41] *Id.*
[42] *Shady Grove*, 559 U.S. at 395-96 (Justice Scalia delivered the opinion of the Court only in regard to Parts I and II–A and wrote an opinion with the Chief Justice, Justice Thomas, and Justice Sotomayor for Parts II–B and II–D).
[43] *Id.* at 398 ("The question in dispute is whether Shady Grove's suit may proceed as a class action.").
[44] *Id.* at 399.
[45] *Id.* at 398.
[46] *Id.*

question, the court applies the federal rule.[47] If the federal rule is ambiguous because it can have two different meanings, then a court should read the rule in a way that prevents it from violating the Rules Enabling Act.[48] However, a court should not contort or read ambiguity into an unambiguous rule so that it can apply the state rule or statute.[49] Rule 23 allows "*any* plaintiff in *any* federal civil proceeding to maintain a class action" lawsuit if its requirements are met.[50] If the federal rule is unambiguous, the rule must be given its full effect.[51] Since Rule 23 is unambiguous, it will control any state statute that tries to change the requirements of maintaining a class action lawsuit.[52] The focus of the analysis is entirely on the scope of the federal rule based on its text and purpose.

In response to the dissent, the majority lists several reasons why federal courts should not speculate about the purpose of a state statute when deciding whether a federal rule preempts or answers the same question as a state statute.[53] First, the question of whether a federal statute or rule preempts a state statute is a federal question.[54] This renders pronouncements by a state's supreme court on the purpose of a rule to be unhelpful in federal court or jurisdiction.[55] Second, "federal judges would be condemned to poring through state legislative history — which may be less easily obtained, less thorough, and less familiar than its federal counterpart."[56] Third, state statutes are often passed with multiple purposes in mind.[57] In some cases, "one State's statute could survive preemption (and accordingly affect the procedures in federal court) while another State's identical law would not, merely because its authors had different aspirations."[58]

---

[47] *Id.*
[48] *Id.* at 405-06.
[49] *Id.* at 406.
[50] *Id.*
[51] *See* Kimberly, *supra* note 12, at 1217 ("Scalia gave great breadth to the federal rule by analyzing it according to its plain language").
[52] *Shady Grove*, 559 U.S. at 406.
[53] *Id.* at 402 (The dissent characterizes the state statute as being about a remedy rather than a class action because its "*purpose* is to restrict only remedies.").
[54] *Id.* at 405.
[55] *Id.* at 404.
[56] *Id.* at 405.
[57] *Id.* at 404.
[58] *Id.*

In summary, using statutory interpretation to determine if a state procedural statute is a hidden substantive statute is best left to state courts. Federal courts should only interpret federal statutes, and when dealing with state procedural statutes, federal courts should only focus on the text to decipher whether the statute is procedural.[59] If the federal rule is ambiguous and has a reasonable reading that would allow it to coexist with a state statute, federal courts should apply them both.[60] If the only reasonable reading of a federal rule is one that conflicts with a purely textual reading of a state statute the court should apply the federal rule.[61] Federal courts should not try to infer that the state statute is actually substantive rather than procedural when it clearly tries to answer the same procedural question as the federal rule.[62] Five justices joined this part of the decision.[63]

The Supreme Court was divided on the second part of the test which focuses on whether the federal rule in question violates the Rules Enabling Act.[64] Justice Scalia explained that under 28 U.S.C. § 2072(b) the Court is only authorized to promulgate rules that do "not abridge, enlarge or modify any substantive right."[65] Since § 2072 restrains the Court in this way, Scalia reasoned the test is whether the rule really regulates procedure.[66]

Justice Scalia's plurality opinion applies a simple and formalist test that is consistent with prior Supreme Court precedent.[67] To determine whether a rule " really regulates procedure," the rule must control "the judicial process for enforcing rights and duties

---

[59] *Id.*

[60] *Id.* at 405-06.

[61] *See id.* at 406. There is only one reasonable reading of Rule 23 and the Court refused to analyze the state statute's purpose outside of its statutory language and procedural effect. *Id.* at 405 n.7.

[62] *See id.* (criticizing the dissent for invalidating Rule 23 based on the substantive effect of a clearly procedural state statute that conflicted with Rule 23).

[63] *Id.* at 395.

[64] *Id.* at 398 (If a federal rule and state statute answer the same question the federal rule applies "unless it exceeds statutory authorization or Congress's rulemaking power.").

[65] *Id.* at 407 (citing 28 U.S.C. § 2072).

[66] *Id*.

[67] Kimberly, *supra* note 12, at 1217 (labeling the approach "formalist"); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1336 (D.C. Cir. 2015) ("Justice Scalia's plurality opinion for four Justices strictly followed a prior Supreme Court precedent." (citation omitted)).

recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them[.]"[68] "What matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."[69] If the rule can be characterized as affecting "the manner and the means" in which a party enforces rights guaranteed by substantive law it is procedural under the Rules Enabling Act.[70] The result of the procedural rule does not matter because almost all procedural rules can affect a person's substantive rights.[71] The substantive nature or purpose of the state law that conflicts with the federal rule is not relevant to whether application of the federal rule violates the Rules Enabling Act.[72] If a rule is authorized by the Rules Enabling Act it is applied in all jurisdictions; regardless of its effect on state-created rights.[73]

In his concurrence, Justice Stevens agreed that Rule 23 applied in the instant case.[74] Justice Stevens also agreed with Justice Scalia's analysis on how a federal court should decide that a federal rule conflicts with a state statute.[75] However, Justice Stevens also reasoned that some state statutes cannot be preempted in diversity actions despite conflicting with a federal rule.[76] According to Justice Stevens, the federal courts must apply a state statute if applying a federal rule "effectively abridges, enlarges, or modifies a state-created right or remedy."[77]

Justice Stevens used the statutory language of the Rules Enabling Act to create his rule. The Rules Enabling Act says, "such

---

[68] *Shady Grove*, 559 U.S. at 407 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).
[69] *Id.* (quoting Miss. Pub. Corp. v. Murphree, 326 U.S. 438, 446 (1946)).
[70] *Id.*
[71] *Id.* ("The test is not whether the rule affects a litigant's substantive rights; most procedural rules do.").
[72] *Id.* at 409 ("The fundamental difficulty with both these arguments is that the substantive nature of New York's law, or its substantive purpose, makes no difference.").
[73] *Id.* at 410.
[74] *Id.* at 416 (Stevens, J., concurring).
[75] *Id.* (joining Parts I and II-A of the Court's opinion which explain how Rule 23 and the New York statute conflict because they answer the same procedural question).
[76] *Id.* at 416-17.
[77] *Id.* at 422.

rules shall not abridge, enlarge or modify *any* substantive right."[78] The key word is *any* because some state procedural statutes also influence substantive rights. In Justice Stevens' opinion, Congress cannot tell states the "form that their substantive law should take."[79] Therefore, even if a state has a statute in a clearly procedural form, the statute may still be substantive based on the outcome it seeks to create.[80] A state procedural rule would apply rather than a federal rule because some state procedural rules are "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."[81] Federal courts are expected to consider the scope and purpose of a clearly procedural state statute before applying a federal rule because federal courts may not apply a federal rule that abridges a state defined right.[82]

Justice Stevens created a guide for applying his test to determine whether applying a Federal Rule of Civil Procedure instead of a state statute would violate the Rules Enabling Act's prohibition against rules that "abridge, enlarge or modify any substantive right."[83] Justice Stevens starts with the assumption that a state law in a procedural form is not substantive because a procedural form strongly suggests "a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies."[84] Justice Stevens also cautions that the "the bar for finding an Enabling Act problem is a high one."[85] The bar is high because there would be heavy costs on federal courts trying to discover the true substantive purpose of a state law, and having that statute apply with a federal rule that seems to govern the same procedural issue.[86] This position echoes Justice Scalia's belief that federal courts should not focus on analyzing clearly procedural state statutes that may have hidden substantive purposes.[87]

The Stevens' Rules Enabling Act analysis continues with the text of the state statute. In *Shady Grove*, it was clear based on the

---

[78] 28 U.S.C. § 2072(b) (emphasis added).
[79] *Shady Grove*, 559 U.S. at 420.
[80] *Id.* at 419-20.
[81] *Id.*
[82] *Id.*
[83] § 2072.
[84] *Shady Grove*, 559 U.S. at 432.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 404 (majority opinion).

text of CPLR section 901(b) that it applied to New York laws, federal laws, and the laws of other states. Section 901(b) prevents plaintiffs from maintaining a class action lawsuit based on minimum statutory damages regardless of what statute imposed the statutory damages.[88] In Justice Steven's view, this is evidence that the statute is procedural because it affects substantive rights not created by New York.[89] The New York courts interpreted the statute in the same way as Justice Stevens.[90] The legislative history showed some specific state purpose by protecting defendants from potential "annihilating punishment" when the class action lawsuits are combined with statutory damages.[91] The protection given to defendants is a potential limit on remedies which would be substantive under the *Erie* doctrine.[92] However, another purpose of the statute could be a more general policy of preventing unnecessary class action lawsuits regardless of the source of law in New York courts.[93]

Overall, Justice Stevens found that the legislative history of CPLR section 901(b) was only evidence that legislators wanted to make it harder for certain litigants to file class action lawsuits in New York courts.[94] Making it harder to file certain lawsuits is the same class of policy concerns "that might go into setting filing fees or deadlines for briefs."[95] Justice Stevens reasoned that when federal courts are faced with clear textual evidence that a state statute is procedural but has an ambiguous legislative history, a federal court should conclude that the statute is procedural rather than substantive.[96] A court must apply the federal rule if a textually procedural statute only has speculative substantive concerns that conflict with a federal rule.[97]

In summary, when deciding whether application of a federal rule that conflicts with a state statute would "abridge, enlarge or modify any substantive right" federal courts have been given two

---

[88] *Id.* at 432 (Stevens, J., concurring); N.Y. C.P.L.R. § 901(b)(McKinney 1975).
[89] *Shady Grove*, 559 U.S. at 432.
[90] *Id.*
[91] *Id.* at 434.
[92] *See id.* at 425 (according to Stevens states can construct substantive rules in a form that appears procedural).
[93] *Id.* at 435.
[94] *Id*.
[95] *Id.*
[96] *Id.* at 436.
[97] *Id.*

tests.[98] First, Justice Scalia's plurality test asks whether the federal rule really regulates procedure.[99] If the federal rule regulates procedure the court applies the federal rule.[100] Second, Justice Stevens' test states that federal courts should apply the federal rule unless there is little doubt that application of the federal rule alters a state-created substantive right.[101] The evidence that a state statute created a substantive state-created right comes from three sources. The strongest evidence is the text of the statute, the next source is the decisions of state courts interpreting the statute, then the final source is the legislative history of the state statute.[102] If the evidence is clear that the state statute is substantive, it applies, and if the evidence is not sufficient the federal rule will apply.[103]

III. THE CIRCUIT SPLIT ON THE APPLICATION OF ANTI-SLAPP STATUTES IN FEDERAL COURTS

Shady Grove attempted to give lower courts a workable test that would promote uniformity among the lower courts. However, circuit courts and district courts across the country have been divided on whether state anti-SLAPP statutes should apply in federal courts. The First and Ninth Circuits have found that state anti-SLAPP statutes are applicable in federal courts.[104] However, the D.C., Second, Fifth, Tenth, and Eleventh Circuits have found that state anti-SLAPP statutes are not applicable in federal courts.[105]

---

[98] 28 U.S.C. § 2072.

[99] *Shady Grove*, 559 U.S. at 407 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

[100] *See id.* at 410 (plurality opinion) (explaining that upon a finding that a rule really regulates procedure and a conflict with a state statute the federal rule always preempts the state statute).

[101] *Id.* at 432 (Stevens, J., concurring).

[102] *See id.* at 431-436 (Stevens, J., concurring) (analyzing evidence of whether N.Y. C.P.L.R. 901(b) is substantive).

[103] *See id.* at 432 (Stevens, J., concurring) Justice Steven's states that "[t]he mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt." *Id.*

[104] Godin v. Schencks, 629 F.3d 79, 86-87 (1st Cir. 2010); United States *ex rel*. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999).

[105] Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1335 (D.C. Cir. 2015); La Liberte v. Reid, 966 F.3d 79, 88 (2d Cir. 2020); Klocke v. Watson, 936 F.3d 240, 242 (5th Cir. 2019); Los Lobos Renewable Power, LLC v. Americulture, Inc., 885

A. Federal Courts that Apply Anti-SLAPP

In *Godin v. Schencks,*[106] Godin commenced an action in the Federal District Court of Maine for a violation of federal due process rights and a state law defamation claim.[107] The defendant sought to apply Maine's anti-SLAPP statute, known as section 556, in order to dismiss the claim and recover attorney fees.[108] Specifically, section 556 gives a special process for dismissing claims that arise from the exercise of a defendant's right to petition under the U.S. Constitution or the Constitution of Maine.[109] The district court ruled that Maine's anti-SLAPP statute conflicted with Rules 12 and 56, and so it did not apply in federal court.[110] The First Circuit Court of Appeals reversed, holding that Maine's anti-SLAPP statute is applicable in federal court.[111] The First Circuit reasoned that section 556 did not answer the same question as Rules 12 and 56.[112] The court determined there was no issue in applying both the federal rules and the state statute.[113] Rule 12(b)(6) and Rule 56 are consistent with anti-SLAPP procedure because they "do not purport to apply only to suits challenging the defendants' exercise of their constitutional petitioning rights."[114] The First Circuit views the anti-SLAPP procedure as supplementing rather than conflicting with the federal rules.[115]

The First Circuit, holding that Rules 12 and 56 do not conflict with anti-SLAPP, also characterized the anti-SLAPP statute as being substantive in nature rather than just procedural. While it may appear procedural with its motion to strike, "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) or Rule

---

F.3d 659, 673 (10th Cir. 2018); Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1350 (11th Cir. 2018).

[106] 629 F.3d 79 (1st Cir. 2010).

[107] *Id.* at 80-81.

[108] *Id.* at 81-82.

[109] *Id.* at 82.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 88.

[113] *Id.* (explaining that Rule 12(b)(6) and Rule 56 do not attempt to answer the same question as Section 556).

[114] *Id.*

[115] *Id.*

56."[116] The First Circuit's analysis of section 556 echoed Justice Stevens' concern that state procedure can sometimes be used as a vehicle to protect substantive state-created rights.[117] In addition, the First Circuit found that applying the anti-SLAPP statute would "serve the 'twin aims of the Erie rule: discouragement of forum shopping and inequitable administration of the laws.'"[118] If section 556 is not applied in federal court, the law is unevenly applied because defendants would not have access to the same defenses as they would have in state court.[119] The First Circuit also found that not applying anti-SLAPP would encourage forum shopping because a plaintiff would bring a case to federal court instead of state court to avoid the various burdens of anti-SLAPP such as having to potentially pay defendant's attorney's fees, and not being able to use "the common law's per se damages rule."[120]

B. Federal Courts that Do Not Apply Anti-SLAPP

The D.C. Circuit Court of Appeals held that an anti-SLAPP statute could not apply in federal court in an opinion by then Circuit Judge Kavanaugh.[121] In *Abbas v. Foreign Policy Group, LLC*,[122] Yasser Abbas, the son of the president of Palestine, brought a defamation action against the Foreign Policy Group in the Federal District Court for the District of Columbia.[123] The District Court applied the D.C. anti-SLAPP special motion and dismissed the

---

[116] *Id.* at 89 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 423 (2010) (Stevens, J., concurring)).
[117] *Shady Grove*, 559 U.S. at 423 ("A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.").
[118] *Godin*, 629 F.3d at 91 (quoting Com. Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 773 (1st Cir. 1994) (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988))).
[119] *See* Schelling v. Lindell, 2008 ME 59, ¶ 18, 942 A.2d 1226, 1232 (Me. 2008) (citing Restatement (Second) of Torts § 569 (1977) ("One who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication."); ME. REV. STAT. tit. 14, § 556 (2011) (requiring plaintiff to show "actual injury.").
[120] *Godin*, 629 F.3d at 92.
[121] Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1331 (D.C. Cir. 2015).
[122] 783 F.3d 1328 (D.C. Cir. 2015).
[123] *Id.*

defamation claim, but the D.C. Circuit Court held that a federal court must apply Federal Rules 12 and 56 instead of the D.C. anti-SLAPP special motion to dismiss.[124] The main issue on appeal was whether a federal court exercising diversity jurisdiction may apply the D.C. anti-SLAPP statute.[125] The D.C. Circuit affirmed the District Court on other grounds by dismissing the suit under Rule 12(b)(6).[126] The D.C. Circuit declined to apply the anti-SLAPP statute because the statute answers the same procedural question as Rule 12 and Rule 56 of the FRCP and Rules 12 and 56 do not violate the Rules Enabling Act.[127] The D.C. Circuit first identified a procedural question: under what circumstances must a court dismiss a claim before trial?[128] Rules 12 and 56 allow for dismissal only if the claim is not plausible or there is no dispute of fact.[129] The D.C. anti-SLAPP statute tries to answer the procedural question differently because it requires that a plaintiff show a likelihood of success on the merits of a claim that neither Rule 12 nor Rule 56 requires.[130] Since D.C.'s anti-SLAPP statute answers the same procedural question as Rules 12 and 56, *Shady Grove* commands that courts should apply the Federal Rules instead of the anti-SLAPP statute unless Rule 12 or 56 violates the Rules Enabling Act.[131]

Although the federal rules and state statutes conflict, the analysis continues because § 2072(b) requires that Federal Rules do not "abridge, enlarge or modify any substantive right."[132] The D.C. Circuit then had to decide what test it would apply to decide whether Rule 12 or Rule 56 violated the Rules Enabling Act by modifying a substantive right.[133] The Circuit Court noted that the Supreme Court in *Shady Grove* was split on this issue with the plurality opinion giving one test, Justice Stevens giving a different test, and the other four justices not addressing the issue.[134] The D.C. Circuit resolved the split by applying the *Sibbach* test which is still binding

[124] *Id.* at 1337.
[125] *Id.* at 1332.
[126] *Id.* at 1340.
[127] *Id.* at 1337.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 1334.
[132] 28 U.S.C. § 2072(b).
[133] Abbas, 783 F.3d at 1336.
[134] *Id.*

precedent.[135] Identical to Justice Scalia's plurality test, the *Sibbach* test is "whether a rule really regulates procedure."[136] The court then applied the *Sibbach* test by holding that "pleading standards and rules governing motions for summary judgment are procedural."[137] While the D.C. Circuit used the *Sibbach* test, it also referred to a part of *Shady Grove* that characterized pleading standards and rules governing summary judgment as procedural.[138] A federal court must apply the Federal Rules of Civil Procedure instead of an anti-SLAPP statute because "Federal Rules 12 and 56 answer the same question as the D.C. Anti–SLAPP Act, and those Federal Rules are valid under the Rules Enabling Act." [139]

In *Carbone v. Cable News Network*,[140] Davide Carbone, a CEO of a medical center, brought a defamation suit against CNN based on an allegedly false news report about the medical center.[141] Georgia's anti-SLAPP statute, section 9-11-11.1, requires that claims related to a person's exercise of free speech or right of petition under the state or federal constitution be subject to a special motion to strike.[142] The Northern District of Georgia did not apply Georgia's anti-SLAPP statute's motion to strike, and CNN appealed. The Eleventh Circuit Court of Appeals had to decide whether the district court erred in not applying section 9-11-11.1.[143] In its decision, the Eleventh Circuit largely affirmed the judgment of the district court and ruled that Georgia's anti-SLAPP statute may not be applied in federal court because it conflicts with Rules 8, 12, and 56.[144] The Eleventh Circuit ruled this way for several reasons. First, the court identified the procedural issue, which was "whether Carbone's complaint states a claim for relief supported by sufficient evidence to avoid pretrial dismissal."[145] Together, Rules 8 and 12 address pretrial dismissal before discovery and Rule 56 applies to pretrial dismissal

---

[135] *Id.* at 1337.
[136] *Id.*
[137] *Id.*
[138] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 404 (2010).
[139] *Abbas*, 783 F.3d at 1337.
[140] 910 F.3d 1345 (11th Cir. 2018).
[141] *Id.* at 1347.
[142] GA. CODE ANN. § 9-11-11.1 (2016).
[143] *See Carbone*, 910 F.3d at 1349.
[144] *See id.* at 1348.
[145] *Id.* at 1350.

after discovery.[146] The Eleventh Circuit reasoned that Georgia's anti-SLAPP procedure conflicts with the federal rules by imposing a probability to prevail requirement different from the plausibility standard and the genuine dispute of material fact standard.[147] The Eleventh Circuit explained that together Rules 8, 12, and 56 "provide a comprehensive framework governing pretrial dismissal and judgment."[148] Thus, "there is no room for any other device for determining whether a valid claim is supported by sufficient evidence to avoid pretrial dismissal."[149] Only Congress can create exceptions to this "comprehensive framework" through statutes or other rules of civil procedure such as Rule 9(b) and the Private Securities Litigation Reform Act.[150] The Eleventh Circuit characterized Rules 8 and 12(b)(6) as creating affirmative requirements to discovery if its requirements are met.[151] Rule 56 then creates a right to a trial on the merits if plaintiffs meet their burden.[152] "[T]here is no room for any other device for determining whether a valid claim [is] supported by sufficient evidence to avoid pretrial dismissal."[153]

IV. FEDERAL COURTS MAY NOT APPLY STATE ANTI-SLAPP STATUTES

A. Federal Rules of Civil Procedure 12 and 56 and State Anti- SLAPP Statutes, Same Question, Different Answer.

A federal court may not apply a state statute if a Federal Rule of Civil Procedure "answers the same question" as the state statute unless the federal rule violates the Rules Enabling Act.[154] Rules 12 and 56 provide the pretrial procedural hurdles a party must overcome before the case goes to trial.[155] The Supreme Court has carefully

[146] *Id.*
[147] *Id.*
[148] *Id.* at 1351.
[149] *Id.*
[150] *Id.* at 1353.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 1351.
[154] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 399 (2010).
[155] Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1334 (D.C. Cir. 2015).

explained how Rules 12 and 56 must be applied by federal courts to screen out weak claims without sufficient factual allegations or sufficient evidence for a trial.[156] How the rules apply is a uniform and comprehensive procedure that, similar to every other Federal Rule of Civil Procedure, must be applied to "all civil actions" in district courts.[157] However, state anti-SLAPP statutes place an additional pretrial burden that cannot be reconciled with the Federal Rules of Civil Procedure.[158]

Before discovery, a defendant can challenge the legal sufficiency of the allegations in a complaint by filing a motion to dismiss under Rule 12(b)(6).[159] A Rule 12(b)(6) motion's standard of review requires that a plaintiff allege sufficient facts if taken as true to "state a claim to relief that is plausible on its face."[160] A plausible claim has factual content that would allow a court to reasonably infer "that the defendant is liable for the misconduct alleged."[161] This is not a probability requirement, but it does require more than a mere possibility that the defendant is liable.[162] A complaint with sufficient plausible factual matter "may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'"[163] However, a mere formulaic statement of the elements of a claim with only legal conclusions, bare speculation, or naked assertions, will not survive a motion to dismiss under Rule 12(b)(6) unless the complaint as a whole is supported by

---

[156] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (explaining that just stating the elements of a claim will not allow a claim to survive a Rule 12(b)(6) motion); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

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

[158] *Abbas*, 783 F.3d at 1334.

[159] Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., dissenting). Judge Watford, joined by four other judges, dissented from the en banc decision not to bring the Ninth Circuit in line with *Shady Grove*. *Id.* ("Neither of those decisions is consistent with controlling Supreme Court precedent, and both warranted reexamination by the court sitting en banc.")

[160] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570).

[161] *Id.* at 678.

[162] *Id.*

[163] *Bell Atl. Corp.*, 550 U.S. at 556.

sufficient factual matter.[164] Rule 12(b)(6) comprehensively answers the procedural question of what needs to be in a complaint before a plaintiff can proceed to discovery.[165] Anti-SLAPP procedure tries to answer the same procedural question as Rule 12(b)(6), which is whether a plaintiff has pleaded sufficient facts to avoid pretrial dismissal, but in a different way.[166]

Anti-SLAPP statutes treat causes of action based on a defendant's right to petition or free speech differently from all other causes of action unlike Rule 12(b)(6).[167] According to *Shady Grove*, when Congress creates exceptions to particular rules, that is evidence that a rule applies generally.[168] An exception to Rule 23's requirements for the certification of class action lawsuits is 8 U.S.C. § 1252(e)(1)(B).[169] A similar exception to Rule 12(b)(6)'s general plausibility standard is Rule 9.[170] Rule 9(b) requires that "a party must state with particularity the circumstances constituting fraud or mistake."[171] Another exception to Rule 12's pleading standard is the Private Securities Litigation Reform Act of 1995.[172] This Act modified pleading standards in some securities cases.[173] Rule 12 generally applies when evaluating the merits of a complaint except in specific circumstances.[174] Only Congress can create exceptions to Rule 12's general rule which applies to all cases not covered by an exception.[175] Anti-SLAPP conflicts with Rule 12 by creating a

---

[164] *Ashcroft*, 556 U.S. at 678.
[165] *See id.* at 678-79.
[166] Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1333-34 (D.C. Cir. 2015).
[167] CAL. CIV. PROC. CODE § 425.16(b)(1) (Deering 2021); GA. CODE ANN. § 9-11-11.1(b)(1) (2020).
[168] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 400 (2010) ("The fact that Congress has created specific exceptions to Rule 23 hardly proves that the Rule does not apply generally. In fact, it proves the opposite. If Rule 23 did not authorize class actions across the board, the statutory exceptions would be unnecessary.").
[169] *Id.*
[170] *See* Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1353 (11th Cir. 2018) (characterizing Rule 9 "as exceptions to the general rule" to the requirements of a sufficient complaint).
[171] FED. R. CIV. P. 9.
[172] Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1335 (D.C. Cir. 2015).
[173] *Id.*
[174] *Id.*
[175] *Id.*

heightened pleading standard that applies to particular causes of action.

Anti-SLAPP procedure directly conflicts with Rule 56 of the Federal Rules of Civil Procedure.[176] Rule 56 answers the procedural question of when a claim can be dismissed after the beginning of discovery but before trial.[177] Rule 56 requires that a court "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[178] Before granting a summary judgment motion, a court must grant an "adequate time for discovery" and only requires that a party with the burden of proof at trial designate specific facts showing that there is an issue for trial.[179]

Some anti-SLAPP statutes are different from summary judgment because they impermissibly put the burden of persuasion on plaintiffs before a trial.[180] The burden of persuasion is "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party."[181] Minnesota's anti-SLAPP statute, section 554.02, explicitly puts the burden of persuasion on the party responding to a motion to dismiss.[182] Section 554.02 requires the responding party to produce evidence and persuade a judge before trial that the party has "clear and convincing evidence that the acts of the moving party are not immunized from liability."[183] Additionally, a judge is not required to make factual inferences in favor of the party responding to the anti-SLAPP motion to dismiss.[184] Ultimately, this burden on the responding party may result in the dismissal of a claim when there is an issue of material fact.[185] This is different from summary judgment because issues of material fact preclude summary

---

[176] *See id.* at 1334.
[177] Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1352 (11th Cir. 2018).
[178] FED. R. CIV. P. 56(a).
[179] Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).
[180] *See* Unity Healthcare, Inc. v. Cty. of Hennepin, 308 F.R.D. 537, 542 (D. Minn. 2015).
[181] *Burden of Persuasion*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[182] MINN. STAT. § 554.02 (2021).
[183] *Id.*
[184] Unity Healthcare, 308 F.R.D. at 541.
[185] Leiendecker v. Asian Women United of Minn., 848 N.W.2d 224, 231 (Minn. 2014).

judgment, and when ruling on summary judgment a judge must make factual inferences in favor of the non-moving party.[186]

An anti-SLAPP motion also stays discovery unless a party shows "good cause" for specified discovery.[187] This good cause requirement for specified discovery is a very restrictive standard that is like "oil to the water of Rule 56's more permissive standard" for discovery.[188] Rule 56 does not put a restrictive "good cause" hurdle on plaintiffs seeking discovery if they have already complied with the requirements of Rule 8.[189] For Rule 56, discovery is the norm, but under anti-SLAPP procedure, discovery is the exception.[190] Since Rule 56 does not put a "good cause" burden on a party seeking discovery, but anti-SLAPP procedure does, there is a direct collision between the FRCP and anti-SLAPP.[191]

Furthermore, anti-SLAPP statutes impose a probability to prevail standard that conflicts with Rules 12 and 56.[192] The probability to prevail standard is one that "contemplates a substantive, evidentiary determination of the plaintiff's probability of prevailing on his claims."[193] An anti-SLAPP statute applied in federal court creates a Rule12(b)(6) "plus" standard, that is more difficult to meet than Rule12(b)(6), for causes of action dealing with First Amendment rights.[194] Contrary to anti-SLAPP motions, Rule 12 only requires a plausible complaint at the pleading stage and Rule 56 permits summary judgment only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[195] A court does not decide on material disputes when applying Rule 12 or Rule 56 to dismiss a case before trial. However, anti-SLAPP requires a court to consider factual materials in the

---

[186] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-255 (1986).
[187] CAL. CIV. PROC. CODE § 425.16 (Deering 2021).
[188] Unity Healthcare, Inc. v. Cnty. of Hennepin, 308 F.R.D. 537, 541 (D. Minn. 2015).
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *See* Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1351 (11th Cir. 2018).
[193] Rosser v. Clyatt, 348 Ga. App. 40, 43 (Ga. Ct. App. 2018).
[194] *See* Carbone v. Cable News Network, Inc., No. 1:16-CV-1720-ODE, 2017 WL 5244176, at *3 (N.D. Ga. Feb. 15, 2017) (labeling Georgia's anti-SLAPP statute as a Rule 12(b)(6) "plus" standard for actions with a first amendment nexus).
[195] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

pleadings, affidavits, and limited discovery to determine whether the plaintiff has a probability to prevail on his claim.[196]

While most courts have focused on the conflicts between Rule 12(b)(6) and Rule 56 with anti-SLAPP statutes, another rule directly conflicts with anti-SLAPP statutes. Rule 12(d) of the Federal Rules of Civil Procedure, a rarely discussed rule of conversion, directly conflicts with anti-SLAPP statutes.[197] Rule 12(d) allows courts to consider matters outside of the parties' pleadings when a party makes a Rule 12(b)(6) or 12(c) motion.[198] However, if the court considers material outside the pleadings, the court must treat the motion "as one for summary judgment under Rule 56."[199] If a Rule 12(b)(6) or Rule 12(c) motion is converted to a motion for summary judgment, "parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."[200]

Rule 12(d) has a discretionary component and two non-discretionary components.[201] The discretionary component gives courts the option to consider matters outside the pleadings after a party makes a Rule 12(b)(6) or 12(c) motion.[202] The non-discretionary components require that if a court does consider matters outside the pleadings, a court *must* treat the motion as one for summary judgment, and the court *must* allow a reasonable opportunity to present all materials relevant to the motion.[203] The procedural question that Rule 12(d) answers is what a court can do if it considers any materials outside the party's pleadings.[204] Rule 12(d) commands that a court treat the motion as one for summary judgment but anti-SLAPP requires that a court use a standard different from summary judgment.[205]

---

[196] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007); *Celotex*, 477 U.S. at 322; *see* CAL. CIV. PROC. CODE § 425.16 (allowing courts to consider the pleadings, affidavits, and specified discovery for good cause when deciding whether to grant the motion).

[197] Kimberly, *supra* note 12, at 1235.

[198] CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1366 (3d ed. 2004).

[199] FED. R. CIV. P. 12.

[200] *Id.*

[201] *See* Kimberly, *supra* note 12, at 1235-36.

[202] WRIGHT & MILLER, *supra* note 198, at § 1366.

[203] *Id.*

[204] Kimberly, *supra* note 12, at 1235.

[205] *Id.* at 1236.

B. Addressing Arguments About Why Federal Courts Should Apply Anti-SLAPP Procedure

A common argument to apply anti-SLAPP statutes in federal court is that they serve as a distinct and beneficial supplement to Rules 12 and 56.[206] Anti-SLAPP procedure is a distinct supplement to the Federal Rules because it can exist "side by side" with the Federal Rules, and it only applies to specific defendants who have been targeted on the basis of their free speech or right to petition.[207] The argument further states that the anti-SLAPP standard is a beneficial independent supplement to the Federal Rules that protects certain defendants from the costs of litigation, but this position is a policy argument that ignores the policy behind the more permissive Federal Rules.[208] Another common argument is that not applying anti-SLAPP statutes encourages forum shopping and would burden federal courts because plaintiffs would be encouraged to bring their claims to federal court to avoid the burden of anti-SLAPP statutes.[209] To a certain extent, this is true, but legal questions should not be determined by workload, and fixing the potential forum shopping should be done by the Supreme Court or by Congress.[210]

The Supreme Court has been very conscious of Rule 12(b)(6)'s role in protecting defendants from needless and expensive discovery.[211] Despite the potential costs of discovery, the Supreme Court still recognizes that on a motion to dismiss all factual assertions must be taken as true and that there is no probability requirement at the pleading stage.[212] While it is theoretically possible to apply Rules 12 and 56 along with anti-SLAPP motions to dismiss, this ignores Rule 12(d).[213] Rule 12(d) makes it clear once matters outside the pleadings are presented, which anti-SLAPP generally allow in the form of affidavits, a party's only option is a motion for summary judgment.[214]

---

[206] *See* La Liberte v. Reid, 966 F.3d 79, 87-88 (2d Cir. 2020).
[207] *Id.*
[208] *Id.* at 88.
[209] Godin v. Schencks, 629 F.3d 79, 92 (1st Cir. 2010); *La Liberte*, 966 F.3d at 88.
[210] *Id.*
[211] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007).
[212] *Id.* at 556.
[213] *See* Godin v. Schencks, 629 F.3d 79, 88 (1st Cir. 2010).
[214] WRIGHT & MILLER, *supra* note 198, at § 1366.

There is no doubt that protecting First Amendment rights is an important policy interest. Ultimately, it is for Congress and not the federal courts to determine whether there should be a procedural mechanism to protect a person's First Amendment rights; especially one that is different from the Federal Rule's more permissive standard for pretrial dismissal of claims.[215]

Even without anti-SLAPP statutes, the Federal Rules of Civil Procedure still have efficient ways to dismiss weak and frivolous defamation claims that threaten free speech before a trial. This Note has emphasized that Rule 12(b)(6)'s "plausibility standard" is very different from anti-SLAPP procedure because it is easier to meet. However, it should also be understood that it remains a significant barrier for plaintiffs asserting their claims in general.[216] Particularly, the formal pleading requirements created by *Ashcroft v. Iqbal*[217] have resulted in people experiencing a higher rate of dismissal of their claims.[218] The current standards applied in federal court are high enough to create a difficult time for plaintiffs to reach discovery, regardless of anti-SLAPP statutes.

A defamation claim's evidentiary standards, including the requirement that a defamation claim of a public figure contain clear and convincing evidence of actual malice, are applicable when a court rules on summary judgment.[219] Thus, on summary judgment, if plaintiffs do not have sufficient evidence of every element of their claim, including the strict clear and convincing evidence standard of actual malice in public figure cases, their claim will be dismissed before trial.[220] The failure of proof at the pretrial stage of an essential element of the claim means there is no genuine issue of material fact, and the defendant is entitled to judgment as a matter of law.[221] The result is that merely pointing out the plaintiff's lack of evidence by a defendant can be enough for summary judgment; Rule

---

[215] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 400 (2010) ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure."); *see* La Liberte v. Reid, 966 F.3d 79, 88 (2d Cir. 2020) (labeling the Federal Rules to be more "permissive").

[216] *See* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2170 (2015).

[217] 556 U.S. 662 (2009).

[218] Reinert, *supra* note 216, at 2170.

[219] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

[220] *See id.* at 254; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

[221] *Celotex*, 477 U.S. at 322-23.

56 is a powerful tool for efficiently dismissing claims.[222] Important to note is that Rule 56 procedure is different from the practice in some states, which requires a defendant moving for summary judgment to present evidence before a court will grant summary judgment.[223] While the concerns about SLAPP lawsuits chilling free speech are an important concern, it is also important to remember that the current Federal Rules of Civil Procedure already stack the deck in favor of defendants with ways to dismiss defamation lawsuits at early stages of litigation.

V. CONCLUSION

Based on the reasoning in *Shady Grove* and other Supreme Court precedent, it is clear that state anti-SLAPP statutes should not be applied in federal courts because anti-SLAPP statutes conflict with the Federal Rules of Civil Procedure.[224] Specifically, anti-SLAPP statutes conflict with the uniform and comprehensive procedure for pretrial dismissal created by Rule 8, Rule 12, and Rule 56.[225] Together, these rules leave no room for an alternative standard for pretrial dismissal unless Congress creates an exception or an exception is created by the standard rule making process.[226] The states may not create an alternative procedure for federal courts even if it is for a reason as venerable as protecting people's First Amendment rights.

However, the debate does not end there on anti-SLAPP statutes. Recently, a member of Congress has introduced a federal anti-SLAPP statute.[227] Many other groups such as "law professors, commentators, and businesses" have been in support of a federal anti-SLAPP statute.[228] With such a wide range of support Congress may soon pass a federal anti-SLAPP statute. Before such a statute is

---

[222] *See* Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 55 (1988).
[223] *See In re* New York City Asbestos Litig., 101 N.Y.S.3d 847 (N.Y. App. Div. 2019); *see also* Aguilar v. Atl. Richfield Co., 24 P.3d 493, 513 (Cal. 2001), as modified (July 11, 2001).
[224] *See* Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1352 (11th Cir. 2018).
[225] *Id.* at 1351.
[226] *See id.* at 1353.
[227] H.R. Res. 7771, 116th Cong. (2020).
[228] Aaron Smith, Article, *SLAPP Fight*, 68 ALA. L. REV. 303, 327 (2016).

passed by Congress it would be a mistake for the federal circuits to apply state anti-SLAPP statutes. We should all be concerned about people like John Oliver and others whose free speech is being suppressed by overly litigious plaintiffs; but we should also remember that the Federal Rules of Civil Procedure already do a good job at protecting defendants from weak claims.