UNCERTAINTY IN PUBLIC PARTICIPATION PROTECTIONS, CITIZENS LEFT "SLAPP"ED WITH NO SOLUTION

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ABSTRACT

In providing a forum for citizens to seek redress for grievances, courts have sought to answer the questions of fact and law that arise every day. The process of litigation is constantly evolving, aiming to protect the interests of all parties involved. In ensuring that a forum is reasonably accessible, however, the United States Court System allows potential for abuse. Even with existing protections, individuals and entities can use litigation as a sword to discourage conduct that is not favorable to their interests.

One specific section of issues arising from the aggressive use of the legal system is the use of litigation to curb public participation. The issue has attracted the attention of citizens, courts, and commentators, and some steps have been taken to protect First Amendment rights from non-meritorious litigation. Despite these efforts, the problem still persists, in part due to inconsistency in the application of protective measures.

INTRODUCTION

The use of lawsuits to "quash controversial speech" became evident to courts and commentators in the 1970s and 1980s.[1] The term "Strategic Lawsuit Against Public Participation" was constructed by Professors George Pring and Penelope Canan.[2] The name was chosen because the Professors thought that it captured "both their causation and consequences."[3] In a 1992 Law Review Article, the professors illustrated the "new and very disturbing trend" which would have "grave consequences" for citizens and our system of government.[4]

The Professors performed a nationwide survey, and estimated that thousands of people were being sued every year at every

1. Roni A. Elias, *Applying Anti-SLAPP Laws in Diversity Cases: How to Protect the Substantive Public Interest in State Procedural Rules*, 41 T. MARSHALL L. REV. 215, 217 (2016).

2. *See id.*

3. George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar, and Bystanders*, 12 BRIDGEPORT L. REV. 937, 939 (1992).

4. *Id.* at 938.

government level for advocacy on every type of public interest.[5] After outlining trends and possible solutions, the Professors declared that "[w]e place a fundamental, constitutional value on public participation in government, because the opposite is unworkable and unthinkable."[6] The two concluded that "time will tell if the cures or the chill prevail."[7]

The strategic use of these meritless lawsuits became a more well-recognized issue.[8] One commenter defined "SLAPP suits" as lawsuits that

(1) involve communications made to influence a government action or outcome, (2) which result in civil lawsuits . . . (3) filed against non-governmental individuals or groups (4) on a substantive issue of some public interest or social significance to intimidate individuals and organizations that speak out against corporate decisions, development projects, government actions or operations, or other activities.[9]

The goal of the filer of a "SLAPP" is not to win the litigation by prevailing at trial.[10] Rather, the aim is "to silence their opponents by forcing them to abandon their protests."[11]

Some causes of action that can act as "a vehicle for SLAPP suit litigation" include: defamation, often in the forms of libel, slander, and business libel; business torts; process violations; conspiracy; constitutional violations; and civil rights violations.[12]

In the decades following Professors Pring and Canan's study, states have been willing to implement the cures that the Professors offered. As of 2021, thirty-one states and the District of Columbia

5. *See id.* at 940–41.

6. *Id*. at 961.

7. *Id*. at 962.

8. *See* Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 847 (2010).

9. *Id.* at 846.

10. *See* Timothy D. Biché, *Thawing Public Participation: Modeling the Chilling Effect of Strategic Lawsuits Against Public Participation and Minimizing Its Impact*, 22 S. CAL. INTERDISC. L.J. 421, 423 (2013). The term "filer" is often associated with the Plaintiff in a civil case, and the terms may be used interchangeably on occasion, however, it is important to note that the person pursuing a "SLAPP" claim may not always be the plaintiff of a case. *Id.* at 426.

11. *Id.* at 423.

12. Laura Lee Prather & Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Though Anti-SLAPP in Texas*, 47 TEX. TECH L. REV. 725, 789 (2015).

have enacted some form of "anti-SLAPP" protections.[13] In simple terms, these laws "create procedural means to accomplish substantive policy objectives."[14] In recent years, multiple states have strengthened their existing statutes, including the state of New York in 2020.[15] However, there are no federal "anti-SLAPP" protections in the United States, and some federal courts have declined to apply the state statutes.[16]

The threat to democracy posed by "SLAPPs" has not diminished in the years since the term was coined. While citizens have expressed concern and states have undertaken some efforts to mitigate the problem, this paper argues that existing remedies to the United States' "SLAPP" problem are not sufficient. Part I introduces the remedies that have been enacted by state legislatures to protect participation and the rules that have prevented them from taking effect in a federal court setting. Part II illustrates the need for "anti-SLAPP" protection. Part III specifically discusses the current circuit split on the applicability of state provisions in federal courts, which illustrates the inconsistency problem. Notably, the same California law that was applied in one circuit was rejected by another, and the same Texas act that one circuit refused to apply was held applicable by another circuit.[17] Part IV explains the elevated danger that exists where the country does not have a uniform system of "SLAPP" protection, a problem exacerbated by the circuit split. Finally, Part V argues that federal legislation is

13. *See* Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPS. COMM., https://www.rcfp.org/introduction-anti-slapp-guide/ (last visited Mar. 28, 2022). Thirty-one states and the District of Columbia have some form of codified anti-SLAPP rule, including Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington. *See generally State Anti-SLAPP Reference Chart*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection (last visited Mar. 28, 2022). Additionally, case law in Colorado and West Virginia protects citizens from "SLAPPS". *Id*. at 1 n.2 (citing Protect Our Mountain Env't, Inc. v. Dist. Ct. of Cnty. Of Jefferson, 667 P.2d 1361 (Colo. 1984)); *id*. at 4 n.9 (citing Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993)).

14. Elias, *supra* note 1, at 215.

15. *See* Vining & Matthews, *supra* note 13.

16. *See id.* (citing Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019)).

17. *See id.* (first citing Liberty Synergistics Inc. v. Microflo Ltd., 718 F.3d 138, 144 (2d Cir. 2013); then citing Godin v. Schenks, 629 F.3d 79, 81 (1st Cir. 2010); and then citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999); and then citing *Klocke*, 936 F.3d at 245).

necessary to protect citizens' First Amendment rights, and that a resolution of the circuit split could help to provide some clarity in the interim.

I. DEFINING THE LAWS

The different state "anti-SLAPP" protections vary drastically, as do the barriers that have prevented their enforcement.[18] A brief overview of existing anti-SLAPP statutes and review of the *Erie* doctrine will aid in understanding subsequent subsections.

A. The State Statutes

The thirty-one states that seek to protect citizens from "SLAPPs" use a variety of techniques to protect public participation.[19] "Anti-SLAPP" protections work by: trying to prevent the filing of "SLAPPs;" providing methods to dismiss "SLAPP" cases quickly, for example, by utilizing a burden shifting framework; and preventing future "SLAPP" cases from being filed, such as by awarding punitive damages to the target.[20]

The differences in state statutes are primarily found in three areas□"the scope of . . . activities immune from liability . . . the procedural accommodations made for dealing with [these] suits . . . and [] the monetary compensation awarded to the target when a suit is found to be a SLAPP."[21]

The scope of protection could be limited to issues currently under consideration by a government body, or include any issue of public interest.[22] The rule could also limit the forum of that speech to speech before a government body, or allow protection for speech made anywhere.[23] While some states require the award of attorney's fees, others do not.[24] Further, laws vary in what the grant of a motion does, as some allow for pleadings to be amended after the grant of an "anti-SLAPP" motion.[25]

18. *See id*.
19. *See id.*
20. *See* Biché, *supra* note 10, at 429.
21. *Id*. at 435.
22. *See State Anti-SLAPP Reference Chart*, *supra* note 13.
23. *See id.*
24. *See id.*
25. *See id.*

B. The Federal Rules of Civil Procedure

Federal courts declining to apply state "anti-SLAPP" laws have primarily rejected the statues as conflicting with Federal Rules of Civil Procedure 12(b)(6) and 56.[26] Federal Rule of Civil Procedure 12(b)(6) provides that "a party may assert the following defenses by motion . . . failure to state a claim upon which relief can be granted."[27] Federal Rule of Civil Procedure 56 allows a party to move for judgement as a matter of law "if the movant shows that there is no genuine dispute as to any material fact."[28] The result of a successful motion under either rule is dismissal of a claim or complaint as a whole.[29]

C. The Jurisdiction of the Federal Courts

Federal district courts have original jurisdiction in all civil actions between citizens of different states where the amount in controversy exceeds the value of $75,000.[30] When the filer of a "SLAPP" suit files a complaint, their goal is not to win the case, but to force the target to endure the process of litigation, so satisfying the amount in controversy requirement would be simple. Further, if the participation that the filer seeks to silence is not limited to one state, it is likely that they could select a target in a state different from their own and achieve the requisite "complete diversity."[31]

By choosing a federal forum for a "SLAPP" case, the Plaintiff is forcing a conflict of state and federal laws. If the defendant seeks to rely on a state "anti-SLAPP" protection, the result will vary based on what circuit the district court is located in.[32]

26. *See* FED. R. CIV. P. 12(b)(6), 56(a).

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

28. FED. R. CIV. P. 56(a).

29. *See, e.g.*, Advanced Cardiovascular Sys. v. SciMed Life Sys., 988 F.2d 1157, 1160 (Fed. Cir. 1993) (citing FED. R. CIV. P. 12(b)(6)) ("The purpose of the [12(b)(6) motion] is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity.").

30. *See* 28 U.S.C. § 1332(a).

31. *See generally* Strawbridge v. Curtiss, 7 U.S. 267, 267–68 (1806); Lincoln Prop. Co. v. Roche, 546 U.S. 81, 81 (quoting 28 U.S.C. § 1332(a)(1)) (citing *Strawbridge*, 7 U.S. at 267) ("[s]ince Strawbridge v. Curtiss . . . this Court has read the statutory formulation 'between citizens of different States' . . . to require complete diversity between all plaintiffs and all defendants").

32. *See State Anti-SLAPP Reference Chart*, *supra* note 13 (demonstrating that different states have different SLAPP requirements and procedures).

D. Resolving Conflicts of State and Federal Law

When state and federal laws conflict in diversity jurisdiction cases, federal courts will apply state substantive law and federal procedural law.[33] Further, in diversity jurisdiction cases, the outcome in federal court should be "substantially the same" at it would have been if it were tried in a state court.[34] When sitting in diversity jurisdiction, courts must attempt to preserve the substance of state laws while also considering the essential characteristics of federal courts.[35]

As Justice Brandeis acknowledged writing for the Supreme Court in *Erie*, "the line between procedural and substantive law is hazy."[36] There are instances when a law does not fit into one category or the other perfectly.[37] This difficulty in determining whether a rule is procedural or substantive is particularly evident in the "anti-SLAPP" protection context.[38]

When the federal law at issue is a federal rule, a court must first determine whether an actual conflict exists between the state law and federal rule.[39] If there is no conflict, the *Erie* doctrine is applied, and a federal court should apply those state laws which govern procedure.[40] If there is a conflict, the court must determine if the rule is valid under the U.S. Constitution and the Rules Enabling Act.[41] So long as the federal rule is valid, it will displace the state law.[42]

33. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

34. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

35. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 539 (1958) (quoting Herron v. S. Pac. Co., 283 U.S. 91, 94 (1931)) (first citing 28 U.S.C. § 724 (1926) (superseded by current 28 U.S.C. tit. I, R. 2.1); then citing 28 U.S.C. § 725 (1926) (current version at 28 U.S.C. § 1652)).

36. *Erie R.R. Co.*, 304 U.S. at 92 (citing Wayman v. Southard, 23 U.S. (1 Wheat.) 1 (1825)).

37. *See* Diamond Ranch Acad., Inc. v. Filer, 117 F. Supp. 3d 1313, 1318 (D. Utah 2015).

38. *Id.* ("[a]n anti-SLAPP statute is typically a hybrid procedural/substantive law, so application of the *Erie* rules is more complicated").

39. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980) (citing Hanna v. Plumer, 380 U.S. 460 (1965)).

40. *See id.* (citing *Hanna*, 380 U.S. 460).

41. *Hanna*, 380 U.S. at 463–64 (first citing FED. R. CIV. P. 4(d)(1); then citing 28 U.S.C. § 2072; and then citing U.S. CONST.)

42. *See id.* at 471 (first citing FED. R. CIV. P.; then citing 28 U.S.C. § 2072; and then citing U.S. CONST.).

The principles governing conflicts of state and federal laws were further complicated by a plurality of Supreme Court opinions in *Shady Grove*.[43] A majority of the Justices found that the federal rule at issue preempted the state law, but no set of reasoning was able to satisfy five justices.[44] Justice Scalia stated that where the federal rule "really regulates procedure," it must always be applied "regardless of its incidental effect[s]".[45] In contrast, Justice Stevens wrote that courts should apply the federal rules "with some degree of 'sensitivity to important state interests and . . . policies.'"[46] Following the decision, courts employed language from both approaches.[47]

II. THE NEED FOR "ANTI-SLAPP" LAWS AND THE TYPICAL "SLAPP" CASE

One simple fact signifies the importance of the protections afforded by "anti-SLAPP" laws—as one commenter remarked, "[a]nyone who voices his or her opinion on a public issue can become the target of a SLAPP."[48] Further, "[l]egal intimidation of truthful speech is not a hypothetical problem."[49]

In their national study, Professors Pring and Canan found that the typical targets in "SLAPP" cases were "generally not extremists or professional activists," rather, they were "typical, middle-class, even middle-of-the-road Americans."[50]

It is difficult to accurately measure the toll that "SLAPP" cases have taken on citizens. For the targets of the litigation, there can be substantial financial costs, including "attorney's fees, court costs and litigation expenses . . . lost wages, potential credit problems, [and]

43. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 415 (2010) (holding that a state statute that precluded class actions didn't prevent the Federal District Court with diversity jurisdiction from proceeding with a class action).

44. *See id.* at 395–96.

45. *Id*. at 410–11 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

46. *Id*. at 418 (Stevens, J., concurring) (quoting Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 427 n.7 (1996)).

47. *See* Colin Quinlan, Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 388 (2014).

48. Biché, *supra* note 10, at 426.

49. Prather & Bland, *supra* note 12, at 727.

50. Pring & Canan, *supra* note 3, at 940.

insurance cancellations."[51] The litigation can also cause the target "extreme psychological insecurity."[52]

"SLAPPs" do more than harm the lawsuit's target, they impose a demonstrable cost on the rest of society. Bringing non-meritorious claims can burden courts which may already be overloaded.[53] Further, there is the non-financial cost that the "chilling effect" that "SLAPP" cases have on public engagement, which many existing models fail to account for.[54] Another issue is that "SLAPPs actually impede [finding] solution[s]" to real problems.[55] By removing parties from the public forum, filers of "SLAPPs" are eliminating a potential source for solutions.[56]

When a "SLAPP" case is brought in court, the anatomy of a dispute radically changes. A disagreement between the plaintiff and the defendant shifts from a simple discourse to a judicial issue.[57] This means that the dispute moves from a more open and freer public arena to the confined setting of a courtroom.[58] This is consequential because the parties' interactions will now be governed by a strict set of rules.[59] Finally, the tone of the relationship of the parties changes.[60] In addition to being more formal, the communications between the parties will be more adversarial.[61] The interactions of two parties in litigation will obviously be more adversarial than two parties with different perspectives on an issue in a general public form, and this may be especially true when the litigation is over a claim with little or no merit.

III. THE APPLICABILITY OF EXISTING MEASURES IN FEDERAL COURTS

As previously identified, one significant barrier between the aim of "anti-SLAPP" statutes and chilling effect that "SLAPPs" create is the inconsistent application of special "anti-SLAPP" provisions both in federal courts generally and between the federal circuit Courts of

51. *Id*. at 942.
52. *Id*.
53. *See id*. at 943.
54. *See* Biché, *supra* note 10, at 428, 462.
55. Pring & Canan, *supra* note 3, at 943.
56. *See id*.
57. *See* Biché, *supra* note 10, at 428.
58. *See id.*
59. *Id.* ("in fact, one of the reasons why a filer may bring a SLAPP is because the filer believes that he or she has some advantage in the judicial forum").
60. *See id*.
61. *See id.*

Appeals.[62] Further, as will be explained below, the degree of inconsistency between even Circuit Courts reaching the same end result is illustrative of just how unreliable the states' statutes can be at protecting First Amendment Rights, and the necessity of a uniform federal solution.

A. Courts Holding States' Anti-SLAPP Laws are Applicable in Federal Courts

The United States Courts of Appeals for the Ninth and First Circuits have both held state "anti-SLAPP" laws applicable in U.S. District Courts.[63] The 1999 and 2010 cases suggested a promising fate for the protective measures.

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

Lockheed Missiles & Space Co., Inc. ("LMSC"), had several "cost-reimbursable" contracts with various U.S. Agencies.[64] Two LMSC employees, Margaret A. Newsham and Martin Overbeek Bloem, filed a *qui tam* action against LMSC, alleged the corporation had filed millions of dollars in false claims for labor costs, billing the government for the hours.[65] In an answer to Newsham and Bloem's complaint, LMSC asserted four counterclaims, including breach of duties imposed by fiduciary obligations, statute, and contract; and a breach of the implied covenant of good faith.[66] Newsham and Bloem moved to strike and obtain attorneys' fees under California's anti-SLAPP statute following the dismissal of LMSC's counterclaims.[67] The District Court denied the motion, and Newsham and Bloem appealed to the United States Court of Appeals for the Ninth Circuit.[68]

The Ninth Circuit first asked whether application of the anti-SLAPP statute would result in a "direct collision" with Federal Rules 8, 12, and 56.[69] The Court concluded that there was no such collision,

62. *See* Biché, *supra* note 10, at 428; Vining & Matthews, *supra* note 13.

63. *See generally* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999); Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010).

64. *See Newsham*, 190 F.3d at 966.

65. *See id.*

66. *See id.* at 967.

67. *See id.* (citing CAL. CIV. PROC. CODE § 425.16(c) (Deering 1999)).

68. *See id.*

69. *Newsham*, 190 F.3d at 972 (first citing Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980); then citing Olympic Sports Prods., Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 914 (9th Cir. 1985); and then citing FED. R. CIV. P. 8, 12(b)(6), 56(a)).

as the special motion to strike and attorneys' fees provision could "exist side by side . . . each controlling its own intended sphere of coverage without conflict."[70] The Court explained that if a litigant did not prevail on the anti-SLAPP motion, that litigant would remain free to utilize a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment.[71] In other words, the application of the anti-SLAPP provisions would not interfere with the operation of the federal rules.[72] The opinion acknowledged that the state provisions and federal rules "serve similar purposes, namely the expeditious weeding out of meritless claims before trial," but nevertheless concluded that there was no "direct collision."[73] The Court also emphasized that the state statutes aim to protect an interest not addressed directly by the Federal Rules of Civil Procedure□"the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'"[74]

Following the conclusion that there was no collision between the state and federal rules, the Court next assessed whether the application of the state provisions would further the twin purposes of the *Erie* rule, "discouragement of forum-shopping and avoidance of inequitable administration of the law."[75] The Court explained that the aims of *Erie* would be furthered by the application of the anti-SLAPP rule which "adds an additional, unique weapon to the pretrial arsenal."[76] The Court remarked the statute sought to further a substantive state interest, and the alleged SLAPP filer failed to identify any federal interest that would be undermined by the application of the state provisions.[77] Concerning forum shopping, the Court observed "[p]lainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in brining meritless SLAPP claims would

70. *Id*. (quoting *Walker*, 446 U.S. at 752) (first citing CAL. CIV. PROC. CODE § 425.16(c) (Deering 1999); then citing FED R. CIV. P. 8, 12, 56).

71. *See id*. (first citing CIV. PROC. § 425.16(b)–(c); then citing FED. R. CIV. P. 12, 56).

72. *See id*.

73. *Id*.

74. *Newsham*, 190 F.3d at 973 (citing CIV. PROC. § 425.16(a)).

75. *Id*. (quoting *Hanna*, 380 U.S. at 468) (citing Gasperini v. Ctr. for Human., 518 U.S. 415, 428 n.8 (1996)).

76. *Id*. (quoting CIV. PROC. § 425.16(b)–(c)).

77. *See id*. (citing Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537–40 (1958); then citing CIV. PROC. § 425.16(a); and then citing *Gasperini*, 518 U.S. at 415).

have a significant incentive to shop for a federal forum."[78] With regard to equitable administration of the law, the Court noted that "a litigant otherwise entitled to the protections of the anti-SLAPP statute would find considerable disadvantage in a federal proceeding" if the state laws were not applied.[79] The Ninth Circuit therefore concluded that California's anti-SLAPP motion to strike and fees provisions are applicable in Federal Court, and remanded the case to the District Court.[80]

The Ninth Circuit's decision in *Newsham* pre-dated the Supreme Court's *Shady Grove* decision altering the *Erie* analysis, and the cases' legacies remained uncertain.[81] While *Newsham* was never explicitly overruled, in a 2013 dissent to an order denying a rehearing en banc, Circuit Judge Watford, joined by Chief Judge Kosinski and Circuit Judges Paez and Bea wrote that California's anti-SLAPP statute was no longer applicable in federal courts.[82] The dissent stated that "California's anti-SLAPP statute creates the same conflicts with the Federal Rules that animated the Supreme Court's ruling in *Shady Grove*."[83]

The Court of Appeals for the Ninth Circuit revisited the applicability of state anti-SLAPP laws in 2020.[84] In 2011, Texas resident Stephanie Clifford agreed to an interview with a magazine to discuss an alleged affair between her and then New York resident Donald Trump.[85] In 2018, Clifford alleged she was confronted about the interview in a parking lot, and Trump accused Clifford of lying via Twitter.[86] Clifford sued Trump for defamation in the Southern District of New York.[87] The parties later stipulated to transfer the case to a California District Court.[88] Trump moved to dismiss the case under the Texas Citizens Participation Act ("TCPA"), Texas' anti-SLAPP

78. *Id*.

79. *Newsham*, 190 F.3d at 973 (citing CIV. PROC. § 425.16).

80. *See id*.

81. *See generally id.* (decided in 1999); Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010) (decided in 2010).

82. *See* Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1192 (9th Cir. 2013) (Watford, J., dissenting) (citing *Shady Grove*, 559 U.S. 393).

83. *See id*. at 1189 (citing *Shady Grove*, 559 U.S. 393).

84. *See generally* Clifford v. Trump, 818 Fed. App'x 746 (9th Cir. 2020).

85. *See id*. at 747–48.

86. *Id.*

87. *See id*. at 747–48; *see also* Clifford v. Trump, 339 F. Supp. 3d 915, 920 (C.D. Cal. 2018).

88. *Clifford*, 339 F. Supp. 3d at 920.

statute.[89] The District Court granted Trump's motion.[90] Clifford appealed the District Court's decision, which the Ninth Circuit affirmed.[91] The Circuit Court's memorandum declared "[w]e have long held that analogous procedures in California's anti-SLAPP law apply in federal court" citing *Newsham* and clarifying its stance in the circuit split.[92] Clifford petitioned the Supreme Court for a Writ of Certiorari, but the petition was denied in February of 2021.[93] The Ninth Circuit further solidified its opinion in *Newsham* in 2021, affirming a District Court's decision to grant a motion to dismiss under Nevada's anti-SLAPP statute.[94]

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

When elementary school principal Pat Godin's employment contract was terminated early, she filed a complaint alleging a violation of state law and her civil rights under § 1983 against the school's union and Board of Directors, and for interference with advantageous contractual relationships and defamation against three individuals, all in a U.S. District Court.[95] The individual defendants filed a motion to dismiss under Maine's anti-SLAPP statute, and the District Court denied the motion, holding the special motion to dismiss provision conflicts with Federal Rules 12 and 56 and could not be

89. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West 2011)).

90. *See id.* at 929.

91. *Clifford*, 818 Fed. App'x at 747 (citing 28 U.S.C. § 1291).

92. *See id.* (first citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999); then citing S&S Emergency Training Sols., Inc. v. Elliot, 564 S.W.3d 843, 847 (Tex. 2018); and then citing Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1120 (Cal. 2011)). The Court acknowledged the Fifth Circuits recent holding in the opposite direction, but nonetheless concluded "[w]e are bound to follow our own precedent, which requires us to apply the TCPA." *Id*. (first citing Klocke v. Watson, 936 F.3d 240, 244–47 (5th Cir. 2019); then citing *Newsham*, 190 F.3d at 972; and then citing FED. R. CIV. P. 8, 12, 56).

93. *See* Clifford v. Trump, 141 S. Ct. 1374 (2021).

94. *See* Walker *ex rel.* United States v. Intelli-Heart Servs., Inc., No. 20-15688, 20-16341, 2021 U.S. App. LEXIS 28856, at *2 (9th Cir. Sept. 22, 2021). Plaintiff-Appellant Terrance Walker filed a Petition for Writ of Certiorari to the Supreme Court on December 2, 2021. The petition is available at https://www.supremecourt.gov/DocketPDF/21/21-832/204158/20211206135140524_20211206-134909-95755286-00001120.pdf (last visited Mar. 28, 2020). *See also* NEV. REV. STAT. §§ 41.635–720 (2022).

95. *See* Godin v. Schencks, 629 F.3d 79, 80–81 (1st Cir. 2010) (citing 42 U.S.C. § 1983).

applied in Federal Court.[96] The defendants appealed the denial of the motion to the United States Court of Appeals for the First Circuit.[97]

The First Circuit began its analysis by remarking that the issue of application of the anti-SLAPP statute was "not the classic *Erie* question," because the state statute "governs both procedure and substance."[98] Applying the Supreme Court's guidance articulated in *Shady Grove*, the First Circuit assessed whether the federal rules are "sufficiently broad to control the issue before the Court."[99] The Court concluded neither Federal Rule 12 nor 56 were meant to control the particular issues addressed by Maine's anti-SLAPP rule.[100] The Court reasoned the Federal Rules do not "attempt[] to answer the same question" or "address the same subject" as the Maine statute.[101] The Court classified Rules 12 and 56 as "general federal procedures governing all categories of cases," different from Section 556 which provided "special procedures for state claims based on a defendant's petitioning activity."[102] The Court emphasized that the Maine special motion to dismiss does not "seek to displace the Federal Rules," and that the Federal Rules would not "cease to function" if the state rule were to be applied.[103] This argument was further supported by the existence of Maine's own general procedural rules which are effectively equivalent to Federal Rules 12(b)(6) and 56□the anti-SLAPP provision therefore cannot be seen as substitute to the Federal Rules, but rather "a supplemental and substantive rule to provide added protections . . . to defendants who are named parties because of constitutional petitioning activities."[104]

The opinion further distinguished the state and federal rules, finding "[Federal] Rule 12(b)(6) serve to provide a mechanism to test

96. *See id*. at 82 (first citing ME. STAT. tit. 14, § 556 (2010); then citing FED. R. CIV. P. 12, 56).

97. *See id*. (citing ME. STAT. tit. 14, § 556).

98. *Id*. at 86. (first citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); then citing Hanna v. Plumer, 380 U.S. 360 (1965)).

99. *Id*. (quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 439 (2010)).

100. *See Godin*, 629 F.3d at 86 (first citing FED. R. CIV. P. 12(b)(6), 56; then citing tit. 14, § 556).

101. *Id*. at 88 (quoting *Shady Grove*, 599 U.S. at 399, 402).

102. *Id.* at 88 first citing FED. R. CIV. P. 12(b)(6), 56; then citing tit. 14, § 556).

103. *Id*. (first citing *Shady Grove*, 599 U.S. 393; then citing tit. 14, § 556; then citing FED. R. CIV. P. 12(b)(6), 56(a); and then citing Morel v. Daimler Chrysler AG, 565 F.3d 20, 24 (1st Cir. 2009)).

104. *Id*. (first citing ME.. R. CIV. P. 12, 56; then citing FED.. R. CIV. P. 12, 56).

the sufficiency of the complaint" while Section 556 "provides a mechanism . . . to dismiss a claim on an entirely different basis: that the claims in question rest on the defendant's protected petitioning conduct."[105] Further, "[Federal] Rule 56 creates a process . . . to secure judgment before trial on the basis that there are no disputed material issues of fact, and as a matter of law, one party is entitled to judgment," different from Section 556, which "serves the entirely distinct function of protecting those specific defendants that have been targeted with litigation on the basis of their protected speech."[106] The special dismissal provision requires a court to consider whether the SLAPP target's conduct "had a reasonable basis in fact or law" and whether that conduct "caused actual injury"—inquiries easily distinguishable from the summary judgement issue.[107]

The Court also noted that Section 556 includes "both substantive and procedural aspects," unlike the Federal Rules which govern only procedure.[108] Specifically, Maine's anti-SLAPP statute determines which party bears the burden of proof, defines the scope of that burden, and provides substantive legal defenses.[109] The Court also stated that Section 556 is "so intertwined with a state right or remedy," and could not be displaced by the Federal Rules of Civil Procedure.[110]

Finally, the Court considered whether the application of Section 556 would serve the twin aims of *Erie*.[111] Similar to the Ninth Circuit, the First Circuit concluded that declining to apply the anti-SLAPP provision would result in an "inequitable administration of justice between a defense asserted in state court and the same defense asserted

105. *Godin*, 629 F.3d at 89 (first citing FED. R. CIV. P. 12(b)(6); then citing Iqbal v. Ashcroft, 556 U.S. 662, 6788 (2009); and then citing tit. 14, § 556).

106. *Id*. (first citing tit. 14, § 556; then citing FED. R. CIV. P. 56(a)).

107. *Id*. (citing tit. 14, § 556).

108. *Id*. (citing tit. 14, § 556).

109. *Id*. (first citing FED. R. CIV. P. 12(b)(6), 56; then citing tit. 14, § 556; and then citing Coll v. PB Diagnostic Sys., Inc., 50 F.3d 1115, 1121 (1st Cir. 1995); and then citing Palmer v. Hoffman, 318 U.S. 109, 117 (1943); and then citing Am. Title Ins. Co. v. E.W. Fin. Corp., 959 F.2d 345, 348 (1st Cir. 1992)). *See also Palmer*, 318 U.S. at 117 (holding the allocation of the burden of proof is substantive in nature and therefore properly controlled by state law).

110. *Godin*, 629 F.3d at 89 (quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 599 U.S. 393, 423 (2010)) (first citing tit. 14, § 556; then citing FED. R. CIV. P. 12(b)(6), 56(a)).

111. *See id*. at 91 (first quoting Com. Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 773 (1st Cir. 1994); then quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988)) (first citing tit. 14, § 556; then citing FED. R. CIV. P. 12(b)(6), 56(a)).

in federal court" and that "incentives for forum shopping would be strong [as] electing to bring state-law claims in federal as opposed to state court would allow a plaintiff to avoid Section 556's burden shifting framework, rely upon the common law's per se damages rule, and circumvent any liability for a defendant's attorney's fees or costs."[112] Accordingly, the First Circuit held that Maine's anti-SLAPP statute could properly be applied in Federal Court, and reversed the District Court's order and remanded the case.[113]

B. Courts Holding States' Anti-SLAPP Laws Inapplicable in Federal Courts

Despite the Ninth and First Circuit's holdings, in more recent years, the United States Courts of Appeals for the District of Columbia, Tenth, Eleventh, Fifth, and Second Circuits have all declined to apply "anti-SLAPP" statutes in diversity jurisdiction cases.[114] The holdings have created a circuit split, with support weighing in favor of declining to apply the protective measures.

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

Foreign Policy Group, LLC, published an article about the sons of Palestinian President Mahmoud Abbas, Yasser and Tarek Abbas.[115] The article discussed the sons' credentials, business ventures, and "conspicuous wealth."[116] Yasser Abbas filed a complaint in the U.S. District Court for the District of Columbia against the group and the article's author alleging defamation under D.C. law.[117] The Defendant moved to dismiss the complaint under D.C.'s anti-SLAPP provision

112. *Id*. at 92 (first citing tit. 14, § 556; then citing *Com. Union*, 41 F.3d at 773).

113. *See id*. (first citing FED. R. CIV. P. 12(b)(6), 56; then citing tit. 14, § 556; and then citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

114. *See generally* Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328 (D.C. Cir. 2015); Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659 (10th Cir. 2018); Carbone v. CNN, Inc., 910 F.3d 1345 (11th Cir. 2018); Klocke v. Watson, 936 F.3d 240 (5th Cir. 2019); La Liberte v. Reid, 966 F.3d 79 (2d Cir. 2020).

115. *See Abbas*, 783 F.3d at 1332 (citing Jonathan Schanzer, *The Brothers Abbas*, FOREIGN POL'Y (June 5, 2012, 4:06 PM), https://foreignpolicy.com/2012/06/05/the-brothers-abbas/).

116. *Id*. at 1333. Specifically, the article asked, "[a]re the sons of the Palestinian president growing rich off their father's system?" and, "[h]ave they enriched themselves at the expense of regular Palestinians–and even U.S. taxpayers?" *Id*. at 1332–33. (quoting Schanzer, *supra* note 117).

117. *See id*. at 1333.

and Federal Rule 12(b)(6), and the U.S. District Court for the District of Columbia applied the anti-SLAPP statute and dismissed the case.[118] Abbas appealed to the United States Court of Appeals for the District of Columbia Circuit.[119]

Applying the test employed in *Shady Grove*, the D.C. Circuit assessed whether the D.C. rule "answered the same question" as the Federal Rules of Civil Procedure.[120] The Circuit Court concluded that the two sets of rules did indeed answer the same question, and in different ways.[121] The Court stated "the D.C. Anti-SLAPP Act establishes the circumstances under which a court must dismiss a plaintiff's claim before trial," because the act requires a court to dismiss a claim if "the plaintiff does not have a likelihood of success on the merits."[122] By contrast, the Federal Rules do not require a plaintiff to demonstrate a likelihood of success on the merits□"[u]nder the Federal Rules, a plaintiff is generally entitled to trial if [they meet] the Rules 12 and 56 standards to overcome a motion to dismiss or [motion] for summary judgment."[123] The opinion explained that this "entitlement" would be "nullifie[d]" in certain cases if the anti-SLAPP rules were applied in Federal Courts.[124] The anti-SLAPP rule, in effect, "conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial," rendering the act inapplicable in Federal cases.[125]

The D.C. Circuit addressed and rejected the Defendant's arguments about the applicability of the act.[126] The Court rejected the proposition that the act was functionally a summary judgment test which simply adds a right to attorney's fees in certain cases, reasoning that the "likelihood of success" standard in the D.C. rule is a more difficult burden for plaintiff's to meet than the Federal Rule

118. *See id*. (first citing D.C. CODE § 16-5502 (2012); then citing FED. R. CIV. P. 12(b)(6); and then citing Abbas v. Foreign Pol'y Grp., LLC, 975 F. Supp. 2d 1, 20 (D. D.C. 2013)).

119. *Abbas*, 783 F.3d at 1332.

120. *Id*. at 1333 (quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 398–99 (2010)) (citing Hanna v. Plumer, 380 U.S. 460, 463–64 (1965)).

121. *Id*. at 1333–34 (first citing § 16-5502; then citing FED. R. CIV. P. 12, 56).

122. *Id*. at 1333 (quoting § 16-5502(b)).

123. *Id*. at 1334 (citing FED. R. CIV. P. 12, 56).

124. *Abbas*, 783 F.3d at 1334.

125. *Id*. (citing § 16-5502)).

126. *See id*. at 1334–36.

standards.[127] The Defendant had also argued that the motion to dismiss provision concerned "a substantive D.C. right . . . a form of qualified immunity shielding participants in public debate from tort liability."[128] The Court distinguished the protection from qualified immunity however, as "[q]ualified immunity (on its own) does not tell a court what showing is necessary at the motion to dismiss or summary judgment stages" and can only affect a case through the use of a Federal Rule of Procedure.[129] By contrast the D.C. provision supplies its own "procedural mechanism" to dismiss cases.[130] The Defendants also attempted to use Federal Acts which effectively modified pleading standards in certain categories of cases to illustrate that the Federal Rules "do not foreclose the application of other pleading standards."[131] The Court also rejected this argument, distinguishing Acts of Congress from the D.C. Act.[132] Finally, the Circuit Court rejected the Defendant's attempts to persuade it to apply the reasoning of other Circuits allowing the application of state anti-SLAPP rules in Federal Court, declaring that it was not persuaded by the reasoning of the First Circuit in Godin or the Ninth Circuit in *Newsham*.[133]

Finally, the Court applied the second step of the *Shady Grove* analysis, assessing whether Federal Rules 12 and 56 are valid under the Rules Enabling Act.[134] The Court concluded that the Federal Rules were valid, therefore those Rules would govern pretrial dismissal, and D.C.'s special motion to dismiss provision could not be applied in

127. *Id*. at 1334–35 (first citing § 16-5502; then citing FED. R. CIV. P. 12, 56).

128. *Id*. at 1335.

129. *Abbas*, 783 F.3d at 1335 (citing FED. R. CIV. P. 12, 56).

130. *Id*. (quoting Doe No. 1 v. Burke, 91 A.3d 1031, 1036 (D.C. 2014)) (citing § 16-5502).

131. *Id*. (citing Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995)).

132. *Id*. ("Congress, unlike the States or the District of Columbia, 'has the ultimate authority over the Federal Rules of Civil Procedure.'"). *Id*. (quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 599 U.S. 393, 400 (2010)).

133. *Abbas*, 783 F.3d 1335–36 (first citing Godin v. Schenks, 629 F.3d 79, 81, 92 (1st Cir. 2010); then citing Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 168–69 (5th Cir. 2009); and then citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999); and then citing 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4509 (2d ed. 2014); and then citing Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1188 (9th Cir. 2013); and then citing Makaeff v. Trump Univ., LLC, 715 F.3d 254, 275 (9th Cir. 2013)). *See generally Godin*, 629 F.3d at 79; *Newsham*, 190 F.3d at 963.

134. *See id*. at 1336 (first citing *Shady Grove*, 559 U.S. at 407; then citing 28 U.S.C. § 2072(a)–(b)).

Federal Court.[135] After rendering the anti-SLAPP act inapplicable, the D.C. Circuit nonetheless dismissed Abbas' complaint under Federal Rule 12(b)(6) with prejudice.[136]

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

Lightning Dock Geothermal, LLC ("LDG"), a Delaware company, developed a geothermal power generating project in New Mexico relying on geothermal mineral rights leased by the United States Bureau of Land Management.[137] AmeriCulture, Inc. ("AmeriCulture"), a New Mexico corporation, purchased land overlying some of the minerals released to LDG to develop and operate a fish farm.[138] LDG and AmeriCulture entered into a "Joint Facility Operating Agreement" which would allow AmeriCulture to utilize the land's geothermal resources without interfering of competing with LDG's development project.[139] After disputes arose, Plaintiff LDG and its sole member, Los Lobos Renewable Power, LLC ("Plaintiffs") sued Defendant AmeriCulture and its director, Damon Seawright, ("Defendants") alleging infractions of New Mexico state law in federal court, invoking diversity jurisdiction.[140] Defendants responded to the complaint by filing a special motion to dismiss under New Mexico's anti-SLAPP statute.[141] The District Court denied the Defendants' motion, stating that the procedural provision does not apply in United States Courts.[142] Defendants appealed to the United States Court of Appeals for the Tenth Circuit.[143]

The Tenth Circuit began its analysis of the applicability of the state's anti-SLAPP rule by stating that "after *Erie* [], the 'overriding consideration' is 'whether . . . the outcome would be substantially the same, so far as legal rules determine the outcome of a litigation, as it

135. *See id*. (first citing *Shady Grove*, 559 U.S. at 404; then citing FED. R. CIV. P. 12, 56; and then citing D.C. CODE § 16-5502 (2012)).

136. *Id*. at 1338 (citing FED. R. CIV. P. 12(b)(6)).

137. *See* Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 661 (10th Cir. 2018).

138. *Id*.

139. *Id*.

140. *Id*. (citing 28 U.S.C. § 1332).

141. *Id*. at 662. (citing N.M. STAT. ANN. §§ 38-2-9.1–.2 (2022)).

142. *Los Lobos Renewable Power*, 885 F.3d at 662 (citing Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 2016 U.S. Dist. LEXIS 193460, at *2 (D. N.M. 2016)).

143. *Id*.

would be if tried in state court.'"[144] Therefore, "[s]tate laws that solely address procedure and do not 'function as part of the State's definition of substantive rights and remedies' are inapplicable in federal diversity actions."[145] The Circuit Court stated "[t]he plain language of the New Mexico anti-SLAPP statute reveals that the law is nothing more than a procedural mechanism designed to expedite the disposal of frivolous lawsuits aimed at threatening free speech rights."[146] The Court relied on the structure of the anti-SLAPP statute to support its conclusion, reasoning that the first subsection mandates certain procedures in certain cases, an indisputably procedural objective, and that the latter two subsections were entirely dependent on the procedural mandate in the former subsection.[147] The Circuit Court also emphasized a New Mexico Supreme Court's decision which held that the SLAPP targets in that case were "entitled to the *procedural* protections of the New Mexico [anti-SLAPP] statute" and explained that, in that case, the anti-SLAPP statute provided the *procedural* protection, but that the *Noerr-Pennington* doctrine was the mechanism used to protect *substantive* First Amendment Rights.[148]

The Circuit Court acknowledged that the aim of the anti-SLAPP statute is to "spare those who exercise their free speech rights . . . from unwarranted and harassing litigation that threatens to chill the exercise of such rights," but that the statute did so "through purely procedural means."[149] The Court also distinguished New Mexico's anti-SLAPP statute from statutes like California's, which "shift substantive burdens of proof," as the New Mexico statute does not affect a Court's assessment of the merits of an alleged SLAPP.[150] In sum, the Circuit reasoned that subsection A only "demands [] expedited procedures;" subsection B allows for the imposition of sanctions; and subsection C provides for an "expedited appeal" when a trial court rules or declines

144. *Id*. at 668 (first quoting Berger v. State Farm Mut. Auto Ins. Co., 291 F.2d 666, 668 (10th Cir. 1961); then quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)).

145. *Id*. (citing Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 416–17 (2010)).

146. *Id*. at 668–69 (citing N.M. STAT. ANN. §§ 38-2-9.1 to -9.2 (2022)).

147. *Los Lobos Renewable Power*, 885 F.3d at 669 (citing §§ 38-2-9.1 to -9.2).

148. *Id*. at 669–670 (quoting Cordova v. Cline, 396 P.3d 159, 162 (N.M. 2017)) (citing U.S. CONST. amend. I).

149. *Id*. at 670 (citing *Cordova*, 396 P.3d at 159).

150. *Id*. at 670 (first citing §§ 38-2-9.1 to -9.2; then citing *Makaeff*, 715 F.3d at 261; and then citing CAL. CIV. PROC. CODE § 425.16 (Deering 2021)).

to rule on a special motion—none of which are substantive in nature.[151] The Tenth Circuit rejected Defendants' argument that the statute intended to create a "right not to stand trial," distinguishing civil immunity (or an exemption from liability) from a procedural tool to dismiss a claim.[152] The Court underlined its reasoning by stating New Mexico statute "is not designed to influence the outcome of an alleged SLAPP suit but only the timing of that outcome."[153] The Court concluded that the New Mexico statute is a "procedural mechanism for vindicating existing rights and nothing more," and affirmed the District Court's denial of Defendants' anti-SLAPP motion.[154]

3. The United States Court of Appeals for the Eleventh Circuit

Cable News Network, Inc. ("CNN") published a series of news reports, articles, and media posts which incorrectly claimed St. Mary's Medical Center's pediatric open-heart surgery mortality rate was more than three times the national average.[155] The Medical Center's CEO, David Carbone, filed a defamation complaint against CNN in a U.S. District Court in Georgia.[156] CNN moved to strike Carbone's complaint under Georgia's anti-SLAPP statute, or alternatively to dismiss under Federal Rule 12(b)(6).[157] The District Court denied CNN's motion on both grounds, ruling, in part, that the anti-SLAPP statute directly conflicts with Rule 12 rendering it inapplicable in Federal Court.[158] CNN appealed to the United States Court of Appeals for the Eleventh Circuit.[159]

The Circuit Court's analysis of the Georgia statute followed the Supreme Court's guidance in *Shady Grove*, first assessing whether the state statute "answers the [same] question" as a Federal Rule.[160] The

151. *Id*. at 669–71 (citing § 38-2-9.1A–C).

152. *Los Lobos Renewable Power*, 885 F.3d at 672.

153. *Id*. at 673.

154. *Id*.

155. Carbone v. CNN, Inc., 910 F.3d 1345, 1347–48 (11th Cir. 2018). The CNN reports compared the program's mortality rate for open heart surgeries with the national rate of mortality for all heart surgeries, which included both open heart surgeries, and less risky closed heart surgeries. *Id.*

156. *Id*. at 1347.

157. *Id*. at 1348 (first citing GA. CODE ANN. § 9-11-11.1 (West 2021); then citing FED. R. CIV. P. 12(b)(6)).

158. *Id.* at 1347 (first citing § 9-11-11.1; then citing FED. R. CIV. P. 12(b)(6)).

159. *Carbone*, 910 F.3d at 1347.

160. *Id*. at 1349 (quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010)).

Circuit held that it could not apply the dismissal provision in Georgia's statute as the "question in dispute is whether Carbone's complaint states a claim for relief supported by sufficient evidence to avoid pretrial dismissal," a question which is answered by Federal Rules 8, 12, and 56 together.[161] In analysis similar to that employed by the D.C. Circuit in *Abbas*, the Court stated the Georgia statute "answer[ed] the same question" as the Federal Rules "in a way that conflicts with those Rules."[162] In sum, "[Federal] Rules 8, 12, and 56 express 'with unmistakable clarity' that proof of probability of success on the merits 'is not required in federal courts' to avoid pretrial dismissal, and that the evidentiary sufficiency of a claim should not be tested before discovery," and the Georgia motion to strike provision directly conflicts with the Federal Rules by requiring a demonstration of probability of success.[163]

The Eleventh Circuit rejected CNN's contention that the state statute and federal rules have a "'separate purpose' and operate[] in a separate 'sphere of coverage.'"[164] CNN argued that "'[t]he object of [the Federal Rules] is to winnow claims and defenses over the course of litigation,' while the object of the anti-SLAPP law is to protect the rights to petition and freedom of speech," also citing Georgia's equivalent motion to dismiss and summary judgment procedures.[165] The problem with that argument, according to the Eleventh Circuit, is that regardless of the purposes of the individual sets of rules, "the Georgia law pursues its special purpose by winnowing claims and defenses in the course of litigation, just like [Federal] Rules 12 and 56," the aim is "irrelevant" when the cause is advanced "by imposing a requirement on a plaintiff's entitlement to maintain a suit" greater than that imposed by the Federal Rules.[166] The Eleventh Circuit also found that the Georgia statute did not create any substantive right, and its existence affects litigation only by providing a procedural device

161. *Id*. at 1350 (citing FED. R. CIV. P. 8, 12, 56).

162. *Carbone*, 910 F.3d at 1350 (quoting *Shady Grove*, 559 U.S. at 401) (citing FED. R. CIV. P. 8, 12,56); *see also* Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1333–34 (D.C. Cir. 2015)).

163. *Carbone*, 910 F.3d at 1351 (quoting Hanna v. Plumer, 380 U.S. 460, 470 (1965)).

164. *Id*. at 1354 (quoting Walker v. Armco Steel Corp,, 446 U.S. 740, 752 & n.13 (1980)).

165. *Id*. (citing GA. CODE ANN. §§ 9-11-12(b)(6) (2021); *id.* § 9-11 -56).

166. *Id*. (first citing GA. CODE § 9-11-11.1; then citing FED. R. CIV. P. 12, 56; and then citing U.S. CONST. amend. I; and then citing *Shady Grove*, 559 U.S. at 403).

to help a defendant "avoid liability for conduct associated with the exercise of [rights to petition and freedom of speech]."[167]

Finally, the Court found that Federal Rules 8, 12, and 56 comply with the Rules Enabling Act as required by *Hanna* and its progeny, concluding the Federal Rules must apply to the case.[168] The Court of Appeals also concluded that it lacked jurisdiction to review the District Court's denial of CNN's motion to dismiss under Rule 12(b)(6).[169] Accordingly, it affirmed the denial of the motion to strike and dismissed the appeal of the denial of the motion to dismiss.[170]

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

University of Texas at Arlington student Thomas Klocke committed suicide after the University refused to grant him permission to graduate.[171] Thomas Klocke had been punished by the University for an alleged Title IX violation following an allegedly false charge of homophobic harassment by Nicholas Watson.[172] Thomas Klocke's father, Wayne Klocke, filed a complaint against the University for Title IX violations and Watson for defamation in a Texas U.S. District Court.[173] Watson filed a motion to dismiss and seek attorney's fees under the Texas Citizens Participation Act ("TCPA"), Texas' anti-SLAPP statute.[174] The District Court granted the motion, dismissing the case and awarding expenses, a sanction, and attorney's fees.[175] Klocke appealed the Judgement to the Court of Appeals for the Fifth Circuit.[176]

The applicability of the TCPA in Federal Courts in the Fifth Circuit was an issue of first impression in *Klocke*, however, the Court

167. *Carbone*, 910 F.3d at 1355 (citing § 9-11-11.1).

168. *Id.* at 1356–57 (first citing FED. R. CIV. P. 8, 12, 56; then citing 28 U.S.C. § 2071; and then citing U.S. CONST.).

169. *Id*. at 1357–58 (quoting Smith v. LePage, 834 F.3d 1285, 1292 (11th Cir. 2016).

170. *Id*. at 1359.

171. Klocke v. Watson, 936 F.3d 242, 242 (5th Cir. 2019).

172. *Id*. (citing 20 U.S.C. § 1681).

173. *Id.* at 242–43.

174. *Id*. at 242–43 (first citing 20 U.S.C. § 1681; then citing TEX. CIV. PRAC. & REM. CODE. ANN. §§ 27.001–.011 (West 2022)).

175. *See id*. at 243 (citing CIV. PRAC. & REM. §§ 27.001–.011).

176. *Klocke*, 936 F.3d at 243.

had previously held Louisiana's anti-SLAPP statute applicable.[177] The Court's analysis of the TCPA began with a brief discussion of *Erie* and its progeny, and acknowledged the apparent circuit split on the applicability of various state anti-SLAPP statutes in federal courts.[178] The Fifth Circuit "[found] most persuasive the reasoning of the D.C. Circuit [in *Abbas*]."[179] The opinion reiterated much of *Abbas*' reasoning in analyzing the Texas act, adding "the Federal Rules impose comprehensive, not minimum pleading requirements."[180] In interesting language, the Circuit remarked that "the practical conflict caused by application of the TCPA in federal court is exemplified in this case, where [Defendant] Watson sought dismissal predicated solely on the TCPA without alluding to Rule 12(b)(6). [Plaintiff] Klocke was understandably thrown off balance by this selective choice of procedure."[181]

The Court of Appeals finally concluded Federal Rules 12 and 56 are valid under the Rules Enabling Act, and therefore properly govern the case before it.[182] Accordingly it reversed the District Court's dismissal judgment and remanded the case.[183]

5. The United States Court of Appeals for the Second Circuit

California citizen Roslyn La Liberte, who is "passionate about . . . immigration policies," attended several city council meetings to speak out against a provision in California's SB 54, which limited cooperation between local law enforcement and federal immigration authorities.[184] At one meeting, La Liberte was photographed

177. *Id.* at 244 (first citing Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164, 169 (5th Cir. 2009); then citing LA. CODE CIV. PROC. ANN. art. 971 (2021); and then citing Cuba v. Pylant, 814 F.3d 701, 706, 706 n.6 (5th Cir. 2016); and then citing *id.* at 719; and then citing Block v. Tanenhaus, 867 F.3d 585, 589 n.2 (5th Cir. 2017)).

178. *See id*. at 244–45.

179. *Id*. at 245 (first citing FED. R. CIV. P. 12, 56; then citing Abbas, 783 F.3d 1328, 1333–34 (D.C. Cir. 2015)).

180. *Id*. at 247 (first citing CIV. PRAC. & REM. §§ 27.001–.011; then citing FED. R. CIV. P. 12(b)(6)).

181. *Klocke*, 936 F.3d at 247–48.

182. *Id.* at 248 (first quoting All Plaintiffs v. All Defendants, 645 F.3d 329, 333 (5th Cir. 2011); then quoting *Abbas*, 783 F.3d at 1336) (first citing 28 U.S.C. § 2072(a); then citing FED. R. CIV. P. 12, 56; and then citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987)).

183. *Id*. at 249.

184. La Liberte v. Reid, 966 F.3d 79, 84 (2d Cir. 2020) (citing S.B. 54, 2017 Leg., Reg. Sess. (Cal. 2017)).

interacting with a fourteen-year-old Hispanic teenager, with her mouth open and her hand at her throat in a gagging gesture.[185] The photo was shared on twitter by a social media activist, and went viral.[186] Television personality Joy Reid retweeted Vargas' tweet and posted the photograph on other platforms.[187] La Liberte's attorney demanded that Reid delete the posts and apologize, and she did so that night.[188] La Liberte subsequently filed a defamation claim against Reid in the Eastern District of New York, and the parties agreed to apply California law.[189] Reid moved to strike the defamation claim and sought attorneys' fees under California's anti-SLAPP statute.[190] The District Court struck the claim and imposed fees, and La Liberte appealed to the Court of Appeals for the Second Circuit.[191]

The applicability of an anti-SLAPP statute in federal court was an issue of first impression in the case, however, the Second Circuit had previously vacated the denial of a California special motion to strike on other grounds without addressing applicability in one case, and approved certain aspects of Nevada's anti-SLAPP statute in

185. *Id*. at 84. The tweet containing the photograph was captioned: "'You are going to be the first deported' [and] 'dirty Mexican' [w]ere some of the things they yelled they yelled [sic] at this 14-year-old boy. He was defending immigrants at a rally and was shouted down. Spread this far and wide this woman needs to be put on blast." *Id*.

186. *Id*.

187. *Id*. at 84–85. Reid's first post on Instagram was captioned: "He showed up to a rally to defend immigrants . . . . She showed up too, in her MAGA hat, and screamed, 'You are going to be the first deported' . . . 'dirty Mexican!' He is 14 years old. She is an adult. Make the picture black and white and it could be the 1950s and the desegregation of a school. Hate is real, y'all. It hasn't even really gone away." *La Liberte*, 966 F.3d at 84. Two days later, Reid posted again about La Liberte on Instagram and Facebook, juxtaposing the photograph of La Liberte with another photograph from 1957 of one of the Little Rock Nine walking by a screaming woman in a post captioned: "It was inevitable that this [juxtaposition] would be made. It's also easy to look at old black and white photos and think: I can't believe that person screaming at a child, with their face twisted in rage, is real. By…every one of them were. History sometimes repeats. And it is full of rage. Hat tip to @joseiswriting. #regram #history #chooselove." *Id.* at 84–85.

188. *Id*. at 85.

189. *Id.*

190. *Id*. at 85 (first citing FED. R. CIV. P. 12(b)(6); then citing CAL. CIV. PROC. CODE § 425.16(b)(1)–(c)(1) (Deering 2022)).

191. *La Liberte*, 966 F.3d at 85.

another.[192] The Second Circuit first found that special motion to strike answered the same question as a Federal Rule of Civil Procedure, favorably citing *Abbas* and *Carbone*.[193] The Circuit rejected the argument that the state and Federal Rules could co-exist without conflict, highlighting the dissenting opinion of four Ninth Circuit Justices in *Makaeff* which suggested that *Newsham* is no longer good law.[194]

Finally, the Court of Appeals concluded Federal Rules 12 and 56 comply with the Rules Enabling Act, and accordingly serve as the sole rules governing pre-trial dismissal.[195] The Second Circuit vacated the District Court's judgment and remanded the case.[196]

IV. THE PROBLEM OF THE CIRCUIT SPLIT

The split between Federal Circuit Courts of Appeals on the applicability of different and even the same states' anti-SLAPP provisions leaves the ordinary citizens who the measures aimed to protect, perhaps above all else, confused. While any form of split in authority, either statutory or judicial, can lead to confusion, this danger is magnified in the SLAPP context. The unique problem of the inconsistent application of SLAPP protections are perhaps best illustrated viewed through the lens of the twin aims of *Erie*: forum shopping and inequitable administration of the law.[197]

Improvements in communications technology and the rise of social media allow citizens across the country to voice their opinions on a multitude of public and private interest issues. With an entire

192. *Id.* at 86 n.3 (first citing Liberty Synergistics Inc. v. Microflo Ltd., 718 F.3d 138, 142, 143, 157 (2d Cir. 2013); then citing Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014)).

193. *Id*. at 87 (first quoting Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1333 (D.C. Cir. 2015); then quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 398–89 (2010); and then quoting CIV. PROC. § 425.16(b)(3); and then quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 570 (2007); and then quoting Carbone v. CNN, Inc., 910 F.3d 1345, 1353) (11th Cir. 2018)) (citing FED. R. CIV. P. 12, 56).

194. *Id.* at 87, 88 n.4 (quoting United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999)) (citing Makaeff v. Trump Univ., LLC, 715 F.3d 1180, 1188 (9th Cir. 2013)).

195. *Id*. at 88 (first quoting *Carbone*, 910 F.3d at 1357; then quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 8 (1987)) (citing FED. R. CIV. P. 12, 56).

196. *La Liberte*, 966 F.3d at 94.

197. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)) (describing the use of state substantive law in federal courts utilizing diversity jurisdiction).

country of potential "SLAPP" lawsuit targets, the filer of a non-meritorious claim has the ability to select an ideal target. Existing "anti-SLAPP" protections, which are primarily found in state statutes, are most powerful when applied consistently. In other words, the current circuit split can "further exacerbate the problem of uncertainty."[198]

Each of the state laws that have been enacted have an important goal, summarily, to protect the rights of citizens to speak without facing civil liability for their protected conduct.[199] However, as one commenter stated, "the enactment of an anti-SLAPP statute will do little to mitigate the chilling of public participation associated with the risk of SLAPPs unless those who would otherwise be silenced are sufficiently confident that, in the case of retaliatory lawsuits, they will be able to avoid burdensome litigation."[200]

A. Forum Shopping and the "SLAPP" Filer

In its 2020 opinion, the United States Court of Appeals for the Second Circuit directly addressed the concerns of forum shopping that could follow its decision.[201] The Court observed that "amici warn that refusal to apply the anti-SLAPP statute will 'encourage forum shopping' . . . [t]hat may be so; but our answer to a legal question does not turn on our workload; and in any event, the incentive to forum-shop created by a circuit split can be fixed, though not here."[202]

While an increased workload is a logical result of forum shopping, there is another concern to consider, and one which is even more imminent in the "SLAPP" context. When a plaintiff engages in forum shopping, they are not only choosing where a jury is selected from or which state's bar their lawyer must have been admitted to the plaintiff can also select what law will apply to the dispute.[203] When filing a "SLAPP" suit, there are two aspects of forum shopping to consider, one being the choice of state, the other, the choice between a federal or state court.[204]

198. Barylak, *supra* note 8, at 853.

199. *See id.* at 847–48.

200. *Id.* at 853.

201. *See La Liberte*, 966 F.3d at 88.

202. *Id.*

203. *See Forum Shopping*, WEX LEGAL DICTIONARY AND ENCYCLOPEDIA, https://www.law.cornell.edu/wex/forum_shopping (last visited Feb. 10, 2022).

204. *See id.*

When the filer in a "SLAPP" case is an individual or entity that has sparked discourse throughout the country, that filer may have the opportunity to either select a target in a state where there are no "anti-SLAPP" protections, or, because of the circuit split, select a target in a state other than their own, and bring the case in a federal district court in the jurisdiction of one of the four circuits which has held that the state statutes are not applicable in a federal case, leaving the target defenseless.

While forum shopping can create inequities in a multitude of areas, the problem seems especially significant in the "SLAPP" context. The state "anti-SLAPP" laws were meant to protect citizens not just from claims that might not have full support, but from a specific class of individuals or organizations whose objective is to use the judiciary as a weapon.[205] When a potential "SLAPP" case filer has the opportunity to forum shop around state protections, the state laws cannot have their intended effect. In sum, "if anti-SLAPP statutes cannot be applied in federal diversity actions, federal courts will become the forum of choice for well-heeled private parties who wish to use marginally meritorious litigation to stifle public criticism or to alter the dynamics of public debate."[206]

B. Inequitable Administration of Laws and National Discourse

"Anti-SLAPP" protections are unlike other state procedural or substantive protections because when even a few "SLAPP" suits are filed, the mere exitance of a single SLAPP could have the chilling effect that state statutes seek to avoid. In other words, "[i]f individuals and groups are unsure whether their petitioning activities will be protected by an anti-SLAPP measure, its ability to mitigate the suits' chilling effect on public participation will be negligible."[207] "Anti-SLAPP" protections are only effective to the degree that they are consistently applied. Hypothetically, the most effective "anti-SLAPP" measure would be one that is applicable to state and federal issues, in any jurisdiction, however the United States' federalist system of government would require, at the very least, either fifty state statutes and one federal statute, or fifty state statutes guaranteed to be applied in federal courts.

205. *See* Barylak, *supra* note 8, at 872–73 (quoting FLA. STAT. §§ 768.295(2), (5), 718.1224(1), (4) (West 2021).

206. Elias, *supra* note 1, at 238.

207. Barylak, *supra* note 8, at 849.

CONCLUSION: SEEKING A RESOLUTION

The inconsistent application of state "anti-SLAPP" statutes has hindered their efficacy, and has the potential to lead to, if it has not already, the "grave consequences" that Professors George Pring and Penelope Canan warned about.[208] The problem is capable of resolution, however, as the judicial or legislative branches could step in and protect citizen's right to public engagement.

Recent trends suggest that citizens want the protection that "anti-SLAPP" laws have to offer. In 2020, New York expanded its "anti-SLAPP" law.[209] The amendments expanded the scope of an "action involving public participation" to include "any communication in a place open to the public or a public forum in connection with an issue of public interest; or any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."[210] The Law further required the term "'public interest' . . . be construed broadly, and [] mean any subject other than a purely private matter."[211] These changes are a drastic change from the prior version, whose scope was limited to activity involving a government body.[212] The amended law also strengthened previous attorneys' fee provisions.[213]

While the New York law illustrates a step in the right direction to protect public participation, it is of course necessary to realize that the statute's effectivity was reduced by the Second Circuit's decision in

208. *See* Pring & Canan, *supra* note 3, at 938.

209. *See* Act of Nov. 10, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 250, at 1028 (codified at N.Y. CIV. RIGHTS LAW §§ 70-a, 76(a) (McKinney 2020)); *see also* Theresa M. House, *New York's New and Improved Anti-SLAPP Law Effective Immediately*, ARNOLD & PORTER (Nov. 17, 2020), https://www.arnoldporter.com/en/perspectives/publications/2020/11/new-yorks-new-anti-slapp-law.

210. CIV. RIGHTS § 76-a(1)(a)(1)–(2).

211. CIV. RIGHTS § 76-a(1)(d).

212. *See* CIV. RIGHTS § 76-a(1)(b) (McKinney 1993); House, *supra* note 209.

213. *See* Act of Nov. 10, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 250, at 1028 (codified at CIV. RIGHTS § 70-a(1)(a)). The updated New York law also ensures that the target of a "SLAPP" will be entitled to attorney's fees, there is no longer a discretionary determination to be made. *See id.* ("[C]osts and attorney's fees shall be recovered upon a demonstration . . . that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law."). *Id.*

La Liberte v. Reid, which followed shortly thereafter.[214] The situation is illustrative of the problem with relying on federal courts to advance states' goals. While a state can expand their own definition of protected conduct, a state cannot expand their protections into a federal forum.

A. The Judicial Solution

So far, the Supreme Court has been silent on the circuit split. The Court has not granted certiorari to any cases which would resolve this conflict in the upcoming term. If such a case were to come to the Court, one Justice's history could provide insight. Notably, Justice Brett Kavanaugh was the author of the D.C. Circuit's opinion which held that a federal court could not apply D.C.'s anti-SLAPP act in a federal diversity case.[215]

If the Supreme Court were to adopt the approach used by the First and Ninth Circuits, this could provide some clarity for citizens. If the state laws were applicable in federal courts, the issue of forum shopping between state and federal courts would be resolved. However, this approach would not protect potential targets in states without existing "anti-SLAPP" protections.

B. The Legislative Solution

The problem of inconsistent application of existing "anti-SLAPP" laws across the United States could most easily be resolved with a federal "anti-SLAPP" law. A federal statute could "provide additional deterrence to forum shopping" and help to fix the United States' "SLAPP" problem.[216] While enacting such legislation is certainly not Congress's current top priority, there have been attempts to address the problem.

Over a decade ago, the "Citizen Participation Act of 2009" was introduced in the United States House of Representatives.[217] Congress had found that "SLAPPS are an abuse of the judicial process that waste . . . resources and clog the already over-burdened court dockets."[218]

214. *See generally* La Liberte v. Reid, 966 F.3d 79 (2d Cir. 2020).

215. *See* Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (citing FED. R. CIV. P. 12, 56).

216. Barylak, *supra* note 8, at 853.

217. H.R. 4364, 111th Cong. § 2 (2009).

218. *Id.* § 2 (7).

Ultimately, Congress failed to enact federal protection.[219] In a later attempt, the "Speak Free Act of 2015" sought to "amend the Federal Judicial Code to allow a person against whom a lawsuit is asserted to file a special motion to dismiss," and define SLAPP claims as those "that arise[] from an oral or written statement or other expression, or conduct in furtherance of such expression, by the [target] that was made in connection with an official proceeding or about a matter of public concern."[220] The bill was introduced by bi-partisan co-sponsors Representatives Blake Farenthold and Anna Eshoo, but ultimately never made it to the House Floor.[221]

In 2020, House Judiciary Subcommittee Chair Rep. Steve Cohen re-introduced the Citizen Participation Act.[222] The proposed act establishes that "[a]ny act in furtherance of the constitutional right of petition or free speech," "without knowledge of falsity or reckless disregard of falsity shall be immune from civil liability."[223] In addition to providing protection in federal courts to citizens in states whose laws have been held to be in conflict with the Federal Rules of Civil Procedure, the Act provides that a party asserting immunity under this bill in state court may remove the case to federal court.[224] The bill was not voted on.[225]

Moving forward, an Act of Congress would the most practical solution to the "SLAPP" problem. In the absence of universal protection, "SLAPP" filers will continue to prevail, to the detriment of our Courts, and more importantly, our democracy.

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219. *See H.R.4364 - Citizen Participation Act of 2009*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/house-bill/4364/actions?r=11&s=1 (last visited Mar. 29, 2022); Jesse Rifkin, *Citizen Participation Act Would Limit Expensive SLAPP Lawsuits Intended to Intimidate and Stifle Freedom of Speech*, GOVTRACK INSIDER (Oct. 8, 2020), https://govtrackinsider.com/citizen-participation-act-would-limit-expensive-slapp-lawsuits-intended-to-intimidate-and-stifle-fe3194a3016a (last visited Mar. 29, 2022).

220. Christopher D. Lee, *DTCI: The Need for Federal Anti-SLAPP Legislation is Great*, THE INDIANA LAWYER, https://www.theindianalawyer.com/articles/41356-dtci-the-need-for-federal-anti-slapp-legislation-is-great (last visited Feb. 13, 2022); H.R. 2304, 114th Cong. § 2 (2015).

221. *H.R.2304–SPEAK FREE Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/2304 (last visited Feb. 13, 2022).

222. H.R. 7771, 116th Cong. (2020).

223. *Id.* §§ 4, 3(a).

224. *Id.* § 6.

225. *H.R. 7771 (116th): Citizen Participation Act of 2020*, GOVTRACK, https://www.govtrack.us/congress/bills/116/hr7771 (last visited Feb. 13, 2022).