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A Curious Motion: The Uncertain Role of Anti-SLAPP Statutes in Federal Courts

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By Markus A. Brazill*

With the emergence of online review sites such as Yelp and TripAdvisor, an unsurprising byproduct has been a spate of defamation lawsuits against those who write critical reviews online. A Washington Post article, for example, describes how a Maryland woman faced a sixty-five-thousand-dollar defamation lawsuit after she wrote a negative review about a dog obedience class she purchased.[1] Similarly, a Colorado man found himself confronting a one-hundred-and-twenty-five thousand dollar suit after he posted a Yelp review castigating a home remodeling contractor for the work the contractor performed on his home.[2] For some, these suits are but the latest example of "strategic lawsuits against public participation" (SLAPP), suits aimed at suppressing legitimate speech or petitioning activity through the financial and psychological tolls of litigation.[3] Others argue that some of these reviews can be appallingly inaccurate and devastating for small businesses that rely on their good standing on these websites.[4]

Putting aside the merit of these suits, the attention that they have generated has renewed public interest in so-called "anti-SLAPP" statutes, a broad term used to describe measures aimed at curbing suits that deter public participation. Within the past five years, many states have enacted robust anti-SLAPP statutes, and Yelp has become one of the leading proponents of a

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[1] Justin Jouvenal, *Negative Yelp, Angie's List Reviews Prompt Dog Obedience Business to Sue*, WASH. POST (Mar. 25, 2015), https://www.washingtonpost.com/local/crime/negative-yelp-review-of-dog-obedience-class-spurs-lawsuit/2015/03/25/eb92dab6-d183-11e4-8fce-3941fc548f1c_story.html.

[2] Josh Harkinson, *Yelp Is Pushing a Law to Shield Its Reviewers from Defamation Suits*, MOTHER JONES (Jul. 20, 2015), http://www.motherjones.com/politics/2015/07/yelp-slapp-lawsuit-legislation-speak-free-act.

[3] *See id.*

[4] *See* Kathleen Miles and Lily Mihalik, *The Yelp Wars: False Reviews, Slander and Anti-SLAPP – What's Ethical in Online Reviewing?*, KPCC (Aug. 25, 2011), http://www.scpr.org/programs/patt-morrison/2011/08/25/20426/yelpamazonfakereviewcitysearchtripadvisorantislapp/.

proposed federal anti-SLAPP statute called the SPEAK FREE Act of 2015.[5] The federal legislation—the first of its kind to garner bipartisan support—is closely modeled after tough anti-SLAPP statutes enacted in jurisdictions such as California, Texas, and the District of Columbia, that offer defendants the right to file a special "anti-SLAPP" motion to challenge the legal and factual merit of a plaintiff's cause of action.[6]

While "Yelpers" can certainty avail themselves of the protections afforded by robust anti-SLAPP measures, these statutes sweep much more broadly. To give an example, California's anti-SLAPP statute has generated over four thousand published opinions[7] and has become a highly popular procedural device for defendants to dismiss claims ranging from appropriation of likeness[8] to disability discrimination.[9] Because of the strategic benefits provided by these statutes, defendants have tried to utilize state anti-SLAPP statutes in federal court diversity proceedings as well, but two principal obstacles have troubled their application: First, an exceptionally robust anti-SLAPP statute could impinge upon a party's Seventh Amendment right to a jury trial. And, second, these anti-SLAPP statutes may directly conflict with various provisions of the Federal Rules of Civil Procedure.

This essay will examine how moderate anti-SLAPP motions probably pose no Seventh Amendment concerns but could more credibly be in direct conflict with Federal Rules of Civil Procedure 12 and 56. Part I will briefly consider the constitutional roots of anti-SLAPP motions in the *Noerr-Pennington* doctrine and provide an overview of how an anti-SLAPP statute such as California's functions. Part II will argue that an anti-SLAPP statute could be modeled after a heightened pleadings standard or summary judgment proceeding without violating the Seventh

[5] Harkinson, *supra* note 2; SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/2304/text [hereinafter SPEAK FREE Act of 2015]
[6] SPEAK FREE Act of 2015, supra note 5.
[7] *See* Michael C. Denison, *SLAPP Happy Courts Continued to Refine the Reach of the Anti-SLAPP Law in Numerous Decisions in 2010*, L.A. LAWYER, June 2011, at 21.
[8] *See, e.g.*, Stewart v. Rolling Stone LLC, 105 Cal. Rptr. 3d 98 (2010).
[9] *See, e.g.*, Greater L.A. Agency on Deafness, Inc. v. CNN, Inc., 742 F.3d 414 (9th Cir. 2014).

Amendment. Focusing on California's anti-SLAPP statute, Part III will argue that an anti-SLAPP motion may conflict with the Federal Rules of Civil Procedure.

I. THE FOUNDATIONS OF AN ANTI-SLAPP MOTION

A. *The* Noerr-Pennington *Doctrine*

In two antitrust decisions, *Eastern Railroad Presidents Conference v. Noerr Motor Freight*[10] and *United Mine Workers of America v. Pennington*[11] the Supreme Court established what would later be known as the *Noerr-Pennington* doctrine, a nearly-absolute immunity for petitioning the government. *Noerr* and *Pennington* held that an individual is immune from antitrust liability for petitioning efforts, even if her actions are aimed at encouraging the government to adopt anticompetitive regulation.[12] But *Noerr* suggested a possible exception to this immunity if the petitioning efforts were "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[13] This possible "sham" petitioning exception to *Noerr* immunity was confirmed in *California Motor Transportation Company v. Trucking Unlimited*,[14] in which the Court denied *Noerr-Pennington* immunity to a consortium of trucking companies that filed various state and federal actions in an attempt to block a rival group of trucking companies from acquiring and transferring highway carriage licenses.[15] Yet *California Motor Transportation Company* did not explicate a precise standard for determining what constitutes "sham" petitioning.[16]

This uncertainty over what qualifies as a "sham" was largely resolved by two Supreme Court decisions in the early 1990s. In *City of Columbia v. Omni Outdoor Advertising*,[17] the Court

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[10] 365 U.S. 127 (1961).
[11] 381 U.S. 657 (1965).
[12] Noerr Motor Freight, Inc., 365 U.S. at 138; Pennington, 381 U.S. at 665. *California Motor Transportation Company v. Trucking Unlimited*, 404 U.S. 508 (1972), clarified that efforts to seek redress from *any* branch of government constituted protected petitioning. *Id.* at 510.
[13] 365 U.S. at 144.
[14] 404 U.S. 508 (1972).
[15] *See id.* at 509, 515.
[16] *Id.* at 510.
[17] 499 U.S. 365 (1991).

clarified that an entity can be held liable only if she uses the petition process *itself* in an anticompetitive manner; merely lobbying a government body in favor of anticompetitive regulation is not actionable.[18] And to determine what constitutes a "sham" lawsuit, the Court in *Professional Real Estate Investors v. Columbia Pictures Industries*,[19] established a two-part test: First, the petitioning "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[20] Second, after demonstrating that the lawsuit is objectively unfounded, a party seeking to overcome *Noerr-Pennington* immunity must prove that the suit was brought with the subjective intent of using the litigation process in an anticompetitive manner.[21]

On what constitutes "petitioning," the Court has made clear that the doctrine is broad enough to cover communications with each of the three branches of government[22] but the Court has refused to delineate clear boundaries, leaving the doctrine's applicability to "indirect" petitioning or conduct "incidental" to petitioning uncertain. In *Allied Tube & Conduit Corporation v. Indian Head, Inc.*,[23] the Court concluded that a company's unseemly efforts to influence the decision-making process of a private standard-setting organization were not "petitioning" activities protected by *Noerr-Pennington* immunity.[24] Although the organization developed the standard with the intent to encourage various legislative bodies to adopt it, the Court held that the applicability of *Noerr-Pennington* immunity depends in part on "the context and nature of the activity," which, given the makeup of private standard-setting organizations and the well-established practice of subjecting them to antirust scrutiny, counseled against

[18] *Id.* at 380.
[19] 508 U.S. 49 (1993).
[20] *Id.* at 60.
[21] *Id.* at 61.
[22] California Motor Transp. Co., 404 U.S. at 510.
[23] 486 U.S. 492 (1988).
[24] *See id*. at 510-11.

affording *Noerr-Pennington* immunity.[25] The Court acknowledged that differentiating between immunized "anticompetitive political activity" and unprotected "anticompetitive commercial activity" that has a "political impact" is "admittedly difficult," but that no clearer line could be drawn.[26]

Despite the flurry of developments culminating in *Omni Outdoor Advertising* and *Professional Real Estate Investors*, the Court has left unresolved the applicability of *Noerr-Pennington* immunity outside of antitrust law. A few Supreme Court decisions—particularly *Bill Johnson's Restaurants, Inc. v. NLRB*,[27] *NAACP v. Claiborne Hardware Company*,[28] and *BE & K Construction Company v. NLRB*[29]—suggest that the *Noerr-Pennington* doctrine extends beyond the antitrust laws, and lower appellate courts have applied *Noerr-Pennington* to causes of action ranging from RICO violations to constitutional torts.[30] Some critics, however, counter that the generous immunity afforded by the *Noerr-Pennington* doctrine should be understood as a reflection of the limited applicability of the antitrust laws to "political" (as opposed to "economic") conduct.[31] For these commentators, *Noerr-Pennington* should not be applied as a trans-substantive standard, and whatever protection the Petition Clause by its own force affords is more limited.[32]

This alternative interpretation finds some support in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,[33] in which the Court recently rebuffed the Federal Circuit's efforts to import the *Noerr-Pennington* standard into the determination of attorney's fees under the Patent Act. *Octane Fitness* concluded that, "[t]o the extent that patent suits are . . . protected as acts of

[25] *See id.* at 499-502.
[26] *Id.* at 511 n.10.
[27] 461 U.S. 731 (1983)
[28] 458 U.S. 886 (1982).
[29] 536 U.S. 516 (2002).
[30] Craig Drachtman, *Taking on Patent Trolls: The Noerr-Pennington Doctrine's Extension to Pre-Lawsuit Demand Letters and Its Sham Litigation Exception*, 42 RUTGERS L. REV. 229, 241-42 (2015).
[31] *See generally* Michael Pemstein, *The Basis for Noerr-Pennington Immunity: An Argument That Federal Antitrust Law, Not the First Amendment, Defines the Boundaries of Noerr-Pennington*, 40 T. MARSHALL L. REV. 79 (2014).
[32] *See id.* at 112-13.
[33] 134 S. Ct. 1749 (2014).

petitioning," the risk of fee-shifting would not as grievously chill the right to petition as treble damages under the antitrust laws. While there is scarce reliable data about district courts' average attorney's fee awards, the Court's assertion that a multi-million dollar attorney's fee award[34] would not chill such activity as much as the (much-more improbable) prospect of a trebled antitrust judgment seems tenuous. That *Octane Fitness* forced such a distinction appears to signal the Court's reticence with applying *Noerr-Pennington*'s robust protections universally. This, coupled with *Octane Fitness*'s recognition that the degree of protection afforded outside of immunity from antitrust liability remains unsettled,[35] suggests that the lower courts' expansive reading of the *Noerr-Pennington* doctrine may be unwarranted.

B. *Anti-SLAPP Statutes*

Inspired by the Supreme Court's buttressing of *Noerr-Pennington* immunity, Professors Penelope Canan and George W. Pring coined the term "strategic lawsuit against public participation" (SLAPP) in a 1988 article to describe suits they believed were brought with the intent of "preventing citizens from exercising their political rights or punishing those who have done so."[36] Specifically, Canan and Pring focused on instances where individuals or non-profit organizations were sued for activity that the authors thought should be protected by the Petition Clause of the First Amendment, such as reporting violations of regulations to government agencies or speaking at public hearings.[37] Although the vast majority of these suits prove unsuccessful, the authors contended that bringing them could nevertheless advantage plaintiffs by inflicting economic and psychological costs on their targets, diverting attention and resources

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[34] *See, e.g.*, Synthia Ford, *Attorney Fees Becoming More Common in Patent Cases*, LITIG. NEWS (Jan. 26, 2016), https://apps.americanbar.org/litigation/litigationnews/top_stories/012616-patent-case-attorney-fees.html (describing a district court order granting 4.1 million dollars in attorney's fees).

[35] *See Octane Fitness, LLC*, 134 S. Ct. at 1757 (stating, after describing the *Noerr-Pennington* standard, "to the extent that patent suits are similarly protected as acts of petitioning," that the sham exception requirements did not apply).

[36] Penelope Canan & George W. Pring, *Strategic Lawsuits Against Political Participation*, 35 SOC. PROBS. 506, 506 (1988); Thomas A. Waldman, Comment, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 981 n.3, 983 (1992).

[37] *See* Canan & Pring, *supra* note 36, at 508-09.

away from the defendants' petitioning activity and deterring others from engaging in similar efforts.[38]

The concept soon gained traction in legal journals, and state legislatures began to formulate mechanisms to address "SLAPPs."[39] Becoming the first state to pass what would later be termed an "anti-SLAPP statute," Washington adopted a statute in 1989 that extended *Noerr-Pennington* immunity to all communications with the government on issues "reasonably of concern."[40]

Three years later, California passed its own anti-SLAPP measure, but it chose a much-different tack, developing what would later serve as a model for other states. The main provision of California's anti-SLAPP statute allows a defendant to file "a special motion to strike," if the "cause of action . . . aris[es] from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue."[41] Upon the filing of an anti-SLAPP motion—which must be done within sixty days of service of a complaint, or with good cause, at any time later in the suit—all discovery is automatically stayed, and a plaintiff must demonstrate good cause to dissolve the stay.[42] The trial court must hold a hearing on an anti-SLAPP-motion within thirty days of service of the motion, unless the court's caseload prevents such a speedy resolution.[43]

In making an anti-SLAPP motion, the defendant bears the initial burden of demonstrating that the cause of action "arise[s] from" activity conducted "in furtherance of the person's right of petition or free speech."[44] In response to concerns raised during the legislative process by the California Judges Association that this broad standard could permit the filing of anti-SLAPP

[38] *See* Canan & Pring, *supra* note 36, at 514-15.
[39] *See generally* Waldman, *supra* note 32.
[40] Tom Wyrwich, *A Cure for A "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 669 (2011).
[41] Cal. Civ. Proc. Code § 425.16(a) (West).
[42] Cal. Civ. Proc. Code § 425.16(f), (g) (West).
[43] Cal. Civ. Proc. Code § 425.16(g) (West).
[44] Equilon Enterprises v. Consumer Cause, Inc., 52 P.3d 685, 694 (2002) (quoting Cal. Civ. Proc. Code § 425.16(b)(1)).

motions in nearly every case,[45] the anti-SLAPP bill was amended to incorporate a four-part definition of protected activity.[46] The first two prongs address conduct conceivably protected by the Petition Clause, namely any communication made in or "in connection with" a government proceeding.[47] "In connection with" is interpreted to encompass only communications *incidental* to a government proceeding (such as pre-suit demand letters) rather than covering any communication made about a government proceeding.[48] The third prong covers some communications that are protected by the Free Speech Clause but not the Petition Clause, namely conduct made in a public forum on "an issue of public interest."[49] Finally, the fourth definitional clause protects conduct made "in furtherance of" activity protected by the Free Speech Clause and Petition Clause on an issue of public interest.[50] Although a literal reading of the statute suggests the statutory definition is non-exhaustive, California's courts have limited the anti-SLAPP motion's applicability to the four categories explicitly included.[51]

If a defendant demonstrates that the plaintiff's cause of action arises from protected activity, the burden shifts to the plaintiff to demonstrate "a probability" of success in her cause of action.[52] An early draft of California's anti-SLAPP legislation required "a substantial probability," but the final bill omitted "substantial" out of concern that the statute would otherwise violate Article I, Section 16 of the California Constitution,[53] which guarantees the right to a jury trial in both criminal and civil cases.[54] This second step in an anti-SLAPP motion requires an examination of the legal and factual adequacy of *all* elements of a plaintiff's cause of

[45] Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 1003 (1999).
[46] Cal. Civ. Proc. Code § 425.16(e) (West)
[47] *Id.*
[48] Anderson v. Geist, 186 Cal. Rptr. 3d 286, 293 (Cal. Ct. App. 2015).
[49] Cal. Civ. Proc. Code § 425.16(e) (West).
[50] *Id.*
[51] Hardin v. PDX, Inc., 227 Cal. App. 4th 159, 165 (Cal. Ct. App. 2014), *as modified on denial of reh'g* (July 21, 2014), *review denied* (Sept. 24, 2014).
[52] Cal. Civ. Proc. Code § 425.16(b)(1) (West).
[53] *See* Braun, *supra* note 45, at 1002.
[54] CAL. CONST. art. I, § 16.

action; the motion is not limited to determining whether California's statutory analog to *Noerr-Pennington* immunity applies or whether a plaintiff can show a probability of satisfying *New York Times Company v. Sullivan*'s actual malice standard. A court will also consider any applicable affirmative defenses, though the California Courts of Appeal disagree over which party bears the burden of proof.[55]

If a plaintiff cannot demonstrate a probability of success, the claim is ordinarily dismissed, but a court can grant leave to amend if the plaintiff can submit new allegations or evidence to demonstrate a probability of success on the merits.[56] Unlike an ordinary demurrer, a decision on an anti-SLAPP motion—regardless of whether the motion is granted or denied—is immediately appealable as a final order.[57] A court must award a prevailing defendant attorney's fees and costs, but a prevailing plaintiff is only so entitled if the anti-SLAPP motion was "frivolous or . . . solely intended to cause unnecessary delay."[58]

Displeased with commercial businesses regularly taking advantage of the anti-SLAPP statute, the California State Legislature amended the statute in 2003 to prevent a defendant from filing an anti-SLAPP motion if the suit is "brought solely in the public interest" or relates to commercial speech.[59] But the 2003 amendments create an exemption allowing members of the press, those involved in the creation of artistic works, and nonprofits to utilize the anti-SLAPP statute.[60]

Although twenty-eight states and the District of Columbia have adopted some form of anti-SLAPP statute,[61] California's is one of the broadest, comparable only to those found in a

[55] No Doubt v. Activision Publ'g, Inc., 192 Cal. App. 4th 1018, 1029 (Cal. Ct. App. 2011).
[56] Nguyen-Lam v. Cao, 90 Cal. Rptr. 3d 205, 217 (2009).
[57] Cal. Civ. Proc. Code § 425.16(i) (West).
[58] Cal. Civ. Proc. Code § 425.16(c)(1) (West).
[59] Cal. Civ. Proc. Code § 425.17 (West).
[60] Cal. Civ. Proc. Code § 425.17(c), (d) (West).
[61] *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Dec. 4, 2015).

few states, such as Texas,[62] Maine,[63] Nevada,[64] and the District of Columbia.[65] A few less sweeping anti-SLAPP statutes require only that the plaintiff demonstrate that the First Amendment or an analogous statutory immunity will not preclude a cause of action.[66] Others, such as Pennsylvania's anti-SLAPP statute, apply only when a defendant has been sued for communicating with government agencies on certain topics, such as environmental regulation.[67] New York's anti-SLAPP statute is particularly unavailing as it applies only if the cause of action arises out of public commentary on government permitting.[68]

II. THE ANTI-SLAPP MOTION AND THE SEVENTH AMENDMENT

The scope of the Seventh Amendment right to a jury trial has been traditionally delineated by examining English conventions as of 1791 (the year the Seventh Amendment was adopted), an approach called the "historical test."[69] This emphasis on English historical practice can be traced to *United States v. Wonsan*, in which Justice Story, while riding circuit, remarked:

> Beyond all question, the common law here alluded to [in the Seventh Amendment] is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.[70]

At least one scholar, however, argues that the Court did not fully articulate the historical test until much later in *Baltimore & Carolina Line v. Redman*.[71] She argues that *Wonson* should be viewed as addressing only the Reexamination Clause and that the decision did not pinpoint any

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[62] Tex. Civ. Prac. & Rem. Code Ann. § 27.001 *et seq.* (West).
[63] Me. Rev. Stat. tit. 14, § 556 *et seq.*
[64] Nev. Rev. Stat. Ann. § 41.660 *et seq.* (West).
[65] D.C. Code Ann. § 16-5502 *et seq.* (West).
[66] *See, e.g.*, Minn. Stat. Ann. § 554.02 *et seq.* (West).
[67] *See, e.g.*, Pa. Stat. and Cons. Stat. Ann. § 8301 *et seq.* (West).
[68] N.Y. Civ. Rights Law § 76-a(1)(a) (McKinney).
[69] Charles E. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639–640 (1973); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).
[70] United States v. Wonson, 28 F. Cas. 745 (No. 16,750) (CC Mass. 1812), Wolfram, *supra* note 69 at 641.
[71] Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 188 (2000); *see generally* Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935).

particular moment in time at which the right to a jury trial should be assessed.[72] Then again, Justice Story's reasoning in *Wonson* seems to interpret the Seventh Amendment more broadly, and he probably thought it unnecessary to mention an exact date because English practice had not substantively changed between 1791 and 1812.[73] Either way, at least since *Redman*, the historical approach has been the clear predominant method for interpreting the Seventh Amendment.[74]

Despite the seeming applicability of the historical test to both questions, the Supreme Court's jurisprudence on what causes of action or issues fall within the scope of the Seventh Amendment markedly deviates from its determinations about the permissibility of gatekeeping procedures.[75] The Supreme Court has interpreted broadly the types of suits or issues that implicate the Seventh Amendment, finding that the jury trial right attaches to actions brought for housing discrimination under Title VII of the Fair Housing Act,[76] fraudulent conveyance (even when adjudicated in bankruptcy court),[77] breaches of the duty of fair representation,[78] statutory damages under the Copyright Act,[79] and unconstitutional takings brought under section 1983.[80] As applied, the historical test often yields comparisons made at such a high degree of abstraction that history may not serve as a meaningful guide; for example, in *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, the majority and dissent vigorously disputed whether a cause of action for breach of a union's duty of fair representation is more akin to an action brought in 1791 for legal malpractice or against a trustee for breach of fiduciary duty.[81] In a closely-related

[72] *See id.* at 188-90.
[73] Wolfram, *supra* note 69, at 641.
[74] *See* Moses, *supra* note 71, at 188.
[75] Joan E. Schaffner, *The Seventh Amendment Right to a Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 BAL. L. REV. 225 (2002).
[76] Curtis v. Loether, 415 U.S. 189, 198 (1974).
[77] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 63 (1989).
[78] Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 573 (U.S. 1990).
[79] Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).
[80] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 721 (1999).
[81] *See generally* 494 U.S. 558, 565-69, 585-88 (1990).

line of cases, beginning in *Beacon Theatres, Inc. v. Westover*,[82] the Court has held that, after the Federal Rules of Civil Procedure merged courts of law and equity, a jury trial must take precedence over equitable proceedings to protect the right against issue or claim preclusion.[83] True, in *Parklane Hosiery Company v. Shore*,[84] the Court recast the *Beacon Theatres* line of cases as "enunciating no more than a general prudential rule,"[85] but the Court has not substantially limited their holdings.

Yet, at the same time, the Court has narrowly construed what "incidents" of a jury trial the Seventh Amendment protects.[86] Since district courts under the Conformity Act had to apply the procedural rules of their forum states, the Supreme Court was repeatedly confronted with determining the constitutionality of exotic state procedural devices unknown at the time of the ratification of the Seventh Amendment. The Court concluded that most of these procedures satisfied the Seventh Amendment. Upholding a New Mexico Territory provision that allowed a court to enter a judgment contrary to a general verdict if it contradicted special interrogatories, the Supreme Court in *Walker v. New Mexico & S. P. R. Co*. remarked:

> The seventh amendment . . . does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but *substance of right*. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. *So long as this substance of right is preserved*, the procedure by which this result shall be reached is wholly within the discretion of the legislature . . .[87]

Walker, therefore, represents the Supreme Court's first explicit acknowledgment of its narrow construction of what limits the Seventh Amendment imposes on gatekeeping procedures—only

[82] 359 U.S. 500 (1959).
[83] Schaffner, *supra* note 75, at 258-61.
[84] 439 U.S. 322 (1979).
[85] *Id.* at 334.
[86] Schaffner, *supra* note 75, at 261.
[87] 165 U.S. 593, 596 (1897) (emphasis added).

the "substance of the right" to a jury trial (however that is construed) is protected.[88] Following the reasoning of *Walker, Gasoline Products Company v. Champlin Refining Company* approved of the grant of a new trial on only the question of damages, a practice forbidden at common law, asserting that "the Constitution is concerned[] not with form, but with substance."[89]

While *Walker, Gasoline Products Company*, and other earlier decisions seemed to acknowledge that the "substance" of the Seventh Amendment largely protected a party's right to have a jury conduct any fact-finding, the Court embraced a more skeptical approach beginning in *Galloway v. United States*. In *Galloway*, the Court upheld the constitutionality of judgment as a matter of law pursuant to Rule 50(a) even though there was no analogous procedure available in 1791.[90] At the time of the adoption of the Seventh Amendment, the two major mechanisms available to a trial judge to check a jury's fact-finding were the demurrer to the evidence and the grant of a new trial.[91] In a demurrer to the evidence, the defendant admitted every fact and reasonable inference offered by the plaintiff.[92] A court would enter judgment in favor of the defendant if there were "no evidence" from which a "material fact" could be inferred.[93] If the court found otherwise, it would instead enter judgment against the defendant.[94] Rule 50(a), in contrast, requires a plaintiff to supply greater proof to withstand the motion and does not preclude a defendant from litigating the case at trial if she loses the motion. Yet *Galloway* characterized these differences as merely "incidental or collateral."[95] Adopting a much narrower understanding than *Walker*, the Court reasoned that the "[Seventh] Amendment was designed to preserve the basic institution of jury trial in *only its most fundamental elements*, not the great

[88] Schaffner, *supra* note 75, at 261.
[89] Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).
[90] 319 U.S. 372, 396 (1943).
[91] *See* Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 458 (2013).
[92] *Id.*
[93] *See, e.g.*, Parks v. Ross, 52 U.S. 362, 373 (1850) (describing the standard).
[94] Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 149 (2007).
[95] Galloway, 319 U.S. at 390.

mass of procedural forms and details . . .”[96] The Court was dismissive of even the differences in the standards of proof, asserting that there is no constitutional difference between requiring a plaintiff to provide “substantial evidence” as opposed to “some” or “any” evidence.[97] Rather, the Court held, “the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.”[98]

Given *Galloway*’s admonition that the Seventh Amendment protects “only the most fundamental elements” of a jury trial, it should come as no surprise that Justice Stewart, citing *Galloway* and *Gasoline Products*, observed in *Parklane Hosiery Company*, that “many procedural devices developed since 1791 that have diminished the civil jury’s historic domain have been found not to be inconsistent with the Seventh Amendment.”[99] The right to a jury trial as construed by the Court is thus quite broad in its application but relatively thin in its protection.[100]

Intriguingly, although *Galloway* suggested that an “essential requirement” of a Rule 50 motion is that a court must make every reasonable inference for the nonmoving party, the Court has found such a practice is not constitutionally compelled when evaluating allegations in a complaint. In the Private Securities Litigation Reform Act (PSLRA), Congress enacted a heightened “strong inference of scienter” pleadings standard for private 10b-5 securities lawsuits. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[101] the Supreme Court concluded that a plaintiff can withstand a 12(b)(6) motion under the strong inference of scienter standard only if, after evaluating competing inferences, “a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts

[96] *Id.* at 392 (emphasis added).
[97] *Id.* at 395.
[98] *Id.*
[99] 439 U.S. 322, 336 (1979).
[100] *See* Schaffner, *supra* note 75, at 261-62, 271.
[101] 551 U.S. 308 (2007).

alleged."[102] Justifying its requirement that a court consider "plausible opposing inferences," Justice Ginsburg noted that determining whether an inference is "strong" is an inherently comparative exercise.[103] Although *Tellabs*—unlike *Twombly*—does not explicitly state that conclusory allegations should not be accepted as true, the opinion indicates that only "*factual* allegations" must be accepted,[104] and the standard would obviously not function in practice if a plaintiff could merely plead a general allegation of scienter.

In the decision below, the Seventh Circuit had refused to adopt a standard that tasked a court with weighing competing inferences for fear that such a procedure would violate the Seventh Amendment.[105] The *Tellabs* majority rejected these concerns on three bases. Its principal argument was that Congress's greater power to create statutory causes of action, includes the lesser power to define pleadings standards.[106] Relying on its 1902 decision *Fidelity & Deposit Company v. United States*,[107] the Court asserted that the PSLRA "'simply 'prescribes the means of making an issue,' and that, when '[t]he issue [was] made as prescribed, the right of trial by jury accrues.'"[108] This suggestion that pleadings standards do not implicate the Seventh Amendment is somewhat curious. Obviously, Congress cannot authorize courts to violate the Seventh Amendment; indeed, in *Feltner* the Court struck down a provision in the Copyright Act that instructed a judge to determine statutory damages.[109] And, although Congress can certainly repeal a cause of action or condition it on the satisfaction of administrative perquisites, scholars have recognized that *Tellabs* approved of "a sort of hybrid between the motion to dismiss and the motion for summary judgment."[110] To survive a motion to dismiss under *Tellabs*, while all factual allegations must be accepted as true, in practice a complaint must contain detailed

[102] *Id.* at 324.
[103] *See id.* at 323-34.
[104] *Id.* at 322 (emphasis added).
[105] *Id.* at 326.
[106] *Id.* at 327.
[107] 187 U.S. 315 (1902).
[108] 551 U.S. at 327 (quoting Fid. & Deposit Co. of Maryland, 187 U.S. at 320).
[109] Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).
[110] Geoffrey P. Miller, *Pleading After Tellabs*, 2009 WIS. L. REV. 507, 532 (2009)

allegations with references to particular witnesses or documents incorporated by reference.[111] Thus, given that a Rule 12(b)(6) motion under *Tellabs* in many ways resembles summary judgment (which has always been considered subject to constitutional limitations), the notion that the "substance of the right" to a jury trial is not implicated merely because the "strong inference" standard is ostensibly just a pleadings rule lacks persuasive force.

The argument also does little to explain the constitutionality of other heightened pleadings standards. Congress had little direct role in crafting Rule 9's heightened pleadings standard, and the rule applies equally to state law causes of action, yet the Court has never questioned its constitutionality. In fact, the Second Circuit had crafted the strong inference of scienter standard before the PSLRA as a—textually questionable—interpretation of Rule 9(b).[112] Perhaps one could characterize Rule 9(b) as a delegation of Congressional authority, but the rule is not limited to federal causes of action, again suggesting that the Court's invocation of Congress's authority explains too little for Seventh Amendment purposes.

Besides Congress's authority to enact pleadings standards, the *Tellabs* Court provided two other bases for its decision. *Tellabs* suggested, albeit somewhat in passing, that heightened pleadings standards do not offend the Seventh Amendment because all factual allegations must be accepted as true.[113] In addition, the Court stressed that under the majority's interpretation of the strong inference standard, a plaintiff need not plead facts supporting an inference of scienter greater than what she would need to prove at trial.[114]

Some of the practices approved of in *Tellabs* were incorporated into the general Rule 8(a) standard in *Bell Atlantic Corporation v. Twombly*[115] and *Ashcroft v. Iqbal*.[116] Specifically, *Twombly* and *Iqbal* both engaged in a comparative weighing of conceivable inferences to

[111] *See id.*
[112] *See* Ross v. A. H. Robins Co., 607 F.2d 545, 558 (2d Cir. 1979).
[113] Tellabs, Inc., 551 U.S. at 328.
[114] *Id.*
[115] 550 U.S. 544 (2007).
[116] 556 U.S. 662 (2009).

determine whether an allegation was "plausible."[117] Likewise, *Twombly* and *Iqbal* both explicitly instruct a court not to accept as true any conclusory allegations.[118] Neither decision suggested that such practices were constitutionally infirm under the Seventh Amendment.

Viewed in light of *Twombly* and *Iqbal*, *Tellabs* implies that federal courts are free to weigh competing inferences and refuse to accept conclusory allegations as true for purposes of a motion to dismiss. On the required strength of the inferences, the Court in *Tellabs* concluded that, at least for causes of action it creates, Congress can require a plaintiff to plead facts creating an inference of tortious conduct as likely as any other alternative, non-tortious inference.[119] Although the *Tellabs* majority did not reach the question, the opinion also suggests that a Congressionally-enacted pleadings standard equal to the standard of proof at trial would be constitutionally permissible, as long as a court for purposes of the motion accepts all factual allegations (*i.e.*, non-conclusory allegations) pleaded in the complaint as true.[120]

Since the Court identified two additional reasons for upholding the provision, the importance that *Tellabs* placed on Congress's authority to enact heightened pleading standards for the causes of action it creates may have been overstated. If Congress's role is necessary, Congress may not have the same broad leeway under the Seventh Amendment to enact pleadings standards for state causes of actions heard in federal court, and it would be peculiar for the scope of Congress's authority under the Seventh Amendment to depend on such a seemingly irrelevant consideration as which sovereign created the cause of action. Assuming that Rule 9(b) is constitutional (as most do), one could craft another greater-power-includes-the-lesser argument to justify the Rule's imposition of a heightened pleadings standards on state causes of action, but the oddity of the entire exercise implies that the better reading of *Tellabs* is that the other two

[117] *See generally* 550 U.S. 544 (2007); 556 U.S. 662 (2009); *see also* Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 262 (2009).
[118] Twombly, 550 U.S. at 557 n.5; Iqbal, 556 U.S. at 663.
[119] Tellabs, Inc., 551 U.S. at 328.
[120] *See id.*

protections discussed by the majority are sufficient to uphold a pleadings standard under the Seventh Amendment.

Galloway and *Tellabs*, therefore, provide two different conceivable ways to structure an anti-SLAPP statute within constitutional boundaries. Given *Galloway*'s approval of judgment as a matter of law, an anti-SLAPP statute with a standard of proof equivalent to Rule 56 or Rule 50 could certainly be lawfully applied in federal court. Yet, a state legislature wishing to enact a statute that could be applied in federal court—or Congress if it enacts a federal anti-SLAPP statute—may opt for an alternative: After *Tellabs*, an anti-SLAPP statute could conceivably be modeled after a Rule 12(b)(6) motion under the PSLRA, requiring a court to dismiss a complaint if the plaintiff does not plead facts creating an inference of tortious conduct that is as likely as any opposing inference for each element of her claim. The court would be free to weigh inferences against plausible alternatives as long as it accepted as true all non-conclusory allegations in the complaint.

While the Seventh Amendment has not been incorporated against the states, state courts have had to address whether anti-SLAPP laws conflict with their state constitutional rights to a jury trial. In *Lafayette Morehouse, Inc. v. Chronicle Publishing Company*, fearing the statute would otherwise be unconstitutional, the California Court of Appeal interpreted "a probability" in the state's anti-SLAPP statute to require only that a plaintiff offer "a prima facie case."[121] Although California courts occasionally equate the anti-SLAPP probability requirement with the summary judgment standard, the Ninth Circuit has recognized that it is more akin to the standard to obtain judgment as a matter of law because the defendant does not have the burden of production.[122]

[121] 44 Cal. Rptr. 2d 46, 53 (1995).
[122] Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 599 (9th Cir. 2010).

In *Davis v. Cox*,[123] the Washington Supreme Court ruled that Washington's anti-SLAPP statute was unconstitutional under its state constitution because the statute's requirement that a plaintiff show "*by clear and convincing a probability* of prevailing at trial" intruded upon "the jury's essential role of deciding debatable questions of fact."[124] The Washington Supreme Court construed the rather unintelligible provision to require a court to engage in improper fact-finding and weighing of the evidence.[125] That is, unlike at summary judgment, in an anti-SLAPP motion a plaintiff would not receive the benefit of every reasonable inference, which the court considered essential to the constitutionality of summary judgment.[126] If one accepts the Washington Supreme Court's interpretation of the statute, this reasoning seems to afford parties a right relatively coextensive with the Seventh Amendment. After all, even in *Galloway*, the Supreme Court considered it "essential" that a court make all reasonable inferences in favor of the non-moving party.[127]

In a perplexing parallel argument, however, *Davis* opted to "[i]nterpret[] the right of trial by jury in light of the petition clause jurisprudence."[128] The Washington Supreme Court essentially claimed that since the anti-SLAPP statute allowed suits to be dismissed that did not fall within the *Noerr-Pennington* sham exception, the statute was unconstitutional.[129] In contrast, summary judgment is constitutional, the court claimed, because it only screens out suits that fall within the sham exemption.[130] Besides the dubious premise that all claims dismissed on summary judgment would satisfy the "objective baseless" prong of the *Noerr-Pennington* sham exception, this argument is disconcerting because the court provided little reasoning for why *Noerr-Pennington* should help delimit the boundaries of the right to a jury trial. *Noerr-*

[123] 351 P.3d 862 (Wash. 2015).
[124] *Id.* (emphasis added).
[125] *Id.* at 871.
[126] *See id.* at 289.
[127] *See* Galloway, 319 U.S. at 390.
[128] Davis, 351 P.3d at 873.
[129] *See* Davis, 351 P.3d at 872-74.
[130] *See* Davis, 351 P.3d at 872.

Pennington may protect plaintiffs from *liability* for filing non-frivolous lawsuits,[131] but the doctrine does not restrict the procedures that a state can employ to screen out claims that lack merit.[132]

Perhaps the true lesson of *Davis* is that a legislature drafting an anti-SLAPP statute should avoid fashioning exotic motion standards that prove hard to interpret, much less to apply. California's "a probability" requirement seemed peculiar enough, but subsequent anti-SLAPP statutes have tried to sharpen the tone, if not the substance, of an anti-SLAPP review. Passed in 2011, Texas's anti-SLAPP statute demands that a plaintiff demonstrate "by clear and specific evidence a prima facie case,"[133] which the Texas Supreme Court has struggled to elucidate.[134] Under the District of Columbia's anti-SLAPP statute passed in 2010, a party can only withstand a motion to dismiss if she is "likely to succeed on the merits,"[135] a term also left undefined. The District of Columbia Court of Appeals has not yet evaluated whether this standard comports with the Seventh Amendment, which applies to local courts in the District.[136]

Like the District of Columbia's anti-SLAPP statute, the proposed federal anti-SLAPP statute requires a plaintiff to demonstrate that she is "likely to succeed on the merits," without defining the term.[137] Although styled as a "special motion to dismiss," the legislation, like enacted state anti-SLAPP statutes, explicitly contemplates relying not only on the pleadings but "affidavits stating the facts on which the liability or defense is based."[138] If the bill is passed—an admittedly unlikely development—it could be construed to impose a heightened pleadings standard, in which case the proposal would likely encounter no constitutional concerns after

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[131] As noted earlier, even this is questionable. *See supra* notes 27-35 and accompanying text.
[132] *Cf.* Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 285, 1066 (1984).
[133] Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c) (West).
[134] *See In re* Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).
[135] D.C. Code Ann. § 16-5502(c) (West).
[136] *In re* Estate of Johnson, 820 A.2d 535, 537 (D.C. 2003); *see* Doe No. 1 v. Burke, 91 A.3d 1031, 1034 n.1, 1044-45 (D.C. 2014) (applying, without mentioning the Seventh Amendment, the "likely to succeed" anti-SLAPP standard to a case in which the facts were not in dispute and the trial court had not conducted any fact-finding).
[137] SPEAK FREE Act of 2015, *supra* note 5, § 4202(a).
[138] *Id.*

Tellabs. If, on the other hand, the statute is construed to be an evidentiary standard of proof, the federal anti-SLAPP legislation is of more questionable constitutionality.

III. *ERIE*'S "MURKY WATERS" AND STATE ANTI-SLAPP STATUTES

While, at least for those provisions similar to California's, the Seventh Amendment poses no apparent obstacle to applying anti-SLAPP statutes in federal court, a much more difficult question is whether doing so would be proper under the *Erie* doctrine. This subject has received much scholarly attention,[139] and proves to be a reoccurring dispute in federal court. The Ninth Circuit has held (and reaffirmed repeatedly) that California's anti-SLAPP statute applies in federal court,[140] and the First Circuit has held that Maine's anti-SLAPP statute likewise applies,[141] while the D.C. Circuit has recently held that the District's anti-SLAPP statute does not.[142] The Fifth Circuit has so far avoided reaching whether Texas' recently-enacted robust anti-SLAPP statute applies in its courts.[143] While these states' anti-SLAPP statutes should not be carelessly conflated, each of these statutes—as noted earlier—has the same essential features: the anti-SLAPP motion, discovery stay, right of interlocutory review, and fee-shifting. Thus, although this section focuses on California's anti-SLAPP law, much of this analysis would apply equally to these other anti-SLAPP statutes.

After *Hanna v. Plumer* refashioned the *Erie* doctrine, determining whether there is a "direct collision" between a state law and a federal rule is largely determinative. *Sibbach* interpreted the Rules Enabling Act's constraints on the federal rules very narrowly, while *Hanna*

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[139] *See, e.g.*, Benjamin Ernst, *Fighting SLAPPS in Federal Court: Erie, the Rules Enabling Act, and the Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. REV. 1181 (2015); Caleb P. Lund, Note, *It's Time To SLAPP Back: Why California's Anti-SLAPP Statute Should Not Apply In Federal Court*, 44 SW. L. REV. 97 (2014); Colin Quinlan, Comment, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367 (2014); Katelyn E. Saner, Note, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions To Dismiss In Federal Court After Shady Grove*, 63 DUKE L.J. 781 (2013).

[140] *See, e.g.*, U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999); Makaeff v. Trump Univ., LLC, 715 F.3d 254, 261 (9th Cir. 2013), *rehearing en banc denied*, 736 F.3d 1180 (9th Cir. 2013).

[141] Godin v. Schencks, 629 F.3d 79, 88 (1st Cir. 2010).

[142] Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1335 (D.C. Cir. 2015).

[143] Culbertson v. Lykos, 790 F.3d 608, 631 (5th Cir. 2015)

left *Sibbach* (and the Constitution) as the only constraints on applying a federal rule where it "directly conflicts" with state law.[144] The only resource left to federal courts to accommodate state interests is to interpret the federal rules remarkably narrowly.[145] As a result, Professors Burbank and Wolff observe that the Court's *Erie* decisions have oscillated between expansive and narrow interpretations of the federal rules:

> In an interpretive landscape where "direct collisions" are manufactured, the same language has multiple "plain meanings," and the governing precedent (*Sibbach*) is hopelessly out of step with legal developments, it is no surprise that, since Walker, the Justices have lurched from one extreme to the other, giving some Federal Rules a scope of application broader than appears plausible—certainly, broader than necessary to escape a charge of infidelity to the text—while emptying others of content. We strongly suspect that the unifying characteristic of these decisions has been an awareness that, although Hanna cleaned up some of the mess engendered (or facilitated) by Erie, it did not clean up enough.[146]

While the Court has not adopted Professors Burbank and Wolff's separation of powers conception of the Rules Enabling Act, the Court has acknowledged that its interpretations of the federal rules are guided in part by an intent not to displace other sources of law. In a footnote in *Gasperini v. Center for Humanities, Inc.*, Justice Ginsburg remarked, "Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies," citing *Walker v. Armco Steel Corporation.*[147] Even Justice Scalia, writing for the majority in *Shady Grove*, observed "we should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation.'"[148]

Notwithstanding this acknowledgment, *Shady Grove* adopted an expansive textual approach to determining what constitutes a direct conflict with a federal rule. In the only section to garner the support of a majority of the Court, Justice Scalia stressed that the use of "may" in Rule 23(b) "confer[s] categorical permission" for a plaintiff to bring a class action if the

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[144] *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 37 (2010).
[145] *Id.*
[146] *Id.*
[147] 518 U.S. 415, 428 n.7 (1996).
[148] Shady Grove Orthopedic Assocs, P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 n.7 (2010).

strictures of the federal rule are met.[149] By providing that class actions "may not be maintained" if a claimant seeks statutory damages, New York's section 901(b), the Court held, "answer[s] the same question."[150]

Shady Grove's textualist approach does not obviously foreclose the application of California's anti-SLAPP in federal court. As four judges on the Ninth Circuit noted in a concurrence to a denial of rehearing en banc after *Shady Grove*, Rule 12 and Rule 56—unlike Rule 23—do not provide that a party "may" proceed to trial if she satisfies the rigors of the two rules.[151] If, as the Court has intimated, there truly is an implicit canon of construing the federal rules narrowly to discourage forum shopping and to accommodate state interests, this difference alone may be sufficient to conclude that there is no conflict.

In response, some commentators argue that Rules 12 and 56 "establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court."[152] While the first prong of California's anti-SLAPP motion (under which a defendant must show that the suit arises out of conduct protected under the statute) shares little in common with a Rule 12(b)(6) motion to dismiss, the second prong does test the factual sufficiency of a party's claim, raising concerns that it usurps the role of Rules 12 and 56 in circumstances where the defendant satisfies her burden under the first prong of the anti-SLAPP statute.[153] To draw an analogy, suppose that a state, fearing a rise in products liability suits, enacts a statute applying only to such suits allowing defendants to file a "special motion," which is no different than a Rule 12(b)(6) motion except that it incorporates the *Tellabs* pleadings standard instead of *Twombly-Iqbal*. Even if Rule 12(b)(6) is construed narrowly, such a statute would almost unquestionably directly conflict with Rule 8.

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[149] *Id.* at 398.
[150] *Id.*
[151] Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1188 (9th Cir. 2013) (Wardlaw, J. and Callahan, J., concurring).
[152] *Id.* at 1188 (9th Cir. 2013) (Watford, J., dissenting).
[153] *See id.* at 1188 (Watford, J., dissenting).

Of course, California's anti-SLAPP statute is not just a test of factual sufficiency for a limited set of claims; most notably, it includes a discovery stay until the motion is resolved. But in *Metabolife International, Inc. v. Wornick*, the Ninth Circuit concluded that the stay directly conflicts with Rule 56(d).[154] In *Anderson v. Liberty Lobby, Inc.*, the Court interpreted Rule 56(d)—at that time codified as Rule 56(f)—to require that "summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition."[155] Finding a direct conflict with the anti-SLAPP statute's "good cause" requirement, *Metabolife* quoted with approval a district court decision stating: "Section 425.16 limits discovery and makes further discovery an exception, rather than the rule. Rule 56 does not limit discovery. On the contrary, it ensures that adequate discovery will occur before summary judgment is considered."[156] Many commentators have interpreted *Metabolife* as holding that the anti-SLAPP discovery stay can *never* apply in federal court, and the Ninth Circuit seems to agree.[157] On the other hand, a few district courts in California have expressed reservations about *Metabolife*, questioning whether the stay truly conflicts with Rule 56(d)[158] and even refusing to grant discovery while an anti-SLAPP motion remains pending unless Rule 56(d) demands otherwise.[159]

Assuming that the anti-SLAPP statute's discovery stay does not apply in federal court, as Judge Kozinski observed, "the federal court special motion is a far different (and tamer) animal than its state-court cousin" because it no longer provides "defendants a quick and painless exit from the litigation."[160] A California anti-SLAPP motion applied in federal court, therefore, is

[154] Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001).
[155] 477 U.S. 242, 250 n.5 (1986).
[156] Metabolife, 264 F.3d at 846 (quoting Rogers v. Home Shopping Network, Inc., 57 F.Supp.2d 973, 980 (C.D.Cal.1999)).
[157] *Civ. Proc. Code § 425.16, subds. (f) and (g)—The Discovery Provisions of the Anti-SLAPP Statute not Available in Federal Court*, Anti-SLAPP Litigation § 2:120 (The Rutter Group 2013); *see* Z.F. v. Ripon Unified Sch. Dist., 482 F. App'x 239, 240 (9th Cir. 2012).
[158] New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1101 (C.D. Cal. 2004).
[159] Price v. Stossel, 590 F. Supp. 2d 1262, 1270 (C.D. Cal. 2008).
[160] Makaeff v. Trump Univ., LLC, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J., concurring).

more akin to Rules 12 and 56, thereby detracting from the claim that the anti-SLAPP statute does not directly conflict with the federal rules.[161]

The Court's partial adoption of state law in *Gasperini v. Center for Humanities*[162] does not lessen any argument that the summary judgment and motion to dismiss rules are in direct conflict with the anti-SLAPP special motion to strike. In *Gasperini*, the Court gave effect to New York's stricter standard for reviewing the excessiveness of a jury verdict but—in a departure from New York law—tasked the federal district courts with applying the standard in the first instance to satisfy the Seventh Amendment Reexamination Clause.[163] The Court avoided any direct conflict with the federal rules by concluding that Rule 59 did not prescribe the standard for reviewing the excessiveness of a jury award.[164] Unlike Rule 59, however, Rules 8, 9, and 56 (as well as California's anti-SLAPP statute) include particular motion standards.[165] So, unlike in *Gasperini*, California law could not fill a void typically occupied by interstitial federal common law. Even when viewing *Gasperini* more abstractly as an endorsement of hybridized incorporations of state law, the decision serves as little of a model for applying California's anti-SLAPP statute without the discovery stay in federal court. For California's anti-SLAPP statute, the debate reduces to whether Rules 12 and 56 constitute the complete set of pretrial procedures for testing the adequacy of a plaintiff's claims. Unlike *Gasperini*'s delegation of the initial review to the district court, removing the anti-SLAPP statute's discovery stay only sharpens this potential conflict by making the anti-SLAPP motion further resemble a pre-trial procedure designed primarily to test the legal and factual adequacy of claims.

One final—but less persuasive—contention against applying California's anti-SLAPP statute in federal court is the California Courts of Appeal's application of the statute to federal

[161] *See id.* at 275 (Kozinski, J., concurring); Lund, *supra* note 139, at 108-110.
[162] 518 U.S. 415 (1996).
[163] *Id.* at 436-38.
[164] *Id.* at 437 n.22.
[165] *See* 2 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE §§ 8.02[1], 56.2 (3d ed. 2016); *see* FED. R. CIV. P. 8, 9, 56.

causes of action, albeit without the California Supreme Court ever endorsing the practice.[166] The principle that the federal rules should be construed narrowly to accommodate California's regulatory interests may seem less convincing if state courts themselves do treat the law—to quote Justice Stevens' *Shady Grove* concurrence—as "part of [the s]tate's framework of substantive rights or remedies."[167] But, as Justice Ginsburg observed in dissent, such reasoning is "out of sync" with the Court's earlier *Erie* jurisprudence, which has applied other generally applicable state statutes in federal diversity proceedings.[168] Indeed, the simplistic dichotomy often made between "substantive" and "procedural" statutes overlooks how the same provision can have both substantive and procedural objects.[169] Tellingly, the plurality did not advance this argument in concluding there was a direct conflict between New York's statute and Rule 23.

An intriguing alternative argument for applying California's anti-SLAPP statute in federal court would be to contend that the standard is functionally the *same* as Rule 56.[170] After all, to save the statute from feared unconstitutionality, California courts have interpreted the "probability" standard to be equivalent to summary judgment, although the plaintiff bears the burden of production.[171] Rule 12(d) allows a court to entertain summary judgment at the pleadings stage as long as the parties have "a reasonable opportunity to present all the material that is pertinent to the motion."[172] Likewise, Rule 56 itself provides that a party may make a motion pursuant to the rule "at any time until 30 days after the close of all discovery" absent a contrary local rule or court order.[173] In effect, one could construe California's anti-SLAPP motion without the benefit of a discovery stay as a summary judgment proceeding with mandatory fee shifting, and the Court has recognized that state fee-shifting statutes are

[166] *See, e.g.*, Z.F. v. Ripon Unified Sch. Dist., 482 F. App'x 239, 240 (9th Cir. 2012).
[167] *See* Shady Grove Orthopedic Assocs., 559 U.S. at 453.
[168] *Id.* at 454 n.12 (Ginsburg, J., dissenting) (referencing Cohen v. Benefit Indus. Loan Corp., 337 U.S. 541 (1949) and Walker v. Armco Steel Corp., 446 U.S. 740 (1980)).
[169] *Id.* at 455 (Ginsburg, J., dissenting).
[170] *Cf.* Makaeff, 736 F.3d at 1183 (Wardlaw, J. and Callahan, J., concurring).
[171] Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 44 Cal. Rptr. 2d 46, 53 (1995).
[172] FED. R. CIV. P. 12(d).
[173] FED. R. CIV. P. 56(b).

substantive laws that apply in diversity proceedings.[174] But such a construction, although preserving the statute's mandatory fee shifting, would invariably prevent the immediate appeal of a denial of an anti-SLAPP motion under the collateral order doctrine, perhaps the greatest advantage at present of filing an anti-SLAPP motion in federal court.

Ultimately, whether the anti-SLAPP statute applies in federal court will depend on whether a court finds a direct conflict with Rules 12 and 56. Under a "relatively unguided" *Erie* analysis, applying the statute in federal court would certainly serve the twin aims of *Erie*, and it would likely not contravene the "influence—if not the command—of the Seventh Amendment."[175] As exemplified by decisions such as *Parklane Hosiery Company* and *Tellabs*, the Seventh Amendment holds relatively little sway in the Court's jurisprudence, except for militating against the complete displacement of the jury as the ultimate fact-finder.[176] Conversely, if the Court accepts that there is a direct conflict, it would surely not find Rules 12(b)(6) and 56 violate the Rules Enabling Act. Perhaps the best hope, therefore, for applying California's anti-SLAPP statute in federal court (if the Supreme Court ever addresses the issue) is that the Court has been consistently inconsistent in how broadly it construes the federal rules; *Shady Grove* may portend little about how the Court would construe the scope of Rules 12 and 56.

CONCLUSION

With states increasingly considering robust anti-SLAPP measures, whether such statutes should apply in federal proceedings has become an essential question for litigants and courts

[174] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.31 (1975).
[175] Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958).
[176] *Compare* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333-37 (1979) (approving of offensive non-mutual issue preclusion even when it deprives a defendant of ever receiving a trial by jury) *with* Byrd, 356 U.S. at 536-39 (refusing, because of "the influence" of the Seventh Amendment, to apply a state decision requiring an affirmative defense to be resolved by a judge); *see also supra* notes 90-120 and accompanying text. Even in *Gasperini*, a decision that only partially adopted state law for fear of impinging the Seventh Amendment's Reexamination Clause, the Court narrowly interpreted the amendment by approving of appellate review under an abuse of discretion standard of a district court's decision on a motion to grant a new trial. *See* Gasperini v. Ctr. for Humanities, 518 U.S. 415, 431-36 (1996).

alike. And—given the Washington Supreme Court's invalidation of its anti-SLAPP statute under its state constitutional guarantee of a civil jury and the D.C. Circuit's refusal to apply the District's robust anti-SLAPP statute in federal court—this question also remains very much unanswered. It is thus no surprise that Yelp and other stakeholders that favor applying anti-SLAPP procedures in federal courts are seeking a federal anti-SLAPP alternative.