ANTI-SLAPPED IN THE FACE: THE APPLICABILITY OF ANTI-SLAPP STATUTES IN FEDERAL COURTS

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INTRODUCTION

"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!'"[1] These were the words and actions attributed to Roslyn La Liberte, a Republican activist who attended a town hall meeting regarding immigration rights and shouted at a 14-year-old Hispanic boy. A photograph from the event depicts La Liberte grasping her throat, while appearing to speak authoritatively to the youth. Two days later, Joy Reid, a well-known political commentator, posted the photograph to her social media accounts, juxtaposing it with a 1957 photograph showing a white woman yelling at an African American girl during a civil rights demonstration.[2] In the following days, La Liberte received severe backlash, including "hundreds of hate messages via telephone, text, e-mail, and mail."[3] Reid, however, got the story wrong. The teenager came forth and disclosed that the conversation was entirely civil.[4] Reid issued an apology, but the damage had already been done to La Liberte, most notably in the form of threats and abusive messages following Reid's posts.[5]

La Liberte pursued a defamation action against Reid, alleging Reid had falsely accused her of yelling racist slurs.[6] The Eastern District Court of New York, however, dismissed the suit prior to discovery, finding California's anti-SLAPP statute precluded suit.[7] The statute, codified as § 425.16 in the California Code of Civil Procedure ("CCCP"), was first enacted in 1992 in an

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1. La Liberte v. Reid, 966 F.3d 79, 84 (2d Cir. 2020).

2. J. Alexander Lawrence, *The Joys and Dangers of Tweeting: A CDA Immunity Update*, JD SUPRA (Nov. 13, 2019), https://www.jdsupra.com/legalnews/the-joys-and-dangers-of-tweeting-a-cda-21716/.

3. Brief for Petitioner-Appellant at 9, La Liberte v. Reid, 966 F.3d 79 (2019) (No. 19-3574), 2019 WL 7046666, at *9.

4. Porter Wells, *Joy Reid Must Defend Against Defamation Claims, Second Cir. Says*, BLOOMBERG LAW (July 15, 2020, 11:58 AM), https://news.bloomberglaw.com/us-law-week/joy-reid-must-defend-against-defamation-claims-second-cir-says.

5. Jeff John Roberts, *How a TV Host's Retweet Could Change Twitter*, FORTUNE (Nov. 12, 2018), https://fortune.com/2018/11/12/retweet-defamation/.

6. Brief for Petitioner-Appellant at 57, *La Liberte*, 966 F.3d at 85.

7. *Id.*

effort to protect "freedom of speech and petition for the redress of grievances."[8] In essence, CCCP § 425.16 acts as a gatekeeping measure for litigants asserting defamation claims and has an undertone of equity, preventing wealthy defendants from burdening plaintiffs through high discovery costs in a meritless claim.[9] To invoke protection, movants file a "special motion to strike," which is governed by a two-step analysis.[10] First, a court decides whether the moving party has made a threshold showing that the challenged cause of action is one arising from a protected activity.[11] The court then determines whether the non-moving party has demonstrated a probability of prevailing on the merits.[12]

California was the first state to adopt an anti-SLAPP statute, triggering a nationwide movement towards protecting plaintiffs against meritless defamation countersuits.[13] The statute, however, is far from a flawless shield, and defendants have consistently found ways to circumvent the protection. In the case of *La Liberte*, the Second Circuit Court of Appeals vacated the district court's ruling, holding CCCP § 425.16 could not apply in federal courts, since it conflicted with the Federal Rules of Civil Procedure.[14] The ruling informally aligned the Second Circuit with the majority view on this matter.[15] The minority view, adopted only by the First and Ninth circuits, permits federal applicability of anti-SLAPP statutes on the basis that federal courts must apply *substantive* state laws under the Rules Enabling Act of 1934 ("REA").[16]

This Note examines the contrasting views adopted by the circuit courts and presents a solution to the disagreement. First, this Note will briefly discuss the historical foundations underlying anti-SLAPP statutes, as well as the foggy saga of the *Erie* progeny. The Note then takes an in-depth look at how the circuit courts have split on whether state statutes—when examined under the *Erie* doctrine—should have weight in federal courts. Finally, this Note offers a

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8. CAL. CIV. PROC. CODE § 425.16(a) (West 2015); *California's Anti-SLAPP Law and Related State and Federal Statutes*, CAL. ANTI-SLAPP PROJECT, https://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/ (last visited Nov. 19, 2021).

9. For example, a low-income individual asserts a harassment claim against a wealthy bureaucrat. The bureaucrat counterclaims with a defamation suit, raising the plaintiff's aggregate litigation costs, and forcing withdrawal of suit. In the end, SLAPP suits would serve to have a chilling effect on First Amendment rights.

10. CAL. CIV. PROC. CODE § 425.16(b) (West 2015). *See also* Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J.L. & PUB. POL'Y 426, 429 (2015) ("Once the first part of the test is met, the courts will grant the special motion to strike unless plaintiffs, in the second part of the test, can show a probability of prevailing on the merits.")

11. *See* Golden, *supra* note 10, at 432.

12. *Id.* at 429.

13. BONA LAW PC, *Anti-SLAPP Motions in California*, https://www.businessjustice.com/anti-slapp-motions-in-california.html (last visited Aug. 1, 2021). *See also* PUBLIC PARTICIPATION PROJECT, *State Anti-SLAPP Laws*, https://anti-slapp.org/your-states-free-speech-protection (last visited May 24, 2021).

14. *See* Wells, *supra* note 4.

15. *See id.*; *see also* La Liberte v. Reid, 966 F.3d 79, 86 (2019).

16. *See, e.g.*, Godin v. Schencks, 629 F.3d 79, 86–87 (1st Cir. 2010); 28 U.S.C. § 2072.

way to resolve the widening split, presenting both jurisprudential and historical bases for the argument. Taking these factors into consideration, this Note concludes that federal courts have been misinterpreting the *Erie* doctrine; a correct interpretation would ensure the applicability of these important state statutes in the federal purview.

I. HISTORICAL BACKGROUND

A. Anti-SLAPP Statutes

Strategic Lawsuits Against Public Participation, more commonly known as SLAPP suits, have been enacted by state legislatures for the past quarter century.[17] These meritless claims are typically filed by wealthy individuals to deter opposing viewpoints, causing a "chilling effect" upon First Amendment rights.[18] SLAPPs originally arose as a way to dampen political expression, threatening plaintiffs who wished to report violations of law, campaign for a political initiative, or voice concern about a particular issue, among others.[19] Although a majority of these meritless suits are typically dismissed, defendants cannot avoid the adverse effects of increased litigation costs, lost resources, and emotional stress.[20]

In response to this troublesome legal strategy, thirty-one states have enacted some type of anti-SLAPP legislation to protect the ideals of free speech.[21] Courts have long recognized the ability of state legislatures to provide broader individual rights than those enumerated within the Constitution.[22] Indeed, when California adopted CCCP § 425.16 in 1992, it had a central purpose to "provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech

17. Matthew D. Bunker & Emily Erickson, *#aintturningtheothercheek: Using Anti-SLAPP Law as a Defense in Social Media*, 87 UMKC L. REV. 801, 801 (2019).

18. *See* Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 845–47 (2010). *See also Anti-SLAPP Legislation: A Backgrounder*, RYERSON UNIV. CTR. FOR FREE EXPRESSION, https://cfe.ryerson.ca/key-resources/guidesadvice/anti-slapp-legislation-backgrounder (last visited Nov. 19, 2021).

19. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 5 (1989).

20. *Id.* at 6. Pring notes that although 77 percent of such suits are ultimately won by the target, this does not prevent litigants from filing them, or from suits terminating quickly. *Id.* at 12.

21. Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/introduction-anti-slapp-guide/ (last visited Nov. 12, 2021) ("As of June 2021, 31 states and the District of Columbia have anti-SLAPP laws . . .").

22. Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L REV. 85, 88 n.18 (1985) ("[F]ederal law sets constitutional minimum below which a state law may not fall. However, state courts may expand right under state constitutions beyond the federal constitution minimum.") (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980)).

and petition for the redress of grievances."[23] As other states have followed California's lead in enacting their own respective statutes, the procedural aspects have remained similar, generally first requiring a litigant's protected communication to focus on a matter of public concern.[24]

B. Law Applied in Federal Courts

While anti-SLAPP statutes have had tremendous success in the state realm, challenges have arisen regarding their applicability within the federal court system. With the backdrop of the Rules Enabling Act of 1934, the Supreme Court has continually wrestled with the proper way to apply state rules within the federal setting.[25] The landmark 1938 holding in *Erie R.R. Co. v. Tompkins*[26] further muddled the judicial analysis. Subsequent cases have built upon this foundation to formulate the *Erie* progeny. Under the original analysis, the first question that courts attempted to tackle was whether a given state statute should be considered "procedural" or "substantive" under the definitions provided by *Sibbach v. Wilson & Co*.[27] If the state law was procedural, courts would then ask if an existing federal rule was "sufficiently broad" to control the issue.[28] If no federal law applied, the requisite test was the traditional Rules of Decision Act inquiry, wherein the federal court considered whether declining to apply the state law would advance the twin aims of *Erie*.[29]

This conflict of laws test was altered by the Court in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*[30] The case involved a challenge to a New York law which outlined a process for class action suits which was distinct from Federal Rule of Civil Procedure 23.[31] In a plurality decision

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23. Club Members for an Honest Election v. Sierra Club, 196 P.3d 1094, 1098 (Cal. 2008); *see also* Golden, *supra* note 10, at 428–29 (discussing the constitutional protections afforded to litigants by California's statute).

24. Barylak, *supra* note 18, at 869. *See also infra* Part IV.

25. *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

26. 304 U.S. 64 (1938).

27. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (holding that FRCP 35 and 37 are valid rules under the Rules Enabling Act because they regulate procedure) ("The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."). *Sibbach*'s formulation of "procedure" has been adopted by at least one court as "the judicial process for enforcing rights and duties recognized by substantive law." Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 670 (10th Cir. 2018) (quoting *id.*).

28. Walker v. Armco Steel Corp., 446 U.S. 740, 749 (1980).

29. *Id.* at 748 ("[T]here being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.") (citing Hanna v. Plumer, 380 U.S. 460, 470 (1965)). The twin aims of *Erie* are the "discouragement of forum-shopping and avoidance of inequitable administration of laws," according to *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). No federal law has ever been voided by the *Erie* test. *Walker*, 446 U.S. at 747.

30. 559 U.S. 393 (2010).

31. *Id.* at 397–98.

authored by Justice Scalia, *Shady Grove* determined that the first and only question is whether the federal procedural rule "answers the question in dispute" and, if it does, "it governs . . . unless it exceeds statutory authorization or Congress's rulemaking power."[32] According to Scalia's opinion—joined in the reasoning portion by just three other justices—this analysis would prevent the Court from wading "into *Erie*'s murky waters."[33] Justice Scalia's opinion evidently carries significant weight within the balance of federalism. Under this new analysis, federal courts need *only* decide whether a federal rule "answered" the same question that the state rule targeted. Importantly, Scalia noted, the federal court need not look into whether the state rule is substantive or procedural, only the "substantive or procedural nature of the Federal Rule."[34] If a federal rule regulates procedure, it is valid in all jurisdictions, *regardless* of its incidental effect upon state-created rights.[35] The Court struck down the New York law.

Justice Stevens authored a concurrence in *Shady Grove*, agreeing that Federal Rule of Civil Procedure 23 was sufficiently broad to preempt the New York state law.[36] Stevens, however, dramatically distanced his reasoning from Scalia's in two primary respects. First, he remarked that "[t]he line between procedural and substantive law is hazy."[37] Stevens shares facets from Justice Ginsburg's dissenting opinion here, arguing that the nature of the state law being displaced must also be considered.[38] Specifically, if the state law is part of that state's framework of substantive rights or remedies, it *may* govern over the federal rule.[39] Second, Stevens went so far as to suggest reinterpreting *Sibbach*, finding that a federal rule cannot "displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[40]

In essence, Stevens eschews Scalia's blanket opinion in favor of a more readily applicable two-step test for judges. First, a federal court must determine whether the procedural federal rule's scope is "sufficiently broad" to control the issue before the court, "'thereby leaving no room for the operation' of

32. *Id.* at 398 (citing *Hanna*, 380 U.S. at 463–64). No federal statute dealing with procedure has ever been found to exceed statutory authorization or Congress's rulemaking power. *Id.*

33. *Id.*

34. *Id.* at 410 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

35. *Shady Grove*, 559 U.S. at 410.

36. *Id.* at 416 (Stevens, J., concurring) ("The New York law at issue . . . is a procedural rule that is not part of New York's substantive law.").

37. *Id.* at 419 (Stevens, J., concurring) (quoting Erie Railroad Co. v. Tompkins, 304 U.S. 64, 92 (1938)).

38. *Id.* at 442 (Ginsburg, J., dissenting) (quoting Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 427 (1996)) ("[F]ederal courts have been cautioned by this Court to 'interpre[t] the Federal Rules . . . with sensitivity to important state interests.'").

39. *Id.* at 419 ("It is important to observe that the balance Congress has struck turns, in part, on the nature of the state law that is being displaced by a federal rule[,]" and "it turns on whether the state law actually is part of a State's framework of substantive rights or remedies.").

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

seemingly conflicting state law."[41] If there is no federal rule which applies or operates alongside the state law, the court "must engage in the traditional Rules of Decision Act inquiry under *Erie* and its progeny."[42] However, if the federal rule is broad enough to create a "direct collision," the court must make an additional determination: whether applying the federal rule is a valid exercise of rulemaking authority by Congress under the Rules Enabling Act.[43] The REA requires that federal rules do not "abridge, enlarge or modify any substantive right."[44] Here, Stevens asserts the relevant test is determining whether the state law is "so intertwined" with a particular state right or remedy that it serves to "define the scope of the state-created right."[45] Thus, Stevens contends that "whether a Federal Rule is valid under the Rules Enabling Act depends not on the Federal Rule alone, but also on the nature of the state rule it seeks to displace."[46] Over the last decade, some federal courts have followed the historical practice of reading Stevens' concurrence as the controlling opinion.[47] Additionally, the concurrence has been applauded by state-right activists.

This approach ensures that applying a Federal Rule does not trammel a state rule of procedure that inextricably contributes to a state's definition of substantive rights. Making this determination requires evaluating on a case-by-case basis how a state procedural rule fits into the state's statutory scheme and how it relates to the state policies that the scheme was designed to promote. Justice Stevens set a high threshold for such a finding, limiting the determination to those rare cases in which there is "little doubt" that the procedural rule helps define substantive rights.[48]

In the context of an anti-SLAPP statute, Stevens' concurrence carries significant weight in determining federal court applicability. "When anti-SLAPP laws are understood as using procedural means to accomplish a substantive end, it is impossible to characterize them as purely procedural, and therefore, more difficult to dismiss them from applying in federal court."[49] Applying Stevens' two-prong test, federal courts would first need to decide whether any federal rule created a "collision" with the state anti-SLAPP law. While Scalia would end the inquiry upon an affirmative answer, Stevens' test requires federal courts to then assess whether the anti-SLAPP law is "so

41. *Id.* at 421 (quoting Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)); Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

42. *Id.* at 421.

43. *Id.* at 422–23.

44. 28 U.S.C. § 2072(b) (1988).

45. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 423 (2010) (Stevens, J., concurring).

46. Godin v. Schencks, 629 F.3d 79, 87 (1st Cir. 2010) (internal citation omitted).

47. *See, e.g.*, McKinney v. Bayer Corp., 744 F. Supp. 2d 733, 747 (N.D. Ohio 2010).

48. Andrew J. Kazakes, *Relatively Unguided: Examining the Precedential Value of the Plurality Decision in* Shady Grove Orthopedic Associates v. Allstate Insurance Co., *and Its Effects on Class Action Litigation*, 44 LOY. L.A. L. REV. 1049, 1058 (2011).

49. 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, 216 (2016).

intertwined" with a state right or remedy.[50] This has, historically, been a troublesome inquiry for federal courts.

Reflecting on the origins of anti-SLAPP statutes, states originally began implementing such laws in the "aim [of protecting] a defendant's rights under the First Amendment to petition and speak out for a public purpose."[51] This purpose has led to the contention that the laws protect *substantive* constitutional rights.[52] Indeed, some courts have conceded "[a]n anti-SLAPP statute is typically a hybrid procedural/substantive law, so application of the *Erie* rules is . . . complicated . . . ."[53] Intuitively, under the Stevens model, federal courts will take on the burden to determine, on a case-by-case basis, whether a state statute protects individual substantive rights. Scalia, in his *Shady Grove* opinion, acknowledges this difficulty, lamenting that Stevens' approach would force courts "to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule."[54] However, as this note will explore, it is Justice Stevens' analysis which carries the precedential weight on the issue, and is justified by historical understandings.

II. THE CIRCUIT SPLIT

In the decade since the controversial *Shady Grove* holding, the circuits have formed a narrow split in regard to whether anti-SLAPP statutes have applicability in the federal courts. Although not always acknowledged in the opinions, the split primarily arose as a result of circuits disagreeing over which *Shady Grove* opinion—the plurality or the concurrence—serves as controlling precedent. A growing minority of circuits elect to disregard Scalia's blanket test and give preference to Stevens' concurrence in order to consider applicability of state statutes. On the other side, the majority of circuits continue to use Scalia's bright-line test to classify an anti-SLAPP law as cutting against the federal rules, therefore disallowing them in federal court.

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

51. Tyler J. Kimberly, *A SLAPP Back on Track: How* Shady Grove *Prevents the Application of Anti-SLAPP Laws in Federal Courts*, 65 CASE W. RES. L. REV. 1201, 1206 (2015); *see also* Louisiana's anti-SLAPP statute, codified as LA. CODE CIV. PROC. ANN. art. 971 (1999) ("The legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.").

52. *See* Elias, *supra* note 49, at 237 ("When a state enacts an anti-SLAPP statute, it makes a policy judgment that the public has an important interest in a vigorous public debate about matters of common concern . . . .").

53. Diamond Ranch Acad., Inc. v. Filer, 117 F. Supp. 3d 1313, 1318 (D. Utah 2015) (following Stevens' concurrence as the relevant framework).

54. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co, 559 U.S. 393, 415 (2010).

A. Minority View Circuits

1. First Circuit

The First Circuit became the initial circuit in the aftermath of *Shady Grove* to spurn the majority view on anti-SLAPP statutes when they decided *Godin v. Schencks* in 2010.[55] In *Godin*, the plaintiff brought suit for defamation against her former employer, Fort O'Brien Elementary School, after she was terminated based on accusations of inappropriate conduct with students.[56] The defendants filed for summary judgment under Maine's anti-SLAPP statute,[57] but the district court denied the motion.[58] The circuit court reversed, finding that the federal rules *were not* sufficient to control the issue addressed by the state law.[59]

Although the appellate court considered Scalia's majority opinion in *Shady Grove*, they also noted that Stevens' concurrence was "joined in relevant part by four other Justices" in finding that whether a Federal Rule is valid depends "not on the Federal Rule alone, but also on the nature of the state rule it seeks to displace."[60] Thus, the critical question which must be asked is "whether the state law actually is part of a State's framework of substantive rights or remedies."[61] On these grounds, the court concluded that Maine's statute protects specific defendants who have been targeted on the basis of protected speech, thus forming a substantive remedy.[62] Relying on Stevens' language, the court subsequently found the anti-SLAPP law "is 'so intertwined with a state right or remedy that it functions to define the scope of the state-created right' [and] cannot be displaced" by Federal Rule of Civil Procedure 12 or 56.[63]

2. Ninth Circuit

In 1999, the Ninth Circuit took the first step towards defending state anti-SLAAP statutes in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*[64] Plaintiff Margaret Newsham brought a qui tam suit alleging that Lockheed had submitted millions of dollars in false claims for excessive

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

56. *Id.* at 81.

57. *Id.* at 81–82. *See also* ME. STAT. tit. 14, § 556 (1995).

58. *Godin*, 629 F.3d at 82.

59. *Id.* at 86.

60. *Id.* at 87 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 419 (2010) (Stevens, J., concurring)).

61. *Id.* (citing *Shady Grove*, 559 U.S. at 419 (quoting Hanna v. Plumer, 380 U.S. 460, 471 (1965))).

62. *Id.* at 89. The court goes on to determine that the specific "substantive" part of Maine's statute is that it shifts the burden of proof. "[I]t is long settled that the allocation of burden of proof is substantive in nature and controlled by state law." *Id.* (citing Palmer v. Hoffman, 318 U.S. 109, 117 (1943)).

63. *Godin*, 629 F.3d at 89 (quoting *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring)).

64. 190 F.3d 963 (9th Cir. 1999).

nonproductive labor hours on government projects.[65] Lockheed moved to dismiss under California's anti-SLAPP statute, codified as CCCP § 425.16.[66] The Ninth Circuit utilized a novel two-step analysis. First, they found there was no direct conflict between the state statute and the federal rules since CCCP § 425.16 was crafted to serve an interest not directly addressed by those rules—the constitutional protection of freedom of speech.[67] Second, no federal interest was undermined by the application of the state provisions since the twin aims of *Erie* favor application.[68]

A decade later, the *Shady Grove* holding provided the Ninth Circuit an opportunity to reconsider their stance. However, the court sidestepped the issue in *Makaeff v. Trump Univ., LLC*.[69] After dissatisfaction with her education at Trump University, Makaeff filed a class action complaint, accusing the institution of deceptive business practices.[70] Trump University counterclaimed for defamation and Makaeff raised CCCP § 425.16 as her defense.[71] The court essentially applied *Newsham* via stare decisis, failing to even consider the implications of *Shady Grove*. The court's stated reasoning was that by creating a separate theory upon which certain kinds of suits can be disposed of before trial, CCCP § 425.16 supplements, rather than conflicts with, the federal rules. Chief Judge Kozinksi and Judge Paez, however, each wrote separate concurring opinions which urged *Newsham* to be reconsidered and criticized the majority for failing to revisit precedent.[72]

B. Majority View Circuits

1. D.C. Circuit

In *Abbas v. Foreign Pol'y Grp.*,[73] the D.C. Circuit, in an opinion by Judge Brett Kavanaugh, strictly followed Scalia's opinion in *Shady Grove* by finding the D.C. anti-SLAPP statute inapplicable in federal court. Following the *Shady Grove* plurality framework, the court held that the local anti-SLAPP act conflicted with Federal Rules of Civil Procedure 12 and 56 by asking courts to evaluate the likelihood of a suit's success on the merits.[74] Although the court acknowledged Stevens' concurrence, they dismissed its prevalence, since "neither opinion can be considered the . . . narrowest opinion."[75] Therefore,

65. *Id.* at 966–67.

66. *Id.* at 967.

67. *Id.* at 973.

68. *Id.* (citing Byrd v. Blue Ridge Rural Elect. Coop., Inc., 356 U.S. 525, 537–40 (1958)). The court's analysis would shift once *Shady Grove* was decided in 2010.

69. 715 F.3d 254 (11th Cir. 2013).

70. *Id.* at 260.

71. *Id.*

72. *Id.* at 272–75, 276 (Kozinski, C.J., concurring) (Paez, J., concurring).

73. 783 F.3d 1328 (D.C. Cir. 2015).

74. *Id.* at 1333–34.

75. *Id.* at 1337.

according to the court, the vague *Sibbach* test advocated by Scalia must apply.[76] Utilizing this framework, the "rules governing motions for summary judgment are procedural" and an anti-SLAPP statute has no application.[77]

2. Eleventh Circuit

In the wake of *Abbas*, the Eleventh Circuit also followed Scalia's *Shady Grove* opinion in *Carbone v. Cable News Network, Inc*.[78] Plaintiff David Carbone brought suit, alleging that CNN had published a series of defamatory news reports about his practices as CEO of St. Mary's Medical Center.[79] CNN, relying on the Georgia anti-SLAPP statute,[80] sought to dismiss the claim.[81] The court ultimately found that the motion-to-strike provision of the state statute "answer[ed] the same question" as Federal Rules of Civil Procedure 8 and 12, which already define the criteria for assessing sufficiency of pleadings.[82]

Mirroring the D.C. Circuit, the Eleventh Circuit based its holding on Scalia's *Shady Grove* opinion, determining that if the federal rule answered the same question as the state rule, the inquiry was over, and the state statute could not apply.[83] By requiring the plaintiff to allege and prove a probability of success on the merits, Georgia Code § 9-11-11.1 was superseded by the Federal Rules of Civil Procedure. If the Georgia statute *was* permitted, the court reasoned, the federal rules would be nullified.[84] CNN countered that the state law "'define[d] the scope' of 'state-created rights'" and was, therefore, substantive.[85] The court quickly dismissed this argument, finding the motion to strike "implicate[s] the same facts and the same law."[86]

3. Fifth Circuit

The Fifth Circuit, relying heavily on *Abbas*, joined the majority viewpoint in *Klocke v. Watson*.[87] In a tragic fact pattern, Klocke's son, Thomas, committed suicide after he was falsely charged with homophobic harassment by Watson.[88] Klocke brought suit against Watson for defamation, and Watson invoked the Texas Citizens Participation Act (TCPA), an anti-SLAPP statute designed to "encourage and safeguard the constitutional rights of persons to

76. *Id.*

77. *Id.*

78. 910 F.3d 1345 (11th Cir. 2018).

79. *Id.* at 1347–48.

80. GA. CODE ANN. § 9-11-11.1 (2020).

81. *Carbone*, 910 F.3d at 1348.

82. *Id.* at 1352–53.

83. *Id.* at 1354.

84. *Id.* at 1352.

85. *Id.* at 1355 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 423 (2010) (Stevens, J., concurring)).

86. *Id.* at 1358.

87. 936 F.3d 240 (5th Cir. 2019).

88. *Id.* at 242.

petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law."[89] The court, reading the Scalia opinion of *Shady Grove* strictly, found procedural rules "answer . . . [] the same question" when each specifies requirements for a case to proceed at the same stage of litigation.[90]

The court continued that the Texas state law imposed additional requirements *beyond* those found in Federal Rules of Civil Procedure Rules 12 and 56, thus answering the same question as those federal guidelines.[91] In particular, the TCPA imposes evidentiary weighing requirements and operates largely without pre-decisional discovery.[92] Importantly, the court noted, it matters not whether it was possible to *comply* with both the state and federal rules, but "whether the Federal Rules in question are 'sufficiently broad to control the issue before the court.'"[93] Here, the TCPA was an extension on what the federal rules had already prescribed. Since the federal rules are valid under the Rules Enabling Act, they control procedure in federal cases.[94] Further, because the anti-SLAPP statute in Texas "answered the same question" as these federal rules, it was ultra vires, and precluded by *Shady Grove*.

III. RESOLVING THE SPLIT

The next section of this note reexamines the *Shady Grove* opinion, advances the interpretation which federal courts should uniformly adopt, and applies it to anti-SLAPP statutes to resolve the growing split. In prelude, most circuits have adopted the incorrect approach in handling such cases and should be following Justice Stevens' concurrence on a stricter basis. On both a pragmatic and historical level, Stevens' reasoning holds the controlling precedent, providing grounds for the applicability of state anti-SLAPP statutes in the federal realm.

A. Jurisprudential Grounds—The Marks *Doctrine*

Any pragmatic analysis on a plurality opinion must begin with consideration of the oft-debated *Marks* doctrine. This canon of construction for courts, promulgated in *Marks v. United States*,[95] sets forth which opinion in a plurality should ultimately control. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those

89. *Id.* at 244 (quoting TEX. CIV. PRAC. & REM. CODE § 27.002 (2017)).

90. *Id.* at 245.

91. *Id.*

92. *Id.* at 246.

93. *Klocke*, 936 F.3d at 247 (quoting Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1355 (11th Cir. 2018).

94. *Id.* at 248 (citing Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1336 (D.C. Cir. 2015)).

95. 430 U.S. 188 (1977).

Members who concurred in the judgments on the narrowest grounds.'"[96] Despite controversy, the Supreme Court has refused to overturn this doctrine.[97] In the context of *Shady Grove*, the *Marks* rule would presumably allow Stevens' formula to have controlling precedent. To be sure, Stevens joins the narrow plurality holding that Federal Rule of Civil Procedure 23 was sufficiently broad enough to preempt § 901 (b). However, in his concurring opinion, joined in relevant part by four justices, Stevens adds the caveat that "whether a Federal Rule is valid under the Rules Enabling Act depends *not on the Federal Rule alone*, but also on the nature of the state rule it seeks to displace."[98]

Although utilized by every circuit in some capacity, the division behind the *Marks* rule is what may rightfully be deemed "the narrowest grounds." In addition to being commonly chastised by critics, courts have also acknowledged the drawbacks of the rule, finding the test to be "more easily stated than applied to the various opinions."[99] In spite of this understandable confusion, two interpretative approaches have emerged, "one focusing on the reasoning of the various opinions and the other on the ultimate results."[100] Under either *Marks* approach, however, Stevens' concurrence must emerge as controlling.

In the first approach, "it is not the result of a judicial decision but rather its 'reasoning – its *ratio decidendi* – that allows it to have life and effect in the disposition of future cases.'"[101] Under this interpretation, one opinion can be equivocally regarded as "narrower" only when that opinion "is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a *common denominator* of the Court's reasoning . . . [.]"[102] An important added consideration is whether the concurring justice serves as a "lynchpin" to the majority. In these cases, the separate opinion provides the most limited interpretation because it provides the so-called swing vote with its narrower

96. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

97. *See* Hughes v. United States, 140 S. Ct. 2657 (2020). There, the Supreme Court refused to overturn precedent from *Freeman v. United States*, 564 U.S. 522 (2011). In *Freeman*, the plurality split 4-1-4, with Justice Sotomayor authoring the concurrence. As a result, Sotomayor's reasoning has served as the controlling opinion under the *Marks* "narrowest reasoning" approach. Despite significant disagreement among lower courts, the Supreme Court refused to address the issue in *Hughes*.

98. Godin v. Schencks, 629 F.3d 79, 87 (1st Cir. 2010) (emphasis added) (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 423–25 (2010) (Stevens, J., concurring)).

99. Nichols v. United States, 511 U.S. 738, 745 (1994). *See also* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1943 (2019). Re finds the narrowest grounds rule "creates precedents that are unlikely to be either legally correct or practically desirable." *Id.* at 1946.

100. United States v. Davis, 825 F.3d 1014, 1020 (2016).

101. Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 124 (2020) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1404 (2020) (plurality opinion)).

102. King v. Palmer, 950 F.2d 771, 781 (1991) (Silberman, J., concurring) (emphasis added).

reading.[103] Under this approach to *Marks*, Stevens' concurrence is considered controlling only if it could be considered a "logical subset" of Scalia's opinion.

Majority circuits contend this "common denominator" approach causes difficulties in *Shady Grove*. Critics have argued that because "Justices Scalia and Stevens stake out opposite positions on this narrow but critical issue, there is no rational common denominator between their opinions."[104] In fact, Judge Kavanaugh, in his *Abbas* holding, considered this precise line of *Marks* reasoning, but ultimately determined that "neither opinion can be considered the . . . narrowest opinion, as the four Justices in dissent simply did not address the issue."[105] On the whole, critics posit that Stevens' concurrence cannot control, as it does not provide a logical subset from the majority.[106] The narrowest opinion, in order to be considered controlling, "must embody a position implicitly approved by . . . five Justices who support the judgment."[107] Courts have also acknowledged the practical concern with providing weight to such opinions. "When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be."[108]

Stevens' concurrence, admittedly, creates an unwieldy 4-1-4 split. His opinion, however, provides the decisive "swing vote" while also narrowing Scalia's broad ruling, therefore providing a common denominator wherein the same outcome is ultimately reached. A fundamental benchmark for critics of the *Marks* approach is that a concurrence which expresses views on future cases not before the court should be treated as *dicta*.[109] Impassioned worries aside, the "narrowest grounds" approach is sensible when two opinions reach the same result, yet one reaches that result for "less sweeping reasons than the other."[110]

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103. B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 310–12 (3d Cir. 2013). *See also* United States v. Donovan, 661 F.3d 174, 183–84 (3d Cir. 2011) (holding that because there was a "point of agreement" between the opinions in an earlier case, that point of commonality provides the controlling precedent for future decisions).

104. Kazakes, *supra* note 48, at 1064.

105. Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015). This conclusion could be considered marginal, at best. Justice Ginsburg's *Shady Grove* dissent, on the contrary, discusses the issue in great detail. *See* Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 559 U.S. 393, 443, 455 (Ginsburg, J., dissenting). Further, the viewpoints of dissenting justices have no bearing on this interpretation of the *Marks* rule, only those in the plurality.

106. *See, e.g.*, Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 170 (3d Cir. 1999) ("Thus, in cases where approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court.") (internal quotations omitted).

107. King v. Palmer, 950 F.2d 771, 781 (1991) (Silberman, J., concurring).

108. *Id.* at 782 (Silberman, J., concurring). *See also* Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F.3d 740, 748 (7th Cir. 2021) ("*Marks* does not command lower courts to find a common denominator—to find an implicit consensus among divergent approaches—where there is actually none.").

109. *See Box*, 991 F.3d at 749.

110. United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006).

Thus, when the narrower opinion is actually applied, an identical outcome would be reached in a subset of cases as if the broader opinion were controlling.[111] This logic fits squarely within the *Shady Grove* context. Stevens' concurrence would, in most cases, ultimately settle on the same outcome, disagreeing solely in the subset of cases where the state statute has a purely substantive purpose.[112] In fact, despite the additional step required of courts, Stevens' analysis establishes that "district courts should set aside the Federal Rule only in extraordinary circumstances."[113]

Furthermore, on a macro-level scale, critics overlook the central purpose of the approach. Although there can be some judicial awkwardness in "attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered,"[114] the *Marks* common denominator interpretation, in practice, unveils the true determinative holding. Federal courts take on the inherent obligation to comply with long-standing Supreme Court precedent. The hidden force behind *Marks* is that a legal standard previously endorsed by the Supreme Court ceases to be controlling only "when a majority of the Court . . . declines to apply it, even if that majority is composed of Justices who disagree on what the proper standard *should* be."[115] No Supreme Court opinion has ever struck down *Marks*, regardless of disagreement in application.

In the second approach to the *Marks* rule, the important distinction is that dissenting opinions are considered in granting a concurrence its controlling weight.[116] These opinions, however, must also embrace the reasoning of the concurrence, thus borrowing the "logical subset" methodology from the alternative *Marks* view.[117] Stevens' concurrence faces less resistance here than under the "reasoning" standard, since this theory focuses not on whether the concurring justice's reasoning maintains a "common denominator" with the majority, but whether five or more justices *on the whole* would agree.[118] This analysis has been accepted by federal courts in several cases, essentially

111. *Id.*

112. What makes a purpose "purely" substantive has been a decades-long question for federal courts. This Note touches on the debate in Part IV.

113. Aaron D. Van Oort & Eileen M. Hunter, Shady Grove *v.* Allstate*: A Case Study in Formalism Versus Pragmatism*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 105, 109 (2010); *see also* Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 559 U.S. 393, 432 (2010) ("[T]he bar for finding an Enabling Act problem is a high one.") (Stevens, J., concurring).

114. Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 694 (3d Cir. 1991) (quoting Blum v. Witco Chemical Corp., 888 F.2d 975, 981 (3d Cir. 1989)).

115. *Id.* at 693 (emphasis added).

116. *See, e.g.*, United States v. Davis, 825 F.3d 1014, 1024 (9th Cir. 2016) ("[W]e acknowledge that the Supreme Court and our sister circuits have considered dissenting opinions when interpreting fragmented Supreme Court decisions.") (citations omitted).

117. *See id.* at 1025–26 (finding that no combination of "dissenting and concurring opinions" yielded a binding result since the dissent was critical of the concurrence view).

118. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1182 (2d Cir. 1992) ("In essence, what we must do is find common ground shared by five or more justices.").

allowing a subsequent court to determine whether there is *any* combination of justices which could be logically configured to give a particular opinion precedential value.[119] Other circuits have spurned this in favor of the "common denominator" approach.[120] Indeed, Stevens acknowledges, in Part III of his concurrence, that Justice Ginsburg's "sufficiently intertwined" standard from the dissent is the correct analysis for the federal-state conflict which *Shady Grove* presents.[121] Stevens, in fact, goes so far as to commend the dissent for reflecting the "laudable concern" in protecting state regulatory policies, as Scalia's opinion had failed to do.[122] Ultimately, Stevens disagrees with Ginsburg's holding that federal courts should be able to rewrite the rules when it comes to interpreting state law, and instead must align their decisions with *Hanna*.[123] Stevens and Ginsburg find common ground in the fact that state laws, for *Erie* purposes, can qualify as "substantive," even when they appear procedural on their face.[124] Justice Ginsburg simply goes a step further, arguing courts should "'interpre[t] the Federal Rules . . . with sensitivity to important state interests,' . . . and a will 'to avoid conflict with important state regulatory policies . . . .'"[125] The crux of the analyses—providing a way to interpret state procedural laws as substantive for the purpose of federal applicability—supplies the necessary mutual understanding for the opinions. Also of note, Justice Sotomayor chose not to join Part II-C of Scalia's opinion, which chastised Stevens' concurrence, demonstrating another potential justice who may find agreement with some of the concurrence's reasoning.[126] Irrespective of which interpretation of *Marks* is followed, the same result follows—Justice Stevens' concurrence, despite creating the 4-1-4 split, serves as controlling precedent for lower courts.

B. Historical Grounds—The Rules Enabling Act

This section of the note explores why Justice Stevens' concurrence should be followed by lower courts for historical reasons. Examination of the REA, as well as how it has been interpreted since *Erie*, demonstrates that Congress's primary concern—upholding state rights—falls under attack with Scalia's

119. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Rappa v. New Castle Cnty., 18 F.3d 1043, 1057 (3d Cir. 1994) (affirming a decision in which the controlling test was one created through a combination of a concurring opinion and a dissent joined by four justices).

120. *See* Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F.3d 740, 744–46 (7th Cir. 2021) (listing several circuit court opinions which reject the notion of using the positions of dissenting justices in forming the ultimate controlling opinion).

121. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 428 (2010) (Stevens, J., concurring).

122. *Id.* at 431.

123. *Id.*

124. *Id.* at 455 (Ginsburg, J., dissenting).

125. *Id.* at 442 (Ginsburg, J., dissenting) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427, 438 (1996)).

126. *See id.* at 395–96.

plurality opinion in *Shady Grove*. Stevens, on the other hand, offers a more conducive alternative which better respects the federalist balance.

The REA, codified in 1988 as 28 U.S.C. § 2072, grants the Supreme Court the ability to "prescribe general rules of practice and procedure and rules of evidence" for the federal court system.[127] However, these prescription powers are limited to the extent that they may not "abridge, enlarge or modify any substantive right."[128] As of yet, the Supreme Court has *never* invalidated a codified Federal Rule, typically finding any challenged rule to be procedural in nature and, therefore, able to trump conflicting state statutes via the Supremacy Clause.[129] Inevitably, the Courts' interpretation of the REA has been a target for states' rights advocates. As Justice Harlan lamented: "So long as a reasonable man could characterize any duly adopted federal rule as 'procedural,' the Court . . . would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens."[130] Indeed, viewing § 2072 as a mere gatekeeping matter which can be avoided by characterizing a federal law as procedural threatens the substantive rights promulgated by states. As Professor A. Benjamin Spencer opines, "[r]eading the REA as a congressional delegation of the full scope of rulemaking power that Congress enjoys—notwithstanding express language suggesting to the contrary—disrespects the separation of powers that the Constitution envisions."[131]

Examining the original bill, as drafted by the House of Representatives, actually supports the notion that the REA was built with a safeguard for individual liberties. The bill reads, in part: "The proposal is . . . in the best traditions of a cooperative and voluntary federalism, respecting state authority in matters of substantive law and facilitating its enforcement through a Federal jurisdiction that should improve economy and uniformity in administration of the law."[132] This background is precisely the idealism which Stevens and Ginsburg seek to uphold in *Shady Grove*. When state substantive rights are at issue, Stevens argues, the principles of federalism command that substantial deference be given to the methods in which states have structured their laws. The Supreme Court has affirmed as much, finding a presumption against federal preemption of laws where Congress is aware of the operation of state law in a particular field.[133] Additionally, in the most recent case of relevance prior to

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127. 28 U.S.C. § 2072(a) (1988).

128. *Id.* § 2072(b).

129. Allan Erbsen, *A Unified Approach to* Erie *Analysis for Federal Statutes, Rules, and Common Law*, 10 U.C. IRVINE L. REV. 1101, 1115–16 (2020). *See also* U.S. CONST. art. VI, § 2.

130. Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring).

131. A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 687 (2019).

132. H.R. 889, 100th Cong., 2d Sess. (1988).

133. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166–67 (1989) (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) (The Court held that because recovery of punitive damages was based on state tort law, Congress did not intend to supersede this when they passed of the Atomic Energy Act of 1954.)).

Shady Grove—Gasperini v. Center for Humanities, Inc.—the Court had noted the importance of showing sensitivity to state interests and regulatory policies when interpreting federal rules.[134] In that same opinion, the Court stated that *Erie*'s twin aims counsel federal courts to provide at least some deference to state procedural measures that intend to impact the scope of substantive rights.[135]

The important determination promulgated by the REA is whether a state law can be classified as one of procedure or substance. An early congressional pronouncement originally defined procedure as "the forms and modes" of the proceedings.[136] The Court, however, produced the modern interpretation in the seminal case of *Sibbach v. Wilson & Co.*, which defined procedure as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[137] A substantive right, on the other hand, is "an entitlement that arises out of the duties, obligations, and privileges we have with respect to one another," or, more specifically, one that ensures we are able to "protect our lives, liberty, and property."[138] In *Shady Grove*, Scalia included a scathing review of Stevens' concurrence, contending that Stevens essentially sought to upend the *Sibbach* precedent.[139] A careful analysis reveals this is not the case. Stevens, instead, simply follows post-*Hanna* precedent indicating that what is procedural in one context may be substantive in another.[140]

Stevens' concurrence begins by citing cases which demonstrate the deference which the Court had previously given to state laws. "When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice."[141] Stevens then proceeds to his two-prong test, which first asks whether a federal rule exists which is "sufficiently broad" to control the particular issue.[142] If there is no such rule, the traditional *Erie* Rules of Decision Act inquiry is implicated. If, instead, an on-point federal rule exists, the second prong of the analysis requires the Court to consider the effect, if any, of the REA. In this prong, preemption principles dictate that courts must not automatically presume Congress has supplanted state law "in a field which the

134. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996).

135. Colin Quinlan, Note, Erie *and the First Amendment: State Anti-SLAPP Laws in Federal Court after* Shady Grove, 114 COLUM. L. REV. 367, 380-81 (2014).

136. *See* Spencer, *supra* note 129, at 662 (quoting Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276).

137. *Id.* (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

138. *Id.* at 673.

139. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 412 (2010) ("[T]he concurrence seeks not to apply *Sibbach*, but to overrule it . . . .").

140. Hanna v. Plumer, 380 U.S. 460, 471 (1965) (citing Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945)).

141. *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring) (citing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949)).

142. *Id.* at 421.

States have traditionally occupied."[143] Thus, Scalia's majority opinion, by ending the inquiry after the initial prong, effectively ignores precedent, as well as the express limitation of the REA.[144]

For these reasons, Justice Stevens' concurrence better respects the historical boundaries of both legislative and judicial precedent. Although all three *Shady Grove* opinions provide slightly different interpretations of the REA's scope, examining the statute with an eye towards legislative history provides critical insights. The House Advisory Committee, in amending the REA in 1988, kept the original 1934 language in place, stating the purpose of the amendment was to "clarif[y] the limitations on national or supervisory rulemaking by the Supreme Court . . . ."[145] Further, the committee report notes that the "most important of these limitations is that the rules promulgated . . . be 'rules of practice and procedure'" and that they do not interfere with substantive rights.[146] The House Committee also made clear that, contrary to the Court's holding in *Sibbach*, "substantive rights" were not confined to rights conferred by substantive law.[147] Indeed, the report states that "[t]he [REA] protection . . . . prevents the application of rules . . . where such rules would have the effect of altering existing remedial rights conferred as an integral part of the applicable [federal] substantive law scheme."[148] Thus, although Congress stopped short of prescribing a literal interpretation to the meaning of "substantive," it showed deference to the courts in carrying out the purpose of the REA, instead of micromanaging federal procedure.[149]

IV. APPLYING THE STANDARD

Anti-SLAPP statutes, by nature, embody substantive state rights. On their face, such statutes appear to have the very characteristics of procedure which *Sibbach* describes. A thorough examination of the statutes' objectives, however, reveals a nature of *substance*. Recent case history can provide an example of this tension. In *La Liberte*, the Second Circuit found California's anti-SLAPP statute (CCCP § 425.16) to be superseded by Federal Rules of Civil Procedure 12 and 56. The court based their reasoning, in part, on grounds that the statute "provide[d] 'an efficient *procedural* mechanism for the early and

143. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

144. Scalia also supported his reasoning by raising the concern that federal courts would be required to inquire into the effect on federal rules on state law. However, Stevens notes that the relevant inquiry is not what rule is easiest on federal courts, but the rule which Congress established. *See Shady Grove*, 559 U.S. at 426 (Stevens, J., concurring).

145. H.R. REP. NO. 99-422, at 5 (1985).

146. *Id.* at 20.

147. Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 103 (1998).

148. H.R. REP. 99-422, at 21–22 (1985).

149. *See* Kelleher, *supra* note 145, at 104.

inexpensive dismissal of nonmeritorious claims . . . .'"[150] However, at no point does the actual text of CCCP § 425.16 use the words "procedure" or "procedural." Instead, the statute's very first provision describes its purpose as combatting the chilling effect on the freedoms of speech and petition.[151] Such a sentiment seems to align not with *Sibbach*'s definition of a procedural rule, but rather one of *substance*, a rule which serves to protect basic individual liberties.

The First Circuit, in *Godin v. Schencks*, has been the only jurisdiction to follow such line of reasoning. In *Godin*, the circuit court found Maine's anti-SLAPP statute applicable in federal court because the state legislation had "both substantive and procedural aspects."[152] Similar to CCCP § 425.16 in California, Maine's statute specifically states its purpose as relating to the moving party's right of petition under the Constitution.[153] The First Circuit placed particular emphasis on this provision, ultimately finding the statute "so intertwined" with substantive rights that it could not be displaced by the Federal Rules.[154] Although each circuit deals with a slightly distinguishable anti-SLAPP statute in regard to language and purpose, inherent commonalities exist in their substantive nature, allowing the Stevens concurrence to have the pivotal effect of protecting litigants' constitutional rights while simultaneously bolstering state rights.

Despite similarities between statutes, circuit courts have differed in the proper legal formula to apply. A recent case which reflects the shortcomings of the majority approach is the D.C. Circuit's *Abbas v. Foreign Pol'y Grp., LLC*. Like other anti-SLAPP statutes, the D.C. anti-SLAPP statute denotes a clear purpose of protecting substantive rights.[155] When the statute was challenged in *Abbas*, however, the court dismissed Stevens' *Shady Grove* concurrence on the basis that neither Scalia nor Stevens could be considered the narrowest opinion under *Marks*.[156] The court went on to hold that, because pleading standards governing summary judgment are procedural, the federal rules must control under *Sibbach*.[157] The holding in *Abbas* misses the mark on two crucial

150. La Liberte v. Reid, 966 F.3d 79, 85 (2d Cir. 2020) (quoting Annette F. v. Sharon S., 119 Cal. App. 4th 1146, 1159 (2004) (emphasis added)).

151. CAL. CODE OF CIV. PROC. § 425.16 (a) (2015).

152. Godin v. Schencks, 629 F.3d 79, 89 (1st Cir. 2010).

153. ME. STAT. tit. 14 § 556 (2012).

154. *Godin*, 629 F.3d at 89 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 428 (2010) (Stevens, J., concurring). Among the several substantive aspects of ME. STAT. tit. 14 § 556 the court acknowledges are the burden shifting to the non-moving party to defeat the special motion, as well as requiring the non-moving party to demonstrate the moving party's activity "(1) was without reasonable factual support, and (2) was without an arguable basis in law." *Id.* (quoting Schelling v. Lindell, 942 A.2d 1226, 1229 (Me. 2008)) (internal quotation marks omitted).

155. D.C. CODE § 16-5502 (2012) (stating the anti-SLAPP statute provides protection from acts arising "in furtherance of the right of advocacy on issues of public interest . . . ").

156. Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015).

157. *Id.*

grounds. First, it fails to acknowledge the precedential value of Stevens' concurrence, and second, it fails to consider the substantive impact of the D.C. statute.

First, the D.C. Circuit makes the error of juxtaposing the D.C. Anti-SLAPP Act against Federal Rules of Civil Procedure 12(b)(6) and 56(a) based on the sole consideration that the D.C. statute "answer[ed] the same question" about pre-trial dismissal and, therefore, was invalid under *Shady Grove*.[158] The court, casting aside the weight of Stevens' concurrence, followed Scalia's reasoning to end the inquiry at this juncture. Subsequently, the *Abbas* court addressed the applicability of the federal rules under the REA. In *Abbas*, the court *did* acknowledge Stevens' opinion on the matter, but ultimately determined that, because the *Shady Grove* plurality chose not to overrule *Sibbach*, the traditional standards of procedure must apply.[159] Applying Stevens' concurrence would have forced the court to look at the "substantive" aspects of the D.C. law, instead of considering only the federal authority. Indeed, D.C. Code § 16-5502 gives significant weight to fundamental rights, as the first section of the law states that claims derive from "act[s] in furtherance of the right of advocacy . . . ."[160] Under Stevens' framework, the fundamental workings of the local statute are considered, allowing it to have applicability in the federal courts. If not already apparent from the text of D.C. Code § 16-5502, the motivation behind the Act can be derived from its legislative history. In fact, a pre-adoption report by the D.C. City Council states that the law "incorporates *substantive* rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate . . . ."[161]

Of course, no statute is the same or as straightforward as was the case in *Abbas*. As Justice Scalia lamented in his *Shady Grove* holding, district courts, applying Stevens' two-prong analysis, will be obliged to "assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule."[162] Indeed, Stevens' interpretation would place the onus on district courts to examine whether a particular anti-SLAPP statute has substantive character—yet this is *precisely* what the REA requires.[163] Additionally, in the context of such statutes, determining whether there is a substantive nature is not a tremendously arduous task. Again, Stevens defines

158. *Id.* at 1334.

159. *Id.* at 1337 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)) (The court used *Sibbach*'s standard test that any federal rule which "really regulates procedure" is valid and reasoned that because "pleading standards and rules governing summary judgment are procedural," the inquiry is over.).

160. D.C. CODE § 16-5502 (2012).

161. COUNCIL OF THE D.C., COMM. ON PUB. SAFETY AND THE JUDICIARY, REPORT ON BILL 18-893 1 (2010) (emphasis added).

162. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 415 (2010). Scalia continues that courts will be bound to consider the substantive or procedural impact of a state rule, in contravention of the reasoning from *Sibbach*.

163. *See id.* at 426 (Stevens, J., concurring) ("The question, therefore, is not what rule *we* think would be easiest on federal courts. The question is what rule Congress established.").

the test to be whether a state law is "so intertwined" with a state right or remedy that it functions to define the scope of the state-created right.[164] To administer this test, Stevens uses a "plain textual reading" standard—agreeing with Scalia in the instant case that Federal Rule of Civil Procedure 23 controls because "there must be more than just a possibility that the state rule is different than it appears."[165]

Legislative history aside, states have been abundantly clear when adopting anti-SLAPP statutes as to the substantive nature behind the acts. Of the thirty-three states which have formally enacted such laws, nearly all of them would meet the "plain text" requirement which Stevens found the New York law to be lacking in *Shady Grove*.[166] Despite the historical divergence as to what truly counts as a "substantive right," the First Amendment rights of petition and speech—which are "cognate rights"[167]—are generally accepted as presiding within this flexible definition.[168] Even on the most rudimentary level, these rights advance personal expression and "have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign."[169]

In response to the threats posed by SLAPP litigation, states have been explicit with the purpose of their statutes, indicating a primary intent to safeguard these fundamental liberties of their citizens. Not only does this characterization satisfy the "plain textual reading" requirement outlined in Stevens's ultimate test,[170] pragmatically, it falls directly in line with what the *Shady Grove* concurrence and dissent sought to shield from the majority's sweeping test. States, by conferring anti-SLAPP laws with the ultimate aspiration of ensuring individual First Amendment liberties, explicitly "intertwine" the substantive with the procedural—giving litigants a safety net from meritless defamation claims.

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164. *Id.* at 423.

165. *Id.* at 436. Stevens also found the dissent's argument about § 901's legislative history to be uncompelling, since this rests on extensive speculation about legislative intent.

166. *See infra* Table A.

167. Thomas v. Collins, 323 U.S. 516, 530 (1945).

168. 1 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 1.05[2][b], at 1-29 (3d ed. 2016), *quoted in Right*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("*Substantive rights* are rights established by law. The term 'substantive' does not mean rights that are 'important' or 'substantial,' but rather those that have been conferred by the Constitution, by statute, or by the common law.").

169. Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 388, 397 (2011); *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 638–39 (1999) (quoting James Madison saying that "'the people have a right to express and communicate their sentiments and wishes' through various means including 'by petition to the whole body . . . .'").

170. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 436 (2010) (Stevens, J., concurring). Stevens distinguishes his opinion from Ginsburg's dissent here by placing less weight on the legislative history of a state law, which poses risks of resting on "extensive speculation" and "competing narratives." *Id.*

Table A[171]

	Substantive Rights Provision?	Upheld in Federal Court?
1st Circuit		
Maine[172]	Yes	Yes
Massachusetts[173]	Yes	No[174]
Rhode Island[175]	Yes	Not Yet Tested
2nd Circuit		
Connecticut[176]	Yes	Not Yet Tested
New York[177]	Yes	Yes[178]
Vermont[179]	Yes	Yes[180]
3d Circuit		
Delaware[181]	Yes	Not Yet Tested
Pennsylvania[182]	No	Not Yet Tested
4th Circuit		

171. This comprehensive table displays the thirty-three existing anti-SLAPP laws, indicates whether they contain a provision as to their substantive effect, and includes whether the particular statute has been tested in federal court.

172. See the discussion on Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010), throughout this paper.

173. MASS. GEN. LAWS ANN. ch. 231, § 59H (West 1996) ("In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.").

174. S. Middlesex Opportunity Council, Inc. v. Town of Framingham, No. 07–12018, 2008 WL 4595369, at *11 (D. Mass. Sept. 30, 2008).

175. 9 R.I. GEN. LAWS ANN. § 9-33-1 (West 1993).

176. CONN. GEN. STAT. ANN. § 52-196a (West 2019).

177. N.Y. CIV. RIGHTS. LAW § 76-a (McKinney 2020).

178. Palin v. New York Times Co., 510 F. Supp. 3d 21, 26 (S.D.N.Y. 2020).

179. VT. STAT. ANN. tit. 12, § 1041(a) (West 2005) ("A defendant in an action arising from the defendant's exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution may file a special motion to strike under this section.").

180. Bible & Gospel Tr. v. Twinam, No. 1:07–cv–17, 2008 WL 5245644, at *1 (D. Vt. Dec. 12, 2008).

181. DEL. CODE ANN. tit. 10, § 8136 (West 1992).

182. 27 PA. STAT. AND CONS. STAT. ANN. § 8302 (West 2000). Although this statute was originally drafted to protect speech on environmental rights, courts have expanded it to cover other forms of speech. *See generally* Sheri Coover, *Pennsylvania Anti-SLAPP Legislation*, 12 PENN ST. ENV'T L. REV. 263 (2004).

Maryland[183]	Yes	Yes[184]
Virginia[185]	Yes	Not Yet Tested
5th Circuit		
Louisiana[186]	Yes	Not Directly Addressed[187]
Texas[188]	Yes	No[189]
6th Circuit		
Tennessee[190]	Yes	Not Yet Tested
7th Circuit		
Illinois[191]	Yes	Not Directly Addressed[192]
Indiana[193]	Yes	Yes[194]
8th Circuit		
Arkansas[195]	Yes	Not Yet Tested
Minnesota[196]	No	No[197]

183. MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2010) ("A lawsuit is a SLAPP suit if it is . . . [i]ntended to inhibit or inhibits the exercise of rights under the First Amendment of the U.S. Constitution . . . .").

184. Russell v. Krowne, No. DKC 2008–2468, 2010 WL 2765268, at *3 (D. Md. July 12, 2010).

185. VA. CODE ANN. § 8.01-223.2 (West 2017) (July 1, 2020).

186. LA. CODE CIV. PROC. ANN. art. 971 (2012) ("A cause of action . . . arising . . . in furtherance of the person's right of petition or free speech . . . .").

187. Lozovyy v. Kurtz, 813 F.3d 576, 583 (5th Cir. 2015) ("We . . . [assume] the statute does not conflict with the Federal Rules.").

188. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2011).

189. See this Note's discussion of *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019).

190. TENN. CODE ANN. § 20-17-102 (West 2019) ("The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law . . . .").

191. 735 ILL. COMP. STAT. ANN. 110/15 (West 2007) ("This act applies to any motion . . . in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.").

192. Cartwright v. Cooney, No. 10–CV–1691, 2012 WL 1021816, at *8 (N.D. Ill. Mar. 26, 2012).

193. IND. CODE ANN. § 34-7-7-2 (West 1998) ("As used in this chapter, 'act in furtherance of a person's right of petition or free speech under the Constitution of the United States . . .' includes any conduct in furtherance of the exercise of the constitutional right of: (1) petition; or (2) free speech . . . .").

194. Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists, No. 1:07–CV–0997, 2009 WL 838549, at *8 (S.D. Ind. Mar. 26, 2009).

195. ARK. CODE ANN. § 16-63-502 (West 2005).

196. MINN. STAT. ANN. § 554.04 (West 1995).

197. Unity Healthcare, Inc. v. Cnty. of Hennepin, 308 F.R.D. 537 (D. Minn. 2015).

Missouri[198]	No	Not Yet Tested
Nebraska[199]	Yes	Never Tested
9th Circuit		
Arizona[200]	Yes	Yes[201]
California[202]	Yes	Yes[203]
Hawaii[204]	No	Not Yet Tested
Nevada[205]	Yes	Yes[206]
Oregon[207]	Yes	Yes[208]
Washington[209]	No	Held Unconstitutional in 2015
10th Circuit		
Colorado[210]	Yes	Not Directly Addressed[211]
Kansas[212]	Yes	Yes[213]

198. MO. ANN. STAT. § 537.528 (West 2012).

199. NEB. REV. STAT. ANN. § 25-21, 24 (1994) ("The threat of [SLAPP suits] . . . significantly chills and diminishes citizen participation . . . and the exercise of these important constitutional rights.").

200. "In any legal action that involves a party's exercise of the right of petition, the defending party may file a motion to dismiss the action under this section." ARIZ. REV. STAT. ANN. § 12-752 (West 2006).

201. Tennenbaum v. Ariz. City Sanitary Dist., 799 F. Supp. 2d 1083, 1086 (D. Ariz. 2011).

202. *See* CAL. CIV. PROC. CODE § 425.16(a) (West 2015).

203. Makaeff v. Trump Univ., LLC, 736 F.3d 1180 (9th Cir. 2013).

204. HAW. REV. STAT. § 634F-2 (2010)

205. NEV. REV. STAT. ANN. § 41.660 (West 1993) ("If an action is brought against a person based upon a good faith communication in furtherance of the right to petition or the right to free speech . . . .").

206. Nat'l Jewish Democratic Council v. Adelson, 417 F. Supp. 3d 416, 423 (S.D.N.Y. 2019).

207. OR. REV. STAT. ANN. § 31.150 (West 2010).

208. Miller v. Watson, No. 3:18-CV-00562, 2019 WL 1871011 (D. Or. Feb. 12, 2019).

209. WASH. REV. CODE ANN. § 4.24.525 (LexisNexis 2010).

210. COLO. REV. STAT. ANN. § 13-20-1101 (West 2019).

211. Although the court in *Stevens v. Mulay*, No. 19-CV-01675, 2021 WL 1153059, at *4, n.6 (D. Colo. Mar. 26, 2021), acknowledged that the 10th Circuit found such statutes to be procedural, the issue was not briefed by the parties, and therefore went unaddressed.

212. KAN. STAT. ANN. § 60-5320 (2016) ("The purpose of the public speech protection act is to encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely . . . .").

213. Caranchini v. Peck, 355 F. Supp. 3d 1052, 1061 (D. Kan. 2018).

New Mexico[214]	Yes	No[215]
Oklahoma[216]	Yes	Yes[217]
Utah[218]	No	Not Yet Tested
11th Circuit		
Florida[219]	Yes	Yes[220]
Georgia[221]	Yes	No
D.C. Circuit		
Washington D.C.[222]	Yes	No

Regarding the emerging circuit split within this field of law, a few cases are simple to explain. For example, the Fifth Circuit has followed the *Shady Grove* plurality opinion to invalidate all anti-SLAPP legislation—while others present statutory interpretation challenges. Some circuits have seen the development of inner-circuit splits between states. In fact, some states, namely New York, have witnessed disagreements between their own district courts on the issue.[223] Despite the pervasiveness of incongruities, a reinterpretation of *Shady Grove* would provide a uniform, workable test in regard to this legislation, without implicating Justice Scalia's fears of imposing an "arduous" burden upon district courts to parse out the purpose of a state law.[224] A majority

214. N.M. STAT. ANN. § 38-2-9.2 (LexisNexis 2001) ("Baseless civil lawsuits . . . have been filed against persons for exercising their right to petition . . . .").

215. Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 673 (10th Cir. 2018) (finding that the statute served *only* to affect the timing of the process, and therefore, was purely procedural).

216. OKLA. STAT. ANN. tit. 12, § 1430(B) (West 2014) ("The purpose of the Oklahoma Citizens Participation Act is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.").

217. KLX Energy Servs., LLC v. Magnesium Mach., LLC, No. CIV-20-1129, 2021 WL 682078, at *4 (W.D. Okla. Feb. 22, 2021).

218. UTAH CODE ANN. § 78B-6-1401 (LexisNexis 2001).

219. FLA. STAT. ANN. § 768.295 (LexisNexis 2000).

220. Corsi v. Newsmax Media, Inc., No. 20-CV-81396, 2021 WL 626855, at *12 (S.D. Fla. Feb. 12, 2021).

221. GA. CODE ANN. § 9-11-11.1 (1996). See this paper's discussion of *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345 (11th Cir. 2018).

222. See this paper's extensive discussion of *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015).

223. *Compare* Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014), *with* La Liberte v. Reid, 966 F.3d 79, 86 n.3 (2d Cir. 2020).

224. *See generally* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 404 (2010).

of the states (78.7%)[225] include a provision directly within the statute implicating substantive rights, sparing courts from examining legislative history and statutory interpretation. Yet, others still satisfy Stevens's "plain reading" requirement by including language which implicates the freedoms of speech and petition.

Reevaluating from the context of *La Liberte v. Reid*, the application of Stevens's concurrence provides a bright-line solution to the disagreement. In evaluating the California statute at hand, the Second Circuit found that CCCP § 425.16 "answered the same question" as both Federal Rule of Procedure 12 and 56 and, therefore, was inadmissible. However, utilizing the standard that this paper suggests, the court would also need to determine whether CCCP § 425.16 was "so intertwined" with a substantive state right or remedy.[226] Indeed, the California statute includes an express provision as to legislative intent:

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.[227]

The statute continues that a special motion to strike shall arise when an individual is subjected to suit based on an act "in furtherance of the person's right of petition or free speech . . . ."[228] The *La Liberte* court did, admittedly, consider the idea that a federal rule and state rule could co-exist, but found the dispositive factor to be Scalia's *Shady Grove* reasoning that states may not "impose[] additional requirements" upon federal legislation.[229] The Second Circuit's interpretation is understandable under the assumption that Justice Scalia's opinion controls, but such reading would undermine precedential and historical foundations. Reinterpreting *La Liberte* under the Stevens concurrence, it becomes clear the statute has applicability in the federal realm. The legislative intent referencing First Amendment rights demonstrates a connection to the substantive rights enjoyed by California citizens and satisfies the "plain statement" requirement.

By following Stevens's concurrence, the circuits not only provide proper construction to the *Shady Grove* split decision, but also respect the authority of states to create, on their own volition, rules which protect fundamental individual liberties. Aside from the merits of ensuring freedoms of speech and petition for citizens, the Stevens formula also provides a way to bridge the

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225. *See supra* Table A. Twenty-six out of thirty-three states have some sort of substantive right provision within their law.

226. *See supra* Part IV.

227. CAL. CIV. PROC. CODE § 425.16(a) (West 2015).

228. *Id.* § 425.16(b)(1).

229. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 401 (2010).

widening circuit split. Despite the reluctance to adopt a concurrence as precedent, the circuits have universally adopted the *Marks* doctrine. Whether by the "common denominator" or "reasoning" method, *Marks* mandates that Stevens's concurrence must be accorded precedential weight. This, in turn, better advances the intent of the REA.

CONCLUSION

This paper has presented the fundamental disagreements underlying a circuit split over the applicability of anti-SLAPP regulation in federal courts. With intra-circuit uniformity consistently at the forefront of the judiciary's ambitions, it makes little sense to treat state laws disparately, entirely dependent on which reading of *Shady Grove* their particular circuit prefers.[230] The existing framework becomes further tarnished when considering the dual aims of the *Erie* doctrine discouraging forum-shopping and avoiding inequitable administration of laws.[231] Yet, by following Scalia's plurality holding, circuit courts subject litigants to burdensome demands which run counter to the Court's jurisprudential goals.

Justice Scalia, in his scathing attack on the Stevens concurrence, argues *Sibbach* cannot be overruled because it is decades-old precedent.[232] Stevens, however, does not ask the Court to overrule this case, but rather to reinterpret the holding in light of the Court's convoluted history. In fact, Congress passed a law many years ago the Rules Enabling Act expressing their intents regarding federal procedural rules. Following the visions of Stevens's concurrence could save countless claims by litigants fighting against financial imbalance within the judicial system. Whether circuits choose to take up this call to action could have monumental effects for equitable litigation in the years to come.[233]

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230. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) ("The jurisprudential rule of like treatment demands consistency not only between cases that are precisely alike but among those where the differences are not significant.").

231. *See generally* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865 (2013).

232. *Shady Grove*, 559 U.S. at 413.

233. For an anecdotal take on the efficacy of anti-SLAPP laws, see On the Media, *SLAPP Un-Happy*, WNYC STUDIOS (Apr. 7, 2021), https://www.wnycstudios.org/podcasts/otm/episodes/slapp-un-happy-on-the-media (Professor Victoria Baranetsky notes that, without a consistent framework and lack of federal applicability, anti-SLAPP laws across the country continue to be weakened.).