NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 12-7012 & 12-7017

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

3M COMPANY,
Appellee,

v.

HARVEY BOULTER, *et al.*,
Defendants-Appellants,

LANNY DAVIS, *et al.*,
Defendants-Appellants,

DISTRICT OF COLUMBIA,
Defendant-Intervenor-Appellant.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS LANNY DAVIS, LANNY J. DAVIS & ASSOCS., PLLC AND DAVIS-BLOCK LLC

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. PARTIES APPEARING BEFORE THE DISTRICT COURT

1. Plaintiff

3M Company

2. Defendants

Lanny Davis

Lanny J. Davis & Associates, PLLC

Davis-Block LLC

Porton Capital Technology Funds

Porton Capital Ltd.

Harvey Boulter

The district court dismissed Porton Capital Technology Funds and Porton Capital Ltd. from this case for lack of personal jurisdiction, and they are not participating in this appeal. In addition, Harvey Boulter has only recently been served with process, and has filed a motion to dismiss for lack of personal jurisdiction and failure to state a claim for relief. The district court has scheduled a hearing on that motion for October 5, 2012.

3. Other Interested Parties

The District of Columbia intervened as a defendant and has filed a separate notice of appeal, which the Court has docketed as No. 12-7017, and has consolidated with this appeal.

4. Amici

Allbritton Communications Company, Atlantic Media, Inc., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, NBCUniversal Media LLC, NPR, Inc., The New York Times Company, POLITICO LLC, The Reporters Committee for Freedom of the Press, and The Washington Post Company moved on August 10, 2012, for leave to file a joint amicus brief in support of the defendant/appellants in this case and the case *Sherrod v. Breitbart*, No. 11-7088. That motion is currently pending.

B. RULINGS UNDER REVIEW

The only rulings under review are the district court's Memorandum and Opinion, and separate Order (Wilkins, J.), denying appellants' special motion to dismiss under the District of Columbia Anti-SLAPP Act, which order also denied appellee 3M's motion to strike appellants' special motion to dismiss, and granted in part and denied in part appellants' motion to dismiss for failure to state a claim upon which relief may be granted. A302-A356. The district court's decision is reported at *3M Company v. Boulter*, 842 F. Supp. 2d 85 (D.D.C. 2012).

C. RELATED CASES

This case is related to Case No. 12-7017, which is an appeal filed by the District of Columbia that arises from the same district court case and order as this appeal. The Court has consolidated that case with this one.

In addition, by order dated July 18 2012, a motions panel of this Court directed the clerk to schedule oral argument for the same day and before the same panel that hears oral argument in No. 11-7088, *Sherrod v. Breitbart*.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1 appellants Lanny J. Davis & Associates, PLLC and Davis-Block LLC state that they have no parent company, and no public company has a 10% or greater ownership interest in either of them. Appellant Lanny J. Davis & Associates, PLLC is a law firm organized as a professional limited liability company. Appellant Davis-Block LLC is a public relations firm organized as a limited liability company.

GLOSSARY OF TERMS

Act:	District of Columbia Anti-SLAPP Act of 2010, D.C. Code 16-5501, *et seq.*
FDA:	Food and Drug Administration
MRSA:	Methicillin-Resistant Staphylococcus aureus
SLAPP:	Strategic Lawsuit Against Public Participation
U.K. MoD:	United Kingdom Ministry of Defence

STATEMENT OF JURISDICTION

The district court's jurisdiction in the action below is based on 28 U.S.C. § 1332(a)(3), which provides the district courts with original jurisdiction over actions where the matter in controversy exceeds $75,000 exclusive of interest and costs, and is between citizens of different states and in which citizens or subjects of a foreign state are additional parties.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 843 (D.C. Cir. 2008). Appellee 3M Company filed a motion to dismiss this appeal contending that the order being appealed is not a final appealable order. On July 18, 2012, a motions panel of this Court referred 3M's motion to dismiss to the merits panel, and directed the parties to address in their briefs the issues presented by the motion to dismiss. Appellants Lanny Davis, Lanny J. Davis and Associates PLLC and Davis-Block LLC address the jurisdictional issue *infra*.

The appellants' notice of appeal was timely filed. *See* Fed. R. App. P. 4(a)(1)(A). The district court entered the order that is the subject of this appeal on February 2, 2012. Appellants Lanny Davis, Lanny J. Davis & Associates PLLC and Davis-Block LLC filed their notice of appeal on February 17, 2012. A359.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In the action below, filed by appellee 3M on the basis of diversity jurisdiction, the district court dismissed, for failure to state a claim, all claims alleged by 3M except a claim for commercial defamation. The district court denied appellants' special motion to dismiss, filed pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq*., to the commercial defamation claim (and all of 3M's other claims), holding that the Act does not apply in federal court. Thus, the issues raised on this appeal are:

1. Whether a district court's order denying a defendant's special motion to dismiss made pursuant to the District of Columbia's Anti-SLAPP Act is a final order appealable pursuant to 28 U.S.C. § 1291 and the collateral order doctrine established by *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

2. Whether the district court erred in holding that, as a matter of law, the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq*. does not apply in federal court.

INTRODUCTION

This appeal presents an important, and purely legal, issue: whether the District of Columbia's Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.*, (the "Act"), applies in federal actions based on diversity of citizenship. A related, preliminary issue is whether the Court has jurisdiction over an appeal of a district court's denial of an anti-SLAPP act motion to dismiss.

The term "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation." In the typical SLAPP, a large, wealthy plaintiff files a lawsuit against a small but vocal critic, then wages a war of attrition whose cost will eventually silence the critic. Such lawsuits abuse the court system and are the antithesis of the fundamental principles of freedom of speech, freedom of conscience, freedom of association, and freedom to petition the government, upon which this nation was founded. At least 25 states have enacted "anti-SLAPP" laws, and virtually every federal court has applied them under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), viewing them as providing an immunity from suit.

The district court here went against this overwhelming weight of authority, denying Davis's special motion to dismiss under the Act on the ground that the Act does not apply to local law claims in federal court because it conflicts with the Federal Rules of Civil Procedure. This decision has had an immediate and

predictable impact that goes to the heart of the *Erie* doctrine: at least one plaintiff has gone forum-shopping by voluntarily dismissing his D.C. Superior Court lawsuit and re-filing it in federal court, candidly acknowledging that the district court's decision here allows him to avoid the Act.

There is little doubt that the Court has jurisdiction of this appeal under the *Cohen* doctrine. Three other courts of appeals have determined that denials of anti-SLAPP motions to dismiss qualify as final orders under that doctrine, and for good reason. The denial of an anti-SLAPP motion to dismiss, like the order in this case, conclusively decides a disputed question that is both separate from the merits of the action, and is effectively unreviewable in an appeal of a later final judgment.

STATEMENT OF FACTS

A. The District of Columbia's Anti-SLAPP Act

While new to the District of Columbia, the Act is patterned on the anti-SLAPP laws of various states. It provides that a party subjected to "a claim arising from an act in furtherance of the right of advocacy on issues of public interest" may file a special motion to dismiss within 45 days of being served with the claim. D.C. Code § 16-5502(a). To succeed, the movant must make a *prima facie* showing that the claim arises from an act in furtherance of the right of advocacy on an issue of public interest. D.C. Code § 16-5502(b). To avoid dismissal, the responding party then must "demonstrate[ ] that the claim is likely to succeed on

the merits." *Id.* If the responding party fails to make such a showing, the motion is granted and the claim dismissed with prejudice. D.C. Code § 16-5502(d).

The Act further provides that upon the filing of a special motion, "discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). However, "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specialized discovery be conducted." D.C. Code § 16-5502(c).

The Act defines the term "act in furtherance of the right of advocacy on issues of public interest" as:

> (A) Any written or oral statement made:
>
> (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
>
> (ii) In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501(1).

The Act defines the term "issue of public interest" as

> an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of

> public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

D.C. Code § 16-5501(3).

As discussed *infra*, the Act provides defendants with a qualified immunity-from-suit defense, and the provisions concerning the special motion to dismiss are integral in effectuating that defense.

B. Factual Background

The genesis of 3M's case is a lawsuit tried during the summer of 2011 in the London High Court of Justice between 3M, on the one hand, and Porton Capital Technology Funds and Porton Capital Ltd. (collectively "Porton") and Ploughshare Innovations, Ltd., on the other hand. *See* Appendix ("A__"), A33, A303-A304. Porton is an investment firm operating out of Dubai and the United Kingdom that specializes in partnering with the U.K. Ministry of Defence ("U.K. MoD") to commericialize technologies and products developed by the U.K. MoD. District Court Docket Item ("D.I.") 9 at p.5. Ploughshare is an entity owned by the U.K. MoD. A304; A305. The London case concerned a product known as BacLite, which the U.K. MoD developed for the detection of the deadly methicillin-resistant *Staphylococcus aureus*, more commonly known as the MRSA bacterium. A28, A303-305. The U.K MoD transferred the technology to a company owned by Porton and Ploughshare, which in turn sold the BacLite technology to 3M. A28-

A29, A304. In exchange, 3M promised to obtain U.S. FDA approval for the technology, market it in the U.S., U.K., European Union, Canada and Australia, and pay a portion of the sales proceeds to Porton and Ploughshare. A29. When 3M prematurely abandoned its regulatory and marketing efforts, Porton and Ploughshare filed the London case seeking damages for breach of contract. A37, A303-A306.

In May 2011, a month before the London trial began, Davis filed a petition on Porton's behalf with the FDA, pursuant to 21 C.F.R. §§ 10.25, 10.30, 12, 13, 14, 15, 16, 54.2 and 54.4(1), requesting that the FDA investigate the circumstances surrounding 3M's decision to cease its efforts to obtain FDA approval for BacLite, and that same day issued a press release and held a press conference announcing the filing of the FDA petition. A34, A306.

In June, just days before the London trial began, Davis granted permission for 3M's counsel, William Brewer, to talk about settling the case directly with Porton's principal, Harvey Boulter, without Davis being present. A38, A278, A308. Following a brief telephone conversation between Brewer and Boulter, Boulter sent Brewer two e-mails concerning settlement, the last sent in the early morning hours of Sunday, June 19. A39-A40, A276-A277, A308.

C. Proceedings in New York Supreme Court

That same Sunday evening, June 19, 3M filed a complaint in the New York state Supreme Court against Porton and Harvey Boulter. D.I. 9-9. 3M alleged that Boulter "blackmailed" 3M in violation of a U.K. criminal statute by threatening to convince the U.K. MoD and the entire U.K. government to cease doing business with 3M if 3M did not settle the London litigation for $30 million. *Id.* 3M's complaint also included business tort claims, and claims for aiding and abetting and conspiracy. *Id.* This complaint did not include a claim for defamation, nor was Davis named as a party. *Id.*

On July 14, 2011, Porton filed a motion to dismiss 3M's New York lawsuit on grounds of lack of personal jurisdiction, forum *non conveniens*, lack of subject-matter jurisdiction and failure to state a claim. D.I. 9-13.

Rather than respond to this motion, 3M instead filed, on July 21, a First Amended Complaint. D.I. 9-14 This time, attempting to provide a U.S. jurisdictional hook, 3M added defendants Lanny Davis, Lanny J. Davis & Associates PLLC and Davis-Block LLC ("Davis"), and included a claim for defamation based on the FDA petition, and the press release and press conference. *Id.*

On August 19, the defendants, including Davis, filed a motion to dismiss 3M's Amended New York Complaint, again on grounds of lack of personal and

subject-matter jurisdiction, forum *non conveniens*, and failure to state a claim. D.I. 9 at 20.

D. Proceedings in the District Court

Rather than respond to the new motion to dismiss filed in the New York court, on August 24, 2011, 3M instead filed the original complaint in the action below against Davis, Boulter and Porton. A17-A48. This complaint was identical to 3M's amended New York complaint, alleging that Davis's FDA petition, press release and press conference statements were part of a grand conspiracy to (1) "blackmail" 3M into settling a London High Court lawsuit between 3M and Porton, (2) defame 3M, and (3) interfere with 3M's ability to do business with the U.K. government. A19. It contained counts for "intimidation and blackmail" under U.K. law (A42-A43), "tortious interference with prospective business relationships and economic advantage" (A43-A44), "commercial defamation" (A44), "aiding and abetting" (A46) and "civil conspiracy" (A46-A47).

On October 6, 2011 Davis filed a special motion to dismiss pursuant to D.C. Code § 16-5502(a). A49. Rather than file an opposition to Davis's special motion to dismiss, 3M instead filed on October 31, 2011, a "motion to strike" Davis's special motion. A50-A52. 3M argued, among other things, that (1) the Act exceeded the District of Columbia's authority under the District of Columbia Home Rule Act, D.C. Code § 1-201, *et seq*., and (2) even if valid, the Federal

Rules of Civil Procedure preempted the Act because the Act's provisions conflicted with the Federal Rules. D.I. 16. 3M also requested that, if the district court denied the motion to strike, that it be allowed to conduct virtually unfettered discovery in order to respond to the special motion. A294. D.I. 16-3.

On November 4, 2011, the District of Columbia filed an unopposed motion for leave to intervene in order to defend the Act's validity and applicability in federal court actions, which the district court granted by order dated November 15, 2011. A53, A62-A63. That order also denied a motion by Davis for a stay of the obligation to file an answer or other response to 3M's complaint under Fed. R. Civ. P. 12. A62. Accordingly, Davis filed a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) on November 18, 2012. A64, A191.[1] On November 29, 2011, Davis and the District of Columbia filed separate oppositions to 3M's motion to strike Davis's special motion to dismiss. A65-A135, D.I. 33.

On December 9—with the special motions and Rule 12 motions based on the first complaint pending—3M filed an amended complaint (A136-A191), adding four new claims to those in 3M's first complaint: "tortious interference with

[1] On that same date, Porton filed a motion to dismiss for lack of personal jurisdiction and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(2) and (b)(6). D.I. 31 Later, on December 2, 2011, Porton filed a special motion to dismiss under the Act, largely incorporating the arguments made in Davis's special motion to dismiss. D.I. 34

existing business advantage" (A181-A182), "tortious interference with contract" (A182-A183), "injurious falsehood and business disparagement" (A185-A186), and with respect to Davis, a frivolous claim for "breach of fiduciary duty" based on Davis's representation of 3M in an entirely unrelated matter 11 years prior (A187).

3M subsequently filed a brief opposing the Rule 12 motions of Davis and Porton, even though 3M had filed an Amended Complaint. D.I. 43. 3M also separately filed oppositions to Davis's and Porton's Anti-SLAPP Act special motions to dismiss D.I. 45, D.I. 46, and a separate reply in support of its motion to strike the defendants' special motions. D.I. 44. On December 28, 2011, Davis and Porton filed supplemental briefs addressing 3M's Amended Complaint and also filed motions to dismiss the Amended Complaint. A296-A298; D.I. 50, 51, 52, 55.

On January 12, 2012, the Court held a hearing on the outstanding motions.

E. The District Court's Memorandum Opinion and Order

On February 2, 2012, the district court issued a Memorandum Opinion and Order ("Order") in which it denied Davis's special motion to dismiss on the ground that the District's Anti-SLAPP Act did not apply in federal court. A302-A356. In reaching this decision, the district court relied on what it perceived to be the majority opinion in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), a case that did not involve an anti-SLAPP law.

Relying on *Shady Grove*, the district court applied that case's two-step process for determining whether a Federal Rule of Civil Procedure preempted an applicable state law in a federal court lawsuit based on diversity jurisdiction. A312-A313. The district court stated that it was required first to determine whether the Federal Rule "answers the question in dispute." A312 (quoting *Shady Grove*, 130 S. Ct. at 1437), A315-A316. If it does, the second step of the process required the court to apply the Federal Rule to the exclusion of the state law so long as the Federal Rule complies with the Rules Enabling Act—which in turn requires a determination of whether the Federal Rule "really regulates procedure" or is unconstitutional. A313, A338. According to the district court, it did not need to "wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid." A313 (quoting *Shady Grove*, 130 S. Ct. at 1437).

The district court then framed the relevant question as "whether this Court may dismiss 3M's claims with prejudice on a preliminary basis based on the pleadings or on matters outside the pleading merely because 3M has not 'demonstrate[d] that the claim is likely to succeed on the merits.'" A316. (quoting D.C. Code § 16-5502). It then concluded that Rules 12 and 56 answered this question. It reached this conclusion by going beyond the Rules' language, examining their early history and citing 60-70 year old cases decided by this Court. A316-A324. Specifically, the district court concluded that "[t]he history and

practice culminating in the 1946 Amendments clearly demonstrates that the framers intended that Rules 12 and 56 provide the *exclusive* means for challenging the merits of a plaintiff's claim based on a defense either on the face of the pleadings or on matters outside the pleadings." A319 (emphasis added). The district court found a further conflict in the Act's requirement that claims failing to withstand a special motion to dismiss be dismissed with prejudice, stating that this provision stripped federal courts of their "discretion" to dismiss claims without prejudice. A329-A333.

The district court then concluded that "[g]iven the procedural characteristics of Rule 12(d) and Rule 56, they fall squarely within the proper scope of the Rules Enabling Act." A339. In reaching this conclusion, the district court declined to consider whether the District's Council intended the Act to confer, or actually conferred, a substantive right, or whether that right might be negated, or the substantive outcome of litigation altered, by a failure to apply the Act. A335-A336. The court reasoned that if the Council intended to confer immunity, it should have enacted a law that allowed a defendant to invoke immunity pursuant to Fed. R. Civ. P. 12 and 56. A336. The district court concluded that "[t]he Act is a summary dismissal procedure that the Defendants and the District seek to clothe in the costume of the substantive right of immunity—but this is largely a masquerade." A340.

Davis filed a notice of appeal on February 17, 2012. A359-A360.

SUMMARY OF ARGUMENT

The Court has jurisdiction over this appeal because the district court's order denying Davis's special motion to dismiss is a final order for purposes of 28 U.S.C. § 1291 under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). To qualify as a final appealable order under the *Cohen* doctrine, the order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action and (3) [be] effectively unreviewable on appeal from a final judgment." *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 843 (D.C. Cir. 2008) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

Orders denying anti-SLAPP motions satisfy the "conclusively determines" criterion because the relevant inquiry is whether the order conclusively determines the disputed question, which is whether a substantive immunity-from-suit defense is available to a SLAPP defendant. Denial of an anti-SLAPP motion satisfies the "separate from the merits" criterion because such a denial is not so intertwined with factual issues as to make the appeal unlikely to affect persons other than the parties. Finally, denials of anti-SLAPP motions are effectively unreviewable on a later appeal from a final judgment. The Act provides an immunity-from-suit defense. If the defendant has to fully litigate the case before seeking review of the

denial of such a motion, the protection that the District's Council intended to confer on SLAPPed defendants will be forever lost.

Thus, the Court should join the three other federal courts of appeals that have held that the denial of a motion to dismiss under an anti-SLAPP law is appealable under the *Cohen* doctrine.

The Act applies in federal court where jurisdiction is based on diversity of citizenship. It is axiomatic that district courts sitting in diversity apply federal procedural law and state substantive law. But where a Federal Rule of Civil Procedure and a state law both appear to apply to a particular issue, a federal court must determine which law to apply. In doing so, a court determines whether the Federal Rule and state law "answer the same question" that is at issue, meaning that the court must determine whether the federal rule is "sufficiently broad to control the issue" before the court, thus creating a "direct collision" between the Federal Rule and the state law.

Here, Federal Rules 12 and 56 are not sufficiently broad to cover the issue that was before the district court. Rule 12(b)(6) provides a procedure for testing the sufficiency of the allegations of a complaint, while Rule 56 provides a procedure for determining whether there are any disputed material facts, and if not, whether one party is entitled to judgment as a matter of law. The Act addresses a different subject-matter: whether a plaintiff's claims arise from a defendant's acts

in furtherance of First Amendment rights in advocacy on a matter of public interest, and if so, whether the plaintiff can establish a likelihood of success on the merits. Virtually every court to have considered the issue has thus held that the Federal Rules and various state anti-SLAPP laws do not collide.

Given that there is no conflict between the Act and the Federal Rules, federal courts must apply the Act in order to fulfill *Erie*'s two aims. First, applying the Act in federal court is necessary to prevent inequitable administration of the laws. Otherwise, a substantive immunity-from-suit defense will be available to defendants in D.C. Superior Court but not to defendants in a D.C. federal court. Second, there is concrete evidence that the failure to enforce the Act in federal court disserves *Erie*'s aim of discouraging forum-shopping: one plaintiff has already sought to dismiss his Superior Court lawsuit and refile it in the federal court due to the district court's decision here.

The district court's analysis was erroneous. First, the district court erroneously viewed Rules 12 and 56 as providing the exclusive procedures for filing motions to dismiss. Nothing in the language of those Rules, or their history, indicates that they were meant to have the preemptive effect conferred here by the district court. They provide that a defendant "may" file a motion to dismiss or for summary judgment. But the fact that a defendant "may" file a motion pursuant to

a Federal Rule does not mean that same defendant "may not" file a motion pursuant to an applicable state law that confers a substantive defense.

The district court further erred by failing to consider whether the Federal Rules and the Act addressed the same subject matter or, stated differently, whether the Federal Rules are sufficiently broad to cover the issue before the court. In doing so, it misapprehended the nature of the "collision" between the Federal Rules and a state law necessary to give preemptive effect to the Federal Rules. The cases show that the conflict must be such that applying the state law would preclude, or effectively nullify, the Federal Rule. That is not the case here, however. A federal court's application of the Act does not preclude application of the Federal Rules. Indeed, here the district court dismissed all but one of 3M's claims under Rule 12(b)(6), and could have gone on to apply the Act to that one remaining claim. Moreover, the district court's holding that the Act does not confer any substantive right conflicts with the overwhelming weight of authority construing other states' laws, and, more importantly, the Act's clear, unequivocal legislative history.

The district court compounded the above errors by concluding that Rules 12 and 56 preempted the Act for the sole reason that those Rules "regulate procedure," without any consideration of the Act's nature or purpose, or the Council's clear intent. The "regulates procedure" standard is set forth only in a

plurality opinion in *Shady Grove* that lacks precedential effect. The standard conflicts with prior Supreme Court authority, as well as the opinion of Justice Stevens, who concurred in part and in the judgment. Justice Stevens's opinion provided the narrowest grounds for the judgment in *Shady Grove*, and is thus entitled to precedential effect under established Supreme Court authority.

STANDARD OF REVIEW

The Court determines *de novo* whether it has jurisdiction over this appeal. *See Blue Ridge Envtl. Def. League v. Nuclear Regulatory Commission*, 668 F.3d 747, 753 (D.C. Cir. 2012) (the Court determines *de novo* whether an administrative order is a final order appealable under the Hobbs Act). The district court's decision that the Act does not apply in federal court is a determination of law that the Court reviews *de novo*. *See Godin v. Schencks*, 629 F.3d 79, (1st Cir. 2010) (district court's determination that Maine's Anti-SLAPP statute does not apply in federal court is a "determination of law" that is reviewed "*de novo*"); *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1294 (11th Cir. 2008) ("[W]e review *de novo* federal-versus-state, or *Erie*, choice-of-law questions"); *cf. City of Harper Woods Emples. Ret. Syst. v. Olver*, 589 F.3d 1292, 1298 (D.C. Cir. 2009) ("This court reviews choice of law issues *de novo*"); *Felch v. Air Florida, Inc.*, 866 F.2d 1521, 1523 (D.C. Cir. 1989) ("This court treats choice of law issues as matters of law over which it exercises *de novo* review").

ARGUMENT

I. The District Court's Denial of Davis's Special Motion to Dismiss Is a Final Order Under 28 U.S.C. § 1291 Pursuant to the Collateral Order Doctrine.

As noted, 3M's motion to dismiss this appeal for lack of jurisdiction has been referred to the merits panel. The sole ground for 3M's motion was that the Order is not a final order under 28 U.S.C. § 1291. 3M is incorrect, however. The Court has jurisdiction pursuant to the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Jurisdiction pursuant to that doctrine is conferred by 28 U.S.C. § 1291. *Id.*

Under the *Cohen* doctrine, an ostensibly interlocutory order is final for purposes of 28 U.S.C. § 1291 if the order: "(1) conclusively determine[s] the disputed question, (2) resolve[s] an important issue completely separate from the merits of the action, and (3) [is] effectively unreviewable on appeal from a final judgment." *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 843 (D.C. Cir. 2008) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

Federal courts of appeals have held that orders denying anti-SLAPP motions satisfy the first two requirements. *See Godin*, 629 F.3d at 83-84; *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 173-77 (5th Cir. 2009); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003). As the First Circuit most recently explained,

orders denying anti-SLAPP motions satisfy the "conclusively determines" criterion because the relevant inquiry is whether the order conclusively determines "the disputed question" (*i.e.*, whether relief under the anti-SLAPP law is available to defendants) rather than the entire action. *Godin*, 629 F.3d at 84. This is the precise issue raised by Davis's appeal, and virtually every other appeal from the denial of an anti-SLAPP motion.

As the First Circuit has also explained, denial of an anti-SLAPP motion satisfies the "separate from the merits" criterion because the denial of an anti-SLAPP motion is "not so intertwined with factual issues as to make it 'highly unlikely to affect, or even be consequential to, anyone aside from the parties.'" *Id.* (quoting *Lee-Barnes v. Puerto Ven Quarry Corp.*, 513 F.3d 20, 26 (1st Cir. 2005)). This is demonstrably true here. Within weeks of the Order, Bradlee Dean, the plaintiff in a SLAPP against NBC Universal and one of its reporters, voluntarily dismissed his D.C. Superior Court case while a special motion to dismiss was pending, and then re-filed his case in the federal district court, specifically citing the Order here as his reason for switching courts. *See* Addendum at ADD1 (Notice of Voluntary Dismissal filed in *Dean v. NBC Universal*, No. 2011 CA 006055 B (D.C. Sup. Ct.)); *see also* complaint filed in *Dean v. NBC Universal*, No.1:12-cv-00283 (D.D.C.).

Courts of appeals have held denials of anti-SLAPP motions are effectively unreviewable on a later appeal. *See Godin*, 629 F.3d at 84-85; *Henry*, 566 F.3d at 177-78; *Batzel*, 333 F.3d at 1025. This is because anti-SLAPP laws provide defendants with immunity from suit. As the Ninth Circuit has explained:

> If the Defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill first amendment rights of free expression. Thus, a defendant's rights under the anti-SLAPP statue are in the nature of immunity: They protect the defendant from the burdens of trial, not merely from ultimate judgments of liability.

Batzel, 333 F3d. at 1025; *see also Godin*, 629 F.3d at 85; *Henry*, 566 F.3d at 178.

Significantly, this Court has likewise recognized that immunity-from-suit defenses are not reviewable on appeal from a final judgment because "appeal from final judgment cannot repair the damage that is caused by requiring the defendant to litigate." *La Reunione*, 533 F.3d at 843 (quoting *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 (2d Cir. 1998)).

Finally, in recent years, the Supreme Court has emphasized that, in assessing the above criteria, appeals under the *Cohen* doctrine must involve an important right or a value of a high order. *Will v. Hallock*, 546 U.S. 345 (2006). That is true here. Immunity from suit has been recognized as a sufficiently important right to justify immediate appeal of an order denying immunity in other contexts. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (claim of qualified immunity

by state actor in civil rights suit); *Abney v. United States*, 431 U.S. 651 (1977) (claim of right not to stand trial under double jeopardy clause); *Wuterich v. Murtha*, 562 F.3d 375, 381-82 (D.C. Cir. 2009) (government employee's claim of immunity under Westfall Act); *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) (claim of tribal immunity by Native Americans); *Roth v. King*, 449 F.3d 1272, 1280 (D.C. Cir. 2006) (claim of D.C. local court judges to immunity from suits seeking injunctive relief provided by 42 U.S.C. § 1983); *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 196 (D.C. Cir. 2004) (order denying claim of immunity under the Foreign Sovereign Immunities Act). It is thus not surprising that federal courts have held that immunity provided by anti-SLAPP laws is an important right for purposes of the collateral order doctrine. *See Godin*, 629 F3d at 84; *Henry*, 566 F.3d at 181; *Batzel*, 333 F.3d at 1025-26.

Moreover, immunity conferred by anti-SLAPP statutes protects First Amendment rights—rights that reflect values of the highest order in our democracy. As the Fifth Circuit explained in *Henry*, in anti-SLAPP appeals

> importance weighs profoundly in favor of appealability. Anti-SLAPP statutes … aim to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights, and as the Supreme Court [has] stated, … "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Indeed, the Supreme Court has time and again emphasized the importance of First Amendment rights.

Henry, 566 F.3d at 180-81 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) and citing *Curtis Publ'g Co. v Butts*, 388 U.S. 130, 165 (1967) (Warren, C.J. concurring in result)). And generally, "'in free-speech cases[,] interlocutory appeals sometimes are more freely allowed.'" *Id.* at 181 (quoting *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 712 (7th Cir. 1986)). Indeed, this Court has held that an order denying newspaper reporters' First Amendment rights to immediate access to court records is immediately appealable under the *Cohen* doctrine. *In re Reporters Committee for Freedom of Press*, 773 F.2d 1325, 1330 (D.C. Cir. 1985) (Scalia, J.).

3M's motion to dismiss noted that the Act does not provide for an immediate appeal of the denial of a special motion to dismiss and concluded (Motion 20) "[b]ecause the District of Columbia City Council [sic] has not itself deemed the matters at issue in an Anti-SLAPP motion sufficiently important to warrant immediate interlocutory appeal in the courts of the District … the Court thus should prohibit an appeal in the federal courts."[2] 3M is wrong, however.

[2] In its motion, 3M relied on two cases denying an appeal because the relevant anti-SLAPP laws did not expressly provide an immediate appeal, *i.e.*, *Metabolic Research, Inc. v. Ferrell*, 2012 U.S. App. LEXIS 12280 (9th Cir. June 18, 2012) (Nevada), *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009) (Oregon). In each case, the Ninth Circuit interpreted the lack of such a provision to indicate that the state legislatures intended not to confer immunity from suit, and also believed that any anti-SLAPP defense could be vindicated on appeal after full litigation. *Metabolic*, 2012 U.S. App. LEXIS 12280, at *15-*21; *Englert*, 551 F.3d at 1105. But as shown above, the District's Council wanted to include an

The original version of the Act authorized the immediate appeal of an order denying a special motion to dismiss. App. Ex. C at 7. That provision ultimately was removed only because a then-new D.C. Court of Appeals case held that a similar provision in the District's arbitration law expanded the Court of Appeals' jurisdiction and violated the Home Rule Act. *See* Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, the "Anti-SLAPP Act of 2010," November 18, 2010 ("Committee Report"), A107, A113.[3] The Committee Report explained (A113):

> As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal. [footnote omitted] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

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immediate-appeal provision, and as shown *infra*, it intended to confer a right to immunity from suit.

[3] That case is *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010). The Court of Appeals later voted to hear the case *en banc* and vacated the initial Court of Appeals opinion. *See Stuart v. Walker*, 2010 D.C. App. LEXIS 697 (D.C. July 8, 2011). After rehearing *en banc*, the Superior Court's order was affirmed by an equally divided court. *See* Order in *Stuart v. Walker*, No. 09-CV-900 (D.C. Ct. of App. Feb. 16, 2012).

Thus, the District's Council thought the denial of a special motion to dismiss was important and justified the taking of an immediate appeal. The only reason it did not include an immediate-appeal provision was the advice it received concerning the Home Rule Act.

In addition to this legislative history, the case law indicates that the D.C. Court of Appeals would likely hear an immediate appeal. That court has long interpreted the District's appellate jurisdictional statute, D.C. Code § 11-721, to be substantially the same as 28 U.S.C. §§ 1291 and 1292. *See B.F. Saul Co. v. Tiefenbacher*, 28 A.3d 1115, 1116 (D.C. 2011); *see also United States v. Harrod*, 428 A.2d 30, 31 n. 1 (D.C. 1981) (*en banc*). What is more, for the past 50 years the D.C. Court of Appeals has interpreted the local "final judgment" law to permit appeals pursuant to *Cohen*. *See Raney v. D.C. Transit System, Inc.*, 166 A.2d 261, 262 (D.C. 1960); *see also Frost v. Peoples Drug Store, Inc.*, 327 A.2d 810, 812 (D.C. 1974), *overruled on other grounds, Rolinski v. Lewis*, 828 A.2d 739, 742 (D.C. 2003).

The D.C. Court of Appeals has not yet had the opportunity to determine whether the denial of a special motion to dismiss is immediately appealable as a collateral order. It has indicated, however, that such orders meet the collateral order doctrine's requirements. In *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132 (D.C. 2010), the D.C. Court of Appeals considered whether an order denying a

motion to dismiss on grounds of the judicial proceeding privilege was an appealable collateral order in light of the Supreme Court's opinion in *Will*, *supra*, 546 U.S. 345, which emphasized that an appealable collateral order must involve a right that is important or reflect a value of a high order. *McNair*, 3 A.3d at 1137-38. In doing so, the D.C. Court of Appeals favorably commented on the Fifth Circuit's decision in *Henry*, *supra*, as follows:

> Following *Will*, the Fifth Circuit in *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009), identified another public interest worthy of protection on interlocutory appeal, that of enforcing a statute that "aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights. …" *Id.* at 180. In *Henry*, the court considered Louisiana's anti-SLAPP ("strategic lawsuits against public participation") statute, which was designed to bring an early end to meritless claims "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances," noting that in enacting the statute, the Louisiana legislature had "declare[d] that it is in the public interest to encourage continued participation in matters of public significance. …" *Id*. at 169.

McNair, 3 A.3d at 1138.

Although the statements in *McNair* are not binding on the D.C. Court of Appeals in a future appeal involving the Act, they provide persuasive authority. The Court of Appeals also would be informed by its prior collateral order jurisprudence, the Act's provisions and legislative history, the cases holding that orders denying anti-SLAPP motions are immediately appealable, and the D.C. Attorney General's concordant view that an immediate appeal lies. Thus, it is

probable that the D.C. Court of Appeals would hold that orders denying special motions to dismiss are immediately appealable.[4]

II. The District of Columbia's Anti-SLAPP Act Applies in Federal Court.

It is fundamental that in federal actions based on diversity jurisdiction, federal courts apply federal procedural law and state substantive law. *See Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Burke v. Air Serv, Int'l Inc.*, 685 F.3d 1102, 1107 (D.C. Cir. 2012). The statutory bases for this legal principle are the Rules of Decision Act, 28 U.S.C. § 1652, and the Rules Enabling Act, 28 U.S.C. § 2072. The Rules of Decision Act provides "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. The Rules Enabling Act grants to the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts … and courts of appeals" but with the proviso that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §§ 2072(a) and (b).

[4] Reiterating one of the district court's findings, 3M also asserted that anti-SLAPP orders are not immediately appealable because "the 'right' granted by the D.C. Anti-SLAPP Act is merely the creation of a procedural motion to effect early dismissal of certain types of claims." This is incorrect. As explained *infra* at 46-47, the District's Council intended to, and the Act in fact does, confer on SLAPP defendants a substantive immunity from suit defense.

Application of these two statutes has given rise over the years to a body of case law whose purpose has largely been to determine when a state law that is ostensibly procedural nonetheless involves state-law substantive rights, thus requiring application of the state law in lieu of a federal procedural law or rule. The leading Rules of Decision Act case is *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), while *Hanna v. Plumer*, 380 U.S. 460 (1965), is considered a leading case on clashes between state law and the Federal Rules. Generally, where a state statute or rule appears to conflict with the Federal Rules of Civil Procedure, a federal court must first determine whether there is a real conflict by asking whether the state law and federal rule "answer the same question." *Shady Grove*, 130 S.Ct. at 1437 (majority opinion); *id.* at 1451 (Stevens, J., concurring in part and concurring in the judgment).[5] The subject addressed by this question is whether the federal rule is "sufficiently broad to control the issue before the court." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980); *see also Burke*, 685 F.3d at

[5] For brevity, this brief will hereinafter parenthetically refer to Justice Stevens' opinion concurring in part and concurring in the judgment as "Stevens, J." His opinion serves to inform Part II-A of Justice Scalia's opinion for the majority, and specifically explicates the notion of, and how courts determine whether, federal and state rules "answer the same question." Morever, Justice Scalia recognized Justice Stevens's discussion of the first step in the two-step analysis as fully consistent with Part II-A of his (Justice Scalia's) opinion. *See Shady Grove*, 130 S. Ct. at 1444 (citing Justice Stevens' opinion at 130 S. Ct. 1450-52 and stating "We understand [the concurrence] to accept the framework we apply … and depart[] from us only with respect to the second part of the test …").

1107-08 (quoting *Armco, supra* and citing *Shady Grove*, 130 S.Ct. at 1437 (2010) (majority opinion)); *id.* at 1451 (Stevens, J.).

If the Federal Rule is not so broad, or can operate with the state law, then there is no conflict and the state law applies. As the Court recently explained, "when … 'no federal statute or Rule covers the point in dispute'" a federal court "must apply state law if it is 'outcome determinative' in the relevant sense." *Burke*, 685 F.3d at 1108 (quoting *Stewart Organization, Inc. v. RICOH Corp.*, 487 U.S. 22, 27 (1988) and *Hanna*, 380 U.S. at 468); *see also Shady Grove*, 130 S. Ct. at 1451 (Stevens, J.). This requires a court to ascertain whether "the failure to enforce state law would disserve the so-called twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* (quoting *Stewart Org.*, 487 U.S. at 27 n.6 and *Hanna*, 380 U.S. at 468) (internal quotation marks omitted); *see also Shady Grove*, 130 S. Ct. at 130 (Stevens, J.).

A. The Federal Rules and the Act Do Not "Answer the Same Question."

Virtually every federal court that has been asked to apply a state anti-SLAPP statute has done so under the *Erie* doctrine. *See Godin*, 629 F.3d at 90-91 (Maine); *Henry*, 566 F.3d at 168-69 (Louisiana); *Englert*, 551 F.3d at 1105-06 (Oregon); *Phoenix Trading, Inc. v. Kayser*, 2011 U.S. Dist. LEXIS 81432 at *20-*24 (W.D. Wash. July 25, 2011) (Washington); *Trudeau v. ConsumerAffairs.com*, 2011 U.S.

Dist. LEXIS 99852 at *15-*18 (N.D. Ill. Sept. 6, 2011) (Illinois); *Collins v. Laborers Int'l Union of N. Am. Local No. 872*, 2011 U.S. Dist. LEXIS 79853 (D. Nev. July 20, 2011); *Armington v. Fink*, 2010 U.S. Dist. Lexis 24294 at *8 n.2 (E.D. La. Feb. 24, 2010) (Louisiana); *Containment Techs. Group, Inc. v. Am. Soc. of Health Sys. Pharmacists*, 2009 U.S. Dist. LEXIS 25421 at *21-*24 (S.D. Ind. Mar. 26, 2009) (Indiana); *Buckley v. DirectTV, Inc.*, 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) (Georgia); *see also Sharif v. Sharif*, 2010 U.S. Dist. LEXIS 86853 at *9-*12 (E.D. Mich. Aug. 24, 2010) (Michigan federal court applying Indiana's anti-SLAPP statute); *USANA Health Scis., Inc. v. Minkow*, 2008 U.S. Dist. LEXIS 16613 at *6-*8 (D. Utah Mar. 3, 2008) (Utah federal court applying California's anti-SLAPP statute to California state law claims); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011) (although Arizona law applies to plaintiff's defamation claim, Illinois anti-SLAPP Act applies as a defense in diversity action filed in Illinois federal court, as Illinois has a strong interest in protecting its citizens' constitutional rights as evidenced in the anti-SLAPP statute).

The First Circuit Court of Appeals' opinion in *Godin v. Schenks* explains why such laws do not conflict with the Federal Rules. In that case, the First Circuit applied the Supreme Court's recent *Shady Grove* decision and held that Maine's anti-SLAPP statute applies in federal court. *Godin*, 629 F.3d at 87-90. Similar to

the District's Anti-SLAPP Act, the statute at issue in *Godin*, Me. Rev. Stat. tit. 14, 556, provides an immunity-from-suit defense for defendants who are sued for claims arising out of their activities in petitioning the government. The First Circuit first considered whether Rules 12 and 56 were "sufficiently broad to control the issue before the court." *Id.* at 87 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980)). Its reasoning is directly applicable here and bears repeating in full (*Godin*, 629 F.3d at 88-89):

> Federal Rules 12(b)(6) and 56 are addressed to different (but related) subject-matters. Section 556 [the Maine anti-SLAPP law] on its face is not addressed to either of these procedures, which are general federal procedures governing all categories of cases. Section 556 is only addressed to special procedures for state claims based on a defendant's petitioning activity. In contrast to the state statute in *Shady Grove*, Section 556 does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function. In addition, Rules 12(b)(6) and 56 do not purport to apply only to suits challenging the defendants' exercise of their constitutional petitioning rights. Maine itself has general procedural rules which are the equivalents of Fed. R. Civ. P. 12(b0(6) and 56. That fact further supports the view that Maine has not created a substitute to the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rule 12 and 56, to defendants who are named as parties because of constitutional petitioning activity.
>
> Rule 12(b)(6) serves to provide a mechanism to test the sufficiency of the complaint. Section 556, by contrast, provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis: that the claims in question rest on the defendant's protected petitioning conduct and the plaintiff cannot meet the special rules Maine has created to protect such petitioning activity against lawsuits.
>
> The federal summary judgment rule, Rule 56, creates a process for parties to secure judgment before trial on the basis that there are not

> disputed material issues of fact, and as a matter of law, one party is entitled to judgment. Inherent in Rule 56 is that a fact-finder's evaluation of material factual disputes is not required. But Section 556 serves the entirely distinct function of protecting those specific defendants that have been targeted with litigation on the basis of their protected speech. When applicable, Section 556 requires a court to consider whether the defendant's conduct had a reasonable basis in fact or law, and whether that conduct caused actual injury. Fed. R. Civ. P. 56 cannot be said to control those issues.

Like the Maine statute at issue in *Godin*, the D.C. Anti-SLAPP Act is not addressed to Rule 12 or 56's procedures, but rather to a different type of motion that implements a D.C.-law statutory defense that is applicable to non-federal claims arising from a defendant's protected First Amendment activity. *Godin*, 629 F.3d at 88. The Act does not seek to displace any federal rule. Indeed, like Maine, the District's Superior Court Rules are virtually identical to Fed. R. Civ. P. 12 and 56, thus indicating that the Anti-SLAPP Act provisions are substantive and supplemental, rather than mere procedures designed to displace those federal rules. *Id.* This is all the more clear given that if a plaintiff prevails on a special motion to dismiss under the Act, the parties may still utilize Rules 12 and 56.

Moreover, similar to the Maine statute in *Godin*, the Anti-SLAPP Act provides a basis to seek dismissal on an entirely different basis than Rule 12(b)(6), specifically, that the plaintiff's claims "rest on the defendant's protected [First Amendment] conduct and that the plaintiff cannot meet the special rules that

[D.C.] has created to protect such [First Amendment] activity against lawsuits." *Id.* at 89.

Further, similar to the Maine statute in *Godin*, the D.C. Anti-SLAPP Act serves an entirely different function than Rule 56. *Id.* As the First Circuit noted, inherent in Rule 56 is that "evaluation of material factual disputes is not required." *Id.* In contrast, the D.C. Anti-SLAPP Act "requires a court to consider whether the defendant's conduct had a reasonable basis in fact or law." *Id.*; *see* D.C. Code § 16-5502(b).

Finally, like Maine's statute, the D.C. Anti-SLAPP Act contains provisions establishing the parties burdens and providing for an award of attorneys' fees to the party prevailing on a special motion. D.C. Code §§ 16-5502, 16-5504. Burdens of proof are considered substantive, not procedural, for purposes of the *Erie* doctrine, as are provisions for attorneys' fees. *See Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20-21 (2000) (burden of proof)*; American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994) (same); *Northon v. Rule*, 637 F.3d 937, 938-39 (9th Cir. 2011) (attorneys' fees under Oregon anti-SLAPP statute); *Godin*, *supra*, 629 F.3d at 85 n.10; *Henry*, *supra*, 566 F.3d at 182-83; *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972-73 (9th Cir. 1999) (attorneys' fees under California anti-SLAPP statute).

In short, the Act and Rules 12 and 56 deal with different subjects. The Federal Rules do not answer the same question as the Anti-SLAPP Act. The district court erred in concluding otherwise.

B. The Act Applies in Federal Court Actions Based on Diversity of Citizenship.

Given that there is no conflict between the Act and the Federal Rules, it is clear that federal courts must apply the Anti-SLAPP Act. *See Burke*, 685 F.3d at 1109. First, failure to apply the Act would lead to inequitable administration of the laws. As explained *infra* at 45-47, courts have consistently held that anti-SLAPP laws confer a substantive immunity-from-suit defense, and the District's Council indisputably intended to confer such a substantive law defense. When a meritless lawsuit arising from a defendant's exercise of First Amendment rights is brought in the District's local courts, then the Act will confer an immunity from suit, the defendant will be spared the expense and time-consuming effort of defending it, and neither that lawsuit nor similar lawsuits will have a chilling effect on the exercise of First Amendment rights.

On the other hand, if the District's federal courts refuse to enforce the Act, then in the same type of lawsuit, defendants will be denied the substantive immunity-from-suit defense conferred by the Act, and will have to forgo the right to be free from the time and expense of full-blown litigation, with such lawsuits

having a chilling effect on First Amendment rights. "Such a result would be outcome determinative in the relevant sense." *Burke*, 685 F.3d at 1109.

Second, there is concrete evidence that the failure to enforce the Act in federal court disserves *Erie*'s aim of discouraging forum-shopping. Within a few weeks of the district court's decision denying Davis's special motion to dismiss, a plaintiff who had filed a defamation action in the D.C. Superior Court voluntarily dismissed his case and refiled it in the federal district court. *See* Addendum at ADD1. That plaintiff candidly admitted that he was switching courts because, based on the decision below, he could avoid a special motion to dismiss. *Id.*

Because there is no conflict between the Act and any federal rule, both may be employed in federal court within their own sphere, and failure to enforce the Act would disserve *Erie's* twin aims, the Anti-SLAPP Act must apply in federal court lawsuits based on diversity jurisdiction.

III. The District Court's Analysis Was Incorrect at Virtually Every Step.

The district court held that the Anti-SLAPP Act does not apply at all in federal court. Purporting to apply the majority opinion in *Shady Grove*, the district court first determined, contrary to other federal courts considering other states' anti-SLAPP laws, that the Act directly conflicts with the Federal Rules, specifically, Rules 12(b)(6), 12(d) and 56. Having found a direct conflict, the district court then held, based on PART II-B of Justice Scalia's *Shady Grove*

opinion, that these federal rules regulate procedure and for this reason alone preempt the Anti-SLAPP Act. The district court's determination was fatally flawed in virtually every respect.

A. The District Court Erroneously Determined that the Anti-SLAPP Act Conflicts with Rules 12(b)(6), 12(d) and 56.

The district court viewed the first step in the analysis as requiring a determination of whether the D.C. Anti-SLAPP Act and Rules 12 and 56 "answer the same question." It posed the relevant question as "whether this Court may dismiss 3M's claims with prejudice on a preliminary basis based on the pleadings or on matters outside the pleadings merely because 3M has not 'demonstrate[d] that the claim is likely to succeed on the merits'" and then found that "Rules 12 and 56 answer the question in dispute." Op. 15 (quoting D.C. Code § 16-5502). Relying on early amendments to Rule 12 in the 1930s and 1940s, with the accompanying Advisory Committee notes, the district court noted that Rule 12 was not intended to permit so-called "speaking motions." From this premise, the district court leaped to the conclusion that Rules 12(b)(6), 12(d) and 56 provide the *exclusive* means for disposing of a case on the merits prior to trial, and *prohibit* every other motion that might dispose of a case, relying on a few cases decided 50 years or more before the District Council's adoption of the Anti-SLAPP Act. The district court's analysis was fatally flawed.

1. Rules 12 and 56 Are Not Exclusive and Do Not Preclude Motions Under the Act.

The linchpin of the district court's finding that the Act conflicts with the Federal Rules is its conclusion that the provisions of Rules 12 and 56 actually preclude the filing of all other merits-based motions, including special motions to dismiss under the Act that are integrally related to the substantive immunity defense. But "[i]f the Rule [is] susceptible of two meanings—one that would violate § 2072(b) and another that would not—" then a court "must interpret [the Federal Rule] in a manner that avoids overstepping its authorizing statute." *Shady Grove*, 130 S.Ct. at 1441 (majority opinion).

Here, Rules 12 and 56 are not susceptible to an interpretation that *precludes* the filing of an Anti-SLAPP Act motion to dismiss. The language of Rules 12 or 56 certainly do not do the job. They merely provide that a party "may" file motions to dismiss and for summary judgment. And while *Shady Grove* acknowledged that "[t]he Federal Rules regularly use 'may' to confer categorical permission," *Shady Grove*, 130 S. Ct. at 1437 (majority opinion), there is no way that "may" can possibly be interpreted to mean a party "may not" file some other motion, as the district court implicitly did here.

"The fact, however, that the federal rules do not specifically authorize or describe a particular judicial procedure does not give rise to prohibition of that

procedure by negative implication." *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1003 (7th Cir. 1989); *see also G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, (1989) (*en banc*) ("The Supreme Court has acknowledged that the provisions of the Federal Rules of Civil Procedure are not intended to be the exclusive authority for actions to be taken by district courts"); *cf. United States v. Torre*s, 751 F.2d 875, 880 (7th Cir. 1984) ("The motto of the Prussian state—that everything which is not permitted is forbidden—is not a helpful guide to statutory interpretation").

Nor do the cases cited by the district court support that the Federal Rules preclude Anti-SLAPP Act motions to dismiss. To be sure, those cases involved motions to dismiss under Rule 12(b)(6) to which matters outside the pleadings were attached. But two of the cases were not based on diversity jurisdiction and thus did not involve, much less require, application of state law. *See Farrall v. District of Columbia Amateur Athletic Union*, 153 F.2d 647, 648 (D.C. Cir. 1946); *National War Labor Board v. Montgomery Ward & Co.*, 144 F.2d 528, 531 (D.C. Cir. 1944), *cert denied*, 323 U.S. 774 (1944). And the other, while apparently based on diversity jurisdiction, did not involve a conflict between the Federal Rules and a state law. *See Callaway v. Hamilton Nat'l Bank*, 195 F.2d 556 (D.C. Cir. 1952). None of these cases can fairly be interpreted to stand for the proposition that Rules 12 and 56 are exclusive to the extent of precluding the

application, in diversity cases, of local laws like the Act that confer and implement substantive immunity defenses.

In short, it is one thing to interpret a Rule 12(b)(6) motion as one restricted to the complaint, and Rule 12(d) as requiring a court that accepts matters outside the pleadings when considering a Rule 12(b)(6) motion to employ Rule 56. It is another thing altogether to interpret Rule 12 to preclude a defendant sued under state law in a diversity action from asserting a state-law immunity-from-suit defense. Neither Rule 12, nor any other Federal Rule, can be interpreted to perform the latter duty, and as shown *infra*, a Federal Rule so interpreted would plainly run afoul of the Rules Enabling Act's admonition that federal procedural rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072.

2. The District Court Failed to Consider the Subject Matter Addressed by the Federal Rules and Anti-SLAPP Act.

Another fundamental problem with the district court's analysis is that, by framing a question that concerned the court's power to decide the motion, it inaptly framed the issue before it, and thus erroneously failed to determine whether the Federal Rule is "sufficiently broad to control the issue before the court." Here, the issue was not whether a federal rule permits or prohibits a *court* from *granting* a particular motion. To paraphrase *Shady Grove*, courts do not file motions, litigants do. *See Shady Grove*, 130 S. Ct. at 1438 (majority opinion) ("Courts do not

maintain actions; litigants do"). Just like Rule 23 in *Shady Grove*, "the discretion suggested by" the word "may" in Rules 12 and 56, "is discretion residing in the" parties and not the court. *Id.* Thus, the issue that should be addressed is whether the federal rules are broad enough to address the subject of the state-law-authorized motion in the first place.

Accordingly, the question that the district court should have asked was whether the federal rules are broad enough to cover a motion presenting a state law immunity-from-suit defense that requires a plaintiff to make a showing that its claims are likely to succeed on the merits. The difference between the Federal Rules and the Act, reflected in the district court's analysis, clearly indicates that the answer to this question is "no, the federal rules are not so broad." Thus, just as the First Circuit concluded with respect to Maine's anti-SLAPP law in *Godin, supra*, there is no conflict between the Federal Rules and the Act, and the latter thus applies.

This flaw in the district court's analysis is reflected in its failure to appreciate the type of conflict between a state law and a Federal Rule that has led to preemption of the state law. To find a conflict between a federal rule and state law, the Federal Rule must be sufficiently broad to control the issue, thus creating a "direct collision" that is "unavoidable." *Shady Grove*, 130 S. Ct. at 1442 n.8

(majority opinion); *see also Walker*, 446 U.S. at 749, 752 (quoting *Hanna*, 380 U.S. at 470, 472); *Burke*, 685 F.3d at 1107-08.

In *Burke*, *supra*, the Court recently recognized the nature of the conflict required for a Federal Rule to preempt a state law.. There, the district court dismissed a negligence action in which the plaintiff failed to present expert testimony regarding the standard of care, as required by D.C. tort law, and the context in which plaintiff's claim arose involved a profession or occupation beyond the experience of an average layperson. *Burke*, 685 F.3d at 1105-06. On appeal, the plaintiff argued that the D.C. law collided with and was preempted by Fed. R. Evid. 702. The Court found no conflict: "As is apparent, Rule 702 determines the circumstances in which expert testimony is permitted (*i.e.*, admissible). The District's rule, by contrast, defines circumstance in which expert testimony is required. A federal court can simultaneously apply both the federal rule … and the District rule …." *Id.* at 1108. There was no collision that was unavoidable.

The Supreme Court cases holding a state law preempted preempted by federal procedural law all involved collisions that were "unavoidable." For example, in the leading post-*Erie* Rules Enabling Act case of *Hanna v. Plumer*, the conflict was between a federal rule and a state law in a Massachusetts federal court action brought against the executor of an estate. The plaintiff served the summons

and complaint by delivering it to the executor's house and giving it to his wife, pursuant to then-Fed. R. Civ. P. 4(d)(1) (now set forth in Fed. R. Civ. P. 4(e)(2)(A) and (B)). The executor moved to dismiss because a Massachusetts statute required service by hand on the executor, and no one else. Application of the Massachusetts statute would have effectively rendered the federal rule null.

In *Shady Grove* itself, the state law that prohibited prosecuting certain civil claims as a class action directly conflicted with Rule 23, and application of the former would have rendered Rule 23 a nullity. 130 S. Ct. at 1537 (majority opinion). In *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987), application of a state law mandating the assessment of a 10% penalty on an appellant who loses an appeal would have rendered Rule 38 of the Federal Rules of Appellate Procedure a nullity. In *Stewart Org.*, 487 U.S. 22 (1988), application of the state policy disfavoring forum-selection clauses would have rendered null 28 U.S.C. § 1404, which permits a transfer of venue for the convenience of the parties and witnesses.

In contrast, the Supreme Court has taken a broader view and found no actual conflict in cases where the state law or rule is integral to a state law right. Twice, the Supreme Court has found that Rule 3, which states in unequivocal terms that "[a] civil action is commenced by filing a complaint in court" Fed. R. Civ. P. 3, does not conflict with state laws stating that a lawsuit commences at the time of

service on the defendant. In those cases, the federal rule was found not to be sufficiently broad because commencement by service was integral to state law statute of limitations defenses. *See Walker*, 446 U.S. 740; *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). In *Business Guides, Inc. v. Chromatic Communs. Enters., Inc.*, 498 U.S. 533, 551-54 (1991), the Supreme Court held that Fed. R. Civ. P. 11 does not conflict with or preempt state laws regarding malicious prosecution as both serve different purposes and protect different interests. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), held that the availability of federal equitable remedies does not prohibit application of a state statute of limitations.

A case that is most applicable case here is *Cohen, supra,* 337 U.S. 541. In that case, the Supreme Court held that a state law requiring a plaintiff to post a bond to secure the payment of defendant's costs and attorneys' fees should the defendant prevail applied in federal court. Just as Rules 12 and 56 here do not authorize the filing of a special motion to dismiss, Rule 23 did not authorize or require the posting of a bond. The Court found no conflict between the state law and Rule 23, stating:

> If all the [state law] did was create this liability [for costs and fees], it would clearly be substantive. But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case. Therefore, a procedure is prescribed by which the liability is insured by entitling the corporate defendant to a bond of indemnity before the outlay is

> incurred. We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device.

Id. at 556.

Here, the Anti-SLAPP Act creates an affirmative immunity-from-suit defense that is substantive in any meaningful sense of that term. And like the state law bond requirement in *Cohen*, this defense "would be without meaning and value … if it resulted in nothing but a judgment … at or after the end of the case." *Id.* Indeed, preemption of the Act in federal court SLAPPs will cause defendants to suffer the exact harm that the Act was designed to prevent.

Finally, the district court found that the Act's provision for dismissal with prejudice if a special motion is granted conflicted with Fed. R. Civ. P. 41(b), which the court claimed grants discretion to dismiss a case without prejudice. It found *Burlington, supra*, 480 U.S. 1, controlling in this respect because the Alabama statute in that case imposed a mandatory penalty on a party to takes an appeal and loses, while Fed. R. App. P. 38 provides a federal appellate court with discretion. A329-A332.

The district court missed the mark for several reasons. First, the relevant language of Rule 41(b) merely sets forth a default rule of construction for ambiguous dismissal orders. *See Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir. 1970); *Sack v. Low*, 478 F.2d 360, 364 (2d Cir. 1973). On its face, Rule

41(b)'s language does not confer discretion on district courts. Second, the Supreme Court itself has viewed *Burlington* as involving a state law "right" that was "incidental" to the litigation. *Business Guides*, 498 U.S. at 552. Third, the fact that the Act provides for dismissal with prejudice upon the grant of a special motion—a motion that involves an evaluation of a claim's merit—should be clear, indeed conclusive, evidence that the Act confers substantive, and not merely procedural, rights—rights that are abridged when the Act is not applied by a federal court.

3. The District Court Erred in Determining that the Act Does Not Confer a Substantive Defense of Immunity from Suit.

The district court also held that the Act did not confer a substantive defense of immunity from suit, stating "[t]he Act is a summary dismissal procedure that the Defendants and the District seek to clothe in the costume of the substantive right of immunity—but this is largely a masquerade." A340. The district court relied only on the Act's special motion to dismiss provisions, and no other authority, for its narrow view of the Act.

First, virtually every court outside the District that has considered other states' anti-SLAPP laws have held that such laws provide defendants immunity from suit.[6]

[6] *See, e.g.*, *Batzel*, 333 F.3d at 1025 (California); *Eklund v. City of Seattle Mun. Court*, 410 Fed. Appx. 14 (9th Cir. 2010) (Washington); *Segaline v. Dept. of Labor*

Second, further evidence that the Act's protections are substantive includes its provisions allocating the burdens of proof, and for the award of attorneys' fees to a prevailing party. D.C. Code §§ 16-5502, 16-5504. State laws allocating the burden of proof are substantive for purposes of the *Erie* doctrine. *See Raleigh*, 530 U.S. at 20-21*; American Dredging*, 510 U.S. at 454. State laws shifting attorneys' fees are also considered substantive for *Erie* purposes. *See Northon*, 637 F.3d at 938-39; *Godin*, 629 F.3d at 85 n.10; *Henry*, 566 F.3d at 182-83; *Newsham*, 190 F.3d at 972-73; *see generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n. 31 (1975).

Third, and most importantly, the Act's legislative history unequivocally establishes that the District's Council viewed the Act as conferring substantive rights that further protect the exercise of First Amendment rights. *See* Committee Report A107 ("Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a

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& Indus., 238 P.3d 1107, 1110 (Wash. 2010); *Karousos v. Pardee*, 992 A.2d 263, 268 (R.I. 2010); *Wright Dev. Group, LLC v. Walsh*, 939 N.E.2d 389, 396 (Ill. 2010); *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 839 (Minn. 2010); *Benoit v. Frederickson*, 908 N.E.2d 714, 717-18 (Mass. 2009); *Hicks v. Cadle Co.*, 355 Fed. Appx. 186, 197-198 (10th Cir. 2009) (Tennessee); *Phillips v. Oklahoma Publ'g. Co.*, 2011 U.S. Dist LEXIS 119077, at *27-28 (W.D. Wash. Oct. 14, 2011); *Trudeau*, 2011 U.S. Dist. LEXIS 99852, at *16; *Mills v. Brown*, 372 F. Supp. 2d 683, 694 (D.R.I. 2005); *cf. Pennsbury Vill. Assocs., LLC v. McIntyre*, 11 A.3d 906, 915 (Pa. 2011) (describing Pennsylvania's Environmental Immunity Act as "anti-SLAPP legislation" that provides "immunity").

political or public policy debate aimed to punish or prevent the expression of opposing points of view"); A110 ("Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest"); *id.* ("Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP …"); A113 (Subsection (a) of Section 3 "[c]reates a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest"); *id.* (Section 4 "[c]reates a substantive right of a person to pursue a special motion to quash a subpoena aimed at obtaining a persons [sic] identifying information relating to a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest").

B. The District Court Erred in Determining that the Federal Rules Preempt the Act.

As shown, the Federal Rules and the Act are addressed to different issues, and do not "answer the same question." And as shown, the district court's analysis leading to the opposite conclusion was fatally flawed. For these reasons alone, the Court must reverse the district court's Order. But the district court was incorrect in

one other respect that the Court may wish to, but we respectfully submit need not, address.

Specifically, after erroneously concluding that the Federal Rules and the Act conflict, the lower court went on to the second step of the *Shady Grove* analysis and held that Rules 12 and 56 preempt the Act for the sole reason that the Rules "regulate procedure" and thus are valid under the Rules Enabling Act. A339. In doing so, however, the district court mistakenly believed that it was applying the majority opinion in *Shady Grove* when in fact it was applying a part of Justice Scalia's opinion, Part II-B, which commanded only four votes. Further, if any of the fractured *Shady Grove* opinions is entitled to precedential effect, it is that of Justice Stevens.

Shady Grove involved the issue of whether, in an action based on diversity jurisdiction, a federal court should apply a New York law that prohibited persons from litigating as class actions claims seeking statutorily prescribed minimum damages or penalties, rather than Rule 23 of the Federal Rules of Civil Procedure. *Shady Grove*, 130 S. Ct. at 1436. Part II of Justice Scalia's *Shady Grove* opinion described a two-step analysis for determining whether a Federal Rule of Civil Procedure applied in a case in which the Federal Rule conflicted with an applicable state law or rule. Part II-A of his opinion held that a federal court must first determine whether there is an actual conflict between the Federal Rule and state

law or rule. *See Shady Grove*, 130 S.Ct. at 1437-1442 (majority opinion). Part II-A commanded the vote of five of the justices: Chief Justice Roberts and Justices Stevens, Scalia, Thomas and Sotomayor. *Id.* at 1436.

In Part II-B of his opinion, Justice Scalia described the second step of the analysis as requiring a federal court to determine whether the federal rule "really regulates procedure." *Id.* at 1442 (plurality opinion) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). According to Justice Scalia, if the rule does so, then it applies regardless of a conflicting state law. Justice Scalia stated further that, in making this determination, public policies embodied in the state law and whether preemption of the state law by the federal Rule will materially affect a party's substantive rights were irrelevant. "[T]he substantive nature of New York's law, or its substantive purpose, *makes no difference*." *Id.* at 1444 (plurality opinion) (emphasis in original). "[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. … [T]he validity of a Federal Rule depends entirely upon whether it regulates procedure." *Id.* This part of Justice Scalia's opinion was joined by only three other Justices: the Chief Justice and Justices Thomas and Sotomayor. *Id.* at 1436.

As noted, Justice Stevens issued an opinion concurring in part and concurring the judgment, thus providing the fifth vote for reversing the Second

Circuit and requiring the application of Rule 23. *Id.* at 1448-61. Justice Stevens concurred in Part II-A of Justice Scalia's opinion, providing a majority for the Court's holding that the first step of the analysis requires a federal court to "first determine whether the scope of the federal rule is sufficiently broad to control the issue before the court, thereby leaving no room for the operation of seemingly conflicting state law." *Id.* at 1451 (Stevens, J.) (quoting and citing *Burlington*, 480 U.S. at 4-5 and *Walker*, 446 U.S. at 749-50 and n.9 (1980)) (internal quotation marks omitted).

Justice Stevens, however, disagreed with the view set forth in Part II-B of Justice Scalia's opinion that the second step is limited to determining whether the federal rule "really regulated procedure" without any consideration of the policies or rights reflected in or implemented by the state law. According to Justice Stevens, "A federal rule [ ] cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary sense of the term but is so intertwined with a state created right or remedy that it functions to define the scope of the state created right." *Id.* (Stevens, J.)

The principal difference between Justice Stevens and Justice Scalia appears to boil down to this: Justice Scalia, with his exclusive focus on the text of the Federal Rule, believes if a Federal Rule *on its face* regulates procedure, then it cannot violate the Rules Enabling Act's command that such rules not "abridge,

enlarge or modify any substantive right." *Shady Grove*, 130 S. Ct. at 1444 (Scalia, J. concurring in judgment) ("compliance of a federal rule with the Enabling Act is to be assessed by consulting *the Rule itself*, and not its *effects* in *individual applications*") (emphasis added); *id.* ("it is not the substantive or procedural nature or purose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule"). Justice Stevens believes that a rule that, on its face, regulates procedure will violate the Enabling Act's command if the *application* of the rule in a particular diversity case "abridges, enlarges or modifies" a state-created right. *Id.* at 1451 (Stevens, J.) ("an *application* of a federal rule that *effectively* abridges, enlarges or modifies a state-created right or remedy violates" the Rules Enabling Act) (emphasis added).

The district court clearly adopted Justice Scalia's view: "Having found that Rules 12 and 56 answer the dispute at issue in this case, those rules will govern unless they were *adopted* in violation of the Rules Enabling Act, 28 U.S.C. § 2072." App. 338 (emphasis added) (citing *Shady Grove*, 130 S.Ct. at 1442 (Scalia, J., plurality opinion); App. 338-A339 (describing procedure for adoption of federal rules); App 339 (citing *Shady Grove*, 130 S.Ct. at 1442 (plurality opinion) for proposition that a federal rule is valid so long as it "really regulates procedure").

The district court's reliance on Part II-B of Justice Scalia's opinion was erroneous. First, it was not a majority opinion. Second, the applicable rule is that

"[w]hen 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 Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). The "narrowest opinion refers to the one which relies on the least doctrinally far-reaching-common ground among the Justices in the majority; it is the concurring opinion that offers the least change to the law." *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009).

Marks itself demonstrates the rule in practice. It involved the issue of whether and under what standards speech could be considered obscene for purposes of criminal prosecution. The Supreme Court had to determine which of the two opinions supporting the Court's judgment in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), constituted binding precedent.[7] The Supreme Court noted that two Justices supporting the *Memoirs* judgment, Justices Black and Douglas, issued an opinion that "reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193 (citing *Memoirs*, 383 U.S. at 421, 424). The Supreme Court found, however, that the three-person plurality opinion authored by Justice Brennan was the narrower and thus controlling opinion in

[7] The conduct at issue in *Marks* occurred before the Supreme Court effectively overruled *Memoirs* in *Miller v. California*, 413 U.S. 15 (1973).

Memoirs because it was based on the third part of the three-part definition of obscenity set forth in *Roth v. United States*, 354 U.S. 476 (1957). *Marks*, 430 U.S. at 193-94.

Applying the *Marks* rule here, Justice Stevens's opinion is the controlling opinion in *Shady Grove* with respect to the second step in the *Erie* analysis, *i.e.*, determining whether a Federal Rule or a conflicting state law applies, because it supports the judgment on the narrowest grounds. Like the concurring opinions of Justices Black and Douglas in *Memoirs* that the First Amendment always protects obscenity, Part II-B of Justice Scalia's plurality opinion effectively sets forth a broad, categorical rule: because the federal rules, on their face, regulate procedure, and need only "regulate procedure" to pass muster under the Rules Enabling Act, then a federal rule will always preempt any conflicting state law, regardless of whether the state law involves state substantive rights, or whether application of the federal rule abridges a substantive right.

In contrast, Justice Stevens's *Shady Grove* opinion employed a carefully tailored analysis to determine that the federal rule, rather than the particular state rule at issue, applied in that particular case. Justice Stevens's analysis provides the "narrowest grounds" supporting the Court's judgment in much the same way that Justice Brennan's plurality opinion in *Memoirs* was deemed to provide the narrowest grounds for the judgment in that particular case.

It is thus not surprising that virtually every court faced with the task of deciphering *Shady Grove* has concluded that Justice Stevens's opinion is controlling. *See Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983 n.6 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 95 (2011); *Leonard v. Abbott Labs., Inc.*, 2012 U.S. Dist. LEXIS 30608, at *28-*36 (E.D.N.Y. March 5, 2012); *Jones v. Correctional Med. Servs., Inc.*, 845 F. Supp. 2d 824, 853 (W.D. Mich. Feb. 24, 2012); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 800 F. Supp. 2d 328, 331 (D. Me. 2011); *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 415-416 (S.D.N.Y. 2011) *Tait v. BSH Home Appliances Corp.*, 2011 U.S. Dist. LEXIS 54456, at *24 (C.D. Cal. May 12, 2011); *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 660-61 (E.D. Mich. 2011); *Estate of C.A. v. Grier*, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010); *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 747 (N.D. Ohio 2010); *Bearden v. Honeywell Int'l, Inc.*, 2010 U.S. Dist. LEXIS 83996, at *29-*30 (M. D. Tenn. Aug. 16, 2010); *In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 675 (E.D. Pa. 2010); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 679254, at *6-*8 (N.D. Ohio July 12, 2010); *Kline v. Mortgage Elec. Sec. Systs.*, 2010 U.S. Dist. LEXIS, 143391 at *10-*12 (S.D. Ohio Dec. 30, 2010).

In short, having erroneously concluded that the Federal Rules conflict with the Act, the district court also erred by applying an incorrect standard to conclude

that the Federal Rules preempt the Act. For this additional reason, the district court's order must be reversed.

CONCLUSION

For the foregoing reasons, the Court should find that it has jurisdiction to hear this appeal, vacate that part of the district court's February 2, 2012 Memorandum and Opinion, and Order holding that the District of Columbia's Anti-SLAPP Act, D.C. Code § 16-5501, *et seq.*, does not apply in federal courts where jurisdiction is based on diversity of citizenship, and remand the case to the district court for consideration of Davis's Special Motion to Dismiss under that Act.

Dated: September 7, 2012

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 13,712 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman font.

Dated: September 7, 2012

/s/Joseph O. Click

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CERTIFICATE OF SERVICE

I hereby certify that, on September 7, 2012, I caused a copy of the foregoing Brief for Appellants Lanny Davis, Lanny J. Davis & Assocs., PLLC and Davis-Block LLC, to be served, by ECF and e-mail, on counsel of record:

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ADDENDUM

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

BRADLEE DEAN, et. al., Plaintiffs, v. **NBC UNIVERSAL, et. al.,** Defendants.	Civil Action No: 2011 CA 006055 B

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1) Plaintiffs, Bradlee Dean and You Can Run But You Can't Hide International, respectfully file this voluntary notice of dismissal without prejudice. The Complaint has been refiled in the U.S. District Court for the District of Columbia due to the Court's recent decision in *3M v. Boulter*, No. 11-cv-1527 (RLW)(D.D.C.).(Exhibit 1).

Respectfully Submitted,

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TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 111. GENERAL PROVISIONS

Go to the United States Code Service Archive Directory

28 USCS § 1652

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

HISTORY:
(June 25, 1948, ch 646, 62 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:
Based on *title 28, U.S.C., 1940 ed., § 725* (R.S. § 721).
"Civil actions" was substituted for "trials at common law" to clarify the meaning of the Rules of Decision Act in the light of the Federal Rules of Civil Procedure. Such Act has been held to apply to suits in equity.
Changes were made in phraseology.

NOTES:

Related Statutes & Rules:
State laws governing evidence, *USCS Federal Rules of Civil Procedure, Rule 43(a).*
Laws of state as including state statutes and state judicial decisions construing them, *USCS Federal Rules of Civil Procedure, Rule 81(e).*

Research Guide:

Federal Procedure:
2 Moore's Federal Practice (Matthew Bender 3d ed.), ch 8, General Rules of Pleading §§ 8.02 et seq.

*** Current through PL 112-173, approved 8/16/12 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 131. RULES OF COURTS

Go to the United States Code Service Archive Directory

28 USCS § 2072

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this *title [28 USCS § 1291]*.

HISTORY:
(Added Nov. 19, 1988, P.L. 100-702, Title IV, § 401(a), 102 Stat. 4648; Dec. 1, 1990, P.L. 101-650, Title III, § 315, 104 Stat. 5115.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:
A prior § 2072 (Act June 25, 1948, ch 646, 62 Stat. 961; May 24, 1949, ch 139, § 103, 63 Stat. 104; July 18, 1949, ch 343, § 2, 63 Stat. 446; May 10, 1950, ch 174, § 2, 64 Stat. 158; July 7, 1958, P.L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, P.L. 89-773, § 1, 80 Stat. 1323) was repealed by Act Nov. 19, 1988, P.L. 100-702, Title IV, § 401(a), 102 Stat. 4648, effective Dec. 1, 1988 as provided by § 407 of such Act, which appears as *28 USCS § 2071* note. Such section provided for rules of civil procedure.

Effective date of section:
This section is effective Dec. 1, 1988 as provided by § 407 of Act Nov. 19, 1988, P.L. 100-702, Title IV, 102 Stat. 4652, which appears as *28 USCS § 4071* note.

*** Current through July 18, 2012, and through D.C. Act 19-397 ***
*** Annotations current through June 21, 2012 ***

DIVISION II. JUDICIARY AND JUDICIAL PROCEDURE
TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 55. STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-5501 (2012)

§ 16-5501. Definitions

For the purposes of this chapter, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(4) "Personal identifying information" shall have the same meaning as provided in *§ 22-3227.01(3)*.

HISTORY: Mar. 31, 2011, D.C. Law 18-351, § 2, 58 DCR 741; , 2012, D.C. Law 19- (Act 19-376), § 401, 59 DCR 6190.

NOTES: EFFECT OF AMENDMENTS. --Section 401 of D.C. Law 19- (Act 19-376) enacted this chapter into law.

*** Current through July 18, 2012, and through D.C. Act 19-397 ***
*** Annotations current through June 21, 2012 ***

DIVISION II. JUDICIARY AND JUDICIAL PROCEDURE
TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 55. STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

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D.C. Code § 16-5502 (2012)

§ 16-5502. Special motion to dismiss

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c) (1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

HISTORY: Mar. 31, 2011, D.C. Law 18-351, § 3, 58 DCR 741; Apr. 20, 2012, D.C. Law 19-120, § 201, 58 DCR 11235; , 2012, D.C. Law 19- (Act 19-376), § 401, 59 DCR 6190.

NOTES: SECTION REFERENCES. --This section is referenced in *§ 16-5504*.

EFFECT OF AMENDMENTS. --The 2012 amendment by D.C. Law 19-120 substituted "specified discovery" for "specialized discovery" in (c)(2).

Section 401 of D.C. Law 19- (Act 19-376) enacted this chapter into law.

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D.C. Code § 16-5503 (2012)

§ 16-5503. Special motion to quash

(a) A person whose personal identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

HISTORY: Mar. 31, 2011, D.C. Law 18-351, § 4, 58 DCR 741; , 2012, D.C. Law 19- (Act 19-376), § 401, 59 DCR 6190.

NOTES: SECTION REFERENCES. --This section is referenced in *§ 16-5504*.

EFFECT OF AMENDMENTS. --Section 401 of D.C. Law 19- (Act 19-376) enacted this chapter into law.

LEGISLATIVE HISTORY OF LAW 18-351. --See note to *§ 16-5501*.

LEGISLATIVE HISTORY OF LAW 19- (Act 19-376). --See note to *§ 16-5501*.

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D.C. Code § 16-5504 (2012)

§ 16-5504. Fees and costs

(a) The court may award a moving party who prevails, in whole or in part, on a motion brought under *§ 16-5502* or *§ 16-5503* the costs of litigation, including reasonable attorney fees.

(b) The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under *§ 16-5502* or *§ 16-5503* is frivolous or is solely intended to cause unnecessary delay.

HISTORY: Mar. 31, 2011, D.C. Law 18-351, § 5, 58 DCR 741; , 2012, D.C. Law 19- (Act 19-376), § 401, 59 DCR 6190.

NOTES: EFFECT OF AMENDMENTS. --Section 401 of D.C. Law 19- (Act 19-376) enacted this chapter into law.

LEGISLATIVE HISTORY OF LAW 18-351. --See note to *§ 16-5501*.

LEGISLATIVE HISTORY OF LAW 19- (Act 19-376). --See note to *§ 16-5501*.