NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 12-7055

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

JOSEPH FARAH,
PLAINTIFF-APPELLANT,
V.
ESQUIRE MAGAZINE, INC., *et al.*,
DEFENDANTS-APPELLEES

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

BRIEF FOR THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* SUPPORTING APPELLEES ON THE APPLICABILITY OF THE ANTI-SLAPP ACT OF 2010 IN FEDERAL COURT

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GLOSSARY

"Act"
District of Columbia Anti-SLAPP Act of 2010, *codified at* D.C. Code § 16- 5501, *et seq.*

"Comm. Rep."
Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, the "Anti-SLAPP Act of 2010" (Nov. 18, 2010).

"SLAPP"
Strategic Lawsuits Against Public Participation.

INTEREST OF *AMICUS CURIAE*

The District of Columbia has a significant interest in ensuring that the free speech rights-implementing protections of the Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et. seq.* (the "Act"), apply in both the federal and local courts in the District. Plaintiff-Appellant argued below that the Act does not apply in federal court proceedings held under diversity jurisdiction. The district court, in considering and granting defendants' motion for dismissal under the Act, considered and explicitly and correctly rejected this argument. *See Farah v. Esquire Magazine, Inc.,* 863 F. Supp.2d 29, 36 n.10 (D.D.C. 2012) (Collyer, J.). On appeal, Plaintiff-Appellant continues to press this dangerous argument which, if adopted, would unjustifiably undermine the substantive policy goals of the Council of the District of Columbia and promote forum-shopping. The District files this brief to urge this Court to make clear in its opinion that as a substantive speech rights-implementing statute, the Act applies in federal court in the District of Columbia.

SUMMARY OF ARGUMENT

The Act provides a qualified immunity to those exercising free speech rights who are subjected to a meritless law suit, and, as a substantive rights-implementing law, it applies in federal diversity actions under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and its progeny.

First, the Act and the Federal Rules of Civil Procedure can operate side by side in federal diversity actions without conflict. Under controlling precedent, a federal court sitting in diversity is bound to apply an otherwise applicable District of Columbia rule unless there is a collision between a federal rule and the District rule that is unavoidable after a fair reading of the rules. All three federal appellate courts to have examined the issue have held that a state Anti-SLAPP statute's immunity-granting provision *does not conflict* with Rules 12 or 56 of the Federal Rules of Civil Procedure. These conclusions are consistent with the precedent of the Supreme Court and this Court, and should be applied here to the Act.

Rules 12 and 56 do not "attempt[ ] to answer the same question" as the District's Act. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). The Council made abundantly clear in the Act's text and legislative history that it was codifying a qualified immunity. The Act is not addressed to the procedures in Rules 12 or 56, which are general federal procedures governing all categories of cases; rather, it focuses on claims challenging defendants' exercise of their constitutional speech rights, and for those claims it codifies a targeted, qualified immunity—a *substantive* immunity from claims that arise from speech on issues of public interest, and where plaintiff cannot show a likelihood of success on the merits. *See* D.C. Code § 16-5502(b).

Nothing in the text or scope of Rules 12 or 56 addresses the key operative question under the Act: whether immunity from suit is proper, based on both a defendant's demonstration that the claim arises out of constitutionally protected petitioning activity, and a plaintiff's failure to show a likelihood of success on the merits. Rules 12 and 56 do not "occupy the field" for resolving such a question, and none of the authorities cited by the plaintiff-appellant or in *3M v. Boulter*, 842 F. Supp.2d 85 (D.D.C. 2012), *appeal by 3M voluntarily dismissed* (No. 12-7017) (D.C. Cir. Oct. 19, 2012), establishes that they do. The Act provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis than Rules 12 or 56 envision and can, as a practical matter, operate in tandem with those rules, without conflict. This construction of the federal rules both is straightforward and serves to harmonize them with the Act, as governing precedent requires.

Nor is there any conflict between Rule 41(b) and the Act. Rule 41(b) is a default rule of construction of otherwise ambiguous language in dismissal orders. The Act's proviso that dismissal must be with prejudice where a defendant has established that it is entitled to immunity from suit under the Anti-SLAPP Act may, therefore, operate consistently with Rule 41(b). Rule 41(b) readily can—and should—be interpreted to allow application of the Act's rights-implementing protections.

Second, applying the Act in federal diversity cases plainly promotes the twin aims of *Erie*: discouragement of forum-shopping and avoidance of inequitable administration of the laws. In light of the Council's policy choice, *Erie* principles require that individuals subjected to meritless suits designed to silence constitutionally protected speech are protected by the District's statutory protections in both federal and Superior Court.

ARGUMENT

I. The District Of Columbia Anti-SLAPP Act Applies In Federal Diversity Actions.

Federal courts are required to "'apply state substantive law and federal procedural law' when sitting pursuant to their diversity jurisdiction." *Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1107 (D.C. Cir. 2012) (quoting *Hanna v. Plumer*, 380 U.S. 460, 465 (1965), and citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996)). The Supreme Court "has evolved a set of tests to determine whether a law is substantive or procedural for *Erie* purposes." *Id.* There are two steps to the governing test.[1]

Under the first step, the "question" is whether there is an applicable federal rule or statute, the "scope" of which is "sufficiently broad to control the issue before the Court." *Id.* (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50

[1] Plaintiff-Appellant fails to acknowledge *Burke* as the controlling test in this Circuit.

(1980)). "If there is, the Federal Rule or statute governs, state law notwithstanding, '*unless* it exceeds statutory authorization or Congress's rulemaking power.'" *Id.* (quoting *Shady Grove*, 130 S. Ct. at 1437) (emphasis added). The analysis thus must account for the Rules Enabling Act's command that the Federal Rules of Civil Procedure, and the Federal Rules of Evidence, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). If the federal rule, properly construed, and the state rule at issue "can exist side by side, . . . each controlling its own intended sphere of coverage without conflict," then a court proceeds to the second step of the test. *Burke*, 685 F.3d at 1108 (quoting *Walker*, 446 U.S. at 752).

Under the second step, the federal court must apply the relevant District law if "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.* (internal quotation marks omitted).

Applying this governing test, the Act's protections apply in federal court diversity actions.

A. The Act And The Federal Rules Of Civil Procedure Can Operate Side By Side In Federal Court Without Conflict

i. Under governing precedent, a federal court sitting in diversity is bound to apply an otherwise applicable state rule unless there is an unavoidable, direct collision between a federal rule and a state rule.

In the seven-plus decades since *Erie*, the Supreme Court has consistently applied state law in diversity actions except where confronted with an unavoidable, direct conflict between the federal procedural rule and the state law in question. *See Semtek Intern. Inc. v. Lockheed Martin Corp*., 531 U.S. 497, 509 (2001); *Gasperini*, 518 U.S. at 439; *Walker*, 446 U.S. at 753; *Cohen v. Beneficial Life Indus. Loan Corp*., 337 U.S. 541, 557 (1949); *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943). In the few exceptional cases where the Court has refused to apply the state law in question in a diversity action, it has in each instance explained how the related federal procedural rule could not be fairly interpreted to accommodate the state rule, and thus how the unavoidable, direct conflict required application of the federal rule. *See, e.g.*, *Hanna*, 380 U.S. at 470 (because Federal Rule of Civil Procedure 4(d)(1) provided "with unmistakable clarity . . . that in-hand service is not required in federal courts," while the relevant state rule provided explicitly that service must be "by delivery in hand," a "clash [was] unavoidable" between the federal and state rules, and thus the federal rule controlled); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987) (two unavoidable conflicts between Federal Rule of

Appellate Procedure 38 and the state law at issue precluded application of the state rule); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (because the application of the state law would "defeat [the] command" of the federal law, they could not exist in a diversity action "'side by side . . . each controlling its own sphere of coverage without conflict'" (quoting *Walker*, 446 U.S. at 752)).

Most recently, in *Shady Grove*, the Court reaffirmed that a truly unavoidable conflict will mean that an on-point federal rule controls, so long as the federal procedural rule does not exceed the Rules Enabling Act's ban on expanding or abridging substantive rights. In that federal diversity action, a state statute by its terms precluded plaintiff's seeking a statutory penalty from proceeding in a class action, but Federal Rule of Civil Procedure 23 provides that class actions "may be maintained" if the Rule's prerequisites are met. 130 S. Ct. at 1436 n.2. Because the state statutory rule, if it applied, would have stripped that explicit procedural right of class action from plaintiffs in federal court, the Court found a conflict, since "[b]y its terms, the [state] provision precludes a plaintiff from 'maintaining a class action seeking statutory penalties.'" *Id.* at 1439 (internal brackets omitted). *Shady Grove* explained the Court's numerous prior opinions applying state law in diversity actions this way: "[E]ach [of those cases] involved a Federal Rule that we concluded could fairly be read not to 'control the issue' addressed by the pertinent

state law, thus avoiding a 'direct collision' between federal and state law." *Id.* at 1442 n.8 (quoting *Walker*, 446 U.S. at 749).

The several precedents of this Court evaluating a claimed conflict between a federal rule and a District rule have echoed the Supreme Court's teachings that courts where possible should construe the respective rules in harmony. In *Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165 (D.C. Cir. 1977); *Answering Service, Inc. v. Egan*, 728 F.2d 1500 (D.C. Cir. 1984); and *Burke*, this Court held that the federal rule in question did not control the resolution of the issue, and applied the District rule. We are unaware of a single decision by this Court *ever* to have refused to apply an otherwise applicable state or District of Columbia law on the grounds that a federal rule overrode the state or District rule.

Answering Service is particularly instructive. There, the issue was whether a party was barred by *res judicata* from bringing a claim for wrongful involvement in litigation. *Answering Service*, 728 F.2d at 1501. Federal Rules of Civil Procedure 13, 14, and 18 describe the claims, cross-claims, and counterclaims that must be joined to an original claim. The key issue was whether to apply the District's common-law rule requiring separation between certain cross-claims and a certain new claim. *Id.* at 1503-04. The federal rules, as construed by this Court, did not expressly address this question, and the Court held the state rule applicable under *Erie*. *Id.* at 1505. The Court emphasized that its analysis "harmonizes,

rather than severs, the Federal Rules of Civil Procedure and the" applicable state law, keeping mindful that while the federal rules "are of course presumptively valid," they must be interpreted consistently with *Erie* and with "the limited mandate of the Rules Enabling Act." *Id.* at 1506.

ii. The Act and the Federal Rules of Civil Procedure do not conflict.

The Act and the Federal Rules can operate in tandem and without conflict. Indeed, the three federal appellate courts to have examined whether under governing Supreme Court precedent a state anti-SLAPP statute applies in federal diversity actions have uniformly held that it does. *Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010); *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 168-69 (5th Cir. 2009); *United States ex rel. Newsham v. Lockheed Missiles & Space Co*., 190 F.3d 963, 973 (9th Cir. 1999). The answer is the same for the Act here.

Rules 12 and 56 do not "attempt[ ] to answer the same question as" the Act, *Shady Grove*, 130 S. Ct. at 1437, because they are "addressed to different (but related) subject-matters." *Godin*, 629 F.3d at 88. The Act "on its face is not addressed to either of these procedures, which are general federal procedures governing all categories of cases." *Id.* Rather, it focuses on District-law "claims based on a defendant's petitioning activity." *Id.* The Act applies only to meritless claims challenging defendants' exercise of their constitutional speech rights, and for those claims it codifies a targeted, qualified immunity from suit.

a. The Act does not conflict with either Rule 12 or Rule 56.

1. The Act provides for a qualified immunity.

The Act provides an immunity from suit for claims that arise from conduct in furtherance of the right of advocacy on issues of public interest where a plaintiff cannot show it is "likely to succeed on the merits." D.C. Code § 16-5502(b). As sister federal appellate courts—as well as a number of state courts—have recognized, anti-SLAPP statutes may codify an implied substantive immunity by using a burden-shifting provision combined with a provision calling for dismissal or striking of plaintiff's claim once the burden shifts back to the plaintiff. Courts have repeatedly recognized an implied immunity in anti-SLAPP statutes regardless of the fact that the statute being analyzed does not use the word "immunity." *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003); *Henry*, 566 F.3d at 177; *Gaylord Ent. Co. v. Thompson*, 958 P.2d 128, 144 (Okla. 1998).

In diversity cases applying District law, this Court's self-described "duty . . . is to achieve the same outcome we believe would result if the District of Columbia Court of Appeals considered this case." *Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902, 907 (D.C. Cir. 2006). The D.C. Court of Appeals has stated that "[w]hen interpreting a statute, the judicial task is to discern, and give effect to, the legislature's intent." *A.R. v. F.C.,* 33 A.3d 403, 405 (D.C. 2011). And in construing legislative intent, that court has deemed it appropriate to refuse to

adhere strictly to the plain wording of a statute where doing so would not "'effectuate the legislative purpose,' as determined by a reading of the legislative history or by an examination of the statute as a whole." *Carter v. State Farm Mut. Auto. Ins.*, 808 A.2d 466, 471 (D.C. 2002) (quoting *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983)).

Here, the statute's language and structure is itself indicative of the intent to provide an immunity. The statutory standard that the Council chose to employ is very similar to the standard in the California statute, which had been recognized as having enacted an implied immunity from suit for over a decade as of the Council's legislative deliberations. *Compare, e.g.,* D.C. Code §§ 16-5502(b) *with* Cal. Civ. Proc. Code § 425.16(b) ("a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim"); *see also United States ex rel. Newsham*, 190 F.3d 963. And in any event the Council's express legislative purpose could not have been more clearly stated in the unanimous Committee report. That legislative Committee report, which was never rebutted on this point at any stage of the legislative debate, explained that in the Act the Council was "*follow[ing] the lead of other jurisdictions, which have similarly extended absolute*

or qualified immunity to individuals engaging in protected actions." D.C. Council, Report on Bill 18-893 ("Comm. Rep.") at 4 (emphasis added) (copy in Addendum at 1-29); *see also id.* at 1. From all this, we submit that the D.C. Court of Appeals would find the Council's intent in the Act to enact an immunity to be clear, and so should this Court.

2. The Act addresses a different question than Rules12 or 56.

The key issue under the Act's immunity scheme is whether the defendant invoking the Act has established in its motion an immunity from suit, based on both the demonstration that the claim arises out of constitutionally-protected speech activity and a lack of showing of likelihood on the merits. There is nothing in the text or scope of Rules 12 or 56 addressing this "question" for *Shady Grove* purposes. And, likewise, there is nothing in the Act that addresses the issue encompassed by Rules 12 or 56.

Rule 12(b)(6) allows a defendant to assert a "failure to state a claim upon which relief can be granted." The Act "provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis [than the federal rules]: that the claims in question rest on the defendant's protected petitioning conduct and that the plaintiff cannot meet the special" standard that the District has "created to protect such petitioning activity against lawsuits." *Godin*, 629 F.3d at 89.

The Act likewise provides mechanisms for relief for a defendant in a SLAPP case different in kind from that provided in the federal summary judgment rule. Rule 56(a) allows parties to move for summary judgment, and requires a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Act "serves the entirely distinct function," *Godin*, 629 F.3d at 89, of protecting those specific defendants that have been (a) targeted with litigation on the basis of their protected speech, (b) where the plaintiff has not shown a likelihood of success on the merits. *See* D.C. Code §§ 16-5502(a)-(b).

Just as with the state anti-SLAPP statutes that have been held by sister federal appellate courts to apply in diversity actions, the Act does *not* "seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function." *Godin*, 629 F.3d at 88. As a practical matter, the Act and these federal rules can operate in tandem—both when a party's special motion to dismiss fails and when it succeeds.

If defendants invoking the Act's protections *fail* to convince the presiding judge that their statements are "in furtherance of the right of advocacy on issues of public interest," or if the court concludes that "the claim is likely to succeed on the merits," such a ruling would do nothing to interfere with the disposition of outstanding or subsequent motions filed by a defendant under Rule 12 or by either

party under Rule 56. Indeed, in *3M*, the defendants' motion under the Act was denied, but their 12(b)(6) motion was granted as to every claim but one. *3M Co.*, 842 F. Supp.2d at 113-20. Similarly, the opinion below here granted dismissal under both Rule 12(b)(6) and the Act. *Farah*, 863 F. Supp.2d. at 29. While these two different motions may if granted both have the same effect in terms of the claims in question being dismissed, because of the fees and costs provisions associated with the anti-SLAPP motion (provisions long recognized as substantive for *Erie* purposes), the two dismissal standards neither turn on the same questions nor necessarily have the same consequences.[2] *See, e.g., United States ex rel.*

[2] For this reason, assuming this Court affirms the district court's 12(b)(6) dismissal, that affirmance will not moot the Court's appellate review of the district court's grant of the special motion to dismiss under the Act. The Act explicitly empowers the trial court to award litigation costs and reasonable attorney's fees to successful movants, D.C. Code § 16-5504(a), in contrast to the default rule prevailing in federal and Superior Court, under which in the absence of such explicit statutory authority, attorney's fees and costs are generally not awarded to a prevailing party without a showing of sanctionable conduct, *see, e.g., Brown v. M Street Five, LLC*, 56 A.3d 765, 777 (D.C. 2012); *Prince George's Hosp. Ctr. v. Advantage Healthplan Inc.*, 865 F. Supp.2d 47, 59-60 (D.D.C. 2012). We note also that though the district court's order in the case below did not specify that it was granting the motion to dismiss pursuant to the Act as well as Rule 12(b)(6), the accompanying opinion explained plainly that it was doing so: "[b]ecause Defendants have made a *prima facie* showing that the common law claims at issue here arose from speech in furtherance of the right of advocacy on issues of public interest and because Plaintiffs have failed to demonstrate that their claims are likely to succeed on the merits, Defendants' motion to dismiss under the D.C. Anti-SLAPP will be granted." 863 F. Supp.2d at 39.

Newsham, 190 F.3d 963 (evaluating *grant* of Rule 12(b) motion to dismiss for lack of jurisdiction and *denial* of California anti-SLAPP act motion).

To be sure, a *successful* special motion to dismiss a claim under the Act may obviate the need for a trial court to entertain further dismissal motions. But this does not amount to a conflict with Rules 12 and 56, any more than those rules conflict with each other. The Act here simply provides an additional, independent basis upon which a court may dispose of a claim prior to trial. *See Godin*, 629 F.3d at 89 (Maine anti-SLAPP law "provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis [than Rule 12(b)(6)]"). Indeed as a practical matter, as this case and *3M* show, it can reasonably be expected that defendants will regularly invoke both bases for dismissal and district courts will entertain both without the analysis under the Act displacing or necessarily becoming co-extensive with the analysis under Rule 12(b)(6). They are different motions, designed for some common and some different purposes, evaluated under different standards, and with a different range of attendant consequences where the motion is granted.

The Act's protections touch on procedural issues, which they must since they are targeted at the evil the Council sought to address—the abuse of the court system to silence speech on topics of public interest. This does not constitute a conflict with the Federal Rules nor does its application conflict with *Erie*

principles. Just like the Maine Anti-SLAPP statute held applicable by the First Circuit, the Act (i) "shifts the burden to plaintiff to defeat the special motion"; (ii) "determines the scope of plaintiff's burden"; and (iii) "allows courts to award attorney's fees and costs to a defendant that successfully brings a special motion to dismiss." *Godin*, 629 F.3d at 89 & n.15.

The partial similarity between the Act's provisions "and Rules 12 and 56 as mechanisms to efficiently dispose of meritless claims before trial occurs does not resolve the issue" of whether the Act may be applied under *Erie*. *Godin*, 629 F.3d at 89 n.16 (citing *Shady Grove*, 130 S. Ct. at 1441 n.7 (in turn relying on *Semtek*, 531 U.S. at 504)); *see also United States ex rel. Newsham*, 190 F.3d at 972 ("This commonality of purpose, however, does not constitute a direct collision—there is no indication that Rules 8, 12 and 56 were intended to occupy the field with respect to pre-trial procedures aimed at weeding out meritless claims."). The fact that Rules 12 and 56 and the Act each provide pathways to a common possible result, the claim being resolved in a defendant's favor, does not present a "conflict" any more than the application in diversity of state law provisions touching on procedural matters that the Supreme Court has previously approved. *Cohen* applied a state law requiring the plaintiff class to post security as a prerequisite to bringing an action— notwithstanding that Federal Rule 23 addressed the same topic. 337 U.S. at 556- 57. *Walker* applied state law to determine when an action

commences notwithstanding that Federal Rule 3 defined when an action is "commenced." 446 U.S. at 753. *Gasperini* applied the state standard of judicial review to be applied to challenges to the size of a jury's damages award, notwithstanding Federal Rule 59's command that new trials may be granted "'for any of the reasons for which new trials have heretofore been granted . . . in the courts of the United States.'" 518 U.S. at 433. And, this Court in *Answering Service* applied the District law that required separation between certain cross-claims and a certain new claim, notwithstanding the fact that Federal Rules 13, 14, and 18 describe the claims, cross-claims, and counterclaims that must be joined to an original claim. *See* 728 F.2d at 1506.

Likewise, there is no conflict here in the relevant sense. A conflict that requires a federal court to disregard state law in a diversity action is, instead, a conflict that directly prevents the federal court from obeying two commands at once. Thus, for example, *Hanna* explained that the clash was "unavoidable" between Rule 4(d)(1)'s command that "in-hand service is not required in federal courts" and the state rule's requirement that service *must* be by delivery in hand." 380 U.S. at 470. In *Stewart*, the federal statute for transfer requests required "an individualized, case-by-case consideration of convenience and fairness" and could not exist in a diversity action "'side by side" with the state law's "*categorical* policy disfavoring forum-selection clauses," 487 U.S. at 29-31 (emphasis added

and internal quotation marks omitted), the application of which would "defeat [the] command" of the federal law, *id.* at 31. In *Burlington*, the Court similarly stressed that a federal appellate court, if both Federal Rule of Appellate Procedure 38 and the state law applied, would be faced with a situation where it would be forced to either exceed its authority under Rule 38 or to violate the mandatory state-law obligation; as a practical matter, the two laws could not operate "side by side." 480 U.S. at 7-8. Similarly, in *Shady Grove*, the Court confronted a situation where a judge faced with plaintiffs demanding state statutory penalties and seeking class certification must either refuse to apply Rule 23's express "may maintain" language or certify a class in violation of state law. 130 S. Ct. at 1442. Again, there was no practical way for the trial judge to apply both laws "side by side." *Id.* at 1442. Here, as discussed above, there is a straightforward way for trial courts to do so.

3. Under any fair reading of *Shady Grove*, the Act does not answer the same question as Rules 12 or 56 or conflict with either of those rules.

Even if this Court perceives ambiguity as to whether Federal Rules 12 and 56 permit the Act's application, precedent and *Erie* principles require the Court to read the rules and the Act to avoid conflict because a fair reading of them allows it to do so. Section II.A, the portion of Justice Scalia's *Shady Grove* opinion that garnered five Justices' votes, echoes the decisions that it built on, and instructs

federal courts to "read an ambiguous Federal Rule to avoid substantial variations [in outcomes] between state and federal litigation." *Shady Grove*, 130 S. Ct. at 1441 n.7 (quoting *Semtek*, 531 U.S. at 504).

The concurrence by Justice Stevens (who provided the fifth vote) in *Shady Grove* is to the same effect. *See id.* at 1451 n.5 (Stevens, J., concurring). Echoing prior Supreme Court majority opinions, the concurrence further requires that "federal rules must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,'" *id.* at 1449 (quoting *Gasperini*, 518 U.S. at 427 n.7), and that "[w]hen a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result," by a reasonable "saving construction" to ensure no violation of the Enabling Act's mandate that federal rules "shall not" alter "*any* substantive right." *Id.* at 1452 (citing *Semtek*, 531 U.S. at 503).

In the wake of *Shady Grove*, this Court in *Burke* has explained that a Federal Rule of Civil Procedure does not displace a District of Columbia law so long as both can exist side by side, . . . each controlling its own intended sphere of coverage without conflict." 685 F.3d at 1108. For the reasons set out above, Rules 12 and 56, read in a straightforward way, do not conflict under this standard. Rules 12 and 56 do not, in the parlance of *Shady Grove*, "attempt[ ] to answer the

same question as" the Act, and thus there is no conflict. 130 S. Ct. at 1437. And under that same standard, to the extent the Court finds any ambiguity on the issue, it "should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation.'" *Id.* at 1441 n.7 (quoting *Semtek*, 531 U.S. at 504). That directive points to a conclusion of no conflict here because, if the Court were to hold that the federal rules forbid application of the Act, the Act's speech-rights-focused immunity, burden-shifting, and cost- and fee-related protections would be available in the District of Columbia in Superior Court, but not available whatsoever in federal district court, a variation that is surely "substantial." *Id.*

If, like the Tenth Circuit, this Court were to apply Justice Stevens's opinion as controlling the conflict inquiry, the result is the same. *Garman v. Campbell County School Dist. No. 1*, 630 F.3d 977 (10th Cir. 2010). First, on straightforward comparison of the rules, again, there is no conflict because Rules 12 and 56 do not address the relevant question of whether immunity is warranted, and thus dismissal ensues. But to the extent the Court finds any ambiguity, it would also interpret federal rules "with some degree of 'sensitivity to important state interests and regulatory policies.'" *Shady Grove,* 130 S. Ct. at 1449 (Stevens, J., concurring) (quoting *Gasperini*, 518 U.S. at 427 n.7). The Council's stated interest in the Act of ensuring that "District residents are not intimidated or

prevented, because of abusive lawsuits, from engaging in political or public policy debates," Comm. Rep. at 4, is surely an important regulatory interest for these purposes and would compel reading the ambiguity, to the extent it exists, so that the federal rules permit operation of the Act's protections. By contrast, the state law in *Shady Grove* did *not* have legislative history showing it was adopted for primarily substantive reasons. *Id.* at 1458-59 (Stevens, J., concurring).

And even if, after an initial conflicts analysis, the Court still thought that Rules 12 or 56 covered the issue, Justice Stevens's standard would compel using a saving construction for the federal rules and applying the Act's speech rights implementing protections, thus avoiding a Rules Enabling Act problem. *See id.* at 1452 (citing *Semtek*, 531 U.S. at 503). Because the Act is, like its state analogs, "'so intertwined with a state right or remedy that it functions to define the scope of the state-created right,' it cannot be displaced by Rule 12(b)(6) or Rule 56." *Godin*, 629 F.3d at 89 (citing *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring)). In any event, the Court need not decide with further precision which *Shady Grove* opinion controls the inquiry because the answer under either one is the same: no conflict exists.

4. The authorities cited in *3M Co. v. Boulter* do not support the conclusion that Rules 12 or 56 conflict with application of the Act in federal diversity actions.

Finally, this Court should reject both the conclusion and the analysis of the district court in *3M.* To conclude that Rules 12 and 56 conflict with application of the Act in diversity matters, *3M* relied principally on: (i) the Supreme Court's decisions in *Burlington, Shady Grove,* and *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958); (ii) Advisory Committee Notes to the 1946 Amendments to the Federal Rules of Civil Procedure, and on several mid-twentieth century decisions of this Court and other circuits applying Rules 12 and 56; and (iii) the Ninth Circuit's decision in *Metabolife Int'l Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001). *See* 842 F. Supp.2d at 96-112. None of those authorities supports, let alone compels, the conclusion reached in *3M.*

First, as discussed above, Supreme Court precedent permits a federal court sitting in diversity to refuse to apply the state law only where there is a true conflict between the state law and a federal law or procedural rule. Thus, for example, *Burlington* posited a situation where, were both Federal Rule of Appellate Procedure 38 and the state law to apply, the appellate court would be forced either to exceed its authority under Rule 38 or to violate the mandatory state-law obligation; as a practical matter, the two laws could not operate "side by side." *Burlington*, 480 U.S. at 7. Similarly, in *Shady Grove*, as discussed above,

there was no practical way for the trial judge to apply Federal Rule 23 and the state law "side by side." 130 S. Ct. at 1441-42. Here, however, there is no such unavoidable clash.

The district court in *3M* suggested that the Act is inapplicable in federal court because under the Act a judge, not a jury, decides whether the Act's immunity applies. *3M Co. v. Boulter*, Am. Mem. Op. and Order, 2012 WL 5245458, at 4 (D.D.C. Oct. 24, 2012) (citing *Byrd*, 356 U.S. at 525). That is incorrect. *Byrd*'s holding is inapplicable here, as it dealt with a state law expressly assigning to the judge the determination of a question of fact, which is not the case here. For example, the Act's "likely to succeed on the merits" standard is very similar to the equivalent California statute's "probability" standard, long held not to require a court to "weigh the evidence." *Dixon v. Superior Court*, 30 Cal. App.4th 733, 746 36 Cal. Rptr.2d 687, 697 (Cal. Ct. App. 1994). Similarly, in assessing for purposes of reviewing decisions disposing of motions for preliminary injunction determinations, which likewise call for an assessment of the likelihood of success on the merits, the Circuit has readily found such determinations to be "primarily on questions of law." *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 614 (D.C. Cir. 1992). There is simply no basis to presume in the abstract that trial judges applying the Act would or could engage in such weighing of the evidence. *Accord Godin*, 629 F.3d at 90 n.18.

Second, the historical materials and mid-20th Century decisions relied on by *3M* Court likewise do not support its conclusion that Rules 12 and 56 are intended to "occupy the field" of weeding out meritless claims. *See 3M*, 842 F. Supp.2d at 109. *3M* characterized the Advisory Committee's notes as "clearly explain[ing] that Rule 12(d) links Rule 12 with Rule 56 to provide the exclusive means for federal courts to use to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint." 842 F. Supp.2d at 98. This is not a persuasive reading of the notes, nor of the cases it applied or those cases cited by *3M* decided shortly after the 1946 amendments.

As an initial matter, the term "exclusive" is not used in this context by the notes themselves, by a single case cited by *3M* or by the text of Rules 12 or 56 – that is solely the gloss of *3M*.

Further, the 1946 Advisory Committee notes simply indicate what has today become black-letter law—that motions filed under the Federal Rules that seek judgment based on the evidence should generally be treated as motions for summary judgment. It is by now an "unobjectionable proposition that when a complaint adequately states a claim, it may not be dismissed" under Rule 12 "based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or fail to prove his claim to the satisfaction of the

factfinder." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007). This proposition is accurate, but does nothing to support *3M*'s extrapolation from it.

Similarly, the authorities cited in *3M* do not speak at all to the question of when courts may dismiss cases upon motions based on state-created substantive immunity rules. None of the 1946 advisory committee language or early cases construing the 1946 amendments cited in *3M* discussed statute-based immunities implementing substantive rights, and none say *anything* to negate through the Federal Rules the application of a state-created right that is narrowly targeted to constitutionally-protected activities. That is not surprising, as Congress spoke to *that* question separately and well before the 1946 amendments, enacting in 1934 the command in the Rules Enabling Act, applicable ever since, that "the Rules 'shall not abridge, enlarge, or modify any substantive right.'" *Semtek*, 531 U.S. at 503 (quoting 28 U.S.C. § 2072(b)).

Third, and contrary to the *3M* court's intimation, Ninth Circuit precedent does not support its conclusion. *Metabolife* does *not* stand for the proposition, ascribed to it by *3M*, that "Rules 12 and 56 are so broad as to cover or answer the same question as the California statute." 842 F. Supp.2d at 109 n.19. Rather, the Ninth Circuit has *repeatedly* held that California's substantive immunity squarely applies in federal court. *See United States ex rel. Newsham*, 190 F.3d at 970-73; *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 n.2 (9th Cir. 2009); *Thomas v. Fry's*

Electronics, Inc., 400 F.3d 1206, 1207 (9th Cir. 2005); *Batzel*, 333 F.3d at 1025-26. Indeed, *Metabolife expressly* left intact *Newsham*'s holding, and addressed only the California statute's discovery-stay provision, which it declined to apply because in its view the "discovery-limiting aspects of" the California act "collide with the discovery-allowing aspects of Rule 56," a holding not particularly relevant to the question of whether the Act applies in the first place. *Metabolife*, 264 F.3d at 845-46. More apposite Ninth Circuit precedent, in particular *Newsham*, instead *supports* the conclusion that the Act applies.

b. The Act does not conflict with Rule 41(b).

The Act does not conflict with Rule 41(b), contrary to the unfounded conclusion in *3M* that the Act's provision that dismissal under Section 16-5502 shall be with prejudice conflicts with Federal Rule of Civil Procedure 41(b). 842 F. Supp.2d at 104-05. Rule 41(b) provides in relevant part that "[u]nless the dismissal order states otherwise, a dismissal under this subdivision . . . and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." As has been long-recognized, the Rule simply sets forth a default rule of construction of otherwise ambiguous language in dismissal orders; contrary to *3M*'s understanding, it does not by its terms independently confer discretion on district courts. *See* 27A Tracy Bateman Farrell, *et al.*, *Federal Procedure, Lawyers Ed.* §

62:557 (Mar. 2012); *see also Sack v. Low*, 478 F.2d 360, 364 (2d Cir. 1973). Because there is no discretion separately provided to federal district judges in Rule 41(b), there is none that could be taken away by the Act to provide the basis of any purported conflict.

B. Application Of The Act In Federal Court Serves *Erie*'s Twin Aims.

Because Rules 12, 41, and 56 and the Act can "exist side by side, . . . each controlling its own intended sphere of coverage without conflict," the second step of the governing test is triggered, and the Act must be applied in this diversity action if its application will serve *Erie*'s twin aims. *Burke*, 685 F.3d at 1108 (quoting *Walker*, 446 U.S. at 752).

Application of the Act's protections in federal court will plainly serve these two related aims, which are (i) avoiding inequitable administration of the laws and (ii) discouraging forum-shopping. *See Hanna*, 380 U.S. at 468; *Burke*, 685 F.3d at 1109; *Walko*, 554 F.2d at 1170–71. First, it would be inequitable to allow the use of a defense to parties subjected to a SLAPP in Superior Court, but deny them the use of that defense in *federal* court, especially since the choice of forum is, in large part, the province of the plaintiff. *See Hanna*, 380 U.S. at 467 ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character of the result of a litigation materially to differ because the suit had been brought in federal court."). A rule that may cause a case that would be dismissed if brought in

Superior Court to proceed to trial in federal court "would be outcome-determinative in the relevant [*Erie*] sense." *Burke*, 685 F.3d at 1109.

Second, if plaintiffs are subject to the heightened burden of proof set forth in the Act if they file their case in local court, but can avoid being subject to that standard if they file in federal court, that result will promote *precisely* the type of forum-shopping *Erie* was designed to avoid. *See, e.g., United States ex rel. Newsham*, 190 F.3d at 973. Indeed, such forum-shopping has *already* occurred in the District as a result of the *3M* decision. *See Dean v. NBC*, No. 2011 CA 006055 B, Order at 2 (D.C. Sup. Ct. June 25, 2012) (copy in Addendum at 30-36) ("Plaintiffs [alleging defamation against a journalist and other parties] wish to discontinue this case and pursue the same matter in Federal Court because [of the *3M* decision]"). The twin aims analysis thus confirms that the Act's protections apply in federal diversity actions.

CONCLUSION

This Court should hold, like the decision below, that the Act applies in federal diversity actions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 19, 2013, electronic copies of the final version of this brief were served on all registered parties through the Court's ECF system.

/s Ariel B. Levinson-Waldman
Ariel B. Levinson-Waldman

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation of this Court's Order of November 20, 2012 because the brief contains 6,976 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point.

/s Ariel B. Levinson-Waldman
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