COMMENT

ANTI-SLAPP STATUTES AND THE FEDERAL RULES: WHY PREEMPTION ANALYSIS SHOWS THEY SHOULD APPLY IN FEDERAL DIVERSITY SUITS

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In an effort to protect the exercise of free speech and petitioning activity against meritless defamation suits, numerous states have enacted laws to deter "SLAPP"—"strategic lawsuit against public participation"—suits.[1] Such strike suits often involve speech on matters of public concern and would have no practical chance of prevailing under current First Amendment doctrine.[2] However, the time and expenses associated with getting these claims dismissed are often enough to intimidate would-be speakers into silence.

State "anti-SLAPP" laws require the plaintiff to demonstrate a likelihood of success on the merits for speech-related tort claims, providing a quick and easy way for defendants to get meritless claims dismissed at the pleadings stage, prior to potentially costly discovery.[3] Because these anti-SLAPP motions spare defendants a great deal of time and expense, they help blunt the threat of SLAPP suits. But debates within the federal courts of appeals may jeopardize the effectiveness of anti-SLAPP statutes. In 2015, the D.C. Circuit created a circuit split by refusing to apply Washington, D.C.'s anti-SLAPP statute, claiming it conflicts with Rule 12(b)(6) motions to dismiss and Rule 56 summary judgment motions.[4]

The anti-SLAPP circuit split now offers the Supreme Court a unique opportunity to correct the broader confusion over the relationship between the Federal Rules of Civil Procedure and state laws. By holding that anti-SLAPP statutes do not conflict with the Federal Rules based on an analysis of the purposes underlying both provisions, the Supreme Court could go a long way in clarifying how the Federal Rules operate.[5] Under the Rules Enabling Act, the Federal Rules will control litigation in federal courts—provided that they do not "abridge, enlarge or modify" substantive rights given by law.[6] But just what constitutes a substantive right has vexed judges and academics since the Enabling Act's inception in the 1930s. It was this same confusion that led the D.C. Circuit to conclude that Rules 12(b)(6) and 56 preclude the operation of anti-SLAPP

1 Cuba v. Pylant, 814 F.3d 701, 704 n.1 (5th Cir. 2016).

2 *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14 (1990) (requiring "public figures" and "public officials" to show actual malice in libel or slander suits (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 134 (1967))); Gertz v. Robert Welch, Inc., 418 U.S. 323, 337 (1974) (explaining that a "public figure" is anyone who is "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large" (citation omitted)); *see also* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (requiring the plaintiff to "bear the burden of showing falsity, as well as fault, before recovering damages" in defamation suits against media defendants); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (holding that appellate courts should "make an independent examination of the whole record" to ensure that a judgment does not impermissibly intrude on protected free speech).

3 *See infra* notes 12–17 and accompanying text.

4 Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1336 (D.C. Cir. 2015).

5 *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949) (examining the policies underlying Rule 23 vis-à-vis a state provision to conclude that the two do not conflict).

6 28 U.S.C. § 2072(b) (2012).

statutes in federal court. However, by treating the question of whether the Federal Rules of Civil Procedure preclude state-law protections in federal court as one akin to preemption, as Professors Stephen Burbank and Tobias Barrington Wolff have advocated,[7] a more coherent answer to the anti-SLAPP-application problem is possible.

As this Comment will argue, there is no sufficiently strong federal interest in having the Federal Rules "preempt" the operation of anti-SLAPP protections in federal court. Instead, straightforward preemption analysis shows that the balance favors having anti-SLAPP motions available to federal litigants. Part I examines the particulars of anti-SLAPP statutes and the circuit split over whether anti-SLAPP statutes apply in federal diversity proceedings. Part II then provides context for the anti-SLAPP-application debate by reviewing the Supreme Court's conflicting interpretations of the Enabling Act. Part III examines Enabling Act precedent through the lens of preemption analysis, which provides a more coherent explanation for when the Court is likely to find that the operation of the Federal Rules supersedes state law. Based on insights gathered from the preemption-analysis approach, Part IV considers the use of anti-SLAPP motions in federal court. Finally, this Comment concludes that no conflict exists between federal interests and anti-SLAPP provisions. Thus, anti-SLAPP motions should be available to defendants in federal court.

I. ANTI-SLAPP STATUTES AND THE QUESTION THEY POSE IN FEDERAL DIVERSITY LITIGATION

Prompted by concerns that the prospect of litigating meritless claims may discourage protected speech or petitioning activity, approximately thirty states, territories, and the District of Columbia have enacted anti-SLAPP statutes.[8] An additional two states, Colorado and West Virginia, adopted anti-SLAPP protections by judicial decision.[9] The policy undergirding these anti-SLAPP provisions is to protect against the filing of state slander, libel, and other speech-related claims meant to chill the exercise of free speech and petitioning activity.[10] The fear is that potential speakers will be so intimidated

7 *See infra* note 45.

8 *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, https://www.anti-slapp.org/your-states-free-speech-protection/ [https://perma.cc/V7LH-BV6C].

9 Protect Our Mountain Env't, Inc. v. Dist. Court, 677 P.2d 1361, 1368-69 (Colo. 1984); Harris v. Adkins, 432 S.E.2d 549, 552 (W. Va. 1993).

10 *See* Atlanta Humane Soc'y v. Harkins, 603 S.E.2d 289, 292 (Ga. 2004) ("[T]he purposes of Georgia's anti-SLAPP statute are to encourage citizen participation in matters of public significance through the exercise of the right of free speech and the right to petition the government for redress of grievances, and to prevent their valid exercise from being chilled through abuse of the judicial process.").

by the burden and expense of litigating these claims, they will refrain from engaging in protected speech.[11]

Anti-SLAPP statutes do not preclude speech-related suits. Rather, they create special motions to dismiss actions brought against defendants based on "any claim arising from an act in furtherance of the right of advocacy on issues of public interest."[12] To succeed, the defendant must make 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."[13] The burden then falls on the plaintiff to demonstrate that "the claim is likely to succeed on the merits."[14] If the plaintiff succeeds, the motion is denied; otherwise, the defendant's motion to dismiss is granted.[15] To keep costs to the defendant low, discovery is stayed during the pendency of the motion.[16] If the motion is granted, the defendant can then seek costs and reasonable attorneys' fees.[17]

Proponents of anti-SLAPP statutes argue that they protect substantive rights—free speech and advocacy, without fear of reprisal through costly litigation—via targeted procedural means.[18] But recently, federal circuits have

11 *See* EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 118 (5th ed. 2014) (explaining how anti-SLAPP statutes "try to decrease the 'chilling effect' of certain kinds of libel litigation and other speech-restrictive litigation").

12 D.C. CODE ANN. § 16-5502(a) (West 2012); *see also* ME. REV. STAT. ANN. tit. 14, § 556 (2012) ("When a moving party asserts that the civil claims . . . are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss.").

13 D.C. CODE ANN. § 16-5502(b) (West 2012).

14 D.C. CODE ANN. § 16-5502(b) (West 2012); *see also* CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2015) (stating that the plaintiff must establish "that there is a probability that the plaintiff will prevail on the claim"); ME. REV. STAT. ANN. tit. 14, § 556 (2012) ("The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party.").

15 *See, e.g.*, D.C. CODE ANN. § 16-5502(b) (West 2012).

16 *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(g) (West 2015); D.C. CODE ANN. § 16-5502(c)(1) (West 2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012).

17 *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2015); D.C. CODE ANN. § 16-5504(a) (West 2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012). Anti-SLAPP statutes also tend to include interlocutory appeal provisions—raising collateral order doctrine issues. *See, e.g.*, Godin v. Schencks, 629 F.3d 79, 83-85 (1st Cir. 2010) (concluding that appellate jurisdiction exists because deciding the anti-SLAPP issue would be conclusive to "the disputed question" and distinct from the merits); *see also* Breazeale v. Victim Servs., Inc., Nos. 15-16549, 16-16495, 2017 WL 6601779, at *6 (9th Cir. Dec. 27, 2017) (discussing the appealability of decisions on anti-SLAPP motions under California law). This Comment, however, will leave the collateral order dispute for another day.

18 *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(a) (West 2015) ("The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.").

divided over whether anti-SLAPP statutes are "procedural" or "substantive" for Enabling Act purposes. The disagreement centers on whether Rules 12(b)(6) and 56 preclude the operation of the anti-SLAPP motions in federal proceedings. This debate has now created a circuit split whose ultimate resolution may come only through Supreme Court review. And in reviewing anti-SLAPP statutes, the Court would have the opportunity to clarify its own Enabling Act jurisprudence. The remainder of this Part will briefly survey some of the more important courts of appeals opinions regarding the place of anti-SLAPP statutes in federal court.

In *Godin v. Schencks*, the First Circuit held that Maine's anti-SLAPP statute must be applied in federal court.[19] A "straightforward reading" of Rules 12(b)(6) and 56, the court said, does not indicate that those Rules were "meant to control the particular issues."[20] Further, "a Federal Rule 'cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term *but is so intertwined with a state right or remedy* that it functions to define the scope of the state-created right.'"[21]

The court went on to hold that Rules 12(b)(6) and 56 do not "address the same subject" as the anti-SLAPP statute.[22] Because the anti-SLAPP statute addresses "special procedures for state claims," it does not seek to displace the "general federal procedures governing all categories of cases."[23] In other words, "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 Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities."[24] Thus, because of the substantive purposes behind Maine's anti-SLAPP statute, distinct from the functioning of Rules 12(b)(6) and 56, finding a conflict was both unnecessary and inappropriate.

In contrast to the First Circuit, the D.C. Circuit found a conflict between D.C.'s anti-SLAPP provision and Rules 12(b)(6) and 56.[25] Specifically, the

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19 629 F.3d 79, 92 (1st Cir. 2010).

20 *Id.* at 86.

21 *Id.* at 87 (emphasis added) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 423 (2010) (Stevens, J., concurring)).

22 *Id.* at 88 (quoting *Shady Grove*, 559 U.S. at 402). The court also emphasized how "the allocation of burden of proof is substantive in nature and controlled by state law." *Id.* at 89.

23 *Id.* at 88.

24 *Id.* Specifically, the anti-SLAPP statute provides "a mechanism" for dismissing a complaint because "the plaintiff cannot meet the special rules Maine has created to protect such petitioning activity against lawsuits." *Id.* at 89. The anti-SLAPP motion is neither testing the sufficiency of the complaint nor granting judgment in the absence of material facts; Rules 12(b)(6) and 56 do both. *Id.* at 88.

25 *See* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015) ("Federal Rules 12 and 56 answer the same question as the D.C. Anti-SLAPP Act . . . . A federal court exercising

court viewed D.C.'s anti-SLAPP statute as imposing a higher burden on getting to trial than Rules 12(b)(6) and 56.[26] Under Rule 12(b)(6), a plaintiff need only show that a claim "is plausible on its face."[27] Indeed, a case "may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable."[28] Because the anti-SLAPP statute and Rules 12(b)(6) and 56 "answer the same question" about a claim's viability, but the anti-SLAPP statute makes getting to trial more difficult for the plaintiff, it conflicts with the Federal Rules and cannot be applied.[29] Thus, from the D.C. Circuit's perspective, the Federal Rules and the anti-SLAPP statute cannot coexist.

Other circuits have also seen the anti-SLAPP controversy come to a head. The Ninth Circuit was the first to hold that anti-SLAPP statutes should apply in federal court because they "can exist side by side" with the Federal Rules.[30] The court noted that if a defendant were unsuccessful in obtaining relief through the anti-SLAPP motion, he could still bring a Rule 12(b)(6) or Rule 56 motion.[31] The anti-SLAPP provision also protects individual "constitutional rights of freedom of speech and petition for redress of grievances," something the Federal Rules do not directly address.[32]

Despite this longstanding Ninth Circuit precedent, Judge Kozinski waged an all-out assault on applying anti-SLAPP statutes in federal court. Specifically, he viewed anti-SLAPP statutes as impermissible alterations to the standards set by Rules 12(b)(6) and 56.[33] He also believed that the Federal Rules operate as "an integrated program of pre-trial, trial and post-trial procedures," and that anti-SLAPP statutes create "an ugly gash" in the ordinary

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diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision.").

26 *See id.* at 1334 (discussing how there is a conflict because "the plaintiff is *not* able to get to trial just by meeting those Rules 12 and 56 standards"—which "do not require a plaintiff to show a likelihood of success on the merits").

27 *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 570 (2007)).

28 *Id.* (quoting *Twombly*, 550 U.S. at 556).

29 *Id.* at 1336.

30 United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999) (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980)).

31 *Id.*

32 *Id.* at 973 (quoting CAL. CIV. PROC. CODE § 425.16(a) (West 2015)).

33 *See, e.g.*, Travelers Cas. Ins. Co. of Am. v. Hirsh, 831 F.3d 1179, 1183-84 (9th Cir. 2016) (Kozinski, J., concurring) (complaining that the anti-SLAPP's probability of success standard is much higher than Rule 12(b)(6)'s plausibility standard: "The plausibility standard isn't a floor or a ceiling from which we can depart. Using California's standard in federal court means that some plaintiffs with plausible claims will have their cases dismissed before they've had a chance to gather supporting evidence. It's obvious that the two standards conflict."); Makaeff v. Trump Univ., LLC, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring) (stating that an anti-SLAPP statute "creates no substantive rights," but only "provides a procedural mechanism for vindicating existing rights"); *id.* at 274 (arguing that defendants can "test the factual sufficiency of a plaintiff's case prior to any discovery [and get a more favorable] standard for surviving summary judgment by requiring a plaintiff to show a 'reasonable probability' that he will prevail, rather than merely a triable issue of fact").

procedural process.[34] Despite his colorful language, Judge Kozinski's arguments have not carried the day in the Ninth Circuit.[35] But Judge Kozinski's views are not outliers. Other circuit judges argue that anti-SLAPP statutes should not apply in federal courts.[36]

The debate involving anti-SLAPP statutes is not unique. Rather, it is part of a broader struggle to understand the relationship between the Federal Rules and state laws. Much of this misunderstanding persists because the legal community tries to catalogue issues as "substantive" or "procedural."[37] If it is a procedural issue, the Federal Rules cover the situation. But if it is substantive, then state law prevails. However, many laws may not be amenable to clear-cut labels and categories. Such is the case with anti-SLAPP statutes, which have substantive aims but use court procedure to further those goals. Truly understanding whether anti-SLAPP protections should apply in federal court requires peeling away the labels and looking instead to the policies underlying the potentially conflicting laws. The next Part will survey the relevant Supreme Court precedent regarding the Rules Enabling Act. Then, the following Part will demonstrate a superior way of examining these sorts of Enabling Act problems.

II. THE CONFUSING SCOPE OF THE FEDERAL RULES

The current confusion surrounding the application of anti-SLAPP statutes in federal court proceeds from the Supreme Court's most recent sojourn into the relationship between the Federal Rules and substantive rights. The Rules Enabling Act—the federal law that vests the Supreme

34 *Makaeff*, 715 F.3d at 274 (Kozinski, C.J., concurring).

35 *See* Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1182 (9th Cir. 2013) (Wardlaw & Callahan, JJ., concurring in denial of rehearing en banc) ("Rules 12 and 56 do not provide that a plaintiff is entitled to maintain his suit if their requirements are met; instead, they provide various theories upon which a suit may be disposed of before trial. California's anti-SLAPP statute, by creating a separate and additional theory upon which certain kinds of suits may be disposed of before trial, supplements rather than conflicts with the Federal Rules.").

36 *See, e.g.*, Cuba v. Pylant, 814 F.3d 701, 719-20 (5th Cir. 2016) (Graves, J., dissenting) (stating that the anti-SLAPP motion's standards are irreconcilable with Rules 12(b)(6) and 56, and that the statutes "must yield" to the Federal Rules); *Makaeff*, 736 F.3d at 1188 (Watford, J., dissenting from denial of rehearing en banc) (arguing that Rules 12(b)(6) and 56 "together . . . establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court" and that anti-SLAPP statutes "impermissibly supplement[] the Federal Rules' criteria for pre-trial dismissal of an action").

37 Judge Kozinski's analysis was especially problematic because he began by trying to abstractly characterize anti-SLAPP statutes as "substantive" or "procedural." *Makaeff*, 715 F.3d at 273 (Kozinski, C.J., concurring). Doing so puts the cart before the horse. Looking to the policies underlying the provisions—within the context of the litigation—to see if they conflict better exposes whether a provision has more substantive or procedural aims. Regardless, this Comment argues that simply assigning labels to provisions does not resolve the problem. Examining how the policies underlying each provision interact is more fruitful. *See infra* Part IV.

Court with the authority to promulgate rules of procedure for the lower federal courts—specifically precludes the operation of rules that "abridge, enlarge or modify any substantive right."[38] But discerning what constitutes an impermissible alteration of substantive rights has not exactly been easy.

Shortly after the Enabling Act went into effect, the Court decided a series of cases, trying to make sense of challenges to the validity of the Federal Rules. The Court first clamped down on attempts to contest the application of the Federal Rules by announcing that a Rule is valid so long as it "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[39] Although this test remains the black-letter question for a Rule's validity, concerns arose regarding its ability to insulate just about any provision from real scrutiny—no matter how great its impact on substantive rights.[40] The Court then began to backpedal by limiting the scope of certain Rules that appeared to conflict with substantive state laws.[41] Then, the Court in *Hanna v. Plumer* reasserted the "really regulates procedure" mantra.[42] The *Hanna* Court doubled down on the primacy of the Federal Rules over conflicting state provisions, emphasizing that the Rules' purpose is "to bring about uniformity in the federal courts."[43] Thus, unless a Rule was invalid under the Enabling Act or the Constitution by doing something other than regulating procedure, it would control regardless of its impact on substantive rights.[44]

Although *Hanna* made clear that assailing a Federal Rule's validity would be extremely difficult, it shifted the debate from arguing about a Rule's impact to arguing about a Rule's scope.[45] To its credit, the *Hanna* Court did try to forestall such scope challenges by instructing courts not to refrain from applying a Rule just to avoid a "direct collision" with state law.[46] However, it

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38 28 U.S.C. § 2072(b) (2012).

39 Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

40 *See, e.g.*, Note, Erie R.R. v. Tompkins *and the Federal Rules*, 62 HARV. L. REV. 1030, 1032-33 (1949) (discussing how certain Federal Rules might be invalid).

41 *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949) (finding that a state-required bond for derivative stockholder suits did not conflict with Rule 23); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949) (holding that the filing of a complaint per Rule 3 did not toll a state statute of limitations, which required that the defendant be served with the summons before tolling would begin).

42 380 U.S. 460, 464 (1965) (quoting *Sibbach*, 312 U.S. at 14).

43 *Id.* at 472 (quoting Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963)).

44 *See id.* at 471 (instructing that courts can only refuse to apply a Federal Rule if it "transgresses . . . the terms of the Enabling Act [or] constitutional restrictions").

45 *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 35-36 (2010) (noting that "the Justices sought to clarify the circumstances in which *Hanna*'s test for the validity of a Federal Rule . . . would apply").

46 *Hanna*, 380 U.S. at 472-73.

was not long before the Court asserted that *Hanna*'s test would only govern when "the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court."[47] The Rule's breadth is determined by its "plain meaning."[48] Most of the Court's modern cases regarding the Federal Rules are decisions about the scope of individual Rules. But they often lack any clear or coherent way to determine that scope, notwithstanding the Court's admonition to follow the Rule's "plain meaning."[49]

Then, in 2009, the Court seemed poised to rethink, or at least clarify, how to handle the relationship between state procedural provisions alleged to protect substantive rights and the Federal Rules.[50] But sadly, the Court's fractured decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* only added to the confusion.[51] Three separate opinions offered competing visions of how to tackle the effect of the Federal Rules on substantive rights. Justice Scalia, writing for a majority of five Justices, reaffirmed the post-*Hanna* test of determining first whether the scope of the Federal Rule covered the same issue as the state provision, and second—if applicable—whether the Rule was valid.[52] The majority then determined that a New York provision limiting the ability for class actions to recover under New York substantive law "attempt[ed] to answer the same question" as Rule 23's class-action certification procedure.[53] Eschewing arguments that the Court need not find a conflict between the two provisions, the Court read Rule 23 as providing the exclusive method for determining the viability of a class action in federal court.[54] Hence, according to the Court, the direct conflict was unavoidable, requiring an examination of Rule 23's validity.

Justice Stevens, the fifth vote for the majority's direct-collision analysis, parted ways with Justice Scalia's opinion in examining the valid application of a Federal Rule. Justice Scalia's plurality maintained that so long as the Rule can be "rationally capable of classification" as procedural and otherwise does not "abridge, enlarge or modify any substantive right," then it is valid.[55]

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47 Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980); Burbank & Wolff, *supra* note 45, at 36.

48 *Walker*, 446 U.S. at 750 n.9.

49 Burbank & Wolff, *supra* note 45, at 35-37.

50 *See id.* at 18-21 (noting a "closely watched case" that "presented the Supreme Court . . . with an opportunity to speak to" the relationship between a "New York law [prohibiting] the award of penalties or statutory damages on a classwide basis . . . and Federal Rule 23").

51 559 U.S. 393 (2010).

52 *Id.* at 398.

53 *Id.* at 399.

54 *Id.* at 405-06.

55 *Id.* at 406-08 (plurality opinion) (first quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965); then quoting 28 U.S.C. § 2072(b) (2006)). In other words, so long as the Rule "governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." *Id.* at 407 (alterations in original) (citation omitted).

Justice Scalia quickly pointed out that any Federal Rule "regulat[ing] only the process for enforcing [substantive] rights" would be upheld.[56] For Justice Scalia, any attempt to consider the impact of applying a Federal Rule on a party's ability to vindicate a substantive right was too difficult and could lead to Federal Rules applying in some states, but not others.[57]

However, Justice Stevens maintained that courts must be "sensitiv[e] to important state interests and regulatory policies."[58] Justice Stevens proposed that if a state procedural rule is "intimately bound up in the scope of a substantive right or remedy," then courts should either narrowly interpret a conflicting Federal Rule to avoid its application or just decline to apply the Federal Rule.[59]

Justice Ginsburg, joined by three other Justices, dissented from the judgment and from Justice Scalia's reasoning. Like Justice Stevens, Justice Ginsburg maintained that interpreting the Federal Rules requires an "awareness of, and sensitivity to, important state regulatory policies" and that conflicts with such state policies should be avoided if possible.[60] Because of this agreement between Justices Stevens and Ginsburg—an agreement comprising five Justices—some courts have maintained that this constitutes a binding decision of the Supreme Court and must be followed.[61]

But regardless of the Stevens–Ginsburg agreement's impact on stare decisis, their respective disagreement highlights the fundamental problem that has plagued the Court's post-*Hanna* jurisprudence. Justice Stevens concluded that New York's class-action provision fell within the scope of Rule 23 and, because the provision was purely procedural, denying its application did not violate the Enabling Act.[62] However, Justice Ginsburg maintained that there was no collision between Rule 23 and the New York provision.[63] Hence, even the five Justices who were sensitive to considering state policies when interpreting the scope of a Federal Rule divided over how to go about determining that scope.

The confusion surrounding whether the Federal Rules should supplant certain state regimes is entirely understandable. Drawing a neat line between substantive provisions versus purely procedural provisions is nearly impossible

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56 *Id.* at 407-08.

57 *Id.* at 409-10.

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

59 *Id.* at 423, 433.

60 *Id.* at 437, 442-43 (Ginsburg, J., dissenting).

61 *See, e.g.*, Godin v. Schencks, 629 F.3d 79, 87 (1st Cir. 2010) (determining that the agreement requires the court to decide "whether the state law actually is part of a State's framework of substantive rights or remedies" before allowing a Federal Rule to control (internal quotation marks omitted) (quoting *Shady Grove*, 559 U.S. at 419)).

62 *Shady Grove*, 559 U.S. at 430-31, 435-36 (Stevens, J., concurring).

63 *Id.* at 446 (Ginsburg, J., dissenting).

at the margins.[64] This confusion makes the Court's responsibility to expound clearly and fairly on the scope of the Federal Rules all the more imperative.

Acknowledging that the Court is engaging in something like preemption analysis helps dispel much of the mystery surrounding Enabling Act jurisprudence and allows for reconciliation of otherwise conflicting cases. Preemption analysis can help evaluate the scope of the Federal Rules as related to state-law regimes because it allows for consideration of the purposes of each provision.[65] And, the Court's post-*Hanna* decisions appear to be consistent with basic preemption analysis. The next Part endeavors to show how the Court engages in Enabling Act preemption analysis and how to tease out patterns relevant to the anti-SLAPP question.

III. THE MORE COHERENT PREEMPTION APPROACH

Recognizing that the Court is engaging in a form of preemption analysis provides a superior means of determining whether given Federal Rules supersede state provisions, as the analysis takes account of the policies underlying the two regimes.[66] Because the facial validity of a Federal Rule is almost unassailable, the question of whether the Rule is broad enough to create a "direct collision" with state law is practically determinative.[67] Thus,

64 *See* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 335 (1933) ("[M]uch of the difficulty arises from the failure on the part of both judges and text writers to state the problem accurately. Nearly every discussion seems to proceed on the tacit assumption that the supposed 'line' between [substance and procedure] has some kind of objective existence, so to speak, and that the object is to find out, as one writer puts it, 'on which side of the line a set of facts falls.'" (citation omitted)); *see also* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 725 (1974) (stating a "substantive right" is "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process").

65 *See* Burbank & Wolff, *supra* note 45, at 37 ("In an interpretive landscape where 'direct collisions' are manufactured, the same language has multiple 'plain meanings,' and the governing precedent (*Sibbach*) is hopelessly out of step with legal developments, it is no surprise that, since *Walker*, the Justices have lurched from one extreme to the other, giving some Federal Rules a scope of application broader than appears plausible—certainly, broader than necessary to escape a charge of infidelity to the text—while emptying others of content.").

66 *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) ("The real question is not whether the separation [of substance versus procedure] shall be made, but how it shall be made: whether mechanically by reference to whether the state courts' doors are open or closed, or by a consideration of the policies which close them and their relation to accommodating the policy of the *Erie* rule with Congress' power to govern the incidents of litigation in diversity suits."); *see also* Burbank & Wolff, *supra* note 45, at 26 (advocating for an approach that interprets "the Rules' open-ended text in identifying the source and content of litigation policies in the federal courts").

67 *See* Burbank & Wolff, *supra* note 45, at 36 (discussing how *Hanna*'s analysis only applies if the Federal Rule is "sufficiently broad to control the issue before the Court" (internal quotation marks omitted) (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980))).

rather than trying to decide whether a Rule is "valid," the more fruitful question is whether the Rule's scope covers the matter at issue.[68]

This Part first discusses the two types of implied preemption that generally occur. Then follows an examination of some key post-*Hanna* cases and how they utilize the modalities of preemption analysis. Finally, based on the case analysis, this Part will conclude by describing the patterns that arise.

A. *Conflict and Field Preemption*

Implied preemption of state law by federal law results when Congress exercises its authority in a way that precludes state operation.[69] There are two types of implied preemption. The first is "conflict preemption." Conflict preemption itself has two subsets. What most people would immediately recognize as conflict preemption—when state and federal law are irreconcilable with each other, making it impossible to comply with both federal and state laws—is the first subset.[70] But another less clear-cut facet of conflict preemption arises when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[71] However, preemption is not always a given. If the federal law at issue involves "the historic police powers of the States," courts presume that Congress did not intend to preempt state law.[72] Also, if federal law merely sets a minimum standard and the states impose a more exacting standard, then there is no conflict.[73]

The second major category is "field preemption," which precludes states "from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."[74] Courts find field preemption either because "the nature of the regulated subject matter permits no other conclusion, or, that the Congress has

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68 And, as Justice Stevens and Justice Ginsburg would have it, considering whether a Rule might transgress the Enabling Act's prohibition on abridging, enlarging, or modifying substantive rights is considered at the scope stage of the inquiry. *Compare Shady Grove*, 559 U.S. at 422-23 (Stevens, J., concurring) ("When 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."), *with id.* at 442 (Ginsburg, J., dissenting) ("In sum, both before and after *Hanna*, the above-described decisions show, federal courts have been cautioned by this Court to 'interpre[t] the Federal Rules . . . with sensitivity to important state interests,' and a will 'to avoid conflict with important state regulatory policies.'" (alteration in original) (citations omitted)).

69 *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (describing the various methods Congress can use to preempt state law).

70 Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

71 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

72 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

73 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 5.2.4 (4th ed. 2011).

74 Arizona v. United States, 567 U.S. 387, 399 (2012).

unmistakably so ordained."[75] The intent of Congress to supersede state law altogether may be found from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[76]

Field preemption often requires courts to engage in policy analysis, determining whether the federal interests underlying a given scheme "will be best served by the law being exclusive in a field."[77] In other words, the Federal Rules must take precedence when state regulations would interfere with comprehensive federal policy.[78] But, preemption is unlikely if the state law in question serves important state interests.[79]

Finding "important state interests" can provide a handy escape device for courts concerned about the impact of a federal scheme on state policies.[80] However, if courts believe that applying federal law is important, then recognizing a comprehensive federal scheme gives ample excuse for preemption. As the next Section will show, utilizing this preemption analysis is helpful in understanding the Court's post-*Hanna* jurisprudence.

B. *Preemption Analysis Applied to the Federal Rules of Civil Procedure*

Although the Court does not explicitly apply preemption jurisprudence to questions regarding the scope of Federal Rules, its confusing array of cases makes more sense when viewed through a preemption prism. Effectively, ever since the Court adopted its "really regulates procedure" mantra, most of its attention has focused on the scope of the Federal Rules, rather than on questions of validity.[81] In crystalizing the "really regulates procedure" test, *Hanna* made it nearly impossible to prove that a Rule is invalid. Thus, claims will almost always rise or fall on the scope of a Federal Rule. Given that scope is essentially the ballgame, it should come as little surprise that the Court treats Enabling Act cases like preemption cases. Finding a narrow scope

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75 *Fla. Lime*, 373 U.S. at 142; *see also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988) (noting that state law mandating a particular outcome cannot override Congress's deliberate decision to give federal judges discretion "in a single 'field of operation'" (quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7 (1987)).

76 *Rice*, 331 U.S. at 230.

77 CHEMERINSKY, *supra* note 73, § 5.2.3. Of course, if Congress chooses not to legislate in a given area, then that question is left to state legislatures. Burbank & Wolff, *supra* note 45, at 29.

78 CHEMERINSKY, *supra* note 73, § 5.2.3.

79 *Id*.

80 *Id*.

81 *See supra* notes 39–49 and accompanying text. However, as Justice Stevens highlighted in his *Shady Grove* concurrence, the analysis of whether a broader reading of a Federal Rule might violate the Enabling Act counsels interpreting the Rule more narrowly. 559 U.S. 393, 422-23 (2010) (Stevens, J., concurring) (citing Ortiz v. Fibreboard Corp., 527 U.S. 815, 842, 845 (1999)).

allows the Court to avoid applying a Federal Rule. Meanwhile, interpreting a Rule broadly lets the Court choose to supersede state provisions.

Over the past few decades, the Court has built on *Hanna*'s foundation and crafted further refinements, many of which typify its preemption jurisprudence. For example, the Court said that if state and Federal Rules cannot coexist "side by side . . . each controlling its own intended sphere of coverage without conflict," the Federal Rule must control.[82] And like preemption cases, if the Court believes that federal law should prevail, it determines that the scope of the Federal Rule is broad.[83] Conversely, if the Court believes that important state interests are at stake, it narrowly interprets the Federal Rule.

1. Enabling Act Avoidance Canon: The *Walker* Narrow-Read Pattern

Since *Hanna*, a number of cases have been decided in which the Court avoids applying the Federal Rules. These cases seem to detract from *Hanna*'s "really regulates procedure" test.[84] However, when viewed from the perspective of preemption analysis, these cases make sense as paradigms of the Court's determination that important state interests were present.[85]

The first major case that arose in the wake of *Hanna* was *Walker v. Armco Steel Corp*. *Walker* dealt with whether Rule 3's statement—that a lawsuit commences with the filing of a complaint—preempted state statutes of limitations that required serving defendants before the limitations period expired.[86] To Court watchers, the case was essentially a rematch. Prior to *Hanna*, the Court had held on similar facts that Rule 3 could not control because doing so would affect substantive rights by giving a claim "longer life in the federal court than it would have had in the state court."[87] With *Hanna* now in the books, the Court had to confront Rule 3's impact on statutes of limitations head-on.

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82 Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988) (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980)).

83 *Compare* Geier v. Am. Honda Motor Co., 529 U.S. 861, 874-76 (2000) (finding that federal interests counseled reading a regulation broadly to preempt state common law), *with* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5-7 (1987) (determining that the interests furthered by a Federal Rule supported applying it broadly to preempt state provisions).

84 Hanna v. Plumer, 380 U.S. 460, 464 (1965) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

85 Recall that both conflict and field preemption provide an escape valve for courts concerned with the impact on state interests. *See supra* text accompanying notes 72 & 80. In conflict preemption contexts, the Court presumes that there is no preemption if the state's police power is implicated. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

86 446 U.S. 740, 742-43 (1980).

87 Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949).

Statutes of limitations have proven difficult to classify. Traditional conflict-of-laws principles considered general statutes of limitations as purely procedural.[88] However, over time, statutes of limitations began to be viewed as more substantive because of their direct impact on a party's right to bring a lawsuit.[89] Initially, these concerns led the Court to conclude that Rule 3 could not preempt them.[90]

After discussing the Court's previous treatment of Rule 3 and highlighting the importance of stare decisis, the *Walker* Court concluded that the scope of Rule 3 was not broad enough to control a state's statute of limitations.[91] Rather than being intended to displace state tolling requirements, Rule 3 simply governed "the date from which various timing requirements of the Federal Rules begin to run."[92] Thus, the narrowness of Rule 3 allowed it and the state statute of limitations to "exist side by side . . . each controlling its own *intended sphere* of coverage without conflict."[93]

An interesting thought experiment would be whether the Court would find Rule 3's scope to be the same if the important state interests bound up in statutes of limitations were removed. However, no such experiment is necessary.[94] Just a few years after *Walker*, the Court decided *West v. Conrail*, a federal question case with tolling provisions governed by federal regulations.[95] One would naturally expect *Walker*'s view—that Rule 3 did not directly conflict with a statute of limitations that continued to run until the defendant was served—would control in *West*. But the opposite was true. Rather than adopting the "plain meaning" of Rule 3 as understood by *Walker*, the *West* Court held that "when the underlying cause of action is based on federal law . . . the action is not barred if it has been 'commenced' in compliance with Rule 3 within the [limitations] period."[96] Hence, the Court

88 RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 603 (AM. LAW. INST. 1934).

89 *See* Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 110-11 (1945) (examining statutes of limitations in light of *Erie* analysis, and noting "a statute that would completely bar recovery in a suit if brought in a State court bears on a Statecreated right vitally and not merely formally or negligibly"). *But see* Sun Oil Co. v. Wortman, 486 U.S. 717, 727-28 (1988) (upholding a classification of statutes of limitations as procedural because that is how they were understood at the framing of the Full Faith and Credit Clause).

90 *Ragan*, 337 U.S. at 533-34.

91 *Walker*, 446 U.S. at 750-51.

92 *Id.* at 751.

93 *Id.* at 752 (emphasis added).

94 *See* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 701-02 (1988) (explaining the "sleight of hand" performed by the Court in distinguishing the "plain meaning" of Rule 3 as applied in federal question cases as opposed to diversity cases).

95 481 U.S. 35, 36-38 (1987).

96 *Id.* at 39.

found Rule 3's "plain meaning" in federal question cases to be exactly the opposite of what it meant in diversity cases.[97]

Trying to understand *West* and *Walker* as derived only from Rule 3's "plain meaning" takes creativity.[98] Something other than straightforward "plain meaning" analysis is going on—something that allows the Court a great deal of discretion in reaching its conclusion regarding a Rule's scope.[99] Indeed, the *Walker* Court's concern over whether Rule 3 preempted a state statute of limitations looks like a Court deploying preemption's "important state interest" escape valve.[100]

As later cases have shown, the *Walker* Court's narrow construction of a Federal Rule is not uncommon. More recently, in *Semtek International Inc. v. Lockheed Martin Corp.*,[101] the Court quite obviously avoided applying a Rule in a way that could violate the Enabling Act's restrictions on altering substantive rights.[102] Specifically, the issue was whether preclusion attached to a claim that was dismissed under Rule 41(b)—such that preclusion would be binding on state courts. The Court held that Rule 41(b)'s straightforward statement that a dismissal "operates as an adjudication upon the merits" did not mean that preclusion necessarily attached.[103] The Court stated: "[I]t would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself."[104] As such, the Court read Rule 41(b) as only barring the refiling of the same claim in the same district court that produced the original dismissal.[105]

Semtek is not without criticism.[106] But it does demonstrate how the Court grapples with the underlying goals of the Federal Rules vis-à-vis state laws. Simply put, there was no clash of policies in *Semtek* because the Federal Rules were meant to govern conduct in federal courts, not create preclusion rules for

97 Burbank, *supra* note 94, at 701-02.

98 *See* Burbank & Wolff, *supra* note 45, at 36-37 (exploring the potential inconsistences between the two cases).

99 *See* CHEMERINSKY, *supra* note 73, § 5.2.3 (discussing how the Court can mold the scope of an express preemption provision by Congress through its interpretation).

100 *See* Burbank & Wolff, *supra* note 45, at 39 (highlighting *Walker* as an example of the Court trying to avoid conflict preemption).

101 531 U.S. 497 (2001).

102 *See* Burbank and Wolff, *supra* note 45, at 40 ("Rather than directly confronting those problems and, in the process, revisiting *Sibbach*'s impoverished account of 'substantive rights,' the Court engaged in a process that can only charitably be described as interpretation and only in Wonderland as an exercise in 'plain meaning' interpretation.").

103 *Semtek*, 531 U.S. at 503.

104 *Id.*

105 *Id.* at 506.

106 *See, e.g.*, *supra* note 102.

all courts.[107] The Court could have found that Rule 41(b) by itself had binding effect on state rules of decision. But this would have gone well beyond the Rules' purpose to act as a uniform system of procedure for federal courts. With nothing to suggest a clash between state and federal policies, such a broad reading of Rule 41(b) would have been inappropriate.

In addition to cases like *Semtek* and *Walker*, the Court has repeatedly reaffirmed the pre-*Hanna* cases limiting the scope of various Federal Rules, and then has utilized them to support conclusions that given Rules do not preempt state law.[108] This practice of reading federal provisions narrowly to avoid preemption in situations that would raise questions about those provisions' underlying validity is neither new nor unique. It mimics the approach taken with federal legislation that raises constitutional concerns.[109] The key point here is that the Court often narrowly construes the Federal Rules to avoid preempting state provisions that appear to protect substantive rights.

2. Don't Tread on Federal Interests: The *Burlington Northern* Preemption Pattern

Much of the confusion surrounding the Court's interpretation and application of the Federal Rules stems from the Court's zigzag between strong, broad application of some Rules, and weak, narrow application of others—as occurred in *Walker*.[110] Justice Scalia's application of Rule 23 in *Shady Grove* is emblematic of the strong, broad approach, preempting any state provision that "attempts to answer the same question" of whether a class action can be maintained.[111] In other words, because New York's class action law added a restriction on top of Rule 23's requirements, it directly conflicted with Rule 23 and thus was preempted.[112] Yet, we cannot derive a "do not add requirements on top of the Federal Rules" standard from *Shady Grove* because other cases have held exactly the opposite—that state laws can impose additional

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107 *See Semtek*, 531 U.S. at 503-05 (discussing numerous problems with giving Rule 41(b) a broader reading).

108 *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428 (1996) (citing Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949), in support of a conclusion that New York's damages standards should apply); *see also* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 213-14 (1983) (finding no preemption between federal regulations and state laws—even though they involved the same subject matter—because each law served different purposes).

109 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (declining to read a statute in a way that would raise constitutional concerns about the federal government's ability to regulate state-government actions via the Commerce Clause).

110 *See supra* notes 91–93.

111 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 399 (2010).

112 *Id.* at 399-400.

requirements not included in the Federal Rules.[113] While no one can be sure of how the Court will view the breadth of given Federal Rules, it is still possible to detect a key pattern from the Court's more recent cases. Specifically, if other federal policies support a broader reading of the Federal Rules, then something akin to field preemption can occur.

Burlington Northern Railroad Co. v. Woods[114] exemplifies a situation where field preemption explains the Court's result.[115] Specifically, the Court found a clash between a Federal Rule and a state statute, even though the two did not directly conflict. Federal Rule of Appellate Procedure 38 allowed an award of damages and costs if the court of appeals determined—at its discretion—that the appeal was frivolous.[116] Meanwhile, an Alabama statute required the court to impose a penalty if the lower court's decision was affirmed without substantial modification.[117] However, Alabama also had a separate rule governing costs for frivolous appeals that was equivalent to Federal Appellate Rule 38.[118] Hence, the statute imposing costs for straight affirmances was not seeking to punish frivolous appeals. Despite the fact that Federal Appellate Rule 38 and the Alabama statute targeted two different scenarios, the Court still found a direct conflict.[119]

Conventionally, *Burlington Northern*'s result is difficult to explain, especially given *Walker*'s apparent desire to avoid needless conflicts. Yet, looking at *Burlington Northern* as engaging in something akin to field preemption allows for reconciliation.[120] Notably, the Court highlighted how the "cardinal purpose" of the Enabling Act was to authorize "the development of a *uniform and consistent system* of rules governing federal practice and procedure."[121] The Court expressed two concerns with giving a narrow reading to the Federal Rule in favor of the state statute. First, it emphasized that the Federal Rule was discretionary, but the state statute was mandatory.[122] Second,

113 *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949) (holding that a plaintiff could be required to post a bond for derivative stockholder suits per New Jersey law, even though the Federal Rules did not require such bond).

114 480 U.S. 1 (1987).

115 Burbank and Wolff, *supra* note 45, at 39.

116 *Burlington Northern*, 480 U.S. at 3-4.

117 *Id.* (citing ALA. CODE § 12-22-72 (1975)).

118 *See* ALA. R. APP. P. 38 (giving the court discretion to award damages and impose additional costs for frivolous appeals).

119 *Burlington Northern*, 480 U.S. at 7; *see also* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 100 (1992) (finding field preemption even though the state provisions did not necessarily conflict with federal regulations).

120 *See* Burbank & Wolff, *supra* note 45, at 38-39 ("[W]hereas the *Walker* Court was preoccupied by conflict preemption, the *Burlington Northern* Court was, tentatively and alternatively, suggesting the possibility of field preemption.").

121 *Burlington Northern*, 480 U.S. at 5 (emphasis added).

122 *Id.* at 7.

"the purposes underlying the Rule" were coextensive with those of the state statute.[123] That is, they both occupied the same field of regulations governing financial incentives regarding appeals.[124] In an apparent effort to bolster its argument, the Court then cited a number of federal rules and statutes governing costs and penalties relating to appeals.[125]

But finding a "direct conflict" in a conflict-preemption sense is impossible in *Burlington Northern*: the two provisions did not conflict and both could coexist. Nonetheless, the Court found a conflict. Thinking in terms of field preemption makes the Court's decision sensible.[126] If the purposes underlying the various federal provisions conflicted with Alabama's statute, then preemption was appropriate.[127]

The *Burlington Northern* pattern of finding preemption was repeated in *Stewart Organization, Inc. v. Ricoh Corp*.[128] This time, the case involved a contract with a forum-selection provision.[129] Alabama law disfavored forum-selection clauses, and the district court concluded that the otherwise discretionary federal transfer provisions gave way to Alabama's substantive contract law.[130] The Supreme Court disagreed. The Court first asked whether 28 U.S.C. § 1404(a) controlled the request for a transfer per the contract.[131]

After determining that the very purpose of the federal provision was to give judges discretion in ruling on transfer motions, the Court concluded that the two provisions occupied the same "field of operation."[132] Specifically, the Court stated, "Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern . . . would defeat that command."[133] Alabama's mandatory provision made it impossible to "exist side by side" with the discretionary federal provision; thus, federal law preempted.[134]

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123 *Id.*

124 *Id.*

125 *Id.* n.5; Burbank & Wolff, *supra* note 45, at 38.

126 However, the Court's opinion would have been more convincing if it had cited every federal provision dealing with financial incentives regarding appeals, rather than just a handful. Burbank & Wolff, *supra* note 45, at 39.

127 *Id.* at 39.

128 487 U.S. 22, 30 (1988).

129 *Id.* at 24.

130 *Id.*

131 *Id.* at 29.

132 *Id.* at 29-30 (quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7 (1987)).

133 *Id.* at 31.

134 *Id.* (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980)).

As with *Burlington Northern*, *Stewart*'s reasoning leaves much to be desired. It created a conflict where none was apparent.[135] And, because there was no direct conflict, the Court appeared to engage in field preemption, but without reference to other federal provisions indicating that federal law occupied a field.[136] Had the Court recognized the existence of a federal regulatory scheme, granting federal judges unhindered discretion in enforcing contractual agreements despite state law holding the contract's choice invalid, the result in *Stewart* would be more sensible.[137] Instead, the Court leaves only hints that it is engaging in field preemption.[138]

In short, the Court seems to rely on reasoning akin to field preemption where it believes federal policy interests favor a broader reading for certain Federal Rules.[139] Hence, if other bodies of federal law exist and seem to have purposes at odds with state rules, then there is the possibility the Court will find a conflict through field preemption logic. But absent overarching federal interests, the Court has fewer means to give a Federal Rule a broader scope.

IV. PREEMPTION OF ANTI-SLAPP STATUTES BY THE FEDERAL RULES IS UNNECESSARY

Nothing in Rules 12(b)(6) or 56 requires preemption of anti-SLAPP statutes. In short, the policies underlying each do not conflict. While the Rules simply establish transsubstantive methods for testing the viability of cases in general, anti-SLAPP statutes create a special means of handling unique problems associated with specific state-law claims. Although the two share commonalities, they do not conflict. And anti-SLAPP statutes thwart no apparent important federal policy. Thus, there is neither a direct conflict nor an intrusion into a field occupied by federal interests.

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135 *See id.* at 35-36 (Scalia, J., dissenting) (discussing how Congress often expects state contract law to govern issues of contract validity and in the absence of an express preemption provision—as occurred in the Federal Arbitration Act—it is inappropriate to find a conflict with traditional state contract law).

136 Rather, the Court focused on Congress's intent to give district judges discretion in handling transfers under § 1404(a). *Id.* at 29-30.

137 *Cf., e.g.*, Arizona v. United States, 567 U.S. 387, 405-09 (2012) (finding that a component of Arizona's immigration law—S.B. 1070—interfered with the "federal statutory structure [that] instructs *when it is appropriate* to arrest an alien during the removal process" (emphasis added)); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638-40 (1973) (finding field preemption where local laws would interfere with the ability of federal regulators to make decisions based on given circumstances).

138 *See, e.g.*, *Stewart Org., Inc.*, 487 U.S. at 30 ("Our cases make clear that, as between these two choices in a single 'field of operation,' the instructions of Congress are supreme." (citation omitted)).

139 *See* Stephen B. Burbank, *Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 517, 537 (1995) ("With the source of the applicable law turning on what may seem to be the fortuity of federal lawmaking arrangements, it is an understandable temptation to hear federal statutes or Federal Rules speaking when they appear to be silent, or at least to hear enough noise nearby to silence state law.").

Anti-SLAPP statutes are embedded in substantive concerns about whether adequate protection exists for defendants in suits involving speech or petitioning activities.[140] Because these statutes protect potential defendants from abusive litigation, simply writing them off as "state procedure" and refusing to engage in conflict analysis is inappropriate.[141] Like statutes of limitations, the "policy aspects" of anti-SLAPP statutes must be analyzed for conflicts with the policies underlying the Federal Rules within the context of the litigation.[142]

This Part proceeds by first examining why Rules 12(b)(6) and 56 do not necessarily conflict with anti-SLAPP statutes. It then analyzes why field preemption, similar to that in *Burlington Northern*, would be inappropriate. Ultimately, these conclusions rest on an examination of whether state and federal interests conflict, so as to require preemption.[143]

A. *There Is No Direct Conflict Between the Federal Rules and Anti-SLAPP Statutes*

Asserting that anti-SLAPP statutes cannot coexist with Rules 12(b)(6) and 56 ignores the fact that the policies underlying both do not conflict. As *Semtek* and *Walker* demonstrate, courts must consider the policies behind the provisions to determine if a direct conflict exists.[144] Rules 12(b)(6) and 56 are procedures for dismissing weak claims. They are meant to work transsubstantively across various causes of action.[145] Their purpose is to determine as a matter of law whether a party has asserted claims with sufficient basis to proceed forward.[146] In contrast, anti-SLAPP statutes

140 *See supra* note 18 and accompanying text.

141 *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949) (explaining that many rules that lawyers classify as "procedural" actually have important implications beyond procedure and, hence, must be considered "substantive" in the context of Enabling Act questions). *But see* Makaeff v. Trump Univ., LLC, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring) (classifying anti-SLAPP motions as mere "procedural mechanism[s] for vindicating existing rights").

142 *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751-52 (1980) (noting that a rule requiring actual service on a defendant promotes the policies served by a statute of limitations); *see also supra* notes 88–92.

143 *See id.* at 751-52 (determining that no conflict occurred based on the policies underlying the federal and state provisions).

144 *See supra* subsection III.B.1.

145 *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1108 (1982) (discussing how the original understanding of the Enabling Act was that "procedure" meant establishing rules of court). As rules of court, the Federal Rules cannot create "substantive legal and remedial rights affected by the considerations of public policy." *Id.* at 1121 n.750 (quoting S. REP. NO. 1190, at 9 (1926)).

146 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 2713 (4th ed. 2016) [hereinafter WRIGHT & MILLER]; *see also* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 833 n.47 (2010) (discussing how the "standards of decision . . . for issues of pure law are identical" for both

establish protections for defendants in specific causes of action. In short, conflict preemption does not exist because complying with anti-SLAPP statutes does not abrogate the operation of Rules 12(b)(6) and 56.

Together, Rule 12(b)(6) and 56 motions make the pretrial litigation process more efficient through "speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact."[147] A Rule 12(b)(6) motion asks the court to determine whether the complaint sufficiently states a claim on which relief can be granted.[148] The motion is judged according to the plausibility standard: "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[149] Meanwhile, Rule 56 instructs the court to grant summary judgment to the moving party if there is no genuine issue of material fact left for a jury to decide and the movant is otherwise entitled to judgment as a matter of law.[150] The motion will come after "a full opportunity to conduct discovery" on the issue.[151]

By contrast, anti-SLAPP motions are not meant to make the litigation process more efficient. Instead, their purpose is to curtail harmful litigation.[152] Many states have found, as stated by the California legislature, "it is in the public interest to encourage continued [speech and petitioning activities on] matters of public significance."[153] Defending against a SLAPP suit can be costly—the mere threat is often enough to silence a potential whistleblower or advocate on a public issue.[154] Even though the suit is likely meritless, a deep-pocketed plaintiff can utilize the costs and delays associated with getting

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motions and serve gatekeeping functions); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 487-88 (2008) (explaining the "weeding out" function of both motions and criticizing their potentially insurmountable evidentiary requirements for certain plaintiffs).

147 FED. R. CIV. P. 56 advisory committee's notes to the 1946 amendment; *see also* FED. R. CIV. P. 12 advisory committee's notes to the 1946 amendment (stating that the dismissal occurs when "there is no genuine issue as to any material question of fact and [the moving party] is entitled to judgment as a matter of law").

148 WRIGHT & MILLER, *supra* note 146.

149 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

150 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

151 *Id.* at 257.

152 *See* Fustolo v. Hollander, 920 N.E.2d 837, 840 (Mass. 2010) (explaining that the purpose behind anti-SLAPP statutes is "to provide a quick remedy for those citizens targeted by frivolous lawsuits based on their government petitioning activities" (internal quotation marks omitted) (quoting Kobrin v. Gastfriend, 821 N.E.2d 60, 63 (Mass. 2005))).

153 CAL. CIV. PROC. CODE § 425.16(a) (West 2015); *see also* Duracraft Corp. v. Holmes Prods. Corp., 691 N.E.2d 935, 940 (Mass. 1998) (describing that the purpose behind Massachusetts's anti-SLAPP statute, MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2017), was to protect those who choose to speak and petition publicly from being hit with meritless suits meant to waste time and expense); Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1014 (N.H. 1994) (listing states that have adopted anti-SLAPP statutes to protect the exercise of speech and petitioning rights).

154 *See, e.g.*, 2 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 19:27 (2017) (discussing how SLAPP suits can be tools to "exhaust" speakers "into silence").

a case dismissed through the general process to dissuade negative speech.[155] By singling out slander, libel, or other speech-related claims being used to silence speakers into submission, anti-SLAPP motions protect civic participation.[156]

As it turns out, states may have good reason to be concerned about whether the usual dismissal process sufficiently protects defendants from abusive speech-related suits. Despite the Supreme Court's recent decisions making it easier for defendants to dismiss weak claims under Rule 12(b)(6),[157] it is still possible for plaintiffs to sufficiently allege defamation.[158] In refusing to give the District of Columbia's anti-SLAPP statute effect in federal court, the D.C. Circuit stated that a claim "may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable."[159] If the claim survives the Rule 12(b)(6) motion to dismiss, the defendant then faces the prospect of burdensome and costly discovery.[160] Hence, the usual procedures may not be enough to protect defendants from abusive suits.

Requiring a plaintiff to show a likelihood of success on the merits to sustain a claim allows states to give what they perceive as adequate protection in specific state-law causes of action implicating speech.[161] A major mistake of the D.C. Circuit is its refusal to recognize the important distinctions between anti-SLAPP motions and motions for dismissal or summary

155 *New York Times Co. v. Sullivan*, for example, required a plaintiff to prove "actual malice"—that the defendant knowingly, or with reckless disregard for the truth, spread false information against a "public official." 376 U.S. 254, 280-83 (1964); *see also* Biro v. Condé Nast, 807 F.3d 541, 544-46 (2d Cir. 2015) (discussing the requirements of alleging actual malice under the current understanding of Rule 12(b)(6)).

156 *See* CAL. CIV. PROC. CODE § 425.16(a) (West 2015) (emphasizing that public civic "participation should not be chilled through abuse of the judicial process").

157 *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that to survive a motion to dismiss, a complaint must state a claim to relief that has facial plausibility, and to be plausible on its face the complaint must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.").

158 Actually proving these claims and prevailing at trial is a nearly impossible burden for a plaintiff to meet. *See supra* note 155; *see also* Snyder v. Phelps, 562 U.S. 443, 456-58 (2011) (affirming the special protection afforded to speech that involves a "public concern"). But even the more exacting pleading requirements under *Twombly* and *Iqbal* may not be enough to protect defendants. Courts have continued to find that defamation claims can survive Rule 12(b)(6) motions. *See, e.g.*, Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1055-57 (N.D. Ill. 2013) (determining that *Shady Grove* precluded applying an anti-SLAPP statute and then holding that the plaintiff sufficiently alleged actual malice); Heyward v. Credit Union Times, 913 F. Supp. 2d 1165, 1190 (D.N.M. 2012) (finding that the plaintiff, a CEO of a credit union, had sufficiently pleaded defamation claims against a newspaper).

159 Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 556).

160 And here, Rule 56 would be of little help in minimizing the harm because courts are less likely to entertain summary judgment motions until substantial discovery has occurred. *See supra* note 151 and accompanying text.

161 *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549-54 (1949) (emphasizing the importance of state policy seeking to protect defendants from abusive strike suits).

judgment[162]—thus ignoring the speech-protecting policies at the heart of anti-SLAPP statutes.[163] Anti-SLAPP motions are not substitutes for dismissal for failure to state a claim or summary judgment motions.[164] Instead, anti-SLAPP provisions create special motions unique to cases involving speech or petitioning activity. They require the court to decide whether the plaintiff is likely to succeed on the merits. Thus, in contrast to Rule 12(b)(6) and 56 motions, anti-SLAPP motions do not require the court to analyze whether claims are sufficiently pleaded or enjoy enough support to leave open genuine issues of material fact.[165] In effect, anti-SLAPP statutes are policy decisions by states to balance the importance of a robust exercise of constitutional rights, while still providing a channel for legitimate defamation claims.[166] While anti-SLAPP motions do get claims dismissed, their probability of success standard and their application to specific state-law

162 *See, e.g.*, *Abbas*, 783 F.3d at 1333-34 (determining that anti-SLAPP statutes only regulate "procedure" and finding that they "answer the same question" as Rules 12(b)(6) and 56); *accord* Makaeff v. Trump Univ., LLC, 715 F.3d 254, 273 (2013) (Kozinski, C.J., concurring) (characterizing anti-SLAPP statutes as "procedural" and refusing to analyze their purpose).

163 *See supra* note 153 and accompanying text.

164 Indeed, the states that have adopted anti-SLAPP statutes still retained their own equivalents to Rules 12(b)(6) and 56. *Compare* MD. R. CIV. P. 2-322(b) (West 2004) (regarding motions for failure to state a claim), *and* MD. R. CIV. P. 2-501 (West 2015) (regarding motions for summary judgment), *with* MD. CODE ANN. CTS. & JUD. PROC. § 5-807(d) (West 2010) (providing a motion to dismiss or stay proceedings in cases involving SLAPP claims).

165 *See supra* notes 14–15 and accompanying text.

166 *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (footnote omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); Chaplinsky v. New Hampshire, 315 U.S. 568, 572-74 (1942) (stating that "narrowly drawn and limited" statutes regulating "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are constitutional).

Here, any federal constitutional concerns weigh in favor of applying anti-SLAPP statutes. Doing so helps protect robust free speech. The Court's decision in *Gasperini v. Center for Humanities, Inc.*, provides a juxtaposition, where constitutional concerns clashed with applying state law in federal court. 518 U.S. 415 (1996). There, the Court faced the question of whether applying the New York state standard for determining excessive jury awards would violate the Seventh Amendment's Reexamination Clause. *Id.* at 434. The Court had held that New York's standard must apply over the federal standard because it was substantive. *Id.* at 429-31. But, it would be a potential violation of the Seventh Amendment to follow New York's appellate review method of deciding if the trial judge erred in determining whether or not the award was excessive. *Id.* at 438-39. Thus, because of the clash between constitutional concerns and protecting state substantive rights, the Court essentially split the difference by saying that the district court would follow the New York standard for excessive jury awards, but the court of appeals would follow the federal standard for reviewing the district judge's decision. *Id.* Anti-SLAPP provisions, however, raise no such conflict because the state law does not thwart First Amendment protections.

causes of action distinguish them from dispositive motions based in the Federal Rules (and other generic motions in state litigation).[167]

Finally, there is no direct conflict between anti-SLAPP provisions and the Federal Rules because it is possible to comply with both.[168] Specifically, a defendant to an anti-SLAPP claim can choose between challenging the complaint with either a Rule 12(b)(6) motion or an anti-SLAPP motion. If, hypothetically, the defendant files a Rule 12(b)(6) motion and is denied, he may still file an anti-SLAPP motion. Meanwhile, Rule 56 summary judgment motions share very little in the way of proximity to anti-SLAPP motions. Anti-SLAPP motions would likely be filed at the early stages of a lawsuit—indeed their purpose is to dismiss a meritless claim quickly to spare the defendant needless expense.[169] By contrast, Rule 56 motions are filed much later, after the parties have had a chance to engage in substantial discovery.[170] Thus, no direct conflict exists between the Federal Rules and anti-SLAPP statutes.

Trying to claim that anti-SLAPP statutes "answer the same question"[171] as Rules 12(b)(6) and 56 motions simply because they are dispositive motions misses the mark. Anti-SLAPP statutes serve the distinct purpose of protecting defendants in the context of specific state-law causes of action. They also do not impede the operation of Rules 12(b)(6) and 56. Reading Rules 12(b)(6) and 56 to avoid a conflict with anti-SLAPP provisions not only makes sense in the abstract; it is also consistent with *Semtek* and *Walker*. In both cases, the Court felt it necessary to read the Federal Rules in a way that avoided a direct conflict with important state interests.[172] In the anti-SLAPP context, states have an obvious interest in keeping their tort causes of action from being misused in a way that implicates individual rights. Thus, finding that the Federal Rules displace anti-SLAPP statutes on the basis of a direct conflict would not be in keeping with the Court's approach to direct conflicts in *Semtek* and *Walker*. Because they are constructed differently and serve two entirely distinct purposes that do not interfere with each other, anti-SLAPP statutes do not fall within the same scope as Rules 12(b)(6) and 56.

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167 *See supra* note 164.

168 *See* Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1181 (9th Cir. 2013) (Wardlaw & Callahan, JJ., concurring in the denial of rehearing en banc) (finding no "direct collision" between anti-SLAPP motions and determining that Rules 12(b)(6) and 56 "can exist side by side . . . each controlling its own intended sphere of coverage without conflict" (ellipsis in original) (quoting United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999))); *see also* Burbank & Wolff, *supra* note 45, at 46-47 (explaining that proper application of a Federal Rule does not necessarily depend on "the putative policies underlying state law," but more so on how the state law "interacts with and is implemented by the litigation process").

169 *See supra* notes 153-58 and accompanying text.

170 *See supra* notes 153-58.

171 Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1336 (D.C. Cir. 2015).

172 *See supra* subsection III.B.1.

B. *Anti-SLAPP Statutes Do Not Encroach on a Field of Important Federal Interests*

Having ruled out finding a direct conflict, the other basis for trumping anti-SLAPP statutes would be through the field preemption approach exhibited in *Burlington Northern*. Indeed, Judge Kozinski argued that the Federal Rules create "an integrated program of pre-trial, trial and post-trial procedures" and that allowing states to interpose anything upsets the system.[173] But this argument has three flaws. First, it directly conflicts with Supreme Court precedent that has recognized circumstances where state provisions can be enforced in federal court.[174] Second, it ignores the reality that federal courts themselves often add to the Rules by implementing local rules.[175] And third, it fails to consider whether Congress intended the Rules to be so broad as to "occupy the field" in ways that would raise significant federalism concerns. The remainder of this Section shows why field preemption is not a compelling conclusion.

The overarching goal of the Enabling Act is to allow for the creation of uniform rules to govern procedure in federal court. The Federal Rules are "only superficially uniform and trans-substantive."[176] The "uniformity" that the Enabling Act sought to provide is a common means for handling civil cases in federal court.[177] Thus, the Enabling Act's requirements "must be measured in pragmatic terms, neither fatally undermined by an approach that focuses on policies underlying state law on the same issue, nor cemented by jingoistic dogma heedless of the evolving realities of court rulemaking and litigation practice."[178] Further, the prevalence of local rules and individual judges' protocols shows how the Federal Rules are meant to have a flexible application.[179] And no matter how detailed written language is, there will always be ambiguities and gaps.[180] Hence, courts regularly interpret the

173 Makaeff v. Trump Univ., LLC, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring).

174 *See supra* note 113.

175 *See infra* note 179.

176 Burbank, *supra* note 94, at 716.

177 Burbank, *supra* note 145, at 1095-98.

178 Burbank & Wolff, *supra* note 45, at 48.

179 *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1696-98 (2004) (discussing the prevalence of local rules and efforts by Congress to deal with them); Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1226-27 (2011) (noting the concern that local rules "threaten the national uniformity of federal procedure," but stating that "the myriad local rules dealing with topics from the trivial to the vital suggest that the federal court system already tolerates a considerable amount of interstate and even intrastate variation").

180 Senate committee reports show that members of the Congress that drafted the Enabling Act were operating under "the notion that the rulemaking power does not extend to 'matters involving substantive legal and remedial rights affected by the considerations of public policy.'" Burbank, *supra* note 145, at 1121 (quoting S. REP. NO. 1174, at 9 (1926)). *But see* Chamber of Commerce of the U.S. v.

Federal Rules—just as they would when determining whether preemption occurs in any other context.

When examining whether federal interests occupy a field, a good place to start is by asking if the federal government has traditionally played a unique role in this area.[181] The history behind federal court rules cuts both ways. From 1792 to 1938, Congress instructed the federal courts to follow the rules of the state in which the court sat for actions at law.[182] However, for suits in equity, Congress recognized the Supreme Court's authority to promulgate rules governing federal equity courts.[183] These Equity Rules became the model for the Federal Rules.[184]

Even conceding that Congress has historically been active in directing the creation of court rules does not by itself indicate field preemption. This is because Congress has expressly limited the scope of the Federal Rules to avoid conflict with substantive law through the Enabling Act.[185] The text of the Enabling Act speaks for itself: the Federal Rules "shall not abridge, enlarge or modify any substantive right."[186] This express reservation shows that Congress did not intend to create a comprehensive scheme so pervasive in nature that any law touching on the same subject matter would be automatically preempted.[187]

Whiting, 563 U.S. 582, 599 (2011) ("[A]s we have said before, Congress's 'authoritative statement is the statutory text, not the legislative history.'" (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005)).

181 CHEMERINSKY, *supra* note 73, § 5.2.3.

182 Burbank, *supra* note 145, at 1028, 1037.

183 JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 9 (2d ed. 1918).

184 Indeed, many of the individual Federal Rules derive their substance from the Equity Rules. *See* Burbank, *supra* note 145, at 1166-68. It is even possible to trace Rule 12(b)(6) back to the earliest version of the Equity Rules, promulgated in 1822. *See* HOPKINS, *supra* note 183, at 39-40 (showing the text of Equity Rule XVIII governing the filing of a demurrer).

185 *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field . . . .").

186 28 U.S.C. § 2072(b) (2012).

187 *See* Chamber of Commerce of the U.S. v. Whiting, 563 U.S. 582, 598-99 (2011) (refusing to narrowly read a broadly worded savings clause that provided space for state law to operate); *see also* Semtek Int'l. Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503-05 (2001) (shying away from interpreting the Federal Rules to control the extent to which state courts must respect the dismissal of an action by a federal court because of the potential Enabling Act violation). There is also precedent for courts withholding the application of Federal Rules when they would interfere with substantive state laws. *See, e.g.*, Marshall v. Mulrenin, 508 F.2d 39, 41 (1st Cir. 1974) (holding that the plaintiff had an "absolute right under Massachusetts law" to bring the defendants into the lawsuit in spite of Federal Rule 15(c)); *see also* Struve, *supra* note 179, at 1198-99 (noting the reasoning of the *Marshall* court and stating that "a [federal] rule is not to be applied to the extent if any, that it would defeat rights arising from state substantive law" (alteration in original) (internal quotation marks omitted) (quoting *Marshall*, 508 F.2d at 44)).

The operation of anti-SLAPP provisions does not interfere with a comprehensive regulatory scheme.[188] Judge Kozinski would have kept anti-SLAPP motions out of federal court because he views the Federal Rules as an integrated code, precluding all supplementation and expansion.[189] But once again, the limits placed by the Enabling Act are instructive. The Enabling Act calls for federal courts to recognize and respect state regulatory arrangements that govern "economic *and social* activity."[190] Few things could have greater societal implications than the ability to chill free expression through costly litigation. With an absence of congressional intent to have the Federal Rules be a closed universe of all possible motions, courts should not be so quick to preempt the entire field of motions practice—particularly in circumstances where doing so might mean nullifying substantive rights.[191]

If the federal government has enacted other laws and regulations touching on the same subject matter at issue, this weighs in favor of finding field preemption.[192] Following the approach of *Burlington Northern*, if the federal government has expressed a desire to regulate free speech and petitioning activity, it would be more reasonable to read the Federal Rules as precluding anti-SLAPP motions.[193] But, no overarching federal policy appears averse to states protecting free speech and petitioning by adding procedural protections that do not conflict with the Federal Rules.[194] The anti-SLAPP statutes reflect the desires of states to protect the robust exercise of constitutional rights in

188 *See supra* note 78 and accompanying text.

189 Makaeff v. Trump Univ., LLC, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring).

190 Burbank & Wolff, *supra* note 45, at 19 (emphasis added).

191 *See* Goldstein v. California, 412 U.S. 546, 568-69, 571 (1973) (refusing to find field preemption when Congress did not express a desire for exclusive federal control).

192 Field preemption would be evident from the "depth and breadth" of legislation that Congress has enacted regarding an area of law. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).

193 *Cf.* Burbank & Wolff, *supra* note 45, at 39 (discussing how the *Burlington Northern*–type of field preemption can occur if other federal policies suggest that a broader reading should be given to a certain Federal Rule).

194 Indeed, the Court's *Cohen* decision shows that the Federal Rules should not be read in a way that would prohibit states from deterring nuisance-value suits. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949) (examining a New Jersey statute which went beyond regulating procedure by creating a new substantive liability). Further, because states have a duty to abide by the dictates of the First Amendment, through the Fourteenth Amendment, there is strong reason for them to provide mechanisms that protect their citizens' speech rights. *See* Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."); Gitlow v. New York, 268 U.S. 652, 666 (1925) (noting that freedom of speech and of the press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

ways that they see fit. And the Court itself has long recognized that federal procedural rules should not inhibit states from protecting such rights.[195]

In short, the purpose of anti-SLAPP statutes is to shield substantive speech rights by defining and limiting the application of state-law causes of action. They are not meant to undermine the application of Rules 12(b)(6) and 56. Therefore, those Rules need not be read to preempt anti-SLAPP protections.[196]

Finally, precluding the operation of anti-SLAPP provisions in federal court would raise serious federalism concerns. Preemption of anti-SLAPP statutes would implicate traditional state interests.[197] This consideration weighs heavily against preemption. Defining the contours and permissibility of defamation causes of action, like any other tort action, is the traditional domain of state law. Special procedures unique to these types of suits will inevitably be "so bound up with the state-created right or remedy that [they] define[] the scope of that substantive right or remedy."[198] States can construct their law to allow for quick recognition of the rights protected in cases like *New York Times v. Sullivan*, which requires proving actual malice when a "public official" sues for libel damages—an especially difficult task for a plaintiff.[199] Thus, states should be able to define what constitutes a viable libel "claim" under their law and likewise prescribe appropriate mechanisms for deterring nuisance-value suits designed to chill free speech rather than obtain a judgment.[200]

Ultimately, our federal system was designed to divide power between the federal government and the state governments.[201] Whenever congressional action appears to intrude upon the traditional state prerogatives, "it is incumbent upon the federal courts to be certain of Congress' intent before

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195 *See, e.g.*, *Ex Parte* Fisk, 113 U.S. 713, 722-23 (1885) (looking to federal policy and constitutional norms to determine whether state law affecting procedure was preempted).

196 *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 213-14, 221 (1983) (finding that a California regulatory scheme was not preempted by federal law because both schemes had different purposes).

197 *See supra* note 77 and accompanying text.

198 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 420 (2010) (Stevens, J., concurring).

199 376 U.S. 254, 283 (1964).

200 *See Shady Grove*, 559 U.S. at 418 (Stevens, J., concurring) ("The Enabling Act's limitation does not mean that federal rules cannot displace state policy judgments; it means only that federal rules *cannot displace a State's definition of its own rights or remedies*." (emphasis added)).

201 *See* Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

finding that federal law overrides."[202] Making state speech-protecting provisions relating to tort claims inoperable in federal diversity suits would bring the Rules Enabling Act into perilous conflict with important, traditional state interests. Just as with any other federal statute, courts should presume that Congress has not intended to interfere with the historic powers of the states absent some plain statement.[203] Nothing on the face of the Enabling Act suggests the intent to intrude upon how states handle matters relating to the speech and petitioning activity of their citizenry.[204] Thus, considering that Rules 12(b)(6) and 56 need not be read to preempt anti-SLAPP provisions, courts should read them not to conflict, and hence avoid raising troubling Enabling Act and federalism questions.

As the First and Ninth Circuits have held, Rules 12(b)(6) and 56 can be read harmoniously with anti-SLAPP statutes because all three of them answer different questions.[205] Nothing in the Enabling Act forbids states from cabining their causes of action. To the contrary, the Federal Rules are not meant to regulate state-law claims.[206] For to do so would be a regulation of substantive rights—a violation of the Enabling Act's very text. Thus, the First and Ninth Circuits were correct to avoid reading the Federal Rules in a way that would generate a conflict with anti-SLAPP provisions.

V. CONCLUSION

The irony of ironies is that in the name of "*Erie* analysis," the D.C. Circuit sets the federal court up as being far more favorable to certain parties than the state court sitting across the street.[207] Denying the application of anti-SLAPP statutes

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202 *Gregory*, 501 U.S. at 459.

203 *Id.* at 461 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). For a broader discussion of applying federalism canons to Enabling Act questions involving historic state-police powers, see generally Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187 (2013).

204 Indeed, if anything, the Enabling Act's instruction that Federal Rules "shall not abridge, enlarge or modify any substantive right" should serve as a signal that Congress did not intend to intrude on the traditional domain of state-tort law. 28 U.S.C. § 2072(b) (2012); *see supra* note 187 and accompanying text.

205 *See* Makaeff v. Trump Univ., 736 F.3d 1180, 1182 (9th Cir. 2013) (Wardlaw & Callahan, JJ., concurring in the denial of rehearing en banc) (stating "Rules 12 and 56 . . . provide various theories upon which a suit may disposed of before trial. California's anti-SLAPP statute, by creating a separate and additional theory upon which certain kinds of suits may be disposed of before trial, supplements rather than conflicts with the Federal Rules"); Godin v. Schencks, 629 F.3d 79, 86 (1st Cir. 2010) (noting neither Rule 12(b)(6) nor 56 "was meant to control the particular issues under [the anti-SLAPP statute] before the district court").

206 *See* Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting) (highlighting that any Rule which effectively alters or introduces public policy must be supported by "explicit legislation").

207 *See* Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (explaining that a case's outcome should not be affected by whether it was filed in federal court or state court).

in federal court would effectively nullify their protection. But as preemption analysis has shown, the purposes behind anti-SLAPP statutes do not conflict with those of Federal Rules 12(b)(6) and 56. Hence, because the two can coexist, there is no need to preclude anti-SLAPP motions in federal court.

Justice Stevens and the *Shady Grove* dissenters noted the need to balance concerns about the Federal Rules with those of state policy. By requiring courts to consider the policies underlying the Federal Rules and state statutes that utilize procedure to advance substantive goals, preemption analysis gives courts an opportunity to discern more carefully the scope of the Rules. And as the situation with anti-SLAPP statutes shows, using straightforward preemption analysis helps courts weigh competing interests, rather than wading directly into difficult Enabling Act questions.

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