



## THE APPLICATION OF THE NEW YORK ANTI-SLAPP SCHEME IN FEDERAL COURT

*Matthew L. Schafer & Tanvi Valsangikar\**

In 2020, the New York Legislature broadly expanded the State's original 1992 anti-SLAPP scheme that had been meant to discourage strategic lawsuits against public participation (SLAPPs). Judicial reception of the 2020 amendments has been mixed. Notably, despite federal courts' uniformity in applying the 1992 law in federal court, several federal courts have now declined to apply the amended law. Their failure to do so takes on pressing importance in the face of proliferating, politically motivated defamation lawsuits and of calls to overrule *New York Times v. Sullivan* that, if successful, will leave anti-SLAPP laws as the strongest defense against retaliatory, speech-based lawsuits.

This Article argues, contrary to this recent trend, that most of New York's amended anti-SLAPP scheme applies in federal court. The law's provisions providing a cause of action for damages and modifying the elements of a SLAPP plaintiff's claims apply in federal court as they are quintessentially substantive state laws. The law's seemingly procedural provisions may well apply too, depending on how courts read *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* Throughout, this Article identifies courts' recent analytical errors and explains how they are irreconcilable with the text and structure of the anti-SLAPP scheme. While it focuses on New York's law, this Article provides a guide for any litigant or judge in federal cases implicating anti-SLAPP laws.

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\* Matthew L. Schafer is an adjunct professor at Fordham University School of Law. Tanvi Valsangikar is a media lawyer at Springer Nature.

Introduction.....	574
I. SLAPPs and New York’s Anti-SLAPP Scheme.....	576
A. The 1992 Anti-SLAPP Scheme.....	577
B. The 2020 Anti-SLAPP Scheme.....	581
II. Federal Adjudication and State Anti-SLAPP Laws.....	583
A. Erie and Its Progeny.....	584
B. Anti-SLAPP Laws in the Second Circuit.....	593
III. The New York Anti-SLAPP Scheme in Federal Court.....	598
A. Does § 70-a Apply in Federal Court? Yes.....	599
B. Does § 76-a Apply in Federal Court? Yes.....	614
C. Do Rules 3211(g) and 3212(h) Apply in Federal Court? Maybe.....	618
Conclusion.....	624

## INTRODUCTION

In 1992, New York adopted an anti-SLAPP scheme to discourage “strategic lawsuits against public participation” (SLAPPs) filed to silence critics for speaking out on matters of public concern.<sup>1</sup> Courts, while applying the 1992 anti-SLAPP scheme in federal court, read the law’s substance so narrowly that it was useless for most defendants.<sup>2</sup> The New York Legislature addressed this cramped reading in 2020 when it adopted a raft of amendments to the law. Nevertheless, some courts are again giving the anti-SLAPP scheme a narrow compass. And, for the first time, some are even refusing to apply some provisions of the law in federal court.

This recent development could not come at a worse time. Politically motivated libel litigation is on the rise.<sup>3</sup> These suits do not seek damages for a cognizable injury; they seek retribution or, better yet, a judicial imprimatur that one’s political

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<sup>1</sup> Brad Hoylman-Sigal, *Free Speech ‘SLAPP’s Back: Governor Signs Hoylman/Weinstein Legislation to Crack Down on Meritless Lawsuits Used to Silence Critics*, N.Y. STATE SENATE (Nov. 10, 2020), <https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/free-speech-slapps-back-governor-signs-hoylman-weinstein>.

<sup>2</sup> See, e.g., *Chandok v. Klessig*, 632 F.3d 803 (2d Cir. 2011); *Cholowsky v. Civiletti*, 16 Misc. 3d 1138(A) (N.Y. Sup. Ct., Suffolk Cnty. 2007).

<sup>3</sup> Matthew L. Schafer & Jeff Kosseff, *Protecting Free Speech in A Post-Sullivan World*, 75 FED. COMM. L.J. 1, 27–38 (2022).

position is valid while another's is not.<sup>4</sup> Couple this with calls to overrule free speech precedents like *New York Times Co. v. Sullivan*, and the availability of state anti-SLAPP laws in federal court takes on pressing importance.<sup>5</sup> If these state protections do not apply in federal court, a new kind of libel tourism—anti-SLAPP tourism, where plaintiffs strategically file in federal court to avoid anti-SLAPPs—will fester.<sup>6</sup>

This Article demonstrates why the recent trend against applying New York's anti-SLAPP scheme in federal court has it all wrong. In Part I, we provide a brief history of SLAPPs before reviewing the history of New York's anti-SLAPP scheme. We then turn to the application of New York's anti-SLAPP scheme in federal court, reviewing in Part II the U.S. Supreme Court's precedent regarding the application of state law in federal courts and the Second Circuit's application of that precedent in the anti-SLAPP context. Finally, in Part III, we consider the applicability of New York's anti-SLAPP scheme in federal court and conclude that two of its provisions apply while two others may as well, although their application is less certain.

This Article provides a much-needed practical guide for anti-SLAPP litigants and courts around the country. While it focuses on New York's anti-SLAPP scheme, its relevance is not so limited. Instead, the underlying principles and analysis advanced are generally applicable to the application of other anti-SLAPP laws in federal court. For example, this Article distills a four-part test that federal courts should follow in determining whether to apply an anti-SLAPP law.<sup>7</sup> It also clarifies that this test must be applied to specific provisions of anti-SLAPP laws rather than, as some suggest, to the laws as a whole.<sup>8</sup> Finally, it concludes that refusing to apply

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<sup>4</sup> *Id.*; see also *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 347 (2019) (Alito, J., dissenting) ("To ensure that our democracy is preserved and is permitted to flourish, this Court must closely scrutinize any restrictions on the statements that can be made on important public policy issues.").

<sup>5</sup> See generally Schafer & Kosseff, *supra* note 3.

<sup>6</sup> Libel tourism as a concept developed in the context of litigants seeking a judgment (usually, a libel judgment) in foreign jurisdictions with few of the traditional U.S. protections for speech. See, e.g., Editorial, *Libel Tourism*, N.Y. TIMES (May 25, 2009).

<sup>7</sup> See *infra* text accompanying notes 133–138.

<sup>8</sup> See *infra* text accompanying notes 174–176.

anti-SLAPP laws in federal court violates basic principles of federalism by undercutting states' power to protect citizens from meritless lawsuits targeting the exercise of constitutional rights.<sup>9</sup>

### I. SLAPPS AND NEW YORK'S ANTI-SLAPP SCHEME

In 1988, professors Penelope Canan and George Pring coined the term "strategic lawsuit against public participation." These SLAPPs, often manifesting as defamation lawsuits, were "labeled as ordinary, apolitical, judicial claims" but were actually meant to squelch "past or anticipated opposition on political issues."<sup>10</sup> They were a kind of legal terrorism that coincided with rapidly expanding civil discovery.<sup>11</sup> Canan and Pring called SLAPPs a "threat[] to an active polity" that, another scholar observed, courts had allowed to develop "through the neglect of First Amendment values."<sup>12</sup> Although plaintiffs rarely won, they claimed victory by "devastat[ing] the defendant financially" through arduous litigation.<sup>13</sup>

While Canan and Pring recognized that SLAPPs targeted First Amendment rights generally, they focused on suits targeting the right to petition. They defined a SLAPP as (1) a civil lawsuit, (2) brought against non-governmental organizations or individuals, (3) "based on advocacy before a government branch official or the electorate," and (4) "of some public or societal significance."<sup>14</sup> These SLAPPs were particularly problematic as they called on courts to punish "presumptively constitutionally protected activity."<sup>15</sup>

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<sup>9</sup> See *infra* text accompanying notes 339–340.

<sup>10</sup> Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385, 385–86 (1988).

<sup>11</sup> Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 535 (1994); Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 988 (1992); see also Judith Miller, *States Have Moved to Keep Plaintiffs From Using Courts to Muzzle Critics*, N.Y. TIMES (June 11, 1996).

<sup>12</sup> Canan & Pring, *supra* note 10, at 385; Waldman, *supra* note 11, at 988.

<sup>13</sup> Tom Wyrwich, *A Cure for A "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 666–67 (2011).

<sup>14</sup> Canan & Pring, *supra* note 10, at 387.

<sup>15</sup> *Id.* at 386.

SLAPP plaintiffs also targeted news organizations for exercising the right to freedom of speech and of the press. In 1992, for example, the *New York Times* reported on the increasing number of SLAPPs filed against local newspapers and even student newspapers.<sup>16</sup> While these suits were meritless, their mere existence meant that the “worried owners” of small publications and their “anxious libel insurers” could face pre-trial litigation costs in excess of a million dollars—to say nothing of the cost of trial.<sup>17</sup> These SLAPPs constituted a “very real threat” to the existence of small newsrooms.<sup>18</sup>

In response, state legislatures began to devise anti-SLAPP statutes. In 1989, the Washington legislature passed such a law. California, Delaware, Massachusetts and others soon followed.<sup>19</sup> These early laws took many forms. Legislatures like New York wrote narrow ones to address the archetypal petitioning SLAPPs identified by Canan and Pring.<sup>20</sup> Other state legislatures, like California’s, broadly targeted SLAPPs in any form so long as the SLAPPs related to matters of public concern.<sup>21</sup> Today, nearly three dozen states (and the District of Columbia) have passed anti-SLAPP laws.<sup>22</sup> And, most recently, in 2020, the New York Legislature revisited its 1992 anti-SLAPP scheme, turning it into one of the strongest in the country.

#### A. The 1992 Anti-SLAPP Scheme

On February 27, 1991, Assembly members William Bianchi and Jerry Nadler introduced a bill “in relation to actions involving public petition and participation.”<sup>23</sup> According to Bianchi, the bill was a response to the “threat of personal

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<sup>16</sup> Alex S. Jones, *Libel Threat Is Increasing Even for Small Publications*, N.Y. TIMES (Feb. 3, 1992).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Chad Baruch, “*If I Had a Hammer*”: *Defending SLAPP Suits in Texas*, 3 TEX. WESLEYAN L. REV. 55, 66 & n.91 (1996) (collecting early anti-SLAPP laws).

<sup>20</sup> See *infra* Part I.A.

<sup>21</sup> See, e.g., *Schwern v. Plunkett*, 845 F.3d 1241, 1244 (9th Cir. 2017); *Johnson v. Ryan*, 346 P.3d 789, 794 (Wash. App. 2015).

<sup>22</sup> Editorial, *The Legal System Should Not Be a Tool for Bullies*, N.Y. TIMES (July 17, 2020); Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPORTERS’ COMM. FOR FREEDOM OF THE PRESS, <https://perma.cc/YA4R-FWL6>.

<sup>23</sup> An Act to amend the civil rights law and civil practice law and rules, in relation to actions involving public petition and participation, Assembly: 4299, Senate: 5411, 1991–1992 Regular Session, Feb. 27, 1991 [hereinafter 1992 Bill Jacket].

damages and litigation costs” from SLAPP suits deployed as “a method of stifling” participation in public affairs.<sup>24</sup> The bill disincentivized such suits by placing four hurdles in front of SLAPP plaintiffs. Two were codified in the Civil Rights Law (“C.R.L.”) and two in the Civil Practice Law and Rules (“C.P.L.R.”).

**C.R.L. § 70-a.** First, the bill amended the C.R.L. to provide for a cause of action for damages arising from a SLAPP: a “defendant in an action involving public petition and participation . . . may maintain an action . . . to recover damages.”<sup>25</sup> Discretionary attorneys’ fees and costs were recoverable on a showing that a SLAPP “was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.”<sup>26</sup> Compensatory damages were recoverable on an additional showing that the SLAPP was meant to “maliciously inhibit[] the free exercise of speech.”<sup>27</sup> Punitive damages were recoverable on a showing that the SLAPP was brought “for the *sole* purpose of . . . maliciously inhibiting the free exercise of speech.”<sup>28</sup>

**C.R.L. § 76-a.** The bill also added § 76-a to the C.R.L.<sup>29</sup> This provision defined an “action involving public petition and participation” as any action “brought by a public applicant or permittee” that was “materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.”<sup>30</sup> In turn, it defined a “public applicant or permittee” as “any person who has applied for or obtained a permit . . . or other entitlement for use or permission to act from any government body.”<sup>31</sup> Section 76-a also raised the burden for SLAPP plaintiffs. It provided that, in any action involving public petition or participation, a SLAPP plaintiff could only recover damages if she “established by

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<sup>24</sup> *Id.* at 8 (Memorandum in support of Legislation).

<sup>25</sup> 1992 N.Y. Sess. Laws Ch. 767, § 2 (A. 4299) (McKinney) [hereinafter 1992 SLAPP Bill].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (emphasis added).

<sup>29</sup> *Id.* at § 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false.”<sup>32</sup> This provision and § 70-a were the heart of the 1992 amendments.<sup>33</sup>

**C.P.L.R. Rule 3211(g).** The bill also made two changes to the C.P.L.R. First, it added a new provision, Rule 3211(g), relating to motions to dismiss.<sup>34</sup> In actions involving public participation, Rule 3211(g) instructed that motions to dismiss for failure to state a claim under Rule 3211(a)(7) “shall be granted” unless a SLAPP plaintiff demonstrated that “the cause of action has a substantial basis *in law* or is supported by a substantial argument for an extension, modification or reversal of existing law.”<sup>35</sup> The substantial basis requirement was meant “to be more stringent” than the traditional reasonableness standard, and it “thrust onto the plaintiff” an early burden.<sup>36</sup> To avoid drawn out litigation, this provision also instructed courts to “grant preference” in hearing the motion.<sup>37</sup>

**C.P.L.R. Rule 3212(h).** The bill added a similar provision to Rule 3212, which governed motions for summary judgment.<sup>38</sup> When a defendant made such a motion in actions involving public participation, Rule 3212(h) instructed that that motion “shall be granted” unless a plaintiff demonstrates that the suit “has a substantial basis *in fact and law* or is supported by a substantial argument for an extension, modification or reversal of existing law.”<sup>39</sup> This threw onto the SLAPP plaintiff the burden of surviving a defendant’s motion for summary judgment.<sup>40</sup> As with Rule 3211(g), the court was instructed to grant preference in hearing the motion.<sup>41</sup> To-

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<sup>32</sup> *Id.*

<sup>33</sup> David D. Siegel, Practice Commentaries, C3211:69, in N.Y. C.P.L.R. 3211 (McKinney 2022) [hereinafter *Practice Commentaries*].

<sup>34</sup> 1992 SLAPP Bill, *supra* note 25, at § 4.

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> *Practice Commentaries*, *supra* note 33, at C3211:69.

<sup>37</sup> 1992 SLAPP Bill, *supra* note 25, at § 4.

<sup>38</sup> *Id.* at § 5.

<sup>39</sup> *Id.* (emphasis added).

<sup>40</sup> *Practice Commentaries*, *supra* note 33, C3211:69.

<sup>41</sup> 1992 SLAPP Bill, *supra* note 25, at § 5.

gether with Rule 3211(g), the Legislature’s design was “to facilitate the early dismissal of the ‘SLAPP’ suit if the proper showing can be made” and to make it “easier” for SLAPP defendants to get out of such cases.<sup>42</sup>

In February 1992, the Assembly unanimously passed the bill.<sup>43</sup> The Senate passed it by a wide margin several months later.<sup>44</sup> By August, Governor Mario Cuomo signed the bill into law.<sup>45</sup> Cuomo said the bill was “New York’s response to the ‘SLAPP’ suit.”<sup>46</sup> The aim of SLAPPs, he said, was “simple and brutal: the individual is to regret ever having entered the public area.”<sup>47</sup> The new law discouraged SLAPPs by increasing the fault standard, providing a SLAPP defendant with a cause of action for damages, and promoting early dismissal of SLAPPs.<sup>48</sup> But Cuomo feared that its narrow focus on SLAPPs arising from the government permitting process did not adequately address all SLAPPs.<sup>49</sup>

Cuomo’s concerns were prescient. Courts narrowly interpreted the 1992 anti-SLAPP scheme. For example, they held that because the anti-SLAPP scheme was in derogation of the common law, it must be strictly construed, and they rarely awarded attorney’s fees.<sup>50</sup> These restrictive interpretations, among others, significantly diluted the law—especially for news organizations that were not speaking in the context of a government permitting process. As one court wrote fifteen years after the law’s adoption, “[T]here has never been a case in which a newspaper successfully came under the umbrella protection of this statute.”<sup>51</sup> Still, federal courts regularly applied the narrowly construed law in cases before them.<sup>52</sup>

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<sup>42</sup> *Practice Commentaries*, *supra* note 33, C3211:69.

<sup>43</sup> 1992 Bill Jacket, *supra* note 23, at 4.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 6–7.

<sup>49</sup> *Id.* at 7.

<sup>50</sup> *See, e.g.*, 315 W. Enters. LLC v. Robbins, 171 A.D.3d 466, 467 (2019); SentosaCare LLC v. Lehman, 58 Misc. 3d 1216(A) (Sup. Ct., Kings Cnty. 2018).

<sup>51</sup> Cholowsky v. Civiletti, 16 Misc. 3d 1138(A) (Sup. Ct., Suffolk Cnty. 2007).

<sup>52</sup> *See infra* note 188 (collecting cases).



### B. The 2020 Anti-SLAPP Scheme

In November 2020, the New York Legislature amended the 1992 anti-SLAPP scheme.<sup>53</sup> Senator Brad Hoylman-Sigal and Assembly member Helene Weinstein sponsored the bill.<sup>54</sup> In her sponsor memo, Weinstein explained that the bill’s purpose was “to extend the protection” of the 1992 law.<sup>55</sup> The amendments would better “protect citizens from frivolous litigation that is intended to silence their exercise of the right[] of free speech.”<sup>56</sup> Hoylman-Sigal added that the 1992 law “failed to accomplish” its objective of ensuring “the utmost protection” for free speech rights, “particularly where such rights are exercised in a public forum with respect to issues of public concern.”<sup>57</sup>

*C.R.L. § 70-a.* The bill first amended § 70-a. Unlike the 1992 law that gave courts discretion to award costs and fees, the 2020 amendments made fees mandatory: “costs and attorney’s *shall* be recovered upon a demonstration that a SLAPP suit was commenced or continued without a substantial basis in fact or law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law.”<sup>58</sup> The amended § 70-a left in place the compensatory and punitive damages provisions. And, it provided that an anti-SLAPP claimant could show that a SLAPP lacked a substantial basis simply by obtaining a dismissal under the anti-SLAPP standards in Rules 3211(g) and 3212(h), although it did not condition recovery on obtaining a judgment under those Rules.<sup>59</sup>

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<sup>53</sup> See Letter from N.Y. City Bar to Gov. Cuomo (Oct. 15, 2020), Bill Jacket at 4, L. 2020, Ch. 250 (An Act to amend the civil rights law; Assembly: 5991-A, Senate: 52-A, 1991–1992 Regular Session, Feb. 26, 2019) [hereinafter 2020 Bill Jacket].

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 5 (Weinstein Memorandum in support of Legislation); see also Gottwald v. Sebert, Nos. 32 & 33, 2023 WL 3959051, at \*5 (N.Y. June 13, 2023) (explaining that the “legislature enacted the 2020 amendments to ‘extend the protection’ of the 1992 statute to a broader class of individuals” (citation omitted)).

<sup>56</sup> 2020 Bill Jacket at 5.

<sup>57</sup> Brad Hoylman-Sigal, Sponsor Memo, S52a, N.Y. SENATE (July 22, 2020), <https://perma.cc/5WPD-PXS5>.

<sup>58</sup> 2020 Sess. Laws of N.Y. Ch. 250, § 1 (A. 5991–A) (McKinney) [hereinafter 2020 SLAPP Bill] (emphasis added).

<sup>59</sup> *Id.*

**C.R.L. § 76-a.** The bill also amended § 76-a to broaden the reach of the anti-SLAPP scheme. Discarding the 1992 law’s focus on government permitting, the bill defined a SLAPP as a lawsuit over “[a]ny communication in a place open to the public or a public forum in connection with an issue of public interest” or “[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.”<sup>60</sup> The bill also instructed courts to broadly construe what constituted “public interest,” defining it as anything other than a “purely private matter.”<sup>61</sup> Finally, while it maintained the actual malice fault requirement, the expanded definition of a SLAPP meant that the actual malice requirement applied to all cases implicating statements made in connection with an issue of public interest—rather than only to those concerning the government permitting process.<sup>62</sup>

**C.P.L.R. Rules 3211 & 3212.** The bill left unchanged the text of Rule 3212, although, as with the fault standard, the new definition of a SLAPP considerably expanded that Rule’s applicability to any case based on speech in a public forum and about an issue of public interest. As to Rule 3211, the bill made two significant changes regarding motions to dismiss in the context of SLAPPs. First, it provided for a stay of discovery, hearings, and motions once a SLAPP defendant filed a motion to dismiss.<sup>63</sup> The bill also allowed courts to consider pleadings and supporting evidence on a motion to dismiss.<sup>64</sup>

With the adoption of the 2020 amendments, the Legislature sought to stem courts’ narrow interpretations of the anti-SLAPP scheme by broadly redefining what constituted a SLAPP and further instructing courts to interpret the law expan-

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<sup>60</sup> *Id.* at § 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* In this way, the actual malice requirement under the current anti-SLAPP resembles the constitutional fault standard in *Rosenbloom v. Metromedia, Inc.* that would have required any defamation plaintiff in a case relating to a matter of concern to show actual malice. 403 U.S. 29, 45–50 (1971) (plurality op.). In *Gertz v. Robert Welch, Inc.*, the Court rejected *Rosenbloom*, however, and emphasized that whether constitutional malice must be shown depended on the status of the plaintiff not the underlying controversy. 418 U.S. 323, 347 (1974).

<sup>63</sup> 2020 SLAPP Bill, *supra* note 58, at § 3.

<sup>64</sup> *Id.*

sively to advance its intended aims. Indeed, the knock-on effect of broadly redefining what constitutes an action involving public petition and participation under § 76-a is the concomitant expansion of the scope of § 70-a and Rules 3211 and 3212.<sup>65</sup> What the Legislature did not anticipate, though, is that federal courts would find a new way to undercut the law by refusing to apply it in federal court at all. Before we turn to whether those courts are right to refuse to do so, we review the Supreme Court precedent and Second Circuit case law that inform the answer to that question.

## II. FEDERAL ADJUDICATION AND STATE ANTI-SLAPP LAWS

In *Erie Railroad Co. v. Tompkins*, the Supreme Court adopted a simple rule—that federal courts sitting in diversity must apply state substantive law and federal procedural rules.<sup>66</sup> It turns out, however, that following that directive is far from simple. This is especially so in the anti-SLAPP context where serious disagreement exists about whether such laws are substantive or procedural. The implications here are significant. If an anti-SLAPP law is procedural and thus does not apply in federal court, a diverse SLAPP plaintiff could simply file her lawsuit in federal court to avoid that law. If, however, state anti-SLAPPs are substantive and thus apply in federal court, such anti-SLAPP tourism would fail and a state’s interest in protecting its citizens in the exercise of their constitutional rights would be honored.

To put this problem in perspective, we first summarize the Court’s jurisprudence regarding the application of state law in federal court before turning to the Second Circuit’s application of that precedent to three states’ anti-SLAPP laws—New York’s, Nevada’s, and California’s. These cases help frame the discussion of whether the provisions of New York’s 2020 anti-SLAPP scheme apply in federal court. They also remind us to eschew the unhelpful question of whether “anti-SLAPP laws,” generally, apply in federal court. Instead, they demonstrate that whether a particular state’s anti-SLAPP law applies in federal court will depend on that state statute’s unique text and structure. In other words, some states’ anti-SLAPPs may well apply in federal court while others may not.

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<sup>65</sup> See, e.g., *Gottwald v. Sebert*, Nos. 32 & 33, 2023 WL 3959051, at \*5 (N.Y. June 13, 2023) (“Sections providing for the discretionary award of compensatory and punitive damages were not amended but have far broader application given the expanded scope of the relevant definitions.”).

<sup>66</sup> 304 U.S. 64 (1938).

### A. *Erie and Its Progeny*

In *Erie*, a train door came loose, injuring Harry Tompkins as he was walking along the tracks.<sup>67</sup> Tompkins sued the railroad company. If Pennsylvania's common law applied, he would lose. If, however, then-existing federal common law applied under the Court's precedent in *Swift v. Tyson*, he would win.<sup>68</sup> The Supreme Court posed the question in the case as "whether the oft-challenged doctrine of *Swift v. Tyson*," which permitted federal courts to create their own common law, "shall now be disapproved."<sup>69</sup> That doctrine was based on the Court's view that the Rules of Decision Act (the "RDA"), which provided that the "laws of the several States . . . shall be regarded as rules of decision in trials at common law, in the courts of the United States," applied only to state statutes and not to state common law rules.<sup>70</sup>

Tompkins lost. The Court overruled *Swift* and its interpretation of the RDA, concluding that Pennsylvania common law controlled.<sup>71</sup> It did so for three reasons.<sup>72</sup> First, because *Swift* allowed federal and state courts to apply different common law to the same issue, uniformity of law became impossible under *Swift*.<sup>73</sup> Second, contrary to diversity jurisdiction's aim to avoid discrimination against out-of-state parties, *Swift*'s "mischievous result" was to allow discrimination against citizens when out-of-state parties purposefully sought out federal court to avoid adverse state law.<sup>74</sup> Third, *Swift* improperly conferred on federal courts powers not provided by the Constitution—neither Congress nor the federal courts had the unwritten power to say what the law of a state should be.<sup>75</sup>

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<sup>67</sup> *Id.* at 69.

<sup>68</sup> *Id.* at 70.

<sup>69</sup> *Id.* at 69 (citing 41 U.S. 1 (1842)).

<sup>70</sup> *Id.* at 71 (quoting 28 U.S.C. § 725 (1789)).

<sup>71</sup> *Id.* at 79–80.

<sup>72</sup> *Id.* at 74–80.

<sup>73</sup> *Id.* at 74.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 78.

Congress minted the other side of the *Erie* coin around the same time when it passed the Rules Enabling Act (the “REA”).<sup>76</sup> The REA set forth the circumstances under which the Supreme Court could adopt procedural rules governing federal proceedings.<sup>77</sup> Under the REA, Congress granted the Court “the power to prescribe, by general rules, for the district courts of the United States . . . the practice and procedure in civil actions at law.”<sup>78</sup> The REA thus limited the kinds of rules that could be adopted to those that dealt with “matters of pleading and court practice and procedure.”<sup>79</sup> Importantly, a rule adopted pursuant to the REA could not “abridge, enlarge, nor modify the substantive rights” of a litigant under state law.<sup>80</sup>

The Court first confronted the REA in earnest in *Sibbach v. Wilson & Co.*, where it considered the validity of Federal Rule of Civil Procedure 35, which governed ordered medical examinations, and Rule 37, which governed sanctions for refusal to engage in discovery.<sup>81</sup> The Court found both valid under the REA.<sup>82</sup> The REA, the Court explained, was “restricted in its operation to matters of pleading and court practice and procedure.”<sup>83</sup> So long as it did not modify state substantive law “under the guise of regulating procedure” nor intrude on the constitutional right to a jury trial, it was presumptively valid.<sup>84</sup>

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<sup>76</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 439 (2010) (Ginsburg, J., dissenting) (“[T]he [RDA] and the [REA] simultaneously frame and inform the *Erie* analysis”); see also Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064, *codified as amended*, 28 U.S.C. § 2072 (“(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”). For a survey of the REA, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

<sup>77</sup> See generally 28 U.S.C. § 2072.

<sup>78</sup> Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064.

<sup>79</sup> *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941).

<sup>80</sup> *Id.* (quoting 28 U.S.C. § 2072(a)).

<sup>81</sup> *Id.* at 14.

<sup>82</sup> *Id.* at 11.

<sup>83</sup> *Id.* at 10.

<sup>84</sup> *Id.* at 10–11.

Applying that analysis, the Court found that Rules 35 and 37 were procedural and rejected the plaintiff's argument that they modified a substantive state right.<sup>85</sup> On the first point, the Court said that the question was whether a rule "really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."<sup>86</sup> On the second, the Court found that the plaintiff had not identified a substantive right that the Rules modified; rather, she identified only a non-substantive, state rule prohibiting a medical examination.<sup>87</sup>

Together, the Court's interpretations of the RDA in *Erie* and the REA in *Sibbach* meant that a federal court sitting in diversity must apply state substantive law and federal procedural rules.<sup>88</sup> Where no federal rule spoke to the issue, *Erie* controlled the analysis; on the other hand, where a federal rule did, *Sibbach* controlled. Beyond this, the Court's early jurisprudence provided little guidance as to how to apply these principles: When is a federal law procedural and when is a state law substantive? What is a court to do when a law has procedural and substantive components? Or what if a state law and federal rule are at cross purposes? The Court would spend decades attempting to answer these questions, refining and retreating from various tests along the way.

In *Guaranty Trust Co. v. York*, for example, the Court considered whether a state statute of limitations applied in a federal court.<sup>89</sup> It held that it did, adopting the outcome-determinative test for deciding whether a state law was substantive. According to the Court, the question was whether the statute regulated only "the manner and the means" by which a right to recover is enforced, which would mean it was procedural, or, alternatively, whether the statute "significantly affect[ed] the result of a litigation," which would mean it was substantive.<sup>90</sup> This approach comported with *Erie*'s policy that litigation of state claims in federal court should "not

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 14.

<sup>87</sup> *Id.* at 10–14 (doubting that the rule was "important" or "substantial" let alone substantive).

<sup>88</sup> Charles W. Adams & Mbilike M. Mwafulirwa, *The Last Lecture: State Anti-SLAPP Statutes and the Federal Courts*, 96 ST. JOHN'S L. REV. 1, 19 (2022).

<sup>89</sup> 326 U.S. 99, 101 (1945).

<sup>90</sup> *Id.* at 109.

lead to a substantially different result” than if litigated in state court.<sup>91</sup> Because not applying the statute of limitations in the case would continue a lawsuit that would otherwise be barred in state court, the Court found that the statute was outcome determinative and thus substantive and applicable in federal court.<sup>92</sup>

The Court revisited the outcome-determinative test in *Byrd v. Blue Ridge Rural Electric Co-op, Inc.* and, later, in *Hanna v. Plumer*.<sup>93</sup> Both cases presented the issue left unresolved in *Sibbach*: what to do when applicable federal and state provisions were at odds. In *Byrd*, the issue was whether a South Carolina rule requiring a judge (not a jury) to decide a question of immunity applied in federal court.<sup>94</sup> The Court admitted that whether immunity was decided by a judge or jury may well affect the outcome of the litigation, which, under *Guaranty Trust*, suggested that it should apply in federal court as a substantive state rule.<sup>95</sup> But the case was different from *Guaranty Trust* in two ways: first, the rule that it was the judge’s responsibility to decide questions of immunity was adopted for practicality’s sake rather than to serve some weightier state interest.<sup>96</sup> Second, the rule conflicted with the constitutional federal interest in a jury trial.<sup>97</sup> In these circumstances, the Court held that the state interests must give way to the federal ones and declined to apply the state rule.<sup>98</sup>

In *Hanna*, the question was whether service of process was controlled by a Massachusetts state law or, rather, Federal Rule of Civil Procedure 4.<sup>99</sup> The defendant argued the restrictive Massachusetts law applied under *Guaranty Trust* because it

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 110.

<sup>93</sup> 356 U.S. 525 (1958); 380 U.S. 460 (1965).

<sup>94</sup> 356 U.S. at 533–34.

<sup>95</sup> *Id.* at 536–37.

<sup>96</sup> *Id.* at 536 (“We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute.”).

<sup>97</sup> *See id.*

<sup>98</sup> *Id.* at 539 (quotation marks and citation omitted); *see also* *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431–36 (1996) (applying *Byrd*).

<sup>99</sup> *Hanna v. Plumer*, 380 U.S. 460, 461 (1965).

was outcome determinative as its application would result in an “immediate victory” for the defendant.<sup>100</sup> The Court disagreed. First, it cabined *Guaranty Trust*’s outcome-determinative test, saying that it was no talisman.<sup>101</sup> At some level, after all, any rule of procedure could be described as outcome determinative.<sup>102</sup> Instead, the Court said, when determining whether a rule is outcome determinative and thus substantive, courts must also consider *Erie*’s aims of discouraging forum-shopping and avoiding inequity.<sup>103</sup>

There was a more fundamental problem though. The defendant in *Hanna* assumed *Erie* was relevant to the question of whether Rule 4 applied in the first place.<sup>104</sup> The Court, however, had never relied on *Erie* to invalidate a federal rule.<sup>105</sup> Instead, where a procedural federal rule was broad enough to control the issue, the only question was whether it violated the REA, as a statutory matter.<sup>106</sup> In such cases, *Sibbach* controlled the analysis—not *Erie*.<sup>107</sup> Said differently, the Court found that neither *Erie* nor its progeny cast “doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.”<sup>108</sup>

The last case we mention before turning to this century is *Burlington Northern Railroad Co. v. Woods*.<sup>109</sup> There, the question was which rule applied: an Alabama statute that automatically penalized certain unsuccessful appellants or Federal Rule of Appellate Procedure 38 that allowed for discretionary sanctions for frivolous appeals.<sup>110</sup> Under *Hanna*, the Court explained that Rule 38 applied if it was “‘sufficiently broad’ to cause a ‘direct collision’ with the state law or, implicitly, to ‘control

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<sup>100</sup> *Id.* at 466.

<sup>101</sup> *Id.* at 466–67.

<sup>102</sup> *Id.* at 468.

<sup>103</sup> *Id.* at 467–68.

<sup>104</sup> *Id.* at 469–70.

<sup>105</sup> *Id.* at 470.

<sup>106</sup> *Id.* at 470–71.

<sup>107</sup> *Id.* at 471 (“When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice.”).

<sup>108</sup> *Id.* at 473.

<sup>109</sup> 480 U.S. 1 (1987).

<sup>110</sup> *Id.* at 2.



the issue' before the court."<sup>111</sup> The Court found Rule 38 was sufficiently broad because its "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute."<sup>112</sup> Moreover, the purpose of Rule 38, penalizing frivolous appeals, was "sufficiently coextensive" with the state rule's purpose.<sup>113</sup> Finally, the Court concluded that Rule 38 did not violate the REA as it could reasonably be classed as procedural.<sup>114</sup> Thus, Rule 38, not the Alabama rule, applied.

In 2010, the Court decided *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* in hopes of clarifying the interplay of state substantive law and federal procedural rules.<sup>115</sup> It would be unsuccessful though. There, the plaintiff brought a class action in federal court against an insurer seeking certain penalties owed under New York law.<sup>116</sup> A New York law, however, prohibited recovery of those penalties through class actions; the class action rules under Federal Rule of Civil Procedure 23 contained no such prohibition.<sup>117</sup> The question was which applied.<sup>118</sup> In a 4-1-4 opinion, the Court held that Rule 23 controlled but could not agree on why.<sup>119</sup>

Justice Scalia, initially writing for five Justices including Justice Stevens, began where *Hanna* and *Burlington Northern Railroad Co.* had: considering whether the Federal Rule was sufficiently broad to control the disputed issue. The Court found that it was.<sup>120</sup> Rule 23, it explained, provided a "one-size-fits-all formula" for determining whether class certification was proper. So long as litigants met its requirements, they could proceed as a class.<sup>121</sup> The Court thus rejected the argument that

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<sup>111</sup> *Id.* at 4–5 (noting that the REA "contains an additional requirement" that the "Federal Rule must not 'abridge, enlarge or modify any substantive right'" (quoting 28 U.S.C. § 2072)).

<sup>112</sup> *Id.* at 7.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 8 (noting that Rule 38 satisfied "the constitutional standard for validity" and "the statutory constraints" of the REA).

<sup>115</sup> 559 U.S. 393 (2010).

<sup>116</sup> *Id.* at 397.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 396.

<sup>119</sup> *Id.* at 411.

<sup>120</sup> *Id.* at 399.

<sup>121</sup> *Id.*

Rule 23 concerned “the criteria for determining whether a given class can and should be certified,” while the New York law addressed the “antecedent question” of whether a “claim is eligible for class treatment in the first place.”<sup>122</sup> That line was too elusive.<sup>123</sup>

On the second issue, Justice Scalia lost Justice Stevens and wrote only for a plurality in finding that Rule 23 was within Congress’s rulemaking power under the REA because it was purely procedural. While the REA made clear that a federal procedural rule “shall not abridge, enlarge or modify any substantive right,” the plurality interpreted *Sibbach* as holding that a federal rule did not violate the REA so long as it “really regulat[ed] procedure.”<sup>124</sup> This standard had nothing to do with whether the rule “affect[ed] a litigant’s substantive rights.”<sup>125</sup> Instead, the only question was whether the rule regulated the manner and means “by which the litigants’ rights are ‘enforced.’”<sup>126</sup> So long as the rule did, it applied and no further inquiry into its effect on state law was necessary.<sup>127</sup>

Justice Stevens wrote separately to argue that the plurality’s approach ignored the REA’s requirement that federal procedural rules not “abridge, enlarge or modify” substantive state law.<sup>128</sup> That requirement meant that federal procedural rules could not “displace a State’s definition of its own rights or remedies,” and, in fact, must be construed with “some degree of ‘sensitivity to important state interests and regulatory policies.’”<sup>129</sup> The upshot of this was that a federal rule should not apply where it “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.”<sup>130</sup> On this point, Justice Stevens agreed with the

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 406–07 (quoting 28 U.S.C. § 2072(b)).

<sup>125</sup> *Id.* at 407.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 410.

<sup>128</sup> *Id.* at 418 (Stevens, J., concurring in part and concurring in judgment).

<sup>129</sup> *Id.* (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14 (1941), and quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, n. 7 (1996)).

<sup>130</sup> *Id.* at 423–24 (noting that the plurality’s approach “ignores the second limitation that such rules also not abridge, enlarge or modify any substantive right” (cleaned up)); *see also id.* at 419 (explaining that the analysis on the second step turns on “whether the state law actually is part of a

dissenters, although he ultimately disagreed with its application on the facts of the case.<sup>131</sup>

While courts debate the import of *Shady Grove*, we set that issue aside (except for a brief note in the margin<sup>132</sup>) in favor of settled rules regarding the applicability of state law in federal court:

First, a court must ask whether a federal rule is “sufficiently broad to control the issue before the court,” thus creating a conflict with state law.<sup>133</sup>

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State’s framework of substantive rights or remedies” and not on whether it is nominally procedural); *id.* at 419–20 (“A ‘state procedural rule, though undeniably “procedural” in the ordinary sense of the term,’ may exist ‘to influence substantive outcomes’” (quoting *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995) (Posner, J.)).

<sup>131</sup> *Id.* at 442 n.2 (Ginsburg, J., dissenting) (“[A] majority of this Court, it bears emphasis, agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns.”); *id.* at 429 (Stevens, J., concurring in part and concurring in judgment) (similar).

<sup>132</sup> See generally *Shady Grove Orthopedic Assocs., P.A. v. Allstate Inc. Co.*, 559 U.S. 393 (2010); and compare, e.g., *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1141 (9th Cir. 2022) (“the majority opinion broke little new ground.”), with *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 985 (10th Cir. 2010) (“Justice Stevens’ concurrence . . . is critical.”), and with *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (Kavanaugh, J.) (finding that *Sibbach* survived *Shady Grove*). It appears to us that Justice Stevens’ opinion controls the second step as he and the dissenters make five. See Noah Brown, *Anti-Slapped in the Face: The Applicability of Anti-SLAPP Statutes in Federal Courts*, 36 NOTRE DAME J.L. ETHICS & PUB. POL’Y 265, 276–80 (2022) (reaching same conclusion after applying *Marks v. United States*, 430 U.S. 188 (1977)). But see Adams & Mwafulirwa, *supra* note 88, at 46–47 (disagreeing in a perfunctory manner). We also find unconvincing then-Judge Kavanaugh’s assertion that the *Shady Grove* plurality “strictly followed” the Court’s opinion in *Sibbach. Abbas*, 783 F.3d at 1336. On the contrary, in *Shady Grove* Justice Stevens persuasively explained that the plurality ignored the facts of *Sibbach* to expand, *post hoc*, its reasoning. *Shady Grove*, 559 U.S. at 427–28 (Stevens, J. concurring in part and concurring in judgment).

<sup>133</sup> See *Shady Grove*, 559 U.S. at 421 (Stevens, J. concurring in part and concurring in judgment); see also *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987) (“The initial step is to determine whether the scope of a federal rule is sufficiently broad to cause a direct collision with the state law” (cleaned up)).

Second, if the federal rule is sufficiently broad, it controls so long as it does not violate the REA.<sup>134</sup> (On this point and considering the ambiguity of *Shady Grove*, courts disagree as to when a rule violates the REA.<sup>135</sup>)

Third, where no federal rule controls, courts must follow the RDA, making the “relatively unguided *Erie* choice” and determine whether the state rule is substantive.<sup>136</sup> In doing so, courts must consider the twin aims of *Erie*: “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”<sup>137</sup>

And, fourth, in the face of a substantive state law, courts must consider whether countervailing federal interests require displacement of that law.<sup>138</sup>

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<sup>134</sup> See *Shady Grove*, 559 U.S. at 398 (plurality opinion) (citing *Burlington N. R.R. Co.*, 480 U.S. at 4–5); *id.* at 417 (Stevens, J., concurring in part and concurring in judgment) (citing *Hanna v. Plumer*, 380 U.S. 460, 469–72 (1965)); see also John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698 (1974) (“Where the matter in issue is covered by a Federal Rule, however, the [REA]—and not the [RDA] itself or the line of cases construing it—constitutes the relevant standard.”).

<sup>135</sup> Compare *Godin v. Schencks*, 629 F.3d 79, 87 (1st Cir. 2010) (finding Justice Stevens’ opinion controlling); *Stender v. Archstone-Smith Operating Tr.*, 958 F.3d 938, 947 (10th Cir. 2020); *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1091 (6th Cir. 2016), with *La Liberte v. Reid*, 966 F.3d 79, 87 (2d Cir. 2020) (plurality approach controlling); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1356–57 (11th Cir. 2018); *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 265 (3d Cir. 2012); see also *Abbas*, 783 F.3d at 1337.

<sup>136</sup> *Shady Grove*, 559 U.S. at 417 (Stevens, J., concurring in part and concurring in judgment) (citing *Hanna*, 380 U.S. at 471); *id.* at 438 (Ginsburg, J., dissenting) (citing *Hanna*, 380 U.S. at 469–74); see also Ely, *supra* note 134, at 698 (“where there is no relevant . . . Rule promulgated pursuant to the [REA] and the federal rule in issue is therefore wholly judge-made, whether state or federal law should be applied is controlled by the [RDA].”); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980) (“Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply.”).

<sup>137</sup> *Shady Grove*, 559 U.S. at 417 n.2 (Stevens, J., concurring in part and concurring in judgment) (quoting *Hanna*, 380 U.S. at 468); *id.* at 438–39 (Ginsburg, J., dissenting) (citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996)).

<sup>138</sup> See, e.g., *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537–38 (1958); see also *Gasperini*, 518 U.S. at 431–32.

### B. Anti-SLAPP Laws in the Second Circuit

With these rules in hand, we return to the applicability of anti-SLAPPs in federal court. Federal appellate courts have reached different conclusions on this question—although we doubt the import of most of these alleged splits as explained further in the margins.<sup>139</sup> On the one hand, the D.C., Fifth, Tenth, and Eleventh Circuits have refused to apply parts of the anti-SLAPP laws of the District of Columbia, Texas, New Mexico, and Georgia, respectively.<sup>140</sup> On the other hand, the First, Fifth, and Ninth Circuits have applied provisions of the Maine, Louisiana, and California anti-SLAPP laws, respectively.<sup>141</sup> The Second Circuit has arrived at different conclusions depending on which state’s anti-SLAPP law is at issue.<sup>142</sup>

Consistent with this Article’s title, we focus on the application of the New York anti-SLAPP in federal court. We do so for a few reasons. Initially, as the media capital of the United States, the application of the anti-SLAPP law in New York has national relevance beyond that of other states. Next, articles that focus on the general applicability of “anti-SLAPPs” in federal court may do more to confuse than clarify, because the application of a particular anti-SLAPP necessarily turns on the

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<sup>139</sup> That conflicts exist as to the “whether anti-SLAPP statutes apply in federal court” does not mean that circuit splits exist. *Margolies v. Rudolph*, No. 21-cv-2447, 2022 WL 2062460, at \*8 (E.D.N.Y. June 6, 2022). Rather, it means that the text and structure of anti-SLAPP laws differ from state to state in ways that affect those laws’ applicability in federal court. See *infra* text accompanying note 167. In other words, one circuit court might find that State X’s anti-SLAPP law does not apply, while another circuit might find that State Y’s anti-SLAPP law does apply. Because these courts are interpreting differing state laws, their contrary conclusions are not necessarily conflicting. One real split does exist: the Second and Ninth Circuits have disagreed as to whether the California’s anti-SLAPP law applies in federal court. Compare *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), with *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020).

<sup>140</sup> *Abbas*, 783 F.3d at 1332; *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1350 (11th Cir. 2018); see also *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1237 (10th Cir. 2020) (considering application of the Oklahoma statute).

<sup>141</sup> *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

<sup>142</sup> Compare, e.g., *La Liberte*, 966 F.3d at 85, with *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014).

text and structure of the specific anti-SLAPP at issue. Finally, while generic inquiries into the applicability of anti-SLAPP laws in federal court risk confusion, a step-by-step analysis of a specific law can provide an analytical blueprint for analyzing the applicability of other such laws.

With that, we turn to the Second Circuit's treatment of state anti-SLAPP laws. In *Chandok v. Klessig*, the Second Circuit considered an appeal of an order dismissing a defamation claim and a cross-appeal of an order dismissing the defendant's counterclaim pursuant to § 70-a of the 1992 anti-SLAPP scheme.<sup>143</sup> After finding dismissal of the defamation claims proper, the court turned to the § 70-a claim.<sup>144</sup> Again, the court affirmed, finding that under the 1992 law Chandok was not a public applicant or permittee merely because she sought federal funding for her research.<sup>145</sup> As such, the Second Circuit applied § 70-a in federal court—albeit without analyzing whether it should—but found that the claim failed on the merits.

It would be easy to write off *Chandok* as immaterial because the court failed to undertake any *Erie/Sibbach* analysis regarding § 70-a. But in historical context we think this reductive interpretation would be mistaken. Less than a year before the Second Circuit decided *Chandok*, the Supreme Court decided *Shady Grove*. The Second Circuit also heard oral argument in *Chandok* just days after the Court handed down *Shady Grove*. Despite *Chandok* being heard during the hotly contested litigation in *Shady Grove*, the issue of § 70-a's applicability appears never to have been raised. This silence is telling: despite the wet ink on *Shady Grove*, no one seriously thought that § 70-a raised any *Erie* issues.

The Second Circuit next confronted an anti-SLAPP in *Adelson v. Harris*.<sup>146</sup> There, casino magnate Sheldon Adelson sued the National Jewish Democratic Caucus after it issued a press release urging Mitt Romney to stop accepting Adelson's political donations.<sup>147</sup> While Adelson brought suit in the Southern District of New York, the district court held that Nevada law applied to his claims.<sup>148</sup> The question then became whether the Nevada anti-SLAPP law applied in federal court. The

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<sup>143</sup> *Chandok v. Klessig*, 632 F.3d 803, 819 (2d Cir. 2011).

<sup>144</sup> *Id.* at 818.

<sup>145</sup> *Id.* at 818–19.

<sup>146</sup> 774 F.3d 803 (2d Cir. 2014).

<sup>147</sup> *Id.* at 805.

<sup>148</sup> *Id.* at 806.

panel found that the law's immunity from civil liability and mandatory fee shifting rules applied because no federal rule "squarely conflicted" with them.<sup>149</sup> Moreover, applying them was consistent with the twin aims of *Erie*: the law's immunity and fees provisions would have applied had the claim been brought in state court and were "consequential enough" that application in federal court would "discourage forum shopping and avoid inequity."<sup>150</sup>

After a few false starts, the Second Circuit again confronted an anti-SLAPP law in federal court in *La Liberte v. Reid*.<sup>151</sup> The plaintiff's defamation claim there arose out of a TV personality's social media posts suggesting the plaintiff was a racist.<sup>152</sup> Applying California law, the district court dismissed the defamation claim under Rule 12(b)(6) and also granted the defendant's special motion to strike under the California anti-SLAPP statute.<sup>153</sup> The Second Circuit reversed, holding that California's special motion to strike was inapplicable in federal court.<sup>154</sup>

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<sup>149</sup> *Id.* at 809 (citing, e.g., *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979) ("[W]hen state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.")).

<sup>150</sup> *Id.* The provision that limited discovery presented a "closer question." *Id.* But, the court below did not apply it, making it unnecessary to resolve its application in federal court on appeal. *Id.*

<sup>151</sup> 966 F.3d 79 (2d Cir. 2020). In 2013, the Second Circuit implicitly applied the California anti-SLAPP law in *Liberty Synergistics Inc. v. Microflo Ltd.* when it vacated a district court's decision denying an anti-SLAPP motion and remanded the case for "further consideration of the motion to dismiss" pursuant to the anti-SLAPP. 718 F.3d 138, 144 (2d Cir. 2013). Three years later, however, a different panel in the same case chastised "the district court's and the parties' apparent assumption that our decision in the prior appeal" condoned the application of the anti-SLAPP, finding that it had not reached the issue. *Liberty Synergistics Inc. v. Microflo Ltd.*, 637 F. App'x 33, 34 n.1 (2d Cir. 2016); see also *La Liberte v. Reid*, 966 F.3d 79, 86 n.3 (2d Cir. 2020) (observing the same); *Ernst v. Carrigan*, 814 F.3d 116, 122 (2d Cir. 2016) (declining to decide whether the Vermont anti-SLAPP applied in federal court); *Haywood v. St. Michael's Coll.*, 536 F. App'x 123, 124 (2d Cir. 2013) (same).

<sup>152</sup> *La Liberte*, 966 F.3d at 83.

<sup>153</sup> *Id.* at 85.

<sup>154</sup> *Id.* at 87 (citing *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015)). But see *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 427 (2010) (Stevens, J., concurring in part and concurring in judgment) (explaining why *Sibbach* could not carry the weight that the *Shady Grove* plurality put on it).

The *Shady Grove* test, the panel wrote, asked whether a federal procedural rule answered the same question as the California anti-SLAPP and, if it did, the federal rule applied so long as it did not violate the REA.<sup>155</sup> On the first step, the panel found that Rules 12(b) and 56 spoke to the same issue as the special motion to strike: when a court could dismiss a claim prior to trial.<sup>156</sup> The anti-SLAPP law also conflicted with those Rules. Rule 12(b) required a plaintiff to make out a plausible claim, but the special motion required a probability of success.<sup>157</sup> Rule 56 required a showing of a genuine dispute as to material fact, but the special motion nullified “that entitlement by requiring the plaintiff to prove that it is likely . . . that a reasonable jury would find in his favor.”<sup>158</sup>

On the second step, the panel found that neither Rules 12 nor 56 violated the REA.<sup>159</sup> Quoting *Sibbach*, the panel said the only question was whether those Rules “really regulate[d] procedure.”<sup>160</sup> Rules 12 and 56 did just that, affecting only the process for vindicating state rights.<sup>161</sup> They thus passed muster under the REA.

The panel also concluded that Ninth Circuit case law finding the special motion to strike applicable in federal court was unpersuasive.<sup>162</sup> Initially, it noted that several Ninth Circuit judges had questioned their own case law on the issue.<sup>163</sup> It also rejected *amici* arguments that the special motion to strike supplemented rather than conflicted with Rules 12 and 56. Invoking *Shady Grove*, it found that California could no more limit the requirements of Rules 12 and 56 than New York could limit the class certification requirements in Rule 23.<sup>164</sup> Finally, it rejected the *amici*'s

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<sup>155</sup> *La Liberte*, 966 F.3d at 87.

<sup>156</sup> *Id.* (citing *Abbas*, 783 F.3d at 1333–34).

<sup>157</sup> *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Carbone v. Cable News Network, Inc.* 910 F.3d 1345, 1353 (11th Cir. 2018)).

<sup>158</sup> *Id.* (quoting *Carbone*, 910 F.3d at 1353).

<sup>159</sup> *Id.* at 88.

<sup>160</sup> *Id.* (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

<sup>161</sup> *Id.* (citing *Carbone*, 910 F.3d at 1357). The panel did not address why the *Shady Grove* plurality's opinion on the second step should be considered controlling over the five votes of Justice Stevens and the dissenters. See *supra* note 132.

<sup>162</sup> *La Liberte*, 966 F.3d at 87.

<sup>163</sup> *Id.*

<sup>164</sup> See *id.*



argument that the panel’s refusal to apply the California anti-SLAPP motion in federal court would encourage forum shopping.<sup>165</sup>

It also disagreed that its opinion in *Adelson* controlled the analysis.<sup>166</sup> The two cases were not analogous, the panel said, because the structure of the Nevada statute was “quite different” than the California statute.<sup>167</sup> While the California statute created a special motion to strike that imposed a higher pleading standard, the Nevada statute “immunize[d] ‘good faith communication[s]’ . . . thereby effectively raising the *substantive* standard that applies to a defamation claim.”<sup>168</sup> Thus, even though some anti-SLAPP statutes addressed SLAPPs through special procedural mechanisms, the Nevada statute did not, saving it from a conflict with Rules 12 and 56.<sup>169</sup>

Finally, the panel refused to apply the California anti-SLAPP’s mandatory fee shifting because the statute allowed fee shifting only where a party prevailed on a special motion to strike—which the panel had just found inapplicable in federal court.<sup>170</sup> Said differently, because the law only made fees available upon a successful motion to strike and not “to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6),” it was unnecessary to decide whether the fees provision applied in federal court.<sup>171</sup> It noted, however, that California “presumably could have awarded attorneys’ fees to the prevailing party in any defamation action, but it chose not to do so.”<sup>172</sup>

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<sup>165</sup> *Id.* at 88.

<sup>166</sup> *Id.* at 86 n.3.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (quoting *Adelson v. Harris*, 973 F. Supp. 2d 467, 493 n.21 (S.D.N.Y. 2013)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 88.

<sup>171</sup> *Id.* (citing *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1337 n.5 (D.C. Cir. 2015)). *But see* *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429 (1996) (applying New York law regarding excessiveness of a money judgment under C.P.L.R. § 5501(c) based on an itemized verdict pursuant to C.P.L.R. Rule 4111 irrespective of Rule 4111’s inapplicability in federal court); *see also* C.P.L.R. § 5501(c).

<sup>172</sup> *La Liberte*, 966 F.3d at 89 n.6; *see also Abbas*, 783 F.3d at 1335 (“Had the D.C. Council simply wanted to permit courts to award attorney’s fees to prevailing defendants in these kinds of defamation cases, it easily could have done so.”).

We can distill some general principles from *Chandok*, *Adelson*, and *La Liberte*.<sup>173</sup> First, these cases make clear that in determining whether a state’s anti-SLAPP scheme applies in federal court, courts must consider each state law’s unique text and structure.<sup>174</sup> These differences will, in some cases, lead a court to find that one state’s law does not apply while another state’s does. Second, courts must ask whether specific provisions of an anti-SLAPP law apply in federal court and not ask the more abstract question of whether a state’s anti-SLAPP law applies in federal court as a whole.<sup>175</sup> Third, and relatedly, these decisions teach that even within a single state’s anti-SLAPP law, some provisions of that law may apply while other provisions may not.<sup>176</sup>

### III. THE NEW YORK ANTI-SLAPP SCHEME IN FEDERAL COURT

We now address the most pressing question facing the New York anti-SLAPP scheme: whether any part of it applies in federal court.<sup>177</sup> We analyze this question by applying the Court’s *Erie/Sibbach* jurisprudence, as well as the Second Circuit’s anti-SLAPP jurisprudence. As we must, we focus our analysis on the anti-SLAPP scheme’s individual provisions—not on the anti-SLAPP scheme as a whole. We conclude that most but perhaps not all of the New York anti-SLAPP scheme applies in federal court.

To that end, we first remind the reader that New York does not have a single anti-SLAPP statute organized around a special motion to strike like California does; instead, it has an anti-SLAPP scheme comprised of four provisions across two

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<sup>173</sup> The Second Circuit will look to these cases in deciding whether the New York anti-SLAPP scheme applies in federal court. Recently, for example, it cited *La Liberte* in the context of assuming for the sake of argument that the New York anti-SLAPP scheme applied. *Harris v. Am. Acct. Ass’n*, No. 22-811, 2023 WL 2803770, at \*3 (2d Cir. Apr. 6, 2023) (“Even assuming without deciding that the statute applies in a diversity suit in federal court, *cf. La Liberte v. Reid*, 966 F.3d 79, 88 (2d Cir. 2020), and applies to a case . . .”). The Second Circuit recently assumed, again without deciding, that the New York anti-SLAPP scheme applied in federal court. *See Kesner v. Dow Jones & Co., Inc.*, No. 22-875, 2023 WL 4072929, at \*2 (2d Cir. June 20, 2023).

<sup>174</sup> *See La Liberte*, 966 F.3d at 86 n.3.

<sup>175</sup> *See Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014); *Chandok v. Klessig*, 632 F.3d 803, 819 (2d Cir. 2011).

<sup>176</sup> *See Adelson*, 774 F.3d at 809.

<sup>177</sup> *La Liberte*, 966 F.3d at 86 n.3 (noting that application of anti-SLAPP law in federal court depends on the nature of the particular law); *Sweigert v. Goodman*, No. 18-cv-08653, ECF No. 321 at 32–33 (S.D.N.Y. Oct. 29, 2021) (conducting *seriatim* analyses).

codes.<sup>178</sup> Two are in the C.P.L.R.: Rule 3211(g), which provides a gloss to a motion to dismiss under Rule 3211(a)(7), and Rule 3212(h), which does the same for summary judgment motions under Rule 3212(a). Two others are in the C.R.L.: § 70-a, which provides a cause of action for damages, and § 76-a, which defines the scope of the scheme and sets a fault standard.<sup>179</sup> We address each in turn.

#### A. Does § 70-a Apply in Federal Court? Yes.

Section 70-a's cause of action for damages applies in federal court. Under the 1992 law, no court questioned whether it did. It was only after the 2020 amendments, which did not significantly alter § 70-a's text, that federal courts began to do so.<sup>180</sup> This reticence can be traced to growing controversies around the country over the applicability of anti-SLAPPs in federal court. But this debate sheds little light on whether the New York anti-SLAPP scheme, specifically, applies in federal court. Instead, courts must undertake an *Erie/Sibbach* analysis that accounts for the New York anti-SLAPP scheme's unique text and structure.<sup>181</sup>

#### 1. Section 70-a applies in federal court sitting in diversity

Section 70-a is a substantive cause of action that applies in federal court. Under it, "a defendant in an action involving public petition and participation" may maintain "an action, claim, cross claim, or counterclaim."<sup>182</sup> A SLAPP defendant asserting such a claim can seek damages, including costs and fees.<sup>183</sup> To be entitled to

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<sup>178</sup> See, e.g., *Cheng v. Neumann*, No. 2:21-cv-00181, 2022 WL 326785, at \*3–\*4 (D. Me. Feb. 3, 2022) (noting "New York's anti-SLAPP law is spread across" various statutes and contrasting Maine's "more concise anti-SLAPP statute").

<sup>179</sup> See, e.g., *Sweigert v. Goodman*, No. 18-cv-08653, 2021 WL 1578097, at \*1 (S.D.N.Y. Apr. 22, 2021) (citing C.R.L. §§ 70-a, 76-a; C.P.L.R. Rules 3211(g), 3212(h)).

<sup>180</sup> The Legislature added a single clause to § 70-a that requires the automatic award of fees and costs when a party obtains a dismissal under Rules 3211(g) or 3212(h). It does not, however, condition § 70-a on obtaining such a judgment. See *supra* text accompanying notes 58–59 and *infra* text accompanying notes 221–229.

<sup>181</sup> Capt. Michelle B. Kalas, *Defamation Litig. in Army Sexual Assault Prosecutions*, 2019-6 ARMY L. 64, 69 n.28 (2019) (noting that "New York is unique in that it treats the Anti-SLAPP right as a counterclaim").

<sup>182</sup> C.R.L. § 70-a(1).

<sup>183</sup> *Id.*

costs and fees, the defendant must show that the SLAPP “was commenced or continued without a substantial basis in fact and law.”<sup>184</sup> While she can do so by obtaining a judgment premised on Rules 3211(g) or 3212(h), a judgment under those Rules is not required.<sup>185</sup> The defendant can also seek compensatory damages if she shows that the plaintiff initiated the SLAPP with the purpose of “maliciously inhibiting the free exercise of speech.”<sup>186</sup> She can seek punitive damages if she can show that the plaintiff initiated it solely for that purpose.<sup>187</sup>

The Second Circuit and at least eleven district courts applied the 1992 scheme’s § 70-a in federal court without question.<sup>188</sup> Since the 2020 amendments, five district courts have held or suggested that § 70-a applies in federal court.<sup>189</sup> At least nine

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<sup>184</sup> *Id.* § 70-a(1)(a).

<sup>185</sup> *Id.* (“[C]osts and attorney’s fees shall be recovered upon a demonstration, *including* an adjudication pursuant to [Rule 3211(g)] or [Rule 3212(h)], . . . that the action . . . was commenced or continued without a substantial basis in fact and law.” (emphasis added)).

<sup>186</sup> *Id.* § 70-a(1)(b).

<sup>187</sup> *Id.* § 70-a(1)(c).

<sup>188</sup> *Chandok v. Klessig*, 632 F.3d 803 (2d Cir. 2011) (Kearse, J.); *Dynamic Energy Sols., LLC v. Pinney*, 387 F. Supp. 3d 176 (N.D.N.Y. 2019) (McAvoy, J.); *In re Elysium Health-Chromadex Litig.*, No. 17-cv-7394, 2018 WL 4907590 (S.D.N.Y. Sept. 27, 2018) (McMahon, J.); *Woods Servs., Inc. v. Disability Advocs., Inc.*, 342 F. Supp. 3d 592 (E.D. Pa. 2018) (Baylson, J.); *Egiazaryan v. Zalmayev*, No. 11-cv-2670, 2014 WL 1244790 (S.D.N.Y. Mar. 19, 2014) (Castel, J.); *Egiazaryan v. Zalmayev*, No. 11-cv-2670, 2013 WL 6486258 (S.D.N.Y. Dec. 11, 2013) (Gorenstein, J.); *Gilman v. Spitzer*, 902 F. Supp. 2d 389 (S.D.N.Y. 2012) (Oetken, J.); *Egiazaryan v. Zalmayev*, No. 11-cv-2670, 2011 WL 6097136 (S.D.N.Y. Dec. 7, 2011) (Castel, J.); *Chandok v. Klessig*, 648 F. Supp. 2d 449 (N.D.N.Y. 2009) (Hood, J.); *Raghavendra v. Trustees of Columbia Univ.*, No. 06-cv-6841, 2008 WL 2696226 (S.D.N.Y. July 7, 2008) (Crotty, J.); *Friends of Rockland Shelter Animals, Inc. (FORSA) v. Mullen*, 313 F. Supp. 2d 339 (S.D.N.Y. 2004) (Connor, J.); *PGC Prop. v. Wainscott/Sagaponack Prop. Owners, Inc.*, 250 F. Supp. 2d 136 (E.D.N.Y. 2003) (Spatt, J.). True, several of these courts dismissed such claims, but they did so on the merits. The headwinds § 70-a faced prior to 2020 were unrelated to *Erie*. For example, courts questioned where federal court was the proper venue for a § 70-a claim where the SLAPP was filed in state court. *See, e.g., Shchegol v. Rabinovich*, No. 98-cv-5616, 1999 WL 398025 (S.D.N.Y. June 9, 1999). Courts also refused to apply § 70-a where the alleged SLAPP sounded in federal law. *See, e.g., Ginx, Inc. v. Soho All.*, 720 F. Supp. 2d 342 (S.D.N.Y. 2010).

<sup>189</sup> *Goldfarb v. Channel One Russia*, No. 18-cv-8128, 2023 WL 2586142 (S.D.N.Y. Mar. 21, 2023) (Cronan, J.); *Max v. Lissner*, No. 22-cv-5070, 2023 WL 2346365 (S.D.N.Y. Mar. 3, 2023) (Caproni, J.); *Cheng v. Neumann*, No. 21-cv-00181, 2022 WL 326785 (D. Me. Feb. 3, 2022) (Walker, J.); *Harris v. Am. Acct. Ass’n*, No. 20-cv-01057, 2021 WL 5505515 (N.D.N.Y. Nov. 24, 2021) (D’Agostino, J.); *Goldman v. Reddington*, No. 18-cv-3662, 2021 WL 4099462 (E.D.N.Y. Sept. 9,

have disagreed.<sup>190</sup> Applying our four-part *Erie* test, those courts finding that § 70-a is applicable in federal court have the better argument. First, we ask whether a sufficiently broad federal rule controls the issue addressed by § 70-a and, if so, whether that rule conflicts with state law. If it does, we then ask whether the federal rule violates the REA. Absent an applicable federal rule, we move to the “‘relatively unguided *Erie* choice’” to determine if state law provides the rule of decision before asking whether countervailing federal interests displace the state rule.<sup>191</sup>

**a. No federal rule is sufficiently broad to control the issue**

No federal rule is sufficiently broad to control the issue addressed by § 70-a: whether a SLAPP defendant can recover damages for being forced to defend against a SLAPP. The oft-invoked Rules 12 and 56 do not speak to this issue because they do not establish a cause of action.<sup>192</sup> Instead, they establish “the circumstances under which a court must dismiss a plaintiff’s claim before trial.”<sup>193</sup> Nor does Rule 11 speak to this issue; instead, it provides for sanctions against counsel for misconduct

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2021) (Kovner, J.); *see also* Sweigert v. Goodman, No. 18-cv-08653, ECF No. 321 (S.D.N.Y. Oct. 29, 2021) (Aaron, M.J.) (admitting, without deciding, that “[i]t may be that Defendant can seek to obtain costs pursuant to § 70-a without invoking the special summary judgment procedures and, therefore, avoid a conflict with Rule 56”), *adopted by* 2022 WL 168080, at \*9 (S.D.N.Y. Jan. 19, 2022) (Caproni, J.).

<sup>190</sup> Unlimited Cellular, Inc. v. Red Points Solutions & Red Points, Inc., No. 21-cv-10638, 2023 WL 4029824, at \*9 (S.D.N.Y. June 14, 2023) (Román, J.); Exec. Park Partners LLC v. Benicci, Inc., No. 22-cv-02560, 2023 WL 3739093 (S.D.N.Y. May 31, 2023) (Halpern, J.); Prince v. Intercept, No. 21-cv-10075, 2022 WL 5243417 (S.D.N.Y. Oct. 6, 2022) (Preska, J.); Maron v. Legal Aid Soc’y, No. 21-cv-5960, 2022 WL 1910247 (S.D.N.Y. June 2, 2022) (Polk Failla, J.); Friedman v. Bloomberg, L.P., No. 15-cv-443, 2022 WL 1004578 (D. Conn. Apr. 4, 2022) (Thompson, J.); Kesner v. Buhl, 590 F. Supp. 3d 680 (S.D.N.Y. 2022) (Engelmayer, J.); Carroll v. Trump, No. 20-cv-7311, 2022 WL 748128 (S.D.N.Y. Mar. 11, 2022) (Kaplan, J.); Brady v. NYP Holdings, Inc., No. 21-cv-3482, 2022 WL 992631 (S.D.N.Y. Mar. 31, 2022) (Liman, J.); Nat’l Acad. of Television Arts & Scis., Inc. v. Multimedia Sys. Design, Inc., 551 F. Supp. 3d 408 (S.D.N.Y. 2021) (Caproni, J.); *see also* Waite v. Gonzalez, No. 21-cv-2506, 2023 WL 2742296, at \*12 (E.D.N.Y. Mar. 31, 2023); Bauer v. Baud, No. 22-cv-1822, 2023 WL 2307413, at \*8 n.10 (S.D.N.Y. Mar. 1, 2023); Ctr. for Med. Progress v. Planned Parenthood Fed’n of Am., 551 F. Supp. 3d 320, 333 (S.D.N.Y. 2021).

<sup>191</sup> *See supra* text accompanying notes 133–138.

<sup>192</sup> *See infra* Part III.A.2.a (providing additional analysis).

<sup>193</sup> *La Liberté v. Reid*, 966 F.3d 79, 87 (2d Cir. 2020).

in litigation but does not provide for damages to a party targeted with a SLAPP nor serve to discourage SLAPPs.<sup>194</sup>

Said differently, unlike Rules 12 and 56, § 70-a does not define the process for dismissal before trial as it is a claim not a defense or a special motion to strike or dismiss.<sup>195</sup> To the extent the New York anti-SLAPP scheme speaks to dismissal at all, it does so only in Rules 3211(g) and 3212(h), which operate independently of § 70-a.<sup>196</sup> As to Rule 11, § 70-a does not provide a vehicle by which courts can sanction counsel for their misconduct in litigation. Section 70-a provides a means to recover damages from a SLAPP plaintiff who brought a SLAPP lawsuit lacking a substantial basis irrespective of misconduct during the litigation. While we think the analysis at this first step is just that simple, we belabor both points in Part III.A.2 below because of the significant confusion among federal courts on this point.

Our conclusion that no federal rule is sufficiently broad to control the issue addressed by § 70-a finds support in *Goldman v. Reddington*, an opinion by Judge Rachel Kovner finding that § 70-a applied in federal court.<sup>197</sup> There, the plaintiff argued the defendant should not be allowed to assert a counterclaim under § 70-a because Rule 3212(h) conflicted with Rule 56.<sup>198</sup> But the SLAPP defendant, Judge Kovner said, did not invoke any special summary judgment procedures under Rule 3212(g) by asserting a claim under § 70-a.<sup>199</sup> Indeed, the plaintiff had not explained “why a litigant would be unable to bring an anti-SLAPP counterclaim . . . merely because” another “portion of the anti-SLAPP statute contain[ed] special summary-judgment rules” that might conflict with Rule 56.<sup>200</sup> While § 70-a “contemplate[d]

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<sup>194</sup> See *infra* Part III.A.2.b (providing additional analysis).

<sup>195</sup> See, e.g., *ImageTrend, Inc. v. Locality Media, Inc.*, No. 22-cv-0254, 2022 WL 17128009, at \*2 (D. Minn. Nov. 22, 2022) (explaining that the New York anti-SLAPP scheme does not “negate[] an essential element of [Plaintiff’s] claims” but instead “permits Defendants to seek damages from [Plaintiff] for commencing or maintaining a baseless lawsuit by asserting a counterclaim”).

<sup>196</sup> Rules 3211(g) and 3212(h) are discussed further in Part III.C. We note now that even this overstates the function of these Rules as neither is a vehicle for dismissal. Instead, they modify the generally applicable procedures for motions to dismiss and for summary judgment under Rules 3211(a) and 3212(a).

<sup>197</sup> *Goldman v. Reddington*, No. 18-cv-03662, 2021 WL 4099462, at \*5 (E.D.N.Y. Sept. 9, 2021).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

that a party pursuing an anti-SLAPP claim will be able to use those special summary-judgment procedures,” its text made clear that such a party could seek damages under § 70-a “without using those procedures.”<sup>201</sup>

To prove the point, take a hypothetical § 70-a counterclaim asserted in response to a SLAPP defamation claim. Assume the parties filed cross-motions for summary judgment on the plaintiff’s defamation claim and the defendant’s § 70-a counterclaim. Our hypothetical court would still assess each of the cross-motions under Rule 56’s genuine-dispute-of-material-fact standard. It could grant the defendant’s motion for summary judgment as to the defamation claim, finding, for example, that the alleged defamation was a pure opinion. It could also grant the defendant’s motion for summary judgment as to the § 70-a claim, finding that there was no genuine dispute of material fact as to whether the defamation claim lacked a substantial basis because it was a matter pure opinion.

In this example, like any other we can think of, the presence of the § 70-a counterclaim in no way changes the application of Rule 56 either to the motion for summary judgment on the defamation claim or on the § 70-a claim. The example holds even if the court finds for the plaintiff on both motions or denies summary judgment to either party entirely. The reason for this is obvious: Rule 56 provides the manner and means by which the litigants’ substantive claims under state defamation law and § 70-a are adjudicated. Meanwhile, defamation law and § 70-a define the metes and the bounds of substantive rights being asserted.

Going back to our hypothetical court, assume further that the plaintiff’s lawyer had been filing affidavits he knew to be false, resulting in the defendant’s counsel sending a Rule 11 letter and later filing a motion for sanctions. The presence of the § 70-a claim in no way would affect adjudication of the motion for sanctions either. Rather, the court would simply ask whether the filing of knowingly false affidavits was objectively unreasonable under Rule 11 and, if so, impose sanctions on the

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<sup>201</sup> *Id.* *Burlington Northern Railroad Co. v. Woods* is not to the contrary. There, Alabama’s mandatory appeal penalty had the same purpose as Federal Rule of Appellate Procedure 38: to discourage frivolous appeals. 480 U.S. 1, 7 (1987). As such, the Court found that “the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute,” thereby precluding the statute’s application in federal court. *Id.* As discussed here, however, § 70-a and Rules 11, 12, and 56’s purposes are not at all coextensive as each serves unique, independent purposes. See *infra* Part III.A.1.

SLAPP plaintiff's attorney for his misconduct in litigation.<sup>202</sup> Again, this motion would be unaffected by § 70-a. Based on the foregoing, we fail to see the conflict as between § 70-a and Rules 11, 12, and 56.

**b. *Erie* favors application of § 70-a in federal court**

Because no federal rule addresses the issue, we need not ask whether the federal rule complies with the REA and can jump ahead to the third step. Here, we consider whether § 70-a provides the applicable rule of decision that must be applied and whether applying § 70-a in federal court is consistent with *Erie*'s twin aims of avoiding forum shopping and the inequitable administration of the law.<sup>203</sup> We conclude that *Erie* favors application of § 70-a in federal court.

Section 70-a provides the rule of decision because it is a cause of action itself. If federal courts refuse to apply § 70-a, they deprive a claimant of a state-created right, in this case. But, as the Supreme Court said in *Byrd*, "It was decided in *Erie R. Co. v. Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts."<sup>204</sup> *Byrd*'s admonition applies forcefully to debates over § 70-a's application in federal court. In comparison to *Byrd*, where the close question was whether the rule requiring judges to determine immunity was sufficiently "bound up with the definition of the rights and obligations of the parties," the issue with § 70-a is clear cut: § 70-a itself defines the "rights and obligations" of the parties as a substantive claim. As such, federal courts sitting in diversity cannot refuse to apply it.<sup>205</sup>

Next, applying § 70-a in federal court advances the twin aims of *Erie*. Applying § 70-a in federal court discourages forum shopping as SLAPP plaintiffs wanting to avoid anti-SLAPP counterclaims will be unable to do so by strategically filing their

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<sup>202</sup> Ted Lapidus, *S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997).

<sup>203</sup> *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

<sup>204</sup> *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535 (1958).

<sup>205</sup> *Id.* at 536; see also *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 558 (1949) (Rutledge, J., dissenting) (noting that *Erie* "held that federal courts in diversity cases must apply state law . . . in determining matters of substantive law, in particular . . . whether a cause of action exists"); *Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1259 (11th Cir. 2011) ("It is plain that the [Florida Deceptive and Unfair Trade Practices Act] itself applies in federal court, as substantive law, because it creates a cause of action.").



claims in federal court.<sup>206</sup> Applying it would also lead to the equitable administration of the law by preventing “discrimination by noncitizens against citizens.”<sup>207</sup> Were § 70-a not applied in federal court, citizens of New York would be deprived of a substantive claim that they would otherwise possess in state court simply because diverse SLAPP plaintiffs filed in federal court.<sup>208</sup>

**c. No countervailing federal interest exists**

Finally, we can make quick work of the fourth step: determining whether any countervailing federal interest militates against applying § 70-a.<sup>209</sup> We see none. If anything, not applying § 70-a would intrude on federal interests by depriving litigants of their rights to a jury trial under the Seventh Amendment despite the substantive cause of action otherwise being properly before a court sitting in diversity.

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In the end, an application of first principles leads to one conclusion: § 70-a, as a cause of action for damages, applies in a federal court sitting in diversity like any other state-created cause of action. No federal rule controls the issues addressed by § 70-a. And, § 70-a’s application in federal court would advance the twin aims of *Erie* while not intruding on any countervailing federal interests. For each of these reasons, settled Supreme Court precedent requires federal courts to apply § 70-a in diversity despite Federal Rules 11, 12, and 56.

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<sup>206</sup> *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (noting Nevada SLAPP statute’s provision regarding fee shifting applied in federal court in part because it was “consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity”); *see also Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010).

<sup>207</sup> *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938); *see also Adelson*, 774 F.3d at 809; *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 866 (2d Cir. 1981) (“It would be inequitable to allow a party to benefit or suffer . . . when a similarly situated non-diverse party would not face such a consequence.”); *accord Godin*, 629 F.3d at 92 (failing to apply anti-SLAPP fee shifting would “result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court”).

<sup>208</sup> Filing in federal court will not absolve a SLAPP plaintiff of those risks entirely. Even were § 70-a found not to apply there, a defendant could file a § 70-a claim in state court *after* resolution of the SLAPP in federal court. But, even so, this approach has little to commend it: “the most efficient procedure . . . would be to counterclaim under the anti-SLAPP statute in the face of the original lawsuit.” *Dynamic Energy Sols., LLC v. Pinney*, 387 F. Supp. 3d 176, 184 n.1 (N.D.N.Y. 2019).

<sup>209</sup> *Byrd*, 356 U.S. at 537–38; *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431–36 (1996).

## 2. Case law to the contrary is not persuasive

Having established that § 70-a applies in federal court, we next explain why recent decisions to the contrary are wrong. Courts have refused to apply § 70-a for two reasons. First, they maintain § 70-a conflicts with Rules 12 and 56. Alternatively, they maintain that § 70-a conflicts with the sanctions regime under Rule 11. Neither contention is persuasive.

### a. Rules 12 and 56 do not conflict with § 70-a

Decisions finding that § 70-a conflicts with Rules 12 and 56 begin with Judge Valerie Caproni's opinion in *National Academy of Television Arts & Sciences, Inc. v. Multimedia System Design, Inc.*<sup>210</sup> After the plaintiffs filed a lawsuit for trademark infringement and defamation, the defendant brought a counterclaim pursuant to § 70-a.<sup>211</sup> Plaintiffs, however, argued that § 70-a was “inapplicable in federal court because the law's substantial basis standard conflicts” with Rule 12(b)(6).<sup>212</sup> Judge Caproni agreed.

After setting out the general rules under *Erie*, Judge Caproni found that the “Second Circuit's decision in [*La Liberte*] all but resolves the question” before the court.<sup>213</sup> In *La Liberte*, she explained, the court of appeals considered whether the “special motion-to-strike provision of California's anti-SLAPP, which requires outright dismissal unless the plaintiff can ‘establish[] a probability that he or she will prevail on the claim,’ could apply in federal court.”<sup>214</sup> The court of appeals, she explained, held that it could not because the special motion to strike's probability standard conflicted with that under Rules 12 and 56.<sup>215</sup>

Turning back to the § 70-a counterclaim, Judge Caproni applied the Second Circuit's reasoning in *La Liberte* to conclude that § 70-a was inapplicable in federal court because, like the California anti-SLAPP's special motion to strike, § 70-a too imposed a different pleading standard than that under Rules 12 and 56.<sup>216</sup> She

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<sup>210</sup> Nat'l Acad. of Television Arts & Scis., Inc. v. Multimedia Sys. Design, Inc., 551 F. Supp. 3d 408, 430–32 (S.D.N.Y. 2021).

<sup>211</sup> *Id.* at 430.

<sup>212</sup> *Id.* at 431.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

reached this conclusion without acknowledging *Chandok v. Klessig* where the Second Circuit applied the 1992 version of § 70-a in federal court nor explaining why the nearly identical 2020 version of § 70-a required a different result.<sup>217</sup> In addition to being contrary to *Chandok*, Judge Caproni's reasoning is erroneous for at least three other reasons.

First, Judge Caproni failed to ask the right question: whether Rule 12 was sufficiently broad to conflict with § 70-a. Instead, she asked whether Rule 12 was sufficiently broad to conflict with the anti-SLAPP scheme's dismissal procedures under Rule 3211(g). She then found a conflict because under Rule 3211(g) a motion to dismiss must be granted unless the underlying claim has a "substantial basis," which was a "different, and higher burden on the plaintiff" than that imposed on a motion to dismiss under Rule 12.<sup>218</sup> But to the extent the defendant was asserting an affirmative counterclaim under § 70-a, the defendant can assert such a claim and the court can rule on such a claim independent of Rule 3211(g)'s applicability in federal court.<sup>219</sup>

Second and relatedly, Judge Caproni conflated Rule 3211(g) with § 70-a when she found that under § 70-a a SLAPP defendant can recover damages and fees only by bringing a motion to dismiss pursuant to Rule 3211(g).<sup>220</sup> But this is not true. Section 70-a does not condition an award of damages on a successful motion under Rule 3211(g). Rather, § 70-a permits damages to be recovered "upon a demonstration, *including* an adjudication pursuant to" Rule 3211(g), that an action lacked "a substantial basis in fact and law."<sup>221</sup> As one court observed, the use of the "qualify-

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<sup>217</sup> 632 F.3d 803, 812 (2d Cir.2011).

<sup>218</sup> *Id.* at 431–32 (citing C.P.L.R. Rule 3211(g)).

<sup>219</sup> *Id.* at 431 n.15 (dismissing out of hand defendant's argument that § 70-a was a substantive cause of action).

<sup>220</sup> *Nat'l Acad. of Television Arts & Scis., Inc.*, 551 F. Supp. 3d at 430.

<sup>221</sup> C.R.L. § 70-a(1)(a) (emphasis added). Notably, the "including" clause was added to § 70-a in the 2020 amendments. As the 2020 amendments were meant to broaden the application of the anti-SLAPP, it would be strange indeed to construe one of those amendments as silently foreclosing § 70-a's application in federal court.

ing word ‘including’” means that an anti-SLAPP plaintiff may use a judgment pursuant to Rule 3211(g) to make out a *prima facie* § 70-a claim but did “not foreclose the possibility” that he could make the substantial basis showing by other means.<sup>222</sup>

Judge Caproni also failed to recognize the distinct purposes of Rule 3211(g) and § 70-a. True enough, both provisions contain the “substantial basis” language, but that language plays different roles in each place. Rule 3211(g) requires courts to use “substantial basis” as a *pleading standard* to determine when a claim must be dismissed. The “substantial basis” language in § 70-a, however, does not act as a pleading standard; rather, it is an *element* of the § 70-a claim itself, as Judge Kovner properly recognized.<sup>223</sup> Thus, courts may, say, grant a Rule 12 motion to dismiss a SLAPP claim under the federal plausibility standard (rather than the “substantial basis” standard under Rule 3211(g)) *and* then turn to the separate question of whether to allow a § 70-a claim for damages because the underlying SLAPP claim also lacked a substantial basis under New York law.<sup>224</sup>

Third, Judge Caproni misconstrued Rule 3211(g) as equivalent to a special motion to strike under the California anti-SLAPP. Judge Caproni broadcast this error by referring to Rule 3211(g) as a “special motion to dismiss”—apparently influenced by the Second Circuit’s discussion in *La Liberte* of California’s “special motion to strike.”<sup>225</sup> But there is no such thing as a “special motion to dismiss” under the New York anti-SLAPP scheme. In fact, unlike California, no portion of the anti-SLAPP scheme provides a vehicle for dismissal. Instead, motions to dismiss a SLAPP in state court are made under the generally applicable rule for failure to state a claim, Rule 3211(a)(7).<sup>226</sup> That is, Rule 3211(g) only “*facilitate[s]* the early dismissal of the ‘SLAPP’ suit”; it is not itself a motion to dismiss.<sup>227</sup>

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<sup>222</sup> RSR Corp. v. Leg Q LLC, No. 650342/2019, 2021 WL 4523615, at \*4 (Sup. Ct., N.Y. Cnty. Oct. 10, 2021).

<sup>223</sup> Goldman v. Reddington, No. 18-cv-03662, 2021 WL 4099462, at \*5 (E.D.N.Y. Sept. 9, 2021).

<sup>224</sup> See, e.g., Harris v. Am. Acct. Ass’n, No. 20-cv-01057, 2021 WL 5505515, at \*13 (N.D.N.Y. Nov. 24, 2021) (applying Rule 12’s plausibility standard to a motion to dismiss and awarding fees under § 70-a).

<sup>225</sup> *Nat’l Acad. of Television Arts & Scis., Inc.*, 551 F. Supp. 3d at 430.

<sup>226</sup> See, e.g., Southampton Day Camp Realty, LLC v. Gormon, 118 A.D.3d 976, 978 (2014) (explaining that Rule 3211(g)’s standard applies to motions to dismiss made under Rule 3211(a)(7) for failure to state a claim).

<sup>227</sup> *Practice Commentaries*, *supra* note 33, C3211:73 (emphasis added).

The sum of these errors led Judge Caproni mistakenly to believe that *La Liberté* resolved the question of whether § 70-a applied in federal court. As explained, however, whether provisions of an anti-SLAPP law apply in federal court depends on the anti-SLAPP law's unique text and structure. To the extent a state's anti-SLAPP resembles California's (and some do), *La Liberté*'s reasoning may resolve the issue in that case. The text and structure of New York's anti-SLAPP scheme, however, is entirely different from California's law. Thus, rather than relying on *La Liberté*, Judge Caproni would have been better off following the lead of the Second Circuit in *Chandok* and, like that court, applying § 70-a.

One last point before moving on: despite Judge Caproni's reliance on *La Liberté*, she failed to acknowledge the import of one part of that decision that was relevant to whether § 70-a applied in federal court. The court in *La Liberté* observed in a footnote that California "could have awarded attorneys' fees to the prevailing party in any defamation action," which "presumably" would have applied in federal court.<sup>228</sup> Section 70-a is essentially that—an award of attorneys' fees to a prevailing SLAPP defendant—and, thus, applies in federal court consistent with *La Liberté*'s observation in the margin regarding attorneys' fees. In sum, *La Liberté* is not a prohibition on the application of anti-SLAPPs in federal court as some courts seem to think; it is a recognition that whether such laws apply will depend on how they are written.

Tellingly, Judge Caproni has since walked back much of the logic of *National Academy*. After *National Academy*, Judge Caproni adopted a report and recommendation finding that Rule 3211(g) and § 70-a operated independently—a conclusion contrary to her prior reasoning.<sup>229</sup> Then, she backtracked again in *Max v. Lissner* by accepting the very argument she rejected in *National Academy*: that an anti-SLAPP claim brought pursuant to § 70-a was applicable in federal court.<sup>230</sup>

In *Max*, the daughter of artist Peter Max filed a complaint in federal court pursuant to § 70-a in response to a state court proceeding filed by her father's court-

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<sup>228</sup> *La Liberté*, 966 F.3d at 89 n.6; see also *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) ("Had the D.C. Council simply wanted to permit courts to award attorney's fees to prevailing defendants in these kinds of defamation cases, it easily could have done so.").

<sup>229</sup> *Sweigert v. Goodman*, No. 18-cv-8653, 2022 WL 168080, at \*9 (S.D.N.Y. Jan. 19, 2022) (Caproni, J.).

<sup>230</sup> No. 22-cv-5070, 2023 WL 2346365, at \*8 (S.D.N.Y. Mar. 3, 2023).

appointed guardian.<sup>231</sup> The defendant then filed a motion to dismiss the § 70-a claim arguing that § 70-a was inapplicable in federal court.<sup>232</sup> Judge Caproni, however, disagreed, finding this time that § 70-a did apply in federal court. Cases like *National Academy* were inapposite, she said, because in those cases “a defamation defendant in federal court asserts an anti-SLAPP defense to the federal court defamation complaint and attempts to invoke the heightened pleading standard that is part of New York’s anti-SLAPP provisions.”<sup>233</sup> Those cases thus did not “stand for the proposition that the federal courts cannot entertain a claim that a defamation plaintiff violated the substantive state law by commencing a defamation lawsuit in state court based on statements made in connection with an issue of public interest without a substantial basis in fact and law.”<sup>234</sup>

Judge Caproni’s attempt to distinguish *National Academy* in *Max* is unpersuasive. First, she asserts that the § 70-a claims in *National Academy* and cases like it were inapplicable in federal court because the defendants invoked the heightened dismissal standards under Rule 3211(g). But even if that is right, it remains unclear why their § 70-a claims could not be applied in federal court anyway without resort to heightened standards elsewhere in the anti-SLAPP scheme.<sup>235</sup> Second, we are unaware of any authority supporting the proposition that a substantive claim is applicable in federal court when raised as a claim but inapplicable when raised as a counterclaim. Whether a state law claim applies in federal court rises and falls on whether it is substantive and not on whether it is pleaded under Federal Rules of Civil Procedure 8 or 13.

**b. Rule 11 does not conflict with § 70-a**

Other courts have found that § 70-a also conflicts with Rule 11, including Judge Lewis Liman in *Brady v. NYP Holdings, Inc.* There, Judge Liman found § 70-a conflicted with Rule 11 because “Rule 11 address[ed] sanctions for filings in federal

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<sup>231</sup> *Id.* at \* 1.

<sup>232</sup> *Id.* at \* 8.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Sweigert*, 2022 WL 168080, at \* 8–\* 9 (considering § 70-a claim to the extent it “does not invoke the statute’s particular summary judgment procedures but is simply seeking costs and attorney’s fees”).

court” that were inconsistent with the sanctions available under § 70-a.<sup>236</sup> Rule 11 sanctions could only be imposed where the other party had notice and an opportunity to respond.<sup>237</sup> Section 70-a made no such allowances.<sup>238</sup> While Rule 11 sanctions were permissive, § 70-a mandated courts to award fees.<sup>239</sup> As a result, he held, “Rule 11—and not the anti-SLAPP provision—would govern any application by Defendants for sanctions.”<sup>240</sup>

Like Judge Caproni, Judge Liman misunderstood the New York anti-SLAPP scheme. First, he mischaracterized § 70-a as a sanctions regime. But, far from being a sanctions regime, we have to remind ourselves that § 70-a is a statute that allows a SLAPP defendant to maintain a cause of action for damages.<sup>241</sup> Section 70-a “compensates prevailing parties for litigation costs and other injuries endured because of an opposing party’s decision to present meritless or bad-faith claims or defenses.”<sup>242</sup> It is meant to make a SLAPP defendant whole for being forced into defending against a SLAPP, placing them “in the same position as [they] would have been in had there been no injury.”<sup>243</sup> It thus discourages the prosecution of certain claims by a party that, in the New York Legislature’s view, pose a threat to the free exercise of constitutional rights.

Rule 11 does not address that issue in any way. It imposes a distinct “duty on attorneys and unrepresented parties to certify that, to the best of their knowledge, their filings are or will be supported by the evidence and the law and are not made for any ‘improper purpose.’”<sup>244</sup> Thus, it punishes *conduct in litigation* by attorneys

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<sup>236</sup> *Brady v. NYP Holdings, Inc.*, No. 21-cv-3482, 2022 WL 992631, at \*11 (S.D.N.Y. Mar. 31, 2022); *accord Max*, 2023 WL 2346365, at \*10 (“If Plaintiff can, consistent with Rule 11, Fed. R. Civ. P., shore up her anti-SLAPP claim, she may seek leave to file an Amended Complaint limited to that claim.”); *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257, 2023 WL 1067961, at \*7 (Del. Super. Ct. Jan. 27, 2023) (questioning whether § 70-a conflicted with Delaware Civil Rule 11).

<sup>237</sup> *Brady*, 2022 WL 992631, at \*11.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> C.R.L. § 70-a(1).

<sup>242</sup> *Showan v. Pressdee*, 922 F.3d 1211, 1225 (11th Cir. 2019).

<sup>243</sup> *Id.* at 1226 (citation and quotation marks omitted).

<sup>244</sup> *Id.* at 1225.

(or pro se parties) rather than discouraging the prosecution of certain claims, like SLAPPs that lack a substantial basis.<sup>245</sup> Rule 11 also is “not designed to make the movant whole for any and all injuries sustained as a result of a frivolous filing, and any monetary sanctions one party happens to receive from the other [under Rule 11] are incidental to the rule’s deterrent purpose.”<sup>246</sup> In short, Rule 11 and § 70-a “have categorically distinct purposes.”<sup>247</sup>

Second, Judge Liman erred in finding that § 70-a conflicted with Rule 11 on the theory that it provides for sanctions in a greater number of cases than Rule 11.<sup>248</sup> On the contrary, setting aside that § 70-a provides damages and not sanctions, it only applies to actions involving public petition and participation and can only be asserted by a defendant in such actions. Rule 11, on the other hand, is generally applicable to all actions and parties.<sup>249</sup> As the Tenth Circuit concluded in assessing a potential conflict with Rule 11, “[b]y protecting a particular class of defendants, . . . the [state] statute vindicates substantive interests of Colorado not covered by Rule 11.”<sup>250</sup>

Judge Liman’s approach is also contrary to the weight of authority. Federal courts considering state fee-shifting rules and state substantive causes of action meant to discourage certain kinds of abusive litigation regularly conclude that such rules are substantive and do not conflict with Rule 11.<sup>251</sup> As the Eleventh Circuit has explained, “Deterrence [under Rule 11] is forward-looking and concerned with

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<sup>245</sup> See C.R.L. § 70-a(1) (permitting filing of claim for damages against “any person who commenced or continued such action”).

<sup>246</sup> *Showan*, 922 F.3d at 1226.

<sup>247</sup> *Id.*

<sup>248</sup> *Brady v. NYP Holdings, Inc.*, No. 21-cv-3482, 2022 WL 992631, at \*11 (S.D.N.Y. Mar. 31, 2022).

<sup>249</sup> C.R.L. § 70-a(1).

<sup>250</sup> *Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1540 (10th Cir. 1996).

<sup>251</sup> See, e.g., *Showan*, 922 F.3d at 1226; see also, e.g., *Cook v. Greenleaf Twp.*, Michigan, 861 F. App’x 31, 34 (6th Cir. 2021) (“When a state legislature allows a party to seek attorney’s fees as part of the recovery on a successful state-law claim, federal courts view this legislative ‘policy’ choice as substantive and so applicable in federal court.” (citation omitted)); *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1279 (10th Cir. 2011); *Degussa Admixtures, Inc. v. Burnett*, 277 F. App’x 530, 533 (6th Cir. 2008) (“As a state law that ‘permits a prevailing party in [a] certain class[] of litigation to recover fees,’ the attorney-fee provision ‘embod[ies] a substantive policy’ of the State.” (citation omitted)); *Shakey’s Inc. v. Covalt*, 704 F.2d 426, 435 (9th Cir. 1983).



preventing future violations of a rule. Compensatory relief [under a Georgia statute akin to a state-law claim for attorney’s fees], in contrast, is backward-looking and aims ‘to place an injured party in the same position as it would have been in had there been no injury.’”<sup>252</sup> On this basis, it is only state fee-shifting rules based on “bad faith *conduct* in litigation” that are considered procedural, in conflict with Rule 11 and, as a result, inapplicable in federal court.<sup>253</sup>

For example, in *Degussa Admixtures, Inc. v. Burnett*, the Sixth Circuit considered whether a fee-shifting provision in the Michigan Uniform Trade Secrets Act conflicted with Rule 11.<sup>254</sup> The court found it did not. Instead, the court applied the Supreme Court’s reasoning in a footnote in *Alyeska Pipeline Serv. Co. v. Wilderness Society* that a “state law denying the right to attorney’s fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.”<sup>255</sup> Based on this, the court concluded that the fee-shifting provision was substantive because it vindicated “a policy that deters frivolous trade-secret actions that threaten ‘free and open competition.’”<sup>256</sup> Rule 11, however, “was ‘a general statute that allows for the award of attorneys’ fees based upon the conduct of the parties and the attorneys in filing and litigating the claim, rather than for success on the underlying merits of the claim.’”<sup>257</sup>

This conclusion also flowed directly from the Supreme Court’s decision in *Chambers v. NASCO, Inc.* where the Court considered the ability of federal courts sitting in diversity to use inherent power to sanction parties.<sup>258</sup> There, invoking the

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<sup>252</sup> *Showan*, 922 F.3d at 1226 (quoting *Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302, 1316 (11th Cir. 2007)).

<sup>253</sup> *Scottsdale Ins. Co.*, 636 F.3d at 1279–80 (emphasis added) (quoting *Chambers*, 501 U.S. at 52–53) (noting difference between “[s]ubstantive fees” and “procedural fees”); see also *Banner Bank v. Smith*, 30 F.4th 1232, 1239 (10th Cir. 2022) (noting the state statute embodied “no apparent substantive policy judgment concerning certain kinds of claims” and, instead, policed “the general conduct of litigation in the state’s courts”).

<sup>254</sup> 277 F. App’x 530 (6th Cir. 2008).

<sup>255</sup> *Id.* at 532 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 259 n.31 (1975) (internal quotation marks)).

<sup>256</sup> *Id.* (quoting *Pepsico, Inc. v. Redmond*, 54 F.3d 1262, 1268 (7th Cir. 1995))

<sup>257</sup> *Id.* (quoting *First Bank of Marietta v. Hartford Underwriters Insurance Co.*, 307 F.3d 501, 529 (6th Cir. 2002)).

<sup>258</sup> 501 U.S. 32, 51–52 (1991).

*Alyeska* footnote, the sanctioned party argued that federal courts had no inherent power to sanction a party when sitting in diversity “unless the applicable state law recognizes the ‘bad-faith’ exception to the general rule against fee shifting.”<sup>259</sup> The Supreme Court disagreed and found that a federal court could use its inherent powers to impose sanctions irrespective of *Alyeska* and absent a bad-faith exception in state law.

For one, the kind of fee-shifting provisions the Court considered in the *Alyeska* footnote were motivated by a substantive state policy seeking to encourage (or discourage, as the case may be) particular kinds of litigation through an award of fees.<sup>260</sup> The sanctions in *Chambers*, however, arose only from “disobedience of the court’s orders” during litigation.<sup>261</sup> Relatedly, the sanctions for bad faith conduct did not depend “on which party wins,” “but on how the parties conduct themselves during the litigation.”<sup>262</sup> For the same reason, imposing sanctions on a party absent a bad-faith exception in state law did not risk forum shopping nor discrimination between citizens and non-citizens because the parties had the power to control their own conduct in any forum to avoid imposition of sanctions.<sup>263</sup>

For all these reasons, Judge Liman’s conclusion that § 70-a sets forth a sanctions regime and further that that sanctions regime conflicts with Rule 11 lacks support in the text or the structure of the New York anti-SLAPP scheme or in controlling Supreme Court precedent. Because § 70-a discourages a SLAPP plaintiff from filing a specific kind of abusive litigation identified by the New York Legislature as especially problematic and does not purport to regulate an attorney’s litigation misconduct during a case, it does not conflict with Rule 11. Instead, Rule 11, as with Rules 12 and 56, can exist side by side with § 70-a.

***B. Does § 76-a Apply in Federal Court? Yes.***

Having concluded that § 70-a applies in federal court, we turn to whether § 76-a, also in the Civil Rights Law, applies. Section 76-a serves two purposes. First, it defines terms, including what constitutes an action involving public petition and

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<sup>259</sup> *Id.* at 51.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 52–53.

<sup>262</sup> *Id.* at 53.

<sup>263</sup> *Id.*

participation, a claim, a communication, and a matter of public interest.<sup>264</sup> Second, it allocates the burden of proof and sets the fault standard in SLAPP cases, requiring a plaintiff to “establish[] by clear and convincing evidence” (the burden) “that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false” (the fault standard).<sup>265</sup>

Unlike with § 70-a, in every case we have identified, save one lacking any analysis, federal courts have applied § 76-a either without question or, less often, after conducting an *Erie/Sibbach* analysis.<sup>266</sup> In light of this general agreement, we review some of the more substantive decisions but otherwise forgo the in-depth discussion we undertook when considering § 70-a.

In an early opinion, *Palin v. New York Times Co.*, Judge Jed Rakoff concluded that § 76-a applied in that defamation lawsuit brought by former Governor Sarah Palin against the *New York Times*.<sup>267</sup> Citing both *Adelson* and *La Liberte*, Judge Rakoff found that he “must apply § 76-a because it is a substantive, rather than a

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<sup>264</sup> C.R.L. § 76-a(1)(a)–(d).

<sup>265</sup> *Id.* § 76-a(2).

<sup>266</sup> Compare *Maron v. Legal Aid Soc’y*, No. 21-cv-5960, 2022 WL 1910247 (S.D.N.Y. June 2, 2022) (Polk Failla, J.) (suggesting that § 76-a does not apply in federal court) with *Novagold Res., Inc. v. J Cap. Rsch. USA LLC*, No. 20-cv-2875, 2022 WL 900604 (E.D.N.Y. Mar. 28, 2022) (Hall, J.) (applying § 76-a); *Shahidullah v. Shankar*, No. 20-cv-3602, 2022 WL 286935 (D. Md. Jan. 31, 2022) (Boardman, J.); *Lindberg v. Dow Jones & Co., Inc.*, No. 20-cv-8231, 2021 WL 5450617 (S.D.N.Y. Nov. 22, 2021) (Kaplan, J.); *Coleman v. Grand*, No. 18-cv-5663, 2021 WL 768167 (E.D.N.Y. Feb. 26, 2021) (Vitaliano, J.); *Sweigert v. Goodman*, No. 18-cv-08653, 2021 WL 1578097 (S.D.N.Y. Apr. 22, 2021) (Aaron, M.J.); *Margolies v. Rudolph*, No. 21-cv-2447, 2022 WL 2062460 (E.D.N.Y. June 6, 2022) (Bulsara, M.J.); *Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21 (S.D.N.Y. 2020); *Palin v. N.Y. Times Co.*, No. 17-cv-4853, 2022 WL 599271 (S.D.N.Y. Mar. 1, 2022) (Rakoff, J.), *reconsideration denied*, No. 17-cv-4853, 2022 WL 1744008 (S.D.N.Y. May 31, 2022); *Kesner v. Buhl*, 590 F. Supp. 3d 680 (S.D.N.Y. 2022) (Engelmayer, J.); *Jacob v. Lorenz*, 626 F. Supp. 3d 672 (S.D.N.Y. 2022) (Ramos, J.).

<sup>267</sup> *Palin*, 510 F. Supp. 3d at 26. Most federal courts considering § 76-a’s application have done so in the context of deciding whether the anti-SLAPP’s actual malice fault standard applies.

procedural, provision.”<sup>268</sup> This included the actual malice fault standard and the burden of proof requirement.<sup>269</sup> Soon, other courts followed.<sup>270</sup>

The most in-depth treatment of the issue came in a decision by Magistrate Judge Sanket Bulsara in *Margolies v. Rudolph*.<sup>271</sup> That case arose out of an allegation of sexual harassment in a Facebook group.<sup>272</sup> There, the court applied the requisite *Erie/Sibbach* analysis before explaining that “certain anti-SLAPP laws permit a defamation defendant to file a special motion to strike” with more stringent pleading standards that conflict with Rule 12.<sup>273</sup> While some courts found these “motion[s] to strike cannot be used in federal court,” others found that they could “exist alongside” Rule 12.<sup>274</sup> But, Judge Bulsara explained, these cases had “nothing to do with” the case before him because the New York anti-SLAPP did not create a special motion to strike.<sup>275</sup>

Instead, at issue was the applicability of § 76-a and, specifically, the actual malice fault standard it imposed.<sup>276</sup> Invoking the Second Circuit’s reasoning in *Adelson*, Judge Bulsara explained that provisions of “an anti-SLAPP law that do not conflict with any federal rule or law—such as provisions that change the elements of a defamation claims—may be applied in federal court.”<sup>277</sup> And that is exactly what § 76-a did: it “expand[ed] the categories of claims that must plead actual malice.”<sup>278</sup> Moreover, the actual malice requirement did not conflict with any Federal Rule of Civil Procedure.<sup>279</sup> As a result, the court found that it applied.

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<sup>268</sup> *Id.* (citing *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014); *La Liberte v. Reid*, 966 F.3d 79, 86 n.3 (2d Cir. 2020)).

<sup>269</sup> *Id.*

<sup>270</sup> *See, e.g., Sweigert*, 2022 WL 168080, at \*1; *Coleman*, 2021 WL 768167, at \*7; *Sweigert*, 2021 WL 1578097, at \*2.

<sup>271</sup> *See Margolies*, 2022 WL 2062460.

<sup>272</sup> *Id.* at \*2.

<sup>273</sup> *Id.* at \*8 (citing *La Liberte*, 966 F.3d at 87).

<sup>274</sup> *Id.* (citing *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1155 (9th Cir. 2021)).

<sup>275</sup> *Id.* at \*8–\*9.

<sup>276</sup> *See id.* at \*9.

<sup>277</sup> *Id.* (emphasis added) (citing *Adelson v. Harris*, 973 F. Supp. 2d 467, 500–01 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413, 415 (2d Cir. 2017)).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

These decisions are clearly correct. They grow out of the accepted principle that a “cause of action”—here, a tort based on false speech—is “created by local law” and “the measure of it is to be found” in local law.<sup>280</sup> These state-created causes of action thus carry “the same burden” and are “subject to the same defenses in the federal court as in the state court.”<sup>281</sup> Were the standards in § 76-a not applied in federal court, *Erie*’s twin aims of discouraging forum shopping and avoiding the inequitable administration of the law would be frustrated as the application of differing standards in state and federal court would lead to differing results in each.<sup>282</sup>

Keeping in mind the four-part test for determining the applicability of state law in federal court, we round out this analysis again by reference to first principles, beginning with burdens of proof. For more than 80 years courts have applied state burdens of proof in federal court. In *Cities Service Oil Co. v. Dunlap*, a case decided the year after *Erie*, the Supreme Court reversed a decision ignoring a Texas state law that allocated burdens relating to a state claim.<sup>283</sup> The lower court thought the allocation unjust and refused to apply it.<sup>284</sup> But the Court reversed because the allocation of the burden was a “substantial right” enjoyed by the litigant.<sup>285</sup>

The Second Circuit has applied this approach too.<sup>286</sup> In *United States v. McCombs*, the court invoked *Cities Service Oil Co.* and found that “[p]resumptions and other matters related to the burden of proof are considered matters of substantive law, governed by the law of the jurisdiction whose substantive law applies to the merits of the question in issue.”<sup>287</sup> As a district court later observed, burdens of

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<sup>280</sup> *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949).

<sup>281</sup> *Id.*

<sup>282</sup> *See id.* at 533–34.

<sup>283</sup> *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 209 (1939) (allocation of burden of proof); *see also Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (nature of burden of proof).

<sup>284</sup> *Cities Serv. Oil Co.*, 308 U.S. at 211–12.

<sup>285</sup> *Id.* at 212.

<sup>286</sup> *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (“[W]e have held that in diversity cases the federal courts must follow the law of the State as to burden of proof.” (citation omitted)).

<sup>287</sup> *United States v. McCombs*, 30 F.3d 310, 323–24 (2d Cir. 1994).

proof are “so inextricably intertwined with the state right as to be outcome determinative” and thus substantive.<sup>288</sup>

Standards of fault like the actual malice standard set forth in § 76-a are similarly applicable in federal court because they define the limits of state causes of action.<sup>289</sup> In the defamation context, for example, the Supreme Court has instructed that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability” for a defamation claim.<sup>290</sup> That is what the New York Legislature did when it adopted § 76-a’s actual malice requirement.<sup>291</sup> Just as federal courts had repeatedly applied the prior fault standard adopted by the New York Legislature, so too must they apply the actual malice requirement now ensconced in § 76-a.<sup>292</sup>

### *C. Do Rules 3211(g) and 3212(h) Apply in Federal Court? Maybe*

We now reach the final provisions of the New York anti-SLAPP scheme: C.P.L.R. Rules 3211(g) and 3212(h). Rule 3211(g) concerns the dismissal of SLAPP claims, while Rule 3212(h) concerns summary judgment for those claims. Notably, neither is a vehicle for dismissing a claim nor seeking summary judgment. Instead, each provides additional procedural protections that SLAPP defendants can invoke when filing a motion to dismiss under Rule 3211(a) or a motion for summary judgment under Rule 3212(a), the generally applicable provisions for making such motions.

For example, while a defendant making a motion to dismiss under Rule 3211(a)(7) usually carries the burden, when a SLAPP defendant demonstrates that Rule 3211(g) is implicated, the burden shifts to the plaintiff who must demonstrate

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<sup>288</sup> N.A.A.C.P. v. AcuSport, Inc., 271 F. Supp. 2d 435, 477 (E.D.N.Y. 2003) (citing *Palmer*, 318 U.S. 109).

<sup>289</sup> See *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535 (1958).

<sup>290</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

<sup>291</sup> See also *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975) (adopting precursor to actual malice requirement, the gross irresponsibility standard).

<sup>292</sup> See, e.g., *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92, 105 (2d Cir. 2000) (Sack, J.) (“New York State is plainly free under its own law to superimpose the *Chapadeau* test to increase the defendants’ protection.” (cleaned up)).

“that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.”<sup>293</sup> Also unlike a traditional motion to dismiss, a court considering a motion to dismiss that implicates Rule 3211(g) can consider evidence outside the pleadings.<sup>294</sup> Finally, once a motion to dismiss is made in the SLAPP context, all other motions, hearings, and discovery are stayed and the court must give preference to deciding the pending motion to dismiss.<sup>295</sup>

Rule 3212(h) works similarly. A defendant must bring a motion for summary judgment pursuant to Rule 3212(a), the normal provision for summary judgment motions and demonstrate that the case involves public participation to invoke Rule 3212(h)’s anti-SLAPP protections.<sup>296</sup> Once she does so, the usual burden is again reversed, requiring the SLAPP plaintiff to demonstrate the claim has “a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law.”<sup>297</sup> As with Rule 3211(g), the court must also grant preference to hearing the summary judgment motion.<sup>298</sup>

According to our survey, at least five courts agree that Rules 3211(g) and 3212(h) do not apply in federal court.<sup>299</sup> One court, a district court in Maine, has disagreed though, while another in the Southern District of New York has left open

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<sup>293</sup> C.P.L.R. Rule 3211(g)(1).

<sup>294</sup> *See id.* Rule 3211(g)(2).

<sup>295</sup> *See id.* Rule 3211(g)(3). One could argue that Rule 3211(g) cannot apply in federal court because the Rule is dependent on a motion made pursuant to Rule 3211(a) rather than Rule 12 under the Federal Rules of Civil Procedure. *Cf. La Liberte v. Reid*, 966 F.3d 79, 88 (2d Cir. 2020). That argument elevates form far over substance and is contrary to Supreme Court precedent applying state rules in federal court even though those rules’ operation is, as a technical matter, tethered to and dependent on another state rule that is inapplicable in federal court. *See supra* note 171.

<sup>296</sup> C.P.L.R. Rule 3212(h).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Carroll v. Trump*, 590 F. Supp. 3d 575 (S.D.N.Y. 2022) (Kaplan, J.); *Kesner v. Buhl*, 590 F. Supp. 3d 680 (S.D.N.Y. 2022) (Engelmayer, J.); *Carroll v. Trump*, 590 F. Supp. 3d 575 (S.D.N.Y. 2022) (Kaplan, J.); *Chinese Americans C.R. Coal., Inc. v. Trump*, No. 21-cv-4548, 2022 WL 1443387 (S.D.N.Y. May 6, 2022) (Koeltl, J.); *Nat’l Acad. of Television Arts & Scis., Inc. v. Multimedia Sys. Design, Inc.*, 551 F. Supp. 3d 408 (S.D.N.Y. 2021) (Caproni, J.).

the possibility that Rule 3212(h)'s protections apply in federal court.<sup>300</sup> We first discuss those decisions open to applying Rules 3211(g) or 3212(h) in federal court before turning to those that have refused to do so. This analysis shows that whether these provisions will be found to apply depends on which opinion in *Shady Grove* a court finds controlling on the question of the proper interpretation of the REA.<sup>301</sup>

### 1. Cases finding Rules 3211(g) and 3212(h) applicable in federal court

One district court has applied Rule 3211(g) in federal court, consistently with Justice Stevens' observation in *Shady Grove* that some "seemingly procedural" state laws will apply when they operate substantively by making it "significantly more difficult to bring or to prove a claim."<sup>302</sup> In that case, *Cheng v. Neumann*, a New York-based far-right newspaper and its cofounder brought a defamation suit against the *Maine Beacon*, a progressive news outlet, and its reporter.<sup>303</sup> Defendants brought a motion to dismiss under New York's anti-SLAPP law.<sup>304</sup>

Recognizing that New York federal courts reached differing conclusions about the application of the anti-SLAPP, the court found that debate irrelevant under controlling First Circuit precedent.<sup>305</sup> In *Godin v. Schencks*, the First Circuit, relying on Justice Stevens' opinion, had held that Maine's anti-SLAPP applied in federal court.<sup>306</sup> As compared to Rules 12 and 56, the First Circuit concluded the Maine law served "the entirely distinct function of protecting those specific [SLAPP] defendants that have been targeted with litigation on the basis of their protected speech."<sup>307</sup> The Maine law contained substantive provisions like the allocation of

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<sup>300</sup> *Cheng v. Neumann*, No. 21-cv-00181, 2022 WL 326785 (D. Me. Feb. 3, 2022); cf. *Sweigert v. Goodman*, No. 18-cv-08653, 2021 WL 1578097, at \*3 (S.D.N.Y. Apr. 22, 2021) (Aaron, M.J.) ("[T]he Court is not convinced, that the special motion to dismiss procedures set forth in CPLR 3211(g) apply to this action, particularly at this stage of the proceedings.").

<sup>301</sup> For an in-depth discussion of this issue, see generally *Brown*, *supra* note 132.

<sup>302</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 420 (2010) (Stevens, J., concurring in part and concurring in judgment) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 555 (1949) (finding that state bond requirement was substantive)).

<sup>303</sup> 2022 WL 326785, at \*1.

<sup>304</sup> *Id.* at \*2.

<sup>305</sup> *Id.* at \*4 n.2.

<sup>306</sup> *Id.* at \*3 (citing 629 F.3d 79, 91 (1st Cir. 2010)).

<sup>307</sup> *Id.* (citing *Godin*, 629 F.3d at 89).



the burden of proof and pleading standards that “ultimately ‘alter[] what plaintiffs must prove to prevail,’” as well as procedural provisions providing additional protections to SLAPP defendants.<sup>308</sup> Because the procedural protections were “‘intertwined with’ the right or remedy created by the law,” the First Circuit “treated the entire law as substantive.”<sup>309</sup>

Consistent with *Godin*, the district court in *Cheng* reasoned that the New York anti-SLAPP scheme also contained “substantive and procedural elements” that together created a substantive rule applicable in federal court.<sup>310</sup> The scheme altered fault standards in § 76-a.<sup>311</sup> And in Rule 3211(g) it reallocated the burden of proof and imposed a heightened pleading standard.<sup>312</sup> These provisions, under *Godin* and Justice Stevens’ opinion in *Shady Grove*, were so “intertwined such that the vindication” of the substantive provisions under the law “depend[ed] upon the availability” of the procedural ones.<sup>313</sup> In other words, the provisions of the New York anti-SLAPP scheme “cohere to ensure the speedy disposition of cases involving constitutionally protected public participation, thus are substantive for *Erie* purposes.”<sup>314</sup>

At least one federal district court sitting in New York has left open the possibility that Rule 3212(h) applies in federal court.<sup>315</sup> After the Second Circuit decided *La Liberte*, Magistrate Judge Stewart Aaron issued a decision in *Sweigert v. Goodman*. In that acrimonious *pro se* defamation case, the defendant moved to dismiss for failure to state a claim pursuant to Rules 3211(a)(7) and 3211(g).<sup>316</sup> While Judge Aaron did not decide the issue, he observed that “certain procedural aspects” of Rule 3211(g) conflicted with Rule 12.<sup>317</sup> For example, Rule 3211(g) allowed courts

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<sup>308</sup> *Id.* (citing *Godin*, 629 F.3d at 89).

<sup>309</sup> *Id.* (citing *Godin*, 629 F.3d at 89 (quoting *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring in part and concurring in judgment))).

<sup>310</sup> *Id.* at \*4.

<sup>311</sup> *Id.* (citing C.R.L. § 76-a(2)).

<sup>312</sup> *Id.* (citing C.P.L.R. Rule 3211(g)).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> See *Sweigert v. Goodman*, No. 18-cv-08653, 2021 WL 1578097 (S.D.N.Y. Apr. 22, 2021).

<sup>316</sup> *Id.* at \*2.

<sup>317</sup> *Id.* at \*3.

to consider evidence outside the pleadings while limiting discovery owed to a plaintiff, but federal courts had declined to apply similar kinds of provisions before.<sup>318</sup> Rule 3212(h), however, contained no such a provision. As such, Judge Aaron gave the defendant leave to assert its protections either by filing a motion for judgment on the pleadings under Federal Rule 12(c) or a motion for summary judgment under Rule 56.<sup>319</sup> Despite this, the defendant failed to file such a motion, leaving the issue unresolved.<sup>320</sup>

## 2. *Cases finding Rules 3211(g) and 3212(h) inapplicable in federal court*

Most courts in the Second Circuit have concluded that neither Rule 3211(g) nor Rule 3212(h) apply in federal court.<sup>321</sup> The reason for this reticence is that, unlike the First Circuit, the Second Circuit in *La Liberte* adopted the *Shady Grove* plurality as the controlling opinion on the question of the interpretation of the REA instead of Justice Stevens' opinion.<sup>322</sup> This makes all the difference because the plurality's approach to the REA asks only whether the federal rule is really procedural. If so, it applies irrespective of its effects on state law. Justice Stevens' approach to the REA, however, is more sensitive to the effect of federal rules on state law, allowing for the former to give way when they intrude too far into the latter.

Judge Lewis Kaplan's reasoning in *Carroll v. Trump* is a perfect example of how applying the *Shady Grove* plurality leads to a finding that neither Rules 3211(g) nor 3212(h) apply in federal court.<sup>323</sup> In *Carroll*, E. Jean Carroll sued Donald Trump for

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<sup>318</sup> *Id.* (citing *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1047 (N.D. Ill. 2013), *aff'd*, 791 F.3d 729 (7th Cir. 2015); *Unity Healthcare, Inc. v. Cty. of Hennepin*, 308 F.R.D. 537, 541 (D. Minn. 2015); *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, No. 07-cv-12018, 2008 WL 4595369, at \*10 (D. Mass. Sept. 30, 2008)). *But see id.* (citing *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (noting the applicability in federal court of Nevada's anti-SLAPP barring discovery after anti-SLAPP motion was "may present a closer question"))).

<sup>319</sup> *Id.*

<sup>320</sup> See *Sweigert v. Goodman*, No. 18-cv-08653, ECF No. 279 (June 1, 2021).

<sup>321</sup> See *supra* note 299 (collecting cases). Often, courts discuss Rules 3211(g) and 3212(h) where a litigant asserts counterclaim pursuant to § 70-a, despite the Rules' irrelevance to the application of § 70-a in federal court. See *supra* Part III.A.2.a.

<sup>322</sup> 966 F.3d 79, 88 (2d Cir. 2020).

<sup>323</sup> *Carroll v. Trump*, 590 F. Supp. 3d 575, 583–85 (S.D.N.Y. 2022).

defamation after he suggested she lied when accusing him of rape.<sup>324</sup> Trump later moved to amend his answer to add a counterclaim under § 70-a.<sup>325</sup> Judge Kaplan, however, found that § 70-a did not apply, largely adopting Judge Caproni’s analysis in *National Academy*.<sup>326</sup> In coming to that conclusion, he also considered the applicability of Rules 3211(g) and 3212(h).<sup>327</sup>

After quoting verbatim *La Liberte*’s discussion of the *Shady Grove* plurality’s two-part test, Judge Kaplan found that Rule 3211(g) conflicted with Rule 12 for two reasons.<sup>328</sup> First, Rule 12 was deferential to a plaintiff, accepting factual allegations as true, drawing reasonable inferences in the plaintiff’s favor, and requiring only a demonstration of plausibility to avoid dismissal.<sup>329</sup> Rule 3211(g), however, flipped these rules on their head, demanding “that a plaintiff in a covered action satisfy a higher standard—both legally and factually—to avoid dismissal.”<sup>330</sup> Second, Rule 3211(g) permitted the filing of affidavits, suggesting that a plaintiff must make an evidentiary showing to avoid dismissal.<sup>331</sup> Rule 12 required no such showing.<sup>332</sup>

Many of the same considerations, Judge Kaplan said, barred the application of Rule 3212(h).<sup>333</sup> While Rule 56 only required a genuine dispute as to a material issue of fact in order for a plaintiff to get to trial, Rule 3212(h) “makes summary judgment more readily available” because it requires a plaintiff to demonstrate that her claim has a “substantial basis in law and fact” to get to trial.<sup>334</sup> Because there was a conflict, the only question under the *Shady Grove* plurality was whether Rules 12 and 56 were really procedural and clearly they were. Thus, Judge Kaplan concluded

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<sup>324</sup> *Carroll v. Trump*, 498 F. Supp. 3d 422, 426 (S.D.N.Y. 2020), *rev’d in part, vacated in part*, 49 F.4th 759 (2d Cir. 2022)

<sup>325</sup> *Carroll*, 590 F. Supp. 3d at 578.

<sup>326</sup> *Id.* at 585 (citing *Nat’l Acad. of Television Arts & Scis.*, 551 F. Supp. 3d at 430–32).

<sup>327</sup> *Id.* at 583–85.

<sup>328</sup> *Id.* at 583.

<sup>329</sup> *Id.* at 584.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 585.

<sup>334</sup> *Id.*

that Trump could not “invoke *any* of the relevant New York anti-SLAPP law’s provisions.”<sup>335</sup>

In short, the Second Circuit’s adoption of the *Shady Grove* plurality’s approach to the REA makes it unlikely that Rules 3211(g) or 3212(h) will be found to apply as they would conflict with normal procedure under Rules 12 and 56. Nonetheless, because the First Circuit adopted Justice Stevens’ more nuanced concurring opinion in *Shady Grove*, Rules 3211(g) or 3212(h) will be found to apply (to the exclusion of Rules 12 or 56) as inextricably intertwined with the anti-SLAPP scheme’s substantive provisions. The same can be said, for example, in the Ninth Circuit, as well as likely the Tenth Circuit, both of which have adopted Justice Stevens’ approach.<sup>336</sup> Until the Supreme Court clarifies which opinion in *Shady Grove* controls, litigants will have to stomach these conflicting results.

#### CONCLUSION

The New York Legislature adopted the 2020 anti-SLAPP amendments to fortify the free expression rights of New Yorkers. By drastically expanding the narrow 1992 anti-SLAPP scheme, it aimed to discourage lawsuits meant to exact punishment on speakers not by succeeding on the merits but by forcing them into expensive and time-intensive litigation. It did so by reallocating burdens to the plaintiff, increasing the level of fault that must be shown, encouraging early dismissal of suits before discovery costs balloon, and, importantly, giving SLAPP defendants a cause of action to recover damages from SLAPP plaintiffs whose lawsuits lacked a substantial basis.

The trend of courts in New York away from applying in federal court several of these provisions of the New York anti-SLAPP scheme, and especially § 70-a, is worrying. If it continues, the result will be a seriously watered-down anti-SLAPP scheme that allows SLAPP plaintiffs to file their harassing litigation in federal court to avoid the many hurdles and attendant risks they would otherwise face in state court. Consequently, lawsuits that would have promptly been dismissed in state

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<sup>335</sup> *Id.* at 583.

<sup>336</sup> *Martin v. Pierce Cnty.*, 34 F.4th 1125, 1129 (9th Cir. 2022) (relying on Justice Stevens’ concurring opinion); *Stender v. Archstone-Smith Operating Tr.*, 958 F.3d 938, 947 (10th Cir. 2020). While outside the scope of this Article, prior scholarship has convincingly demonstrated that Justice Stevens’ concurring opinion in *Shady Grove* should be considered controlling. Brown, *supra* note 132, at 276–80.

court will live on in federal court, fostering a kind of anti-SLAPP tourism that undercuts the New York Legislature's purpose in adopting the 2020 amendments.

But this trend, propelled by its oversimplification of how the law works, is unsupported by the unique text and structure of the New York anti-SLAPP scheme and controlling precedent.<sup>337</sup> This Article has demonstrated that §§ 70-a and 76-a apply in federal court because they are substantive provisions of state law occupying an area free from conflicting federal rules. It has also put a fine point on how disagreements between the First and Second Circuits regarding *Shady Grove* and the REA have led to differing conclusions as to the applicability of Rules 3211(g) and 3212(h) in federal court. While it appears that the First Circuit has the better of the arguments, we recognize that the Second Circuit has foreclosed that reading of *Shady Grove*.<sup>338</sup>

In the end, this Article is not just about the application of New York's anti-SLAPP scheme. It is about what power federal courts claim for themselves at the expense of state interests. In a world where plaintiffs are increasingly resorting to defamation lawsuits for political retribution and where previously settled constitutional principles protecting free speech are under attack, federal courts' unwillingness to apply state anti-SLAPP laws deprives states of the power to protect their citizens in exercising their constitutional rights.<sup>339</sup> And, it does violence to the long-standing rule that because a "cause of action is created by local law, the measure of it is to be found only in local law."<sup>340</sup>

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<sup>337</sup> *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

<sup>338</sup> *But see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 429 (2010) (Stevens, J., concurring in part and concurring in judgment) (noting that he and the four dissenters agreed: "if a federal rule displaces a state rule that is procedural in the ordinary sense of the term but sufficiently interwoven with the scope of a substantive right or remedy, there would be an [REA] problem" (internal citations and quotation marks omitted)).

<sup>339</sup> Schafer & Kosseff, *supra* note 3, at 27–38.

<sup>340</sup> *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949).

