IT'S TIME TO SLAPP BACK: WHY CALIFORNIA'S ANTI-SLAPP STATUTE SHOULD NOT APPLY IN FEDERAL COURT

"An error does not become truth by reason of multiplied propagation."[1] This article contends, writ large, that Ninth Circuit anti-SLAPP jurisprudence is a mess. In particular, the Ninth Circuit has made two critical errors. The first was to apply California anti-SLAPP's special motion to strike in federal diversity cases, and the second was to review denied anti-SLAPPs pursuant to the collateral order doctrine. Below, these two errors are explored in depth[2] in hopes of finding a "way . . . out of the wilderness."[3]

INTRODUCTION

The procedural outcome of California's anti-SLAPP statute is akin to a motion to strike a complaint (i.e., a demurrer).[4] The key difference is that the defendant who successfully strikes a complaint pursuant to the anti-SLAPP statute is entitled to an automatic award of attorneys' fees and costs.[5] The policy reason is that Strategic Lawsuits Against Public Participation ("SLAPPs") are considered meritless attempts to sue defendants simply for exercising their rights of petition and free speech.[6]

Here's how the anti-SLAPP statute works. A defendant is sued and then moves to strike the complaint pursuant to the anti-SLAPP's special

1. MOHANDAS K. GANDHI, ALL MEN ARE BROTHERS 79 (2013).

2. The impetus for this article springs in large part from a pair of concurrences in *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013), in conjunction with a dissent by Judge Watford to a denied rehearing of *Makaeff* en banc, *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188-91 (9th Cir. 2013).

3. *See Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring).

4. *Compare* CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2014), *with id.* §§ 430.10-90.

5. *See id.* § 425.16(c)(1).

6. *See id.* § 425.16(a).

motion to strike.[7] To succeed on its motion, the defendant first must show that she was sued for engaging in a form of free speech or right to petition.[8] If the defendant makes a successful showing, the burden shifts to the plaintiff to show a probability of success on her claims.[9] If the court finds the plaintiff's complaint is a sham,[10] then the defendant is awarded attorneys' fees and costs for having to waste time and resources fending off the plaintiff's meritless attempt to sue her (i.e., the defendant) into silence.

This article is focused on the Ninth Circuit's erroneous choices to (1) apply California's anti-SLAPP in federal diversity suits, and (2) hear appeals of denied anti-SLAPPs pursuant to the collateral order doctrine.

Error One: Applying Anti-SLAPP Procedures in Federal Diversity Suits

California's anti-SLAPP statute was first enacted in 1992.[11] Seven years later, in *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*,[12] the Ninth Circuit for the first time faced an Erie Doctrine choice-of-law problem. The issue was whether to apply the anti-SLAPP statute's motion to strike as substantive law, or instead to apply relevant Federal Rules of Civil Procedure.[13]

Every first-year law student will perhaps recall (with dread?) that in diversity suits, federal courts apply state substantive law (i.e., tort law, contract disputes, etc.)[14] and federal procedural law.[15] Usually this substance-procedure distinction is clear so choosing which law to apply is a simple task.[16] But categorizing a state law is "not always clear-cut."[17]

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7. *See id.* § 425.16(b)(1).

8. *See id.*

9. *See id.* § 425.16(b)(1)-(3).

10. Kathleen L. Daerr-Bannon, *Cause of Action: Bringing and Defending Anti-SLAPP Motions to Strike or Dismiss*, 22 CAUSES OF ACTION 2D 317 (2003).

11. CIV. PROC. § 425.16.

12. 190 F.3d 963 (9th Cir. 1999).

13. *Id.* at 972.

14. Makaeff v. Trump Univ., LLC, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, C.J., concurring), *reh'g denied en banc*, 736 F.3d 1180 (9th Cir. 2013).

15. Unless the Federal Rule violates the Rules Enabling Act. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 438 (2010) (citing 28 U.S.C. § 2072 (2012)) ("The Rules Enabling Act, enacted in 1934, authorizes us to 'prescribe general rules of practice and procedure' for the federal courts, but with a crucial restriction: 'Such rules shall not abridge, enlarge or modify any substantive right.'"); *see also* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

16. *See Makaeff*, 715 F.3d at 272 (Kozinski, C.J., concurring).

Confusingly, the Ninth Circuit has treated California's anti-SLAPP statute as one such problematic choice-of-law situation. It is confusing because the choice as to which law to apply is not only clear, but abundantly so. Consider that California's anti-SLAPP statute is codified as a civil procedure. Its effect is to strike a lawsuit and award attorneys' fees to prevailing defendants. And, as a matter of law, state procedural rules do not apply in federal court; rather, Federal Rules of Civil Procedure do.

Stop to think it through. Demurrers are not permitted in federal courts. Instead, parties file 12(b)(6) motions to dismiss.[18] Why should anti-SLAPP's motion to strike garner special treatment? The only difference between demurrer and anti-SLAPP outcomes is the right to automatic attorneys' fees, but the Ninth Circuit has never held that the right to attorneys' fees is a substantive issue in situations where the underlying mechanism for obtaining that right is procedural. Plus, Rule 11 provides sanctions for meritless suits filed in federal courts.[19]

In Section I, I will argue that in *Newsham* the Ninth Circuit got off on the wrong foot. Consequently, Ninth Circuit anti-SLAPP jurisprudence is a confused mess.[20] This confusion was exacerbated by *Metabolife International, Inc. v. Wornick*'s holding,[21] which created a situation where "neither the Federal Rules nor the state anti-SLAPP statute operate as designed."[22] Furthermore, *Newsham* is out of line with the Supreme Court's most recent *Erie* decision, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*.[23] For these reasons (and more) *Newsham* should be overturned.

Error Two: The Collateral Order Doctrine Problem

The second issue facing the Ninth Circuit (as regards California's anti-SLAPP) is whether it has jurisdiction to hear denied anti-SLAPPs on appeal because a stricken complaint is not technically a final judgment for purposes of 28 U.S.C. § 1291.[24]

17. *Id.*

18. FED. R. CIV. P. 12(b)(6) ("failure to state a claim upon which relief can be granted").

19. FED. R. CIV. P. 11(c)(2) ("Motion for Sanctions").

20. *See Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring).

21. 264 F.3d 832 (9th Cir. 2001).

22. *Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring).

23. 559 U.S. 393 (2010).

24. 28 U.S.C. § 1291 (2012) ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

The default federal rule is that "a party is entitled only to a single appeal, to be 'deferred until final judgment has been entered.'"[25] The Supreme Court has, however, carved out a narrow exception to the final judgment rule. This exception, known as the collateral order doctrine, permits appellate review without a final decision on the merits, but only for a small class of cases where the court is able to "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[26]

The collateral order doctrine's narrow exception kicks in only where cases satisfy three conditions.[27] That is, appellate review must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and the issue must be (3) "effectively unreviewable on appeal from a final judgment."[28]

In *Batzel v. Smith*, the Ninth Circuit for the first time reviewed a denied California anti-SLAPP motion pursuant to the collateral order doctrine.[29] This case, too, was wrongly decided. Federal courts do not have jurisdiction to review denied 12(b)(6) motions to dismiss in federal court;[30] *a fortiori*, nor should federal courts have jurisdiction to review demurrers, anti-SLAPPs, or any other kind of state-created motion to strike or dismiss.

In Section II, I will argue that collateral review of denied anti-SLAPPs fails prong two. California Code of Civil Procedure section 425.16, in subsections (b)(1) and (b)(2), instructs judges to consider the pleadings and supporting and opposing affidavits to determine the plaintiff's probability of success on her claims. Given that judges must engage in a fact-intensive analysis of the merits of plaintiff's claims in order to make a probability determination, I argue that the issue on review is not in any way, shape, or form "separate from the merits."

25. Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003) (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)).

26. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

27. Flanagan v. United States, 465 U.S. 259, 265 (1984); *see also* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985) ("[A]n order must at a minimum satisfy three conditions.").

28. Richardson-Merrell, 472 U.S. at 431 (citing Coopers & Lybrand v. Livestay, 437 U.S. 463, 468 (1978)).

29. *See Batzel*, 333 F.3d at 1024.

30. FED. R. CIV. P. 12(b)(6) ("[F]ailure to state a claim upon which relief can be granted").

I. *NEWSHAM*'S ERIE ERROR

The *Erie Railroad Co. v. Tompkins*[31] decision is undoubtedly familiar to any law student. Much ink has spilled dissecting it in law journals. Yet, the Erie Doctrine continues to perplex, not only students, but also judges. Spanning what is now seventy-five years since the death of federal general common law,[32] courts sitting in diversity have continually wrestled with *Erie*.

Overturning *Swift v. Tyson*,[33] which held that federal judges need not apply state substantive law in federal diversity suits, the Supreme Court in *Erie* held that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."[34] Consequently, federal courts post-*Erie* are required to apply state law that is substantive in nature, while the Federal Rules govern procedure in diversity.[35]

Here's the rub. In *Erie*, the state law was unquestionably substantive (i.e., a tort).[36] Because this was so, *Erie*'s holding did not directly address situations where it is unclear if the state law is substantive in nature. Fortunately, *Erie*'s progeny[37] has tackled this issue head-on numerous times.[38]

Accordingly, two tests have emerged. First, where a court finds that a state procedure is bound up with substantive rights, it asks whether the state and federal laws "directly collide."[39] If they do, then the Federal Rule applies. Second, if the state procedure is just that – merely procedural –

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31. 304 U.S. 64 (1938).

32. *Id.* at 78 ("There is no federal general common law.").

33. 41 U.S. 1 (1842), *overruled by Erie*, 304 U.S. 64.

34. *Erie*, 304 U.S. at 78.

35. Again, this is the case so long as the rule does not violate the Rules Enabling Act. *See* U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 972 (9th Cir. 1999).

36. Adam N. Steinman, *What Is the Erie Doctrine? (and What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 309 (2008).

37. Some contend this is not a fair term because *Erie*'s so-called progeny is "principally about procedural federalism," where *Erie* involved a clearly substantive issue. *See id.* at 308-09.

38. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) (holding that claim-preclusive effect was properly determined using federal law); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (holding that New York state law governing the standard of review for granting a new trial trumped federal law for determining excessive jury verdicts); Bus. Guides, Inc. v. Chromatic Commc'ns Enters., 498 U.S. 533 (1991) (holding that Rule 11 sanctions were appropriate, even against pro se parties); Hanna v. Plumer, 380 U.S. 460 (1965) (holding that federal service of process trumped state service procedure); Sibbach v. Wilson, 312 U.S. 1 (1941) (holding Rule 35 did not violate the Rules Enabling Act and that plaintiff must submit to physical examination, contrary to state law).

39. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980).

then the direct collision analysis is unnecessary because the Federal Rules of Civil Procedure indubitably apply. These two tests are explored in greater detail below but, before turning to them, a reintroduction to California's anti-SLAPP statute is needed.

INTRODUCTION TO CALIFORNIA'S ANTI-SLAPP

SLAPPs are efforts to sue people into silence.[40] Masquerading as ordinary lawsuits, SLAPPs deter citizens from exercising their right to public participation, mainly by forcing them to divert valuable resources,[41] time, and energy to fend off meritless suits.[42] The common thread underlying SLAPPs is not a particular cause of action;[43] rather, it is the motive to intimidate a defendant whose actions assert a protected right.[44] Thus, while anti-SLAPP suits often arise in response to defamation claims, SLAPPs have also included "business torts, anti-trust, intentional infliction of emotional distress, invasion of privacy, civil rights violations," among others.[45] This is because no language in the statute "categorically excludes any particular type of action from its operation."[46]

California's legislature enacted its anti-SLAPP statute based on the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[47] And over the past two decades, twenty-seven states have created their own anti-SLAPP statute.[48]

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40. *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, PACE ENVTL. L. REV. 2, at 3 (1989).

41. *See* Christopher B. Latham, *Limiting Discovery with Anti-SLAPP Motions*, ORANGE CNTY. LAW, at 18 (2003) ("SLAPP lawsuits focus on creating expensive litigation for public commentators rather than on remedying actual harms.").

42. *See* Pring, *supra* note 40, at 6 ("SLAPPs send a clear message: that there is a price to speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings.").

43. *See* Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 805 (2000). SLAPPs are "not easy to recognize, even by the courts," because SLAPP suits are in every way like other lawsuits, except for the improper motive. *See id.* at 803-04.

44. Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002) (quoting Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620, 652 (2d Dist. 1996)) ("Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights.").

45. Tate, *supra* note 43, at 804-05.

46. *Navellier*, 52 P.3d at 711.

47. CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2014).

48. *See State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT: FIGHTING FOR FREE SPEECH, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Mar. 19, 2014). Most states in the Ninth Circuit (except Idaho, Montana, and Alaska) have their own anti-

Again, this is how the anti-SLAPP works. First, the defendant must show that the plaintiff's lawsuit is a meritless attempt to quell its (i.e., the defendant's) right to public participation. If the defendant makes a successful showing that it is party to a lawsuit arising from an "act in furtherance of its right of petition or free speech,"[49] then the burden shifts to the plaintiff to "demonstrate a probability of prevailing on the merits of each of plaintiff's claims."[50] If the plaintiff cannot demonstrate a probability of prevailing on the merits,[51] then the claim is struck and the defendant is entitled to automatic attorneys' fees and costs.[52]

A. Newsham Must Be Overturned to Restore Clarity to Ninth Circuit Anti-SLAPP Jurisprudence, Especially Post-Metabolife

In *Newsham*, the Ninth Circuit first held that the key procedural mechanisms of California's anti-SLAPP statute should apply in federal diversity cases.[53] At issue in *Newsham* was whether Federal Rules of Civil Procedure 12 and 56 directly collide[54] with California anti-SLAPP's special motion to strike[55] and its correlative automatic award of attorneys' fees and costs to a prevailing defendant.[56]

The *Newsham* court chose to apply California's anti-SLAPP procedures reasoning that, although "Rules 12 and 56 allow a litigant to test the opponent's claims before trial, California's 'special motion to strike' adds an additional, unique weapon to the pretrial arsenal, a weapon whose

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SLAPP statute. *See id.* While there have been attempts to pass a federal anti-SLAPP statute, these efforts have proven unsuccessful to date. *See, e.g.*, Eric Goldman, *We Need Federal Anti-SLAPP Legislation, But Sen. Kyl's "Free Press Act of 2012" Isn't the Answer (Yet)*, FORBES (Sept. 24, 2012, 11:52 A.M.), http://www.forbes.com/sites/ericgoldman/2012/09/24/we-need-federal-anti-slapp-legislation-but-sen-kyls-free-press-act-of-2012%E2%80%B3-isnt-the-answer-yet/.

49. CIV. PROC. § 425.16(b)(1).

50. Doe v. Gangland Prods., Inc., 730 F.3d 946, 953 (9th Cir. 2013).

51. Plaintiff need not show probability of success on each claim. Thus, for example, a court may determine probability of success as to two claims, and a lack of probability of success as to the other four claims. *See id.* at 963.

52. CIV. PROC. § 425.16(c)(1).

53. *See* U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999).

54. *Id.* at 972 (citing Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980); Olympic Sports Prods., Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 914 (9th Cir.1985) ("In determining whether the relevant provisions of California's Anti-SLAPP statute may properly be applied in federal court, we begin by asking whether such an application would result in a 'direct collision' with the Federal Rules.").

55. CIV. PROC. § 425.16(b)(1).

56. *Id.* § 425.16(c).

sting is enhanced by an entitlement to fees and costs."[57] The court also argued that, if the anti-SLAPP provisions are "held not to apply in federal court, [then] a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum," which runs contrary to the twin aims of *Erie*.[58]

While *Newsham* is good law and has been affirmed numerous times,[59] at least four Ninth Circuit judges[60] have recently (and rightly) called it into question. The first shot across the bow was announced in a pair of concurrences in *Makaeff*. In those concurrences, Judges Kozinski and Paez argue that *Newsham* was wrongly decided and that, in light of the Ninth Circuit's *Metabolife* decision, *Newsham*'s continued application mistakenly promotes a "hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed."[61]

MAKAEFF V. TRUMP UNIVERSITY, LLC

In April of 2013, the Ninth Circuit sitting in diversity decided *Makaeff*. In *Makaeff*, a disgruntled former customer filed a class action against Trump University for deceptive business practices.[62] Makaeff sought recovery of the roughly $35,000 in payments made for Trump University's educational services.[63] Trump University[64] counter-claimed, arguing it was defamed when Makaeff wrote letters to her bank and the Better Business Bureau, and also posted false comments on the Internet, stating that Trump University was engaged in "deceptive business practices," "outright fraud," and "grand larceny."[65] Makaeff filed an anti-SLAPP to Trump University's defamation counter claim.

The Ninth Circuit affirmed the district court's holding that Makaeff's statements about Trump University were made in connection with a public issue because, "[u]nder California law, statements warning consumers of

57. *Newsham*, 190 F.3d at 973.

58. *Id.*

59. *See, e.g.*, its recent application in Doe v. Gangland Prods., Inc., 730 F.3d 946 (9th Cir. 2013).

60. Judges Watford, Kozinski, Paez, and Bea. *See* Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013) (Kozinski, C.J., concurring), *reh'g denied en banc*, 736 F.3d 1180 (9th Cir. 2013) (Watford, J. dissenting).

61. *Id.* at 275 (Kozinski, C.J., concurring).

62. Among other claims. *Id.* at 260 (majority opinion).

63. *See id.*

64. Donald Trump founded Trump University, LLC, which is now called "The Trump Entrepreneur Initiative." *The Trump Entrepreneur Initiative*, WIKIPEDIA.COM (May 30, 2014), http://en.wikipedia.org/wiki/The_Trump_Entrepreneur_Initiative.

65. *Makaeff*, 715 F.3d at 260.

fraudulent or deceptive business practices constitute a topic of widespread public interest, so long as they are provided in the context of information helpful to consumers."[66] The burden then shifted to Trump University to show probability of prevailing on its defamation counterclaim.[67]

The Ninth Circuit determined that Trump University was a limited purpose public figure by virtue of its aggressive advertising campaigns, which constituted a "voluntary expo[sure]" of the company to "increased risk of injury from defamatory falsehood."[68] Because the Ninth Circuit deemed Trump University a limited purpose public figure, it reversed and remanded to the district court to determine whether the alleged defamatory statements were made with actual malice.[69]

Building on reasoning advanced in a pair of concurrences in *Makaeff*, I argue that *Newsham* should be overturned for three reasons. First, because California's anti-SLAPP is thoroughly procedural, the *Newsham* court should not have engaged in an analysis of whether the state-created procedures directly collided with Federal Rules. Second, *Newsham* is clearly untenable post-*Metabolife*, which gutted California anti-SLAPP's stayed-discovery requirement, thus creating an unacceptable hybrid application of the statute in diversity suits. Third, *Newsham* is out of line with the Supreme Court's most recent iteration of the Erie Doctrine in *Shady Grove*.

1. *Newsham* Was Wrongly Decided on Its Own Terms Because State-Created Procedures, Like California's Anti-SLAPP Statute, Are Always Trumped in Favor of Federal Rules of Civil Procedure

In his *Makaeff* concurrence, Judge Kozinski rightly argues that *Newsham*'s holding does not hold water (pun intended). The *Newsham* court's confused reasoning established bad precedent. First, the *Newsham* court applied the wrong rule when analyzing the statute. The court focused too narrowly on the substantive nature of California's anti-SLAPP statute, and not enough on what the statute actually regulates. Because the statute merely regulates the procedures for effectuating substantive rights, the *Newsham* court erred in finding that the statute should be applied as substantive law. Nevertheless, even if the "direct collision" analysis were appropriate, a simple side-by-side comparison shows that the two laws cannot co-exist (i.e., there is a direct collision).

66. *Id.* at 262.
67. *Id.* at 263-64.
68. *Id.* at 268-69.
69. *Id.* at 271-72.

a. The Newsham court misapplied the rule: what matters is what the rule regulates, not whether it touches upon a substantive issue

Judge Kozinski explains in his *Makaeff* concurrence that *Erie* created "two broad categories" of applicable law in diversity cases.[70] One category is for substantive state law, which is applicable in federal court,[71] and the other category is for procedural state law, which is trumped by Federal Rules. He acknowledges that more often than not the distinction between substance and procedure is obvious enough.[72] However, there are times when the distinction is not so obvious.[73] In these cases, federal judges ordinarily compare the laws to determine whether they "directly collide"[74] or can co-exist. Accordingly, the question of direct collision only arises where the distinction between substance and procedure is unclear.

However, it is unnecessary and inappropriate to determine whether the rules directly collide where a state rule is thoroughly procedure. As such, Judge Kozinski (in his *Makaeff* concurrence) rightly argued that, because California's anti-SLAPP is a merely "procedural device to screen out meritless claims,"[75] Federal Rules of Civil Procedure should apply. Accordingly, *Newsham* needlessly analyzed whether there was a direct collision between anti-SLAPP's motion to strike (et al.) and Rules 12 and 56.[76]

Put simply, the *Newsham* court misapplied the rule. It improperly engaged in a direct collision analysis because it deemed the right to attorneys' fees and costs as substantive.[77] Granted, there is Ninth Circuit precedent that the availability of attorneys' fees is a substantive right.[78] However, not once has the Ninth Circuit held the right to attorneys' fees is

70. *Makaeff*, 715 F.3d at 272 (Kozinski, C.J., concurring).

71. *See id.* ("Whether a defendant is liable in tort for a slip-and-fall, or has a Statute of Frauds defense to a contract claim, is controlled by state law.").

72. *Id.*

73. *See id.*

74. U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999) ("In determining whether the relevant provisions of California's Anti-SLAPP statute may properly be applied in federal court, we begin by asking whether such an application would result in a 'direct collision' with the Federal Rules.").

75. *Makaeff*, 715 F.3d at 273 (Kozinski, C.J., concurring) (citing Kibler v. N. Inyo Cnty. Local Hosp. Dist., 138 P.3d 193, 198 (Cal. 2006)).

76. *See id.* ("Federal courts must ignore state rules of procedure because it is Congress that has plenary authority over the procedures employed in federal court, and this power cannot be trenched upon by the states.").

77. *See Newsham*, 190 F.3d at 972.

78. *See, e.g.*, Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1479 (9th Cir. 1995) ("The method of calculating a fee is an inherent part of the substantive right to the fee itself, and a state right to an attorneys' fee reflects a substantial policy of the state.").

substantive where the underlying law is procedural in nature, as it is here. Furthermore, it is improper to apply a procedural law substantively solely based on the fact that it touches on a substantive right.[79]

In sum, the *Newsham* court determined the two laws could co-exist because doing so preserved substantive aspects of the statute. However, because the statute merely circumscribes procedures by which to effectuate substantive rights, it was incorrect to apply the statute as substantive law.

b. A simple side-by-side comparison shows that the two laws directly collide and cannot co-exist

Even applying the direct collision test, a simple side-by-side comparison of the Federal Rules and California's anti-SLAPP shows the two laws directly collide.

First, California anti-SLAPP's motion to strike[80] directly collides with Rule 12. For example, 12(b)(6) of the Federal Rules of Civil Procedure provides for a motion to dismiss a plaintiff's complaint for failure to state a claim. To defeat a 12(b)(6), the plaintiff's need only state a plausible claim for relief[81] that draws a reasonable inference that the defendant is liable.[82] Contrarily, section 425.16(b)(3) requires a showing of probability. In other words, the anti-SLAPP statute has a higher burden of proof, where Rule 12 merely tests for "legal sufficiency."[83] Likewise, anti-SLAPP's motion to strike directly collides with 12(f), which only requires courts to consider the pleadings, while California's statute requires courts to consider the pleadings and "supporting and opposing affidavits stating the facts upon which the liability or defense is based."[84] Any argument that these two can co-exist is facially futile.

Second, California anti-SLAPP's sanctions[85] and automatic award of attorneys' fees and costs[86] directly collide with Rules 11 and 54. Trump

79. The fact is, most procedural rules do touch on substantive rights. *See* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946).

80. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2014).

81. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

82. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

83. Makaeff v. Trump Univ., LLC, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring), *reh'g denied en banc*, 736 F.3d 1180 (9th Cir. 2013) (citing FED. R. CIV. P. 12) ("The Federal Rules don't contemplate that a defendant may get a case dismissed for factual insufficiency while concealing evidence that supports plaintiff's case."); *see also* Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) ("The procedural sufficiency of a pleaded claim or defense in federal court is governed by the federal rules, even though the defense relied on may be a state defense.").

84. CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2004 & Supp. 2014).

85. *Id.* § 425.16(c)(1).

University's Petition for Rehearing En Banc summarizes this conflict nicely:

> Federal Rule of Civil Procedure 11 governs the awarding of sanctions for the filing of defective pleadings, and does so under very limited circumstances. Federal Rule of Civil Procedure 54 governs the recovery of attorneys' fees and costs in a federal action. California's anti-SLAPP law, however, authorizes an award of attorneys' fees simply by virtue of a plaintiff losing an anti-SLAPP motion. As the Federal Rules already provide standards for the recovery of attorneys' fees and costs, including specifically with respect to dismissals at the pleading stage under Rule 11, this is yet another reason that California's anti-SLAPP statute providing for a different standard cannot be applied in federal court.[87]

Third, anti-SLAPP's discovery rules[88] conflict with Rule 56. It is quite obvious from the statutory language that the standard of review is different because, "[u]nder the anti-SLAPP statute, plaintiff must show a 'reasonable probability' of success; whereas, under Rule 56, the standard is a 'triable issue of fact.'"[89]

A simple side-by-side comparison shows that these two sets of procedures cannot co-exist, as the *Newsham* court held. This is yet another reason to overturn *Newsham*.

2. *Newsham*'s Holding Is Untenable Post-*Metabolife*

Regardless of whether *Newsham* was wrongly decided, its holding is now untenable post-*Metabolife*. In *Metabolife*, a Boston news station aired a three-part series on the negative health effects associated with taking an herbal supplement.[90] In response, Metabolife sued in federal court alleging state claims for defamation, slander, trade libel, and negligent and intentional interference with prospective economic advantage.[91]

The defendant then filed an anti-SLAPP motion, arguing that Metabolife's suit was frivolous and aimed at interfering with its right to public participation.[92] The district court stayed discovery pursuant to California Code of Civil Procedure section 425.16(g) and concluded that

86. *Id.* § 425.16(c)(2).

87. Petition for Rehearing En Banc at 13-14, Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013) (No. 11-55016).

88. *See* CIV. PROC. § 425.16(f).

89. Petition for Rehearing En Banc, *supra* note 87, at 13.

90. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 837 (9th Cir. 2001).

91. *Id.*

92. *Id.*

Metabolife did not make a prima facie showing of actual malice, which was required under defamation law.[93]

Reversing this determination, the *Metabolife* panel held that "the discovery-limiting aspects of the anti-SLAPP statute conflict with Federal Rule of Civil Procedure 56."[94] The court reasoned that staying discovery adversely impacted Metabolife's ability to defend against the anti-SLAPP motion because the plaintiff requested information that only the defendant had, information which would have provided additional factual support to show a probability of success.[95] "If this expedited procedure were used in federal court to test the plaintiff's evidence before the plaintiff has completed discovery, it would collide with Federal Rule of Civil Procedure 56."[96]

In his *Makaeff* concurrence, Judge Kozinski noted that, while the panel correctly applied federal discovery rules in *Metabolife*, it thereby created an additional problem. Post-*Metabolife*, the federal application of California's anti-SLAPP is a "far different (and tamer) version of its state-court cousin."[97] Applying *Metabolife*'s modifications to anti-SLAPP in diversity suits has created a hybrid procedure where "neither the Federal Rules nor the state anti-SLAPP statute operate as designed."[98]

While this hybrid application of anti-SLAPP is more amendable to the Federal Rules, Ninth Circuit judges still apply the other anti-SLAPP procedures as substantive law. This has created a federalism issue. From California's perspective, *Metabolife* represents an attempt by the federal government to encroach its sovereignty; and contrarily, from the federal perspective, California's legislature has effectively displaced "Congress as the delimiters of [its] jurisdiction."[99]

I contend that the best approach moving forward is for the Ninth Circuit to choose one of these two sets of procedures and to apply it in its entirety. Accordingly, the Federal Rules of Civil Procedure should entirely

93. *Id.* at 840.

94. *Id.* at 845.

95. *Id.* at 850 ("The district court's decision not to allow Metabolife discovery on falsity issues under Federal Rule of Civil Procedure 56(f) is REVERSED because Metabolife identified and requested discovery of probative information solely available from the defendants.").

96. *Id.* at 846.

97. Makaeff v. Trump Univ., LLC, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring), *reh'g denied en banc*, 736 F.3d 1180 (9th Cir. 2013).

98. *Id.*

99. *Id.*

supplant anti-SLAPP's procedural rules, especially after the Supreme Court's most recent Erie Doctrine decision, *Shady Grove*.[100]

B. Newsham Must Be Brought into Line with the Most Recent Iteration of the Erie Doctrine in Shady Grove

In *Shady Grove*, the Supreme Court considered whether "a federal diversity class action seeking statutory interest could move forward in the federal court, or whether a New York state law prohibiting the recovery of a penalty in class actions (such as the statutory interest sought) prevented the class action pursuant to the Erie doctrine."[101] The district court held that the New York law forbade the class action, and the Second Circuit affirmed.[102] The Supreme Court reversed, holding that the two procedures conflicted[103] because federal courts should apply federal procedural law. Thus, New York's statute did not apply and the class action was permitted to proceed.

While Judges Kozinski and Paez spend little time in their concurrences elaborating on the Supreme Court's most recent iteration of the Erie Doctrine in *Shady Grove*, Judge Watford's dissent to the denied rehearing of *Makaeff* en banc is centrally focused on it.

About *Shady Grove*, Judge Watford explained that "[t]he Court found a conflict between the two provisions because it viewed Rule 23 as establishing an exclusive set of criteria governing class certification that States may not supplement."[104] Viewed through this lens, Watford further explained that "California's anti-SLAPP statute conflicts with Federal Rules 12 and 56. Taken together, those rules establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court."[105]

Judge Watford's comparison is apt. As was discussed above, requiring a probability determination at the pleading stage contradicts Rule 12 in two ways. First, Rule 12 does not require a probability analysis, but only that plaintiffs state a claim that is plausible on its face. Second, a probability analysis conflicts with the standard of review for motions to strike[106] under

100. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010) ("*Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules.").

101. Debra Lyn Bassett, *Enabling the Federal Rules*, 44 CREIGHTON L. REV. 7, 7 (2010).

102. *Shady Grove*, 559 U.S. at 397-98.

103. *Id.* at 415. The state procedure conflicted with Rule 23, which is the federal rule permitting class actions.

104. Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., dissenting from denial of rehearing en banc).

105. *Id.*

106. FED. R. CIV. P. 12(d).

Rule 12, which is the same as summary judgment,[107] requiring the non-movant to "'designate specific facts showing that there is a genuine issue for trial.'"[108]

Admittedly, at first blush it does appear that the Court in *Shady Grove* faced a stark contrast – i.e., follow the federal rule and the class action proceeds, otherwise it doesn't – which is absent in an anti-SLAPP analysis – i.e., follow the federal rule and the action may be dismissed, otherwise it is stricken with attorneys' fees available to defendant.

However, upon closer inspection this simply is not true because, "just as the New York statute in Shady Grove impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleading stage when Rule 12 would allow them to proceed."[109] Judge Watford correctly argues that *Newsham* must be brought into line with *Shady Grove* because "California's anti-SLAPP statute creates the same conflicts with the Federal Rules that animated the Supreme Court's ruling in Shady Grove."[110]

Next, we must consider whether applying the Federal Rules of Civil Procedure, thus effectively gutting the remaining state-created procedures, violates the Rules Enabling Act. I will argue that it does not.

C. Applying Federal Rules of Civil Procedure Does Not Violate the Rules Enabling Act

Applying relevant Federal Rules of Civil Procedure in anti-SLAPP cases does not violate the Rules Enabling Act because judge-made rules that regulate procedure are appropriately applied even if they affect a substantive state right or obligation.[111]

Erie and its progeny represent the Court's "attempt within our federal system to honor two potentially competing congressional statutes: the Rules of Decision Act and the Rules Enabling Act."[112] The Rules of Decisions Act says that federal courts sitting in diversity must apply the underlying

107. *Id.* 12(f).

108. *Makaeff*, 736 F.3d at 1189 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)) (Watford, J., dissenting from denial of rehearing en banc).

109. *Id.*

110. *Id.* at 1189-90.

111. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 410 (2010) ("It is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule.").

112. Bassett, *supra* note 101, at 8; *see also* Rules of Decision Act 28 U.S.C. § 1652 (2012), and Rules Enabling Act 28 U.S.C. § 2072 (2006).

state substantive law,[113] while the Rules Enabling Act vests in the United States Supreme Court Congress' plenary power to enact rules of federal procedure.[114] The interplay between these two boils down to the fact that the Federal Rules of Civil Procedure cannot "abridge, enlarge or modify any substantive right" available under an applicable state law.[115]

Generally, federal courts have the power to supplant state law with judge-made rules. Because this is the case, the presumption is that the Federal Rules do not abridge, enlarge, or modify substantive rights. Thus, the party in favor of applying the state law must show that, despite the existence of a judge-made rule, the state rule is the "rule of decision."[116]

To so argue, the party in favor of the state rule may attempt to persuade the court that failure to apply the state rule would be "outcome determinative," or that the state rule is "bound up" with that state's rights and obligations. However, both *York* ("outcome determinative" test) and *Byrd* ("bound up" rule) pitted state rules against a federal equity doctrine and the Seventh Amendment, respectively. Because these cases did not involve a collision with the Federal Rules of Civil Procedure, they are more appropriately deemed "Rules of Decision" cases.[117] *Hanna* once-and-for-all clarified that the outcome determinative and bound-up tests do not govern in Rules Enabling cases.[118]

In *Hanna*, the Supreme Court considered whether a Massachusetts law requiring in-hand service should apply, not Rule 4's substituted service. The state law had a statute of limitations which had run and, thus, if Rule 4 applied the result would be outcome determinative. The Court clarified that "[n]either York nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which Erie had adverted."[119] *Erie* was never intended to require per se application of these tests because

113. 28 U.S.C. § 1652 (2012) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

114. 28 U.S.C. § 2072(a) (2006) ("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.").

115. 28 U.S.C. § 2072(b) (2006).

116. *Shady Grove*, 559 U.S. at 417.

117. Bassett, *supra* note 101, at 11 ("Erie, York, and Byrd were all Rules of Decision Act cases.").

118. *See id.* at 14 ("Thus, concepts of outcome-determination and 'bound up' have no application in Hanna/Rules Enabling Act analysis.").

119. Hanna v. Plumer, 380 U.S. 460, 472 (1965).

the federal courts must apply Federal Rules, acting on "'a Congressional mandate (the Rules) supported by constitutional authority.'"[120]

Since *Hanna*, the Supreme Court has repeatedly rejected arguments that a state rule is the rule of decision where the conflicting federal rule regulates procedure.[121] Because Federal Rules that regulate procedure are "valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights,"[122] it is inappropriate to allow a state legislature to replace "Congress as the delimiters of our jurisdiction."[123] Application of California's anti-SLAPP in diversity suits does just that.

D. The Ninth Circuit Should Apply Federal Rules Even Though Doing So Could, But Will Not Necessarily, Increase Forum Shopping

There is no doubt that supplanting anti-SLAPP procedural elements could increase forum shopping.[124] Forum shopping is defined as the litigant's attempt to have her case heard in a forum she feels is likely to give her a favorable judgment.[125] The predominant view is that forum shopping is "something that a respectful, responsible lawyer [is] not to do."[126] In fact, some "members of the Court have stated that a 'significant encouragement to forum shopping is alone sufficient to warrant application of state law.'"[127]

However, not only is forum shopping something that all lawyers do for strategic reasons when they select a venue in which to bring suit,[128] but it is

120. *Id.* at 473 (citing Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963)).

121. *Shady Grove*, 559 U.S. at 410 ("We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure.").

122. *Id.*

123. Makaeff v. Trump Univ., LLC, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring), *reh'g denied en banc*, 736 F.3d 1180 (9th Cir. 2013).

124. *See* U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) ("Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti–SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the 'twin aims' of the Erie doctrine.").

125. *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (quoting BLACK'S LAW DICTIONARY 590 (5th ed. 1979)).

126. Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QLR 25, 25 (2005).

127. *Forum Shopping Reconsidered*, *supra* note 125, at 1681 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 40 (1988) (Scalia, J., dissenting)).

128. *See* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting A Venue*, 78 NEB. L. REV. 79, 81 (1999).

also something that courts permit, however reluctantly. For example, federal courts have permitted forum shopping to select more favorable law, to select courts likely to interpret that law favorably, and for pre-emptive shopping (i.e., where the potential defendant sues in a favorable forum before being sued by the potential plaintiff in order to gain a tactical advantage).[129]

In addition, the Supreme Court has expressly permitted forum shopping in two kinds of situations. First, situations where there is an overriding federal interest in allowing it and, second, where the court deems that "divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure."[130]

Here, the overriding federal interest is in federalism and the plenary power of congress to enact – and federal courts to promote – uniform rules of procedure in federal courts. "The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to 'disembowel either the Constitution's grant of power over federal procedure' or Congress's exercise of it.'"[131]

Moreover, in other choice-of-law situations, the Ninth Circuit has found an overriding federal interest in clean water,[132] and the Supreme Court has found an overriding federal interest in real estate financing[133] and a defendant's ability to successfully raise a "military contractor defense" to a state's product liability tort.[134] Certainly there is a colorable argument here that Congress has as strong (indeed, a stronger) overriding interest in applying relevant Federal Rules, even if doing so may increase forum shopping.

Furthermore, applying California's statute in federal court puts parties on uneven ground because a resident's ability to avail herself of anti-SLAPP protections greatly depends upon the language in the statute of the state in which she is sued. For example, if a defendant is sued in California and the case is removed to federal court she's in luck because, even if she

129. *See id.* at 88-105.

130. Shady Grove Orhopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 416 (2010).

131. *Id.* (citing Hanna v. Plumer, 380 U.S. 460, 473-74 (1965)).

132. *See* Nat'l Audubon Soc'y v. Dep't of Water, 869 F.2d 1196 (9th Cir. 1988).

133. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

134. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 505-06 (1988).

loses her anti-SLAPP motion to strike, the Ninth Circuit recognizes a right to immediate appeal as to California's anti-SLAPP statute.[135]

But, if she loses the same motion pursuant to a very similar anti-SLAPP statute in say, Nevada, she is out of luck because the Ninth Circuit does not recognize a right to immediate appeal in that state.[136] And until the legislature conformed the language of its anti-SLAPP to something akin to California's, residents SLAPPed with alleged frivolous suits in Oregon faced the same fate.[137] Such happenstance-jurisprudence is unacceptable, both as a matter of fairness and law.

In sum, because California's anti-SLAPP procedures are thoroughly procedural, the Federal Rules should apply. Regardless, applying the direct collision test, California's anti-SLAPP collides with the Federal Rules and on this basis the anti-SLAPP statute should not apply.[138] Furthermore, the relevant Federal Rules do not violate the Rules Enabling Act, and the mere fact that a Federal Rule may increase forum shopping is not enough, on its own, to refuse to apply it. Rightly, two sister circuits have refused to apply state anti-SLAPPs.[139] The Ninth Circuit should likewise refuse to do so.

II. *BATZEL*'S COLLATERAL ORDER DOCTRINE ERROR

Ordinarily, appellate review is delayed until final judgment has been entered.[140] As a practical matter, the final judgment rule prevents "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy."[141] Repeated interruptions increase costs and slow things down, which effectively clogs dockets and creates unnecessary waste in the system.[142] Thus, limiting appeals to final judgments improves efficiency.

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135. *See* U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999) (first case to apply California's anti-SLAPP in federal court).

136. *See* Metabolic Research, Inc. v. Ferrell, 693 F.3d 795, 803 (9th Cir. 2012) (denying collateral review).

137. *See* Englert v. MacDonell, 551 F.3d 1099 (9th Cir. 2009).

138. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980).

139. *See* S. Middlesex Opportunity Council, Inc. v. Town of Framingham, No. 07-12018, 2008 WL 4595369, at *8-9 (D. Mass. Sept. 30, 2008); *see also* 3M Co. v. Boulter, 842 F. Supp. 2d 85 (D.C. Cir. 2012).

140. 28 U.S.C. § 1291 (2012); *see also* Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003) (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)).

141. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

142. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985); *see also* Kristin B. Gerdy, *"Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine*, 38 U.S.F. L. REV. 213, 216 (2004) ("In addition to creating problems of cost, inconvenience, and delay, appeals before a final judgment can undermine the workings of the trial court.").

Federal courts will on occasion review decisions that are not "final." One such exception[143] to the final judgment rule is the collateral order doctrine, which permits appellate review without a final decision on the merits, but only for a small class of cases where the court is able to "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[144]

The Supreme Court has repeatedly stressed that the collateral order doctrine "is a narrow exception and should never be allowed to swallow the rule"[145] and that its "reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal."[146] Accordingly, the collateral order doctrine is only available where three prongs are satisfied. Appellate review must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and the issue must be (3) "effectively unreviewable on appeal from a final judgment."[147]

Collateral review is permitted where the issues under review are collateral to the merits of the case. Furthermore, the issues on review must turn "on an issue of law."[148] Here it is important to note one nuance to the question of whether something is deemed an issue of law. As to the second prong, the Supreme Court has said that collateral review which involves analysis of some facts, but only for the purpose of deciding a pure question of law, may be considered "separate from the merits" where the issue is "conceptually distinct."[149] For example, in *Batzel* the court held that the "anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed."[150] In other words, the issue of immunity from suit was considered distinct from the merits of the plaintiff's claims.

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143. Some courts refer to the collateral order doctrine as a practical construction of the ordinary final judgment rule, and not as an exception to it. *See, e.g.*, Will v. Hallock, 546 U.S. 345, 349 (2006); Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995). However, some commentators have alternatively described the collateral order doctrine as merely a "strained reading" of 28 U.S.C. § 1291. *See, e.g.*, Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 547 (1998).

144. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

145. *Digital Equip.*, 511 U.S. at 863.

146. *Richardson-Merrell*, 472 U.S. at 430-31 (holding that denied motions to disqualify counsel are immediately appealable under the collateral order doctrine).

147. *Id.* at 431 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

148. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

149. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995).

150. Batzel v. Smith, 333 F.3d 1018, 1025 (9th Cir. 2003).

In Section II, I will argue that *Batzel* should be overturned because collateral review of denied anti-SLAPPs fails the second prong and is not by any stretch of the imagination conceptually distinct. In addition, *Batzel* circumscribed an expansive reading of the collateral order doctrine, one which runs contrary to the policy aims of the final judgment rule.

A. The Collateral Order Doctrine's Narrow Application and Limited Purpose

In 1949, the Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation* interpreted the "final decisions" language of 28 U.S.C. § 1291[151] as flexible enough to "permit immediate appeal of decisions that did not end the litigation but that conclusively determined claimed rights that were separate from the merits and that were effectively unreviewable after final judgment."[152] But, not all flexible things are meant to bend to their breaking point. The collateral order doctrine embodies this truism. Accordingly, the Supreme Court has clarified a few of the limited scenarios where collateral review is permissible. It first did so in *Cohen*.

Cohen v. Beneficial Industrial Loan Corporation

Cohen involved a shareholder derivative action where a small shareholder sued asserting that the company's officers and directors were raiding company money for personal enrichment.[153] Pursuant to a state law, the defendants moved to require the shareholder-plaintiff to post security to pay defense costs if the plaintiff lost.[154] The district court denied this motion and the defendants appealed.

The *Cohen* Court found that, even though the motion did not terminate litigation, appeal was proper under section 1291 because the district court's decision was final as to the question of security which is "a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[155] Without review, the *Cohen* Court reasoned that the defendants' right to security would have been lost, "probably irreparably."[156]

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151. 28 U.S.C. § 1291 (2012) ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States.").

152. Anderson, *supra* note 143, at 540.

153. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 543 (1949).

154. *Id.* at 544-45.

155. *Id.* at 546-47.

156. *Id.* at 546.

Cohen was decided a few years after *Erie*. Of course, *Erie* involved an unquestionably substantive state law (i.e., a tort). Accordingly, it left open the question as to whether federal courts in diversity suits must apply state-created procedures as substantive law. This variation on the choice-of-law question post-*Erie* was first presented to the Supreme Court in *Cohen*. Thus, if the *Cohen* court did not find section 1291 jurisdiction it would be denied an opportunity to further flesh out *Erie*. Thus, in *Cohen*, the *Erie* issue "too important to be denied review" was a pure question of law – i.e., whether the state law should apply – "entirely distinct"[157] from the merits – i.e., whether the plaintiff's claims have merit.

Post-*Cohen*, there are a few recurring situations where the Supreme Court deems collateral review proper.[158] For our purposes, we will look at two. The first is in the criminal context where a defendant asserts immunity under the Speech and Debate Clause or Double Jeopardy. The second is review of denied claims to absolute and qualified immunity. Boiling the Court's jurisprudence to its essence, if the Court finds that a party was denied on a claim to a right not to stand trial, and if review of this denied claim involves a pure question of law that is "conceptually distinct" from the merits of the case, then collateral review is permissible.[159]

1. Collateral Review in the Criminal Context

The Speech and Debate Clause says that members of both Houses of Congress "shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same."[160] In *Helstoski v. Meanor*,[161] the Court held that collateral review of denials of the Speech and Debate Clause protections was permissible.

The Court, echoing a Double Jeopardy case,[162] advanced two reasons as to why collateral review was proper. First, once a motion to dismiss is denied "there is nothing the Member can do under that Clause in the trial court to prevent the trial."[163] And second, the Clause entitles the

157. Anderson, *supra* note 143, at 547-48.

158. This list is not comprehensive, but it does give a sample of the kinds of decisions the Supreme Court feels warrant collateral review. To wit, in *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), the Court held that the denied agency's motion to dismiss based on the Eleventh Amendment was immediately appealable and reviewable pursuant to the collateral order doctrine.

159. *See, e.g.*, Will v. Hallock, 546 U.S. 345 350-51 (2006).

160. U.S. CONST. art. 1, § 6, cl. 1.

161. Helstoski v. Meanor, 442 U.S. 500, 507 (1979).

162. *See* Abney v. United States, 431 U.S. 651 (1977).

163. *Helstoski*, 442 U.S. at 507.

congressional member to immunity from suit; thus, if a "member is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs."[164]

Likewise, the Fifth Amendment's Double Jeopardy Clause says, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb in criminal or civil cases . . . ."[165] Basically, the Double Jeopardy Clause is invoked as a defense to retrial after an acquittal, a conviction, certain mistrials, and from multiple punishment. In *Abney v. United States*, the Court held that collateral review of denied Double Jeopardy claims is proper because:

> [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.[166]

2. Absolute and Qualified Immunity[167]

In *Nixon v. Fitzgerald*,[168] the Supreme Court permitted collateral review of a denied claim to absolute immunity. While the Court based its decision mostly on the "compelling public ends" that would be "compromised by failing to allow immediate appeal of a denial of absolute Presidential immunity,"[169] it is not difficult to ascertain why absolute immunity is a good candidate for collateral review. First, review is conclusive because either the President is immune from suit, or he's not. Second, answering the immunity question is an entirely separate exercise from assessing the merits of the plaintiff's claims. And third, if review is denied and the action commences to final conclusion, then the issue of immunity from suit is moot.

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164. *Id.* at 508.

165. U.S. CONST. amend V.

166. *Abney*, 431 U.S. at 659.

167. *See* 42 U.S.C. § 1983 (2012) (qualified immunity can be used to defend against a "constitutional tort" against a government official for engaging in actions alleged to violate clearly established law).

168. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

169. Will v. Hallock, 546 U.S. 345, 352 (2006).

As to whether collateral review applies, the answer is more difficult in qualified immunity cases. A grant of qualified immunity is only proper if the alleged actions of the government official do not violate clearly established statutory or constitutional rights, of which a reasonable person would have known.[170] If this standard is met, then the suit cannot proceed. "The qualified-immunity defense 'shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[171]

Qualified immunity is similar to absolute immunity in that both grant "an entitlement not to stand trial or face the other burdens of litigation" and both are usually "effectively unreviewable on appeal from a final judgment."[172] In *Mitchell v. Forsythe*, an Attorney General asserting a qualified immunity defense sought collateral review of a denied motion for summary judgment. The Court held that collateral review was proper, and in the process nuanced the second prong's "entirely separate from the merits" analysis by introducing the "conceptually distinct" test.[173]

First, it reasoned that "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law."[174] The question of law is "a purely legal one: whether the facts alleged . . . support a claim of violation of clearly established law."[175] Then, the Court said that, while "resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief,"[176] considering some facts is permissible as long as the issue on appeal is "conceptually distinct" from the merits of the case.[177] Thus, the conceptually distinct issue was immunity from suit; that is, the immunity issue was separable from the merits of the actual claims against the Attorney General.[178] With this background in mind, let us turn to the reasons why *Batzel* should be overturned.

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170. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

171. Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (citing *Harlow*, 457 U.S. at 818).

172. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).

173. *Id.* at 527-49.

174. *Id.* at 528.

175. *Id.* at 555 n.9 (Brennan, J., dissenting).

176. *Id.* at 528 (majority opinion).

177. *Id.*

178. The Supreme Court has refused to allow appellate review in the qualified immunity context. For example, in *Johnson v. Jones* the Court considered "the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case,

B. The Batzel Court Misapplied the Collateral Order Doctrine Because California's Anti-SLAPP Statute Fails the Second Prong

In *Batzel*, the Ninth Circuit first (erroneously) held that it had appellate jurisdiction to review denied anti-SLAPPs pursuant to the collateral order doctrine.[179] *Batzel* arises from a dispute between a handyman, Bob Smith, and Ellen Batzel, "an attorney licensed to practice in California and North Carolina, at Batzel's house in the North Carolina mountains."[180] Cobbling together a series of statements allegedly made by Batzel, Smith developed a suspicion that Batzel had stolen valuable German works of art, many of which hung on the walls of Batzel's North Carolina residence.[181] "To Smith, these paintings looked old and European."[182]

Based on these suspicions, Smith ran an Internet search for websites with information about stolen artwork. The search yielded the name "Museum Security Network," along with an email address to which inquiries may be sent about stolen artwork. Smith sent an email which detailed his suspicions.[183] Upon reception of Smith's email, the sole operator of the Network, Ton Cremers, took it, made a few subtle edits, and then sent the edited email text to a well-populated listserv, and also posted its contents on the Network website, which was "read by hundreds of museum security officials, insurance investigators, and law enforcement personnel around the world, who use the information in the Network posting to track down stolen art."[184]

When Batzel learned of the website posting she sued Smith, Cremers, and two other parties for defamation, arguing that she was not, and never had been, a descendant of a Nazi official, and that she did not inherit the art.[185] She claimed reputational damage and lost business.[186] Cremers countered with two motions,[187] here the one most pertinent being a motion to strike pursuant to the California anti-SLAPP statute.[188]

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determines only a question of 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial." 515 U.S. 304, 313 (1995).

179. Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003).

180. *Id.* at 1020.

181. *Id.* at 1020-21.

182. *Id.* at 1021.

183. *Id.*

184. *Id.* at 1021-22.

185. *Id.* at 1022.

186. *Id.*

187. *Id.* at 1023.

188. The other was a motion for lack of personal jurisdiction, which was denied at the district level and subsequently affirmed by the Ninth Circuit. The Ninth Circuit affirmed because interlocutory appeal of Cremers' personal jurisdiction motion failed both prongs, in that it was not

For our purposes, the key issue facing the court in *Batzel* was "whether a district court's denial of an anti-SLAPP motion is an immediately appealable 'final decision' under 28 U.S.C. § 1291, so that we have jurisdiction to address Cremers' appeal."[189] For the first time, in *Batzel* the Ninth Circuit held that it could exercise appellate review of denied anti-SLAPPs pursuant to the collateral order doctrine.[190]

As to the first prong,[191] the *Batzel* court determined that the district court's denial of Cremers' anti-SLAPP motion was conclusive because it involved whether the litigation would proceed or not. In other words, "[i]f an anti-SLAPP motion to strike is granted, the suit is dismissed and the prevailing defendant is entitled to recover his or her attorneys' fees and costs" and "[i]f the motion to strike is denied, the anti-SLAPP statute does not apply and the parties proceed with the litigation."[192]

As to the third prong,[193] the district court's denial was effectively unreviewable after final judgment because a "decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression . . . a claim of immunity, to the extent that it turns on an issue of law, is an appealable final decision within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."[194]

(a) "so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal," nor (b) did the "resolution of the issue properly raised on interlocutory appeal necessarily resolve[ ] the pendent issue." *Id.*

189. *Id.* at 1024.

190. *Id.* at 1025-26.

191. I.e., appellate review must conclusively determine the disputed question. *Id.* at 1024.

192. *Id.* at 1025.

193. I.e., that the issue must be "effectively unreviewable on appeal from a final judgment." *Id.* at 1024-25.

194. *Id.* at 1025-26. As an aside, it is interesting to note that in *DC Comics v. Pacific Pictures Corp*, 706 F.3d 1009 (9th Cir. 2013), the Ninth Circuit reconsidered Batzel's holding as to the third prong after the Supreme Court's *Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009), decision. In *Mohawk*, the Supreme Court held that the collateral order "doctrine does not permit an interlocutory appeal of a discovery order requiring production of documents over which a party asserts attorney-client privilege." *DC Comics*, 706 F.3d at 1014 (citing *Mohawk*, 558 U.S. at 130). *DC Comics* argued that *Mohawk*'s holding as to the effectively unreviewable prong undermines *Batzel* because, post-*Mohawk*, circuit judges should focus solely on whether delaying review "'would imperil a substantial public interest' or 'some particular value of a high order.'" *Id.* at 1014 (quoting *Mohawk*, 558 U.S. at 100-01). And immunity from suit is not a value of highest order. In short, the *DC Comics* court held that the state interest in immunity from suit touches on values of the highest order because First Amendment rights are implicated. *DC Comics*, 706 F.3d at 1015. Subsequently, the *DC Comics* court reaffirmed that anti-SLAPP's motion to strike was "effectively unreviewable on appeal." *Id.* at 1014.

Finally, and most importantly, as to the second prong[195] the court held that "[d]enial of an anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed."[196] The *Batzel* court deemed the separate question as whether the "defendant is being forced to defend against a meritless claim," and thus deciding the answer to this question is separate from the question of the "merits of the defamation claim itself." This reasoning is patterned on the conceptually distinct test articulated in *Mitchell*.

1. The *Batzel* Court Misapplied the Collateral Order Doctrine Because It Asked and Answered the Wrong Question

To determine whether the plaintiff's claims are meritorious, California's anti-SLAPP statute requires that "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based"[197] in order to figure out whether "the plaintiff has established a probability that he or she will prevail on the claim."[198] The separate question, then, is the plaintiff's probability of success of her claims. The answer to that question will determine whether the defendant should be forced to defend against it.

Put simply, the *Batzel* court identified and answered the wrong question. In so doing, it found appellate jurisdiction out of thin air. *Batzel* asked whether immunity from suit is a separable – i.e., conceptually distinct – issue, collateral to the underlying causes of action. If framed that way, the clear answer is "yes." The problem with that question, however, is that it allows the third prong "immunity from suit" analysis to bleed into and essentially supplant the second prong "separate from the merits" analysis.[199]

As was discussed above, the second prong of collateral review permits pre-final judgment to resolve important issues completely separate from the merits of the action. The problem is that review of California's anti-SLAPP requires the court to determine plaintiff's probability of success on the merits of her claims. In conducting the analysis, then, it is imperative that judges consider issues that are inseparably related to the merits of the

195. I.e., appellate review must "resolve an important issue completely separate from the merits of the action." *Batzel*, 333 F.3d at 1024.

196. *Id.* at 1025.

197. CAL CIV. PROC. CODE § 425.16(b)(2) (West 2004 & Supp. 2014).

198. *Id.* § 425.16(b)(3).

199. Likewise, while it is true that anti-SLAPP's special motion to strike a complaint "protect[s] the defendant from the burdens of trial, not merely from ultimate judgments of liability," so do demurrers and 12(b)(6) motions. *Batzel*, 333 F.3d at 1025.

action. That is, judges must consider the strength of the claims that define the very controversy itself. As Judge Watford put it, "[a] court cannot gauge the probability of success on a claim without assessing the merits of the claim itself."[200]

If the *Baztel* court had asked the right question it likely would have wound up with the right answer: that review of denied anti-SLAPPs is not a separate issue; rather, it is inseparably bound up with the merits of the claims. As such, it fails prong two.

2. Anti-SLAPP Determinations Are Fact-Intensive Analyses, Which Are Barred by the Second Prong for Collateral Review

California courts have interpreted the anti-SLAPP statute to say that probability of success requires a plaintiff to show each challenged claim is both legally sufficient and evidences a "'sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'"[201] This is not some generalized, blanket analysis, but instead requires judges to thoroughly analyze whether the plaintiff has established even a scintilla of evidence of prevailing on any part of its claim. If she does, it is deemed that "'the plaintiff has established that its cause of action has some merit and the entire cause of action stands.'"[202]

In Judge Watford's dissent to the denied rehearing of *Makaeff* en banc, he argues that "[s]uch a predictive analysis may not amount to *deciding* the claim on the merits, but there's no credible argument that it's '*completely* separate from the merits.'"[203] And "[f]or proof, we need look no further than the panel's opinion in this case, which engages in an exhaustive analysis of the merits of Trump University's defamation claim."[204]

The Supreme Court has required satisfaction of all three prongs, lest the collateral order doctrine's narrow exception swallow the final judgment rule. Thus, even though denying immediate appeal of anti-SLAPPs undercuts California's interest in promoting its residents' right to free speech, and also a defendant's right to attorneys' fees, "when the immunity

200. Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1190 (9th Cir. 2013) (Watford, J., dissenting from denial of rehearing en banc).

201. Navellier v. Sletten, 52 P.3d 703, 708 (Cal. 2002) (quoting Wilson v. Parker, Covert & Chidester, 50 P.3d 733, 739 (Cal. 2002)).

202. Mann v. Quality Old Time Serv., Inc., 15 Cal. Rptr. 3d 215, 223 (Ct. App. 2004).

203. *Makaeff*, 736 F.3d at 1190 (Watford, J., dissenting from denial of rehearing en banc) (citing Will v. Hallock, 546 U.S. 345, 349 (2006)).

204. *Makaeff*, 736 F.3d at 1190 (Watford, J., dissenting from denial of rehearing en banc) (citing Makaeff v. Trump Univ., LLC, 715 F.3d 254, 261–71 (9th Cir. 2013)).

issues are not distinct from the merits, 'precedent, fidelity to statute, and underlying policies' do not permit interlocutory appeals."[205]

Review of California's anti-SLAPP is fact-intensive, and as such it is similar to qualified immunity cases where the Supreme Court has refused to find a collateral issue. For example, in *Johnson v. Jones* the Court held that "defendants asserting qualified immunity may not appeal 'a *fact*-related dispute' – sufficiency of the evidence – under the collateral order doctrine."[206] Citing *Behrens v. Pellettier*, Judge Watford in his dissent to the denied rehearing of Makaeff en banc notes that if "nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim."[207] He then argues that the anti-SLAPP statute contemplates a fact-bound inquiry: "'In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[208]

Thus, based on *Johnson*, and in light of the fact that review of an anti-SLAPP denial is a fact-intensive inquiry, "even if California's anti-SLAPP statute confers a right not to stand trial, that fact alone is not enough to satisfy the collateral order doctrine's requirements."[209]

CONCLUSION

Since its 1992 enactment, California's anti-SLAPP statute has grown from "a little-used statutory protection for environmental and other protestors to a blossoming cottage industry for the defense bar."[210] At this point, its proliferation is seemingly boundless, especially considering the wide array of claims that are deemed to evidence acts in furtherance of public participation.[211]

Regrettably, the Ninth Circuit applies anti-SLAPP's state-created special motion to strike as substantive law, and then further clogs its docket

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205. *Makaeff*, 736 F.3d at 1191 (Watford, J., dissenting from denial of rehearing en banc) (citing Johnson v. Jones, 515 U.S. 304, 317 (1995)).

206. *Id.* (citing *Johnson*, 515 U.S. at 307).

207. *Makaeff*, 736 F.3d at 1191 (Watford, J., dissenting from denial of rehearing en banc) (citing Behrens v. Pelletier, 516 U.S. 299, 313 (1996)).

208. *Id.* (quoting CAL. CIV. PROC. CODE § 425.16(b)(2) (West 2004 & Supp. 2014)).

209. *Id.* at 1191-92.

210. Sharon J. Arkin, *Bringing California's Anti-SLAPP Statute Full Circle: To Commercial Speech and Back Again*, 31 W. ST. U. L. REV. 1, 1-2 (2003).

211. "[B]usiness torts, anti-trust, intentional infliction of emotional distress, invasion of privacy, [and] civil rights violations," among others. Tate, *supra* note 43, at 805. Because First Amendment rights are implicated, the legislature instructed that the statute is to be "construed broadly." *See* CIV. PROC. § 425.16(1).

wasting time on collateral review of denied anti-SLAPPs. The Ninth Circuit does not permit demurrers, nor does it review 12(b)(6) motions to dismiss. Why does an anti-SLAPP motion to strike receive special treatment? It shouldn't. *Newsham* and *Batzel* were wrongly decided.

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