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## Attorney-fee Shifting Is the Solution to SLAPPING Meritless Claims out of Federal Court

Gleisy Sopena

Florida International University College of Law, gsopen001@fiu.edu

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# ATTORNEY-FEE SHIFTING IS THE SOLUTION TO SLAPPING MERITLESS CLAIMS OUT OF FEDERAL COURTS

*Gleisy Sopena*\*

## ABSTRACT

Strategic Lawsuits Against Public Participation (“SLAPPs”) are meritless claims brought against individuals or corporations to silence them for exercising protected speech under the First Amendment. In response to the chilling effects of these SLAPP suits, State legislatures have enacted anti-SLAPP statutes to quickly dismiss these meritless claims and protect the targets of these suits. These anti-SLAPP statutes have two prominent components: a special motion to dismiss and an attorney fee-shifting provision that is dependent on prevailing on the special motion set forth in the statute. Federal courts sitting in diversity are divided over whether the special motion standards set forth in the statute can apply in federal court because the special motion standard answers the same question as Federal Rules of Civil Procedure 12 and 56. Under *Erie*, a federal court must apply the state substantive law, but if the state law conflicts with the federal rules, the latter will apply as long as it is valid under the Rules Enabling Act. Florida’s anti-SLAPP statute is unique in that it does not limit the recovery of attorney’s fees to prevailing on the special motion standards set forth in the statute. Thus, under Florida’s anti-SLAPP statute a SLAPP target can use the Federal Rules of Civil Procedure to quickly dismiss a meritless claim and use a relatively unguided *Erie* analysis to get an award of attorney’s fees pursuant to the anti-SLAPP statute. Strong use of *Twombly* and *Iqbal*, coupled with the award of attorney’s fees provided in Florida’s statute, can achieve the same effect that anti-SLAPP laws have in state court—but in federal court and without running afoul of the *Erie* doctrine.

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\* J.D. 2022, Florida International University College of Law.

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## I. INTRODUCTION

In his show, *Last Week Tonight with John Oliver*, the British television host takes a satirical approach to many current events affecting the United States and the world. In one of his 2018 episodes, Oliver featured a story of American businessman Robert E. Murray and his coal mining business.<sup>1</sup> The episode, as most episodes of the show, was comedic with jokes and satire spread throughout the segment and even an appearance by a man dressed as a giant squirrel.<sup>2</sup> The episode discussed the Crandall Canyon mine collapse,<sup>3</sup> and Oliver expressed throughout the segment that Murray did not properly protect his miners' safety.<sup>4</sup> Coincidentally, the segment also mentioned how Murray has previously used defamation lawsuits to silence his critics.<sup>5</sup> After the episode aired, Murray disagreed with the content of the episode and with what Oliver said about him and his company. To retaliate against HBO and John Oliver, Murray sued both the network and Oliver for defamation.<sup>6</sup> After tying John Oliver and HBO up with litigation for about two years, Murray

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<sup>1</sup> LastWeekTonight, *SLAPP Suits: Last Week Tonight with John Oliver*, YOUTUBE (Nov. 11, 2019), <https://youtu.be/UN8bJb8biZU>.

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

<sup>3</sup> In 2007, a mine co-owned by Murray collapsed, trapping six workers underground. Three rescue workers died in an attempt to reach the miners, and after twenty-six days of unsuccessful rescue efforts, the miners were declared dead and their bodies were never recovered. After the incident, the Mine Safety and Health Administration, an agency of the Department of Labor, concluded that the accident was the result of an inadequate mine design. See U.S. DEP'T OF LAB., CRANDALL CANYON ACCIDENT INVESTIGATION SUMMARY AND CONCLUSIONS, <https://arlweb.msha.gov/genwal/ccsummary.asp> (last visited Feb. 3, 2022). The owners of the mine, including Murray Energy, entered into a settlement agreement which included \$949,351 in fines, as well as acceptance by Murray Energy that four violations of mine safety laws by Murray Energy contributed to the fatal accident. Howard Berkes, *Coal Mine Company Denies Responsibility Despite Disaster Settlement*, NPR (Sept. 27, 2012, 8:26 PM), <https://www.npr.org/sections/thetwo-way/2012/09/27/161920764/coal-mine-company-denies-responsibility-despite-disaster-settlement>.

<sup>4</sup> *SLAPP Suits: Last Week Tonight with John Oliver*, *supra* note 1.

<sup>5</sup> *Id.*

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

voluntarily dismissed the meritless lawsuit.<sup>7</sup> Even though Oliver and HBO “won the case,” the meritless lawsuit ended up costing about \$200,000 in attorney’s fees and caused the show’s libel insurance to triple.<sup>8</sup> This is precisely what anti-SLAPP laws aim to discourage—filing meritless lawsuits to silence constitutionally protected speech.

The rights to petition the government, voice concerns, and engage in public discourse are fundamental pillars of American democracy engrained in the First Amendment of the Constitution. “Strategic lawsuits against public participation,” or “SLAPPs”<sup>9</sup> threaten to chill free speech and public debate by giving plaintiffs leeway to file baseless lawsuits against those engaging in protected speech.<sup>10</sup> The main purpose of a SLAPP lawsuit is to embroil the target in endless litigation to the point of settlement or to stop the target from engaging in constitutionally protected speech.

In response to the intimidating and chilling effects caused by SLAPP lawsuits, thirty-one states<sup>11</sup> have enacted anti-SLAPP statutes to protect SLAPP targets<sup>12</sup> from the financial threat of meritless claims.<sup>13</sup> Anti-SLAPP statutes aim to balance First Amendment concerns while also protecting private causes of action under state law. Currently there is no federal anti-SLAPP provision,<sup>14</sup> and federal courts around the country disagree about whether state anti-SLAPP statutes conflict with the Federal Rules of Civil Procedure. The Second, Fifth, Eleventh, and D.C. circuits find that anti-

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

<sup>8</sup> *Id.*

<sup>9</sup> The term SLAPP was first coined by Penelope Canan and George W. Pring in the 1980s. GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996).

<sup>10</sup> Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/introduction-anti-slapp-guide/> (last visited Feb. 3, 2022).

<sup>11</sup> *Understanding Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/resources/anti-slapp-laws/>.

<sup>12</sup> This comment will often use the term “target” because SLAPP lawsuits can also take the form of a counterclaim. SLAPP lawsuits are not only limited to an initial suit filed by a plaintiff. A defendant can file a SLAPP counterclaim to either force the original plaintiff to drop the lawsuit or settle.

<sup>13</sup> *Understanding Anti-SLAPP Laws*, *supra* note 11.

<sup>14</sup> Many First Amendment supporters have continuously called for a federal anti-SLAPP statute, but Congress has been very slow to act. The Citizens Participation Act of 2020 was reintroduced to the House of Representatives in July 2020 where it was referred to the House Committee on the Judiciary. The Bill includes a special motion to dismiss, like most state anti-SLAPP statutes, as well as an attorney-fee shifting provision providing recovery to defendants fighting these meritless claims. See Citizen Participation Act of 2020, H.R. 7771, 116th Cong. (2d Sess. 2020); see also Jay Adkisson, *Federal Anti-SLAPP Legislation Re-Introduced in Congress but Needs Updating*, FORBES (Aug. 29, 2020, 12:40 AM), <https://www.forbes.com/sites/jayadkisson/2020/08/29/federal-anti-slapp-legislation-re-introduced-in-congress-but-needs-updating/?sh=6e9fd88a1d28>; Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, 2020 N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 89 (2020).

SLAPP statutes have no application in federal court,<sup>15</sup> while the Ninth and First circuits find that they do.<sup>16</sup> The United States Supreme Court recently denied certiorari in *Van Dyke v. Retzlaff*,<sup>17</sup> meaning that the circuit split lives and federal courts will continue to grapple with these concerns until the Supreme Court decides to take up the issue.

On the applicability of anti-SLAPP statutes in federal court, the issue is that under most states' anti-SLAPP statutes, a defendant can recover attorney's fees and costs only if the defendant prevails on the procedural standards set forth in the statute; not if the defendant prevails through other procedural mechanisms like a motion to dismiss or motion for summary judgment. Florida's anti-SLAPP statute might prove to be the solution to this problem. Florida's statute allows the targets of these lawsuits to recover attorney's fees and costs for actions that involve protected speech and that are "without merit."<sup>18</sup> Thus, under Florida's anti-SLAPP statute, a defendant can prevail on other procedural mechanisms, like a motion to dismiss or motion for summary judgment, while still recovering the attorney's fees provided by the statute. While the special motion standards set forth in anti-SLAPP statutes cannot apply in federal court because these standards conflict with the Federal Rules of Civil Procedure, under a relatively unguided *Erie* analysis,<sup>19</sup> an attorney-fee shifting provision, which requires the non-prevailing party to pay the legal fees of the prevailing party, should apply in federal court and would protect both First Amendment and *Erie* concerns. By not allowing the targets of these lawsuits to recover fees through procedural mechanisms put in place by the Federal Rules of Civil Procedure, courts and

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<sup>15</sup> See *La Liberte v. Reid*, 966 F.3d 79, 83 (2d Cir. 2020) (finding that California's anti-SLAPP statute does not apply in federal court because it conflicts with Federal Rules of Civil Procedure 12 and 56); *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019) (holding that the anti-SLAPP statute cannot apply in federal court because the burden-shifting framework imposes additional requirements beyond those found in Rules 12 and 56 of the Federal Rules of Civil Procedure); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1351 (11th Cir. 2018) (finding that Georgia's anti-SLAPP statute was invalid because under the Rules Enabling Act, Federal Rules of Civil Procedure 12 and 56 answered the same basic question as the statute); *Abbas v. Foreign Pol'y Grp., L.L.C.*, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (holding that the anti-SLAPP statute cannot apply in federal court because Rules 12 and 56 of the Federal Rules of Civil Procedure were valid under the Rules Enabling Act and answered the same question as the anti-SLAPP statute).

<sup>16</sup> See *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) (finding that Maine's anti-SLAPP statute applies in federal court because Federal Rules of Civil Procedure 12 and 56 are not broad enough to cover the issues within the scope of the anti-SLAPP statute); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (finding that California's anti-SLAPP statute applies in federal court because there is no direct collision between the statute and Federal Rules of Civil Procedure 12 and 56).

<sup>17</sup> *Van Dyke v. Retzlaff*, 781 F. App'x 368 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 610 (2020).

<sup>18</sup> FLA. STAT. § 768.295 (2022).

<sup>19</sup> *Hanna v. Plumer*, 380 U.S. 460 (1965).

legislatures are still punishing these targets who must deal with these meritless claims.

This comment will seek to analyze why applying the attorney-fee shifting provision in federal court does not offend *Erie* and still protects First Amendment concerns. The special motion standards set forth in the statute cannot apply because these standards answer the same question as the Federal Rules of Civil Procedure. This comment will thus be divided into five sections. Part I will provide an introduction to anti-SLAPP statutes with an illustrative example of a recent case. Part II will discuss what a SLAPP lawsuit is and the response by states in enacting anti-SLAPP statutes. Part III will discuss the American Rule, which requires litigants to pay for their own attorney's fees and costs. Part IV will discuss the First Amendment in the context of defamation cases. Lastly, Part V will analyze why an attorney-fee shifting provision should apply in federal court to reconcile First Amendment concerns with regards to SLAPP lawsuits while also satisfying the mandates of *Erie*.

## II. BACKGROUND ON SLAPP SUITS AND ANTI-SLAPP STATUTES

### A. *What is a SLAPP?*

Generally, SLAPP is the name for a complaint or counterclaim that is filed against individuals or organizations, arising from that individual's or organization's speech on an issue of public interest or concern.<sup>20</sup> The filers of these lawsuits have one goal in mind: to silence their target. Most SLAPPs are legally unsuccessful because of their meritless nature; but for the filers of a SLAPP claim, winning on the merits was never the goal. However, SLAPPs are very successful in the public, day-to-day arena, because defending a SLAPP claim requires a substantial amount of money, resources, and time.<sup>21</sup> The end result is a chill on public participation and protected speech not only from the lawsuit's target, but also others who might otherwise have voiced their opinion or concern but are now too scared because of the threat of future litigation.<sup>22</sup>

SLAPPs are usually filed under the disguise of regular civil claims such as tortious interference, conspiracy, trespass, and invasion of privacy.<sup>23</sup> However, the most common legal claim that is used as a vehicle for SLAPP

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<sup>20</sup> *Guarding Against the Chill: A Survival Guide for SLAPP Victims*, THE FIRST AMEND. PROJECT, <https://www.thefirstamendment.org/media/Guarding-Against-the-Chill.pdf> (last visited Feb. 3, 2022).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *What is a SLAPP Suit?*, ACLU OHIO, <https://www.acluohio.org/slapped/what-is-a-slapp-suit> (last visited Feb. 3, 2022).

suits is defamation.<sup>24</sup> Take the example in the introduction of this comment:<sup>25</sup> Robert E. Murray knew he would not win a defamation case because John Oliver's speech in the segment of his episode was protected speech.<sup>26</sup> However, as the Oliver example makes clear, the underlying effect of these lawsuits is to silence the target through expensive and tedious litigation.

### B. *The response? States enact anti-SLAPP statutes*

To combat the chilling effects of SLAPP lawsuits and guard protected speech under the First Amendment, twenty-eight states, the District of Columbia, and Guam have enacted anti-SLAPP statutes.<sup>27</sup> Additionally, while West Virginia does not have an anti-SLAPP statute, its Supreme Court has adopted protections against SLAPP suits.<sup>28</sup> The degree of protection afforded by anti-SLAPP statutes varies, but generally they serve a multitude of purposes. These statutes can deter SLAPP suits from being filed; ensure that if filed, SLAPP suits are resolved quickly; punish filers of SLAPP suits; and protect targets of SLAPP suits by allowing the recovery of attorney's fees and costs.<sup>29</sup>

<sup>24</sup> *Id.*

<sup>25</sup> *SLAPP Suits: Last Week Tonight with John Oliver*, *supra* note 1.

<sup>26</sup> The First Amendment protects the use of satire to comment on matters of public concern. *See* Kyonzte Hughes, *Parody & Satire*, FREEDOM F. INST. (Sept. 13, 2002), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/arts-first-amendment-overview/parody-satire/>.

<sup>27</sup> *See Anti-SLAPP Legal Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/anti-slapp-legal-guide/> (last visited Feb. 4, 2022); ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (2022); ARK. CODE ANN. §§ 16-63-501 to -508 (2021); CAL. CIV. PROC. CODE §§ 425.16-.18 (Deering 2022); DEL. CODE ANN. tit. 10, §§ 8136-8138 (2022); D.C. CODE §§ 16-5501 to -5505 (2022); FLA. STAT. ANN. § 768.295 (West 2022); GA. CODE ANN. § 9-11-11.1 (2021); HAW. REV. STAT. ANN. §§ 634F-1 to -4 (2021); 735 ILL. COMP. STAT. ANN. 110/1-/99 (West 2021); IND. CODE ANN. §§ 34-7-7-1 to -10 (2022); LA. CODE CIV. PROC. ANN. art. 971 (2021); ME. REV. STAT. ANN. tit. 14, § 556 (2021); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (2021); MASS. ANN. LAWS ch. 231, § 59H (2022); MINN. STAT. ANN. §§ 554.01-.06 (West 2022); MO. ANN. STAT. § 537.528 (2021); NEB. REV. STAT. §§ 25-21, 241-246 (2022); NEV. REV. STAT. ANN. §§ 41.635-.670 (2021); 2021 NEV. STAT. 622, 622-24; N.M. STAT. ANN. §§ 38-2-9.1 to .2 (2022); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2022); 2014 OK. ALS 107 HB 2366 (2014); OR. REV. STAT. §§ 31.150-.155 (2021); 27 PA. CONS. STAT. ANN. §§ 7707, 8301-8305 (2022); 9 R.I. GEN. LAWS §§ 9-33-1 to -4 (2022); TENN. CODE ANN. §§ 4-21-1001 to -1004 (2022); TEX. CIV. PRAC. & REM. CODE ANN. § 27.001-.011 (West 2021); UTAH CODE ANN. §§ 78B-6-1401 to -1405 (West 2022); VT. STAT. ANN. tit. 12, § 1041 (2021); WASH. REV. CODE ANN. §§ 4.24.500-.525 (West 2022); 7 GUAM CODE ANN. §§ 17101-17109 (2022).

<sup>28</sup> The West Virginia Supreme Court has held that petitioning activity as well as speech that is connected with issues of important public interest is entitled to a malice standard level of protection. *See Harris v. Adkins*, 432 S.E.2d 549, 552 (W. Va. 1993). The actual malice standard requires statements to be made with knowledge that they were false or with reckless disregard of whether the statements were false or not. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>29</sup> Horwitz, *supra* note 14.

In order to protect defendants from meritless litigation, anti-SLAPP statutes have two prominent components: a special motion to dismiss as well as an attorney-fee shifting provision. The special motion to dismiss allows the targets of these lawsuits to get rid of SLAPP suits early in the litigation, while the attorney-fee shifting provisions ensures that these targets are not ruined by such meritless claims. The special motion allows targets of SLAPP suits to move to strike a claim if the claim is based on protected speech or petitioning activity.<sup>30</sup> While the burden varies within each statute, in order to prevail on the motion, the moving party must show that their acts are considered protected under the statute.<sup>31</sup> If the moving party makes this showing, the burden shifts to the filer of the suit to show that they are likely to prevail on their claim.<sup>32</sup>

The other important component of anti-SLAPP statutes is the attorney-fee shifting provision. Under the attorney-fee shifting provision, the prevailing party on the special motion standards can recover attorney's fee from the non-prevailing party; in other words, the filer of the SLAPP suit.<sup>33</sup> The anti-fee shifting provision ensures that the targets of these SLAPP suits will not be punished simply by engaging in constitutionally protected speech. An example of a plaintiff having to pay thousands of dollars for filing a SLAPP suit and losing on the special motion standard is Stormy Daniels. In December of 2018, she was ordered to pay \$292,000 in attorney's fees and costs for filing a defamation suit against former President Donald Trump.<sup>34</sup> District Judge James Otero ruled that the Tweet over which Daniels sued

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<sup>30</sup> See e.g., GA. CODE ANN. § 9-11-11.1(b)(1) (2022) (providing a motion to strike claims which could stem from acts that "could reasonably be construed as an act in furtherance of the person's or entity's right of petition or free speech"); ME. REV. STAT. ANN. tit. 14, § 556 (2022) (providing a special motion to dismiss for claims of the right of petition under the Constitution of the United States or of Maine).

<sup>31</sup> See e.g., D.C. CODE. § 16-5502(b) (2022) ("If a party filing a special to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits[.]"); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2022) (providing that costs and attorney's fees shall be recovered if the defendant can show that the action involved public petition and participation and was commenced "without a substantial basis in fact and law").

<sup>32</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16 (Deering 2022) (the motion to dismiss will be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim"); TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West 2021) (action will not be dismissed if the non-moving party can show a prima facie case for the claim at issue).

<sup>33</sup> See, e.g., 9 R.I. GEN. LAWS § 9-33-2(d) (2022) (which provides that the prevailing party will be awarded "costs and reasonable attorney's fees, including those incurred for the motion and any related discovery matters."); CAL. CIV. PROC. CODE § 425.16(c)(1) (Deering 2022) (providing that "a prevailing defendant on a special motion to strike shall be entitled to cover his or her attorney's fees and costs.").

<sup>34</sup> Debra Cassens Weiss, *Stormy Daniels Ordered to Pay Nearly \$300k in Attorney Fees to Trump Under Anti-SLAPP Law*, ABA J. (Dec. 12, 2018, 9:22 AM), [https://www.abajournal.com/news/article/stormy\\_daniels\\_is\\_ordered\\_to\\_pay\\_nearly\\_300k\\_in\\_attorney\\_fees\\_to\\_trump\\_unde](https://www.abajournal.com/news/article/stormy_daniels_is_ordered_to_pay_nearly_300k_in_attorney_fees_to_trump_unde).



Trump was “rhetorical hyperbole” and the expression of an opinion protected by the First Amendment.<sup>35</sup>

### III. THE AMERICAN RULE

The general rule in the United States is that each party embroiled in litigation must pay its own attorney’s fees and costs. Its rationale is that litigants should not be discouraged from bringing meritorious claims out of fear of having to pay the defendant’s attorney’s fees if the case is lost. This is a departure from the English rule, under which the losing party must pay its own attorney’s fees and costs and the attorney’s fees and costs of the prevailing party. It is common in practice in England to conduct a separate hearing before a “taxing Master” to determine the size and propriety of an award of attorney’s fees.<sup>36</sup> Courts in the United States “have generally resisted any movement in that direction.”<sup>37</sup> Thus, unless a statute or court creates an exception, the general rule in the United States is that each party must pay its own attorney’s fees and costs.<sup>38</sup>

Fee-shifting statutes can be generally classified as “one-way shift statutes or two-way shift statutes.”<sup>39</sup> In a one-way shift statute, the legislature has determined that fees can be shifted in favor of only one party, most commonly plaintiffs.<sup>40</sup> In the two-way shift statutes, the loser (could be either the plaintiff or the defendant) must pay the prevailing party’s attorney’s fees.<sup>41</sup> Anti-SLAPP fee-shifting can be thought of as a two-way shift, because the shift is not assigned to one party, like a plaintiff. Rather, whoever prevails on the special motion (a quick reminder that SLAPP claims can take the form of an initial claim, or a counterclaim, thus, a defendant or plaintiff can be the filer of a SLAPP claim) will be awarded attorney’s fees.

A state legislature may have several purposes for enacting fee-shifting legislation. Some of the most common reasons are to “compensate [a] prevailing plaintiff, promote public interest litigation, punish or deter the

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<sup>35</sup> *Id.*

<sup>36</sup> *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

<sup>37</sup> *Id.*

<sup>38</sup> The Supreme Court has recognized judge-made exceptions with respect to the American Rule for several categories of cases. See *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426–28 (1923) (assessing attorney’s fees for willful violation of a court order); *Vaughan v. Atkinson*, 369 U.S. 527, 530–31 (1962) (for bad faith or oppressive litigation practices); *Fleischmann*, 386 U.S. at 718–19 (allowing expenses where the plaintiff extended a substantial benefit to a class).

<sup>39</sup> John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1589 (1993).

<sup>40</sup> *Id.* at 1590.

<sup>41</sup> *Id.*

losing party for misconduct, or prevent abuse of the judicial system.”<sup>42</sup> In the case of anti-SLAPP statutes, a state legislature may have two purposes: to protect First Amendment interests or to punish the filers of these suits for bringing meritless claims. Many times, the legislative intent is present in the statute itself. For example, the Arkansas General Assembly stated in its anti-SLAPP statute that “[i]t is in the public interest to encourage participation by the citizens of the State of Arkansas in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition the government for a redress of grievances.”<sup>43</sup> Other states like Georgia further find that “the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through the abuse of the judicial process.”<sup>44</sup> Thus, statutes like Georgia’s also focus on punishing or deterring filers of SLAPP suits from bringing meritless claims.

As evident, state legislatures have reacted to a rise in SLAPP litigation by abandoning the American Rule and providing for fee-shifting in its statutes in order to discourage the filing of SLAPP suits. Without such fee-shifting and reliance solely on the American Rule, individuals might be on the hook for thousands of dollars of attorney’s fees and costs<sup>45</sup> simply for exercising what the Constitution allows them to.

#### IV. FIRST AMENDMENT IN DEFAMATION CASES

##### A. *Requirements and Protections*

Defamation is a tort where one person or entity makes an untrue factual statement about another person or entity. There are two main categories of defamation: libel and slander. Libel is generally written defamation, while

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<sup>42</sup> *Id.* at 1588.

<sup>43</sup> ARK. CODE ANN. § 16-63-502 (2022). *See also* CAL. CIV. PROC. CODE § 425.16(a) (Deering 2022) (providing that the legislature found it is in the public interests to encourage continued participation in matters of public significance); FLA. STAT. ANN. § 768.295 (West 2022) (providing that the legislature’s intent in passing the statute is to protect the exercise of free speech in connection with public issues as protected by the United States Constitution and the State Constitution); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2014) (providing that “[t]he purpose of the Oklahoma Citizen Participation Act is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and other participate in government”).

<sup>44</sup> GA. CODE ANN. § 9-11-11.1(a) (2021). *See also* 735 ILL. COMP. STAT. ANN. 110/5 (West 2021) (“This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.”); NEB. REV. STAT. ANN. § 25-21,241(3) (West 2022) (providing similar language as Illinois about the abuse of the judicial process to bring SLAPP suits).

<sup>45</sup> *See supra* Part I.

slander usually refers to spoken defamation.<sup>46</sup> Because the First Amendment protects free speech, it will usually be in conflict with many defamation statutes, and thus case law has developed to balance the interests of the First Amendment while also protecting people from being unjustly defamed.

In order to recover for defamation, a plaintiff must usually meet several elements. First, a plaintiff must establish (1) identification—that the publication was about the plaintiff.<sup>47</sup> A plaintiff must also establish (2) publication—that the statements were disseminated to someone else. In libel, publication would mean that the defamatory statements were written and made available to a third party, and in slander that the statements were heard by someone else.<sup>48</sup> Next a plaintiff must establish that the (4) statements were false<sup>49</sup> and lastly (5) damages.<sup>50</sup>

While states differ in their defamation statutes, at the heart of a defamation claim is the need to protect one's good name. As Justice Douglas explained in a concurring opinion, "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being[.]"<sup>51</sup> This protection of one's good name can pull at the First Amendment. After all, the Amendment, by its plain words, forbids "abridging the freedom of speech."<sup>52</sup> There are no exceptions or requirements under the Amendment, thus, legislatures need to balance First Amendment protections with the possibility of defamatory statements creating reputational harm.

Until 1964, defamation law seemed to favor plaintiffs suing for reputational harm: "defamation was closer to the concept of strict liability than it was to negligence, or fault."<sup>53</sup> Change came about with *New York Times Co. v. Sullivan*, where the United States Supreme Court "constitutionalized libel law."<sup>54</sup> The case held that a public official suing for defamation must not only prove the standard elements of defamation, but also that the statements were made with actual malice.<sup>55</sup> This heightened the

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<sup>46</sup> *Defamation*, CORNELL L. SCH. LEGAL INFO. INST. (last visited Mar. 23, 2022), <https://www.law.cornell.edu/wex/defamation>.

<sup>47</sup> David L. Hudson Jr., *Libel and Slander*, THE FIRST AMEND. ENCYCLOPEDIA (May 14, 2020), <https://mtsu.edu/first-amendment/article/997/libel-and-slander>.

<sup>48</sup> *Id.*

<sup>49</sup> *Defamation*, *supra* note 46.

<sup>50</sup> *Id.*

<sup>51</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966).

<sup>52</sup> U.S. CONST. amend. I.

<sup>53</sup> Hudson, *supra* note 47.

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

<sup>55</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

standard for public officials because actual malice requires a finding that the defendant knew that the statements were false or exhibit reckless disregard for its truthfulness.<sup>56</sup> This heightened standard has also been extended to all “public figures,”<sup>57</sup> and “private individuals.”<sup>58</sup>

Defamation law has been carefully crafted to promote freedom of speech and freedom of the press under the First Amendment, while also affording protection to a person’s reputation. However, defamation can still threaten and chill public speech and its main avenue to do so is SLAPP suits that threaten targets simply for engaging in constitutionally protected speech.

### B. *Twiqbal* in Defamation cases

*Twombly* and *Iqbal*,<sup>59</sup> every first-year law student’s nightmare, heightened the standard under which a court must evaluate a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Under the *Twiqbal* standard, the plaintiff must plead sufficient non-conclusory facts to show a plausible claim for relief.<sup>60</sup> The pleading standard under *Twiqbal* ensures that meritless complaints do not burden the court system, nor defendants, with needless litigation because plaintiffs must plead enough facts in their complaint to show the court that they have at least a meritorious claim.

Prior to *Twiqbal*, the actual malice element in defamation claims was understood to be proved at the summary judgment stage or at trial.<sup>61</sup> Federal Rule of Civil Procedure 9(b) allows “malice” and most state of minds to be plead generally. Pre-*Twiqbal* pleading actual malice “required only a general allegation that the defendant acted with ‘actual malice.’”<sup>62</sup> However, after *Twiqbal* “facts must be pleaded to ‘nudge’ the claim ‘across the line from conceivable to plausible.’”<sup>63</sup> As a result, plaintiffs filing defamation actions

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<sup>56</sup> *Id.*

<sup>57</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

<sup>58</sup> *See Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) (plurality opinion) (finding that *New York Times v. Sullivan* applies to private individuals); *Gertz v. Rober Welch, Inc.*, 418 U.S. 323 (1974) (holding that a state defamation law could allow private plaintiffs to recover for a lesser state of mind than actual malice).

<sup>59</sup> The two cases combined are commonly referred to as “*Twiqbal*.” This note will use the term “*Twiqbal*” to refer to the plausibility standard set forth in the two cases. These two Supreme Court cases established the plausibility standard that is now used when federal courts across the United States analyze the sufficiency of a plaintiff’s complaint when a motion to dismiss has been filed by the other party. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>60</sup> *See Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678.

<sup>61</sup> Judy M. Cornett, *Pleading Actual Malice in Defamation Actions After Twiqbal: A Circuit Survey*, 17 NEV. L.J. 709, 715 (2017).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 716.

have to deal with a heightened standard under the actual malice requirement coupled with the stringent requirements of *Twiqbal*.

The Courts of Appeals have applied the stringent requirements of *Twiqbal* in defamation cases, and the result has been the swift dismissal of defamation claims. For example, in *Mayfield v. National Association for Stock Car Auto Racing* (“NASCAR”), the Fourth Circuit found general allegations of malice, which would have been sufficient before *Twiqbal*, to not survive a 12(b)(6) dismissal under *Twiqbal*.<sup>64</sup> The complaint alleged that NASCAR’s CEO’s press conference, stating that Mayfield was suspended for taking performance enhancing drugs, contained statements that the CEO knew were false or were made with reckless disregard as to their truth.<sup>65</sup> The Fourth Circuit found the allegations to be insufficient—“This kind of conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegation that *Twombly* and *Iqbal* rejected.”<sup>66</sup> Similarly, in *Schatz v. Republican State Leadership Committee*, the first Circuit held that Schatz’s complaint was insufficient because he pleaded malice by alleging that the defendant knew the statements were false or had “serious doubts” about their truth.<sup>67</sup> The court characterized these allegations as “actual-malice buzzwords.”<sup>68</sup>

After *Twiqbal*, “every circuit court that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice.”<sup>69</sup> Because federal courts cannot apply the special motion standards present in most state anti-SLAPP statutes, a different avenue that will work just as swiftly to ensure meritless complaints are disposed of quickly is *Twiqbal*. After all, federal courts must apply the *Twiqbal* standard to most federal actions, and defamation claims are no different.

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64 *Mayfield v. Nat’l Ass’n for Stock Car Auto Racing*, 674 F.3d 369, 377–78 (4th Cir. 2012).

65 *Id.* at 378.

66 *Id.*

67 *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56 (1st Cir. 2012).

68 *Id.*

69 *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016); *see also* *Biro v. Conde Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015) (affirming dismissal of the plaintiff’s libel suit because the complaint failed to state sufficient facts to plausibly allege malice); *McDonald v. Wise*, 769 F.3d 1202, 1220 (10th Cir. 2014) (reversing a 12(b)(6) dismissal because the plaintiff pled sufficient facts to raise a reasonable inference that the statements were not made in good faith and that the complaint sufficiently pled malice); *Nelson Auto Ctr., Inc., v. Multimedia Holdings Corp.*, 951 F.3d 952, 958 (8th Cir. 2020) (finding that the plaintiff’s complaint must allege enough facts to raise a reasonable expectation that discovery will reveal evidence that the statements were published with actual malice); *Pippen v. NBCUniversal Media, L.L.C.*, 734 F.3d 610, 614 (7th Cir. 2013) (affirming dismissal of *Scottie Pippen*’s defamation suit because his complaint failed to plausibly allege actual malice).

## V. ATTORNEY-FEE SHIFTING IN FEDERAL DIVERSITY ACTIONS IS THE SOLUTION

Anti-SLAPP statutes' special motion standards have no application in federal courts, but an attorney-fee shifting provision, like the one found in Florida's statute, should apply in federal court. The Supreme Court has yet to address the issue, and without a clear indication from the Court, lower courts are in disagreement about the applicability of these statutes in federal court. Florida's statute could prove to be the solution because the statute's fee-shifting provision is not dependent on prevailing on the special motion standards set forth in the statute. Instead, Florida's statute allows the target of these lawsuits to recover fees and costs if the lawsuit is found to be without merit.<sup>70</sup> This in turn allows the targets of these lawsuits to prevail on procedural mechanisms available through the federal rules, such as a motion to dismiss or a motion for summary judgment, while still recovering the expenses associated with fighting these lawsuits.

### A. Florida's anti-SLAPP statute

The Florida legislature enacted the statute to "protect the right in Florida to exercise the rights of free speech in connection with public issues."<sup>71</sup> Like most anti-SLAPP statutes, Florida's statute seeks to curtail the effects of SLAPP litigation and provides a means for the targets of these lawsuits to effectively get rid of meritless claims early in the litigation process. The statute does not tie the award of attorney's fees and costs to prevailing on the special motion procedures set forth in the statute; it simply states that "[t]he court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section."<sup>72</sup>

In a case of first impression, the United States District Court for the Southern District of Florida tackled the issue of whether the fee-shifting provision in Florida's anti-SLAPP statute applies in a federal court exercising diversity jurisdiction.<sup>73</sup> The plaintiff in the case was a public figure who hosted podcasts, wrote books, and, until 2018, hosted a show on NRATV.<sup>74</sup> After learning that the show would no longer air, Defendant's reporter reached out to the Plaintiff about the show's cancellation, but the Plaintiff

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<sup>70</sup> FLA. STAT. § 768.295 (2022).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Bongino v. Daily Beast Co.*, 477 F. Supp. 3d 1310, 1322 (S.D. Fla. 2020).

<sup>74</sup> *Id.* at 1314.

never responded.<sup>75</sup> The Defendant then published a newspaper article titled “Dan Bongino out at NRATV—BONGI-NO-MORE.”<sup>76</sup> The Plaintiff then filed suit for defamation, because he claimed he was not fired, but instead decided not to renew his contract.<sup>77</sup> The Court dismissed the lawsuit and found that Florida’s anti-SLAPP fee-shifting provision did not conflict with the Federal Rules of Civil Procedure and may apply in federal courts exercising diversity jurisdiction.<sup>78</sup> The *Bongino* opinion comports with Eleventh Circuit precedent, which finds that state-law statutes and attorney’s fees provisions apply in federal court.<sup>79</sup>

Further support for the application of the fee-shifting provision in federal court is found in *Parek v. CBS Corp.*<sup>80</sup> In that case, Mr. Parekh’s ex-girlfriend pretended to have cancer and requested funds for medical treatment and expenses.<sup>81</sup> When Mr. Parekh discovered the truth, he contacted the media and an article was published about the purported scam.<sup>82</sup> However, when Mr. Parekh was implicated in the scam by the news report, he filed suit against CBS for defamation.<sup>83</sup> The district court dismissed the complaint for failure to state a claim and awarded attorney’s fees and costs pursuant to Florida’s anti-SLAPP statute.<sup>84</sup> The Eleventh Circuit found that “based on the plain language of the statute [Florida’s anti-SLAPP statute], the district court properly awarded fees” to the defendants under the fee-shifting provision.<sup>85</sup> The court reasoned that the suit was “without merit” and arose out of protected First Amendment activity.<sup>86</sup> The court did not address whether Florida’s anti-SLAPP statute applied in federal court because the argument was first raised on appeal, and not in the lower court, but nonetheless found no error in the district court awarding fees and costs under the statute.<sup>87</sup>

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

<sup>76</sup> *Id.* at 1314.

<sup>77</sup> *Id.* at 1315.

<sup>78</sup> *Id.* at 1324.

<sup>79</sup> *Id.* at 1323; *see also* Showan v. Pressdee, 922 F.3d 1211, 1225 (11th Cir. 2019) (Georgia’s fee shifting provision does not conflict with the sanctions provisions of Rule 11 of the federal rules); Horowitch v. Diamond Aircraft Indus., Inc., 645 F.3d 1254, 1259 (11th Cir. 2011) (FDUTPA fee-shifting provision applies in federal court as long as there is no conflict with another federal statute or rule).

<sup>80</sup> *Parek v. CBS Corp.*, 820 F. App’x 827, 836 (11th Cir. 2020).

<sup>81</sup> *Id.* at 830.

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

<sup>83</sup> *Id.* at 831.

<sup>84</sup> *Id.* at 831–32.

<sup>85</sup> *Id.* at 836.

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

<sup>87</sup> *Id.*

## B. Erie Analysis

Under *Erie*, when a federal court must resolve a dispute that does not implicate a federal question—usually sitting in a diversity action—the federal court must apply the law of the state, whether found in a statute passed by the state’s legislature, or a decision passed by the highest court of the state.<sup>88</sup> While the federal court is bound by the substantive law of the state in which it sits, the federal court must still apply federal procedural rules. The twin aims of the *Erie* doctrine are (1) to prevent plaintiffs from “forum-shopping” and (2) to avoid the inequitable administration of laws.<sup>89</sup>

With anti-SLAPP statutes, because of a conflict with the Federal Rules of Civil Procedure, federal courts must follow the Rules Enabling Act and *Hanna* approach. The Rules Enabling Act gives the Supreme Court the “power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.”<sup>90</sup> However, the Act imposes a limitation: “[s]uch rules shall not abridge, enlarge, or modify any substantive right.”<sup>91</sup> The Supreme Court explained how conflicts between state law and federal rules must be resolved in the landmark decision *Hanna v. Plummer*.<sup>92</sup> The question in *Hanna* was whether in civil diversity actions, service of process must comply with state law on the subject or with Rule 4 of the Federal Rules of Civil Procedure.<sup>93</sup> The Court found that federal courts are not bound by the service of process methods prescribed in state law.<sup>94</sup> Chief Justice Warren reasoned that “[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.”<sup>95</sup>

After *Hanna*, the first step is to determine whether the case deals with a conflict between a Federal Rule of Civil Procedure and state practice<sup>96</sup> or a “relatively unguided” conflict between state practice and federal judicial practice.<sup>97</sup> In deciding whether to apply a federal rule instead of a state rule, the federal court needs to consider whether such application of the federal

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88 *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

89 *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

90 28 U.S.C. § 2072(a).

91 28 U.S.C. § 2072(b).

92 *Hanna*, 380 U.S. at 471.

93 *Id.* at 461.

94 *Id.* at 464.

95 *Id.* at 473–74.

96 *Id.* at 464–65.

97 *Id.* at 471.



rule would lead to forum shopping and different outcomes or opportunities for parties in federal court other than those available in state court.<sup>98</sup> What, then, are “relatively unguided” *Erie* cases? In these cases, the “court’s choice between state and federal law must vindicate the twin aims of the *Erie* rule:<sup>99</sup> ‘discouragement of forum-shopping and avoidance of inequitable administration of laws.’”<sup>100</sup>

### C. *Anti-SLAPP application in Federal Court*

There is a current circuit split on the application of anti-SLAPP statutes in Federal Court. The recent trend over the years is for federal courts to find that anti-SLAPP laws do not apply in federal court.<sup>101</sup> The Second, Fifth, Eleventh, Tenth, and D.C. Circuits correctly conclude that anti-SLAPP statutes have no application in federal courts, usually finding that the standards set forth in the statutes conflict with the Federal Rules of Civil Procedure.<sup>102</sup> And their views on the application of anti-SLAPP statutes in federal court are consistent with the *Erie* doctrine because the Federal Rules of Civil Procedure and the anti-SLAPP statute answer the same questions: whether the plaintiff has stated a plausible claim for relief. The Ninth and First Circuit stray from the other circuits and are the only ones to that find that the anti-SLAPP statutes do not conflict with the federal rules and thus do apply in federal court.<sup>103</sup> However, tellingly, these cases are much older than

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<sup>98</sup> *Id.* at 468–69.

<sup>99</sup> 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, 260 (2008).

<sup>100</sup> *Hanna*, 380 U.S. at 468.

<sup>101</sup> The most recent cases have decided that anti-SLAPP statutes have no application in Federal Court. The decision from the Second Circuit is from 2020; the decision from the Fifth Circuit is from 2019; the decision from the Eleventh Circuit is from 2018; and the decision from the D.C. Circuit is from 2015. Contrast that with decisions that do apply anti-SLAPP laws in federal courts: the decision from the Ninth Circuit is the oldest, dating back to 1999; and the decision from the First Circuit dates back to 2010. This tends to suggest that the modern trend is for federal courts to find that anti-SLAPP statutes have no application in federal court.

<sup>102</sup> See *La Liberte v. Reid*, 966 F.3d 79, 83 (2d Cir. 2020) (finding that California’s anti-SLAPP statute does not apply in federal court because it conflicts with Federal Rules of Civil Procedure 12 and 56); *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019) (holding that the anti-SLAPP cannot apply in federal court because the burden-shifting framework imposes additional requirements beyond those found in Rules 12 and 56 of the Federal Rules of Civil Procedure); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1351 (11th Cir. 2018) (finding that Georgia’s anti-SLAPP statute was invalid because under the Rules Enabling Act, Federal Rules of Civil Procedure 12 and 56 answered the same basic question as the statute); *Abbas v. Foreign Pol’y Grp., L.L.C.*, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (holding that the anti-SLAPP statute cannot apply in federal court because Rules 12 and 56 of the Federal Rules of Civil Procedure were valid under the Rules Enabling Act and answered the same question as the anti-SLAPP statute).

<sup>103</sup> See *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) (finding that Maine’s anti-SLAPP statute applies in federal court because Federal Rules of Civil Procedure 12 and 56 are not broad enough

the cases finding that anti-SLAPP laws have no application in federal court. But these conclusions are not in accordance with current *Erie* jurisprudence.

In 1999, the Ninth Circuit found that California's anti-SLAPP statute did apply in federal court.<sup>104</sup> The statute provides that when a SLAPP lawsuit is filed, it "shall be subject to a special motion to strike"<sup>105</sup> where, the defendant must show that the suit arises from an act "in furtherance of a person's right of petition or free speech under the United States or California Constitution."<sup>106</sup> The prevailing party on the special motion to strike can recover attorney's fees and costs.<sup>107</sup> The Ninth Circuit found that there was no "direct collision" with Rules 8, 12, or 56 of the Federal Rules of Civil Procedure,<sup>108</sup> reasoning that there was no indication that the federal rules were "intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims."<sup>109</sup> The court found that the anti-SLAPP statute was crafted to protect First Amendment interests, something that is not directly addressed by the federal rules.<sup>110</sup> The court remanded the case to the district court to rule on the issue of attorney's fees and costs.<sup>111</sup>

The issue with the Ninth Circuit's decision is that it wrongly focused on the intent not only of the anti-SLAPP statute but also of the Federal Rules of Civil Procedure in occupying the field. The Federal Rules of Civil Procedure "govern the procedure in all civil actions and proceedings"<sup>112</sup> and the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>113</sup> Thus, the federal rules govern any claim that is brought in federal court, unless an exception specified in the rules applies. The Ninth Circuit has reasoned that Rule 12 is about "whether the plaintiff has stated a claim that is plausible on its face and upon which relief can be granted."<sup>114</sup> Whereas, according to the court, California's anti-SLAPP statute is concerned with "whether the claims rest on the SLAPP defendant's

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to cover the issues within the scope of the anti-SLAPP statute); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (finding that California's anti-SLAPP statute applies in federal court because there is no direct collision between the statute and Federal Rules of Civil Procedure 12 and 56).

<sup>104</sup> *Lockheed*, 190 F.3d at 973.

<sup>105</sup> CAL. CIV. PROC. CODE § 425.16(b)(1) (Deering 2022).

<sup>106</sup> CAL. CIV. PROC. CODE § 425.16(e) (Deering 2022).

<sup>107</sup> CAL. CIV. PROC. CODE § 425.16(c)(1) (Deering 2022).

<sup>108</sup> *Lockheed*, 190 F.3d at 972.

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

<sup>110</sup> *Id.* at 973.

<sup>111</sup> *Id.*

<sup>112</sup> FED. R. CIV. P. 1.

<sup>113</sup> FED. R. CIV. P. 1.

<sup>114</sup> *Makaeff v. Trump Univ., L.L.C.*, 736 F.3d 1180, 1182 (9th Cir. 2013).

protected First Amendment activity and whether the plaintiff can meet the substantive requirements California has created to protect such activity from strategic, retaliatory lawsuits.”<sup>115</sup> However, at their core, these two questions ask the same thing. When analyzing an anti-SLAPP motion, “courts determine whether First Amendment activity was involved in order to determine whether the filer has stated a claim upon which relief can be granted.”<sup>116</sup> Essentially, the anti-SLAPP statutes and the federal rules govern dismissal mechanisms at the pre-trial stage, and thus involve the same question.

In 2010, the First Circuit followed similar suit and found that Maine’s anti-SLAPP must be applied in federal court.<sup>117</sup> The court first found that Federal Rules 12 and 56 were not broad enough to control the particular issues that the anti-SLAPP statute controls.<sup>118</sup> The court reasoned that the anti-SLAPP statute only addressed special procedures “for state claims based on a defendant’s petitioning activity,”<sup>119</sup> whereas Federal Rules of Civil Procedure 12 and 56 are general rules governing all cases.<sup>120</sup> Secondly, the Court found that applying the anti-SLAPP statute in federal court would best serve the twin aims of the *Erie* doctrine.<sup>121</sup> It found that declining to apply the anti-SLAPP statute in federal court would result in an “inequitable administration of justice” between the remedies available to defendants in federal court and state court.<sup>122</sup> Additionally, incentives for forum shopping would increase: plaintiffs would bring actions in federal court instead of state court to avoid application of the anti-SLAPP statute.<sup>123</sup>

This analysis is also flawed. The First Circuit held that Federal Rule of Civil Procedure 12 “serves to provide a mechanism to test the sufficiency of the complaint,”<sup>124</sup> whereas Maine’s anti-SLAPP statute “provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis: that the claims in question rest on the defendant’s protected petitioning conduct and that the plaintiff cannot meet the special rules Maine has created to protect such petitioning activity.”<sup>125</sup> This is essentially the same assumption the Ninth Circuit made. However, under the federal rules or

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115 *Id.*

116 Aaron Smith, *SLAPP Fight*, 68 ALA. L. REV. 303, 321 (2016).

117 *Godin v. Schencks*, 629 F.3d 79, 92 (1st Cir. 2010).

118 *Id.* at 88.

119 *Id.*

120 *Id.*

121 *Id.* at 91.

122 *Id.* at 92.

123 *Id.*

124 *Id.* at 89.

125 *Id.*

under the anti-SLAPP motion the question is still the same: Is the plaintiff's complaint legally sufficient to state a cause of action? Such a reading by the First Circuit "contorts the plain meaning of the federal rules and the anti-SLAPP laws to accommodate the underlying state interests."<sup>126</sup>

#### D. *Protection of First Amendment concerns*

The Federal Rules of Civil Procedure already provide a mechanism for the dismissal of meritless claims. A motion to dismiss<sup>127</sup> ensures that meritless complaints are thrown out quickly while motions for summary judgment<sup>128</sup> ensures that the Plaintiff will never see a day in court. These Rules address and answer the same question that the special procedure in anti-SLAPP statutes seek to answer—to throw meritless or frivolous complaints out of court quickly. However, strong use of the standards under these rules coupled with attorney-fee shifting provisions, like the one in Florida's statute, serve to protect state concerns in protecting their citizens and ensuring that First Amendment rights are not curtailed by meritless claims.

Twiqbal coupled with application of anti-SLAPP fee-shifting provisions would get rid of meritless claims expeditiously while still protecting defendants and their First Amendment rights. This would also preserve the States' interests in curtailing the chilling effect of SLAPP lawsuits and ensuring that their citizens are exercising the rights afforded to them not only by the United States Constitution, but by each state's Constitution.<sup>129</sup> Because the Supreme Court recognized that the federal rules have been interpreted with sensitivity towards state goals and practices,<sup>130</sup> federal courts who apply the federal rules coupled with the attorney-fee shifting provision of the anti-SLAPP statutes would be further protecting state policy and interest in controlling the chilling effects of SLAPP suits.

Strong Twiqbal use, coupled with the attorney-fee shifting provision found in anti-SLAPP statutes, also protects *Erie* concerns. The first aim of *Erie*, discouragement of forum shopping,<sup>131</sup> would specially benefit from the application of the attorney-fee shifting provision in federal court. This is because filers of SLAPP suits will no longer escape the burdens of anti-

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<sup>126</sup> Smith, *supra* note 116, at 322.

<sup>127</sup> See FED. R. CIV. P. 12(b)(6) (governing motions to dismiss for failure to state a claim).

<sup>128</sup> See FED. R. CIV. P. 56 (governing motions for summary judgment).

<sup>129</sup> FLA. STAT. § 768.295 (2022) (stating that the purpose of the anti-SLAPP statute is not only to protect First Amendment rights under the United States Constitution, but also to protect the freedoms afforded by Section 5, Article I of the Florida Constitution).

<sup>130</sup> Gasperini v. Ctr. for Humanities, 518 U.S. 415 (1996).

<sup>131</sup> Hanna v. Plumer, 380 U.S. 460 (1965).

SLAPP statutes by filing in federal court rather than in state court. Federal courts should not be burdened with added litigation, specially for meritless claims, by opportunistic filers of SLAPP suits who seek to curtail the rights of other citizens. As the Court in *United States ex rel. Newsham v. Lockheed* stated: “Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have significant incentive to shop for a federal forum.”<sup>132</sup>

The second aim of *Erie*, avoidance of the inequitable administration of the laws,<sup>133</sup> would also best be served by application of the Federal Rules of Civil Procedure coupled with strong use of *Twiqbal* and the fee-shifting provision of anti-SLAPP statutes. Anti-SLAPP statutes usually have protections for the targets of these lawsuits that would be unavailable in federal court. While each statute varies in the amount of protection it affords, most statutes provide for a special motion process to strike SLAPP claims, expedited hearing of these special motions, as well as fee-shifting provisions.<sup>134</sup> The idea behind this principle is that in any given state, the outcome of litigation should not be immensely different simply because the plaintiff chose to file a claim in state court rather than in federal court or vice versa. The result should be the same in both courts.

As previously mentioned, the special motion procedure cannot apply in federal court because of the direct conflict with Federal Rules 12 and 56; however, by applying the fee-shifting provision, federal courts would ensure that there is no inequitable administration of the laws.<sup>135</sup> Strong use of *Twiqbal* can have the same effect of the special motion procedures set forth in the statute and would ensure that meritless complaints are thrown out quickly. Such vigorous use of *Twiqbal* would ensure that the same standards available in state court—the heightened standards set forth on most anti-SLAPP statutes to get rid of SLAPP claims—are also available in the federal forum.

Further, applying the fee-shifting provision in federal court would also deter filers of these suits from bringing meritless claims in state court, while protecting the targets of these claims by affording them the same protections available in state court. Additionally, there would be no inequitable administration of the laws because the same protections and remedies

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<sup>132</sup> *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999); see also Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 405 (2014) (where the author explains that “filers of SLAPP lawsuits would . . . have an incentive to shop for a federal forum to evade more-protective state Anti-SLAPP laws.”).

<sup>133</sup> *Hanna*, 380 U.S. at 460.

<sup>134</sup> Eric M. Larsson, *Application of Anti-SLAPP (“Strategic Lawsuit Against Public Participation”) Statutes to Real Estate Development, Land Use, and Zoning Disputes*, 64 A.L.R.6th 365.

<sup>135</sup> *Hanna*, 380 U.S. at 460.

available to the targets of these SLAPP suits available in state court would also become available in federal court. No longer would filers of SLAPP suits be able to chill protected speech by seeking to file these meritless SLAPP claims in federal court to avoid the State's anti-SLAPP laws.

Thus, the twin aims of *Erie*, as well as First Amendment concerns, are best served if federal courts sitting in a diversity action use the Federal Rules of Civil Procedure, coupled with strong use of *Twiqbal* and the anti-SLAPP statutes fee-shifting provisions. The incentive for forum shopping would decrease, and there would be no inequitable administration of the laws because the same remedies available in state court would be available in the federal forum. Such an approach would harmonize the federal rules with each state's policy in protecting its citizens from the chilling effects of meritless SLAPP suits. First Amendment advocates would also celebrate these results because strong use of *Twiqbal* has been successful at expeditiously dismissing defamation claims that infringe on a party's First Amendment rights.<sup>136</sup>

However, for this approach to work, the anti-SLAPP statute needs to be phrased like Florida's,<sup>137</sup> which does not limit the recovery of attorney's fees to prevailing on the special motion standards. If the statute ties the recovery of attorney's fees to prevailing on the special motion standards, as is most common,<sup>138</sup> then under *Erie*, the attorney-fee shifting cannot apply because it is contingent on the special motion standard which directly conflicts with the federal rules. The Fifth Circuit, in *Klocke v. Watson*, refused to apply the attorney-fee shifting provision after it concluded that Texas's anti-SLAPP<sup>139</sup> statute did not apply in federal court.<sup>140</sup> The court stated that "because the TCPA does not apply in federal court, the district court erred by awarding fees and sanctions pursuant to it."<sup>141</sup> In *Abbas v. Foreign Policy Group*, the

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<sup>136</sup> See *supra* Part IV, Section b.

<sup>137</sup> FLA. STAT. § 768.295 (2022).

<sup>138</sup> See e.g., ARIZ. REV. STAT. ANN. § 12-752(D) (2022) (providing that "[i]f the court grants the motion to dismiss, the court shall award the moving party reasonable attorney fees, including those incurred for the motion."); CAL. CIV. PROC. CODE § 425.16(c)(1) (Deering 2022) ("a prevailing defendant on a special motion to strike shall be entitled to recover [his or her] attorney's fees and costs."); D.C. CODE § 16-5504 (2022) (providing that the court may award attorney's fees and costs to the prevailing party on a motion brought under § 16-5502, which is the statute special motion standard, or § 16-5503, the costs of litigation, including reasonable attorney fees.); ME. REV. STAT. ANN. tit. 14, § 556 (2021) (stating that if pursuant to the statute a court grants the special motion to dismiss, "the court may award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters.").

<sup>139</sup> TEX. CIV. PRAC. & REM. CODE § 27.009(a) (West 2021) (stating that if a court orders dismissal of a legal action under the anti-SLAPP statute, the court shall award attorney's fees and costs to the moving party).

<sup>140</sup> *Klocke v. Watson*, 936 F.3d 240, 247 (5th Cir. 2019).

<sup>141</sup> *Id.* at n.6.

D.C. Circuit also refused to grant attorney's fees because the award of fees was contingent on prevailing on the special motion standards, which the court stated cannot apply in federal court.<sup>142</sup> In footnote five, the court explained that D.C.'s anti-SLAPP statute "does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)."<sup>143</sup> The court thus concluded that because the case was dismissed pursuant to a Rule 12(b)(6) motion, attorney's fees were unavailable.

A few statutes, like Florida's,<sup>144</sup> do not make the recovery of attorney's fees contingent on prevailing on the special motion. Federal courts sitting in diversity in these states can apply procedural mechanisms in the federal rules and still award attorney's fees. For example, in its anti-SLAPP statute, Minnesota's definition of motion includes "any motion to dismiss, motion for summary judgment, or any other judicial pleading filed to dispose of a judicial claim."<sup>145</sup> Its attorney-fee shifting provision then provides "[t]he court shall award a moving party who prevails in a motion under this chapter reasonable attorney fees and costs associated with the bringing of the motion."<sup>146</sup> Thus, states can broadly define the term "motion" under their anti-SLAPP laws and in doing so avoid any conflict with the federal rules. Another approach, taken by Utah, is to base the recovery of attorney's fees and costs on a showing that the action was filed "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>147</sup>

As stated below, several states,<sup>148</sup> including Florida, do not tie the recovery of attorney's fees and costs to prevailing on the special motion standards provided in the anti-SLAPP statute. Federal courts sitting in diversity should have no problem reconciling the Federal Rules of Civil Procedure with the award of attorney's fees, especially in states like these, because there is no direct conflict with either Federal Rule of Civil Procedure

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142 *Abbas v. Foreign Pol'y Grp., L.L.C.*, 783 F.3d 1328, 1332 (D.C. Cir. 2015).

143 *Id.* at n.5.

144 FLA. STAT. § 768.295 (2022).

145 MINN. STAT. § 554.01 (2022).

146 MINN. STAT. § 554.04 (2022).

147 UTAH CODE ANN. § 78B-6-1405(1)(a) (LexisNexis 2021); *see also* NEB. REV. STAT. § 25-21,243(1) (2022) (providing that "[c]osts and attorney's fees may be recovered upon a demonstration that the action involving public petition and participation 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.").

148 *See supra* notes 121, 123; *see also* N.M. STAT. ANN. § 38-2-9.1 (2022) (providing that if a court "grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment filed within ninety days of the filing of the moving party's answer, the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action.").

12(b)(6) or 56. Thus, states that directly tie the recovery of attorney's fee to prevailing on the special motion standards should consider amending their statutes in order to provide broader protection of their citizens' protected First Amendment Speech.

## VI. CONCLUSION

The rise in meritless SLAPP suits has led to state legislatures enacting anti-SLAPP statutes to protect their constituents. The problem with these statutes is that when federal courts are sitting in diversity and have to apply state substantive law, federal courts cannot apply the anti-SLAPP statutes because of a direct conflict with the federal rules. This, in turn, leaves targets of these suits, even in states with anti-SLAPP statutes, without protection because filers of these suits, looking to circumvent the requirements of the statute, will just file their claims in federal courts. Florida's statute is different from most anti-SLAPP statutes in that it does not tie the recovery of attorney's fees to prevailing on the special motion standard set forth in the statute. As such, federal courts sitting in diversity can apply regular procedural mechanisms found in the Federal Rules of Civil Procedure, such as a 12(b)(6) motion or motion for summary judgment under rule 56, and still award the target of the SLAPP suit attorney's fees. Other states could follow the Florida model and amend their anti-SLAPP statutes to provide an attorney-fee shifting provision that is not tied to prevailing on the special motion standards that usually accompany these statutes. In doing so, states can afford their citizens greater protection and federal courts would not struggle with the application of the anti-SLAPP statute in federal court.

Strong use of *Twiqbal* combined with application of the attorney-fee shifting provision found in the anti-SLAPP statutes can be the solution, as long as the attorney-fee shifting provision follows the Florida model. Federal courts have to apply *Twiqbal* when testing the sufficiency of a complaint; stringent use of *Twiqbal* coupled with an award of attorney's fees can deter filers of these suits because they are no longer able to file SLAPP suits in federal court without repercussions. First Amendment protections would be safeguarded because the threat of having to pay the other party's attorney's fees and costs for filing meritless SLAPP suits should deter those seeking to curtail a citizen's right to engage in public discourse. After all, one of the main uses of SLAPP suits is to embroil the target in meritless and expensive litigation. If the filers of these SLAPP suits now face the threat of having to pay the other party's attorney fees, they would think twice before filing meritless SLAPP suits.