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SLAPPING Back in Federal Court: Florida's anti-SLAPP Statute

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SLAPPING Back in Federal Court: Florida's anti-SLAPP Statute

HARRIS BLUM*

Strategic Lawsuits Against Public Participation, or “SLAPPs,” are frivolous lawsuits used to silence and harass critics by forcing them to spend money on legal fees. An overwhelming majority of states have enacted anti-SLAPP statutes to shield against these lawsuits, recognizing their potential to chill free speech and healthy debate. Though anti-SLAPP statutes come in different shapes and sizes, they commonly employ procedural mechanisms such as expedited dismissal procedures, heightened standards at the pleading and summary judgment stages, and fee-shifting provisions. The unintended consequence of these features is that SLAPP filers can often elude the protections of anti-SLAPP statutes by filing suit in federal court, where Federal Rules of Procedure displace conflicting state law. Unlike other states’ anti-SLAPP statutes, however, Florida’s version—when read properly—does not conflict with the Federal Rules of Procedure.

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INTRODUCTION

At the tail end of the 1980s, two University of Denver professors noticed a “disturbing” trend—some citizens were using lawsuits to prevent others from or punish others for speaking out.¹ The professors called those suits “SLAPPs,” short for Strategic Lawsuits

¹ George W. Pring & Penelope Canan, “Strategic Lawsuits Against Public Participation” (“SLAPPs”): *An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937, 938 (1992); see also Penelope Canan et al., *Using Law Ideologically: The Conflict Between Economic and Political Liberty*, 8 J.L. & POLS. 539, 539–40 (1992).

Against Public Participation.² A lawsuit, the Supreme Court has said, can be “a powerful instrument of coercion or retaliation” because, no matter how frivolous the suit is, the defendant must retain counsel and “incur substantial legal fees to defend against it.”³ The suit’s ultimate consequence is its “chilling effect” on the defendant’s willingness to continue the activity that gave rise to that suit.⁴ Though SLAPPs come in many flavors—libel, zoning, and tortious interference, for example—they all arise from the target’s⁵ protected First Amendment activity.⁶

In response to this trend, many states enacted anti-SLAPP statutes.⁷ For the most part, these statutes combat SLAPPs by (1) giving targets the ability to file motions to dismiss or strike early in the litigation process; (2) obliging courts to hear these motions quickly and staying discovery in the meantime; (3) requiring the filer to show that their case has merit; and/or (4) imposing cost-shifting sanctions that award fees and costs if the filer cannot meet that burden.⁸ At the same time, these mechanisms can make federal courts—where Federal Rules of Procedure displace conflicting state laws⁹—a safe harbor for SLAPP filers.¹⁰ Most Courts of Appeals hold that various iterations of the anti-SLAPP statute conflict with

² Pring & Canan, *supra* note 1, at 939.

³ *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 740–41 (1983).

⁴ *Id.* at 741.

⁵ SLAPP parties are best described in terms of “filers” and “targets,” rather than plaintiffs and defendants. See Pring & Canan, *supra* note 1, at 942 n.11. This is because SLAPPs arise in many contexts, including counterclaims, in which case the “target” is really the plaintiff. *Id.*

⁶ *Id.* at 946–47.

⁷ See *State Anti-SLAPP Laws Reference Chart*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/your-states-free-speech-protection> (last visited Sept. 17, 2021) (listing states that currently have anti-SLAPP statutes and rating the protections of each).

⁸ Issues Memorandum from Lane Shetterly, Chair, Robert T. Sherwin, Rep. & Pub. Participation Prot. Act Drafting Comm. to the Nat’l Conf. of Comm’rs on Unif. State L. 3 (June 3, 2019), <https://perma.cc/7LCX-WNB9> [hereinafter Memorandum from Shetterly].

⁹ See *infra* Section I.A.

¹⁰ See *infra* Section II.B.

the Federal Rules of Procedure and therefore do not apply in a federal court.¹¹

Florida first enacted an anti-SLAPP statute in 2000,¹² but that law applied only to suits filed by state actors.¹³ Because of its narrow scope, the statute saw little action during its effective period.¹⁴ All that changed in 2015 when Florida amended its anti-SLAPP statute to include suits brought by a “person.”¹⁵ Although Florida’s statute lacks many of the procedural mechanisms found in other states’ statutes,¹⁶ the law still contains a handy tool for combatting SLAPPs¹⁷: a fee-shifting provision that entitles SLAPP targets to attorney’s fees and costs when a filer’s suit violates the statute.¹⁸

¹¹ See *Abbas v. Foreign Pol’y Grp., LLC.*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (D.C.); *La Liberte v. Reid*, 966 F.3d 79, 83 (2d Cir. 2020) (California); *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019) (Texas); *Carbone v. Cable News Network*, 910 F.3d 1345, 1350 (11th Cir. 2018) (Georgia); see also *infra* Part II.

¹² Citizen Participation in Government Act, 2000 Fla. Sess. Law Serv. 2000-174 (West) (formerly codified at Fla. Stat. § 768.295).

¹³ *Id.* (“No governmental entity in this state shall file or cause to be filed . . .”).

¹⁴ Samuel J. Morley, *Florida’s Expanded Anti-SLAPP Law: More Protection for Targeted Speakers*, 90 FLA. B.J. 17, 18 (2016) (suggesting that government entities “‘hardly, if ever,’” filed SLAPP suits).

¹⁵ See 2015 Fla. Sess. Law Serv. 2015-70 (West) (codified as Fla. Stat. § 768.295).

¹⁶ See Morley, *supra* note 14, at 18 (“Unlike many states, Florida’s version does not contain any special burden shifting, burden of proof, motion to strike, or discovery provisions to help flesh out the details of SLAPP dismissals.”).

¹⁷ See, e.g., David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1212 (1995) (arguing that fee shifting is a “possible solution” for the “chilling effect” of litigation expenses on media defendants in frivolous suits); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662–63 (1982) (positing that fee-shifting is “sound” when socially desirable litigation would otherwise be uneconomical for a prospective party); Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & CONTEMP. PROBS. 233, 241 (1984) (“Fee shifting is designed to remove some of the disincentives facing public interest litigants, thus increasing access to the courts for groups who otherwise might be unrepresented or underrepresented.”).

¹⁸ See FLA. STAT. ANN. 768.295(4) (West 2015) (“The 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.”). That said, victories for SLAPP targets under Florida’s anti-SLAPP statute are hard to come by. See

And that matters. David Boies presents evidence that more than ninety percent of all litigation expenses for defamation suits go to legal fees and related expenses.¹⁹ Similarly, Florida's Office of the Attorney General reviewed twenty-one SLAPPs filed in Florida between 1983 and 1993 and found that the costs of defending some of those suits surpassed six figures.²⁰ While larger media corporations might be able to afford such a bill, most SLAPPs target middle-class Americans, many of whom are first-time activists.²¹

This Note seeks to establish that, when given its proper meaning, Florida's anti-SLAPP statute does not conflict with the Federal Rules of Procedure. Part I, therefore, outlines the framework for addressing putative conflicts between Federal Rules of Procedure and state laws. Part II then discusses the different approaches that the courts of appeals have taken when applying that framework to putative conflicts between Federal Rules and certain states' anti-SLAPP statutes. Because such conflicts turn on a construction of the Federal Rules and the relevant state's statute, Part III attempts to give Florida's anti-SLAPP statute its proper meaning. That Part begins by discussing the statute's text before discussing the case law that, although sparse, has interpreted the law to this point. Finally, Part IV concludes by applying the framework for putative conflicts between Federal Rules and state laws to the interpretation of Florida's anti-SLAPP statute outlined in Part III. And that yields the conclusion that Florida's anti-SLAPP statute does not conflict with the Federal Rules and therefore applies in federal court.²²

Zach Schlein, *Miami Lawyers Win Rare Victory in Anti-SLAPP Case*, LAW.COM (Oct. 23, 2018, 1:51 PM), <https://www.law.com/dailybusinessreview/2018/10/23/miami-lawyers-win-rare-victory-in-anti-slapp-case/>.

¹⁹ Boies, *supra* note 17, at 1207.

²⁰ See SENATE JUDICIARY COMM., ISSUE BRIEF ON STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION, S. 2009-332, 2008 Sess., at 2 (Fla. 2008) (citing OFFICE OF ATTORNEY GENERAL ROBERT A. BUTTERWORTH, STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPS) IN FLORIDA: SURVEY AND REPORT 2 (1993)), <https://www.flsenate.gov/UserContent/Committees/Publications/InterimWorkProgram/2009/pdf/2009-332ju.pdf>.

²¹ Pring & Canan, *supra* note 1, at 940.

²² The Eleventh Circuit has affirmed an order awarding attorneys' fees to a SLAPP target under Florida's anti-SLAPP statute. *Parekh v. CBS Corp.*, 820 F. App'x 827, 836 (11th Cir. 2020). But the court explicitly declined to address the issue analyzed in this Note—that Florida's anti-SLAPP Statute applies in federal court—because the SLAPP filer failed to raise the argument below and thus

I. CHOOSING BETWEEN FEDERAL PROCEDURAL LAW AND STATE SUBSTANTIVE LAW

As most first-year law students will tell you, federal courts must apply state substantive law and federal procedural law when sitting in diversity jurisdiction.²³ Two federal statutes produce that deceptively simple proposition.²⁴ The first, the Rules Enabling Act, empowers the Supreme Court to “prescribe general rules of practice and procedure” to be used in federal courts provided that such rules do not “abridge, enlarge or modify any substantive right.”²⁵ When faced with a Federal Rule of Procedure that seemingly conflicts with a state’s “substantive” law, the threshold question is whether the Federal Rule is “sufficiently broad” to collide with the state law.²⁶ If so, the Federal Rule applies unless it is invalid under the Rules Enabling Act, which occurs when the Rule abridges, enlarges, or modifies a substantive right, or when the Rule cannot be “rationally”

forfeited it on appeal. *Id.* (citing *Tannenbaum v. United States*, 142 F.3d 1262, 1263 (11th Cir. 1998)). *But see* *Bongino v. Daily Beast Co.*, 477 F. Supp. 3d 1310, 1322, 1324 (S.D. Fla. 2020) (“Florida’s anti-SLAPP fee-shifting provision does not conflict with any Federal Rules of Civil Procedure and thus may apply in a federal court exercising diversity jurisdiction.”); *Corsi v. Newsmax Media, Inc.*, 519 F. Supp. 3d 1110, 1128 (S.D. Fla. 2021) (applying *Bongino*), *appeal docketed*, No. 21-10480 (11th Cir. Feb. 16, 2021). On appeal, *Corsi* argues that Florida’s anti-SLAPP statute conflicts with the Federal Rules, *see* Appellant’s Initial Brief at 16–19, *Corsi v. Newsmax Media, Inc.*, No. 21-10480 (11th Cir. July 28, 2021), setting the stage for the Eleventh Circuit to decide the question addressed in this Note.

²³ *E.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 65, 78 (1938) (“Except 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.”); *Hanna v. Plummer*, 380 U.S. 460, 465 (1965) (“[F]ederal courts are to apply state substantive law and federal procedural law.”).

²⁴ *See* 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE DESKBOOK § 57 (2d ed. 2019), Westlaw FPP DESKBOOK (“No issue in the whole field of federal jurisprudence has been more difficult than determining the meaning of [the Rules of Decision Act].”). Adding insult to injury, at least one judge has complained of a “headache” when discussing the Supreme Court’s most recent decision in this area. Oral Argument at 9:08, *Abbas v. Foreign Pol’y Grp.*, 783 F.3d 1328 (D.C. Cir. 2015) (No. 13-7171), [https://www.cadc.uscourts.gov/recordings/recordings2015.nsf/363F50B1AF33E8BC85257D770055EC2E/\\$file/13-7171.mp3](https://www.cadc.uscourts.gov/recordings/recordings2015.nsf/363F50B1AF33E8BC85257D770055EC2E/$file/13-7171.mp3).

²⁵ 28 U.S.C. § 2072.

²⁶ *See* *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50, 750 n.9 (1980)).

classified as procedural.²⁷ If the Federal Rule and state law do not conflict—or if they do conflict, but the Federal Rule is invalid—the second statute, the Rules of Decision Act,²⁸ steps in and adjures federal courts to apply state law.²⁹ Therefore, the crux of the issue in most cases is whether a Federal Rule and a state law conflict.³⁰

A. *Determining Whether a Federal Rule and a State Law Conflict*

Because the Supreme Court has employed an array of methods to interpret competing Federal Rules and state laws, the approach for analyzing potential conflicts between Federal Rules and state laws is less than clear.³¹ The Court's most recent decision on this

²⁷ *Id.* at 5 (quoting *Hanna*, 380 U.S. at 472). The Supreme Court has yet to render a Federal Rule invalid under the Rules Enabling Act. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion). Indeed, the requirement that the Supreme Court report the Rule to Congress for a period of review before the Rule takes effect, 28 U.S.C. § 2074, in tandem with the Advisory Committee's, Judicial Conference's, and Supreme Court's study and approval of each Federal Rule of Procedure cloaks those Rules with a presumption of validity. *Burlington*, 480 U.S. at 6.

²⁸ 28 U.S.C. § 1652 (corresponds to the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92).

²⁹ *Erie R. Co. v. Tompkins*, 304 U.S. 65, 71, 78 (1938).

³⁰ See Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent Erie Decisions*, 92 VA. L. REV. 707, 737 (2006) ("That leaves conflicts between the Federal Rules and state law as the principal arena in which controversies persist under the *Erie* doctrine."); Allan Erbsen, *Erie's Starting Points: The Potential of Default Rules in Structuring Choice of Law Analysis*, 10 J.L. ECON. & POL'Y 125, 146–47 (2013) ("The scope of a federal rule is often the central disputed issue in *Erie* cases . . .").

³¹ See Joshua P. Zoffer, Note, *An Avoidance Canon for Erie: Using Federalism to Resolve Shady Grove's Conflicts Analysis Problem*, 128 YALE L.J. 482, 492–93 (2018) (documenting seventy years of "confusing and contradictory approaches to conflicts analysis" that "eventually culminated in *Shady Grove's* three conflicting tests."). Compare *Gasperini v. Ctr. For Humans, Inc.*, 518 U.S. 415, 427 n.7 (1996) (citing *Walker*, 446 U.S. at 750–52) ("Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."), and *id.* at 437 n.22 (ceding that Rule 59 provides a vehicle for challenging excessiveness of jury's verdict, but arguing that state law supplies the answer to whether damages are excessive), with *id.* at 468 & n.12 (Scalia, J., dissenting) (agreeing that state law supplies an answer to whether damages are excessive, but arguing that Rule 59 supplies the vehicle for challenging excessiveness of jury's verdict).

point is *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,³² which contains three opinions, each embodying a different interpretive approach to competing Federal Rules and state laws.³³

Shady Grove arose after a class of plaintiffs sued Allstate in federal court to recover statutory interest after Allstate failed to make timely payments on insurance claims.³⁴ At issue was a potential conflict between a New York statute,³⁵ which precludes class actions in lawsuits that seek penalties such as statutory interest, and Federal Rule of Civil Procedure 23,³⁶ which permits a class action as long as certain conditions are satisfied.³⁷ In other words, the New York law precludes a class action when Rule 23 would otherwise permit one. For that reason, five justices agreed that the two conflicted and that Rule 23 displaced New York's law.³⁸ More important than that holding, however, are the competing interpretive approaches employed by the three opinions.³⁹

³² 559 U.S. 393 (2010).

³³ See Ralph U. Whitten, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: Justice Whitten, Nagging in Part and Declaring a Pox on All Houses*, 44 CREIGHTON L. REV. 115, 125 (2010) ("Combined with its failure to establish an appropriate and consistent method for interpreting Federal Rules to determine whether they conflict with state law, the Court leaves the fundamental, threshold question under the *Erie* doctrine in a state of incoherence. The result has and will continue to be chaos in the lower federal courts . . .").

³⁴ 559 U.S. at 397.

³⁵ See N.Y. C.P.L.R. LAW § 901(b) (McKinney 2006) ("Unless a statute . . . specifically authorizes the recovery [of a penalty or statutory damages] in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute *may not be maintained* as a class action." (emphasis added)).

³⁶ See FED. R. CIV. P. 23(a) ("One or more members of a class may sue . . . if: [four conditions are met]."); FED. R. CIV. P. 23(b) (emphasis added) (providing that a class action "*may be maintained*" if Rule 23(a) is satisfied).

³⁷ *Shady Grove*, 559 U.S. at 396.

³⁸ *Id.* at 411; see also *id.* at 416, 429–31 (Stevens, J., concurring) (agreeing that Rule 23 displaces New York's law).

³⁹ The opinion also embodies three distinct approaches to testing the validity of a Federal Rule under the Rules Enabling Act. See generally Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 25–52 (2010); Zoffer, *supra* note 31, at 499–503. Because this Note posits that Florida's anti-SLAPP statute does not collide with any Federal Rule, that analysis is beyond the scope of this Note.

Writing for a four-justice plurality, Justice Scalia employed a rigid, textualist approach, concluding that the New York “statute’s clear text” prohibited a class action when Rule 23 permitted one.⁴⁰ He therefore brushed aside the argument that Federal Rules should be read with “sensitivity to important state interests” to avoid conflicts with a state law.⁴¹ Though Justice Scalia admitted that an ambiguous Federal Rule should be read to avoid “substantial variations” in outcomes between state and federal litigation,⁴² he concluded that a Federal Rule’s text could not be contorted under any circumstance.⁴³

In a dissent that also garnered four votes, Justice Ginsburg emphasized the Court’s long history of “vigilantly” reading the Federal Rules to avoid a conflict with state laws.⁴⁴ Unlike Justice Scalia, she focused on the purposes underlying Rule 23 and New York’s law, positing that while “[t]he fair and efficient *conduct* of class litigation” is the concern of Rule 23, the “*remedy* for an infraction of state law . . . is the legitimate concern of the State’s lawmakers and not of the federal rulemakers.”⁴⁵ In other words, Justice Ginsburg read New York’s law to place a “limitation” on the kinds of remedies available to class action plaintiffs.⁴⁶ Because Rule 23 “does not command that a particular remedy be available” for a class, she thought the conflict was avoidable.⁴⁷ In essence, the task as she saw it was to approach putative conflicts with greater deference to important state policies.⁴⁸

That leaves Justice Stevens’ concurrence as the swing vote. Like the dissent, Justice Stevens embraced the principle that courts should interpret a federal rule with “sensitivity” to important state

⁴⁰ *Shady Grove*, 559 U.S. at 403, 405–06 (plurality opinion).

⁴¹ *Id.* at 405 n.7.

⁴² *Id.* (quoting *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001)).

⁴³ *See id.* at 405–06.

⁴⁴ *See id.* at 439–43 (Ginsburg, J., dissenting).

⁴⁵ *Id.* at 447 (emphasis added).

⁴⁶ *Id.* at 444–45.

⁴⁷ *Id.* at 446.

⁴⁸ *See id.* at 459 (“I would continue to approach *Erie* questions in a manner mindful of the purposes underlying the Rules of Decision Act and the Rules Enabling Act, faithful to precedent, and respectful of important state interests.”).

interests and regulatory policies.⁴⁹ He, too, believed that courts should avoid “immoderate interpretations of the Federal Rules that would trench” on state policies.⁵⁰ But he also agreed with Justice Scalia, explaining that courts may not “rewrite” the Federal Rules under any circumstance.⁵¹ In the end, an unavoidable conflict existed between the two provisions in his mind, leaving the central disagreement between him and the dissent about “the degree to which the meaning of federal rules may be contorted . . . to accommodate state policy goals.”⁵²

In sum, Justice Scalia’s opinion yields an approach to the conflicts analysis that is the least deferential to state laws. For that reason, this Note applies Justice Scalia’s approach to the conflict analysis below in an effort to show that Florida’s anti-SLAPP statute steers clear of competing Federal Rules—even under the most stringent analysis.

B. *The Analysis When No Conflict Exists: Erie’s Twin Aims*

When the relevant Federal Rule and state law do not conflict, the analysis proceeds to a second step.⁵³ This step finds its roots in *Erie Railroad Co. v. Tompkins*,⁵⁴ where the Supreme Court retired its earlier decision in *Swift v. Tyson*⁵⁵ and held that the Rules of Decision Act requires federal courts sitting in diversity jurisdiction to apply the states’ substantive law.⁵⁶ The “twin aims” of *Erie* were (1) to avoid the unfairness that arises when the result or character of litigation differs simply because the suit had been brought in a federal court and (2) to discourage the practice of forum-shopping that had arisen under *Swift*.⁵⁷ The problem is, the line between substance and procedure is often “hazy.”⁵⁸ The Court grasped that in *Guaranty*

⁴⁹ *Id.* at 421 n.5 (Stevens, J., concurring).

⁵⁰ *Id.* at 430 (quoting *id.* at 439 (Ginsburg, J., dissenting)).

⁵¹ *Id.* at 431.

⁵² *Id.* at 422 n.5.

⁵³ See *Hanna v. Plummer*, 380 U.S. 460, 469–70 (1965); *Walker v. Armco Steel Corp.*, 445 U.S. 740, 752–53 (1980).

⁵⁴ 304 U.S. 64 (1938).

⁵⁵ 41 U.S. (16 Pet.) 1 (1842).

⁵⁶ *Erie*, 304 U.S. at 78–80.

⁵⁷ *Hanna*, 380 U.S. at 468.

⁵⁸ *Erie*, 304 U.S. at 92 (Reed, J., concurring); see also John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 735 (1974) (“With York four

*Trust Co. v. York*⁵⁹ when it sidelined “abstractions regarding ‘substance and ‘procedure’” in favor of a test that would apply state laws if they “significantly affect” the outcome of a suit.⁶⁰ Applying that test, the Court paved the way for a flurry of state laws to operate in federal courts.⁶¹

When the overbreadth of *York*’s outcome-determinative test became apparent, so too did its inevitable reverberation.⁶² That reverberation came in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* when the Court confronted a conflict between federal and state law about the division of responsibility between judge and jury.⁶³ After announcing the presence of countervailing federal interests,⁶⁴ the *Byrd* Court framed the question as a balancing test: whether the federal policy outweighs the states’ interest in avoiding different outcomes in federal and state courts.⁶⁵

Finally, in *Hanna v. Plummer*,⁶⁶ the Court explained that its prior cases show that choices between state and federal law cannot

years in the future, the Court was still operating on the assumption that the Rules of Decision Act divided legal problems into two separate piles market ‘substance’ and ‘procedure’ . . .”).

⁵⁹ 326 U.S. 99, 108 (1945) (citation omitted) (“Neither ‘substance’ nor ‘procedure’ represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.”).

⁶⁰ *Id.* at 109.

⁶¹ See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202–04 (1956) (analyzing a state law governing enforceability of arbitration provisions); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555–56 (1949) (analyzing a statute requiring derivative plaintiffs to make bond payments for maintenance of derivative actions); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 535–38 (1949) (analyzing a statute affecting which corporations may bring state law claims); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949) (analyzing a statute governing tolling for purposes of statute of limitations).

⁶² Ely, *supra* note 58, at 709. Once it became clear that *York*’s test controlled not only judge-made rules, but also “Federal Rules of Civil Procedure and even other federal statutes as well, some sort of backlash was inevitable.” *Id.*

⁶³ 356 U.S. 525, 534 (1958). The Seventh Amendment is one of the few Bill of Rights that does not apply in state courts. See *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010) (incorporation doctrine).

⁶⁴ *Byrd*, 356 U.S. at 537.

⁶⁵ *Id.* at 538.

⁶⁶ 380 U.S. 460 (1965).

be made by any axiomatic criterion.⁶⁷ Rather, those choices turn on the two policies underlying *Erie*: discouraging forum shopping and avoiding unfairness.⁶⁸ And when those two policies favor applying the state law—such that the failure to apply the state law would trigger unfairness or forum shopping—the state law will apply absent the presence of some countervailing federal interest.⁶⁹

II. THE FATE OF ANTI-SLAPP STATUTES IN THE FEDERAL COURTS OF APPEALS

Shady Grove's failure to deliver a single approach for analyzing putative conflicts has led to disparate results in the lower courts.⁷⁰ Some courts turn to Justice Scalia's approach⁷¹ while others look to Justice Stevens's, interpreting the Federal Rules with sensitivity to "important state interests."⁷² With that said, the prevailing view in the courts of appeals is now that many versions of the anti-SLAPP statute collide with Federal Rules 8, 12, and 56.⁷³ This Part examines both sides of that split to show how the putative conflict analysis works in the context of anti-SLAPP statutes.

⁶⁷ *Id.* at 467.

⁶⁸ *Id.*

⁶⁹ The occasions in which a countervailing justification has outweighed the policies underlying the *Erie* rule are few and far between. Even so, the language appears in the Court's decisions, old and new. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980); *Gasperini v. Ctr. For Humans, Inc.*, 418 U.S. 415, 432 (1996); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 439 (2010) (Ginsburg, J., dissenting).

⁷⁰ *See* Jack E. Pace III & Rachel J. Feldman, *From Shady to Dark: One Year Later, Shady Grove's Meaning Remains Unclear*, 25 ANTITRUST 75, 78–80 (2011) (recapping lower courts' incongruent approaches when applying *Shady Grove*).

⁷¹ *See 3M Co. v. Boulter*, 842 F. Supp. 2d 85, 95 n.7 (D.D.C. 2012) (rejecting a claim that Justice Stevens' concurrence governs the analysis for putative conflicts).

⁷² *In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 675 (E.D. Pa. 2010) (rejecting Justice Scalia's approach and quoting Justice Ginsburg's dissent for the notion that five justices agreed "that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns."); *accord McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 747 (N.D. Ohio 2010) (internal citations omitted) (finding that Justice Stevens was "the crucial fifth vote" and thus adopting his approach to putative conflicts).

⁷³ *See infra* Section II.B.

A. *Godin v. Schencks (The Minority's Approach)*

The First Circuit was among the first courts of appeals to address a putative conflict in the wake of *Shady Grove*. In *Godin v. Schencks*, the court held that neither Rule 12(b)(6) nor Rule 56 “answer the same question” as Maine’s anti-SLAPP⁷⁴ statute.⁷⁵ In so doing, the *Godin* court reasoned Maine’s anti-SLAPP statute does not supplant Rules 12 and 56 as much as it supplements those rules in cases arising from a target’s First Amendment activity.⁷⁶ The court then read Rule 12(b)(6) narrowly, suggesting that it merely provides a mechanism to test the sufficiency of a complaint.⁷⁷ But Maine’s anti-SLAPP statute, according to the court, creates a separate basis for dismissal if the filer cannot satisfy Maine’s special rules for suits arising from First Amendment activities.⁷⁸ In the same way, the First Circuit suggested that Rule 56 merely creates a process for parties to secure a pretrial judgment absent disputed material facts.⁷⁹ By contrast, it read Maine’s anti-SLAPP statute to serve “the entirely distinct function” of combating SLAPPs.⁸⁰ The court further explained that Maine’s statute allocates the burden of proof, which neither Rule 12 nor Rule 56 do.⁸¹ “And it is long settled that the allocation of burden of proof is substantive in nature and controlled by state law.”⁸² Relying on Justice Stevens’s *Shady Grove*

⁷⁴ ME. REV. STAT. ANN. tit. 14, § 556 (2012).

⁷⁵ 629 F.3d 79, 88 (1st Cir. 2010).

⁷⁶ *Id.*

⁷⁷ *Id.* at 89.

⁷⁸ *Id.*

⁷⁹ *Id.* The *Godin* court apparently thought that an inherent feature of Rule 56 “is that a fact-finder’s evaluation of material factual disputes is not required.” *Id.* This seemingly contradicts the summary judgment standard. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“summary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”).

⁸⁰ *Godin*, 629 F.3d at 89.

⁸¹ *Id.*

⁸² *Id.* (citing *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943)). The court’s reliance on *Palmer* seems inapposite, however. Although *Palmer* indeed holds that state law allocates the burden of proving contributory negligence, that holding applies only to the burden of proof at trial. 318 U.S. at 117. In fact, the losing party argued that Rule 8(c), which makes contributory negligence an affirmative defense, allocated the burden of proof at trial. *Id.* Rejecting this argument, the Court explained that “Rule 8(c) covers only the manner of pleading.” *Id.* The

concurrence, the First Circuit concluded that Rules 12(b)(6) and 56 could not displace Maine's anti-SLAPP statute because the latter effectively defines the scope of the state-created right.⁸³

Perhaps the most vulnerable part of the First Circuit's analysis pertains to the putative conflict between Maine's discovery-staying mechanism and Rule 56.⁸⁴ For starters, the court assumed that Rule 56 provides a mechanism for litigants to circumvent a fact-finder's evaluation of factual disputes.⁸⁵ Rule 56 does just that, to be sure.⁸⁶ It does so, however, only after a litigant supports their summary judgment motion by citing an evidentiary record, including depositions, documents, electronically stored information, affidavits, declarations, admissions, interrogatory answers, or other materials.⁸⁷ The development of a "record" is thus implicit in Rule 56's mechanism for bypassing a fact-finder's evaluation of the facts. Yet Maine's statute automatically stays discovery upon the filing of a special motion,⁸⁸ thus impeding the development of a record.

Court later referenced that part of the *Palmer* opinion as an example of a case when the "scope of the Federal Rule was not as broad as the losing party urged . . ." *Hanna v. Plummer*, 380 U.S. 460, 470 (1965). By negative implication, Rule 8 is broad enough to control the allocation of the burden at the pleading stage.

⁸³ *Godin*, 629 F.3d at 89.

⁸⁴ See *Zoffer*, *supra* note 31, at 541 (suggesting it is "implausible to arrive at any reading that allows discovery-staying provisions" to operate concomitantly with Rule 56). One might also plausibly argue that the First Circuit's reading of Rule 12(b)(6)—that it leaves room for a supplemental state device—is unpersuasive. Rule 12(d) does indeed provide that a motion for judgment on the pleadings must be treated as one for summary judgment under Rule 56 when the court considers matters outside the pleadings. So, the Rules contemplate that a claim will be assessed on the pleadings alone or under the summary judgment standard, leaving no room for another device to test the sufficiency of a claim on a pretrial motion to dismiss. See *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1351 (11th Cir. 2018) (suggesting that Rules 12 and 56 leave "no room for any other device for determining whether a valid claim supported by sufficient evidence to avoid pretrial dismissal"); *but see Zoffer*, *supra* note 31, at 540 (suggesting that "the text of Rule 12 can plausibly be read to create room for the operation" and thus application of "anti-SLAPP special motion provisions.").

⁸⁵ *Godin*, 629 F.3d at 89; *see also supra* note 79.

⁸⁶ See FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

⁸⁷ FED. R. CIV. P. 56(c)(1)(A).

⁸⁸ ME. REV. STAT. ANN. tit. 14, § 556 (2012).

Wary of this, the First Circuit noted that Maine's law allows a court to order "specific discovery" if good cause is shown.⁸⁹ That mechanism, the court said, dovetails with Rule 56(d),⁹⁰ which grants courts latitude to defer a summary judgment motion and order *more* discovery upon the nonmovant's showing that it cannot present essential facts.⁹¹ But this, too, misses the point: Rule 56 provides a chance for discovery before a motion for summary judgment,⁹² whereas the special motion procedure in Maine's statute forces the nonmovant to justify the need for discovery in the first place.⁹³

Forging ahead to the second step, the *Godin* court asked whether applying Maine's statute would best serve the two policies undergirding *Erie*.⁹⁴ Not only does the statute substantively alter a state-created claim by shifting the burden and forcing the plaintiff to show damages, but it also awards attorney's fees to prevailing SLAPP targets.⁹⁵ The court held that declining to apply the statute would produce an "inequitable administration of justice" between state and federal forums along with an incentive for SLAPP filers to forum shop.⁹⁶

B. *The Majority's Approach*

Most federal courts of appeals to consider this issue have shunned the First Circuit's anemic interpretation of Federal Rules 12 and 56,⁹⁷ instead finding an unavoidable conflict exists between those Rules and states' anti-SLAPP statutes.⁹⁸ This trend began with

⁸⁹ *Godin*, 629 F.3d at 90.

⁹⁰ *Id.* at 90–91.

⁹¹ FED. R. CIV. P. 56(d).

⁹² *See* *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 n.5 (1986) ("[summary judgment need] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition."). Rule 56 is quite clear on this point: A party moving for summary judgment "*must* support the assertion by[] citing to particular parts of materials in the record . . ." FED. R. CIV. P. 56(c)(1)(B) (emphasis added).

⁹³ tit. 14, § 556.

⁹⁴ *Godin*, 629 F.3d at 91.

⁹⁵ *Id.*

⁹⁶ *Id.* at 92.

⁹⁷ *See, e.g.,* *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1355–56 (11th Cir. 2018) ("We are not persuaded by the reasoning of [*Godin*].").

⁹⁸ To "prevent the collision of California state procedural rules with federal procedural rules," the Ninth Circuit applies the federal standards for dismissal and

Abbas v. Foreign Policy Group, LLC, when the Court of Appeals for the District of Columbia described D.C.’s anti-SLAPP statute⁹⁹ as establishing “the circumstances under which a court must dismiss a plaintiff’s claim before trial—namely, when the court concludes that the plaintiff does not have a likelihood of success on the merits.”¹⁰⁰ Federal Rules 12 and 56 answer the same question, however.¹⁰¹ And they do so differently.¹⁰² As then-Judge Kavanaugh explained, the Federal Rules “do not require a plaintiff to show a likelihood of success on the merits.”¹⁰³ Instead, the Rules entitle a plaintiff to a trial when they overcome the standards embodied by those Rules, both of which differ from and are less difficult than the likelihood-of-success-on-the-merits standard.¹⁰⁴ In effect, D.C.’s anti-SLAPP statute sets up another hurdle for a plaintiff to get to trial, a feature that “conflicts” with Rules 12 and 56.¹⁰⁵

Even more to the point is the Eleventh Circuit’s explanation that Rules 8, 12, and 56 “provide a comprehensive framework governing pretrial dismissal and judgment.”¹⁰⁶ In *Carbone v. Cable News Network, Inc.*, the Eleventh Circuit declined to apply Georgia’s anti-SLAPP statute,¹⁰⁷ which contains a special motion-to-strike

summary judgment when faced with a California anti-SLAPP motion. See *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 80 F.3d 890, 833 (9th Cir. 2018). But the Ninth Circuit declines to apply California’s discovery-staying mechanisms because they collide with Rule 56. See *Metabolic Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001). But this line of cases is not without its critics. See *Makeaff v. Trump Univ., LLC* 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J., concurring) (urging court to reconsider cases applying California’s anti-SLAPP statute because “[f]ederal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules”); *Makeaff v. Trump Univ., LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Waterford, J., dissenting from denial of petition for rehearing en banc) (“California’s anti-SLAPP statute impermissibly supplements the Federal Rules’ criteria for pre-trial dismissal of an action.”).

⁹⁹ D.C. CODE ANN. §§ 16-5501–5505 (West 2012).

¹⁰⁰ 783 F.3d 1328, 1333 (D.C. Cir. 2015) (Kavanaugh, J.).

¹⁰¹ *Id.* at 1333–34.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1334–35.

¹⁰⁵ *Id.* at 1334.

¹⁰⁶ *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1351 (11th Cir. 2018).

¹⁰⁷ *Id.* at 1350.

procedure that requires the nonmoving party to show there is a “probability” that they will prevail on their claim.¹⁰⁸ After asking whether the Federal Rules in question were broad enough to control the disputed issue—the standard under which a pretrial dismissal must be tested—the court held that conflict with Rules 8, 12, and 56 was inevitable.¹⁰⁹

The Fifth Circuit addressed Texas’ anti-SLAPP statute using a similar analysis.¹¹⁰ When triggered, the Texas anti-SLAPP statute imposes a complex, multi-layered burden-shifting framework.¹¹¹ The statute also contains a “clear and specific evidence” standard, which a SLAPP filer must meet when a target uses the statute’s special motion.¹¹² But, again, those mechanisms collide with the comprehensive pretrial framework embodied by Rules 8, 12, and 56.¹¹³ And so those Rules supply the applicable standards and procedures for a pretrial motion to dismiss or summary judgment.¹¹⁴

By contrast, the Fifth Circuit applies Louisiana’s anti-SLAPP statute,¹¹⁵ even though that, too, embodies a “probability of success on the claim” standard for testing special anti-SLAPP motions.¹¹⁶ That said, Louisiana courts interpret the “probability of success” standard to be “closely in line” with the standard for summary

¹⁰⁸ GA. CODE ANN. § 9-11-11.1 (West 2016).

¹⁰⁹ *Carbone*, 910 F.3d at 1355. *See also supra* note 84.

¹¹⁰ *See generally* *Klocke v. Watson*, 936 F.3d 240, 244–47 (5th Cir. 2019).

¹¹¹ *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011 (West 2019). If a target triggers that statute with a special motion and establishes that the claim relates to his or her First Amendment Activity, *id.* at § 27.005(b)(1)–(3), the nonmoving party must present “clear and specific evidence” that they can meet each element of their claim. *Id.* at § 27.005(c). Even if the nonmoving party carries that burden, a court must strike his or her claim if the moving party (the target) establishes an affirmative defense by a preponderance of the evidence. *Id.* at § 27.005(d). All the while, the court must stay discovery absent a showing of good cause. *Id.* at §§ 27.003(c), 27.006(b).

¹¹² *See supra* note 111.

¹¹³ *Klocke*, 936 F.3d at 245, 247.

¹¹⁴ *Id.*

¹¹⁵ *See* *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 181–82 (5th Cir. 2009) (before *Shady Grove*); *see also* *Lozovyy v. Kurtz*, 813 F.3d 576, 582–83 (5th Cir. 2015) (declining to revisit *Henry*’s analysis of Louisiana’s anti-SLAPP statute after *Shady Grove* and assuming the statute does not conflict with the Federal Rules); *Block v. Tanenhaus*, 815 F.3d 218, 221 (5th Cir. 2016) (same).

¹¹⁶ LA. STAT. ANN. § 971 (2012).

judgment under Rule 56.¹¹⁷ The conflict between Louisiana’s anti-SLAPP law and the Federal Rules is therefore “less obvious” than that between Texas’ and the Federal Rules.¹¹⁸

III. FLORIDA’S ANTI-SLAPP STATUTE

Although multiple district courts have held that Florida’s anti-SLAPP statute¹¹⁹ applies in federal court,¹²⁰ neither the Eleventh Circuit nor any other circuit has addressed this question.¹²¹ The overarching theme of this Note is that Florida’s anti-SLAPP statute does not conflict with any Federal Rules and therefore applies in federal court.¹²² Hopefully, this analysis of Florida’s anti-SLAPP statute is helpful for jurists and practitioners alike. To do so, this Part first analyzes the statute’s meaning before turning to the case law that, although sparse, has addressed the statute to this point.

A. *The Text*

By its terms, Florida’s anti-SLAPP statute realizes a “fundamental state policy” by prohibiting lawsuits incompatible with the First Amendment right to speak freely on public issues.¹²³ It does so by precluding persons and government entities from filing certain suits, claims, crossclaims, and counterclaims that undermine public participation.¹²⁴ At the statute’s core is a fee-shifting provision that entitles the “prevailing party” to fees and costs when a target claims

¹¹⁷ See *Lozovyy*, 813 F.3d at 585–86.

¹¹⁸ *Klocke*, 936 F.4d at 248–49.

¹¹⁹ FLA. STAT. ANN. § 768.295 (West 2015).

¹²⁰ See *Bongino v. Daily Beast Co.*, 477 F. Supp. 3d 1310, 1324 (S.D. Fla. 2020); *Corsi v. Newsmax Media, Inc.*, 519 F. Supp. 3d 1110 (S.D. Fla. 2021) (applying *Bongino*), *appeal docketed*, No. 21-10480 (11th Cir. Feb. 12, 2021). *But see* Appellant’s Initial Brief at 16–19, *Corsi v. Newsmax Media, Inc.*, No. 21-10480 (11th Cir. July 28, 2021) (arguing that Florida’s anti-SLAPP statute conflicts with the Federal Rules of Civil Procedure and therefore does not apply in federal court).

¹²¹ See *supra* note 22.

¹²² See *infra* Part IV.

¹²³ § 768.295(1).

¹²⁴ See § 768.295(3) (“A person or governmental entity in this state *may not file . . . any . . . claim . . . against another person . . . primarily because such person . . . has exercised the constitutional right of free speech in connection with a public issue . . .*” (emphasis added)).

that a lawsuit violates the statute's terms.¹²⁵ Whether a suit in fact violates the statute turns on three elements: a filer's suit must be (1) meritless, and (2) primarily caused by (3) the target's protected speech.¹²⁶ The statute also specifies the procedural mechanisms that SLAPP targets can use to trigger the statute's fee-shifting provision—a motion to dismiss, a motion for final judgment, and a motion for summary judgment.¹²⁷ This Section addresses each aspect separately.

1. THE “FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE” AND “WITHOUT MERIT” REQUIREMENTS

For the statute to apply, the target's protected speech must be the *primary* cause of the filer's claim.¹²⁸ When analyzing similar language found in other states' anti-SLAPP statutes, courts focus on the facts supporting the filer's theory of liability to see if those facts arise from the target's protected speech.¹²⁹ So too has the Eleventh Circuit employed this approach when interpreting Florida's anti-SLAPP statute.¹³⁰

The predecessor to Florida's current statute throws light on the nexus required to satisfy the statute's “primarily because” language.¹³¹ That version required that the target's speech be the *sole* cause of the filer's claim.¹³² The current version therefore relaxes

¹²⁵ § 768.295(4) (“The 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.”).

¹²⁶ § 768.295(3).

¹²⁷ § 768.295(4).

¹²⁸ *Id.* (“A person . . . may not file . . . any lawsuit . . . against another person . . . *primarily because* such person . . . exercised the constitutional right of free speech in connection with a public issue . . .”(emphasis added)).

¹²⁹ *See* Morley, *supra* note 14, at 22.

¹³⁰ *Parekh v. CBS Corp.*, 820 F. App'x 827, 836 (11th Cir. 2020) (holding that a plaintiff's defamation suit “*arose out of*” the defendant's protected First Amendment Activity, publishing a news report on a matter of public concern in violation of Florida's anti-SLAPP statute (emphasis added)). In that opinion, the Eleventh Circuit explicitly declined to address whether Florida's anti-SLAPP statute applies in federal court. *Id.*

¹³¹ *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256–60 (2012) (“[A] change in the language of a prior statute presumably connotes a change in meaning.”).

¹³² *See* 2000 Fla. Sess. Law Serv. ch. 2000-174 (West).

the nexus requirement between the filer's cause of action and the target's protected speech.¹³³ It stands to reason that, in most cases, courts can analyze that nexus by looking at the facts that support the filer's theory of liability.

The statute's next element is the phrase: "speech in connection with a public issue," which the statute defines to mean any statement made (a) before a government entity¹³⁴ about an issue that a government entity is considering or reviewing or (b) in connection with an array of multimedia, including plays, movies, television, radio broadcasts, audiovisual works, books, magazine articles, musical works, and news reports.¹³⁵ As for the former, speech made before a government entity in relation to an issue under consideration or review is inherently connected to a public issue.¹³⁶ The requirement that the speech relates to an "issue under consideration or review" thus supplants any requirement that the speech be connected to a public issue. Similarly, the law does not require that speech relate to a public issue when that speech is made in connection with one of the listed forms of media.¹³⁷ This simplifies the matter: when the

¹³³ See also FINAL BILL ANALYSIS, H.B. 1041, 2015 Sess. (Fla. 2015), <https://www.flsenate.gov/Session/Bill/2015/1041/Analyses/h1041z1.CJS.PDF> ("The bill also provides that a meritless suit is a SLAPP suit if brought primarily because of the exercise of rights protected by the Act, rather than solely because of the exercise of such rights, which is a less rigorous standard than current law.").

¹³⁴ A government entity refers to the State, including the three branches of government, the municipalities, corporations acting as instrumentalities for the state and municipalities, and any agencies thereof. FLA. STAT. ANN. § 768.295(2)(b) (West 2015).

¹³⁵ See *id.* § 768.295(2)(a).

¹³⁶ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government . . .").

¹³⁷ Though this proposition follows from the statute's clear, unambiguous language, see § 768.295(2)(a) (defining free speech in connection with public issues as "any written or oral statement that is protected under applicable law and is made . . . in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work"), the legislative history shows that the Legislature was aware of this meaning when the bill passed. See COMM. ON RULES, BILL ANALYSIS AND FISCAL IMPACT STATEMENT, S.B. 1312, 2015 Sess. (Fla. 2015), <https://www.flsenate.gov/Session/Bill/2015/1312/Analyses/2015s1312.rc.PDF>.

SLAPP target's speech takes either form, the speech is *per se* connected to a public issue within the statute's plain meaning.¹³⁸

Finally, the filer's suit not only needs to arise from the target's protected speech, it also must be "without merit" to fall within the statute's ambit.¹³⁹ This is where Florida's statute departs from the pack. Most states' anti-SLAPP statutes test a suit's merit using a heightened standard, requiring, for example, a SLAPP filer to demonstrate that a claim is likely to succeed on the merits¹⁴⁰ or establish by clear and specific evidence a *prima facie* case for each of the claim's essential elements.¹⁴¹

Shedding light on Florida's standard, the Florida Supreme Court has used a "without merit" standard to test a complaint's legal sufficiency on a motion to dismiss, finding that standard was met in "the absence of sufficient facts to make a good claim or to state a cause of action."¹⁴² In general, if a statute uses words or phrases that have already received authoritative construction by that jurisdiction's court of last resort, those words "are to be understood according to that construction."¹⁴³ The question, then, is how a SLAPP target triggers the statute.

¹³⁸ By reducing uncertainty and thus litigation about the types of speech that relate to a "public issue," the statute fulfills its stated intent—for the courts to "expeditiously dispose[]" of such suits. *See* § 768.295(1); *see also* SCALIA & GARNER, *supra* note 131, at 217–20 ("A preamble, purpose clause, or recital is a permissible indicator of meaning.").

¹³⁹ *See* § 768.295(3) ("A person . . . may not file . . . any lawsuit . . . against another person . . . *without merit and primarily because* such person . . . exercised the constitutional right of free speech in connection with a public issue . . .") (emphasis added).

¹⁴⁰ D.C. CODE ANN. § 16-5502(b) (West 2012).

¹⁴¹ TEX. CIV. PRAC. & REM. CODE ANN. § 27.005 (West 2019); *see also* CAL. CIV. PROC. CODE § 425.16 (West 2015) (requiring a filer to establish "that there is a probability that [they] will prevail on the claim."); GA. CODE ANN. § 9-11-11.1 (West 2016) (requiring a filer to establish that "there is a probability that [they] will prevail on the claim.").

¹⁴² *See* *Ellison v. City of Fort Lauderdale*, 175 So. 2d 198, 200 (Fla. 1965) (noting that the standards for a motion to dismiss under Florida's Rules of Civil Procedure and the Federal Rules of Civil Procedure are "the same").

¹⁴³ SCALIA & GARNER, *supra* note 131, at 322.

2. THE PROCEDURE FOR INVOKING FLORIDA'S ANTI-SLAPP STATUTE

When the Florida Legislature amended its anti-SLAPP statute in 2015, it expanded the statute's coverage to claims brought by private persons,¹⁴⁴ but left the procedures alluded to in the former version untouched.¹⁴⁵ Early drafts of the former version included a discovery-staying mechanism, a burden-shifting framework, and a "clear and convincing evidence" standard.¹⁴⁶ But both chambers of Florida's Legislature ultimately expressed concern¹⁴⁷ that such procedures would violate the separation of powers provision in the Florida Constitution.¹⁴⁸ For that reason, the Florida Legislature scrapped that version in favor of the one it enacted,¹⁴⁹ which lacks any such

¹⁴⁴ See *supra* note 15 and accompanying text.

¹⁴⁵ Compare Citizen Participation in Government Act, 2000 Fla. Sess. Law Serv. 2000-174 (West), with Fla. Stat. § 768.295.

¹⁴⁶ See S.B. 308-671-00, 2000 Leg. Sess. (Fla. 2000), <http://archive.flsenate.gov/data/session/2000/Senate/bills/billtext/pdf/s0306c1.pdf>; H. R. B. 565-171-00, 2000 Leg. Sess. (Fla. 2000), <http://archive.flsenate.gov/data/session/2000/House/bills/billtext/pdf/h0135.pdf>.

¹⁴⁷ See generally STAFF OF SEN. COMM. ON GOV'T OVERSIGHT & PRODUCTIVITY, STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S.B. 306, 2000 Leg. Sess., at 3–6 (Fla. 2000), <http://archive.flsenate.gov/data/session/2000/Senate/bills/analysis/pdf/SB0306.go.pdf>; HOUSE COMM. ON THE JUDICIARY, STAFF ANALYSIS, H.B. 135, 2000 Leg. Sess., at 7–8 (Fla. 2000), https://www.flsenate.gov/Session/Bill/2000/135/Analyses/20000135HGG_HB0135A.GG.pdf; see also S. Res. 306, 2000 Leg. Sess. (Fla. 2000) (enacted as recommended by Sen. Comm. On Gov't Oversight & Productivity), <http://archive.flsenate.gov/data/session/2000/Senate/bills/amendments/pdf/sb0306c1455042.pdf>.

¹⁴⁸ See FLA. CONST. art. II, § 3 ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the branches unless expressly provided herein."); FLA. CONST. art. V, § 2(a) (empowering Florida's Supreme Court to proclaim rules of practice and procedure).

¹⁴⁹ See generally STAFF OF SEN. COMM. ON GOV'T OVERSIGHT & PRODUCTIVITY, 2000 Leg. Sess., Rep. on CS/SB 306, at 3–6 (Fla. 2000), <http://archive.flsenate.gov/data/session/2000/Senate/bills/analysis/pdf/SB0306.go.pdf>; S. Res. 306, 2000 Leg. Sess. (Fla. 2000) (enacted as recommended by Sen. Comm. on Gov't Oversight & Productivity), <http://archive.flsenate.gov/data/session/2000/Senate/bills/amendments/pdf/sb0306c1455042.pdf>.

discovery-staying mechanism, burden-shifting framework, or “clear and convincing evidence” standard.¹⁵⁰

Instead, Florida’s anti-SLAPP statute instructs SLAPP targets to file a motion for dismissal of the complaint, for final judgment, or for summary judgment.¹⁵¹ And if the target succeeds in such a motion, the statute awards the SLAPP target fees and costs, assuming the statute covers the filer’s claim.¹⁵² Though the statute is silent about the procedures for the motions to dismiss and for final judgment, it expands on a motion for summary judgment: a SLAPP target “may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the [filer’s] lawsuit has been brought in violation of this section.”¹⁵³ The SLAPP filer must then file a response with any supplemental affidavits, before the court “shall” expeditiously set a hearing on the motion.¹⁵⁴

¹⁵⁰ See *supra* note 145; see also Morley, *supra* note 14, at 18, 23. But see *infra*, pp. 32–33.

¹⁵¹ FLA. STAT. ANN. § 768.295(4) (West 2015). (“A person or entity sued . . . in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant’s . . . lawsuit has been brought in violation of this section . . .”).

¹⁵² See *id.*; see also Parekh v. CBS Corp., 820 F. App’x 827, 836 (11th Cir. 2020) (holding that statute’s “plain language” supported the district court’s award of attorney’s fees and costs to SLAPP target); Boling v. WFTV, LLC, No. 2017-CA-6488, 2018 WL 2336159, at * 2 (Fla. Cir. Ct. Feb. 28, 2018) (“Under the anti-SLAPP law, an award of reasonable attorneys’ fees and costs is mandatory [when both elements are met].”). But see Berisha v. Lawson, 378 F. Supp. 3d 1145, 1157 n.8 (S.D. Fla. 2018) (suggesting that SLAPP target entitled only to fees and costs incurred in connection with special motion itself). The *Berisha* court’s reading is not without the support of the statute’s language, which entitles the prevailing party to fees and costs “incurred in connection with a *claim* that an action was filed in violation of this section.” § 768.295(4) (emphasis added). On the other hand, any attorney’s fees and costs incurred to establish that a filer’s claim is “without merit,” are also arguably incurred in connection with a claim that the filer’s action violated Florida’s anti-SLAPP statute. And that reading is more consonant with the statute’s stated purpose—to protect Floridian’s right to speak freely on public issues. See § 768.295(1); see also SCALIA & GARNER, *supra* note 131, at 219 (asserting that a statute’s stated purpose suggests “which *permissible* meanings of the enactment should be preferred.”).

¹⁵³ § 768.295(4).

¹⁵⁴ *Id.*

Save for the requirement that the court expeditiously set a hearing, this procedure aligns with that for summary judgment under Florida's Rules of Civil Procedure.¹⁵⁵

Viewed this way, Florida's anti-SLAPP statute creates no procedural mechanisms; it merely directs SLAPP targets to use the already-existing procedural mechanisms—a motion to dismiss, a motion for final judgment, or a motion for summary judgment—to test the merits of the filer's claim.¹⁵⁶ If any such motion is successful, and if the filer's claim arises "primarily" because the target engaged in one of the two types of activities covered by the statute,¹⁵⁷ then the target can recoup fees and costs.¹⁵⁸ The bottom line is that Florida's anti-SLAPP statute is merely a garden variety, fee-shifting provision that attaches to certain types of claims.¹⁵⁹ But not everyone sees it this way.

B. *Gundel v. AV Homes, Inc.—(Mis)Interpreting Florida's Anti-SLAPP Statute*

In *Gundel v. AV Homes, Inc.*, Florida's Second District Court of Appeal became the first Florida appellate court to elaborate on this framework.¹⁶⁰ At issue in *Gundel* was the trial court's refusal to consider supplemental affidavits filed with the SLAPP target's all-encompassing motion to dismiss, motion for judgment on the pleadings, and motion for summary judgment.¹⁶¹ Because the statute "plainly authorizes" the filing of a motion for summary judgment with supplemental affidavits, the appellate court held that the trial

¹⁵⁵ See Fla. R. Civ. P. 1.510(b) (A defending party "may move for a summary judgment . . . at any time with or without supporting affidavits.").

¹⁵⁶ See § 768.295(4).

¹⁵⁷ See *supra* notes 134–138 and accompanying text.

¹⁵⁸ § 768.295(4).

¹⁵⁹ See *Bongino v. Daily Beast Co.*, 477 F. Supp. 3d 1310, 1323 (S.D. Fla. 2020) ("At bottom, Florida's statute is a garden variety fee shifting provision, which the Florida legislature enacted to accomplish a 'fundamental state policy'—deterring SLAPP suits.").

¹⁶⁰ See generally *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. Dist. Ct. App. 2019). But see *WPB Residents for Integrity in Gov't, Inc. v. Materio* 284 So. 3d 555, 556 (Fla. Dist. Ct. App. 2019) (splitting with Florida's Second District Court of Appeal on finality of an order denying an anti-SLAPP motion to dismiss).

¹⁶¹ *Gundel*, 264 So. 3d at 309.

court should have tested the motion as one for summary judgment.¹⁶² The appellate court turned to Florida Rule of Civil Procedure 1.510 to define the contours of the summary judgment procedure.¹⁶³

In what amounts to dicta,¹⁶⁴ the appellate court also elaborated on the statute's motion to dismiss mechanism, first noting: "the statute is silent as to the burden or procedure for considering a motion to dismiss."¹⁶⁵ Even so, the court discerned that both burdens and procedures adhere to the statute's framework, as evidenced by its purpose.¹⁶⁶ Explaining the presence of a burden-shifting framework, the court reasoned that the anti-SLAPP motion to dismiss focuses not on whether a SLAPP filer sufficiently alleges a cause of action but rather on whether a SLAPP filer's cause of action arises from the target's protected activity.¹⁶⁷ In other words, the court understood the law to create a special motion. On that basis, the court said the initial burden lies with the SLAPP target to establish that

¹⁶² *Id.* at 312–13. This, of course, makes sense because the statute grants discretion to the SLAPP target, providing that such person "may" file a motion for summary judgment together with supplementary affidavits. § 768.295(4) (emphasis added); see also SCALIA & GARNER, *supra* note 131, at 112 (noting that permissive words such as "may" grant discretion); cf. *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 400 (2010) (adopting an analogous interpretation of Rule 23, which grants discretion to a litigant, not a court, to maintain a class action).

¹⁶³ *Gundel*, 264 So. 3d at 313.

¹⁶⁴ *E.g.*, *Powell v. Thomas*, 643 F.3d 1300, 1304–05 (11th Cir. 2011) (quoting *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009)) ("[D]icta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us[.]'"). Because the *Gundel* court needed only to decide that the trial court should have treated the motion as one for summary judgment, its discussion of the motion to dismiss mechanism is dicta. See *Gundel*, 264 So. 3d at 313.

¹⁶⁵ *Id.* at 314.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* The court relied in part on the Maine Supreme Court's interpretation of Maine's own anti-SLAPP statute. See *id.* (citing *Schelling v. Lindell*, 942 A.2d 1226, 1229 (Me. 2008)). Yet the *Gundel* court neglects the fact that Maine's anti-SLAPP statute explicitly contains a burden-shifting framework. See ME. REV. STAT. ANN. tit. 14, § 556 (2012) ("The court shall grant the special motion, *unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party.*"(emphasis added)). Florida's framework, by contrast, contains no such language. See generally FLA. STAT. ANN. § 768.295 (West 2015).

the statute applies—i.e., that the target’s protected activity gives rise to the filer’s suit.¹⁶⁸ The burden then shifts to the SLAPP filer to establish that their claims have merit and do not arise “primarily” because of the target’s protected speech.¹⁶⁹ On top of that, the court asserted that the motion to dismiss entails consideration of matters beyond the complaint—here, the supporting affidavit.¹⁷⁰

That reading of the motion to dismiss mechanism defies the statute’s text, however. For one, the statute explicitly authorizes a SLAPP target to file a motion for summary judgment with affidavits, while the statute fails to mention supplemental materials in connection with a motion to dismiss.¹⁷¹ To that end, if a court must consider an affidavit when appraising an anti-SLAPP motion to dismiss, as the *Gundel* court claims,¹⁷² then the language entitling the parties to submit “supplemental affidavits” on a summary judgment motion is surplusage.¹⁷³ For another, the *Gundel* court failed to notice that the statute necessarily applies when speech takes one of two forms: (1) speech made before a governmental entity about issues under review or (2) speech made in connection with the listed forms of media.¹⁷⁴ In effect, this eclipses the *Gundel* court’s “initial burden,” leaving only the SLAPP filer burdened with establishing that their

¹⁶⁸ *Gundel*, 264 So. 3d at 314.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 314–15.

¹⁷¹ See FLA. STAT. ANN. § 768.295(4) (West 2015); see also SCALIA & GARNER, *supra* note 131, at 93 (“The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it.”).

¹⁷² Interpreting *Gundel*, one trial court claimed three things to be true: (1) plaintiffs faced with an anti-SLAPP motion to dismiss have the burden to show that their claims are not “without merit,” (2) courts need not accept the complaint’s factual allegations as true or draw all inferences in the plaintiff’s favor, and (3) courts may look beyond the four corners of the complaint. See Order Granting Defendants’ Motion to Dismiss Pursuant to Florida’s Anti-Slapp Statute, Fla. Stat. § 768.295, *Lam v. Univision Commc’ns, Inc.*, (Fla. Cir. Ct. Nov. 2, 2019) (No. 2019-016891-CA-01), 2019 WL 6830882, at *2.

¹⁷³ See SCALIA & GARNER, *supra* note 131, at 174 (“If possible, every word and every provision is to be given effect . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”).

¹⁷⁴ See *supra* notes 134–138 and accompanying text.

claims have merit and do not arise “primarily” because of the target’s speech.¹⁷⁵

The statute’s text aside, *Gundel’s* interpretation of the anti-SLAPP statute contravenes the Florida Constitution’s separation of powers provision.¹⁷⁶ Not only does the legislative history counsel against that construction,¹⁷⁷ but it is also a pillar of statutory interpretation that a statute should be construed “in a way that avoids placing its constitutionality in doubt.”¹⁷⁸

Above all, the notion that Florida’s anti-SLAPP statute contains a special motion to dismiss¹⁷⁹ defies the statute’s ordinary meaning. Indeed, the states’ whose statutes contain special motion procedures define them explicitly.¹⁸⁰ Against that backdrop, Florida’s Legislature used language associated with three common motions to instruct SLAPP targets that the only thing “special” about those motions is the fees and costs they might recover if they are successful.¹⁸¹ As Justice Frankfurter put it, “if a word is obviously

¹⁷⁵ See *supra* notes 138–143 and accompanying text. At least one other appellate judge has adopted this burden-shifting framework; see *WPB Residents for Integrity in Gov’t, Inc. v. Materio*, 284 So. 3d 555, 561–64 (Fla. Dist. Ct. App. 2019) (Gross, J., concurring). *But see id.* at 564–65 (Forst, J., concurring) (“As we have determined that we do not have jurisdiction . . . I do not believe it is appropriate at this juncture to render a view as to the merits of the parties’ legal arguments or of the circuit court’s reasoning in denying Petitioners’ motions for summary judgment and dismissal.”). In addition, Judge Gross opted to test the target’s motion as one for summary judgment, rather than applying the special motion-to-dismiss framework announced in *Gundel*. *See id.* at 563 (Gross, J., concurring) (“Based on the summary judgment evidence, Materio did not meet her burden. Her claims are therefore ‘without merit’ under section 768.295(3).”).

¹⁷⁶ See *supra* notes 146–150 and accompanying text.

¹⁷⁷ See *supra* note 147.

¹⁷⁸ See SCALIA & GARNER, *supra* note 131, at 247–51.

¹⁷⁹ See *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 314 (Fla. Dist. Ct. App. 2019) (accepting the argument that an anti-SLAPP motion to dismiss “focuses not on whether a cause of action has been sufficiently alleged but on whether the activity that is alleged to have given rise to the cause of action is protected activity . . .”).

¹⁸⁰ See, e.g., CAL. CIV. PROC. CODE § 425.16 (West 2015) (special motion to strike); D.C. CODE ANN. § 16-5502 (West 2012) (special motion to dismiss); ME. REV. STAT. ANN. tit. 14, § 556 (2012) (special motion to dismiss); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 1996) (special motion to dismiss).

¹⁸¹ See *supra* note 151 and accompanying text.

transplanted from another legal source . . . it brings the old soil with it.”¹⁸²

With all that said, a federal court tasked with interpreting Florida law must predict how the Florida Supreme Court would decide the issue.¹⁸³ Decisions of the Florida District Courts of Appeals “provide guidance” in that endeavor.¹⁸⁴ Federal courts will disregard those decisions, however, “if persuasive evidence demonstrates that the [Supreme Court of Florida] would conclude otherwise.”¹⁸⁵ The rest of this Note will assume that the foregoing evidence is sufficiently persuasive for a federal court to disregard the *Gundel* court’s interpretation of Florida’s anti-SLAPP statute.

IV. APPLYING THE REA/RDA/*ERIE* ANALYSIS TO FLORIDA’S ANTI-SLAPP STATUTE

Using that interpretation of Florida’s anti-SLAPP statute, coupled with the predominant approach to putative conflicts between Federal Rules of Procedure and states’ anti-SLAPP statutes, this Part posits that, unlike most anti-SLAPP statutes, Florida’s version does not infringe on Federal Rules of Civil Procedure 8, 12, or 56.¹⁸⁶ As

¹⁸² Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

¹⁸³ See, e.g., *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) (citations omitted).

¹⁸⁴ *Id.* (citations omitted).

¹⁸⁵ *Id.* See also *Knealing v. Puelo*, 675 So. 2d 593, 596 (Fla. 1996) (concluding that a statute unconstitutionally “intrudes upon the rule-making authority of the Supreme Court” when it “set[] forth only procedural requirements”); *Massey v. David*, 979 So. 2d 931, 935–36 (Fla. 2008) (holding that statute’s “purely procedural nature” “compelled” conclusion that statute unconstitutionally “intrudes upon the powers of the judiciary, through the Florida Supreme Court, to determine matters of practice and procedure before the Florida courts.”). Similarly, “[f]ederal courts are not bound by dicta of state appellate courts.” *Kendall v. Pladson (In re Pladson)*, 35 F.3d 462, 466 (9th Cir. 1994) (citation omitted); *accord McKenna v. Ortho Pharm. Corp.*, 622 F.3d 657, 662 (3d Cir. 1980); *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998). And, as already discussed, the *Gundel* court’s discussion of the procedural aspects of Florida’s anti-SLAPP statute is dicta. See *supra* note 164 and accompanying text.

¹⁸⁶ See *supra* Section II.B.

a result, the Rules of Decision Act guides the choice-of-law analysis.¹⁸⁷ This Part analyzes each step in turn.

A. *Florida's Version Does Not Conflict with Any Federal Rules*

A brief discussion of Federal Rules 8, 12, and 56 brings the conflicts analysis into focus. Under Rule 8, a complaint must include “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁸⁸ A defendant can question the sufficiency of such a statement by moving to dismiss the complaint under Rule 12(b)(6). To survive such a motion, a complaint must allege sufficient facts to state a facially plausible claim for relief.¹⁸⁹ In the same way, a defendant can challenge the complaint’s legal basis by moving for judgment on the pleadings under Rule 12(c).¹⁹⁰ But, if “matters . . . are presented to and not excluded by the court” on either motion, then “the motion must be treated as one for summary judgment under Rule 56.”¹⁹¹ And summary judgment is proper only when no reasonable jury could return a verdict for the nonmoving party.¹⁹² In sum, these Rules provide a comprehensive framework governing pretrial dismissal and judgment.¹⁹³

Most states’ iterations of the anti-SLAPP statute disturb that framework by raising the bar for a filer to overcome a motion to dismiss under Rule 12(b)(6),¹⁹⁴ or for summary judgment under

¹⁸⁷ See *supra* notes 27–29 and accompanying text.

¹⁸⁸ FED. R. CIV. P. 8(a)(2).

¹⁸⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).

¹⁹⁰ See 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367 (3d ed. 2020) (“The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court.”).

¹⁹¹ FED. R. CIV. P. 12(d).

¹⁹² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); FED. R. CIV. P. 56(a).

¹⁹³ *Carbone v. Cable News Network*, 910 F.3d 1345, 1351 (11th Cir. 2018).

¹⁹⁴ See *id.* at 1356 (holding that Georgia’s anti-SLAPP statute conflicts with Rule 12(b)(6) because it requires the “plaintiff to establish ‘a probability’ that he ‘will prevail on the claim’ asserted in the complaint”); *La Liberte v. Reid*, 966 F.3d 79, 87 (2d Cir. 2020) (holding that California’s anti-SLAPP statute conflicts with Rule 12(b)(6) because it requires “dismissal unless the plaintiff can

Rule 56,¹⁹⁵ and by creating a separate device to test a claim's validity.¹⁹⁶ Not so for Florida's statute. Instead, it instructs SLAPP targets to test the validity of a filer's claim by using preexisting procedural devices.¹⁹⁷ Indeed, any other interpretation would cast doubt on the statute's constitutionality under the Florida Constitution's separation of powers provision.¹⁹⁸

As a result, Rules 8, 12, and 56 have the requisite space to operate. Once a target appeals to the procedures outlined by those rules, a court can test the filer's claim as it would on an ordinary motion. When a court finds that a given claim is in fact meritless, the statute's fee-shifting provision applies if the claim arises from the target's protected speech.¹⁹⁹ In this sense, Florida's anti-SLAPP statute fuses with Rules 8, 12, and 56, deferring to those devices for the relevant procedures, while adding a substantive element—the type of activity giving rise to the filer's claim—for claims that fall within the statute's ambit.²⁰⁰ In sum, the statute neither raises the bar for a

'establish[] a probability that he or she will prevail on the claim'); *Klocke v. Watson*, 936 F.3d 240, 246 (5th Cir. 2019) (holding that Texas's anti-SLAPP statute conflicts with Rule 12(b)(6) because it requires "'clear and specific evidence' that a plaintiff can meet each element of his claim"); *Abbas v. Foreign Pol'y Grp., LLC.*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (holding that D.C.'s anti-SLAPP statute conflicts with Rule 12(b)(6) because it requires dismissal when the "plaintiff does not have a likelihood of success on the merits").

¹⁹⁵ *Compare Carbone*, 910 F.3d at 1350–51 (internal citations omitted) (holding that Georgia's anti-SLAPP statute conflicts with Rule 56 because it "contemplates a substantive, evidentiary determination of the plaintiff's probability of prevailing on his claims."), *with Block v. Tanenhaus*, 815 F.3d 218, 221 (5th Cir. 2016) (assuming that Louisiana's anti-SLAPP statute does not conflict with Rule 56 because it provides the same standard for summary judgment as Rule 56).

¹⁹⁶ *Carbone*, 910 F.3d at 1351 ("In other words, the [Federal] Rules contemplate that a claim will be assessed on the pleadings alone or under the summary judgment standard; there is no room for any other device for determining whether a valid claim supported by sufficient evidence to avoid pretrial dismissal.").

¹⁹⁷ *See supra* Section III.A.2.

¹⁹⁸ *See supra* notes 176–178 and accompanying text.

¹⁹⁹ *See supra* Section III.A.1.

²⁰⁰ *See Bongino v. Daily Beast Co.*, 477 F. Supp. 3d 1310, 1323 (S.D. Fla. 2016) (suggesting that Florida's anti-SLAPP statute "fuses with Rules 8, 12, and 56 by entitling the prevailing party to fees and costs if, after invoking the devices set forth by those rules, a court finds an action is 'without merit' and thus prohibited."). As *Bongino* shows, the questions of whether a target's speech is protected, and whether that speech is the primary cause of the filer's suit, require minimal analysis. *See id.* (citing *Parekh v. CBS Corp.*, 820 F. App'x 827, 831–32 (11th

filer to overcome a motion for pretrial disposition nor creates a separate device to test the validity of a filer's claim. Therefore, the statute leaves intact the comprehensive framework set forth by Rules 8, 12, and 56, avoiding conflict with those Rules altogether.

B. Applying Florida's Statute in Federal Courts Serves Erie's Twin Aims

When there is no conflict between the relevant state law and the Federal Rules, the Rules of Decision Act governs the choice-of-law analysis.²⁰¹ And that choice turns on the twin aims underlying *Erie*: avoiding the unfairness that arises when litigation differs because it is brought in federal court and deterring the correlative forum-shopping.²⁰² Applying Florida's anti-SLAPP statute carries out both of these goals. As for the first aim, applying the statute avoids unfairness that would result if a SLAPP target could recover attorney's fees in a Florida court but not in a federal court. With no ability to recoup attorney's fees and costs, a target might submit to a SLAPP altogether,²⁰³ leading to the chilling effect that anti-SLAPP statutes aim to wipe out.²⁰⁴

To that end, applying the statute in federal court eliminates any incentive for SLAPP filers to prefer federal rather than state court. Because a SLAPP filer's purpose is to punish or silence the target,²⁰⁵ there is a double incentive to file in whichever forum does not have an anti-SLAPP statute. For example, if Florida's statute does not apply in federal court, not only can a SLAPP filer evade the risk of having to pay the target's attorney's fees and costs, but the SLAPP filer can also better accomplish their purpose—to punish and silence

Cir. 2020) (“[B]ecause [p]laintiff’s suit ‘arose out of’ [d]efendant’s news report, the second element—free speech in connection with a public issue—is also satisfied.”).

²⁰¹ See *supra* pp. 7–13.

²⁰² *Hanna v. Plummer*, 380 U.S. 460, 467–68 (1965) (“The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”).

²⁰³ See *supra* note 17.

²⁰⁴ See Memorandum from Shetterly, *supra* note 8, at 2–3.

²⁰⁵ See Pring & Canan, *supra* note 1, at 939.

the target²⁰⁶—because the target can no longer recover fees and costs to fund their defense.

On the other hand, the presence of countervailing federal interests at times counsels against applying a state’s law, even when doing so would serve *Erie*’s twin aims.²⁰⁷ The argument might state that federal courts have no business applying “exotic” state procedural rules.²⁰⁸ But Florida’s statute does not require that of federal courts.²⁰⁹ In fact, the opposite is true: federal courts often apply state laws that contain fee-shifting elements.²¹⁰ For all of these reasons, Florida’s anti-SLAPP statute should apply in Federal Court.

CONCLUSION

Even under an expansive reading of the Federal Rules, there is no conflict between the Rules and Florida’s anti-SLAPP statute. Florida’s anti-SLAPP fee-shifting provision—which attaches to claims that arise primarily because a target spoke (a) before a government entity about matters under review or (b) in connection with an assortment of multimedia—steps back and leaves the procedure to state and federal devices. In this way, the statute is simply a fee-shifting law for an important constitutional right. Using the interpretive arguments outlined by this Note, practitioners should trigger Florida’s anti-SLAPP statute more often. Indeed, lawyers can use this tool for pro-bono and corporate media defendants alike and, in doing so, defend the right to engage in robust debate on public issues for all Floridians no matter their financial means. After all, that is the statute’s stated intent.²¹¹

²⁰⁶ See Memorandum from Shetterly, *supra* note 8, at 1–2.

²⁰⁷ See *supra* notes 63–65 and accompanying text.

²⁰⁸ See *Makeeff v. Trump Univ., LLC* 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J., concurring) (“Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules . . .”).

²⁰⁹ See *supra* Section III.

²¹⁰ See *Bongino v. Daily Beast Co.*, 477 F. Supp. 3d 1310, 1323–24 (S.D. Fla. 2020) (“decades of Eleventh Circuit precedent . . . find that state-law statutes and claims for attorneys’ fees and costs ‘unequivocally’ apply in a federal court exercising diversity jurisdiction.”).

²¹¹ See FLA. STAT. ANN. § 768.295(1) (West 2015).