No. 15-527

IN THE

Supreme Court of the United States

MEBO INTERNATIONAL, INC.,

Petitioner,

v.

SHINYA YAMANAKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Twenty-eight states, plus the District of Columbia and Guam, have enacted anti-SLAPP statutes. These thirty jurisdictions vary significantly in the type and breadth of substantive protection, as well as the manner in which those substantive protections are enforced. The question presented is whether the specific provisions of California's anti-SLAPP statute that afford certain defendants immunity from suit and award attorneys' fees to prevailing defendants are properly applied in federal diversity cases under the *Erie* doctrine.

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INTRODUCTION

Twenty-eight states, plus the District of Columbia and Guam, have enacted statutes to prevent abusive litigation from chilling constitutionally protected speech. These laws share a common purpose and are often referred to by a common name—anti-SLAPP statutes.[1]

Beyond that common purpose, the similarities end. These individual anti-SLAPP laws provide different protections, with different exemptions and exceptions, to different categories of protected speech, and implement those protections in different ways. Some states, like Tennessee, endow SLAPP defendants with immunity from civil liability based on protected communications. Georgia's anti-SLAPP law, in contrast, provides no immunity at all; it merely requires plaintiffs and their counsel to verify that the suit was brought for a proper purpose. Many states, including Hawaii and Nevada, deter SLAPP suits by awarding attorneys' fees and other recoveries to prevailing defendants. Others, like Maryland and Pennsylvania, do not. Some States, such as California, endow SLAPP defendants with immunity from suit, a right which is implemented through immediate dismissal of abusive actions via a special motion to strike. In other states, including Delaware, anti-SLAPP protections are asserted alongside other defenses through a motion to dismiss or summary judgment motion.

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[1] "SLAPP" refers to a strategic lawsuit against public participation.

Given the variations in state law, lower courts sitting in diversity have not posed the question Petitioner asks this Court to answer: "Whether state anti-SLAPP statutes are properly applied in federal diversity cases." Instead, the lower courts ask whether applying *each provision* of an anti-SLAPP law is consistent with federal law and the *Erie* doctrine. *Erie R.R. Co. v. Thompkins*, 304 U.S. 64 (1938). In the Ninth Circuit, for example, substantive provisions of California's anti-SLAPP statute (like fee-shifting) are applied in diversity cases, whereas others (like the automatic discovery stay) are not. The lower courts, in other words, apply the *Erie* doctrine exactly as they should—they apply the substantive protections available through this patchwork of state laws, while still following the purely procedural aspects of the federal rules.

Given the vast differences among the state statutes, the lack of anti-SLAPP laws in many states, and the consistent application of the Erie doctrine, this case presents no issue of national importance meriting this Court's attention. In fact, it presents no issue of national scope at all. Nearly half the states have no anti-SLAPP law. The states that have such laws provide different substantive protections to different categories of defendants and different means for asserting those rights. A decision by this Court addressing the particular circumstances of this case would not have nationwide applicability and would be of limited utility to the lower courts.

STATEMENT OF THE CASE

Respondent Dr. Shinya Yamanaka is a

groundbreaking scientist who was awarded the Nobel Prize in Physiology or Medicine in 2012 for his discovery that adult skin cells could be reprogrammed into pluripotent cells. Petitioner MEBO International Inc. and Dr. Rongxiang Xu then sued Dr. Yamanaka in California Superior Court. The suit was based entirely on Dr. Yamanaka's discussion of his own research in a scientific journal. In the article, Dr. Yamanaka used certain acronyms ("iPS" and "iPSC") to describe the cells created by his scientific method. Dr. Xu claimed that Dr. Yamanaka should not have used these acronyms in the journal article and, by doing so, Dr. Yamanaka usurped the notoriety and prestige in the scientific community that should have rightly belonged to Dr. Xu. Thus, the suit attempts to hold Dr. Yamanaka liable for the exercise of his First Amendment rights concerning matters of public importance—*i.e.,* statements made in an academic article describing a scientific process for which Dr. Yamanaka won the Nobel Prize.

There is no question that, when sued in state court, Dr. Yamanaka was entitled to the substantive protections afforded under California's anti-SLAPP law (Pet. App. 20-23, Cal. Civ. Proc. Code ("CCP") § 425.16), including immunity from suit and entitlement to attorneys' fees. Dr. Yamanaka, a Japanese citizen, removed the case to the United States District Court for the Northern District of California based on diversity of citizenship. Relying on fifteen years (at the time) of Ninth Circuit precedent, Dr. Yamanaka understood that he could exercise his right to removal without forfeiting the substantive protections afforded to him by

California's anti-SLAPP law, including his rights to attorneys' fees and immunity from suit. Accordingly, Dr. Yamanaka timely filed a motion to strike Petitioners' frivolous first amended complaint under California's anti-SLAPP statute, and alternatively a motion to dismiss under Federal Rule 12(b)(6).

Dr. Yamanaka's anti-SLAPP motion presented the district court with a threshold substantive issue that has no parallel in federal law—whether Dr. Yamanaka's conduct made him eligible for the protections available under California's anti-SLAPP statute. California affords those protections to acts "in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue," (*see* Pet. App. 20, CCP § 425.16), but expressly exempts certain categories of speech and certain types of cases. For example, SLAPP protections are *not* available in some cases "brought solely in the public interest," or in cases arising from commercial speech. *See* Pet. App. 20-21, CCP § 425.17(b), (c).

In response to the anti-SLAPP motion, MEBO and Dr. Xu dropped four of their five original causes of action, leaving only an unfair competition claim under California Business and Professions Code § 17200. They argued the anti-SLAPP law was inapplicable to this claim because Dr. Yamanaka's speech was purportedly commercial in nature. The district court rejected this argument. Pet. App. 10-12. Because MEBO and Dr. Xu were unable to offer even basic facts suggesting they could establish their claim for relief under section 17200, the district court granted Dr. Yamanaka's special anti-SLAPP motion to strike and awarded him attorneys' fees. Pet. App.

14-15. The court did not rule on the 12(b)(6) motion. Pet. App. 15.

While their appeal from the district court's decision was pending before the Ninth Circuit, Dr. Xu died and Petitioner MEBO elected to move forward with the case alone. The Ninth Circuit affirmed the district court's decision and later declined to rehear the matter *en banc*. Pet. App. 4, 18.

REASONS FOR DENYING THE PETITION

An analysis of the patchwork of state anti-SLAPP laws discloses significant variations. Indeed, the pending SPEAK FREE Act of 2015, H.R. 2304 (114th Cong., 1st Sess.), was recently introduced in Congress with bi-partisan support to establish a uniform approach to SLAPP protections. *See also* Citizens Participation Act of 2009, H.R.4364 (111th Cong., 1st Sess.) ("[state-level] protection against SLAPPs has not been uniform or comprehensive"). A decision by this Court addressing only certain provisions found in some state laws would have limited applicability or utility in the lower courts. Further, twenty-two states have no anti-SLAPP law at all. Thus, the limited issue raised in this case does not warrant this Court's attention because any decision would not have nationwide applicability.

Nor is this Court's guidance needed. The courts of appeals have produced largely uniform outcomes when addressing the applicability of anti-SLAPP provisions in diversity cases. Any limited disagreement that exists is not sufficiently important or developed to warrant granting the Petition.

In any event, the lower court's decision was correct in all respects. The anti-SLAPP provisions applied in this case—immunity from suit and an automatic award of attorneys' fees—do not collide with federal law. They provide substantive rights and protections far outside the scope of the Federal Rules of Civil Procedure.

I. A RULING BY THIS COURT ON THE QUESTION PRESENTED WOULD NOT HAVE NATIONWIDE APPLICABILITY

Petitioner urges the Court to grant certiorari to decide "[w]hether state anti-SLAPP statutes are properly applied in federal diversity cases." Pet. i. The unstated—but incorrect—premise of this question is that state anti-SLAPP statutes are all the same, at least with respect to the features relevant to the *Erie* analysis. Yet, these state statutes differ from one another in important respects. The real question faced by the lower courts is not whether "state anti-SLAPP statutes" apply in federal court but whether particular provisions within a particular state law apply. Granting the Petition would involve this Court in piecemeal decision-making, offering little clarity to lower courts confronted with different anti-SLAPP statutes or different provisions of similar statutes.

A. The States That Enacted Anti-SLAPP Statutes Follow Widely Divergent Approaches

State anti-SLAPP statutes differ as to *who* is protected, *what* protections are available, and *how*

those protections may be asserted. The differences defy easy categorization, but some of the variations are described below.

1. Anti-SLAPP as Immunity from Liability

Several States cloak protected communications with complete immunity from civil liability on any state-law claim, unless the defendant knew or should have known the communication was false. Examples of this type of anti-SLAPP protection include statutes enacted in Arkansas,[2] Delaware,[3] and Tennessee.[4]

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[2] Ark. Code Ann. §16-63-504 ("Any person making a privileged communication or performing an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern shall be immune from civil liability, unless a statement or report was made with knowledge that it was false or with reckless disregard of whether it was false.").

[3] *See* Del. Code Ann. tit. 10, § 8136 ("In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.").

[4] *See* Tenn. Code. Ann. § 4-21-1003 ("Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of

Illinois affords immunity from liability, except when the speech at issue is "not genuinely aimed at procuring favorable government action." *See* 735 Ill. Comp. Stat. 110/1-110/99. Minnesota's anti-SLAPP law attaches immunity to conduct or speech "genuinely aimed . . . at procuring favorable government action . . . unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights." *See* Minn. Stat. §§ 554.01-554.05.

States that afford immunity from liability (as opposed to immunity from suit) can make this protection available without employing a unique procedural vehicle. Thus, whereas in California (an immunity-from-suit state) a SLAPP defendant may bring a special motion to strike, Pet. App. 20, in Tennessee (an immunity-from-liability state) anti-SLAPP protection is an affirmative defense asserted in a motion to dismiss or motion for summary judgment.[5]

This difference is significant because one of Petitioner's principal arguments is that California's

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concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.").

[5] *See, e.g., Sykes v. Chattanooga Hous. Auth.*, No. E200800525COAR3CV, 2009 WL 2365705, at *5 (Tenn. Ct. App. July 31, 2009) *aff'd*, 343 S.W.3d 18 (Tenn. 2011) ("Chief Hazelwood is entitled to the statutory [anti-SLAPP] immunity and, hence, also entitled to summary judgment."); *see also Jimenez v. Vanderbilt Landscaping, LLC*, No. 3-11-0276, 2011 WL 3027190, at *2 (M.D. Tenn. July 25, 2011) (analyzing whether a defendant who brought a motion to dismiss had met the standard for showing immunity under the Tennessee anti-SLAPP statute).

special motion to strike is precluded by the Federal Rules of Civil Procedure. *See* Pet. 8, 12. The argument is wrong, *see infra* Point III, but even if it were correct, it would mean nothing in a state that has no such motion.

2. Anti-SLAPP as Immunity from Suit

Some jurisdictions, including California and Louisiana, provide SLAPP defendants with immunity from suit, instead of immunity from liability. *See Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) ("California lawmakers wanted to protect speakers from the trial itself rather than merely from liability."); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 178 (5th Cir. 2009) (Louisiana anti-SLAPP law "provides a right not to stand trial, as avoiding the costs of trial is the very purpose of the statute"). These jurisdictions do not change the substantive grounds on which liability may attach. Rather, they provide an early exit ramp from meritless suits so that plaintiffs cannot harass SLAPP defendants by imposing substantial litigation costs.

Immunity from suit is worthless if it cannot be asserted at the beginning of an action. Thus, immunity-from-suit jurisdictions provide a supplemental procedural vehicle to vindicate this substantive right. They allow defendants to file a special motion immediately after the commencement of the litigation to determine whether anti-SLAPP protections are available. *See*, e.g., Pet. App. 20, CCP § 425.16(b); LSA-C.C.P. Art. 971(A)(1). As this case

illustrates, filing such a motion presents a threshold question that is unremittingly substantive in nature and which has no analog in federal procedural rules—*i.e.*, whether the defendant has been sued for conduct or speech within the ambit of the applicable anti-SLAPP statute. If the suit does involve protected speech and the plaintiff cannot show a probability of prevailing, the action is dismissed.

3. Anti-SLAPP as a Verification Requirement

Georgia employs a different method to deter SLAPP suits. It requires both the plaintiff and plaintiff's attorney to submit "a written verification under oath" certifying, among other things, that the claim "is well grounded in fact" and "is not interposed for any improper purpose." Ga. Code Ann. § 9-11-11.1(b). Failure to submit the verification is a ground for dismissal of the suit, and a false verification can result in an award of attorneys' fees or other sanctions. *See id.*

Arkansas likewise requires plaintiffs and their counsel to submit verifications when filing suits targeting speech. *See* Ark. Code Ann § 16-63-506. But unlike Georgia, where verification is the sole anti-SLAPP protection, Arkansas also provides SLAPP defendants immunity from liability. Ark. Code Ann § 16-63-504 ("Any person making a privileged communication or performing an act in furtherance of the right of free speech or the right to petition…shall be immune from civil liability…").

4. The Extent of Protected Speech

Different states extend anti-SLAPP protections to different categories of speech. California's statute, for example, is broad. Subject to enumerated exceptions, it protects "any act . . . in furtherance of the . . . right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Pet. App. 20, CCP § 425.16(b).

Many other states have more limited protections. For example, Arizona and Maine's anti-SLAPP laws protect only the right to petition government, not all First Amendment activity. Ariz. Rev. Stat. §§ 12-751-752; Me. Rev. Stat. Ann. tit. 14 § 556. The Minnesota and Illinois statutes are similarly restricted to activities "aimed in whole or in part at procuring favorable government action." Minn. Stat. §§ 554.01-554.05; *see also* 735 Ill. Comp. Stat. 110/1-110/99 (same). And in Pennsylvania, anti-SLAPP protection extends only to communications about environmental law. 27 Pa. C.S.A. § 8302.

5. The Standard for Dismissal of SLAPP Suits

The burden placed on the plaintiff also varies statute by statute. In California, if a defendant meets its burden to show that the anti-SLAPP statute applies to the claims, then the burden shifts to the plaintiff to show "a probability that the plaintiff will prevail on the claim." *See* Pet. App. 20, CCP § 425.16(b). The Maine anti-SLAPP statute

imposes a different standard. If a defendant shows the claim was based on the specified criteria in the statute, the court will grant the 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." Me. Rev. Stat. Ann. Tit. 14, § 556. And while Petitioner contends that California's anti-SLAPP law "requires a higher pleading standard" than the federal rules, Pet. 11, some states' anti-SLAPP statutes, like those of Florida, Maryland, Missouri, and New Mexico, are completely silent as to pleading standards or burdens.[6]

6. Statutes That do Not Provide a Unique Type of Motion

In contrast to California's anti-SLAPP statute, which provides a supplemental procedural vehicle solely to assert anti-SLAPP immunity, some statutes, such as Indiana, Guam, and Hawaii, specify that motions asserting anti-SLAPP rights are to be treated as summary judgment motions or motions for judgment on the pleadings. *See* Ind. Code § 34-7-7-9 (if a "person files a motion to dismiss under this chapter…the Court…shall…[t]reat the motion as a motion for summary judgment"); *see also* 7 G.C.A. § 17106 ("On the filing or any motion described in § 17105…the motion shall be treated as one for

[6] *See* Fla. Stat. Ann. § 718.1224; Md. Code Ann., Cts. & Jud. Proc. § 5-807; Mo. Ann. Stat. § 537.528; N.M. Stat. Ann. § 38-2-9.

summary judgment…."); *see also* HRS § 634F-2 ("upon the filing of any motion…[t]he motion shall be treated as a motion for judgment on the pleadings").

7. SLAPPback Rights, Discovery Stays, and Other Variations

Many states permit defendants to "SLAPPback" at meritless suits by recovering attorneys' fees, consequential damages, or other relief. *See e.g.*, Pet. App. 20-21, CCP § 425.16(c) (attorneys' fees and costs); LSA-C.C.P. Art. 971 (B) (same); *see also* N.Y. Civ. Rights Law § 70-a (separate action or claim for damages). Other states, such as Maryland, do not award such relief to SLAPP defendants. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807.

Some states also provide for automatic stays of discovery when motions asserting anti-SLAPP rights are pending. *See*, e.g., Pet. App. 22, CCP § 425.16(g); Georgia (Ga. Code Ann. § 9-11-11.1); Hawaii (HB 741 CD1, 21st Leg. Session). However, other states do not include such provisions. *See e.g.,* Delaware (Del. Code Ann. tit. 10, §§ 8136-8138); Florida (Fla. Stat. § 57.105, Fla. Stat § 768.295); Nebraska (Neb. Rev. Stat. Ann. § 25-21,241-21,246); Nevada (Nev. Rev. Stat. Ann. § 41.637, 41.650); New York (N.Y. C.P.L.R. 3211(g), 3212 (h)).

B. The Lower Courts Are Largely in Agreement As to When Anti-SLAPP Provisions Apply in Federal Court

In view of the patchwork nature of state anti-

SLAPP laws, it is pointless to ask (as Petitioner would) whether "state anti-SLAPP statutes" apply in diversity cases. Not surprisingly, the federal courts of appeals have not posed this question. Rather, they decide applicability under an *Erie* analysis on a provision-by-provision basis.

For example, in the Ninth Circuit, where this case arose, SLAPP defendants are allowed to file a special motion to strike and recover attorneys' fees if they prevail because such rights are substantive, *see U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999), but the California anti-SLAPP law's automatic discovery stay is not followed because it is purely procedural, *see Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001). Three other courts of appeals have likewise held that anti-SLAPP motions to strike and/or fee-shifting provisions are available in federal courts exercising diversity jurisdiction. *See Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 144-48 (2d Cir. 2013) (The "aspects of California's anti-SLAPP rule considered substantive by federal law continue to apply in this case."); *Godin v. Schencks*, 629 F.3d 79, 87-88 (1st Cir. 2010) (holding "that the dual purposes of *Erie* are best served by enforcement of [Maine's anti-SLAPP statute] in federal court. . . . Maine has not created a substitute to the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities"); *Henry*, 566 F.3d at 168-69 ("Louisiana law, including the nominally-procedural [Louisiana anti-SLAPP statute], governs this

diversity case." (citing *Newsham*, 190 F.3d at 972-73)).

Faced with an altogether different anti-SLAPP statute, the Eleventh Circuit held that Georgia's verification requirement does not apply in diversity cases because it conflicts with Rule 11. *See Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1360 (11th Cir. 2014). However, the court was careful to explain that its decision was "distinguishable from" *Newsham* and other "cases considered by other circuits that have found state anti-SLAPP laws applicable in federal court." *Id*. at 1361.

The courts of appeals have also uniformly agreed that orders denying anti-SLAPP motions are immediately appealable under the collateral order doctrine—but only when the statute provides for immunity from suit. For example, orders denying anti-SLAPP motions in immunity-from-suit states California and Louisiana are immediately appealable. *See Batzel*, 333 F.3d at 1025-26; *Liberty Synergistics*, 718 F.3d at 148; *Henry*, 566 F.3d at 178. But orders denying motions under Nevada's and Oregon's anti-SLAPP laws are not, even though those states, like California, fall within the Ninth Circuit. The difference is that, "unlike California's," Oregon's and Nevada's laws do "not furnish [their] citizens with immunity from trial." *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 801 (9th Cir. 2012); *see also Englert v. MacDonell*, 551 F.3d 1099, 1105 (9th Cir. 2009) ("the Oregon anti-SLAPP… was not intended to provide a right not to be tried").

* * *

Because federal cases addressing anti-SLAPP protections consider only isolated provisions of diverse state laws, and recognize substantive versus procedural distinctions on a provision-by-provision basis, their tailored decisions are generally consistent in application under *Erie* and too narrow to warrant oversight from this Court. There is simply no entrenched, mature circuit conflict needing resolution by this Court.

II. EVEN IF GUIDANCE FROM THIS COURT WERE APPROPRIATE, THIS WOULD NOT BE THE RIGHT TIME OR THE RIGHT CASE TO GIVE IT

Petitioner contends that a single outlier decision, *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015), creates a conflict requiring this Court's intervention. Although the reasoning of *Abbas* departed from the Ninth Circuit's, the outcomes may be reconcilable. Moreover, even assuming that *Abbas* cannot be harmonized with the result in this case, it would not be a sufficient ground for granting a writ of certiorari. Nor, in any event, would this case be an appropriate vehicle to consider the issue Petitioner would raise.

A. The California and DC Statutes are Distinguishable

Although the anti-SLAPP laws in California and D.C. are similar, they differ in one potentially important respect: California's law was enacted to provide SLAPP defendants with immunity from suit, whereas D.C.'s law may not have been. When

observing that California's law shields defendants from the burdens of litigation, the Ninth Circuit pointed to a feature of the statute that is not present in the D.C. law—a statutory right to interlocutory appeal if the defendant's motion is denied. *See* Pet. App. 22, CCP § 425.16(i). This provision was included in the California statute, the legislative history explained, because without it, "the anti-SLAPP law is useless and has failed to protect the defendant's constitutional rights." Cal. Sen. Judiciary Comm. Rep. on AB 1675, at 4 (quoted in *Batzel*, 333 F.3d at 1025). D.C.'s anti-SLAPP statute contains no such provision, suggesting that D.C. viewed SLAPP protections differently from California. *See generally* D.C. Code §§ 16-5501-5505.

Although *Abbas* stated that the Ninth Circuit's anti-SLAPP "decisions are ultimately not persuasive," 783 F.3d at 1335-36, it never asked whether D.C.'s and California's statutes may be distinguishable. Nor did it consider whether D.C.'s statute was intended to provide an immunity from suit, rather than a "qualified immunity shielding participants in public debate from tort liability." *Id.* at 1335. Had it done so, the outcome it reached might have been shown to be consistent with Ninth Circuit precedent.

B. The Narrow, Undeveloped Split Asserted by Petitioner Does Not Merit This Court's Review

Even if *Abbas* is irreconcilable, the Court should deny the Petition. For sixteen years, since the *Newsham* decision, it has been settled Ninth Circuit

law that the substantive immunity from suit and fee-shifting provisions in California's anti-SLAPP statute are applicable in diversity cases. Dr. Yamanaka relied on this precedent when exercising his right to remove this case to federal court. At the time of that removal, three other circuits had agreed with the Ninth Circuit's analysis and none had disagreed. This was also the state of the law when Dr. Yamanaka filed his special anti-SLAPP motion to strike the complaint in the district court.

It was not until *Abbas* was decided in March 2015 that another circuit first disagreed with the *Newsham* line of cases. That disagreement is as shallow as it is recent. When other circuit courts are in unanimous accord, a lone demurring court of appeals panel decision should be addressed through the *en banc* process. It should not immediately command the attention of this Court. This is especially true when the disputed issue would not have nationwide applicability.

Even if the question Petitioner poses could one day be sufficiently important to come before this Court, now is not the time to hear it. Many states still have no anti-SLAPP statutes and it is unclear whether laws employing a special motion to strike or other models will ultimately become prevalent. Alternatively, enactment of the pending federal anti-SLAPP legislation would moot the issue entirely. *See* SPEAK FREE Act of 2015, H.R. 2304 (114th Cong., 1st Sess.)

Judicial decisions addressing existing statutes are similarly undeveloped. Whatever limited disharmony exists among the lower courts should be

allowed to percolate before this Court intervenes. *See California v. Carney,* 471 U.S. 386, 400-401 n.11 (1985) (Stevens, J., dissenting) ("Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts. . . . [T]he Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable."). Time will tell whether *Abbas* was an aberration or whether other lower courts will find its reasoning persuasive. So far, at least one district court has expressly disagreed with *Abbas* and followed *Newsham* instead. *See Tobinick v. Novella*, 108 F. Supp. 3d 1299, 1305 n.4 (S.D. Fla. 2015) (observing that "the majority of circuit courts have found anti-SLAPP special motions to strike permissible").

Accordingly, even if the question presented by Petitioner could ultimately be worthy of this Court's review, the Court should deny the Petition and allow further development of the issue among the lower courts. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice,* n. at 199 (6th ed. 1986) ("In some cases the Justices may feel that the time is not ripe for the Court to resolve a conflict, preferring to await further litigation that might produce a consensus or a satisfactory majority view among the lower courts."); s*ee also* Stewart A. Baker, *A Practical Guide to Certiorari,* 33 Cath. Univ. L. Rev. 611, 618 (1984) ("Each additional decision may shed new light on the way the issue should be analyzed. While it makes for temporary uncertainty, this process of percolation is ultimately good for the law.").

C. This Meritless Lawsuit is Not The Proper Vehicle to Consider This Issue

This case is a prime example of the kind of vexatious litigation California's anti-SLAPP statute was designed to prevent. Dr. Yamanaka was sued for unfair business practices (not to protect some intellectual property right) based on his use of specific acronyms in a scientific journal article describing research for which he won the Nobel Prize. It is beyond frivolous. Dr. Xu, who claimed Dr. Yamanaka' usurped his reputation by using the wrong acronyms, died while the appeal was still pending before the Ninth Circuit. What remains is the husk of an action that was meritless from the outset and that Petitioner pursues in this Court presumably only to avoid the award of attorneys' fees rightly entered against it.

If the Court wants to address the applicability of certain provisions in California's anti-SLAPP statute in federal diversity cases, it should await a lawsuit that has at least minimal merit, where the Court's decision could potentially make a difference in the outcome of the case. Even putting the anti-SLAPP law aside, it is clear the complaint in this case could not withstand a Rule 12(b)(6) motion to dismiss. Indeed, the Ninth Circuit expressly held, in a ruling Petitioner has not challenged, that Petitioner "has not pleaded sufficient facts to survive Federal Rule of Civil Procedure 9(b)'s particularity requirement." Pet. App. 3. There is no question Petitioner's lawsuit fails. The only question is why it fails—because it is

barred by the anti-SLAPP law or because Petitioner is incapable of asserting a viable claim for relief.

The real concern driving this Petition is one the Petition never mentions—the automatic award of attorneys' fees to prevailing anti-SLAPP defendants. *See* Pet. App. 21, CCP § 425.16(c)(1). Importantly, there can be little doubt a state law granting fees to certain parties confers a substantive right not displaced by any federal procedural rule. The Petition ignores completely the fee-shifting provision that constitutes Petitioner's only remaining interest in the case.

III. THE NINTH CIRCUIT CORRECTLY APPLIED THE ANTI-SLAPP PROVISIONS IN THIS CASE

The court below properly determined that the California anti-SLAPP statute's special motion to strike and fee-shifting provision were available in this case. Its decision should not be disturbed.

If there is a direct collision between a provision of state law and a federal procedural rule, the federal rule applies unless it exceeds the congressional mandate embodied in the Rules Enabling Act or the U.S. Constitution. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-750 (1980) (*citing Hanna v. Plumer*, 380 U.S. 460, 464 (1965)). If there is no direct collision between the federal rule and state law, courts apply the *Erie* doctrine to determine which law applies. *Id.* at 752.

As the Ninth Circuit first explained in *Newsham*, there is no direct collision between the relevant

California anti-SLAPP provisions and federal procedural rules. *See Newsham*, 190 F. 3d at 972 ("We conclude that these provisions and Rules 8, 12, and 56 can exist side by side ... each controlling its own intended sphere of coverage without conflict.") (internal quotations omitted) (citing *Walker,* 446 U.S. at 752). The court later elaborated that California has enacted both an anti-SLAPP statute as well as a Rule 12 equivalent, each of which answer a distinct question:

> That the California legislature enacted both an analog to Rule 12 and, additionally, an anti-SLAPP statute is strong evidence that the provisions are intended to serve different purposes and control different spheres. Moreover, the anti-SLAPP statute asks an *entirely different question*: whether the claims rest on the SLAPP defendant's protected First Amendment activity and whether the plaintiff can meet the substantive requirements California has created to protect such activity from strategic, retaliatory lawsuits.

Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1183 (9th Cir. 2013) (emphasis added).

To be certain, California's anti-SLAPP law contains a procedural component (a special motion to strike), but it is a component that is necessary to give effect to a substantive right. *See Montgomery v. Louisiana*, 2016 WL 280758 at *14, Slip Op. 18 (Jan. 25, 2016) ("There are instances in which a substantive change in the law must be attended by a

procedure. . . . Those procedural requirements do not, of course, transform substantive rules into procedural ones."). California has provided SLAPP defendants with substantive immunity from suit to prevent vexatious litigation from chilling valuable speech. That protection would be meaningless if there were no procedure to enforce it immediately after a SLAPP suit is commenced. The Ninth Circuit therefore properly treats this procedural vehicle as an essential component of a substantive right. *See Batzel*, 333 F.3d at 1025-26 ("Because California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well.").[7]

Even if there were a direct collision between the applicable anti-SLAPP provisions and the federal rules, the state law would still apply in this case. Federal procedural rules displace state law only when consistent with the Rules Enabling Act and the U.S. Constitution. *Walker*, 446 U.S. at 750. Applying the federal rules of procedure in the manner urged by Petitioner would violate the Rules Enabling Act by "abridg[ing]" and "modify[ing] [a] substantive right," 28 U.S.C.A. § 2072-(b), namely, the right to be immune from meritless suits that harm the public interest by chilling free expression.

As there is, in fact, no collision between federal and state law in this case, the *Erie* doctrine governs

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[7] MEBO contends the anti-SLAPP statute is contrary to the Federal Rules because it stays discovery pending the outcome of a motion to strike (Pet. 11), but the Ninth Circuit has held that the anti-SLAPP law's automatic discovery stay does not apply in federal court. *Metabolife*, 264 F.3d at 846.

the applicability of the disputed anti-SLAPP provisions. *Walker*, 446 U.S. at 752. The objective of the applicable provisions is "manifestly substantive," therefore the provisions are substantive for purposes of *Erie*, notwithstanding any procedural components. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429 (1996) (holding that ostensibly procedural law with "manifestly substantive" objective is applicable in federal court). Indeed, here, the disputed provisions are overwhelmingly substantive not only in purpose but in effect. The motion to strike prevents harassment of SLAPP defendants like Dr. Yamanaka by allowing them to exit meritless litigation before incurring substantial costs. The fee-shifting provision deters plaintiffs from bringing SLAPP suits and gives defendants an automatic right of recovery that is not otherwise available.

Petitioner's argument also raises important federalism concerns. When enacting its anti-SLAPP statute, California found that state law causes of action had been abused "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *See* Pet. App. 20, CCP § 425.16(a). It therefore provided substantive rights and remedies to SLAPP defendants "to encourage continued participation in matters of public significance." *Id.*

To rule as Petitioner urges would override these protections and permit state laws to be misused for improper purposes, contrary to the state's express statutory directive. What is at stake in this case is not, as Petitioner suggests, whether federal procedural rules govern the progress of federal cases.

It is whether state laws may be abused in a manner that harms the public interest, when the state has clearly declared they may not. To treat California's anti-SLAPP provisions as procedural merely because they include a procedural component would succumb to a mechanical formalism that this Court's *Erie* jurisprudence has never embraced and never should.

Here, Dr. Yamanaka was haled into a California court for publishing an article in a scientific journal. If Petitioner had its way, future litigants in Dr. Yamanaka's position would be placed at an irrational and unjust crossroads: either relinquish their right to a federal diversity forum or relinquish their substantive anti-SLAPP rights. Neither *Erie* nor any prior decision of this Court calls for such an absurd result.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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