No. 15-527

In the Supreme Court of the United States

MEBO INTERNATIONAL, INC.,
Petitioner,
v.
SHINYA YAMANAKA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. THE PETITION PRESENTS A QUESTION OF NATIONAL IMPORTANCE 1

II. THE CURRENT SPLIT IN THE CIRCUIT COURTS HAS BECOME MORE PRONOUNCED SINCE THE *ABBAS* DECISION 3

III. THE NINTH CIRCUIT'S "PROVISION-BY-PROVISION" *ERIE* ANALYSIS OF CALIFORNIA'S ANTI-SLAPP STATUTE HAS RESULTED IN THE CREATION OF A NEW ANTI-SLAPP STATUTE 7

IV. THIS PETITION PRESENTS THE IDEAL VEHICLE FOR CONSIDERING THIS JURISDICTIONAL ISSUE 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Abbas v. Foreign Policy Group, LLC,
783 F.3d 1328 (D.C. Cir. 2015) 3, 4, 6, 7

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 10

Bob Jones University v. United States,
461 U.S. 574 (1983) 7

Club Members for an Honest Election v. Sierra Club,
45 Cal.4th 309 (2008) 8, 9

Culbertson v. Lykos,
790 F. 3d 608 (5th Cir. 2015) 6

Diamond Ranch Academy, Inc. v. Filer,
2015 WL 3618278 (D. Utah 2015) 7

EC Term of Years Trust v. United States,
550 U.S. 429 (2007) 4

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 2, 5, 6, 7, 9

Foman v. Davis,
371 U.S. 178 (1962) 10

Henry v. Lake Charles American Press, LLC,
566 F.3d 164 (5th Cir. 2009) 5, 6

Intercon Solutions, Inc. v. Basel Action Network,
791 F.3d 729 (7th Cir. 2015) 6

Lozovyy v. Kurtz,
2015 WL 9487734 (5th Cir. Dec. 29, 2015) . . . 5, 6

Makaeff v. Trump Univ., LLC,
715 F.3d 254 (9th Cir. 2013) 1, 5, 8

Makaeff v. Trump Univ., LLC,
736 F.3d 1180 (9th Cir. 2013) 5

Metabolife Int'l, Inc. v. Wornick,
264 F.3d 832 (9th Cir. 2001) 8

Mitchell v. Hood,
614 Fed. Appx. 137 (5th Cir. 2015) 6

Sarver v. Chartier,
2016 WL 625362 (9th Cir. Feb. 17, 2016) 8

U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.,
190 F.3d 963 (9th Cir. 1999) 4, 5, 6, 7

Unity Healthcare, Inc. v. County of Hennepin,
308 F.R.D. 537 (D. Minn. 2015) 6, 7

Youngblood v. West Virginia,
547 U.S. 867 (2006) 9

STATUTES

Ariz. Rev. Stat. Ann. § 12-752(B) 3

Cal. Bus. & Prof. Code § 17200 9

Cal. Civ. Proc. Code § 425.16(b) 4

Cal. Civ. Proc. Code § 425.16(b)(2) 3

D.C. Code § 16-5502(b) 3, 4

Fla. Stat. Ann. § 720.304(4)(c) 3

Guam Code Ann. § 17106(c) 3

Haw. Rev. Stat. § 634F-2(4)(A) 3

Ind. Code Ann. § 34-7-7-9(c) 3

La. Code Civ. Proc. Ann. art. 971(A)(2) 3

Me. Rev. Stat. tit. 14, § 556 3

Mass. Gen. Laws Ann. ch. 231, § 59H 3

N.Y. C.P.L.R. 3211(g) 3

Okla. Stat. tit. 12, § 14431.1 2

Or. Rev. Stat. § 31.150(4) 3

27 Pa. Cons. Stat. Ann. § 8303 2

R.I. Gen. Laws. Ann. § 9-33-2(c) 2

Tenn. Code Ann. § 4-21-1003(a) 2

Tex. Civ. Prac. & Rem. Code Ann. §27.006(a) 3

Utah Code Ann. § 78B-6-1403(1)(a) 3

Vt. Stat. Ann. tit. 12, § 1041(e)(2) 3

Wash. Rev. Code § 4.24.525(4)(c) 3

RULES

Fed. R. Civ. P. 12 4

Fed. R. Civ. P. 12(b)(6) 9, 10

Fed. R. Civ. P. 15(a)(2) 10

Fed. R. Civ. P. 56 . . . . 4, 5, 7, 8

OTHER AUTHORITIES

H.R. 4364, 111th Cong., 1st Sess. 7

H.R. 2304, 114th Cong., 1st Sess. 7

REPLY BRIEF FOR PETITIONER

I. THE PETITION PRESENTS A QUESTION OF NATIONAL IMPORTANCE

State anti-SLAPP statutes, such as California's, do not create new First Amendment rights; but rather, they provide defendants with significant (and unique) procedural power to invoke immunity by allowing for the filing of a motion to dismiss the plaintiff's claim early on in the litigation. See *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) ("*Makaeff I*")("The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights. The language of the statute is procedural: Its mainspring is a 'special motion to strike.'") (Kozinski, J., concurring). While it is true that "twenty-two states have no anti-SLAPP law" (Resp. Opp. at p. 5), it is also true that every circuit court in the nation (except the Federal Circuit) has a state, district, or territory within its jurisdictional boundaries that has enacted an anti-SLAPP statute.[1] Respondent's attempt, therefore, at

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[1] The following sets forth the circuit courts of appeals, along with the state, district, or territory within their jurisdictional boundaries that have enacted anti-SLAPP statutes: D.C. Circuit (District of Columbia); First Circuit (Maine, Massachusetts, and Rhode Island); Second Circuit (New York and Vermont); Third Circuit (Delaware and Pennsylvania); Fourth Circuit (Maryland); Fifth Circuit (Louisiana and Texas); Sixth Circuit (Tennessee); Seventh Circuit (Illinois and Indiana); Eighth Circuit (Arkansas, Missouri, Minnesota, and Nebraska); Ninth Circuit (Arizona, California, Guam, Hawaii, Nevada, Oregon, and Washington); Tenth Circuit (New Mexico, Oklahoma, and Utah); and Eleventh Circuit (Florida and Georgia).

minimizing the national importance of the question presented by this petition by stating that "any decision would not have nationwide applicability" (Resp. Opp. at p. 5) rings hollow. The procedural quagmire which the "mainspring" of these state anti-SLAPP statutes has created in federal diversity cases demands this court's attention. It has already led to a split in the circuit courts of appeals, and continues to present the lower courts with difficult jurisdictional "choices" under the *Erie* doctrine.

And while state anti-SLAPP statutes do share the "common purpose" (Resp. Opp. at p. 1) of preventing abusive litigation from chilling constitutionally protected speech, they are not merely a "patchwork of state laws" (Resp. Opp. at pp. 2, 5, 13), as Respondent repeatedly suggests. Instead, nearly every state anti-SLAPP statute shares the common procedural mechanism of allowing a defendant to invoke immunity through an express motion procedure.[2] What's more, the majority of those state anti-SLAPP statutes (including California's) contain burden shifting provisions or otherwise impose evidentiary standards, which render the anti-SLAPP challenge to a plaintiff's

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[2] Those state anti-SLAPP statutes that do not contain an express motion procedure (and instead merely entitle the defendant to immunity) still require that the defendant file a motion to invoke that immunity. See 27 Pa. Cons. Stat. Ann. § 8303; R.I. Gen. Laws. Ann. § 9-33-2(c); Tenn. Code Ann. § 4-21-1003(a); Okla. Stat. tit. 12, § 14431.1.

claim a difficult one to overcome, especially at the outset of a case.[3]

Therefore, and contrary to Respondent's contention, the fundamental jurisdictional issue raised by this petition (i.e. whether federal courts in diversity should apply the unique procedural mechanisms of state anti-SLAPP statutes or must adhere to the Federal Rules of Civil Procedure) is a straightforward one of national importance, and is especially worthy of this court's attention. Petitioner therefore respectfully requests that certiorari be granted.

II. THE CURRENT SPLIT IN THE CIRCUIT COURTS HAS BECOME MORE PRONOUNCED SINCE THE *ABBAS* DECISION

Respondent argues against certiorari by attempting to marginalize the importance of the circuit split between the D.C. Circuit and the Ninth Circuit by referring to the D.C. Circuit's opinion in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015) as "a single outlier decision" (Resp. Opp. at p. 16), and contending that "a lone demurring court of appeals panel decision" should not command the

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[3] See Ariz. Rev. Stat. Ann. § 12-752(B); Cal. Civ. Proc. Code § 425.16(b)(2); D.C. Code § 16-5502(b); Fla. Stat. Ann. § 720.304(4)(c); Guam Code Ann. § 17106(c); Haw. Rev. Stat. § 634F-2(4)(A); Ind. Code Ann. § 34-7-7-9(c); La. Code Civ. Proc. Ann. art. 971(A)(2); Me. Rev. Stat. tit. 14, § 556; Mass. Gen. Laws Ann. ch. 231, § 59H; N.Y. C.P.L.R. 3211(g); Or. Rev. Stat. § 31.150(4); Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a); Utah Code Ann. § 78B-6-1403(1)(a); Vt. Stat. Ann. tit. 12, § 1041(e)(2); Wash. Rev. Code § 4.24.525(4)(c).

attention of this court. (Resp. Opp. at p. 18). As a preliminary matter, this court has not historically conducted a "head count" in order to determine whether a sufficient number of circuit courts have weighed in on the question before granting certiorari. See *EC Term of Years Trust v. United States*, 550 U.S. 429, 433 (2007) (granting certiorari to resolve a split between the Fifth Circuit and the Ninth Circuit).

But in any event, the circuit split between the Ninth Circuit and the D.C. Circuit on this anti-SLAPP jurisdictional issue warrants review not only because the D.C. Circuit's holding in *Abbas* (that the motion to dismiss provision in the D.C. Anti-SLAPP Act[4] is preempted by Federal Rules of Civil Procedure 12 and 56) is the direct opposite of the Ninth Circuit's holding in *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999) ("*Newsham*"); but also because the holding in *Abbas* is premised in large part upon the analyses of judges within the Ninth Circuit who believe *Newsham* was wrongly decided and should be overturned. Coloring this disagreement as being "as shallow as it is recent" (Resp. Opp. at p. 18) severely misses the mark, and

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[4] The special motion to strike provision in California's anti-SLAPP statute is nearly identical to that of the D.C. Anti-SLAPP Act. Compare D.C. Code § 16-5502(b) and Cal. Civ. Proc. Code § 425.16(b)

only highlights the fact that Respondent's Opposition ignores the enormous chinks in *Newsham*'s armor.[5]

While it may be the case that at the time of removal, "other circuits had agreed with the Ninth Circuit's analysis and none had disagreed," (Resp. Opp. at p. 18), simply put, things change. The Fifth Circuit's prior (and tenuous) "endorsement" of the applicability of the state anti-SLAPP motion procedure in federal diversity cases from *Henry v. Lake Charles American Press, LLC*, 566 F.3d 164, 169 (5th Cir. 2009) ("Louisiana law, including the nominally procedural [Louisiana anti-SLAPP statute] governs this diversity case") has eroded so much that, at best, the Fifth Circuit should be characterized as undecided on the issue.

In *Lozovyy v. Kurtz*, 2015 WL 9487734 (5th Cir. Dec. 29, 2015), the Fifth Circuit acknowledged that "other circuits have refused to apply anti-SLAPP dismissal provisions. . . in federal court under the *Erie* doctrine, reasoning that they create distinct mechanisms for pretrial dismissal of claims that are incompatible with the Rule 56 standard." *Id*. at *1. However, rather than address that issue, the court in *Lozovyy*, for procedural reasons, declined to revisit *Henry*'s pronouncement on

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[5] In spite of the dissension in the ranks at the Ninth Circuit on this issue, as voiced in *Maekaff I* and *Makaeff v. Trump Univ., LLC,* 736 F.3d 1180 (9th Cir. 2013) ("*Makaeff II*"), Respondent myopically refers to current anti-SLAPP jurisprudence in the Ninth Circuit as "settled Ninth Circuit law" (Resp. Opp. at p. 18); as if not discussing the issues raised by Judge Kozinski's concurrence in *Makaeff I* or Judge Watford's dissent from the denial of rehearing *en banc* in *Makaeff II* means that they don't actually exist.

this point, or to address its implications with respect to the applicability of Louisiana's anti-SLAPP statute in federal court under the *Erie* doctrine, and instead simply "assumed" it was properly applied in federal court. *Id*. at *2 and *6. The *Lozovyy* court also admitted that "*Henry* is not a paragon of clarity." *Id*. at *7.

Of course this recent Fifth Circuit pronouncement comes on the heels of other post-*Henry* Fifth Circuit decisions which likewise call into question whether or not the Fifth Circuit should still be counted as being in line with *Newsham*. See, e.g., *Mitchell v. Hood*, 614 Fed. Appx. 137, 139, n.1 (5th Cir. 2015) (noting the disagreement among courts of appeals as to whether the procedural motions built into state anti-SLAPP statutes are properly applied in federal court at all, but declining to decide that issue); *Culbertson v. Lykos*, 790 F.3d 608, 631 (5th Cir. 2015) ("we have not specifically held that the [Texas anti-SLAPP statute] applies in federal court; at most we have assumed without deciding its applicability"). To say then (as Respondent does), that "the other circuit courts are in unanimous accord" on this issue (Resp. Opp. at p. 18) is hyperbolic to say the least. See also *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015) (observing that the subject of the federal courts' authority to hear an anti-SLAPP motion "has produced disagreement among appellate judges").

Respondent's claim that "time will tell whether *Abbas* was an aberration or whether other lower courts will find its reasoning persuasive" (Resp. Opp. at p. 19) also overlooks the fact that district courts are already struggling with the issue. Compare *Unity Healthcare,*

Inc. v. County of Hennepin, 308 F.R.D. 537, 540-43 (D. Minn. 2015) (citing *Abbas* in holding that Minnesota's anti-SLAPP motion procedure is inapplicable in federal court because it conflicts with Rule 56) and *Diamond Ranch Academy, Inc. v. Filer*, 2015 WL 3618278 at *3 (D. Utah 2015)(following *Newsham* in applying California's anti-SLAPP statute's motion procedure, but characterizing that anti-SLAPP statute as a hybrid procedural/substantive law). Allowing "for whatever limited disharmony exists among the lower courts . . . to percolate" (Resp. Opp. at pp. 18-19) before this court intervenes, as Respondent suggests, will only lead to further obfuscation of this jurisdictional issue. Certiorari should therefore be granted.[6]

III. THE NINTH CIRCUIT'S "PROVISION-BY-PROVISION" *ERIE* ANALYSIS OF CALIFORNIA'S ANTI-SLAPP STATUTE HAS RESULTED IN THE CREATION OF A NEW ANTI-SLAPP STATUTE

Respondent claims that federal courts are already doing a "provision-by-provision" *Erie* analysis of state anti-SLAPP statutes, such that this court's review of the ultimate issue presented by this petition (whether

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[6] While there have been two attempts to introduce federal anti-SLAPP legislation, the first attempt back in 2009 (H.R. 4364, 111th Cong., 1st Sess.) died in committee. The current attempt (H.R. 2304, 114th Cong., 1st Sess.) appears headed towards that same fate as it has remained in committee for nearly one year. In any event, the existence of potential legislation should not have any impact on this court's decision to grant certiorari. See *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983) (courts should "ordinarily be slow to attribute significance to the failure of Congress to act on particular legislation").

state anti-SLAPP motion procedures are properly applied in federal diversity actions) is "pointless." (Resp. Opp. at p. 14). This position misses the point entirely because it fails to acknowledge that this piecemeal analysis has achieved nothing more than the creation of new and different anti-SLAPP statutes in federal court. Indeed, the version of California's anti-SLAPP statute applied in diversity actions in the Ninth Circuit has already been neutered following *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (declining to apply the automatic discovery stay from California's anti-SLAPP statute in diversity actions). See *Makaeff I* at 274 ("the federal court special motion is a far different (and tamer) animal than its state-court cousin.")(Kozinski, J. concurring). See also *Id*. at 275 ("California's anti-SLAPP statute is quintessentially procedural, and its application in federal court has created a hybrid mess that now resembles neither the Federal Rules nor the original state statute.")(Paez, J., concurring).

The Ninth Circuit's most recent transformation of California's Anti-SLAPP statute is evident in *Sarver v. Chartier*, 2016 WL 625362 at *5 (9th Cir. Feb. 17, 2016), which held that the "timing controls imposed by section 425.16(f) directly collide with the more permissive timeline Rule 56 provides for the filing of a motion for summary judgment" and therefore refused to require a defendant asserting California's anti-SLAPP statute in a federal diversity action to adhere to the state procedural rule requiring an anti-SLAPP motion to be filed within 60 days of service of process. In so doing, the Ninth Circuit has now done away with another hallmark of California's anti-SLAPP statute: "early dismissal of unmeritorious claims." *Club*

Members for an Honest Election v. Sierra Club, 45 Cal.4th 309, 315 (2008). California's anti-SLAPP statute in the hands of the Ninth Circuit has therefore become "[l]ike the Ouroboros swallowing its tail," *Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting); a mythical statutory creature being periodically recreated through this piecemeal *Erie* analysis. This court's guidance is therefore crucial in order to maintain the integrity of both the intended effect of state anti-SLAPP statutes, as well as the fundamental tenets of *Erie* and its progeny.

IV. THIS PETITION PRESENTS THE IDEAL VEHICLE FOR CONSIDERING THIS JURISDICTIONAL ISSUE

This case presents a perfect example of what happens when a diversity litigant's procedural protections afforded by the Federal Rules of Civil Procedure are broad-sided by the procedural mechanism built into California's anti-SLAPP statute. Petitioner's well-pled pleading was stricken by the lower courts even though it satisfied federal pleading standards and sufficiently stated a claim for relief under California's Bus. & Prof. Code section 17200.[7] Even though an alternative Rule 12(b)(6) motion was filed concurrent with the anti-SLAPP special motion to strike, the lower court declined to rule on that motion,

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[7] The substantive issues presented in this case are important ones involving stem cell research use in developing therapies to treat and possibly cure many deadly ailments. Petitioner should be afforded the right to correct the wrong it believes Respondent has perpetrated by the manner in which he labels his stem cell research.

and instead, granted the anti-SLAPP special motion to strike.

Had Petitioner been afforded the opportunity to oppose the Rule 12(b)(6) motion, which requires a plaintiff to allege facts stating a claim that is "plausible on its face," it could have done so. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable").[8] Unlike a state anti-SLAPP statute, the Rule 12 standard does not impose a "likelihood of success" requirement at the pleadings stage. As a direct result of this jurisdictional collision, Petitioner has a final judgment entered against it, which includes an award of attorney's fees. This case therefore presents the ideal vehicle for this court to address this recurring jurisdictional issue that continues to divide the circuit courts.

[8] Petitioner should also have been given the opportunity to amend its pleading under Rule 15(a)(2), which allows leave to amend "when justice so requires." See also *Foman v. Davis*, 371 U.S. 178, 182 (1962)(holding that federal policy strongly favors determination of cases on their merits, such that the role of pleadings is limited, and leave to amend should be freely given unless the opposing party can make a showing of prejudice or dilatory motive).

CONCLUSION

Since there is no way to reconcile the disparate outcomes between the D.C. Circuit and the Ninth Circuit on this issue, and since the lower courts continue to struggle with the procedural application of state anti-SLAPP motions in diversity actions, Petitioner respectfully requests that this court grant certiorari to ensure nationwide uniformity on this important and recurring jurisdictional question.

Respectfully submitted,

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