Three Ways to Sit Under a *Shady Grove*: The Uncertain Future of the Oklahoma Citizens Participation Act in Federal Court

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I. Introduction

On March 23, 2020, the Oklahoma Council of Public Affairs published an article titled "Stitt: Businesses' Survival Important to State Recovery."[1] This article lauded Oklahoma Governor Kevin Stitt's response to COVID-19, while labeling Oklahoma businessman Chad Richison as an individual who "called for Stitt to order most business to close and control how others operate."[2] Richison, CEO of Oklahoma-based software company Paycom Payroll, gained significant acclaim for a series of March 2020 letters encouraging Governor Stitt to employ measures related to the spread of COVID-19.[3] Less than a month after the article's publication, Paycom filed a lawsuit in Oklahoma County District Court against the Oklahoma Council of Public Affairs.[4] The suit alleged that the article's portrayal of Paycom and its CEO constituted a defamatory statement intentionally designed to hurt the company's reputation.[5]

In response to the lawsuit, the Oklahoma Council of Public Affairs filed a special motion to dismiss under a 2014 Oklahoma law, the Oklahoma Citizens Participation Act ("OCPA").[6] Under the OCPA, if a defendant demonstrates that the plaintiff's claim affects their right to free speech, petition, or association, the court abandons standard litigation procedure to consider dismissal under the statute's novel three-part burden-shifting scheme.[7] Applying this novel burden-shifting scheme, the district court dismissed Paycom's claim.[8] Then, the Oklahoma Council of Public Affairs

1. Ray Carter, *Stitt: Businesses' Survival Important to State Recovery*, OKLA. COUNCIL OF PUB. AFF. (Mar. 23, 2020), https://www.ocpathink.org/post/stitt-businesses-survival-important-to-state-recovery.

2. *Id.*

3. *See, e.g.*, Rachel Hubbard & Ryan LaCroix, *In the Face of COVID-19, Paycom CEO Chad Richison Urges Oklahoma Gov. Stitt to Do More*, KOSU (Mar. 23, 2020), https://www.kosu.org/health/2020-03-23/in-the-face-of-covid-19-paycom-ceo-chad-richison-urges-oklahoma-gov-stitt-to-do-more; Steve Metzer, *Governor Criticized for COVID-19 Response*, J. REC. (Mar. 23, 2020), https://journalrecord.com/2020/03/23/governor-criticized-for-covid-19-response/.

4. Petition at 2–6, Paycom Payroll, LLC v. Okla. Council of Pub. Aff., Inc., CJ-2020-1950 (Okla. Cnty. Dist. Ct. Apr. 22, 2020).

5. *Id.*

6. Defendant's Motion to Dismiss and Supporting Brief at 2, Paycom Payroll, LLC v. Okla. Council of Pub. Aff., Inc., CJ-2020-1950 (Okla. Cnty. Dist. Ct. June 29, 2020).

7. *See* Sw. Orthopaedic Specialists, P.L.L.C. v. Allison, 2018 OK CIV APP 69, ¶ 7, 439 P.3d 430, 434 (citing 12 OKLA. STAT. § 1434 (2018)).

8. Paycom Payroll, LLC v. Okla. Council of Pub. Aff., Inc., CJ-2020-1950, slip op. at 17 (Okla. Cnty. Dist. Ct. Dec. 30, 2020).

invoked the OCPA's mandatory sanctions provision and moved for $105,000,000 in sanctions against Paycom.[9]

Facing this potentially remarkable sanction, Paycom appealed the dismissal to the Oklahoma Supreme Court and challenged the district court's compliance with the OCPA.[10] In an October 19, 2020 order, the court sided with Paycom and overturned the dismissal, holding that the district court's ruling was null and void because the court failed to rule within the OCPA's mandatory thirty-day timeline.[11] As this case illustrates, the OCPA creates a high-stakes dismissal battle "unlike any other Oklahoma law and unlike any federal law."[12]

Among the unsettled legal issues posed by the OCPA is whether litigants may invoke this Act in federal court.[13] The basic tenant of the U.S. Supreme Court's *Erie* doctrine is that a federal court addressing a state law cause of action applies state substantive law and federal procedural law.[14] But, as a hybrid-procedural mechanism designed to protect substantive rights, the OCPA challenges the distinction between substance and procedure under *Erie*.[15] As illustrated by the *Paycom* case, the OCPA's application has significant consequences in the life of a lawsuit, including the Act's provisions that restrict or eliminate discovery, heighten evidentiary standards to overcome dismissal, constrict timelines for court rulings, and mandate fee shifting and sanctions for successful dismissals.[16]

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9. Plaintiff's Response to Defendant's Supplemental Motion to Assess Attorney Fees, Court Cost, and Expenses at 5, Paycom Payroll, LLC v. Okla. Council of Pub. Aff., Inc., CJ-2020-1950 (Okla. Cnty. Dist. Ct. Jun. 21, 2021) (describing Oklahoma Council of Public Affairs' motion for a minimum of $105,000,000 in sanctions against Paycom and Richison).

10. Paycom Payroll, LLC v. Hon. Thomas E. Prince, No. 119,654, slip op. at 1 (Okla. Oct. 19, 2021).

11. *Id.* at 1–2.

12. Thacker v. Walton, 2021 OK CIV APP 5, ¶ 22, 499 P.3d 1255, 1263.

13. *See* Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 956 F.3d 1228, 1239 (10th Cir. 2020) (declining to adopt a definitive holding on the OCPA's federal court applicability).

14. *See, e.g.*, Hill v. J.B. Hunt Transp., Inc., 815 F.3d 651, 667 (10th Cir. 2016) (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996)); Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 2 (2012).

15. As many scholars have noted, this murky distinction between substance and procedure underlies *Erie* doctrine caselaw. *See, e.g.*, Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161, 1226 (2016); Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to the Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 270 (2008).

16. *See* 12 OKLA. STAT. §§ 1432–1438 (2023).

This Comment analyzes the applicability of the OCPA in federal court under the *Erie* doctrine. Part II examines the Supreme Court's evolving *Erie* doctrine jurisprudence and the three competing tests arising out of the Court's most recent *Erie* doctrine case, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*.[17] Part III traces the history of the strategic lawsuit against public participation ("SLAPP"), then reviews the current circuit split in applying *Shady Grove*'s competing frameworks to state anti-SLAPP laws in federal court. Part IV builds on this analysis by explaining the mechanics of the OCPA and addressing a series of cases from Oklahoma federal district courts and a recent Tenth Circuit decision, which provide conflicting analysis on the OCPA's federal court applicability. Part V applies *Shady Grove*'s competing frameworks to the OCPA and recommends that federal courts follow the formalist framework as applied in anti-SLAPP decisions from the Second, Fifth, Eleventh, and D.C. Circuits. This Comment concludes that the OCPA conflicts with the Federal Rules of Civil Procedure's Rules 8, 12, and 56, and thus should not apply in federal court. Finally, Part VI of this Comment proposes a federal legislative solution to combat SLAPP lawsuits that would avoid the *Erie* doctrine issues posed by the OCPA.

II. From Erie *to* Shady Grove*: Following the Court's Evolving* Erie *Doctrine Framework*

Federal courts encounter *Erie* doctrine questions when exercising jurisdiction over a state law cause of action under 28 U.S.C. § 1332 (original jurisdiction) or § 1367 (supplemental jurisdiction).[18] Two important concepts emerge when dissecting the Court's *Erie* framework. First there are enduring federalism and statutory interpretation issues underlying the Court's framework and rationale in *Erie* caselaw.[19] Second, the *Erie* doctrine remains unsettled, and the Court's most recent plurality decision in *Shady Grove* reflects these conflicting viewpoints about how state law should operate within a uniform system of federal procedure.[20]

17. 559 U.S. 393 (2010).

18. *See Barnett*, 956 F.3d at 1237–38 (explaining that the court needed to do an *Erie* analysis after exercising supplemental jurisdiction over the state law claim).

19. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 695–96 (1974).

20. Jack B. Harrison, Erie *SLAPP Back*, 95 WASH. L. REV. 1253, 1272 (2020); *see also* Suzanna Sherry, *A Pox on Both Your Houses: Why the Court Can't Fix the* Erie *Doctrine*, 10 J.L., ECON. & POL'Y 173, 182 (2013).

A. Consequential Events of 1938: Erie *and the Federal Rules of Civil Procedure*

The 1938 namesake case of the *Erie* doctrine, *Erie Railroad Co. v. Tompkins*, purports to offer a simple solution to an enduring issue of federalism: when a federal court exercises jurisdiction over a state law claim, what law applies?[21] The Court answered that question by holding that unless an issue is governed by the U.S. Constitution or act of Congress, state law—both legislative acts and judicial opinions—govern federal court decisions on state law.[22] Prior to *Erie*, the Court's holding in *Swift v. Tyson* allowed federal courts exercising jurisdiction over state law claims to disregard state judicial opinions on substantive law and create "federal general common law."[23] In *Erie*, the Court rejected this notion of federal general common law and explained that unless a federal statute governs the issue in a case, the Rules of Decision Act requires that federal courts apply state substantive law.[24] As noted by the Court, this holding bolstered two policy goals: avoiding forum shopping for favorable litigation between state and federal courts and preventing inequitable administration of justice under federal general common law.[25]

The year 1938 was a watershed year for federal courts because in addition to ruling on *Erie*, the Supreme Court approved the Federal Rules of Civil Procedure (the "Rules").[26] Under the Rules Enabling Act of 1934, Congress empowered the Supreme Court to create a uniform set of "rules of practice and procedure" for federal courts, so long as those rules did not "abridge, enlarge or modify any substantive right."[27] Following their enactment in 1938, the Rules created a unified procedural system applying across federal courts.[28] Most scholars and courts agree that, taken together, the 1938 *Erie* holding and enactment of the Rules embody the black letter

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21. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

22. *Id.*

23. *Id.* at 71–72, 78 (citing Swift v. Tyson, 41. U.S. (16 Pet.) 1 (1841)).

24. *Id.* at 78; *see also* Adam N. Steinman, *What Is the* Erie *Doctrine? (and What Does It Mean for the Contemporary Politics of Judicial Federalism?*), 84 NOTRE DAME L. REV. 245, 247–48 (2008).

25. *See Erie*, 304 U.S. at 73–76, 78. The Court would later describe these two policy rationales as the "twin aims" of *Erie*. Hanna v. Plumer, 380 U.S. 460, 468 (1965); *see also* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1866 (2013).

26. *Hanna*, 380 U.S. at 465 (explaining that both the Federal Rules of Civil Procedure and *Erie* happened in the same year).

27. 28 U.S.C. § 2072.

28. Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 276 (2008); *see also* Gensler, *supra* note 15, at 257.

principle that federal courts addressing state law causes of action apply state substantive law and federal procedural law.[29] But the distinction between what is substantive and what is procedural remains difficult to resolve.

*B. Early Post-*Erie *Caselaw and* Hanna*'s Modern Framework*

Following the consequential events of 1938, the Court attempted to resolve disputes when both the Rules and state law could apply to an issue. Initially, the Court adopted a state-law-dominant analysis, while narrowing the scope of the Rules to circumvent any potential conflict with state law.[30] For example, in *Palmer v. Hoffman*, the Court applied a restrictive version of Rule 8(c)'s affirmative defense standard and held that contributory negligence is a question of state law not covered by the Rules.[31] Building on this case, the Court next took a narrow view of Rule 23, which at that time governed derivative actions, to hold that this Rule did not preempt a New Jersey law providing additional requirements for stockholders to post a bond in derivative suits.[32] The Court's deference to state law culminated in the outcome determinative test created by *Guaranty Trust Co. v. York*.[33] Under this test, the Court implied that state law must be followed any time the choice of a federal forum could affect the outcome of litigation in comparison to a state court action.[34]

In the 1965 case *Hanna v. Plumer*, the Court rejected the broad sweep of this outcome determinative test and applied a new framework for analyzing *Erie* conflict questions.[35] Writing for the Court, Chief Justice Earl Warren explained that two distinct situations confront a federal court applying state

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29. Perschbacher & Bassett, *supra* note 28, at 276; *see also* Roosevelt, *supra* note 14, at 2; *Hanna*, 380 U.S. at 465.

30. Joshua P. Zoffer, Note, *An Avoidance Canon for* Erie*: Using Federalism to Resolve* Shady Grove*'s Conflicts Analysis Problem*, 128 YALE L.J. 482, 493–94 (2018); Ely, *supra* note 19, at 696.

31. 318 U.S. 109, 117 (1943).

32. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555–56 (1949).

33. 326 U.S. 99, 109 (1945). The case centered around the applicability of a state statute of limitations to a case in federal court. *Id.* at 107. The Court held that state law on the timing and effect of the statute of limitations controlled in federal court. *See id.* at 111–12.

34. *Id.* at 108–10; *see also* Ely, *supra* note 19, at 696. Scholars have criticized this outcome determinative test as undermining the purpose of the Rules since every state procedural rule could in some form have an impact on the case's outcome. Charles E. Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEX. L. REV. 211, 220 (1961).

35. 380 U.S. 460 (1965); *see* Robert J. Condlin, *"A Formstone of Our Federalism": The* Erie/Hanna *Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 507 (2005).

law: the "unguided Erie Choice," when there is no competing Rule or statute in play, or situations in which the disputed issue falls under the scope of the Rules or other federal law.[36] As the Court noted, *Erie* by its own terms applies only to unguided cases where the issue is not governed by the Rules or other federal law.[37] Conversely, the Court explained that where a Rule applies to the disputed issue, courts must disregard the state law and apply the Rule, so long as the Rule is consistent with the Rules Enabling Act.[38]

Applying this framework, the Court analyzed that Rule 4's provisions allowing forms of service outside of in-hand delivery unavoidably clashed with in-hand delivery as the exclusive form of service under state law.[39] Thus, because the scope of Rule 4 covered the disputed issue, the Court held that Rule 4 controlled the standard for measuring service of process in federal courts and not the Massachusetts law.[40] For the Court, this holding affirmed the policy goal of uniformity of procedure in federal court set out by Congress in the Rules Enabling Act.[41] *Hanna* established a Rules-centered *Erie* analysis by emphasizing that when the Rules apply to a disputed issue in federal court, any conflicting state law must yield to the federal provision.[42]

C. Shady Grove *Creates Three Frameworks for Analyzing* Erie *Doctrine Questions*

In the latest chapter of the Court's *Erie* doctrine caselaw, *Shady Grove Orthopedic Associates P.A. v. Allstate Insurance Co.*, the Court addressed a potential conflict between the class action requirements under Rule 23 and a New York law restricting a special type of class action.[43] The New York law in question provided that parties could not form a class action lawsuit if

36. *See Hanna*, 380 U.S. at 471; *see also* Harrison, *supra* note 20, at 1270.

37. *Hanna*, 380 U.S. at 470–72.

38. *Id.* at 471. The Court's framework rejected the proposition that any state law evaluated as "outcome determinative" applied in federal court, as the Court reasoned that this test would nullify every federal procedural variation presenting a different result from a state court action. *Id.* at 468–69.

39. *Id.* at 470.

40. *Id.* at 463–64.

41. *See id.* at 463.

42. Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 205 (2013).

43. 559 U.S. 393, 397–98 (2010).

they were attempting to recover a minimum statutory penalty.[44] Rule 23 did not, and does not, contain such a restriction.[45] In the case, the named plaintiff filed a federal class action suit against Allstate Insurance, alleging that Allstate failed to pay a class of insureds the required statutory interest penalty for unsettled claims.[46] This claim constituted the type of minimum statutory penalty barred by the New York class action statute.[47] As a result, both the district court and the Second Circuit held that this claim could not proceed as a class action because New York's class action statute precluded this type of lawsuit.[48] Further, both courts found that the statute did not conflict with Rule 23 under the *Erie* doctrine, and thus, since no Rule governed, the New York statute controlled.[49]

In a 5-4 decision, the Supreme Court reversed, holding that New York's class action statute *did* conflict with Rule 23's class action requirements, and thus Rule 23 preempted New York's class action statute for purposes of federal court actions.[50] Justice Antonin Scalia authored the Court's opinion, joined by four other justices for the holding and initial two sections.[51] Only two other justices joined his final Rules Enabling Act analysis section.[52] Justice John Paul Stevens's solo concurring opinion agreed with Justice Scalia's overall holding but offered a different framework for answering *Erie* conflicts questions.[53] Writing for a four-justice dissent, Justice Ruth Bader Ginsburg challenged both the framework and reasoning of the majority opinion.[54]

Justice Scalia's opinion began by setting out a two-part test to analyze *Erie* doctrine questions consistent with the Court's past precedent.[55] At step one of the test, the reviewing court asks whether the Rule(s) at issue conflict with the state law invoked by the litigant by "answer[ing] the

44. *Id.* (citing N.Y. C.P.L.R. § 901(b) (McKinney 2009)).

45. *See id.* at 398–99; FED. R. CIV. P. 23.

46. *Shady Grove*, 559 U.S. at 397.

47. *Id.*

48. *See id.* at 397–98.

49. *Id.*

50. *Id.* at 399; *see also* Glenn S. Koppel, *The Fruits of* Shady Grove*: Seeing the Forest for the Trees*, 44 AKRON L. REV. 999, 1004 (2011).

51. Koppel, *supra* note 50, at 1005.

52. *Id.*

53. *Shady Grove*, 559 U.S. at 417, 421–25 (Stevens, J., concurring).

54. *Id.* at 437 (Ginsburg, J., dissenting).

55. *Id.* at 398 (majority opinion) (citing Hanna v. Plumer, 380 U.S. 460, 463–64 (1965)).

question in dispute."[56] If there is a conflict, then at step two, the court must apply the Rule instead of the state law so long as the Rule is consistent with the Rules Enabling Act.[57] As scholars noted, this two-part test embraces a formalist approach to the *Erie* doctrine by focusing on how the language of state law may intervene with the language and operation of the Rules.[58]

In *Shady Grove*, the Court framed the disputed question as whether Shady Grove could maintain its suit as a class action.[59] According to the Court, Rule 23 answers this question because the Rule dictates how a class action may be maintained in federal court.[60] A class action requires fulfilling the numerosity, typicality, commonality, and adequacy requirements in Rule 23(a).[61] A class action must also meet one of the three class categories under Rule 23(b).[62] The Court found that New York's class action statute answered the same question by providing that a named plaintiff may not maintain a class action suit for a different reason: the claim is for a minimum statutory penalty.[63] Thus, the Court held that New York's class action statute conflicted with Rule 23 because it answered the same question and imposed *additional procedural requirements* for class action certification beyond Rule 23's standard.[64]

At step two of this framework, Justice Scalia then analyzed whether Rule 23's class action requirements are consistent with the Rules Enabling Act.[65]

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56. *Id.* at 398–99 (citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)).

57. *Id.* at 398.

58. *See* Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907, 915 (2011) (explaining that Justice Scalia's two-part test embodies a formalist approach); *see also* Aaron D. Van Oort & Eileen M. Hunter, Shady Grove v. Allstate*: A Case Study in Formalism Versus Pragmatism*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Sept. 2010, at 105, 107, https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/ZJDjCCipRFf8hyk3hGYWUV965YVcHVrNyaHDtrU9.pdf; Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism:* Shady Grove *Versus* Nicastro, 16 LEWIS & CLARK L. REV. 905, 921 (2012); Zoffer, *supra* note 30, at 533.

59. *Shady Grove*, 559 U.S. at 398.

60. *Id.*

61. *Id.* (citing FED. R. CIV. P. 23).

62. *Id.* (citing FED. R. CIV. P. 23).

63. *Id.* at 399–400. The Court explained that language of the statue directly spoke to suits that "may *not* be maintained as a class action" in rejecting the dissent's contention that the New York law did not conflict with Rule 23 because the statute regulated only the type of remedies available and not maintaining a suit. *See id.* at 398, 400–01 (quoting N.Y. C.P.L.R. 901(b) (McKinney 2010)).

64. *See id.* at 400–01. The Court emphasized the expansive scope of Rule 23 as "a one-size-fits-all formula for deciding the class-action question." *Id.* at 399.

65. *Id.* at 407 (citing 28 U.S.C. § 2072(b)).

Drawing on the Court's earlier analysis from *Sibbach v. Wilson & Co.*, Justice Scalia explained that a Rule is valid so long as it "really regulat[es] procedure—the judicial process for enforcing rights and duties recognized by substantive law"[66] Under this test, Justice Scalia determined that Rule 23 is consistent with the Rules Enabling Act because Rule 23 regulates the process for enforcing rights when multiple claimants attempt to form a class action.[67]

In the final section of his opinion, Justice Scalia expressed that in this second step of the analysis, courts should avoid looking at whether the particular state legislature intended to enact substantive or procedural law.[68] Rather, Justice Scalia insisted that Congress did not design a Rule to be valid in some jurisdictions but invalid in others based on the subjective intent of state legislatures.[69] As such, Scalia's formalistic analysis is federal law dominant and focuses on the scope and procedural validity of the Rule at issue.[70]

Justice Stevens's solo concurrence agreed with the Court's holding that Rule 23 applied to the issue and displaced New York's class action law, but he proposed a different two-step *Erie* doctrine framework.[71] At step one, Justice Stevens's test asks whether a Rule is broad enough to control the issue such that there is a "direct collision" with state law.[72] When there is no conflict between the Rules and state law, courts should follow state law consistent with the Rules of Decision Act.[73] Conversely, if there is a conflict between the two laws, the court proceeds to step two and considers whether applying the Rule would violate the Rules Enabling Act.[74] Here, Justice Stevens rejected Justice Scalia's "really regulates procedure" test in regard to the Rules.[75] Instead, his framework focused on the state law and analyzing whether it functioned as a part of the state's framework for substantive rights or remedies.[76] In the case at hand, Justice Stevens held at step one that Rule 23 controlled the issue of class certification, and thus New York's class action statute directly collided with Rule 23 by restricting

66. *Id.* (quoting 312 U.S. 1, 14 (1941)).
67. *Id.* at 408.
68. *Id.* at 409.
69. *Id.*
70. *See id.* at 410.
71. *Id.* at 416, 421 (Stevens, J., concurring).
72. *Id.* at 421.
73. *Id.*
74. *Id.* at 422
75. *Id.* at 424.
76. *Id.* at 423.

class formation for certain cases.[77] Then, at step two, he concluded that applying Rule 23 would not violate the Rules Enabling Act because New York's procedural law does not function as part of New York's definition of substantive rights and remedies.[78]

While Justice Stevens's opinion reached the same outcome as the majority, his two-step framework was unique and proved significant to the future of the *Erie* doctrine because some lower courts adopted his approach.[79] Since Justice Scalia's test did not receive a majority of votes, the approach was not binding, and so lower courts were free to adopt Justice Stevens's more state-law centered *Erie* analysis. In particular, Justice Stevens's step one, allows for conflict avoidance analysis if the court takes a narrow view of the scope of the Rule(s) at issue.[80] Likewise, Justice Stevens's outright rejection of Justice Scalia's Rules Enabling Act analysis serves as an impetus for courts to engage with the function and purpose of the state law rather than just the Rule's procedural form.[81]

Writing in dissent, Justice Ginsburg criticized the Court's broad interpretation of Rule 23 and lack of consideration for states' interests.[82] The dissent's framework embraced an outright conflict avoidance framework,[83] insisting that courts must first engage in a vigilant, narrow reading of the Rules to avoid potential conflict with state law.[84] According

77. *See id. at* 429–30.

78. *See id.* at 431–33. Justice Stevens looked to the text, legislative history, and caselaw relating to New York's class action statute in determining that it did not function as a part of the state's substantive rights or remedies for purposes of *Erie*. *Id.* at 432–35.

79. *See, e.g.*, Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010) (applying Justice Stevens' framework to find no conflict between Maine's law and the Rules).

80. By allowing courts to avoid conflicts with the federal rules when both the Rule and the state law could arguably govern, Stevens's approach gives courts a greater opportunity to apply state law than Scalia's approach.

81. Stempel, *supra* note 58, at 910; *see also* Harrison, *supra* note 20, at 1276–77.

82. *Shady Grove*, 559 U.S. at 437 (Ginsburg., J., dissenting).

83. *See* Harrison, *supra* note 20, at 1277 (explaining that Justice Ginsburg's dissent represents a conflict avoidance model); *see also* Zoffer, *supra* note 30, at 503.

84. *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting). Justice Ginsburg's dissent echoed her earlier majority opinion in the 1996 *Erie* doctrine case *Gasperini v. Center for Humanities, Inc*. 518 U.S. 415, 436 (1996). In *Gasperini*, she employed this conflict avoidance framework to hold that a state compensation law restricting certain damage types did not conflict with the Seventh Amendment. *See id.* at 438.

to Justice Ginsburg, state law should only be displaced when the Rule(s) at issue leave no room for the operation of state law.[85]

Employing this conflict avoidance framework to Rule 23's class action prerequisites, the dissent found that Rule 23 does not preclude New York from creating a statute prohibiting special categories of class actions.[86] Likewise, Ginsburg argued that New York's class action statute reflects the New York legislature's substantive policy of limiting a defendant's liability by prohibiting the remedy of class action lawsuits for certain cases.[87] To support this argument, Ginsburg borrowed from the Court's early outcome determinative analysis introduced by *Guaranty Trust*.[88] She reasoned that New York's class action statute should apply because the case would have a different outcome dependent on whether the case was tried in federal court or New York state court.[89] Although Justice Ginsburg's framework failed to receive a majority of votes in *Shady Grove*, her underlying conflict avoidance framework remains persuasive for some lower courts in *Erie* conflict analyses.[90]

III. The Rise of State Anti-SLAPP Laws and the Ongoing Circuit Split

The Court's divided opinion in *Shady Grove* largely left unresolved the important issue of how courts should analyze a state law that is intertwined with substantive rights but could conflict with federal procedural law embodied in the Rules.[91] This unresolved tension coincides with the emergence of anti-SLAPP laws, a novel form of state law providing enhanced procedural protection for lawsuits impacting substantive free

85. *Shady Grove*, 559 U.S. at 439 (Ginsburg, J., dissenting); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1932 (2011).

86. *Shady Grove*, 559 U.S. at 456 (Ginsburg, J., dissenting).

87. *Id.*

88. *See id.* (referring to state law that is "outcome affective").

89. *Id.* at 459. The dissent argued that New York's class action statute was outcome determinative in federal court because New York state courts prohibited plaintiffs from forming this type of class action. *Id.*

90. These courts looked to Justice Ginsburg's early opinion in *Gasperini* that commanded a majority as support for their conflict avoidance framework. *See* Liberty Synergistics Inc. v. Microflo Ltd., 718 F.3d 138, 152 (2d Cir. 2013) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 428 n.8 (1996)); *In re* Cnty. of Orange, 784 F.3d 520, 524 (9th Cir. 2015).

91. *See* Sherry, *supra* note 15, at 1226 ("The most difficult question under the current doctrine: what to do about a Federal Rule of Civil Procedure that seems to conflict with substantive state policies in a diversity case.").

speech rights. This Part traces the history of SLAPP lawsuits, the rise of state anti-SLAPP laws, and the ongoing circuit split regarding the applicability of state anti-SLAPP laws in federal court.

A. Pring and Canan Define the Contours of a SLAPP

Professors George W. Pring and Penelope Canan coined the term Strategic Lawsuit Against Public Participation (SLAPP) in an influential 1992 law review article discussing the rise in frivolous lawsuits designed to chill First Amendment rights.[92] According to Pring and Canan, the essential elements of a SLAPP claim are: (1) a civil complaint or counterclaim lacking a strong legal or factual basis, (2) filed against a nongovernment individual or organization, (3) due to their specific communication with the government, (4) on a substantive issue of some public policy.[93] For example, a paradigm SLAPP lawsuit would be a large land developer filing a defamation or slander action against an environmental group that spoke in opposition of the developer's plans where the developer lacked a legal or factual basis for its claim.[94] Rather than filing the lawsuit to seek redress for a legal wrong, the developer filed its lawsuit to retaliate against the environmental group and the group's political opposition to the developer's plans.[95]

While many SLAPP claims like the hypothetical developer's suit do not reach trial, the claims may nonetheless succeed in their intended purpose by chilling an individual or group's free speech rights through prolonged and costly litigation.[96] Pring and Canan's ten-year empirical study of 228 cases highlighted that frivolous lawsuits filed by plaintiffs significantly impact an individual's future decision to engage in public discourse because of the expensive court cost and fines associated with defending lawsuits.[97] At the conclusion of their article, the authors proposed several solutions to confront the rise in SLAPPs, including either a federal statute addressing

92. George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 962 (1992).

93. *Id.* The authors identified six categories of claims common to most SLAPP suits: defamation, business torts, judicial-administrative torts, conspiracy, constitutional and civil rights violations, and other wrongs, such as nuisance or invasion of privacy. *See id.* at 947.

94. Sharon J. Arkin, *Bringing California's Anti-SLAPP Statute Full Circle: To Commercial Speech and Back Again*, 31 W. ST. U.L. REV. 1, 3 (2003).

95. Pring & Canan, *supra* note 92, at 947.

96. *Id.* at 945; *see also* Alice Glover & Marcus Jimison, *S.L.A.P.P. Suits: A First Amendment Issue and Beyond*, 21 N.C. CENT. L.J. 122, 122-23 (1995).

97. Pring & Canan, *supra* note 92, at 945.

SLAPPs or state anti-SLAPP laws that would provide effective methods for summary dismissal of SLAPP lawsuits.[98]

B. State Anti-SLAPP Laws

Pring and Canan's advice for states to create mechanisms to counteract the rise in SLAPP lawsuits quickly took ahold of state legislatures.[99] In 1992, California enacted the first state anti-SLAPP law to thwart what the legislature detailed as a "disturbing increase in lawsuits brought primarily to chill the valid exercise of constitutional rights of free speech."[100] Nevada soon followed California's lead by enacting their own anti-SLAPP law in 1993.[101] The public interest group Public Participation Project spearheaded much of the legislative policy efforts by supporting the enactment of new state anti-SLAPP laws or the strengthening of existing anti-SLAPP laws. The number of states with new or enhanced anti-SLAPP laws has increased markedly throughout the last twenty years, including Texas's 2011 enactment of a robust anti-SLAPP that served as the model for Oklahoma's anti-SLAPP law (OCPA).[102] As of February 2022, the Public Participation Project reports that thirty-one states and Washington, D.C., have some version of an anti-SLAPP statute in place.[103]

While each state's anti-SLAPP statute is unique, they contain several similar provisions. The hallmark feature of an anti-SLAPP statute is a special motion to dismiss or strike mechanism.[104] This special motion requires courts to resolve motions to dismiss on an expedited basis when the plaintiff's claim implicates communication that is protected under the statute.[105] Some states like Oklahoma, Texas, and California have broad anti-SLAPP statutes covering a broad spectrum of First Amendment speech

98. *Id.*

99. *See* Arkin, *supra* note 94, at 3 (describing Pring & Canan's article as an influential motivation for California's anti-SLAPP law).

100. CAL. CIV. PROC. CODE § 425.16(a) (West 2022).

101. *Nevada*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/nevada (last visited Sept. 5, 2023).

102. *Texas*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/texas (last visited Sept. 5, 2023).

103. Dan Greenberg & David Keating, *Anti-SLAPP Statutes: A Report Card*, INST. FOR FREE SPEECH (Feb. 28, 2022), https://www.ifs.org/anti-slapp-report/.

104. Harrison, *supra* note 20, at 1264.

105. Caitlin E. Daday, Comment, *(Anti)-SLAPP Happy in Federal Court? The Applicability of State Anti-SLAPP Statutes in Federal Court and the Need for Federal Protection Against SLAPPs*, 70 CATH. U. L. REV. 441, 443 (2021).

and petition activity.[106] Conversely, other states like Arizona, New Mexico, and Pennsylvania have narrow anti-SLAPP statutes protecting only targeted communication in specific forums.[107] If a defendant invokes this special motion to dismiss, many anti-SLAPP statutes require courts to stay or limit discovery while the motion is pending.[108] In deciding the motion, anti-SLAPP statutes may alter the typically stringent dismissal standard with a heightened evidentiary burden-shifting framework required to overcome dismissal.[109] In any case, if the court grants the motion and dismisses the claim under an anti-SLAPP statute, the defendant is often entitled to recover litigation costs and sanctions against the plaintiff.[110]

C. Anti-SLAPP Law Circuit Split

The lawsuits that most frequently implicate anti-SLAPP motions to dismiss are causes of action closely related to First Amendment free speech: libel, slander, or tortious misrepresentation.[111] Federal court cases often involve high-dollar value claims or claims involving notable figures.[112] In fact, recent federal court cases involving anti-SLAPP statutes include popular media entities and figures like Trump University,[113] CNN,[114] MSNBC anchor Joy Reid,[115] and the son of Palestinian President Mahmoud Abbas.[116]

For defendants (or counter-defendants) in these cases, the availability of a state anti-SLAPP statute is an important tool that can flip the fortunes of litigation in its early stages and force the plaintiff to prove their case on a

106. *See* Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 8, 417 P.3d 1240, 1245.

107. *See* ARIZ. REV. STAT. ANN. § 12-751 (West 2022) (explaining that the statute only covers the exercise of the right to petition when made as part of an initiative, referendum, or recall effort); 27 PA. STAT. AND CONS. STAT. ANN. § 8302 (West 2022); CAL. CIV. PROC. CODE §§ 425.16(b)(3), 425.16(f)-(g) (West 2022); *see also* Arkin, *supra* note 94, at 6 (describing probability of success requirement as prima facie case).

108. Harrison, *supra* note 20, at 1264.

109. *Id.*

110. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(1) (West 2022).

111. Pring & Canan, *supra* note 92, at 947.

112. The $75,000 claim threshold and complete diversity rule for original diversity jurisdiction narrows the types of cases which implicate anti-SLAPP claims in federal court. *See* 28 U.S.C. § 1332. An anti-SLAPP issue could also reach federal courts under supplemental jurisdiction where there is otherwise an independent federal jurisdictional basis. *See* 28 U.S.C. § 1367 (outlining the supplemental jurisdiction requirements).

113. Makaeff v. Trump Univ., LLC, 715 F.3d 254, 258 (9th Cir. 2013).

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

115. La Liberte v. Reid, 966 F.3d 79, 83 (2d Cir. 2020).

116. Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1331 (D.C. Cir. 2015).

constricted timeline with a higher evidentiary burden.[117] And, if a defendant is successful on the anti-SLAPP motion, they would not only have the case dismissed but they could also recover sanctions and costly attorney's fees associated with the lawsuit.[118] On the other hand, the heightened dismissal burden and restrictions on discovery create a strong incentive for plaintiffs to challenge the application of the anti-SLAPP law. Thus, if a defendant files a motion to dismiss under a state anti-SLAPP law, the plaintiff's first argument is often that the anti-SLAPP statute reflects a procedural law that should not apply in federal court under the *Erie* doctrine.[119]

Under the *Erie* doctrine, the threshold issue is whether there is a conflict between state and federal law. In deciding whether an anti-SLAPP statute applies in federal court, judges generally look to Rules 8, 12, or 56 as the federal provisions at issue.[120] Rule 8 provides the baseline pleading requirement of a "short and plain statement showing that the pleader is entitled to relief," while the Rule 12(b)(6) motion to dismiss allows defendants to challenge the legal sufficiency of the plaintiff's pleadings.[121] Under the plausibility pleading standard in federal court, a claimant can overcome a Rule 12(b)(6) dismissal motion by pleading sufficient facts to show that relief is facially plausible.[122] If a plaintiff survives the Rule 8 pleading standard and the Rule 12(b)(6) motion to dismiss, defendants often turn to Rule 56. Rule 56 states that a court grants summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[123] In evaluating a Rule 56 summary judgment motion the court does not weigh the relative strength of each parties' evidence; instead, the court analyze the required elements for a claim or defense to decide whether there is a genuine issue of material fact for to trial.[124]

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117. Harrison, *supra* note 20, at 1264.

118. For example, in *Klocke v. Watson* the trial court dismissed under the TCPA and granted defendant $25,000 in attorney's fees, $3,000 in cost, and a nominal sanction. 936 F.3d 240, 243 (5th Cir. 2019), *as revised* (Aug. 29, 2019).

119. *See id.* (noting that plaintiff initially moved to challenge the anti-SLAPP law as inapplicable in federal court).

120. *See* Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1350 (11th Cir. 2018) (explaining that the conflict analysis involves Rules 8, 12, and 56).

121. *Id.* (citing FED. R. CIV. P. 8, 12(b)(6)).

122. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

123. *Carbone*, 910 F.3d at 1350 (citing FED. R. CIV. P. 56).

124. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

1. Courts Holding That Anti-SLAPP Laws Apply in Federal Court

Less than one year after *Shady Grove*, the First Circuit considered the Court's updated *Erie* doctrine framework as applied to a state anti-SLAPP law.[125] In this 2010 case, the First Circuit analyzed whether Maine's anti-SLAPP law applied in federal court consistent with the pre-trial dismissal provisions of Rule 12 and Rule 56.[126] Maine's anti-SLAPP statute provides a special motion to dismiss with heightened evidentiary requirements that defendants can invoke if plaintiff's claim implicates their right of petition under either the Constitution of Maine or the First Amendment to the U.S. Constitution.[127] In deciding which of the *Shady Grove* tests to apply, the First Circuit treated Justice Stevens's concurrence as controlling, while discounting the overall holding and Justice Scalia's opinion as "fractured" and "narrow."[128]

Applying step one of Justice Stevens's test, the court reasoned that Rule 12 and 56 did not conflict with Maine's anti-SLAPP statute because the Rules were not intended to occupy the field of pretrial dismissals.[129] Embracing a conflict avoidance framework, the court narrowly interpreted the scope of Rules 12 and 56 as isolated pretrial procedures, and explained that Maine's statute provides a distinct substantive defense against lawsuits that impact the right to petition not covered by either of those rules.[130] The court also distinguished Maine's anti-SLAPP law from Rules 12 and 56 because Maine's statute provides a burden-shifting framework for specific cases implicating the freedom of petition, but neither Rule 12 nor Rule 56 provide burden-shifting frameworks.[131] For the court, Maine's anti-SLAPP statute functioned as supplemental to and not in conflict with either Rule 12 or 56.[132] Thus, the Court held that Maine's anti-SLAPP statute applies in federal court under the *Erie* doctrine because the statute does not conflict with the Rules.[133]

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125. Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010).

126. *Id.* at 89.

127. *Id.* at 86.

128. Helen Hershkoff, Shady Grove*: Duck-Rabbits, Clear Statements, and Federalism*, 74 ALB. L. REV. 1703, 1713 (2011).

129. *Godin*, 629 F.3d at 91 (quoting United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 972 (9th Cir. 1999)).

130. *Id.* at 89.

131. *Id.*

132. *Id.* at 88.

133. *Id.* at 90 (holding that Maine's anti-SLAPP statute applied in federal court and then dismissing the claim under this anti-SLAPP statute).

2. Courts Holding That Anti-SLAPP Laws Do Not Apply in Federal Court

The D.C. Circuit's 2015 opinion in *Abbas v. Foreign Policy Group., LLC*, split from the First Circuit by holding that an anti-SLAPP law was inapplicable in federal court.[134] In *Abbas*, plaintiff Yasser Abbas, son of Palestinian leader Mahmoud Abbas, sued the media website Foreign Policy Group for defamation after the site posted an article questioning whether Yasser unjustly enriched himself.[135] The defendant moved to dismiss the plaintiff's claim by invoking the motion to strike under Washington D.C.'s local anti-SLAPP statute.[136] Under this special motion to strike, if the defendant can establish that the plaintiff's claim targets their public advocacy, then the plaintiff must prove the heightened evidentiary threshold of "likelihood of success on the merits" to overcome dismissal.[137] On appeal, the D.C. Circuit considered whether the District's anti-SLAPP law applied in federal court under the *Erie* doctrine.[138] The court rejected the First Circuit's conflict avoidance framework and analysis as unpersuasive.[139] Instead, the court treated Justice Scalia's *Shady Grove* formalist framework as controlling.[140] According to the court, Scalia's framework creates a straightforward test that federal courts should not apply state law when: (1) a Federal Rule "answer[s] the same question" as the state statute; and (2) the Federal Rule falls within the scope of the Rules Enabling Act.[141]

Under step one of this framework, the court analyzed that D.C.'s anti-SLAPP act answers the same question as Rules 12 and 56 about when a claim may advance to trial.[142] In contrast to the First Circuit's narrow interpretation of Rules 12 and 56 in *Godin*, the D.C. Circuit adopted a broader understanding of Rules 12 and 56 as comprehensive criteria for testing whether a plaintiff's claim is entitled to trial in federal court.[143] As the court explained, the D.C. anti-SLAPP act's likelihood of success on the

134. 783 F.3d 1328, 1337 (D.C. Cir. 2015).
135. *Id.* at 1331.
136. *Id.*
137. *Id.*
138. *Id.* at 1333.
139. Id. at 1335–36.
140. *Id.* at 1333.
141. *Id.* (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–99 (2010)).
142. *Id.* at 1333–34.
143. *See id.*

merits standard is more difficult for plaintiffs to overcome than either the plausibility standard for Rule 12(b)(6) dismissal or the genuine dispute of fact standard under Rule 56.[144] Thus, the court held that D.C.'s anti-SLAPP act conflicts with the Rules by placing an "additional hurdle that plaintiff must jump over to get to trial."[145] At step two, the court analyzed that Rule 12 and Rule 56 regulate the procedure of enforcing litigants' rights in federal court through pretrial dismissal and are thus procedural regulations consistent with the Rules Enabling Act.[146]

After *Abbas*, other circuit courts followed the D.C. Circuit's lead and applied the formalist framework to analyze anti-SLAPP laws in federal court under the *Erie* doctrine. This growing majority of circuits similarly concluded that anti-SLAPP laws do not apply in federal court. For example, in *Carbone v. Cable News Network, Inc.*, the Eleventh Circuit applied Justice Scalia's two-part test to answer whether Georgia's anti-SLAPP law applied in federal court.[147] Georgia's anti-SLAPP law required plaintiffs to establish a certain probability of success to overcome the special motion to dismiss.[148] Building on the D.C. Circuit's broad view of the Rules, the court treated Rules 8, 12, and 56 as the comprehensive framework governing pretrial dismissal, and explained that Georgia's statute conflicted with those Rules by imposing evidentiary requirements over and above what the Rules required.[149] In particular, the court noted that Georgia's anti-SLAPP motion to dismiss standard requires judges to weigh evidence for a plaintiff to overcome dismissal, while under a Rule 56 summary judgment motion, the judge would not weigh the evidence presented by parties.[150]

In *Carbone*, the court also rejected the purposive analysis adopted by the First Circuit.[151] The court believed that the distinct purpose of Georgia's anti-SLAPP law—to protect free speech—should probably not be

144. *Id.* at 1334.

145. *Id.*

146. *Id.* at 1337. The D.C. Circuit explained that the "really regulates procedure" aspect of Justice Scalia's *Shady Grove* opinion at step two closely follows the Court's earlier precedent. *Id.* at 1336 (first citing Sibbach v. Wilson & Co., 312 U.S. 1 (1941); and then citing Hanna v. Plumer, 390 U.S. 460, 470–71 (1965)). According to the D.C. Circuit, this *Sibbach* analysis—rather than Justice Stevens' one-person concurrence inquiring into the substantive nature of state law under the Rules Enabling Act—is the most applicable Court precedent binding lower courts. *Id.* at 1337.

147. 910 F.3d 1345, 1349 (11th Cir. 2018).

148. *Id.* at 1351.

149. *Id.*

150. *Id.* (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

151. *See id* at 1355–56 ("We are not persuaded by the reasoning of [*Godin*].").

considered a distinguishing factor to show a lack of conflict with the Rules.[152] Rather, consistent with the formalist framework, the Eleventh Circuit concluded that the special purpose of free speech protection was not a relevant consideration under the *Erie* doctrine. Instead, the integral question is how the form of state law conflicts with the operation of the Rules.[153] Applying the second step of the Rules Enabling Act analysis, the court determined that Rules 8, 12, and 56 are validly enacted procedural rules that affect the process of enforcing litigants' rights through pleading standards and pretrial dismissals of claims.[154] Based on this *Erie* doctrine analysis, the court concluded that Georgia's anti-SLAPP statute did not apply in federal court.[155]

The Fifth Circuit adopted a similar analysis to the D.C. and Eleventh Circuits' analyses in the 2019 case *Klocke v. Watson*.[156] In that case, the Fifth Circuit held that Texas's anti-SLAPP act, the Texas Citizens Participation Act ("TCPA"), did not apply in federal court.[157] Similar to the OCPA, the TCPA creates a special motion to dismiss with a three-part burden-shifting scheme.[158] Under this motion to dismiss, if the defendant initially shows that the plaintiff's claim implicates free speech First Amendment activity, the plaintiffs then must prove each essential element of a prima facie case by "clear and specific evidence."[159] But, even if the plaintiff meets this standard, the defendant can still succeed in a motion to dismiss by proving the essential elements by a preponderance of the evidence.[160] In *Klocke*, the defendant responded to the plaintiff's online harassment and defamation claim by invoking the TCPA's special motion to dismiss.[161] The trial court dismissed the plaintiff's claims by applying the TCPA's burden-shifting scheme, and the court awarded the defendant $25,000 in attorney's fees, $3,000 in costs, and imposed a nominal sanction

152. *Id.* at 1354 (noting that the court would not recognize the special purpose of Georgia's anti-SLAPP law as a relevant factor for *Erie* analysis).
153. *See id.* at 1354–57.
154. *Id.* at 1357.
155. *Id.*
156. 936 F.3d 240 (5th Cir. 2019), *as revised* (Aug. 29, 2019).
157. *Id.* at 249.
158. *Id.*
159. *Id.* at 244.
160. *Id.*
161. *Id.* at 242.

as required by the statute.[162] The plaintiff appealed the lower court's decision, arguing that the TCPA is wholly inapplicable in federal court.[163]

In deciding which *Erie* doctrine test to use, the Fifth Circuit followed Justice Scalia's *Shady Grove* framework as applied by the D.C. Circuit in *Abbas* and the Eleventh Circuit in *Carbone*.[164] Building on the circuit's formalist analysis, the court reasoned that the TCPA's requirement, that plaintiffs prove clear and specific evidence to overcome dismissal, conflicts with Rules 12 and 56 by creating an additional hurdle for the plaintiffs to overcome to advance to trial.[165] Also, the court explained that the TCPA's burden-shifting structure invites courts to weigh evidence, and thus dismiss cases, when neither Rule 12 nor Rule 56 allow the court to consider evidence when ruling.[166] Alongside the conflicting nature of the TCPA's burden-shifting scheme, the court noted that while discovery is widely available for parties under Rule 56 summary judgment, the TCPA eliminates parties' access to discovery except for good cause.[167] In regard to the TCPA's fee-shifting and sanctions provisions, the court explained that the provisions were connected to the burden-shifting scheme and could not operate independently of these rules.[168] Then, at the second step's Rules Enabling Act analysis, the court concluded that Rules 12 and 56 are validly enacted procedural rules governing pretrial dismissal and adjudication of claims.[169] Thus, the Fifth Circuit held that the TCPA was wholly inapplicable in federal court, and offered that, on remand, the plaintiff could "pursue his case under the Federal Rules unhindered by the TCPA."[170]

In the 2020 case *La Liberte v. Reid*, the Second Circuit exacerbated the ongoing circuit split by holding that California's anti-SLAPP act did not apply in federal court.[171] The plaintiff in *Reid* filed a defamation suit in New York federal court against MSNBC anchor Joy Reid after she posted a Twitter photo with a caption stating that the plaintiff made racial remarks at

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162. *Id.*

163. *Id.* at 243.

164. *Id.* at 245 ("We find most persuasive the reasoning of the D.C. Circuit that Rules 12 and 56, which govern dismissal and summary judgment motions, respectively, answer the same question as the anti-SLAPP statute . . . .").

165. *Id.* at 246.

166. *Id.*

167. *Id.*

168. *Id.* at 246 n.5.

169. *Id.* at 248 (quoting Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1357 (11th Cir. 2018)).

170. *Id.* at 249.

171. 966 F.3d 79 (2d Cir. 2020).

a California city council meeting on sanctuary city laws.[172] California law applied to this dispute, and the defendant initially dismissed the plaintiff's claim under California's anti-SLAPP act.[173] On appeal, the plaintiff challenged the Act's applicability in federal court.[174] While Ninth Circuit caselaw pre-*Shady Grove* allowed California's anti-SLAPP law in federal court (as discussed below),[175] the Second Circuit rejected the Ninth Circuit's earlier caselaw as unpersuasive.[176] Rather, the court adopted Justice Scalia's formalist *Shady Grove* framework as the more appropriate analysis.[177]

Applying the first step of the formalist *Erie* framework, the court concluded that California's anti-SLAPP statute answered the same question as Rules 12 and 56: when a court must dismiss a claim before trial.[178] Citing language from the majority portion of *Shady Grove*, the court explained that a state cannot impose additional requirements on the same issue already covered by the Rules.[179] In this case, California's anti-SLAPP motion to strike requirement, that a plaintiff establish a certain probability of prevailing on a claim, poses a greater evidentiary burden than required by either Rule 12 or Rule 56.[180] At step two of the framework, the Second Circuit joined the D.C., Eleventh, and Fifth Circuits by holding that Rules 12 and 56 are valid under the Rules Enabling Act.[181]

The Tenth Circuit's only definitive caselaw on state anti-SLAPP applicability in federal courts is *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, a 2018 case addressing New Mexico's anti-SLAPP statute.[182] In *Los Lobos*, the Tenth Circuit did not analyze which *Shady Grove* framework to adopt; rather, the court reasoned that the case did not call for a "complex *Erie* analysis" because New Mexico's statute presented

172. *Id.* at 83–85.

173. *Id.* at 85.

174. *See id.* at 83.

175. *See infra* Section III.C.3.

176. *Id.* at 87 (discussing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999) (applying California's anti-SLAPP law in federal court under an *Erie* doctrine analysis)).

177. *See id.*

178. *Id.*

179. *Id.* at 88 (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–99, (2010)).

180. *Id.* at 87.

181. *See id.* at 86, 88 (noting that the Fifth, Eleventh, and D.C. Circuits held anti-SLAPP acts inapplicable in federal court under an *Erie* doctrine analysis).

182. 885 F.3d 659, 668 (10th Cir. 2018).

a purely procedural mechanism for expediting litigation of frivolous claims.[183] According to the court, the primary function of New Mexico's anti-SLAPP act is the procedural requirement to consider motions to dismiss and appeals on an expedited basis.[184] Unlike most of the other state anti-SLAPP laws, New Mexico's statute does not require a heighted evidentiary burden to overcome dismissal.[185] Thus, the court held that New Mexico's procedural anti-SLAPP statute did not apply in federal court and avoided engaging with *Shady Grove* and the subsequent analysis from other circuits.[186]

3. The Ninth Circuit's Fractured Approach to California's Anti-SLAPP Law

The Ninth Circuit's anti-SLAPP caselaw spans Court precedent both pre- and post-*Shady Grove*. In 1999, the Ninth Circuit first addressed state anti-SLAPP law applicability, holding that the special motion to strike under California's anti-SLAPP law applied in federal court.[187] The Ninth Circuit adopted a conflict avoidance framework similar to Justice Ginsburg's later dissent in *Shady Grove*. The court emphasized that California's anti-SLAPP law and Rules 8, 12, and 56 could co-exist side-by-side with each controlling an independent sphere of influence.[188] According to the court, California's anti-SLAPP law served the distinct purpose of protecting free speech and petition rights, while the Rules did not address this specific purpose.[189]

Since *Newsham*, the Ninth Circuit has limited portions of California's anti-SLAPP act as inapplicable in federal court but still retained the overall holding of the case. For example, in 2001 the court held that the discovery

183. *Id.* at 668–69.

184. *Id.* at 663.

185. *Id.* at 670 (citing Cordova v. Cline, 396 P.3d 159, 162 (N.M. 2017) (explaining that New Mexico's anti-SLAPP act should be classified as procedural mechanism).

186. *Id.* at 673.

187. *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 973 (9th Cir. 1999) (holding that there was not a "direct collision" between the California anti-SLAPP statute and the Federal Rules and the "twin aims of *Erie*" called for application of the state rule). Under this special motion to strike, if the defendant meets the threshold showing that the plaintiff's claim impacts their free speech or petition rights, the plaintiffs must meet a heightened evidentiary showing by establishing a probability of success on the merits of the claim to overcome dismissal. *Id.* at 972 (citing CAL. CIV. PROC. CODE § 425.16(a) (West 1999)).

188. *Id.* at 972.

189. *Id.* at 973.

stay under California's anti-SLAPP motion to strike did not apply in federal court.[190] In the 2013 case *Makaeff v. Trump University, LLC*, the majority opinion of a three-judge panel applied California's anti-SLAPP motion without discussing either of the *Shady Grove* frameworks.[191] In an influential concurring opinion, then-Chief Judge Alex Kozinski encouraged an en banc hearing to reevaluate and overturn *Newsham* in light of *Shady Grove*.[192] His opinion described California's anti-SLAPP statute as an "exotic state procedural rule" distorting the comprehensive scheme of the Rules that should not be applied in federal court.[193] But, the Ninth Circuit ultimately denied Chief Judge Kozinski's requested rehearing, reasoning that California's anti-SLAPP motion to strike is distinguishable from the New York statute and Rule 23's comprehensive class action requirements in *Shady Grove*.[194]

In 2018, the Ninth Circuit limited *Newsham* an additional time by holding that motions to strike under California's anti-SLAPP statute must be evaluated under Rule 12 or Rule 56 standards and not the heightened evidentiary burden set forth in the act.[195] The court's analysis retreated from

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190. *See* Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001). The Ninth Circuit held that the required discovery stay when deciding an anti-SLAPP motion to strike conflicted with the general rule of Rule 56, which allows parties to conduct discovery before summary judgment decisions. *See id.* The court explained that Rule 56 should be understood as requiring courts to allow some form of discovery. *Id.* (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986) (noting that courts must allow discovery for Rule 56 motions).

191. 715 F.3d 254 (9th Cir. 2013).

192. *Id.* at 272 (Kozinski, C.J., concurring).

193. *Id.* at 275.

194. *Makaeff*, 736 F.3d 1180. In the denial, two judges authored an explanatory concurrence attempting to detail a distinction with the Rule 23 analysis from *Shady Grove*:

> Rule 23 provides a categorical rule: *if* the requirements are met, *then* a plaintiff is entitled to maintain his suit as a class action.
>
> In contrast, Rules 12 and 56 do not provide that a plaintiff is entitled to maintain his suit if their requirements are met; instead, they provide various theories upon which a suit may be disposed of before trial. California's anti-SLAPP statute, by creating a separate and additional theory upon which certain kinds of suits may be disposed of before trial, supplements rather than conflicts with the Federal Rules.

Id. at 1182 (Wadlaw, J., & Callahan, J., concurring).

195. Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 833 (9th Cir. 2018), *as amended*, 897 F.3d 1224 (9th Cir. 2018). The court explained that a challenge to the legal sufficiency of a claim should be evaluated under the Rule 12(b)(6) standard for failure to state a claim, while challenges to the factual sufficiency fall within

the broad conflict avoidance in *Newsham* by recognizing that the heightened evidentiary standards under California's anti-SLAPP laws complicate the procedural safeguards for pretrial dismissal and discovery firmly established by the Rules.[196] While this holding prevented the heightened evidentiary standards of California's anti-SLAPP act in federal court, the court explained that a defendant would still be able to recover attorney's fees if they invoke the anti-SLAPP motion to strike in an action affecting their free speech or petition rights and the court dismisses the action.[197] The Ninth Circuit's complex severing and "hotly disputed" caselaw highlights the difficulty of the issues surrounding anti-SLAPP statutes in federal court without a more unified Supreme Court precedent.[198]

IV. OCPA History and Federal Court Caselaw

A. History and Structure of the OCPA

In 2014, the Oklahoma legislature joined the burgeoning number of states that have passed anti-SLAPP laws by enacting the OCPA.[199] As stated in the Act, the dual purpose of the OCPA is to simultaneously encourage and safeguard the First Amendment free speech, petition, and association rights of persons to the maximum extent permitted by law, while also protecting the rights of a person to file meritorious lawsuits for demonstrable injury.[200] When drafting the OCPA, the Oklahoma legislature adopted the language and structure from Texas's TCPA.[201] As compared to other state laws, the OCPA fits within the category of "broad" anti-SLAPP acts alongside Texas and California because Oklahoma's anti-SLAPP act aims to protect a wide category of First Amendment activity.[202] For example, the scope of the OCPA covers: the exercise of the right of free speech, defined under the statute as a communication made on a matter of public concern; the exercise of the right of association, defined as

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Rule 56's summary judgment standard. *See id.* at 834–36. Thus, there is no special standard for the motion to strike under this type of analysis.

196. *Id.* at 833–34.

197. *Id.* at 833.

198. *See* Herring Networks, Inc. v. Maddow, 8 F.4th 1148, 1155 (9th Cir. 2021).

199. *See generally* Anagnost v. Tomecek, 2017 OK 7, ¶ 8, 390 P.3d 707, 709 (detailing the history of the OCPA's enactment in 2014).

200. 12 OKLA. STAT. § 1430 (2023).

201. *See* Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 5, 439 P.3d 1240, 1244 ("Oklahoma's Act, which became effective in 2014, mirrors that of the Texas Citizens' Participation Act . . . .").

202. *Id.* ¶ 8, 417 P.3d at 1245.

communication between individuals who join together to defend collective interests; and the right of petition, defined as communication pertaining to any judicial, agency, or legislative proceeding.[203]

In practice, the OCPA functions by altering standard pretrial litigation procedure when a litigant files a special motion to dismiss invoking the Act. Under the language of the statute, litigants must file this special motion to dismiss within a constricted sixty-day timeline.[204] When a defendant files this motion, the court suspends all discovery, unless a party produces good cause for limited discovery that is relevant to the special motion to dismiss.[205]

The most distinctive aspect of the OCPA is the statute's three-part, burden-shifting scheme. The Oklahoma Court of Civil Appeals explained the scheme as follows:

> In an OCPA proceeding, the initial burden is on the defendant seeking dismissal to show that the plaintiff's claim "is based on, relates to, or is in response to the [defendant's] exercise of the right of free speech, the right to petition, or the right of association." The burden then shifts to the plaintiff to show "by clear and specific evidence a prima facie case for each essential element of the claim in question." If § 1434(C) is satisfied, the burden shifts back to the defendant to show "by a preponderance of the evidence" a defense to the plaintiff's claims. If the plaintiff's prima facie case fails, or the defendant shows a defense by a preponderance of the evidence, the suit is dismissed.[206]

This three-part, burden-shifting scheme is "unlike any other Oklahoma law and unlike any federal law."[207]

In order to expedite the OCPA motion to dismiss under this three-part, burden-shifting scheme, the Act requires that the presiding court conduct a hearing within sixty days after a defendant files its motion.[208] Moreover,

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203. 12 OKLA. STAT. § 1431 (defining types of communication covered under the OCPA).

204. *See id.* § 1432(B). The Act allows for motions outside of this sixty-day window only with a showing of good cause. *Id.*

205. *Id.* §§ 1432, 1435 (explaining that the court allows only limited discovery on a showing of good cause when the discovery is relevant to the motion to dismiss).

206. *Krimbill*, 2018 OK CIV APP 37 ¶ 9, 417 P.3d at 1245 (citations omitted).

207. Thacker v. Walton, 2021 OK CIV APP 5, ¶ 22, 499 P.3d 1255, 1263.

208. *See* 12 OKLA. STAT. § 1433(A). The OCPA provides that if the court allows discovery on the motion to dismiss, the deadline for a hearing is extended to no more than

following the hearing, the OCPA requires courts to submit their rulings within thirty days.[209] In the *Paycom* litigation,[210] the Oklahoma Supreme Court held that this provision is mandatory, and a court's failure to comply with this requirement results in denial of the motion to dismiss by operation of law under OCPA.[211] If a court applies the OCPA's three-part, burden-shifting analysis and grants the motion to dismiss, the movant is entitled to receive from the party who brought the claim: court costs, attorney fees and expenses, and sanctions sufficient to deter that party from bringing similar actions.[212] While the Texas legislature amended the TCPA in 2019 to make the sanctions permissive instead of mandatory, the Oklahoma legislature has not amended the OCPA since its 2014 enactment, and thus Oklahoma continues to require mandatory sanctions for dismissal.[213] Thus, Oklahoma retains a broad anti-SLAPP law that, when applicable, can dramatically shift the landscape of pre-trial litigation.

B. The OCPA in Federal Court: Tenth Circuit and Oklahoma U.S. District Court's Unsettled Caselaw

In 2018, the U.S. District Court for the Western District of Oklahoma addressed for the first time whether the OCPA applies in federal court under the *Erie* doctrine.[214] In *Craig PC Sales & Service v. CDW Government*, the plaintiff, an Oklahoma computer company, filed suit against Microsoft and CDW Government alleging claims of negligent misrepresentation, intentional interference with contractual relations, and malicious prosecution under state and federal law.[215] The court's order addressed CDW and Microsoft's motion to dismiss all of Craig PC's

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one hundred and twenty days. *Id.* § 1434(A)-(C). In the event a court fails to adhere to these guidelines the motion is denied by operation of law and the party moving to invoke the OCPA has a right to appeal. *Id.* § 1437.

209. *Id.* § 1434(A).

210. *See supra* Part I.

211. *See* Paycom Payroll, LLC v. Hon. Thomas E. Prince, No. 119,654, slip op. at 2 (Okla. Oct. 19, 2021).

212. 12 OKLA. STAT § 1438(A). Conversely, if the court finds the OCPA motion to dismiss is frivolous and without merit, then the movant must pay the party bringing the claim court cost and reasonable attorney's fees. *Id.* § 1438(B).

213. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009 (West 2022) (explaining that under the TCPA the court "may" award sanctions, and the Texas Legislature amended the TCPA in 2019).

214. Craig PC Sales & Serv. v. CDW Gov't, No. CIV-17-003-F, 2018 WL 4861522, at *11 (W.D. Okla. Apr. 30, 2018).

215. *Id.* at *2, *7.

claims, and in particular, Microsoft's motion to dismiss the state-based malicious prosecution claims by invoking the OCPA motion to dismiss.[216]

In its order, the court addressed the plaintiff's contention that the OCPA was a procedural mechanism and thus inapplicable in federal court under the *Erie* doctrine.[217] In choosing its *Erie* doctrine framework, the court employed Justice Stevens's two-step test from *Shady Grove*.[218] Although the Western District used the same framework as the First Circuit in *Godin*, it reached the opposite conclusion as *Godin* in part one of the two-part test.[219] Whereas the First Circuit in *Godin* found there was no conflict between the Rules and the applicable state law, the court here found a conflict between the Rules and the OCPA.[220] The court concluded that the OCPA conflicts with Rule 12(b)(6) because under that dismissal motion the plaintiff only has to plead sufficient factual allegations such that relief is facially plausible, while the OCPA's novel clear and specific evidence standard imposes a higher burden.[221] Likewise, the court reasoned that the OCPA and Rule 56 conflict since the statute calls for dismissal where the movant establishes each essential element of a defense by a preponderance of the evidence, while a court applying Rule 56's summary judgement standard would not dismiss similar claims presenting a genuine fact dispute as to a valid defense.[222] Essentially, the OCPA's three-part, burden-shifting scheme invites courts to weigh evidence to decide motion to dismiss, while Rule 56 does not allow courts to weigh evidence and dismiss claims.[223] Therefore, the court found there was conflict between the OCPA and Rules 12(b)(6) and 56.[224]

After concluding that the OCPA conflicts with Rules 12 and 56, the court turned to step two and addressed the validity of these Rules under the Rules Enabling Act.[225] Here, the court rejected the "really regulates procedure" language used by Justice Scalia in *Shady Grove* and the D.C.

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216. *Id.* at *10.
217. *Id.* at *11.
218. *Id.* at *15.
219. *Id.*
220. *Id.* at *14–15. Since both Maine and Oklahoma's Anti-SLAPP laws implicate changing pre-trial dismissal burdens and standards impacting Rules 12 and 56 in a similar way, the difference in outcome at step one of Justice Stevens' framework should not be attributed to minor differences in language in the state laws themselves.
221. *Id.* at *13.
222. *See id.* at *14.
223. *Id.*
224. *Id.*
225. *Id.* at *15.

Circuit in *Abbas*.[226] Instead, the court applied Justice Stevens's *Shady Grove* framework and analyzed whether the OCPA is so bound up in Oklahoma's definition of substantive rights and remedies such that it must be applied, regardless of its conflict with the Rules.[227] The court determined that the OCPA "create[s] a new defense to causes of action involving first amendment rights, which effectively provides immunity from suit," and so the OCPA functions as part of Oklahoma's definition of substantive rights and remedies.[228] Thus, the court held that applying Rules 12 and 56 instead of the OCPA would run afoul of the Rules Enabling Act by abridging or modifying Oklahoma's substantive right to immunity from suit.[229] Based on this analysis, the court held that the OCPA fully applies in federal court and displaces Rules 12 and 56 for purposes of the OCPA's special motion to dismiss.[230]

The court's analysis and holding in *Craig PC* provides one of the most robust endorsements of Justice Stevens' idea in *Shady Grove* such that even in the face of conflict between the Rules and state law, the Rule itself may be void if the state law it conflicts with constitutes a substantive right or remedy.[231] While the First and Ninth Circuits likewise found anti-SLAPP laws applied in federal court, those courts largely rested their decisions on a lack of conflict between the Rules and state law.[232] Instead, in *Craig PC,* the Western District of Oklahoma conceded that the OCPA conflicts with the Rules but nonetheless held that the OCPA applied because it reasoned that the statute is so intertwined with substantive rights in Oklahoma that it should apply in federal court anyways.[233]

Two years after *Craig PC*, the U.S. District Court for the Northern District of Oklahoma addressed a party's challenge to the applicability of the OCPA in *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson,*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id. Craig PC* is the first published opinion in which a court has expressly applied Justice Stevens's test, reached step two, and then found that applying the Rules would violate the Rules Enabling Act in light of state law.

230. *Id.*

231. Justice Stevens himself in *Shady Grove* declined to apply state law in the face of conflict because of what he described as the "high" bar required to invalidate the application of Rules based on substantive purpose of state law. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., Co., 559 U.S. 393, 432 (2010) (Stevens, J., concurring).

232. *See supra* Sections III.A, III.C (discussing First and Ninth Circuit precedent).

233. *Craig PC*, 2018 WL 4861522, at *15.

P.C.[234] Here, the plaintiff filed an action against a Tulsa law firm and the University of Tulsa for federal civil rights violations, false light, and civil conspiracy claims under Oklahoma law arising out of an allegedly fraudulent report to the Oklahoma Attorney General.[235] Both defendants moved to dismiss plaintiff's state law claims pursuant to the OCPA, and they argued that plaintiff's claim involved their free speech rights covered under the Act.[236] The Northern District did not cite or engage with either *Craig PC* or the Court's *Shady Grove* opinion. Instead, the court applied older Supreme Court Erie precedent.[237]

At the outset of its *Erie* doctrine analysis, the court followed a conflict avoidance framework by framing the issue as whether the OCPA and Rules 8, 12, and 56 present a "direct collision."[238] Adopting a restrictive view of the Rules similar to the First Circuit in *Godin*, the court reasoned that there is no indication that the Rules were intended to solely "occupy the field" of pretrial dismissal.[239] Based on this analysis, the court held that there is no conflict because the OCPA motion to dismiss has distinct evidentiary requirements and would not interfere with the operation of Rules 8, 12 or 56.[240] According to the court, even if a plaintiff survives an OCPA dismissal proceeding, a defendant could make a dismissal motion under Rules 12 and 56 without redundancy.[241] The court's analysis on this point directly opposes the district court's explanation in *Craig PC* that the OCPA's heightened evidence requirements combined with burden shifting would interfere with the comprehensive pretrial dismissal operation of Rules 12 and 56.[242] Yet, in this case, the court reasoned that the OCPA's distinct evidentiary standard with burden shifting shows a lack of conflict

234. No. 18-CV-00064-TCK-FHM, 2018 WL 4038117, at *1 (N.D. Okla. Aug. 23, 2018), *aff'd in part, rev'd in part and remanded*, 956 F.3d 1228 (10th Cir. 2020).

235. *Id.*

236. *See id.* at *1, *7.

237. *See id.* at *3. At the outset of the opinion, the court declined to apply Tenth Circuit's recent opinion rejecting the application of New Mexico's anti-SLAPP law, as the court reasoned that the OCPA is unlike New Mexico's narrow anti-SLAPP law because the OCPA substantially alters pretrial burdens of proof. *Id.*

238. *See id.* at *3.

239. *Id.*

240. *Id.* at *4. The court also grounded its holding that there was no conflict by stating that the OCPA reflects Oklahoma's substantive policy goal to protect First Amendment rights from meritless suits, while the Rules do further specific any policy goals. *See id.*

241. *Id.*

242. *See* Craig PC Sales & Serv., LLC v. CDW Gov't, LLC, No. CIV-17-003-F, 2018 WL 4861522, at *15 (W.D. Okla. Apr. 30, 2018).

with the Rules since the Rules 8, 12, and 56 do not call for similar burden-shifting dismissal structure.[243]

After finding that the Rules and the OCPA do not conflict, the court then bolstered its analysis by explaining how applying the OCPA could be outcome determinative in the case.[244] This outcome determinate language draws from *Guaranty Trust* and is similar to the language used by Justice Ginsburg in her *Shady Grove* dissent.[245] On this point, the court argued that OCPA must be applied because the statutes' three-part, burden-shifting scheme is likely to determine the outcome of a lawsuit by dismissing some claims that would otherwise survive under either Rule 12 or 56.[246] The courts ultimate holding that the OCPA applies in federal court is consistent with the *Craig PC* opinion, yet the court here utilized a distinct version of *Erie* doctrine analysis based on the lack of conflict between the Rules and state law and the outcome-determinative nature of the OCPA.[247]

Following the Northern District's dismissal of both his state and federal law claims, the plaintiff in *Barnett* appealed to the Tenth Circuit.[248] In its 2020 decision, the Tenth Circuit considered, inter alia, the lower court's analysis on OCPA applicability.[249] From the outset, the court disputed the lower court's *Erie* doctrine analysis, noting that "we are not so sure" about the court's holding and reasoning on OCPA applicability.[250] Contrasting the lower court's failure to engage with or cite any portion of *Shady Grove*, the

243. *Barnett*, 2018 WL 4038117, at *4.

244. *See id.* ("Because there is no federal statute on point, the Court must look to whether the application of the state law, the OCPA, is likely to be outcome determinative.").

245. *See supra* note 33–34 and accompanying text (referencing *Guaranty Trust* as the origin of the outcome determinative analysis framework); Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 456 (2010) (Ginsburg, J., dissenting) (referencing the "outcome affective" nature of the state statute as favoring the application of state law).

246. *See Barnett*, 2018 WL 4038117, at *4. In effect, the *Barnett* court realized the same principle as the D.C., Eleventh, and Fifth Circuits: applying an anti-SLAPP law adds additional procedural requirements to the Rules and affects the outcome of litigation. *See supra* Section III.C.2 (discussing caselaw holding that state anti-SLAPP laws are inapplicable in federal court). Yet instead of treating these additional hurdles as cause to *reject* the application of the OCPA, the court in *Barnett* found the heightened burden of proof under the OCPA as reason *favoring* its federal court application. *See Barnett*, 2018 WL 4038117, at *4.

247. *See id.* at *3–4.

248. Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 956 F.3d 1228, 1237 (10th Cir. 2020).

249. *Id.*

250. *See id.*

Tenth Circuit cited Justice Scalia's *Shady Grove* majority with approval, identifying it as the current *Erie* doctrine framework.[251] Then, the court explained that the D.C. Circuit's holding in *Abbas* presents the most faithful application of *Shady Grove* in the context of a state anti-SLAPP law.[252] According to the court, the proper two-step inquiry is (1) whether the applicable state law and Rules conflict by answering the same question, and if so, (2) whether the Rules are valid under the Rules Enabling Act.[253]

While the Tenth Circuit's analysis largely rejected the lower court's *Erie* framework, the court did not resolve the issue of the OCPA's federal court applicability.[254] Instead, the court explained that because the district court dismissed all of the plaintiff's federal law claims as well, there was little basis for a federal court to exercise supplemental jurisdiction over the state law claims to implicate the OCPA.[255] Thus, the court's instruction regarding the best *Erie* doctrine framework is largely dicta and not binding on lower courts.[256] The court cited the ongoing circuit split over anti-SLAPP applicability and the lack of OCPA precedent on the novel state law as its reasons favoring remand to state court where OCPA applicability would not be an issue.[257] Thus, the court failed to reach a definitive holding on the OCPA's applicability, noting that "it makes sense to wait to decide the issue until we must do so, perhaps after helpful development of both federal law and Oklahoma caselaw interpreting the statute."[258]

The Tenth Circuit's lack of a conclusive holding on the OCPA's applicability presented a perplexing legal situation for the two most recent Oklahoma U.S. District Court cases involving OCPA applicability. First, in the 2020 Western District of Oklahoma case *Terry v. Ely*, the plaintiff alleged a claim for a breach of a non-disparagement clause arising from the defendant's statements in a police report and earlier litigation.[259] The defendant moved to dismiss this claim pursuant to the OCPA on grounds

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251. *Id.*

252. *Id.*

253. *Id.* at 1238 (citing Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1333 (D.C. Cir. 2015)).

254. *Id.* ("[W]e need not decide that issue because Barnett's state-law claims come before us only under the district court's supplemental jurisdiction.").

255. *Id.* at 1239.

256. *See id.*

257. *See id.*

258. *Id.*

259. No. 19-CV-00990-PRW, 2020 WL 9074888, at *1–2, *4 (W.D. Okla. Sept. 8, 2020).

that the claim implicated free speech activity.[260] At the outset of his order, the judge noted that the Tenth Circuit's opinion had not resolved the issue of the OCPA's federal court applicability.[261] In choosing which *Erie* framework to follow, the court adopted the analysis from *Craig PC* reflecting Justice Stevens's two-part *Shady Grove* test.[262] The court explained that "for the reasons articulated in *Craig PC*, the Court finds that the OCPA is applicable in federal court."[263]

The most recent published opinion involving the OCPA's federal court applicability is the 2021 Western District of Oklahoma case *KLX Energy Services v. Magnesium Machinery*.[264] This case—assigned to the same judge who issued the *Craig PC* opinion—involved a counterclaim for the misappropriation of trade secrets, where the defendant moved to dismiss under the OCPA.[265] The court noted at the outset that the Tenth Circuit's *Hall Estill* opinion recommended courts consider the formalist *Shady Grove* test for their OCPA analyses as applied by the D.C. Circuit in *Abbas*.[266] Again, this language was not-binding on lower courts and was ultimately dicta because the court failed to rule on OCPA applicability.[267] Thus, the presiding judge for the case stated that he would "reluctantly" adopt his earlier analysis from *Craig PC* and apply the OCPA in federal court using Justice Stevens's *Shady Grove* framework.[268]

V. Analysis: Should the OCPA Apply in Federal Court

As the above caselaw explains, the OCPA's federal court applicability presents an unsettled issue complicated by: (a) fractured Supreme Court precedent lacking a cohesive analysis for resolving *Erie* issues; (b) an ongoing split in circuit court decisions over state anti-SLAPP law

260. *Id.* at *2.

261. *Id.* at *5 (citing *Barnett*, 956 F.3d at 1237).

262. *See id.* Within the Western District of Oklahoma, the earlier opinion functioned only as persuasive authority that the district judge in *Terry* could choose to follow or ignore since no circuit court decision resolved the issue. *See generally* Fox v. Acadia State Bank, 937 F.2d 1566, 1570 (11th Cir. 1991) ("A district court is not bound by another district court's decision, or even an opinion by another judge of the same district court . . . ."). Thus, the court in *Terry* treated the *Craig PC* court's opinion as "persuasive," not binding. *See Terry*, 2020 WL 9074888, at *5.

263. *Terry*, 2020 WL 9074888, at *5.

264. 521 F. Supp. 3d 1124, 1131 (W.D. Okla. 2021).

265. *Id.* at 1127.

266. *Id.*

267. *Id.*

268. *See id.* at 1130–31.

applicability; and (c) division between Tenth Circuit dicta and Oklahoma U.S. District Courts as to the correct structure for resolving the issue. Thus, addressing this complex legal analysis of "*Erie's* murky waters"[269] requires a sound framework and thorough analysis.

The Court's competing tests in *Shady Grove* and the ensuing circuit and district splits establish the three primary legal frameworks that could be used to analyze the OCPA's applicability in federal court. The first framework is conflict avoidance. This framework is typified by Justice Ginsburg's *Shady Grove* dissent, as well as some of the language from Justice Stevens's concurrence, implying that courts should read the Rules to avoid conflict with state law if possible.[270] In the context of the OCPA, this approach is consistent with the *Hall Estill* court's holding that the OCPA does not conflict with the Rules.[271] The second option applies the Rules Enabling Act analysis from *Craig PC,* which tracks Justice Stevens's *Shady Grove* dicta for step two of his framework.[272] Under this framework, in the event the OCPA and Rules conflict, the court may still find that the OCPA would apply because of the nature of the state law as providing suit.[273] Finally, the court could apply Justice Scalia's formalist *Shady Grove* framework as applied by the D.C., Eleventh, Fifth, and Second Circuits, and find that the OCPA is inapplicable in federal court.

This analysis section proceeds in three steps. First, it examines whether there is a conflict between the OCPA and Rules 8, 12, and 56. This portion builds off the diverse federal and Supreme Court caselaw by evaluating Justice Ginsburg's conflict avoidance framework against Justice Scalia's formalist framework. This section then considers the Rules Enabling Act analysis component by comparing Justice Stevens' purposive approach against Justice Scalia's formalist framework. Third, it explains why courts

269. Racher v. Westlake Nursing Home Ltd. P'ship, 871 F.3d 1152, 1163 (10th Cir. 2017).

270. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 430 (2010) (Stevens, J., concurring) (agreeing with Justice Ginsburg's dissent that in some cases the Rules should be read to avoid conflict with state rules).

271. Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., No. 18-CV-00064-TCK-FHM, 2018 WL 4038117, at *5 (N.D. Okla. Aug. 23, 2018), *aff'd in part, rev'd in part and remanded*, 956 F.3d 1228 (10th Cir. 2020).

272. *See Shady Grove,* 559 U.S. at 425 (Stevens, J., concurring) ("A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.").

273. *See* Craig PC Sales & Serv., LLC v. CDW Gov't, LLC, No. CIV-17-003-F, 2018 WL 4861522, at *2 (W.D. Okla. Apr. 30, 2018) (citing *Shady Grove*, 559 U.S. at 424).

should not follow the Ninth Circuit's fractured approach to resolve the issue of the OCPA's federal court applicability.

A. The OCPA Conflicts with Rules 8, 12, and 56

The threshold issue under each of the three *Erie* doctrine analyses asks whether the OCPA conflicts with any of Rules 8, 12, and 56. Under a conflict-avoidance framework similar to the district court's analysis in *Hall Estill*, a court would determine that these Rules were not intended to completely occupy the field of pretrial dismissal and should be interpreted narrowly and in isolation.[274] The basic thrust of this state-law centered analysis is that the Rules only function as a floor for procedural requirements, and the OCPA functions as a distinct system for dismissing cases with unique evidentiary standards posing no conflict with the Rules.[275]

Yet, this narrow analysis fails to account for the scope and importance of these Rules, and in particular, how the Rule 8 pleading standard, Rule 12(b)(6) motion to dismiss, and Rule 56 summary judgment granting liberal discovery are core features of the federal pretrial process.[276] As the Eleventh Circuit aptly noted in *Carbone*, a better understanding of the Rules takes them together; Rules 8, 12, and 56 "provide a comprehensive framework governing pretrial dismissal and judgment" in federal court.[277] Furthermore, courts should reject the argument adopted by the conflict-avoidance framework caselaw that the particularized purpose of the OCPA in protecting First Amendment activity shows a lack of conflict with Rules 12 and 56, which do not embody a similar policy goal.[278] In his *Shady Grove* opinion, Justice Scalia rejected a similar argument in the context of Rule 23 by explaining that the specialized purpose of state law cannot override the central question: does the application of the state law interfere with the operation of the Rules?[279]

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274. *Barnett*, 2018 WL 4038117, at *3.

275. *See id.*

276. *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674 (2010).

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

278. *See Barnett*, 2018 WL 4038117, at *4 ("Unlike the Rules, the OCPA is a statement of a substantive policy of the state of Oklahoma . . . . Though the Rules provide mechanisms for dismissal of a claim prior to trial, they do not provide any policy goals, nor any burden shifting and changes to substantive standards to enact these goals.").

279. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 402 (2010).

Instead of the unwieldy conflict avoidance approach, future courts should instead follow the analysis from the D.C., Eleventh, Fifth, and Second Circuits and apply a formalist conflict analysis. This analysis looks to whether the OCPA and Rules 8, 12, and 56 conflict by answering the same question.[280] The common question addressed by the OCPA and Rules 8, 12, and 56 is under what circumstance does a claim survive dismissal and advance to trial. The plausibility pleading regime under Rule 8 and Rule 12(b)(6) motions to dismiss allows a plaintiff to overcome dismissal by pleading sufficient factual material such that relief is plausible on its face.[281] This pleading standard requires no external evidentiary support.[282]

The OCPA's three-part burden-shifting scheme functions by imposing additional requirements to survive dismissal beyond Rule 12(b)(6)'s dismissal standard. After the defendant meets the threshold burden that the legal action affects their freedom of speech, association, or petition rights, the OCPA requires that the plaintiff establish each essential element of a prima facie case by clear and specific evidence to survive dismissal.[283] This clear and specific standard, meaning evidence free from doubt, is a greater evidentiary burden to survive dismissal than the low bar of Rule 12(b)(6)'s plausibility standard.[284] Moreover, in considering an OCPA motion, a court is required to consider both the pleadings and supporting affidavits opposing the motion, while courts do not require evidentiary support to overcome a Rule 12(b)(6) motion.[285] Thus, the OCPA conflicts with the operation of Rules 8 and 12 by adding additional requirements for a plaintiff to overcome dismissal for insufficient pleadings.[286]

The OCPA also conflicts with the Rule 56 summary judgment standard by imposing additional requirements to overcome summary judgment dismissal. To dismiss a claim under Rule 56, the movant has the initial burden to establish that there is no genuine dispute as to a material fact, while the non-movant can defeat summary judgment by showing there is a

280. *See, e.g.*, Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019) (citing Abbas v. Foreign Policy, 783 F.3d 1328, 1333–34 (D.C. Cir. 2015)), *as revised* (Aug. 29, 2019).

281. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

282. Germain v. Nielsen Consumer LLC, 1:22-CV-1314-GHW, 2023 WL 1818627, at *11 (S.D.N.Y. Feb. 8, 2023) ("In the context of a motion to dismiss, the Court does not analyze the evidentiary support for a claim.").

283. 12 OKLA. STAT. § 1432 (2023).

284. *Klocke*, 936 F.3d at 245.

285. *Id.*

286. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 401 (2010).

genuine dispute.[287] Under the OCPA, however, the defendant does not have the initial burden of showing there is no dispute over a material fact. Rather, the defendant's initial burden is only to show that the plaintiff's claim affects their exercise of a right protected under the OCPA.[288]

The plaintiff's step two burden under the OCPA, mandating that a plaintiff affirmatively establish essential elements of a claim by clear and specific evidence, is greater than Rule 56's burden of establishing disputed facts sufficient to justify trial. As noted by the Fifth Circuit in *Klocke*, clear and specific evidence means evidence that is free from doubt, and this unique standard imposes a greater hurdle for a plaintiff to advance to trial than Rule 56's burden on the non-movant.[289]

Even if a plaintiff meets the clear and specific evidence standard in step two of the OCPA's burden-shifting scheme, the court is still required to dismiss in step three if the defendant establishes a defense to the plaintiff's claim by a preponderance of the evidence.[290] As noted by the court in *Craig PC*, this step requires the court—and not the jury—to weigh the evidence of the defendant's defense and dismiss if it finds the evidence meets the preponderance standard. On the other hand, Rule 56 instead leaves the weighing of evidence for the jury at trial.[291] In addition to the OCPA's burden-shifting scheme, the Act's discovery-limiting provision also conflicts with Rule 56. As both the Fifth and Eleventh Circuits noted, state anti-SLAPP acts greatly circumscribe or eliminate pre-decisional discovery, while Rule 56 summary judgment generally occurs after the conclusion of robust discovery.[292] Thus, the OCPA interferes with the normal liberal discovery regime of the Rules by suspending all discovery for purposes of the motion to dismiss unless there is a showing of good cause for specific and limited discovery.[293]

In sum, the OCPA's special motion to dismiss forces the plaintiff to prove their case at the outset of litigation with restricted discovery under a

287. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citing FED. R. CIV. P. 56).

288. *See* Craig PC Sales & Serv., LLC v. CDW Gov't, LLC, CIV-17-003-F, 2018 WL 4861522, at *14 (W.D. Okla. Apr. 30, 2018); *see also* Cuba v. Pylant, 814 F.3d 701, 720 (5th Cir. 2016) (Graves, J. dissenting) (noting that Rule 56's initial burden clashes with the TCPA's initial burden standard).

289. *Klocke*, 936 F.3d at 246.

290. 12 OKLA. STAT. § 1432 (2023).

291. *Craig PC*, 2018 WL 4861522, at *14.

292. *Klocke*, 936 F.3d at 246; Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1348, 1350 (11th Cir. 2018).

293. 12 OKLA. STAT. § 1432(C), 1435(B).

greater burden than either Rule 12 or Rule 56 would impose.[294] While the district court in *Hall Estill* argued that parties could still invoke Rule 12(b)(6) and Rule 56 after the OCPA motion to dismiss, this argument is undercut by the foregoing analysis that the OCPA would dismiss every claim implicating covered First Amendment rights that would otherwise survive Rule 12 and Rule 56. Thus, the OCPA makes both the motion to dismiss and motion for summary judgment ineffective in federal court. As such, future courts should conclude that the OCPA conflicts with Rules 8, 12, and 56 by answering the same question.

B. Rules 8, 12, and 56 Do Not Violate the Rules Enabling Act

After holding that the OCPA conflicts with Rules 8, 12, and 56, the court should proceed to the second step of the *Erie* doctrine analysis and address the Rules Enabling Act issue. The Rules Enabling Act authorized "rules of practice and procedure" in federal court so long as those rules did not abridge or modify any substantive right.[295] In the context of the OCPA, the *Craig PC* court applied Justice Stevens's Rules Enabling Act state-law-centered analysis from *Shady Grove* and reasoned that the OCPA is so intertwined with the substantive right to immunity from suit that Rules 8, 12 and 56 violate the Rules Enabling Act by abridging this right.[296]

But, as Justice Scalia noted in *Shady Grove,* focusing this analysis on the purpose of the state law in question is problematic because it invites nullification of the Federal Rules on an as-applied basis.[297] Federal courts should not ignore federal procedure based on the idiosyncrasies of a state's law with a loose nexus to a state's substantive definition of rights.[298] Moreover, a growing number of circuit courts and judges have outright rejected arguments that anti-SLAPP acts are substantive and not procedural. For example, the Fifth Circuit in *Klocke* categorized the TCPA, an anti-SLAPP act which the OCPA is based on, as procedural because the Act creates no rights independent of existing litigation and "merely provides a procedural mechanism for vindicating existing rights" through the special motion to dismiss.[299]

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294. *Klocke*, 936 F.3d at 248.

295. *See* 28 U.S.C. § 2072.

296. *Craig PC*, 2018 WL 4861522, at *14.

297. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 415 (2010).

298. *Id.*

299. *Klocke*, 936 F.3d at 247 (5th Cir. 2019) (citing Makaeff v. Trump Univ., LLC, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring)).

In contrast to Justice Stevens's Rules Enabling Act framework that could render Rules 8, 12, and 56 inoperable based on the ambiguous substantive nexus of the OCPA, Justice Scalia's straightforward formalist approach to the Rules Enabling Act analysis more closely adheres to past court precedent. As Justice Scalia noted in *Shady Grove*, the Court's 1941 *Sibbach* opinion dictated that the test of a Rules' validity under the Rules Enabling Act depends only on the procedural nature of the Rule.[300] Applying this Rules-centric analysis, the court would analyze whether the three Rules at issue are consistent with the Rules Enabling Act by "really regulat[ing] procedure."[301] As both the D.C., Eleventh, Fifth, and Second Circuits have held, these Rules are validly enacted under the Rules Enabling Act because they define the procedures for determining whether pleadings sufficiently state a plausible claim and whether claims present a genuine dispute of material fact sufficient to warrant a trial.[302] In sum, these rules do not violate the Rules Enabling Act because they affect the process of enforcing litigants' rights in federal court, rather than creating a substantive right.[303]

Based on the foregoing two-step analysis, future courts should conclude that the OCPA does not apply in federal court because the Act's special motion to dismiss answers the same question as Rules 8, 12, and 56. This conclusion is the result of a faithful application of the formalist framework set out by Justice Scalia's majority and plurality sections of *Shady Grove*, the Court's most recent *Erie* doctrine caselaw.

C. Courts Should Avoid the Ninth Circuit's Fractured Approach for the OCPA

Instead of the recommended approach set forth in the preceding section, a future federal court could adopt the Ninth Circuit's fractured approach to California's anti-SLAPP statute and apply only those provisions of the OCPA that do not conflict with the Rules. Recent scholarship addressing Kansas's anti-SLAPP act championed this approach as harmonizing a court's desire to uphold the broad purpose of state anti-SLAPP statutes while rejecting provisions that conflict with the operation of the Rules.[304]

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300. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 415 (2010).

301. *Klocke*, 936 F.3d at 248 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

302. *Id.*

303. *Id.*

304. Sydney Buckley, Comment, *Getting SLAPP Happy: Why the U.S. District Court for the District of Kansas Should Adopt the Ninth Circuit's Approach When Applying the*

In the context of the OCPA, however, this approach should be avoided. As Judge Kozinski noted in his concurrence in *Makaeff v. Trump University, LLC,* the Ninth Circuit's fractured approach to California's anti-SLAPP applicability results from a reluctance to overturn the *Newsham* holding, even in light of later Court precedent from *Shady Grove* undermining this holding.[305] But here, unlike the Ninth Circuit's adherence to *Newsham* as a matter of stare decisis, the Tenth Circuit recognized in *Hall Estill* that there is no dispositive precedent on the OCPA's applicability in federal court.[306] Thus, future courts analyzing the OCPA can proceed with a fresh analysis and apply the formalist framework unencumbered by muddled past precedent.

Also, the Ninth Circuit's fractured approach should be avoided when analyzing the OCPA because the court would be applying a version of the statute that the Oklahoma legislature did not intend to enact. Under the Ninth Circuit's current approach, California's anti-SLAPP act provisions governing burden shifting standards, discovery stays, and timeliness requirements for when court rulings are inoperable in federal court, while litigants can still invoke the special motion and recover attorney's fees based on the court's finding that a dismissal impacts protected First Amendment activity.[307] In his *Makaeff* concurrence, Judge Kozinski explained that this fractured approach engenders a distorted procedural scheme in which California's statute does not operate as enacted by the legislature.[308] The same would be true if the fractured approach were adopted to analyze the OCPA's applicability in federal court. The OCPA's construction as a comprehensive pretrial procedure dismissal statute cuts against this fractured approach. For example, under the OCPA, mandatory sanctions and fee shifting are available only if the court dismisses the action pursuant to the OCPA, which requires a three-part, burden-shifting analysis with heightened evidentiary standards.[309] Yet, under the Ninth Circuit's

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Kansas Anti-SLAPP Law, 68 U. KAN. L. REV. 791, 793 (2020) (proposing that federal courts adopt the Ninth Circuit's approach in analyzing the Kansas anti-SLAPP act under *Erie*).

305. *See* Makaeff v. Trump Univ., LLC, 715 F.3d 254, 272, 275 (9th Cir. 2013) (Kozinski, C.J. concurring).

306. Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 956 F.3d 1228, 1237 (10th Cir. 2020) (explaining that the Tenth Circuit's only other precedent on this issue is not controlling because the OCPA is a distinct statute).

307. *See* Buckley, *supra* note 304, at 791 (explaining that if Kansas applied the Ninth Circuit's approach, federal court litigants could still recover attorney's fees even with other provisions inoperable).

308. *Id.*; *Makaeff*, 715 F.3d at 275.

309. 12 OKLA. STAT. §§ 1434, 1438 (2023).

approach, the burden-shifting scheme would be abandoned because of its conflict with the Rules. Thus, in allowing OCPA fee-shifting and sanctions under the Ninth Circuit's approach, the court would judicially create a new version of the Act not intended by the language adopted by Oklahoma's state legislature.

The Ninth Circuit's fractured approach that severs the full language and effect of the anti-SLAPP law should be avoided in favor of an analysis recognizing that all provisions of the OCPA are inoperable in federal court. This result would be consistent with the Fifth Circuit's holding in *Klocke* where the court reasoned that the attorney's fees and sanctions provision of the TCPA did not apply in federal court because those provisions were inseverable from the burden-shifting early dismissal framework.[310]

VI. Recommendation: A Federal Solution to SLAPP Lawsuits

The OCPA, Oklahoma's state-level solution to counteract SLAPP lawsuits, should not apply in federal court. But this Comment's analysis does not foreclose the ability of the U.S. Congress to counteract SLAPP lawsuits at the federal level by enacting a new statute or amendment to the Rules that would discourage individuals from filing such lawsuits to chill First Amendment rights. As recognized in other scholarship, a federal solution avoids the *Erie* doctrine issues inherent with the OCPA and other state anti-SLAPP laws in federal courts because the Rules Enabling Act specifically allows for federal pretrial procedures.[311]

In fact, one month after the D.C. Circuit's decision in *Abbas*, a bipartisan group of legislators introduced the Speak Free Act, a federal anti-SLAPP statute aimed at protecting Americans from meritless First Amendment lawsuits.[312] The Act had a similar structure as the OCPA and other state anti-SLAPP statutes with a special motion to dismiss based on First Amendment activity, heightened pleading standards, limited discovery, and fee shifting upon a successful dismissal.[313] This federal anti-SLAPP statute could tackle the state statute applicability question from the top down by creating a uniform system for addressing and disposing of SLAPP suits in

310. Klocke v. Watson, 936 F.3d 240, 247 (5th Cir. 2019), *as revised* (Aug. 29, 2019).

311. Daday, *supra* note 105, at 463.

312. Speak Free Act of 2015, H.R. 2304, 114th Cong.; *see also Speak Free Act of 2015*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/speak-free-act (last visited Sept. 5, 2023).

313. H.R. 2304 § 4202, 114th Cong. (2015).

federal court.[314] Although this Act had initial support from both sides of the aisle, the Act did not advance past its committee, and Congress has not revisited the issue since 2015.[315]

Congress should reconsider this earlier legislation, or consider drafting a new bill, to provide litigants with enhanced procedural protection from meritless lawsuits affecting their First Amendment rights. As other scholarship has recognized, federal anti-SLAPP legislation provides three distinct advantages.[316] First, a federal statute with heightened pleading and evidentiary standards for certain claims implicating First Amendment rights would discourage litigants from filing frivolous litigation.[317] Next, a fee-shifting provision for cases dismissed under a federal anti-SLAPP statute would punish litigants who chose to file meritless lawsuits.[318] This would be consistent with Pring and Canan's original suggestion for anti-SLAPP laws, calling for legislative action to deter frivolous lawsuits because fee shifting also provides a deterrent to baseless litigation.[319] Third, the federal anti-SLAPP statute would accomplish the goals of anti-SLAPP statutes on a federal level while still maintaining consistent federal procedure across federal courts.[320] Instead of state anti-SLAPP laws with widely varying features, one uniform anti-SLAPP statute in federal court would comport with the Rules and would not cause a state and federal law *Erie* doctrine conflict.[321]

VII. Conclusion

When enacting the OCPA, the Oklahoma legislature created a novel form of state law seeking to protect First Amendment rights via a special motion to dismiss.[322] When the special motion to dismiss applies in a suit, the statute completely alters the landscape of pretrial procedure. While the OCPA's application in state court is not in dispute, the *Erie* doctrine leads

314. Marc J. Randazza, *The Need for a Unified and Cohesive National Anti-SLAPP Law*, 91 OR. L. REV. 627, 633 (2012).

315. *H.R. 2304—Speak Free Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/2304?q=%7B%C22search%C22%C3A%5B%22HR+2304%22%C5D%7D&s=5&r=1 (last visited Sept. 7, 2023).

316. Daday, *supra* note 105, at 463.

317. *Id.*

318. *Id.*

319. Pring & Canan, *supra* note 92, at 959.

320. Daday, *supra* note 105, at 463.

321. *Id.*; Harrison, *supra* note 20, at 1316.

322. *See* Thacker v. Walton, 2021 OK CIV APP 5, ¶ 22, 499 P.3d 1255, 1263.

federal courts to analyze whether such anti-SLAPP laws can apply consistent with the pretrial dismissal scheme under the Federal Rules.

Upon careful analysis, the heightened burden shifting under the OCPA's motion to dismiss conflicts with the comprehensive federal pleading and pretrial dismissal standards under Rules 8, 12, and 56 by creating a more difficult evidentiary standard to advance to trial. In effect, the OCPA conflicts with these Rules by adding an additional procedural requirement to advance to trial that is inconsistent with the dismissal structure of these three Rules. Furthermore, Rules 8, 12, and 56 comply with the Rules Enabling Act by regulating the procedural processes of pretrial pleadings and dismissal in federal court. Thus, this Comment recommends that federal courts resolve the unsettled nature of the OCPA by holding that this law does not apply in federal court under the *Erie* doctrine.

Although this Comment advocates that federal courts should refuse to apply the OCPA, this Comment does not advocate that our government should ignore the important problems caused by frivolous SLAPP lawsuits. As scholars Pring and Canan explained, SLAPP lawsuits affect individuals' First Amendment rights, particularly their freedom of speech.[323] Instead, Congress should pursue federal legislative action and create a federal anti-SLAPP statute by an addition to the Rules. This federal solution would avoid the *Erie* doctrine problem posed by the OCPA and other similar state anti-SLAPP statutes. This federal option could protect the rights of Americans who may be subject to frivolous federal court lawsuits that impact their First Amendment rights.

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323. *See supra* Section III.A.