No. 25-1329

IN THE

Supreme Court of the United States

WEALTHY, INC., AND DALE BUCKZKOWSKI,
Petitioners,

v.

SPENCER CORNELIA, CORNELIA MEDIA LLC, CORNELIA EDUCATION LLC, JOHN MULVEHILL, AND JOHN ANTHONY LIFESTYLE, LLC,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THOMAS MORE SOCIETY IN SUPPORT OF PETITIONERS

JEFFREY M. TRISSELL
Counsel of Record
CHARLES S. LIMANDRI
PAUL M. JONNA
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
(858) 759-9930
jtrissell@limandri.com

THOMAS BREJCHA
PETER BREEN
THOMAS MORE SOCIETY
121 West Wacker Drive
Suite 650
Chicago, IL 60601
(312) 782-1680

Counsel for Amicus Curiae Thomas More Society

QUESTION PRESENTED

With the emergence of state anti-SLAPP statutes, the federal circuit courts are divided on whether and how to apply such statutes in federal court. The First Circuit applies state anti-SLAPP statutes identically to state courts. *Godin* v. *Schencks*, 629 F.3d 79, 88 (1st Cir. 2010). In contrast, following the lead of the D.C. Circuit, the Second, Fifth and Eleventh Circuits hold that state anti-SLAPP statutes cannot apply at all in federal court. See, *e.g.*, *Abbas* v. *Foreign Pol'y Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015) (Kavanaugh, J.).

Finally, recognizing the *Erie* problems with the First Circuit's approach, over the course of twenty-five years and nearly a dozen key precedents, the Ninth Circuit has adopted a novel "hybrid" approach. Under the Ninth Circuit's unique jurisprudence, all aspects of an anti-SLAPP statute except the fee-shifting provision are precluded, and replaced instead with the Rule 12(b)(6) and Rule 56 standards, and the fee provision is also expanded to permit awards of attorneys' fees far greater than would be permitted in state court. See *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 890 F.3d 828 (9th Cir. 2018); *Graham-Sult* v. *Clainos*, 756 F.3d 724 (9th Cir. 2014). As shown by the petition for certiorari in this case, these three disparate approaches represent an entrenched circuit split that requires this Court's resolution.

The lead question presented is:

1. Whether such an anti-SLAPP statute is displaced by Rules 12(b)(6) and 56, applies as enacted, or applies only in the hybrid form described above.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae **Thomas More Society** is a not-for-profit, national public interest law firm based in Chicago, Illinois, dedicated to restoring respect in law for life, family, and religious liberty. The Thomas More Society advocates and fosters support for these causes by providing pro bono legal services at every level-from local trial courts to this Court.

Consistent with its mission, the Thomas More Society is currently representing Joseph Nicolosi Jr., Ph.D., a licensed clinical psychologist in California who serves as the clinical director of a psychological clinic that treats traumatic memories, including those of individuals with unwanted same-sex attractions. Dr. Nicolosi is also the founder and president of the board of the Reintegrative Therapy Association, Inc., a California 501(c)(3) non-profit corporation that offers training in proprietary Reintegrative Therapy® psychological services to mental health professionals. See https://www.reintegrativetherapy.com/.

Although sexual-attraction change is not a goal of Reintegrative Therapy, sexual-attraction change is a known byproduct. See Carolyn Pela & Philip Sutton, *Sexual Attraction Fluidity and Well-Being in Men: A Therapeutic Outcome Study*, 12 J. Hum. Sex. 61

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[1] Counsel of record received timely notice of *Amicus*'s intent to file this brief under Supreme Court Rule 37.2. No counsel for any party authored this brief in whole or in part, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief.

(2021); Joseph Nicolosi Jr. & Jacek Szanduła, *Memory Reconsolidation for Unwanted Sexually Arousing Memories: A Randomized, Placebo-Controlled Study*, 2 Integratus 287 (2024). As a result, Dr. Nicolosi and the Reintegrative Therapy Association have frequently found themselves defamed as practitioners of "conversion therapy" and investigated by California for their therapy practices.

Amicus submits this brief to highlight the history of their work on the litigation, *Reintegrative Therapy Ass'n* v. *Kinitz*, No. 21-cv-1297 (S.D. Cal. July 20, 2021), as an illustration of why the Ninth Circuit's "hybrid mess," *Makaeff* v. *Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Paez, J., concurring), is not a set of stray ambiguities easily resolved by a more careful application, but the unavoidable consequence of applying a state anti-SLAPP statute in federal court at all. So long as the federal courts continue to entertain anti-SLAPP motions grounded in state law, the incoherence will persist and recur—and will continue to be weaponized against disfavored voices. *Amicus*, therefore, asks this Court to go beyond merely refining the federal anti-SLAPP practice and, instead, grant certiorari to resolve the entrenched circuit conflict by holding that state anti-SLAPP statutes have no application in federal court.

SUMMARY OF ARGUMENT

For twenty-five years, the Ninth Circuit has struggled through a misguided experiment of finding a way of applying California's, and other states', anti-

SLAPP statutes in federal court under the venerable principle that state substantive law applies in federal court but not state procedural law. See *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Hanna* v. *Plumer*, 380 U.S. 460 (1965).

The result has been the development of a unique federal anti-SLAPP jurisprudence—"a hybrid mess that now resembles neither the Federal Rules nor the original state statute[s]." *Makaeff* v. *Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Paez, J., concurring and calling for en banc review). Most recently, the Ninth Circuit engaged in a new effort to address en banc the issue of whether anti-SLAPP statutes can apply in federal court, but punted. The Ninth Circuit "assume[d]" without deciding that anti-SLAPP statutes apply in federal court, and merely held that no interlocutory appeal can be taken from the denial of an anti-SLAPP motion. *Gopher Media LLC* v. *Melone*, 154 F.4th 696, 699-702 & n.2 (9th Cir. 2025) (en banc).

This, of course, was simply a temporary fix that ultimately left "anti-SLAPP practice in this circuit even more incoherent than we found it." *Id*. at 716 (Bress, J., concurring, joined by Collins, Lee, Bumatay, JJ.) And despite the pleas of Judge Bress, just recently this Court denied certiorari. *Gopher Media LLC* v. *Melone*, -- S. Ct --, No. 25-1067, 2026 WL 1717993 (U.S. June 15, 2026).

In concluding his concurrence, Judge Bress somberly predicted that applicability of the anti-

SLAPP statute in federal court "surely will" "present[] itself again." *Gopher Media*, 154 F.4th at 721 (Bress, J., concurring). And if the Ninth Circuit cannot redress this issue on its own, then those cases "surely will" repeatedly present themselves to this Court—as the instant petition exemplifies.

This Court's decision in *Berk* v. *Choy*, 607 U.S. 187 (2026), should have conclusively resolved that state anti-SLAPP statutes have no place in federal court. Indeed, *amici* in that case explained how the requested result (with which the Court agreed) was supported by the reasoning of the various circuit courts which had held that anti-SLAPP statutes cannot apply in federal court. Brief of Public Justice as *Amicus Curiae* in Support of Petitioner at 13-15, *Berk* v. *Choy*, No. 24-440 (U.S., June 3, 2025). But the Ninth Circuit has not read *Berk* v. *Choy* in that manner, issuing several new anti-SLAPP decisions since its issuance—even after its import was separately briefed. See Rule 28(j) Letter, *Reintegrative Therapy Ass'n* v. *Kinitz*, No. 22-56009, ECF No. 57 (9th Cir. Apr. 24, 2026); accord *Left* v. *Anson Funds Mgmt. LP*, No. 25-cv-10432, 2026 WL 1365637, at *8 (C.D. Cal. Mar. 31, 2026) ("*Berk* did not address or discuss California's anti-SLAPP statute, nor did it directly overrule any existing Ninth Circuit precedent permitting the application of the anti-SLAPP statute in federal court").

Below, *Amicus* first lays out the background of the Ninth Circuit's extraordinarily circuitous route to developing its own, unique anti-SLAPP jurisprudence.

Then *Amicus* lays out the history of their own case before explaining how it is likely to create even more unique, federal anti-SLAPP jurisprudence. *Amicus* then closes by requesting that the Court summarily reverse the Ninth Circuit's decision here or GVR with instruction to reconsider the opinion in light of *Berk* v. *Choy*, 607 U.S. 187 (2026). In light of various Ninth Circuit judges' eagerness to fix Ninth Circuit anti-SLAPP jurisprudence, this is likely the most efficient way of redressing a significant and recurring problem.

ARGUMENT

I. BACKGROUND OF CALIFORNIA'S ANTI-SLAPP STATUTE

A. The Core Features of California's Anti-SLAPP Statute.

In 1992, the California Legislature enacted California's anti-SLAPP statute because it found a "disturbing increase" in strategic lawsuits against public participation that "chill the valid exercise of the constitutional rights of freedom of speech and petition." *Braun* v. *Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1042 (1997). The statute protects two core constitutional rights: "freedom of speech and petition for the redress of grievances." Cal. Code Civ. Proc. § 425.16(a).

California's anti-SLAPP statute contains five main provisions applicable to all cases based on "any * * * conduct in furtherance of the exercise of the

constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Code Civ. Proc. § 425.16(e). These include:

(1) the right to strike claims unless the plaintiff establishes a "probability of prevailing" as to that claim, *id*. at subd. (b);
(2) the right to attorneys' fees for a successful defendant, *id*. at subd. (c);
(3) the right to have the motion heard quickly (within 30 days of being filed) and requirement that the motion be filed quickly (within 60 days after service of the complaint), *id*. at subd. (f);
(4) the right to a stay of "[a]ll discovery proceedings," *id*. at subd. (g); and
(5) the right to an immediate, interlocutory appeal. *Id*. at subd. (i).

These five main provisions are the bread and butter of anti-SLAPP statutes, which have been enacted by nearly every state. See George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("Slapps") an Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 952 (1992) (law and sociology professors who invented SLAPP theory explaining the necessary elements of an anti-SLAPP statute).

While some of the provisions are self-evident, others required development by the courts. First, in reviewing this "probability of prevailing" standard, California courts concluded that it would violate the

right to trial by jury if the court were "required to weigh and adjudicate factual disputes." *Lafayette Morehouse, Inc.* v. *Chronicle Pub'g Co.*, 37 Cal. App. 4th 855, 866 (1995). Thus, instead, the statute requires "the court to determine only if the plaintiff has stated and *substantiated* a legally sufficient claim." *Rosenthal* v. *Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 412 (1996) (emphasis added).

Under this standard, the plaintiff's burden is similar to that required to respond to a motion for "nonsuit" or for a "directed verdict." *Seelig* v. *Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 809 (2002). The plaintiff must "demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id.* As pithily explained by one court:

> On appeal, [Plaintiff] TDE does not explain how its evidence substantiates the elements of this claim; it simply contends respondents failed to establish their actions were statutorily immune or privileged as they had asserted in their motion for section 425.16 relief. But this argument misunderstands the burdens on a section 425.16 motion. In moving for section 425.16 relief, it was not respondents' burden to show TDE could not demonstrate a probability of prevailing on its claims; its only burden was to establish that the claims fell within the ambit of the statute. The fact respondents also made arguments directed toward the second

> probability-of-prevailing prong does not relieve TDE of its own statutory burden, that is, to make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor. In this way section 425.16 differs significantly from the summary judgment statute.

Tuchscher Dev. Enterprises, Inc. v. *San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1239 (2003) (cleaned up).

Second, the California Supreme Court has explained that application of the anti-SLAPP statute does not "turn on how the challenged pleading is organized," for example, "[b]y mixing allegations of protected and unprotected activity" in a single pleaded claim. *Baral* v. *Schnitt*, 1 Cal. 5th 376, 392 (2016). Nor is the anti-SLAPP statute limited to strike "indivisible 'causes of action' as determined by primary right theory." *Id.* at 394. Rather, "the Legislature's choice of the term 'motion to strike' reflects the understanding that an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded," even when "the same primary right may be violated by both protected and unprotected activity." *Id.* at 393, 394.

Third, California courts have determined that "[t]here is no such thing as granting an anti-SLAPP motion with leave to amend." *Dickinson* v. *Cosby*, 17 Cal. App. 5th 655, 676 (2017). Doing so, they explain, "would undermine the legislative policy of early

evaluation and expeditious resolution of claims arising from protected activity." *Salma* v. *Capon*, 161 Cal. App. 4th 1275, 1294 (2008).

Fourth, California courts have determined that the attorneys' fees "provision applies only to the motion to strike, and not to the entire action." *Lafayette Morehouse, Inc.* v. *Chron. Publ'g Co.*, 39 Cal. App. 4th 1379, 1383 (1995) (quoting Sen. Judiciary Comm., Analysis of Sen. Bill 1264, at 5 (1991-1992 Reg. Sess.)). Specifically, courts have disallowed "non-anti-SLAPP efforts such as attacking service of process, preparing and revising an answer to the complaint, summary judgment research, a senior associate's work on a press release, and a conference regarding the appropriate way to address opposing counsel and the client." *Christian Rsch. Inst.* v. *Alnor*, 165 Cal. App. 4th 1315, 1325 (2008) (cleaned up). Other courts have disallowed "work on discovery, ex parte appearances, work surrounding the case management conference, and conferring with cocounsel." *569 E. Cty. Boulevard LLC* v. *Backcountry Against the Dump, Inc.*, 6 Cal. App. 5th 426, 441 (2016).

But the California Supreme Court has also held that a fee award is mandatory once an anti-SLAPP motion is filed even if the case is dismissed on other grounds. For example, as in federal court, California courts recognize that a plaintiff has an absolute right to dismiss his case. See Cal. Code Civ. Proc. § 581(c). If the complaint is dismissed prior to resolution of the anti-SLAPP motion, California appellate courts require the trial court to rule substantively on the

anti-SLAPP motion to determine who *would have* succeeded. This is because the fee award is not tied to prevailing in the action as a whole, but rather "the critical issue is the merits of the defendant's motion to strike." See *Moore* v. *Liu*, 69 Cal. App. 4th 745, 752 (1999). Under this rule, "a plaintiff's voluntary dismissal of a suit, after a section 425.16 motion to strike has been filed, neither automatically precludes a court from awarding a defendant attorney's fees and costs under that section, nor automatically requires such an award." *Id*. at 753.

B. History of the Ninth Circuit's Application of California's Anti-SLAPP Statute in Federal Court

The Ninth Circuit first held that California's anti-SLAPP statute applied in federal court in *United States ex rel. Newsham* v. *Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999). There, the Ninth Circuit held that the following provisions of the statute apply in federal court because "there is no direct collision" with the Federal Rules: (1) the right to move to strike claims unless the plaintiff establishes a "probability of prevailing" as to that claim, Cal. Code Civ. Proc. § 425.16(b); and (2) the right to attorneys' fees for a successful defendant. *Id*. at subd. (c).

In so doing, the Ninth Circuit held that "there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims" and, if unsuccessful, a SLAPP defendant "remains free to

bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Newsham*, 190 F.3d at 972.

Two years later, the Ninth Circuit revisited California's anti-SLAPP statute in *Metabolife International, Inc.* v. *Wornick*, 264 F.3d 832 (9th Cir. 2001), and held that two portions of it could *not* apply in federal court: (3) the requirements to file an anti-SLAPP motion within 60 days of service of the complaint, and to have the motion heard within 30 days of being filed, Cal. Code Civ. Proc. § 425.16(f); and (4) the right to a stay of all discovery proceedings pending adjudication of the motion. *Id.* at subd. (g).

Recognizing the plaintiff's burden to establish a prima facie case with admissible evidence, the Ninth Circuit stated that federal courts cannot scrutinize whether a plaintiff has established that prima facie case if the needed evidence is "uniquely within the Defendants' control" without delaying adjudication of the motion and "ordering discovery." *Metabolife*, 264 F.3d at 846. On remand, the district court concluded that it must also award fees to the prevailing defendant for the entire case under the Ninth Circuit's new understanding. *Metabolife Int'l, Inc.* v. *Wornick*, 213 F. Supp. 2d 1220, 1223-24 (S.D. Cal. 2002).

After another two year jump, the Ninth Circuit in *Batzel* v. *Smith*, 333 F.3d 1018 (9th Cir. 2003), affirmed that: (5) the right to an immediate, interlocutory appeal applied in federal court. Cal. Code Civ. Proc. § 425.16(i). The *Batzel* court's rationale was that "[b]ecause California law

recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well." *Id*. at 1025-26.

The next watershed application of the anti-SLAPP statute came in *Mindys Cosmetics, Inc.* v. *Dakar*, 611 F.3d 590 (9th Cir. 2010). There, the Ninth Circuit held that a plaintiff has the burden of producing sufficient evidence to establish a prima facie case such that he could survive a motion for nonsuit, and the Ninth Circuit affirmed that a moving defendant has no burden of production. *Id*. at 599.

Four years later, the Ninth Circuit adopted the rule of the district court in *Metabolife*, holding that if an anti-SLAPP motion is successful in full, striking the entire complaint instead of merely certain claims, then fees for the entire action should be awarded. *Graham-Sult* v. *Clainos*, 756 F.3d 724, 751-53 (9th Cir. 2014) (awarding $386,938 for work on motions to dismiss and initial disclosures).

Beginning around this time, in *Makaeff I*, the Hon. Alex Kozinski began adding a concurrence in every California anti-SLAPP appeal. In those concurrences, he requested en banc review of the case law applying the anti-SLAPP statute in federal court on the grounds that Ninth Circuit precedent had created a situation where "[w]hat we're left with * * * is a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed." *Makaeff* v. *Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J., concurring).

En banc review in *Makaeff* was ultimately denied, with Hon. Paul Watford, Hon. Alex Kozinski, Hon. Richard Paez, and Hon. Carlos Bea dissenting from the denial. *Makaeff* v. *Trump Univ., LLC*, 736 F.3d 1180, 1188-92 (9th Cir. 2013) (*Makaeff II*). Hon. Ronald Gould voted against en banc review at that time and joined a concurrence to that denial. *Id.* at 1180-87. Beginning in 2016, however, Judge Gould also became "persuaded by Judge Kozinski's reasoning" and began adding his own concurrences requesting en banc review of the anti-SLAPP statute. See, *e.g.*, *Travelers Cas. Ins. Co. of Am.* v. *Hirsh*, 831 F.3d 1179, 1186 (9th Cir. 2016).

In 2018, Judge Gould obtained his opportunity to re-fashion anti-SLAPP jurisprudence in federal court. In *Planned Parenthood Federation of America, Inc.* v. *Center for Medical Progress*, 890 F.3d 828 (9th Cir.), *amended*, 897 F.3d 1224 (9th Cir. 2018), the Ninth Circuit announced the rule that "when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated. And, on the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply. But in such a case, discovery must be allowed." *Id.* at 834; see also *id.* at 833 ("[O]ur ruling today * * * support[s] the idea that if Defendants' anti-SLAPP motion was based on legal deficiencies, Plaintiffs were not required to present prima facie evidence supporting Plaintiffs' claims").

This rule—adopting the Rule 12 and Rule 56 standards—appeared self-evidently clearer. But it soon led to difficulties. On evidence-based challenges, district courts remained confused whether they should solely apply a Rule 56 standard or impose on the plaintiff a burden of production to overcome a nonsuit. Compare *Nat'l Abortion Fed'n* v. *Ctr. for Med. Progress*, No. 15-cv-3522, 2018 WL 5879786, at *11 (N.D. Cal. Nov. 7, 2018) (continuing to apply nonsuit standard "flies in the face" of *Planned Parenthood*); with *Todd* v. *Lovecruft*, No. 19-cv-1751, 2020 WL 60199, at *7-8 (N.D. Cal. Jan. 6, 2020) (lengthy analysis regarding why California standard applies).

In addition, application of the fee-shifting provision under the federal paradigm has confused district courts. Some courts continue to follow the California standard that only fees incurred with the motion are recoverable. *Bacudio* v. *Contreras*, No. 24-cv-628, 2024 WL 4328824, at *13 (C.D. Cal. Sept. 20, 2024). But other courts hold that all fees incurred in the lawsuit must be awarded. *Monteleone* v. *Goldberg*, No. 25-cv-5557, 2025 WL 3773035, at *6 (C.D. Cal. Dec. 16, 2025); *Herring Networks, Inc.* v. *Maddow*, No. 19-cv-1713, 2021 WL 409724, at *9 (S.D. Cal. Feb. 5, 2021). The Ninth Circuit has affirmed these broad fee awards, but only in unpublished cases. *Gunn* v. *Drage*, No. 20-16046, 2023 WL 3043651 (9th Cir. Apr. 21, 2023).

More, the Ninth Circuit has never addressed whether federal district courts must award anti-SLAPP fees after dismissing a case on other grounds

in a published case. In the instances where the issue has presented itself to the Ninth Circuit, the court has taken inconsistent positions. See *McMillan* v. *Chaker*, 791 F. App'x 666 (9th Cir. 2020) (affirming denial of anti-SLAPP motion as moot); *Mireskandari* v. *Associated Newspapers, Ltd.*, 665 F. App'x 570 (9th Cir. 2016) (dismissing appeal for lack of jurisdiction after plaintiff dismissed case); but see *Wealthy, Inc.* v. *Mulvehill*, No. 23-16132, 2026 WL 544972, at *1 n.1 (9th Cir. Feb. 25, 2026) (reversing denial of motion as moot and remanding for determination of fees).

Finally, beginning in 2022, a new push emerged to extract California's anti-SLAPP statute from federal court in toto. In *CoreCivic, Inc.* v. *Candide Group, LLC*, 46 F.4th 1136, 1140 (9th Cir. 2022), the defendant argued that the California anti-SLAPP statute's application in federal court violated this Court's decision in *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393 (2010). The Ninth Circuit panel, however, concluded that its anti-SLAPP jurisprudence was not "clearly irreconcilable" with *Shady Grove*, and so it could not overrule that jurisprudence on its own authority. *CoreCivic*, 46 F.4th at 1140.

In *Martinez* v. *ZoomInfo Technologies, Inc.*, 82 F.4th 785 (9th Cir. 2023), Judges McKeown and Desai wrote two separate concurring opinions arguing that the Ninth Circuit's anti-SLAPP jurisprudence—specifically the allowance of an interlocutory appeal—should be reevaluated en banc. See *id.* at 794-95 (McKeown, J., concurring); *id.* at 796-97 (Desai, J.,

concurring). When the case proceeded en banc, the en banc panel ordered the parties to brief "(1) whether California's anti-SLAPP statute applies in federal court, and (2) whether the denial of a motion to strike under California's anti-SLAPP statute is immediately appealable under the collateral order doctrine." Order, *Martinez* v. *ZoomInfo Techs, Inc.*, No. 22-35305, ECF No. 76 (9th Cir. Nov. 14, 2023). The case, however, was ultimately dismissed based on the parties' settlement. *Martinez* v. *ZoomInfo Techs., Inc.*, 122 F.4th 739, 740 (9th Cir. 2024).

In the next anti-SLAPP case, the Ninth Circuit ordered the parties to brief the same issue and took the case en banc in the first instance. Order, *Gopher Media LLC* v. *Melone*, No. 24-2626, ECF No. 49 (9th Cir. Nov. 5, 2024); *Gopher Media LLC* v. *Melone*, 129 F.4th 1196 (9th Cir. 2025). However, instead of resolving the key question, the en banc panel ultimately chose to "assume" that California's anti-SLAPP statute applies in federal court and to address solely the narrower issue of whether the collateral order doctrine permits interlocutory appeals from the denial of an anti-SLAPP motion. *Gopher Media LLC* v. *Melone*, 154 F.4th 696, 699-702 & n.2 (9th Cir. 2025).

Under that "assum[ption]," the en banc panel chose not to revisit its holding that, under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), certain aspects of the anti-SLAPP statute can be applied in federal court. *See id.* at 699 n.2 (citing *United States ex rel. Newsham* v. *Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999)). In addition, Judge Bennett, joined by

Judge Callahan, wrote separately to stress that California's anti-SLAPP statute provides substantive rights that must apply in federal court. *Id*. at 704-09 (Bennett, J., concurring). In contrast, Judge Bress, joined by Judge Collins, Judge Lee, and Judge Bumatay, wrote separately to argue that California's anti-SLAPP statute is entirely procedural and should not be applied in federal court. *Id*. at 709-21 (Bress, J., concurring).

And district courts have not hesitated to subsequently complain that the Ninth Circuit's most recent ruling "vastly understates the disruption when federal courts apply the California anti-SLAPP statute." *Zvik* v. *Roth*, No. 25-cv-3807, 2026 WL 504764, at *2 n.4 (N.D. Cal. Feb. 24, 2026) (quoting *Makaeff* v. *Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring)).

II. THE CIVIL ACTION OF DR. JOSEPH NICOLOSI AND THE REINTEGRATIVE THERAPY ASSOCIATION.

The Ninth Circuit's "hybrid" anti-SLAPP jurisprudence is constantly evolving, often to the detriment of politically disfavored voices. See, *e.g.*, *Herring Networks, Inc.* v. *Maddow*, 8 F.4th 1148 (9th Cir. 2021); *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 890 F.3d 828 (9th Cir. 2018). As one illustration of how this "hybrid mess" has operated practically, Amicus presents *Reintegrative Therapy Ass'n* v. *Kinitz*, No. 21-cv-1297 (S.D. Cal. July 20, 2021), as a case study.

Dr. Nicolosi is a licensed clinical psychologist in California and a recognized expert in evidence-based psychotherapy associated with changes in clients' sexual attractions. He is also the founder and president of the board of Reintegrative Therapy Association, Inc., a California 501(c)(3) non-profit corporation that offers training in Reintegrative Therapy® psychological services to mental health professionals who treat individuals seeking healing from addiction and trauma.

In 2012, when California banned so-called "conversion therapy" for minors, Cal. Bus. & Prof. Code § 865, Dr. Nicolosi and the Reintegrative Therapy Association confirmed that none of the therapy they provide fits that statutory definition. Specifically, they never make sexual-orientation change a goal of treatment, even though Reintegrative Therapy® has been shown to produce significant changes in sexual attraction as a *byproduct*, rather than a *goal*.

Nevertheless, in a January 2021 publication, Canadian researchers characterized "reintegrative therapy" as a form of "conversion therapy"—"a set of pseudo-scientific, discredited practices." David J. Kinitz & Travis Salway, et al., *The scope and nature of sexual orientation and gender identity and expression change efforts: a systematic review protocol*, 10 Syst. Rev. 14 (2021). As a result of this gross misrepresentation of Reintegrative Therapy®, on July 20, 2021, Dr. Nicolosi and the Reintegrative Therapy Association filed a federal action against Mr. Kinitz

and Dr. Salway in the U.S. District Court for the Southern District of California. See Complaint, *Reintegrative Therapy Ass'n* v. *Kinitz*, No. 21-cv-1297, ECF No. 1 (S.D. Cal. July 20, 2021). Mr. Kinitz and Dr. Salway each responded to the complaint with a combined (1) motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), (2) motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), and (3) California anti-SLAPP motion. *Id*. at ECF Nos. 9, 30.

On September 26, 2022, the district court granted the motion to dismiss for lack of personal jurisdiction, with leave to amend to attempt to cure the jurisdictional deficiencies, and denied as moot the motion to dismiss for failure to state a claim and anti-SLAPP motion. *Reintegrative Therapy Ass'n, Inc.* v. *Kinitz*, No. 21-cv-1297, 2022 WL 4490149 (S.D. Cal. Sept. 26, 2022). Instead of amending, Dr. Nicolosi dismissed the action pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i).

Mr. Kinitz and Dr. Salway then appealed the denial of their anti-SLAPP motion as moot. *Reintegrative Therapy Ass'n, Inc.* v. *Kinitz*, No. 22-56009 (9th Cir. Oct. 28, 2022). They argued that the district court was required to rule on the anti-SLAPP motion for purpose of determining whether to award fees. Under California law, if an action is dismissed prior to resolution of an anti-SLAPP motion, California courts still retain jurisdiction to rule substantively on the motion to determine who *would have* succeeded. As part of the fee motion, California

courts are required to issue an advisory opinion concerning whether the motion would have succeeded, and award fees accordingly. See *Moore* v. *Liu*, 69 Cal. App. 4th 745, 752 (1999).

Under this rule, "a plaintiff's voluntary dismissal of a suit, after a section 425.16 motion to strike has been filed, neither automatically precludes a court from awarding a defendant attorney's fees and costs under that section, nor automatically requires such an award." *Id*. at 753. Dr. Nicolosi argued, in contrast, that this rule could not apply in federal court once the case had been dismissed because the federal courts lost jurisdiction and because the courts are prohibited from issuing advisory opinions. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 84, 94-95 (1998).

Although the appeal was argued in November 2023, the Ninth Circuit deferred ruling pending a final en banc decision in two other anti-SLAPP appeals. Ultimately, on June 3, 2026, in an unpublished decision, the Ninth Circuit reversed the district court's denial of the anti-SLAPP motion as moot and remanded. *Reintegrative Therapy Ass'n, Inc.* v. *Kinitz*, No. 22-56009, 2026 WL 1591571 (9th Cir. June 3, 2026). Citing only California law, the Ninth Circuit held that "[t]he district court retained jurisdiction to award attorneys' fees and was required to rule on the merits of Appellants' special motions to strike." *Id*. at *2. Following the grant of an extension of time, a petition for rehearing en banc will be timely filed.

During this briefing, it became clear that two additional issues will complicate Ninth Circuit anti-SLAPP jurisprudence going forward. First, as stated, there is no published Ninth Circuit ruling addressing whether or how to adjudicate a pending anti-SLAPP motion in a case that has been dismissed on other grounds. California case law requires the court to adjudicate the motion as part of the fee award, granting fees only if the motion would have been granted. But such a procedure conflicts with settled jurisprudence on the jurisdiction of federal courts. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 84, 94-95 (1998). More, once a case is dismissed for lack of jurisdiction, a fee-shifting statute must provide an independent source of jurisdiction in order for a court to award fees. *Zambrano* v. *I.N.S.*, 282 F.3d 1145, 1150 (9th Cir. 2002). Yet a state statute definitionally cannot serve as that independent source of jurisdiction.

Second, under state substantive law, personal jurisdiction cannot be challenged via an anti-SLAPP motion. California views "defenses" as "substantive resistance to a complaint," including "lack of consideration, duress, privilege, and estoppel," and "lack of *subject matter* jurisdiction." *Roy* v. *Superior Ct.*, 127 Cal. App. 4th 337, 341-43 & n.5 (2005). But California law does not treat "*personal* jurisdiction" as a defense. *Id.* Thus, the "exclusive" means of challenging personal jurisdiction is a motion to quash and immediate interlocutory appeal, pursuant to Cal. Code Civ. Proc. § 418.10. See *Roy*, 127 Cal. App. 4th at 341-43 & n. 5.

As a defense, subject matter jurisdiction may be challenged via any motion—a demurrer, anti-SLAPP motion, or summary judgment, *Barry* v. *State Bar of Cal.*, 2 Cal. 5th 318, 328 (2017)—but personal jurisdiction may not, and thus is excluded from the anti-SLAPP motion. *ViaView, Inc.* v. *Retzlaff*, 1 Cal. App. 5th 198, 219 (2016) (declining to rule on SLAPP motion after granting motion to quash). Thus, it appears that the Ninth Circuit is poised to expand anti-SLAPP jurisprudence even further beyond what would be permitted in state court.

III. THE COURT SHOULD GVR OR SUMMARILY REVERSE THE NINTH CIRCUIT TO RESOLVE THE ANTI-SLAPP "HYBRID MESS."

Summary reversal is most appropriate in cases that are "important but not complex." Richard C. Chen, *Summary Dispositions As Precedent*, 61 Wm. & Mary L. Rev. 691, 722 (2020). In that context, this Court has not hesitated to summarily correct a persistent problem whose solution is particularly simple. See, *e.g.*, *Mirabelli* v. *Bonta*, 607 U.S. 492, 499 (2026) (Barrett, J., concurring) (result is "dictated by existing law"); *Wis. Legislature* v. *Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam) ("Summarily correcting the error gives the court sufficient time").

Here, the dispute between the various circuits on applicability of anti-SLAPP statutes in federal court is well-entrenched and has percolated for many years. See Pet., 11-29. The Ninth Circuit has led the way in

attempting to find some way of applying state anti-SLAPP statutes in federal court, but its efforts have simply made a "hybrid mess." *Gopher Media LLC* v. *Melone*, 154 F.4th 696, 717 (9th Cir. 2025) (Bress, J., concurring) (quoting *Makaeff* v. *Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Paez, J., concurring)). Resolution of that mess is simple: anti-SLAPP statutes cannot apply in federal court. As Judge Bress noted,

> There is really nothing new to think about here. Chief Judge Kozinski, Judge Watford, our sister circuits, and many others have identified the clear path for holding that under *Shady Grove* and *Hanna* v. *Plumer*, California's anti-SLAPP statute cannot apply in federal court, where the Federal Rules of Civil Procedure reign.

Id. at 716 (Bress, J., concurring).

Thus, *Amicus* respectfully urges the Court to grant certiorari and summarily reverse the Ninth Circuit, adopting the common-sense rule that "[t]he answer is no," anti-SLAPP statutes do not apply in federal court. See *Abbas* v. *Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (Kavanaugh, J.). At the very least, the Court should GVR the case for reconsideration in light of *Berk* v. *Choy*, 607 U.S. 187 (2026).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEFFREY M. TRISSELL
Counsel of Record
CHARLES S. LiMANDRI
PAUL M. JONNA
LiMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
(858) 759-9930

THOMAS BREJCHA
PETER BREEN
THOMAS MORE SOCIETY
121 West Wacker Drive
Suite 650
Chicago, IL 60601
(312) 782-1680
Counsel for Amicus Curiae