No. 21-15690

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANET AID, INC. AND LISBETH THOMSEN,

Plaintiffs-Appellants,

v.

REVEAL, CENTER FOR INVESTIGATIVE REPORTING,
MATT SMITH, AND AMY WALTERS

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 17-cv-03695-MMC, Hon. Maxine Chesney

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 32 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEES SEEKING AFFIRMANCE

Katie Townsend
Sarah S. Matthews
Charles Hogle*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
**Of counsel*

Theodore J. Boutrous, Jr.
Counsel of Record
Michael H. Dore
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
TBoutrous@GibsonDunn.com

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Reporters Committee for Freedom of the Press states that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

The Atlantic Monthly Group LLC is a privately-held media company, owned by Emerson Collective and Atlantic Media, Inc. No publicly held corporation owns 10% or more of its stock.

BuzzFeed Inc. is a privately owned company, and National Broadcasting Company (NBC) owns 10% or more of its stock.

Cable News Network, Inc. ("CNN") is a Delaware corporation that owns and operates numerous news platforms and services. CNN is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded corporation. AT&T Inc. has no parent company and, to the best

of CNN's knowledge, no publicly held company owns ten percent or more of AT&T Inc.'s stock.

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

The Center for Public Integrity is a nonprofit organization with no parent corporation and no stock.

Courthouse News Service is a privately held corporation with no parent corporation and no publicly held corporation holds more than 10 percent of its stock.

Dow Jones & Company, Inc. ("Dow Jones") is an indirect subsidiary of News Corporation, a publicly held company. Ruby Newco, LLC, an indirect subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. News Preferred Holdings, Inc., a subsidiary of News Corporation, is

the direct parent of Ruby Newco, LLC. No publicly traded corporation currently owns ten percent or more of the stock of Dow Jones.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the parties' or amicus' stock.

Freedom of the Press Foundation does not have a parent corporation, and no publicly held corporation owns 10% or more of the stock of the organization.

Hearst Corporation is privately held and no publicly held corporation owns 10% or more of Hearst Corporation.

Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

The Foundation for National Progress, dba Mother Jones, is a nonprofit, public benefit corporation. It has no publicly-held shares.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the parties' or amicus' stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News Leaders Association has no parent corporation and does not issue any stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

Pro Publica, Inc. ("ProPublica") is a Delaware nonprofit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Reuters News & Media Inc. is a Delaware corporation whose parent is Thomson Reuters U.S. LLC, a Delaware limited liability company. Reuters News & Media Inc. and Thomson Reuters U.S. LLC are indirect and wholly owned subsidiaries of Thomson Reuters Corporation, a publicly-held corporation, which is traded on the New York Stock Exchange and Toronto Stock Exchange. There are no intermediate parent corporations or subsidiaries of Reuters News & Media Inc. or Thomson Reuters U.S. LLC that are publicly held, and there are no publicly-held companies that own 10% or more of Reuters News & Media Inc. or Thomson Reuters U.S. LLC shares.

The Seattle Times Company: The McClatchy Company, LLC owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

VICE Media is a wholly-owned subsidiary of Vice Holding Inc., which is a wholly-owned subsidiary of Vice Group Holding Inc. The Walt Disney Company is the only publicly held corporation that owns 10% or more of Vice Group Holding Inc.'s stock.

WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

WNET is a not-for-profit organization, supported by private and public funds, that has no parent company and issues no stock.

Dated: November 3, 2021

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (*continued*)

Page(s)

TABLE OF AUTHORITIES (*continued*)

Page(s)

STATUTES

TABLE OF AUTHORITIES (*continued*)

IDENTITY AND INTEREST OF AMICI CURIAE AND SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici are the Reporters Committee for Freedom of the Press, The Associated Press, Association of Alternative Newsmedia, The Atlantic Monthly Group LLC, BuzzFeed, Cable News Network, Inc., California News Publishers Association, Californians Aware, The Center for Public Integrity, Courthouse News Service, Dow Jones & Company, Inc., First Amendment Coalition, Freedom of the Press Foundation, Hearst Corporation, Los Angeles Times Communications LLC, Mother Jones, MPA – The Association of Magazine Media, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The New York Times Company, The News Leaders Association, News Media Alliance, POLITICO LLC, ProPublica, Reuters News & Media Inc., The Seattle Times Company, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, Vice Media Group, The Washington Post, and WNET (collectively, "Media Amici"). A supplemental statement of identity and interest of amici is included as an Appendix.

As members and representatives of the news media, Media Amici are the frequent targets of strategic lawsuits against public

participation ("SLAPPs") designed to punish and deter constitutionally protected newsgathering and reporting activities. Media Amici therefore have a strong interest in ensuring that federal courts sitting in diversity properly interpret and apply the substantive provisions of state anti-SLAPP laws.

Plaintiff-Appellants Planet Aid, Inc. and Lisbeth Thomsen as well as *amici curiae* Clare Locke LLP and the Liberty, Life and Law Foundation contend that California citizens should be stripped of all anti-SLAPP protections afforded them under state law when sued in federal court based on diversity jurisdiction. If the Court adopted this position—which is inconsistent with prior Ninth Circuit precedent—it would have broad ramifications for the press and Media Amici specifically, emboldening plaintiffs to pursue harassing and meritless federal court litigation that evades and thwarts substantive state law and policy and that could impair their ability to report the news and keep the public informed. Media Amici therefore have a substantial interest in this issue and write to assist the Court to the extent the Court considers it as part of this appeal.

Media Amici have obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Media Amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person, other than amicus the Reporters Committee, its members or counsel, contributed money intended to fund preparing or submitting this brief.

INTRODUCTION

Plaintiffs-Appellants Planet Aid and Lisbeth Thomsen (collectively, "Planet Aid") spend a mere footnote questioning whether California's anti-SLAPP law should apply in federal court. Opening Br. at 15 n.2. That is insufficient to raise the issue on appeal. *See, e.g.*, *Rodriguez v. Airborne Express*, 265 F.3d 890, 894 n.2 (9th Cir. 2001). But even if the Court considers the issue to which Planet Aid devotes only a few sentences of its 65-page brief, the panel is bound to resolve it the way multiple panels of this Court have for decades: California's anti-SLAPP statute applies in federal diversity actions. That is what this Court's precedent requires, and it is the correct interpretation of the law.

Almost thirty years ago, the California Legislature enacted a statute that expressly sought to stem the "disturbing increase" in strategic lawsuits against public participation—known as "SLAPPs." Plaintiffs bring these lawsuits "primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16(a). The California Legislature recognized that just the cost of defending a lawsuit can significantly restrain speech. A citizen in the town square

is more likely to stay silent about a matter of public concern, a journalist more likely to put down her pen, if the subject of her constitutionally protected speech can bankrupt her with a baseless lawsuit.

The California Legislature thus expressly declared "that it is in the public interest to encourage continued participation in matters of public significance." *Id.* To do that, the anti-SLAPP law created a particularly crucial right for prevailing defendants that would be eliminated if—as Planet Aid and its supporting *amici* advocate—no provision of California's anti-SLAPP law could apply in federal court: it entitled them to recover attorney's fees and costs.

Fee shifting helps non-affluent defendants in SLAPP suits secure representation by offering a way for their lawyers to be paid. It also causes a potential plaintiff to think twice before bringing a lawsuit to chill speech. Rather than just pay for the plaintiff's own lawyers to prosecute the SLAPP suit, the plaintiff targeting speech could be on the hook for the significant sums that news organizations, journalists, and others must pay to fend off meritless litigation meant to silence them.

The statutory right to recover attorney's fees is directly linked to the specific policy interest California sought to advance with its anti-SLAPP law. Not every prevailing defendant is entitled to

attorney's fees, nor even every defendant in a defamation case. The statute creates a substantive right to attorney's fees only where the defendant prevails in an action arising from any act in furtherance of her "right of petition or free speech under the United States Constitution or the California Constitution *in connection with a public issue*." Cal. Civ. Proc. Code § 425.16(b)(1) (emphasis added).

This Court held decades ago that California's anti-SLAPP statute "is crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'" *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (quoting Cal. Civ. Proc. Code § 425.16(a)). It is no surprise, then, that in *Newsham*, in *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828, 834 (9th Cir. 2018), and as recently as a few months ago in *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1156 (9th Cir. 2021), Ninth Circuit panels have adhered to the view that the core substantive elements of the anti-SLAPP statute—particularly its fee shifting provision—apply in federal diversity actions.

These decisions bind the panel. In this case, under the Court's precedent, the district court was required to—and did—recognize that anti-SLAPP motions must be assessed using the standards established under either Rule 12 or Rule 56 of the Federal Rules of Civil Procedure. This Court's approach to applying the anti-SLAPP statute in diversity actions aims to avoid any conflict with the Federal Rules, prevent forum shopping, and fully comport with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Nothing about the Supreme Court's holding in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), undermines this approach, which this Court has reiterated multiple times after that decision.

Indeed, the Federal Rules say nothing about SLAPPs, let alone what rights a defendant has when she defeats such a lawsuit targeting the exercise of her core constitutional freedoms that the California Legislature sought to protect. And this Court has made clear that "federal law establishes that attorney's fees law is substantive for *Erie* purposes." *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 973 (9th Cir. 2013) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). A prevailing SLAPP defendant's entitlement to attorney's fees plays no role in determining *how* a court decides the

motion or otherwise oversees the proceedings before it; rather, fee shifting reflects the California Legislature's policy judgment about the value of speech on a public issue.

That substantive policy judgment is deeply rooted in California law. As the California Supreme Court noted several years before the California Legislature passed the anti-SLAPP statute, "[t]he threat of a clearly nonmeritorious defamation action ultimately chills the free exercise of expression." *Baker v. L.A. Herald Exam'r*, 42 Cal. 3d 254, 268 (1986). Today there is a proliferation of defamation suits against journalists and news organizations that make California's substantive protections all the more necessary. Without them, California's policy objectives would be frustrated, and core constitutional freedoms would be threatened. As the California Supreme Court noted in *Baker*, "[t]o be truly free, the press must know it is free." *Id.* at 269.

In sum, this case does not implicate a conflict between state and federal procedural rules, let alone present this panel with the opportunity to overrule prior Ninth Circuit precedent. This Court should reject Planet Aid's fleeting invitation to do so.

ARGUMENT

This Circuit's well-established precedent entitled Defendants-Appellees Reveal, The Center for Investigative Reporting, and journalists Matt Smith and Amy Walters (collectively, "Reveal") to file a motion to strike under California's anti-SLAPP law. Planet Aid acknowledges that this is the law of the Circuit but seems to question whether the panel will determine "that it is bound by prior panel decisions." Opening Br. at 15 n.2. That, of course, is not an option. The law of this Circuit is clear, and the panel is bound to follow it. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc).

It is also correct. *Planned Parenthood* and *Herring*, which post-date the Supreme Court's *Shady Grove* decision, harmonize the Federal Rules of Civil Procedure with California's strong interest in, *inter alia*, providing mandatory fee shifting in SLAPP cases, consistent with *Erie*.

I. The panel is bound to follow this Court's precedent.

A. This Court has interpreted California's anti-SLAPP statute as not in conflict with the Federal Rules.

In *Planned Parenthood*, this Court held that "to prevent the collision of California state procedural rules with federal procedural rules, we will review anti-SLAPP motions to strike under different standards depending on the motion's basis." 890 F.3d at 833.

It distinguished between an anti-SLAPP motion brought as a facial attack on the pleading, which "must be treated in the same manner as a motion under Rule 12(b)(6)," and an anti-SLAPP motion presenting a factual challenge to the complaint, which "must be treated as though it were a motion for summary judgment." *Id.* at 833–34 (internal quotations omitted).

The Court in *Planned Parenthood* observed that this "interpretation eliminates conflicts between California's anti-SLAPP law's procedural provisions and the Federal Rules of Civil Procedure." 890 F.3d at 833. It thereby allows federal procedure to apply while preserving California law's substantive protections—in particular, the anti-SLAPP law's fee shifting provision. *See id.*[1]

Here, the district court properly recognized this Court's precedent, explaining that "where, as here, a defendant brings an anti-SLAPP motion based on a factual challenge to the allegations in the complaint, such motion 'must be treated as though it were a motion

[1] While there have been various calls to revisit this approach, *see, e.g.*, *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski, Ch. J., Paez, J., and Bea, J., dissenting from denial of rehearing en banc), this Court has never done so.

for summary judgment.'" *Planet Aid, Inc. v. Ctr. for Investigative Reporting*, No. 17-CV-03695-MMC, 2021 WL 1110252, at *25 (N.D. Cal. Mar. 23, 2021) (quoting *Planned Parenthood*, 890 F.3d at 834).

In doing so, the district court cited Rule 56 several times. *Planet Aid, Inc.*, 2021 WL 1110252, at *3 n.6, *12 n.17. It also framed the analysis in a way that matches up almost verbatim with Planet Aid's own statement of the law in its Opening Brief. *Compare id.* at *2 ("To show a reasonable probability of prevailing, the plaintiff 'must demonstrate that the complaint is legally sufficient and supported by prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'") (quoting *Metabolife Int'l Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001)) *with* Opening Br. at 15 ("Although the statute refers to a plaintiff having to show a 'reasonable probability of prevailing' at trial, this has been construed only to require at this stage a *prima facie* case sufficient to sustain a jury verdict . . . .") (emphasis in original).

In following this Court's application of the Rule 56 standard to Reveal's anti-SLAPP motion, the district court permitted more than two years of discovery and considered extensive evidence submitted by Plaintiffs-Appellants—including "declarations from thirty-five

witnesses with personal knowledge of the facts." *See* Opening Br. at 11–12 (describing the evidence presented and considered). It was on the basis of this evidence that the Court granted Reveal's anti-SLAPP motion. *Planet Aid*, 2021 WL 1110252, at *25.

B. There is no intervening authority that allows the panel to deviate from this Court's well-established precedent.

This Court is "bound by [its] prior opinion[s] unless an intervening case so undercuts the theory or reasoning underlying the prior circuit precedent as to make it clearly irreconcilable with that intervening authority." *United States v. Henderson*, 998 F.3d 1071, 1074 (9th Cir. 2021). "[T]he 'clearly irreconcilable' requirement 'is a high standard.'" *FTC v. Consumer Defense, LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) (quoting *Rodriguez v. AT&T Mobility Servs., LLC*, 728 F.3d 975, 979 (9th Cir. 2013)).

It is "not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citations omitted). "'So long as the court can apply [its] prior circuit

precedent without running afoul of the intervening authority it must do so.'" *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018).

Since this Court decided *Planned Parenthood*, neither the Supreme Court nor an en banc panel of this Court has issued an intervening decision that is clearly irreconcilable with *Planned Parenthood*. To the contrary, just three months ago in *Herring Networks*, this Court reaffirmed *Planned Parenthood*'s holding that California's anti-SLAPP statute applies in federal court. *Herring Networks*, 8 F.4th at 1155–56 (explaining that *Planned Parenthood*'s "'interpretation eliminates conflicts between California's anti-SLAPP law's procedural provisions and the Federal Rules of Civil Procedure'"). *Herring Networks* conclusively shows that *Planned Parenthood* is the law in this Circuit and binds this panel.[2]

---

[2] Planet Aid points to out-of-circuit, non-binding decisions to suggest that the panel should deviate from the Ninth Circuit precedent that Planet Aid concedes is applicable to its appeal. *See* Opening Br. at 15 (quoting *Planned Parenthood* for the proposition that where a prima facie case involves a factual determination, the anti-SLAPP motion "'must be treated as though it were a motion for summary judgment.'"). But none of the decisions cited by Planet Aid discussed the harmonizing interpretation that this Court used in *Planned Parenthood*.

Unable to refute this Court's well-established precedent holding that California's anti-SLAPP statute applies in federal court diversity actions, amicus Clare Locke LLP goes back more than a decade to invoke the Supreme Court's decision in *Shady Grove* as intervening authority that is clearly irreconcilable with this Court's case law. 559 U.S. at 393; *see* Opening Br. at 15 n.2; Clare Locke *Amicus* Br. at 15-16. That argument is wrong.

In *Shady Grove*, the Supreme Court considered whether the plaintiff's lawsuit could proceed as a class action. The Court held that Federal Rule of Civil Procedure 23 "provides a one-size-fits-all formula for deciding the class-action question," while a New York statute "attempts to answer the same question—*i.e.*, it states that Shady Grove's suit 'may *not* be maintained as a class action' because of the relief it seeks." 559 U.S. at 398–99 (emphasis in original). After emphasizing this conflict, the Court concluded that the New York statute did not apply in diversity suits. *Id.* at 399. It held that the state law could not limit the permission that Rule 23 gave to proceed by class action. *Id.* at 401.

Planned Parenthood is easily reconciled with *Shady Grove.* In *Shady Grove*, the Court noted that "even artificial narrowing cannot

render [the New York statute] compatible with Rule 23." 559 U.S. at 405. "*Whatever* the policies they pursue, they flatly contradict each other." *Id.* (emphasis in original). As Justice Stevens noted in his *Shady Grove* concurring opinion, the New York class action statute at issue "expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State," and "there is no interpretation from New York courts to the contrary." *Id.* at 432 (Stevens, J., concurring).

By contrast, nothing in *Planned Parenthood*'s interpretation of California's anti-SLAPP statute conflicts with the Federal Rules. In *Planned Parenthood*, this Court recognized—consistent with *Shady Grove*—that "if there is a contest between a state procedural rule and the federal rules, the federal rules of procedure will prevail." *Planned Parenthood*, 890 F.3d at 834. Indeed, *Planned Parenthood*'s conclusion regarding California's anti-SLAPP statute addresses the Supreme Court's reasoning in *Shady Grove*: To avoid a conflict between the state law and the Federal Rules of Civil Procedure, *Planned Parenthood* interpreted the anti-SLAPP statute in a way that "eliminates conflicts between [it] and the Federal Rules of Civil Procedure." *Id.* at 833; *Herring Networks*, 8 F.4th at 1156.

Perhaps the clearest indication that *Shady Grove* is consistent with this Court's application of California's anti-SLAPP statute in federal diversity actions is that *Shady Grove* is not an "intervening" decision that would enable this Court to deviate from its precedent. *Shady Grove*—issued on March 31, 2010—was decided *more than eight years before* this Court decided *Planned Parenthood* on May 16, 2018. Because *Planned Parenthood* "was decided well after [*Shady Grove*]," this Court is "obligated to follow" *Planned Parenthood*. *United States v. Johnson*, 889 F.3d 1120, 1133 n.4 (9th Cir. 2018) (O'Scannlain, J., concurring); *see Miller*, 335 F.3d at 900 (three-judge panel may reject prior opinion of this Court only where it is clearly irreconcilable with "*intervening* higher authority") (emphasis added).

That *Planned Parenthood* did not cite *Shady Grove* in its analysis does not affect the validity of its conclusion. Because *Planned Parenthood*'s analytical framework eliminates conflicts between California's motion-to-strike provision and the Federal Rules, it raises no questions that *Shady Grove* is equipped to answer. *Planned Parenthood* uses the methodology of the Federal Rules to adjudicate California's anti-SLAPP statute. Only after the court grants

the motion according to the Federal Rules standard and finds that the claims concerned speech or petitioning activity on a public issue is a prevailing defendant's right to attorney's fees triggered.

II. This Court's binding precedent holds that California's anti-SLAPP fee-shifting provision applies in federal diversity cases and respects California's substantive policy.

Planned Parenthood is not only binding on this panel but it also, importantly, reinforces this Court's well-established recognition that the substantive fee-shifting provision of California's anti-SLAPP law applies in federal diversity actions. And, by "eliminat[ing] conflicts between California's anti-SLAPP law's procedural provisions and the Federal Rules of Civil Procedure," *Herring Networks*, 8 F.4th at 1156, *Planned Parenthood* does so in a manner that is consistent with Supreme Court precedent. This Court should decline to nullify its long line of anti-SLAPP jurisprudence to reach a legally erroneous result.

Federal courts sitting in diversity "apply state substantive law and federal procedural law," *Hanna v. Plumer*, 380 U.S. 460, 465 (1965), using a two-step analysis to determine whether a state law applies. Courts first ask whether a Federal Rule "answers the question in dispute." *Shady Grove*, 559 U.S. at 398. If it does, the Federal Rule governs so long as it does not violate the Rules Enabling Act. *Id.*

Fee shifting under the anti-SLAPP statute does not "answer" any question resolved by the Federal Rules. Contrary to the argument made by *amicus* Clare Locke (p. 14), Federal Rule of Civil Procedure 11 has nothing to do with a litigant's rights when she defeats a California cause of action that targets her speech in connection with a public issue.

Rule 11 focuses on "representations to the court" during the course of a proceeding. Fed. R. Civ. P. 11(b) (capitalization omitted). It is procedural and "not tied to the outcome of [the] litigation." *Bus. Guides, Inc. v. Chromatic Commc'ns. Enters., Inc.*, 498 U.S. 533, 553 (1991). "Nor," under Rule 11, "do sanctions shift the entire cost of litigation; they shift only the cost of a discrete event." *Id.* Moreover, "the Rule calls only for 'an appropriate sanction'—attorney's fees are not mandated." *Id.* The Supreme Court could not be more clear: "'Rule 11 is not a fee-shifting statute . . . .'" *Id.* at 553 (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 409 (1990)).

By contrast, a statute like California's anti-SLAPP statute that "permits a prevailing party in certain classes of litigation to recover fees" is a "fee-shifting rule[] that embod[ies] a substantive policy." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991); *see In re S. Cal. Sunbelt Developers, Inc.*, 608 F.3d 456, 462 (9th Cir. 2010)

("Like other fee-shifting provisions and in contrast to Rule 11, eligibility for fees [under 11 U.S.C. § 303] turns on the merits of the litigation as a whole, rather than on whether a 'specific filing' is well founded.") (quoting *Bus. Guides*, 498 U.S. at 553); *see infra* Part II.A.

The anti-SLAPP statute's right to attorney's fees thus exists independent of the Federal Rules, like the rights to attorney's fees that this Court has allowed litigants to recover under other California laws without invoking Rule 11. *See, e.g.*, *Wilson v. Tesla, Inc.*, 833 F. App'x 59, 61 (9th Cir. 2020) (wage and hour); *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 809 (9th Cir. 2018) (civil rights); *CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1111 (9th Cir. 2007) (trade secret); *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478–79 (9th Cir. 1995) (age discrimination).

A. The California anti-SLAPP statute's fee-shifting provision embodies a substantive policy judgment of the California Legislature

Planned Parenthood did not merely avoid the "stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure." 890 F.3d at 834. It also promoted what this Court described in *Newsham* as the "twin aims" of the *Erie* doctrine—

"discouragement of forum-shopping and avoidance of inequitable administration of the law"—both of which "favor application of California's Anti-SLAPP statute in federal cases." *Newsham*, 190 F.3d at 973 (quoting *Hanna*, 380 U.S. at 468).

The fee-shifting provision is the substantive consequence of the California Legislature's decision to deter litigants from filing lawsuits to improperly chill someone's constitutional free speech rights in connection with a public issue. Without it, the core protection that the California Legislature enacted to protect speech on public issues would vanish for many journalists and other defendants in this Circuit. The California Legislature's critical protection in furtherance of what it determined to be "the public interest" would exist in a state courthouse but not in a federal courthouse next door.

That inequitable result would conflict with this Court's precedent and common sense. The fee-shifting provision in California's anti-SLAPP statute is designed to achieve the fundamentally substantive objective of minimizing SLAPP suits that chill the exercise of core constitutional rights. *See Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) ("[S]tate 'regulation can be . . . effectively exerted through an award of damages,' and '[t]he obligation to pay

compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'") (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1950)).

In fact, the Supreme Court has made clear that state laws providing for the recovery of attorney's fees "reflect[] a substantial policy of the state" because they further state policies governing litigation. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975); *see also Newsham*, 190 F.3d at 971–73 (holding that attorney's fees are recoverable and referring to the anti-SLAPP statute as articulating "substantive state interests.").

In *People of Sioux County v. National Surety Co.*, 276 U.S. 238 (1928), for example, the Supreme Court held that a state statute requiring an award of attorney's fees should be applied in a case removed from state courts to federal courts. *Id.* at 243. According to the *Sioux County* Court, "[i]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases." *Id.* The Court emphasized that "[i]t would be at least anomalous if this policy could be thwarted and

the right so plainly given destroyed by removal of the cause to the federal courts." *Id.*

While the Court decided *Sioux County* prior to *Erie*, it saw "nothing after *Erie* requiring a departure from [*Sioux City*'s] result." *Alyeska Pipeline*, 421 U.S. at 259 n.31. Indeed, this Court has held—after both *Erie* and *Shady Grove*—that the question of whether federal law or state law applies to an attorney's fees award is "easily answered." *Alaska Rent-A-Car, Inc.*, 738 F.3d at 973. Simply put, "federal law establishes that attorney's fees law is substantive for *Erie* purposes." *Id.*

B. The California Legislature's anti-SLAPP policy objectives are more crucial now than ever.

The anti-SLAPP statute's fee shifting provision is the perfect embodiment of this substantive right, reflecting the California Legislature's clear policy judgment that "it is in the public interest to encourage continued participation in matters of public significance." Cal. Civ. Proc. Code § 425.16(a). That statutory protection is essential. News organizations and reporters live under constant threat of litigation—including entirely meritless claims aimed only at retaliating for unflattering stories. *See New York Times v. Sullivan*, 376 U.S. 254, 278 (1964) ("Whether or not a newspaper can survive a succession of

such [civil libel] judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.").

That threat is growing. In the past several years, journalists have faced a proliferation of retaliatory and meritless lawsuits. *See, e.g.*, *Herring Networks*, 8 F.4th at 1161 (affirming dismissal of SLAPP targeting discussion related to Russian interference in the 2016 presidential election and holding that Rachel Maddow's "statement is well within the bounds of what qualifies as protected speech under the First Amendment"); *CoreCivic, Inc. v. Candide Grp., LLC*, 2021 WL 1267259, at *1 (N.D. Cal. Apr. 6, 2021) (dismissing SLAPP aimed at reporting on investment in the private prison industry); *Mossack Fonseca & Co., S.A. v. Netflix Inc.*, 2020 WL 8510342, at *3 (C.D. Cal. Dec. 23, 2020) (SLAPP suit involving a film documenting "the story of the documents known as the Panama Papers" which "revealed how Panamanian law firm Mossack Fonseca illegally funneled money from the wealthy in Panama and worldwide"); *Sarver v. Chartier*, 813 F.3d 891, 902 (9th Cir. 2016) (SLAPP suit targeting reporting on the conduct of the Iraq war).

This case itself is powerful validation of the California's Legislature's conclusion that an anti-SLAPP statute was necessary. As Center for Investigative Reporting's (CIR) Senior Advisor and former CEO Christa Scharfenberg explained to the district court, "[t]his lawsuit . . . threatened the existence of CIR. CIR has a modest annual budget" and this lawsuit caused its "available insurance proceeds [to be] nearly exhausted." Decl. of Christa Scharfenberg ¶ 4, *Planet Aid Inc. v. Reveal, Ctr. for Investigative Reporting*, No. 17-cv-03695-MMC (No. 316-5).

CIR is not alone. Media organizations across the country have described the devastating toll that SLAPPs have taken on their ability to continue reporting the news. *See, e.g.*, Meagan Flynn, *A small-town Iowa newspaper brought down a cop. His failed lawsuit has now put the paper in financial peril*, The Washington Post (Oct. 10, 2019), https://www.washingtonpost.com/nation/2019/10/10/iowa-newspaper-cop-investigation-leads-libel-lawsuit-financial-peril/ ("The legal victory was welcome, . . . but more than a year later, the paper has still not caught up financially."); Clara Jeffery & Monika Bauerlein, *We Were Sued by a Billionaire Political Donor. We Won. Here's What Happened*, Mother Jones (Oct. 8, 2015),

https://www.motherjones.com/media/2015/10/mother-jones-vandersloot-melaleuca-lawsuit/ ("*Mother Jones* and our insurance company have had to spend at least $2.5 million defending ourselves.").

The threat that these SLAPP suits pose goes well beyond the individual news publications or journalists in a given case. As the Supreme Court repeatedly has made clear, "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, *an opportunity essential to the security of the Republic*, is a fundamental principle of our constitutional system." *Sullivan*, 376 U.S. at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)) (emphasis added); *see also Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 346 (2019) (Alito, J., dissenting from denial of certiorari) ("The constitutional guarantee of freedom of expression serves many purposes, but its most important role is protection of robust and uninhibited debate on important political and social issues. If citizens cannot speak freely and without fear about the most important issues of the day, real self-government is not possible." (internal citations omitted)).

The robust anti-SLAPP protection of fee shifting for which the California Legislature declared a need nearly thirty years ago is truly indispensable now. More important for purposes of this appeal, it is exactly what this Court's binding precedent requires and perfectly consistent with *Shady Grove*.

CONCLUSION

Planet Aid's footnote in its Opening Brief does not sufficiently raise in this appeal the issue of whether California's anti-SLAPP statute applies in federal court diversity actions. But even if it did, this Court's binding precedent dictates that the panel follow *Planned Parenthood* and other Ninth Circuit precedent in applying to diversity suits the California anti-SLAPP law that protects core constitutional freedoms.

Dated: November 3, 2021

Respectfully submitted,

s/ Theodore J. Boutrous, Jr.

THEODORE J. BOUTROUS, JR.
MICHAEL H. DORE
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
TBoutrous@GibsonDunn.com

KATIE TOWNSEND
SARAH S. MATTHEWS
CHARLES HOGLE*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
ktownsend@rcfp.org
**Of counsel*

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Brief of Reporters Committee for Freedom of the Press and 32 Media Organizations as *Amicus Curiae* in Support of Appellees Seeking Affirmance is proportionately spaced, has a typeface of 14 points, and contains 6,985 words, excluding the portions excepted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count feature of Microsoft Word used to generate this brief.

Dated: November 3, 2021

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, I filed the foregoing Brief of Reporters Committee for Freedom of the Press and 32 Media Organizations as *Amicus Curiae* in Support of Appellees Seeking Affirmance with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 3, 2021

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

APPENDIX

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association that provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association which represents nearly 100 alternative newspapers across North America. There are a wide range of publications in AAN, but all share an intense focus on local news, culture and the arts; an emphasis on point-of-view reporting and narrative journalism; a tolerance for individual freedoms and social

differences; and an eagerness to report on issues and communities that many mainstream media outlets ignore. AAN members speak truth to power.

The Atlantic Monthly Group LLC is the publisher of The Atlantic and TheAtlantic.com. Founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others, The Atlantic continues its 160-year tradition of publishing award-winning journalism that challenges assumptions and pursues truth, covering national and international affairs, politics and public policy, business, culture, technology and related areas.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Cable News Network, Inc. ("CNN"), a Delaware corporation, is a portfolio of two dozen news and information services across cable, satellite, radio, wireless devices and the Internet in more than 200 countries and territories worldwide. Domestically, CNN reaches more individuals on television, the web and mobile devices than any other cable TV news organization in the United States; internationally, CNN

is the most widely distributed news channel reaching more than 271 million households abroad; and CNN Digital is a top network for online news, mobile news and social media. Additionally, CNN Newsource is the world's most extensively utilized news service partnering with hundreds of local and international news organizations around the world.

The California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 400 daily, weekly and student newspapers and news websites throughout California.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

The Center for Public Integrity was founded in 1989 by Charles Lewis. We are one of the country's oldest and largest

nonpartisan, nonprofit investigative news organizations and winner of the 2014 Pulitzer Prize for investigative journalism.

Courthouse News Service is a California-based legal news service that publishes a daily news website with a focus on politics and law. The news service also publishes daily reports on new civil actions and appellate rulings in both state and federal courts throughout the nation. Subscribers to the daily reports include law firms, universities, corporations, governmental institutions, and a wide range of media including newspapers, television stations and cable news services.

Dow Jones & Company is the world's leading provider of news and business information. Through The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open

government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Freedom of the Press Foundation ("FPF") is a non-profit organization that supports and defends public-interest journalism in the 21st century. FPF works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including building privacy-preserving technology, promoting the use of digital security tools, and engaging in public and legal advocacy.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in

Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

Los Angeles Times Communications LLC is one of the largest daily newspapers in the United States. Its popular news and information website, www.latimes.com, attracts audiences throughout California and across the nation.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

MPA – The Association of Magazine Media, ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic

excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO

has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

ProPublica is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won six Pulitzer Prizes, most recently a 2020 prize for national reporting, the 2019 prize for feature writing, and the 2017 gold medal for public service. ProPublica is supported almost entirely by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica has extensive regional and local operations, including ProPublica Illinois, which began publishing in late 2017 and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting, an initiative with the Texas Tribune, which launched in March 2020, and a series of Local Reporting Network partnerships.

Reuters, the news and media division of Thomson Reuters, is the world's largest multimedia news provider. Founded in 1851, it is committed to the Trust Principles of independence, integrity and

freedom from bias. With unmatched coverage in over 16 languages, and reaching billions of people worldwide every day, Reuters provides trusted intelligence that powers humans and machines to make smart decisions. It supplies business, financial, national and international news to professionals via desktop terminals, the world's media organizations, industry events and directly to consumers.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic* and *Walla Walla Union-Bulletin*, all in Washington state.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire

and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

VICE Media is the world's preeminent youth media company. It is a news, content and culture hub, and a leading producer of award-winning video, reaching young people on all screens across an unrivaled global network.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won Pulitzer Prizes for its journalism, including the award in 2020 for explanatory reporting.

WNET is the parent company of THIRTEEN, WLIW21, NJTV, Interactive Engagement Group and Creative News Group and the producer of approximately one-third of all primetime programming seen on PBS nationwide. Locally, WNET serves the entire New York

City metropolitan area with unique on-air and online productions and innovative educational and cultural projects. Over seven million viewers tune in to THIRTEEN, WLIW21 and NJTV each month, and the stations' websites reach another 480,000 people. The news programming produced by WNET affiliates includes PBS NewsHour Weekend, NJTV News, and MetroFocus.