No. _____

In The
Supreme Court of the United States

DAVID CHRISTOPHER HESSE,

Petitioner,

v.

JASON KANE HOWELL,

Respondent.

On Petition For Writ Of Certiorari To The Seventh Court Of Appeals At Amarillo, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are acting as a witness by swearing to facts, abusing process and committing crimes, acts that are foreign to the duties of a prosecutor? If so, is that prosecutor entitled to any immunity for those acts when they result in the wrongful attachment and incarceration of an individual?

2. Can Chapter 27, Texas Civil Practices and Remedies Code (Anti-SLAPP), preclude a 42 U.S.C. § 1983 suit against a prosecutor who, during the pendency of a contempt proceeding that he did not initiate, falsely swears to facts in an Application for Writ of Attachment, resulting in the attachment and arrest of a person who was never served with the Notice to Appear?

3. When a prosecutor commits felony and misdemeanor crimes in order to cause someone's false arrest, is that prosecutor entitled to absolute prosecutorial immunity or even to attorney immunity?

4. Can conduct by persons acting under color of state law, which is wrongful under § 1983, be immunized by state law even though the federal cause of action is being asserted in state court?

PARTIES TO THE PROCEEDING

David Christopher Hesse – Petitioner

Jason Kane Howell – Respondent

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Petitioner, David Christopher Hesse, respectfully petitions for a writ of certiorari to review the judgment of the Seventh Court of Appeals at Amarillo, Texas. (Appendix 1)

OPINIONS BELOW

The Order of the Texas Supreme Court denying the Petition for Review is unpublished and is at Appendix 27. The order of the Seventh Court of Appeals at Amarillo, Texas, denying the motion for rehearing is unpublished and is at Appendix 23. The opinion of the Seventh Court of Appeals at Amarillo, Texas, affirming the trial court's dismissal of Petitioner's lawsuit against Respondent is unpublished and is at Appendix 1. The final judgment in the trial court is unpublished and is at Appendix 25.

STATEMENT OF JURISDICTION

The Texas Supreme Court denied Petitioner's timely-filed Petition for Review on November 2, 2018. Appendix 27. No motion for rehearing was filed in the Supreme Court of Texas. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). This petition is timely filed.

RELEVANT CONSTITUTIONAL PROVISIONS

Article VI, Clause 2 to the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Article VI, cl. 2.

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. Amend. IV.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. V.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

On June 14, 2016, Judge Anna Estevez drafted and issued a Notice of Allegations of Contempt against Petitioner, as a result of conduct alleged to have occurred on April 11, 2016, before her in the 251st Judicial District Court of Potter County, Texas. The Notice set the hearing on the contempt for July 29, 2016, before a different judge.

In the Notice, Judge Estevez ordered that the Clerk of the Court cause a NOTICE OF SHOW CAUSE ORDER to be sent to the Respondent by certified mail, return receipt requested, at his current address according to the records of the District Clerk.

Even though there is no provision in State law allowing service of a Notice to Appear and Show Cause by certified mail, the Clerk did as ordered and mailed the Notice to Appear and Show Cause to Petitioner at 112 West 8th Street Amarillo, TX 79101. No suite number is shown on the Return Receipt, even though that address is a 10-story office building.

The Return Receipt was signed for by one Cathy Bears, whomever she may be and wherever she may be in the 10-story office building at 112 West 8th Street. The Return Receipt was not signed for by Petitioner.

Further, the Officer's Return on the Notice to Appear and Show Cause is blank – completely blank.

In July, the District Attorney of Potter County, Texas,[1] assigned Respondent, an Assistant District Attorney in his office, to prosecute the pending contempt against Petitioner.

Petitioner was never served with the Notice to Appear and Show Cause. Because he was never served and had no notice, Petitioner did not present himself in court on July 29, 2016.

There was no evidence of service of the Notice to Appear and Show Cause upon Petitioner to be found anywhere in the Court's file.[2] Even though the lack of service, personal or otherwise, upon Petitioner was apparent on the face of the documents within the Court's file, Respondent filed a sworn Application for (Writ of) Attachment, wherein he swore that "David Christopher Hesse was served with said notice by Certified Mail, but he failed to appear before this court."

The jurat states, in relevant part – "who being by me duly sworn, upon his oath deposes and says the matter and things set forth in the foregoing application for attachment are true and correct to the best of his knowledge and belief" – as though this language would vitiate or negate Respondent's perjury.

In that Application, Respondent prayed that "the Court grant this application and order an attachment

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[1] The formal name of the Office is 47th District Attorney as the jurisdiction of the office covers both Potter and Armstrong County. Source: http://www.co.potter.tx.us/page/potter.District.Attorney (last accessed January 4, 2019).

[2] *Supra*, regarding the green card and Officer's Return.

be issued for David Christopher Hesse, for his appearance before this Court to show cause why he has failed to appear as requested." As Petitioner was never served with the Notice to Appear, there was nothing to explain as to why he had not appeared.

An Order was signed, that day, on Respondent's Application. The Writ of Attachment issued and Petitioner was arrested on the Writ of Attachment on July 31, 2016. He was not released from jail until the afternoon of August 1, 2016.

Petitioner sued Respondent individually and in his official capacity as a prosecutor of the Potter County District Attorney's Office under 42 U.S.C. § 1983 for violating his civil and constitutional rights. He also sued Respondent for malicious prosecution and false imprisonment under state law.

Respondent answered and also filed a Motion under Chapter 27, Texas Civil Practices and Remedies Code, claiming *inter alia*, attorney immunity and prosecutorial immunity and that everything that he did was in the context of his right of free speech, right to petition or right of association. Respondent asserted Eleventh Amendment immunity in his answer but that issue was not addressed in the Motion under Chapter 27.

As additional support for his Motion to Dismiss, Respondent asserted that the trial judge "took judicial notice" of the "fact" that Petitioner had been served and that perjury would not attach to his affidavit because he had sworn to the facts "to the best of his knowledge and belief."

Petitioner responded to the Motion. Following a hearing, the motion to dismiss was granted.

Petitioner timely appealed to the Seventh Court of Appeals in Amarillo, which affirmed. The Supreme Court of Texas denied review.

This timely Petition results.

REASONS FOR GRANTING THE WRIT

The Texas courts have once again shown themselves to be unwilling to enforce this Court's pronouncements regarding Due Process rights, Constitutional rights and whether a state may immunize a state actor's conduct – that is wrongful under 42 U.S.C. § 1983 – by refusing to entertain that suit under the guise of a procedural rule.

Unlike the prosecutor in ***Imbler***,[3] Respondent did not initiate the original prosecution – Judge Anna Estevez did.

Respondent was not sued for malicious prosecution at the conclusion of the prosecution, as the prosecutor in ***Imbler*** was. Respondent was sued under 42 U.S.C. § 1983, for swearing out a false affidavit to procure (and procuring) Petitioner's attachment and arrest during the pendency of that original contempt prosecution in face of the fact that Petitioner was never

[3] ***Imbler v. Pachtman***, 424 U.S. 409 (1976).

served with notice requiring him to appear on July 29, 2016.

In the Application for Attachment and in the Order for the Attachment, Respondent requested that Petitioner be attached and be brought before the court to "show cause why he had not appeared as ordered." Respondent thereby effectively commenced another contempt proceeding against Petitioner with an attachment in contravention of this Court's pronouncements as to the Due Process rights of a contemnor,[4] and the rights of persons to be free from illegal seizures of their person.[5] Respondent also caused the first notice of Judge Estevez's contempt proceeding against Petitioner to be an attachment in contravention of this Court's pronouncements as to the Due Process rights of a contemnor,[6] and the rights of persons to be free from illegal seizures of their person.[7]

When Respondent falsely swore that Petitioner had been served with notice to appear and had that false affidavit filed among the court's papers, in order to have Petitioner attached and arrested, he actually committed three separate crimes.

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[4] *See* ***Cooke v. United States***, 267 U.S. 517, 537 (1925).

[5] *See* ***Monroe v. Pape***, 365 U.S. 167, 171 (1961), overruled on other grounds, ***Monell v. Dep't of Social Services of City of New York***, 436 U.S. 658 (1978).

[6] *See* ***Cooke v. United States***, 267 U.S. 517, 537 (1925).

[7] *See* ***Monroe v. Pape***, 365 U.S. 167, 171 (1961), overruled on other grounds, ***Monell v. Dep't of Social Services of City of New York***, 436 U.S. 658 (1978).

As committing crimes is foreign to the duties of every attorney, this Court should answer whether a prosecutor who commits crimes during a prosecution is entitled to absolute immunity or prosecutorial immunity for using those crimes to secure the false arrest and incarceration of a person.

This especially since this Court has held that when a prosecutor swears to facts, he thereby makes himself a witness – one not entitled to absolute immunity.[8] This Court should clarify whether its ***Kalina*** holding is limited to those situations wherein a prosecutor executes a certification for determination of probable cause or whether it extends to any document in which the prosecutor swears to facts in order to procure someone's arrest.

Further, this Court has held that, consistent with Due Process, a court may not start off a contempt proceeding against an attorney with an order of attachment and the arrest of the attorney.[9] This Court should clarify whether issuing a proper Notice to Appear and Show Cause but not serving same on the alleged contemnor, and then issuing and serving a Writ of Attachment on the alleged contemnor to appear and show cause why he did not appear, violates the holding of ***Cooke***.

Further still, this case presents an opportunity for this Court to decide whether a state may, through

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[8] ***Kalina v. Fletcher***, 522 U.S. 118 (1997).

[9] *See* ***Cooke v. United States***, 267 U.S. 517, 537 (1925).

passage of an Anti-SLAPP statute,[10] deny a person – whose federal constitutional rights are violated by a state actor – the right to sue for the damages caused him by that state actor, even when that state actor is nominally a prosecutor. Whether the constitutional rights asserted by Petitioner were "'given due recognition by the [Texas courts] is a question as to which the [Petitioner is] entitled to invoke this Court's judgment.'"[11]

And this Court should answer whether the Texas Anti-SLAPP statute conflicts with 42 U.S.C. § 1983 to the extent that it precludes liability against (immunizes) state actors who cause citizens of the United States to be subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws through pleadings or other documents filed during a legal proceeding.

I. State Actor Acting Under Color Of Law.

Respondent is the Assistant District Attorney of Potter County who was assigned to and did prosecute the contempt against Petitioner.

A government official in the role of personal-capacity defendant fits within the statutory term "person."[12] As such, Respondent could be sued under 42

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[10] Chapter 27, TEX. CIV. PRAC. & REM. CODE (2011).

[11] *See* ***Howlett By and Through Howlett v. Rose***, 496 U.S. 356 (1990).

[12] ***Hafer v. Melo***, 502 U.S. 21, 27 (1991).

U.S.C. § 1983 for the actions he took to cause Petitioner to be attached and arrested if, as here, the actions he took were not privileged and criminal. And, as a prosecutor, he had a non-discretionary duty not to violate the Constitution.[13]

II. Duties of an Attorney.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society.[14] In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law.[15]

As to what the bounds of the law are, in Texas, a "lawyer shall not commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; or engage in conduct constituting obstruction of justice."[16] And "shall" impose a duty.[17] Perforce, a felony, any felony, is a serious crime.

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[13] ***Owen v. City of Independence***, 445 U.S. 622, 649-650 (1980).

[14] TEX. GOVT. CODE T. 2, Subt. G App. A, Art. 10, § 9, Preamble.

[15] *Id.*

[16] TEX. GOVT. CODE T. 2, Subt. G App. A, Art. 10, § 9, Rule 8.04. Perforce, perjury involves dishonesty.

[17] TEX. GOVT. CODE § 311.016(2).

Fraud is foreign to the duties of an attorney.[18] And no case holds that committing a crime falls within the duties of an attorney. As there seems to be some doubt (at least in Texas courts) as to that proposition of law, this Court should take this opportunity to remove doubt from the minds of any attorney who might be operating under the mistaken belief that same can be countenanced under any circumstance.

III. Attorney Immunity.

Under Texas law, attorney immunity is a "comprehensive affirmative defense protecting attorneys from liability to non-clients, stemming from the broad declaration . . . that 'attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.'"[19] The immunity aims "to ensure 'loyal, faithful, and aggressive representation by attorneys employed as advocates.'"[20] Generally, the immunity applies to "conduct . . . involving 'the office, professional training, skill, and authority of an attorney.'"[21]

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[18] ***Poole v. Houston & T.C. Ry. Co.***, 58 Tex. 134, 137 (1882).

[19] ***Cantey Hanger, LLP v. Byrd***, 467 S.W.3d 477, 481 (Tex. 2015) (quoting ***Kruegel v. Murphy***, 126 S.W. 343, 345 (Tex. Civ. App. 1910, writ ref'd)).

[20] *Id.*

[21] ***Reagan Nat'l Advert. of Austin, Inc. v. Hazen***, No. 03-05-00699-CV, 2008 WL 2938823, at *3 (Tex. App.—Austin July 29, 2008, no pet.).

If an attorney shows that the conduct at issue was "part of the discharge of the [attorney's] duties in representing [the] client," immunity is appropriate.[22]

On the other hand, "attorneys are not protected from liability to non-clients for their actions when they do not qualify as 'the kind of conduct in which an attorney engages when discharging . . . duties to [a] client.'"[23] For example, an attorney cannot avoid liability "for the damages caused by [the attorney's] participation in a fraudulent business scheme with [the] client, as 'such acts are entirely foreign to the duties of an attorney.'"[24] And an attorney is liable if he knowingly commits a fraudulent act that injures a third person.[25]

Importantly, an attorney seeking dismissal based on attorney immunity bears the burden of establishing entitlement to the defense.[26] To meet this burden, the attorney must "conclusively establish that [the] alleged

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[22] ***Cantey***, 467 S.W.3d at 481.

[23] ***Cantey***, 467 S.W.3d at 482 (quoting ***Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.***, No. 01-06-00696-CV, 2008 WL 746548, at *7 (Tex. App.—Houston Mar. 20, 2008, pet. denied) (mem. op. on reh'g)).

[24] ***Cantey***, 467 S.W.3d at 482 (quoting ***Poole v. Hous. & T.C. Ry. Co.***, 58 Tex. 134, 137 (1882)).

[25] ***Likover v. Sunflower Terrace II, Ltd.***, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ)

[26] ***JJJJ Walker, LLC v. Yollick***, 447 S.W.3d 453, 468 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *see also* ***Cantey***, 467 S.W.3d at 484 ("An attorney who pleads the affirmative defense of attorney immunity has the burden to prove that [the] alleged wrongful conduct . . . is part of the discharge of [the attorney's] duties to [the] client.").

conduct was within the scope of [the attorney's] legal representation of [the] client."[27]

Here, in the Application for Attachment, Respondent swore that Petitioner was "served with said notice by Certified Mail . . . " To serve means "to make legal delivery of (a notice or process) or to present (a person) with a notice or process as required by law.[28] There is no case that holds that merely mailing a document, without receipt of same, constitutes service of that document upon the person to whom it is mailed.

And there is no case that holds that mailing a notice to a 10-story office building, with no suite shown, with the Return Receipt being signed for by a "Cathy Bears" constitutes or could possibly constitute service of a Notice to Appear and Show Cause on a contempt against Petitioner. Further, the Officer's Return on the Notice to Appear and Show Cause is blank – completely blank. Again, no service upon Petitioner is to be found in the Court's file.

In short, there was no evidence that Petitioner was ever served with the Notice to Appear and Show Cause. But that didn't stop Respondent from swearing that Petitioner had, in fact, been served.

So, to be entitled to the defense of Attorney Immunity, Respondent would have to have shown that his

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[27] ***Santiago v. Mackie Wolf Zientz & Mann, P.C.***, No. 05-16-00394-CV, 2017 WL 944027, at *3 (Tex. App.—Dallas Mar. 10, 2017, no. pet.); accord ***Cantey***, 467 S.W.3d at 484.

[28] Source: Black's Law Dictionary (10th ed. 2014).

falsely swearing the Petitioner was served with the Notice to Appear and Show Cause in order to procure Petitioner's attachment and arrest was within the scope of Respondent's legal representation of [the] client" – here the State of Texas in the prosecution of the contempt charge.[29]

Further, Respondent's "Hail Mary" argument in his motion, that the trial judge took judicial notice of the "fact that Petitioner had been served," should not avail him anything. The court can only take judicial notice of facts[30] not supposed or non-existent facts.[31] As a prosecutor, Respondent was a trustee of the State's interest in providing fair trials and charged with the constitutional duty to "illuminate the court with the truth of the cause."[32] And "[I]t does not matter whether the prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized the misleading nature of the evidence" – here the judicial notice of "service."[33]

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[29] ***Santiago v. Mackie Wolf Zientz & Mann, P.C.***, No. 05-16-00394-CV, 2017 WL 944027, at *3 (Tex. App.—Dallas Mar. 10, 2017, no. pet.); accord ***Cantey***, 467 S.W.3d at 484.

[30] Rule 201, TEX. R. EVID. and Rule 201, FED. R. EVID., are virtually identical.

[31] Again, mailing a notice to a 10-story office building without actual receipt by Petitioner, does not and cannot constitute service upon Petitioner.

[32] ***Duggan v. State***, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989).

[33] *Id.*

As falsely swearing to anything is never within the duties of an attorney, much less those of a prosecutor, there was and could be no such showing. Similarly, committing the crimes of falsification of a governmental document[34] and subjecting someone to official oppression[35] are not within the duties of an attorney.

Therefore, Respondent was not entitled to attorney immunity.

IV. Prosecutorial Immunity.

This Court has held that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties.[36] So the question arises as to whether Respondent's acts were within the scope of his prosecutorial duties when he caused Petitioner's attachment and jailing in the manner and by the means which he did.

A prosecutor's activities in connection with the preparation and filing of charging documents are protected by absolute immunity.[37] But the charging instrument (the Notice to Appear and Show Cause) was prepared by Judge Anna Estevez, not Respondent. So that is not an issue before the Court. And preparing and filing the charging instrument (the Notice to

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[34] TEX. PENAL CODE § 37.10(a)(1); ***State v. Vasilas***, 253 S.W.3d 268 (Tex. Crim. App. 2008).

[35] TEX. PENAL CODE § 39.03(a)(1).

[36] ***Imbler v. Pachtman***, 424 U.S. 409, 420 (1976).

[37] ***Kalina v. Fletcher***, 522 U.S. 118, 129 (1997).

Appear and Show Cause) is not what Respondent was sued for.

Respondent was sued for falsely swearing to the facts in an application for a writ of attachment – that Petitioner had been served with the Notice of Allegations of Contempt – in order to have Petitioner attached and arrested. As observed by this Court –

> Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required "Oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.[38]

Such it was here. Respondent was nothing more than a witness when he falsely swore that Petitioner was served with the Notice. There was no prosecutorial immunity for acting as a witness in this instance, and this Court should reaffirm its ***Kalina***[39] holding.

Further, when Respondent falsely swore that Petitioner was served with the Notice to Appear and Show Cause, Respondent committed perjury.[40] It matters not that Respondent swore that the facts were "true and correct to the best of his knowledge and belief," as

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[38] ***Kalina v. Fletcher***, 522 U.S. at 130–131.

[39] ***Kalina v. Fletcher***, 522 U.S. 118 (1997).

[40] TEX. PENAL CODE § 37.02.

perjury will attach to that to the false swearing.[41] And, because the question of whether Petitioner had or had not been served with Notice was material, that perjurious affidavit was a felony.[42]

Respondent used his false affidavit to procure Petitioner's attachment and arrest, thereby subjecting Petitioner to official oppression.[43] While only a Class A misdemeanor, what Respondent did is nonetheless a crime.[44]

And when Respondent filed that perjurious affidavit among the court's papers, he thereby falsified a governmental document – another felony.[45]

Respondent's acts were not mere negligence or inadvertence – they were intentional and knowing criminal acts.

Although it would seem obvious, this Court should address that there is no immunity, prosecutorial or otherwise, for committing crimes, much less felonies,

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[41] ***Beach v. State***, 22 S.W. 976 (Tex. Crim. App. 1893); ***Griffin v. State***, 128 S.W.2d 1197 (Tex. Crim. App. 1939); ***Brasher v. State***, 715 S.W.2d 827, 831 (Tex. App.—Houston [14th Dist.] 1986, no pet.).

[42] TEX. PENAL CODE § 37.03.

[43] TEX. PENAL CODE § 39.03(a)(1).

[44] TEX. PENAL CODE § 39.03(a)(1). Punishment for a Class A Misdemeanor is a fine not to exceed $4,000, confinement in jail for a term not to exceed one year, or both. TEX. PENAL CODE § 12.21.

[45] TEX. PENAL CODE § 37.10(a)(1); ***State v. Vasilas***, 253 S.W.3d 268 (Tex. Crim. App. 2008).

that result in someone's false arrest[46] and jailing. If there is no prosecutorial immunity for committing crimes, then Respondent had no immunity from Petitioner's suit. And this Court should so hold.

V. Anti-SLAPP vs. 42 U.S.C. § 1983 Claims.

Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[47] 42 U.S.C. § 1983 is that "supreme Law of the Land" and cannot be ignored or neutered by Legislative fiat.

A. 42 U.S.C. § 1983.

In connection with 42 U.S.C. § 1983 claims, this Court has held:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility

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[46] False arrest – an arrest made without proper legal authority. Source: Black's Law Dictionary (10th ed. 2014).

[47] Art. VI, cl. 2, U.S. Constitution.

> to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.[48]
>
> This Court went on to hold:
>
> A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse." (citation omitted) "The existence of the jurisdiction creates an implication of duty to exercise it. (citations omitted) 2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. * * * 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution

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[48] ***Howlett By and Through Howlett v. Rose***, 496 U.S. 356, 367 (1990) (citations omitted).

> before deciding that it is obligated to entertain the claim.[49]

This Court concluded with:

> These principles are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.[50]

A claim under 42 U.S.C. § 1983 is therefore cognizable in state court. And the state courts may not deny a meritorious claim under 42 U.S.C. § 1983, in the absence of "valid excuse." The question then is, is the Texas Anti-SLAPP statute a "valid excuse"?

B. Texas Anti-SLAPP.

Respondent moved to dismiss Petitioner's lawsuit pursuant to the provisions of Texas' Anti-SLAPP statute,[51] which was granted. This was done in face of Petitioner's assertion of a 42 U.S.C. § 1983 claim against Respondent.

The "adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which this Court reviews *de*

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[49] ***Howlett By and Through Howlett v. Rose***, 496 U.S. at 369–372.

[50] ***Howlett By and Through Howlett v. Rose***, 496 U.S. at 372–373.

[51] Chapter 27, TEX. CIV. PRAC. & REM. CODE (2011).

novo."[52] And "whether the constitutional rights asserted by petitioner were 'given due recognition by the [Court of Appeal] is a question as to which the [petitioner is] entitled to invoke [this Court's] judgment, and this [he has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.' "[53]

As part of their continuing efforts at "Tort Reform," in 2011 the Texas Legislature enacted the Anti-SLAPP statute.[54] The stated purpose of the law is:

> The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, **protect the rights of a person to file meritorious lawsuits for demonstrable injury**.[55]

So, on the face of the statute, if a person (such as Petitioner) has suffered demonstrable injury, his right

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[52] ***Howlett By and Through Howlett v. Rose***, 496 U.S. 356, 366 (1990) (citations omitted).

[53] *Id.*

[54] Chapter 27, TEX. CIV. PRAC. & REM. CODE (2011).

[55] TEX. CIV. PRAC. & REM. CODE § 27.02. [Bold emphasis supplied.]

to file a lawsuit for that injury would have to be protected.

But those words, "protect the rights of a person to file meritorious lawsuits for demonstrable injury" are hollow words, without meaning or effect other than to occupy space on a page, when, as here, a person is unlawfully seized and arrested (thereby showing demonstrable injury through the violation of his 4th and 14th Amendment rights against unlawful seizure) but is left without any recourse in the Texas courts.

Why? Because the Texas courts consistently turn a blind eye to the right of a person, such as Petitioner, to file a meritorious lawsuit for demonstrable injury, such as here. They also turn a blind eye when that meritorious lawsuit arises from the denial of federal constitutional rights by a state actor, such as here.[56] And they turn a blind eye to this Court's pronouncements on the rights of persons affected to bring 42 U.S.C. § 1983 suits in state court.[57]

Indeed, because of the definition of the "right to petition" contained in the statute,[58] it is to be anticipated

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[56] *See, e.g.*, ***Tirrez v. Comm'n for Lawyer Discipline***, Docket No. 03-16-00318-CV, 2018 WL 454723 (Tex. App.—Austin 2018) (Memorandum Opinion, not designated for publication), pet. denied, cert. denied, 139 S.Ct. 275 (2018) (dismissing suit and refusing to recognize this Court's holding in ***In re Ruffalo***, 390 U.S. 544 (1968) that, as a matter of Due Process, disbarment proceedings are quasi-criminal).

[57] *See, e.g.*, ***Howlett By and Through Howlett v. Rose***, 496 U.S. 356 (1990).

[58] TEX. CIV. PRAC. & REM. CODE § 27.01(4).

that Texas courts would grant a motion to dismiss[59] a lawsuit against a lawyer who violates the Fair Debt Collection Practices Act.[60]

In short, in Texas, Federal laws are not the Supreme Law of the Land, in part because the Texas courts are as deaf to the assertion of violations of Federal Constitutional rights (and the damages arising from those violations), as Beethoven was to any sounds.

C. Lawsuit Was Meritorious.

Assuming, without conceding, that the Texas Legislature could immunize a state actor from a claim for damages arising out of a wrongful arrest and imprisonment, through a procedural mechanism such as this, then for the language of § 27.02[61] to have any significance beyond mere verbiage, Petitioner's suit would have had to not be meritorious.[62]

In order for Petitioner's lawsuit to not have been meritorious, the following facts would have had to exist:

(A) Respondent would have had to have initiated the contempt prosecution and would have had to have

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[59] TEX. CIV. PRAC. & REM. CODE § 27.03(a).

[60] *See, e.g.*, ***Heintz v. Jenkins***, 514 U.S. 291 (1995).

[61] TEX. CIV. PRAC. & REM. CODE § 27.02.

[62] Although not raised hereunder, denying a person the right to sue for demonstrable injury would seem to raise a 14th Amendment denial of equal protection question.

been sued for that prosecution,[63] separate and apart from any other criminal act that he committed.

(B) Petitioner would have had to have been served with Judge Estevez's Notice to Appear and Show Cause on the contempt for an attachment to issue against Petitioner for not appearing on July 29, 2016.

(C) Someone other than Respondent would have had to have sworn to the facts in the Application for the (Writ of) Attachment that resulted in the issuance of the Attachment that was served upon Petitioner; and those facts would have to have been true.

(D) Respondent would have had to issue a new Notice to Appear and Show Cause as to why Petitioner did not appear on July 29, 2016, instead of issuing an attachment for Petitioner to show cause why he had not appeared.[64]

(E) Petitioner would have had to not been attached, arrested and then incarcerated for two days, after never being served with Notice of the Contempt.

But none of those facts exist.

Because none of those facts exist, Petitioner made a prima facie case of violation of his 4th and 14th Amendment constitutional right against unlawful arrest and

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[63] ***Imbler v. Pachtman***, 424 U.S. 409 (1976).

[64] Respondent thereby commenced a new contempt action against Petitioner in violation of this Court's holding in ***Cooke v. United States***, 267 U.S. 517, 537 (1925).

unlawful confinement.[65] As the legality of an arrest and the legality of an imprisonment may present constitutional issues, the state court would have jurisdiction of Petitioner's lawsuit under the civil rights statute, irrespective of the amount in controversy.[66]

And the State of Texas was not free to deny Petitioner the right to assert violation of his federal constitutional right against false arrest and false imprisonment under 42 U.S.C. § 1983 based on a procedural rule,[67] as was done here.

CONCLUSION AND PRAYER

This Court has held that "[T]here is no wrong without a remedy."[68] But, by statutory fiat, that is exactly the situation in which the State of Texas and its courts have left Petitioner (and anyone else similarly situated),[69] whose federal constitutional rights are violated during or as a result of a legal proceeding. This, even when those violations of federal constitutional rights are precipitated by knowing and intentional criminal acts by a state actor, as here.

Therefore this Court should grant this petition because the holding of the Seventh Court of Appeals

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[65] *Cf.* ***Monroe v. Pape***, 365 U.S. 167 (1961).

[66] 42 U.S.C. § 1983.

[67] Chapter 27, TEX. CIV. PRAC. & REM. CODE (2011).

[68] ***Panama R. Co. v. Rock***, 266 U.S. 209, 215 (1924).

[69] Chapter 27, TEX. CIV. PRAC. & REM. CODE (2011).

failed to properly apply this Court's precedents to the issues before it, and consequently, the statutes promulgated by the Texas Legislature outlined in this petition: (1) are statutes that foreclose assertion of a federal cause of action in a way that conflicts with this Court's decisions; and (2) implicitly decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This Honorable Court should grant Petitioner, David Christopher Hesse, general relief.

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