No.

In the Supreme Court of the United States

THOMAS CHRISTOPHER RETZLAFF,
PETITIONER

v.

JASON LEE VAN DYKE

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Texas enacted the Texas Citizens Participation Act ("TCPA") 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." Tex. Civ. Prac. & Rem. Code Ann. § 27.002 (West 2015). Like other States' anti-SLAPP ("Strategic Litigation Against Public Participation") statutes, it creates "a speedy [way] for resolving litigation that may impinge on a party's exercise of th[ese] rights." *Klocke* v. *Watson*, 936 F.3d 240, 244 (5th Cir. 2019). The question presented is:

Whether under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), state anti-SLAPP statutes apply in federal diversity cases, as the First, Second, and Ninth Circuits hold, or do not apply, as the Fifth, Tenth, Eleventh, and D.C. Circuits hold.

RELATED PROCEEDINGS

1. *Van Dyke* v. *Retzlaff*, No. 18-2793-431 (Tex. 431st D. Ct.). On March 28, 2018, plaintiff filed the original proceeding in Texas District Court.

2. *Van Dyke* v. *Retzlaff*, No. 4:18-CV-247 (E.D. Tex.). On July 24, 2018, the district court denied petitioner's motion to dismiss pursuant to the TCPA.

3. *Van Dyke* v. *Retzlaff*, No. 18-40710 (5th Cir.). On October 22, 2019, the court of appeals affirmed the district court and remanded for further proceedings.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-3a) is reported at 781 Fed. Appx. 368. The memorandum opinion of the district court (App., *infra*, 4a-10a) is unreported but is available at 2018 WL 4261193.

JURISDICTION

The judgment of the Court of Appeals was entered on October 22, 2019. A petition for rehearing was denied on December 5, 2019 (App., *infra*, 11a-12a). On February 21, 2020, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 3, 2020. On March 19, 2020, this Court extended "the deadline to file any petition for a writ of certiorari due on or after the date of this order * * * to 150 days from the date of the * * * order denying a timely petition for rehearing." S. Ct. Order of March 19, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth at App., *infra*, 13a-20a.

STATEMENT

A. Statutory Background

In 2011, the Texas legislature enacted the Texas Citizens Participation Act ("TCPA") without dissent and with immediate effect. Tex. Civ. Prac. & Rem.

Code §§ 27.001-27.011; 2011 Tex. Sess. Law Serv. Ch. 341 (West).[1] The TCPA, like other anti-SLAPP laws, is designed to "protect[] citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015). They were enacted in response to notable cases where plaintiffs filed unfounded lawsuits to silence critics. See Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 Tex. Tech. L. Rev. 633, 637-639 (2018) (collecting cases); and SLAPP'ED IN TEXAS.COM, Examples of SLAPP Suits In Texas, https://tinyurl.com/y8uhojty (last visited May 1, 2020) (collecting Texas SLAPP cases before enactment of TCPA). Texas resident Lance Armstrong, for example, admitted filing lawsuits to "bully" many who accused him of using performance-enhancing drugs. Prather & Bland, 50 Tex. Tech. L. Rev. at 638. And today prominent politicians and celebrities continue to bully critics in jurisdictions that provide few SLAPP protections. See, *e.g.*, Justin Jouvenal, *Devin Nunes, Johnny Depp lawsuits seen as threats to free speech and press*, Wash. Post. (Dec. 22, 2019), https://tinyurl.com/yc5poky9 (describing recent SLAPP suits).

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[1] Texas amended the TCPA in 2019. 2019 Tex. Gen. Laws 961, 961-964. Since the amendments left all the relevant features of the prior version in place and that version continues to apply to this action, see *id.* at 964, citations and quotations refer to the older version, Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-27.011 (2015), which is reprinted in the appendix, see App., *infra*, 13a-20a.

The TCPA protects against such suits by "effectuat[ing] a speedy process for resolving litigation that may impinge on a party's exercise of the rights to free speech, petition, or association." *Klocke* v. *Watson*, 936 F.3d 240, 244 (5th Cir. 2019). It reflects the Texas Constitution's "strong and longstanding commitment to free speech," *Davenport* v. *Garcia,* 834 S.W.2d 4, 7 (Tex. 1992), a commitment so strong that it "provides greater rights of free expression than its federal equivalent," *id.* at 10.

The TCPA provides defendants with four important protections. *First*, a defendant can move early on to dismiss the action. Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a). If he shows that the action is "based on, relates to, or is in response to" his exercise of certain listed rights, including free speech, petition, or assembly, *id.* § 27.005(b), the court must dismiss the action, *ibid.*, unless the plaintiff "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question," *id.* § 27.005(c). And even if the plaintiff meets this burden, the court must still dismiss the action if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense" to the claim. *Id.* § 27.005(d). *Second*, until the court decides the motion, only discovery relevant to the motion itself can proceed. *Id.* §§ 27.003(c), 27.006(b). *Third*, the court must expedite a hearing on the motion to dismiss, *id.* § 27.004, and decide it no later than 30 days after the hearing, *id.* § 27.005(a). *Fourth*, if the court grants the motion, it must award the defendant the costs and reasonable attorney's fees incurred in defending against

the action, *id.* § 27.009(a)(1), as well as whatever monetary award it believes necessary to deter the plaintiff from filing similar actions in the future, *id.* § 27.009(a)(2).

In federal court, state anti-SLAPP statutes like the TCPA operate against the background of two federal statutes: the Rules of Decision Act and the Rules Enabling Act. The Rules of Decision Act requires federal courts to apply state substantive law in diversity cases. 28 U.S.C. § 1652; see *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). The Rules Enabling Act, by contrast, authorizes the Supreme Court to "prescribe general rules of practice and procedure" so long as "such rules [do] not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. Thus, if a Federal Rule "answer[s] the same question" as a state law, the Federal Rule applies (so long as it was validly promulgated under the Rules Enabling Act) even if the state law has a largely substantive effect and purpose. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 399 (2010).

B. Procedural Background

1. Alleging that Retzlaff made several false defamatory remarks and publications about him, Van Dyke sued in Texas state court for libel per se, intrusion on seclusion, and tortious interference with contract. App., *infra*, 4a-5a. He claimed "at least" $30 million in compensatory and $70 million in punitive damages. 2d Am. Compl. ¶ 7.1(a)-(b), ECF 7.

2. Retzlaff removed the case to federal court on diversity grounds and moved to dismiss it under the

TCPA. App., *infra*, 2a. The district court, however, denied his motion. *Ibid.* It held that "the TCPA, regardless if classified as procedural or substantive, does not apply in federal court." *Id*. at 9a.

3. Retzlaff filed an interlocutory appeal. While it was pending, the Fifth Circuit held in a separate case that the TCPA does not apply in diversity cases in federal court. See *Klocke* v. *Watson*, 936 F.3d 240, 242 (5th Cir. 2019). In particular, it held that since Rules 12 and 56 were both valid Federal Rules and "answer the same question" as the TCPA—"what are the circumstances under which a court must dismiss a case before trial?," *id.* at 245—the TCPA's additional grounds for dismissal conflicted with both rules and must yield. See *id.* at 247-249.

Finding *Klocke* dispositive, the Fifth Circuit affirmed the district court's denial of Retzlaff's TCPA motion. App., *infra*, 3a. It later denied his timely filed petition for panel rehearing and for rehearing en banc. App., *infra*, 11a-12a.

REASONS FOR GRANTING THE PETITION

I. There Is A Deep And Acknowledged Conflict Among The Circuits As To Whether State Anti-SLAPP Laws Apply In Federal Diversity Actions

The decision below deepens a clear split in the courts of appeals: Whether early dismissal provisions in state anti-SLAPP laws apply in federal court under the *Erie* doctrine. The First, Second, and Ninth Circuits have held that these provisions do apply in diversity proceedings. In stark contrast, the Fifth, Tenth,

Eleventh, and D.C. Circuits have held that they do not. Had the defendant been sued in the First, Second, or Ninth Circuits, he would have been entitled to greater speech protections. But his rights go unvindicated by virtue of his being sued in the Fifth. This Court should grant certiorari to resolve this clear split, which has significant implications for state speech protections nationwide.

Many federal courts of appeals have expressly acknowledged the circuit split. See, *e.g.*, *Abbas* v. *Foreign Policy Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) (Kavanaugh, J.) ("[S]ome other courts * * * have applied state anti-SLAPP acts' pretrial dismissal provisions[.] * * * [T]hose decisions are ultimately not persuasive."); *Mitchell* v. *Hood*, 614 Fed. Appx. 137, 139 n.1 (5th Cir. 2015) ("[T]here is disagreement among courts of appeals as to whether state anti-SLAPP laws are applicable in federal court."); *Intercon Sols., Inc.* v. *Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015) (Easterbrook, J.) (noting that the application of anti-SLAPP laws "has produced disagreement among appellate judges").

Leading treatises on federal procedure and commentators on the *Erie* doctrine have also recognized the split. See, *e.g.*, 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4509 (4th ed. 2019) ("The case law [from the courts of appeals] bearing on whether anti-SLAPP statutes directly conflict with the[] Rules is in sharp disagreement."); 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.04 (2019) ("[F]ederal courts [of appeals] have splintered over * * * whether these state anti-SLAPP

laws apply at all under the *Erie* doctrine."); Mary-Rose Papandrea, *Media Litigation in a Post*-Gawker *World*, 93 Tul. L. Rev. 1105, 1134 (2019) ("[F]ederal courts disagree about whether state anti-SLAPP statutes apply in federal diversity actions.").

As a leading treatise has noted, "[r]esolution of * * * the questions raised by anti-SLAPP statutes may require resolution by the Supreme Court." 19 Wright & Miller § 4509.

A. Three Circuits Hold That Federal Courts Exercising Jurisdiction Over State Law Claims Must Apply State Anti-SLAPP Laws

The First, Second, and Ninth Circuits have held that anti-SLAPP statutes apply in federal courts exercising jurisdiction over relevant state law claims. *Godin* v. *Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) ("We hold the Maine anti-SLAPP statute must be applied."); *Adelson* v. *Harris*, 774 F.3d 803, 809 (2d Cir. 2014) ("[T]he specific [Nevada] anti-SLAPP provisions applied by the district court—immunity from civil liability and mandatory fee shifting—seem to us unproblematic.") (citations omitted); *United States ex rel. Newsham* v. *Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) ("[W]e hold that the district court erred in finding that subsections (b) and (c) of California's Anti-SLAPP statute [providing for a special motion to dismiss and recovery of fees and costs] could not be applied.").

The First and Ninth Circuits have concluded that anti-SLAPP early dismissal provisions do not "attempt

to answer the same question" as Federal Rules 12 and 56, because they address a narrow and substantive state interest: the protection of free speech. *Godin*, 629 F.3d at 88 (quoting *Shady Grove*, 559 U.S. at 399); see also *Newsham*, 190 F.3d at 973 ("The 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.'") (quoting Cal. Civ. Proc. Code § 425.16(a) (West 2015)).

The First Circuit, for example, reasoned that Maine's anti-SLAPP law "serves the entirely distinct function" from either Rule 12 or Rule 56. *Godin*, 629 F.3d at 89. The Federal Rules establish processes for testing the legal "sufficiency of the complaint" generally and for resolving any case where "there are no disputed material issues of fact." *Ibid.* An anti-SLAPP motion, however, "protect[s] those specific defendants that have been targeted with litigation on the basis of their protected speech." *Ibid.* Unlike the state statute at issue in *Shady Grove*, the anti-SLAPP law did "not seek to displace the Federal Rules or have [them] cease to function." *Id.* at 88. Instead, each "control[s] its own intended sphere of coverage without conflict." *Id.* at 91. Rules 12 and 56, therefore, were not "sufficiently broad to control the issue before the court." *Id.* at 86 (citing *Shady Grove*, 559 U.S. at 422 (Stevens, J., concurring in part and concurring in the judgment)). Maine's anti-SLAPP law applied. *Id.* at 92.

Similarly, though writing prior to *Shady Grove*, the Ninth Circuit in *Newsham* found "no 'direct collision'" between Federal Rules 8, 12, and 56 and California's

anti-SLAPP statute. *Newsham*, 190 F.3d at 972. The court acknowledged that "in some respects" the two "serve similar purposes, namely the expeditious weeding out of meritless claims before trial." *Ibid.* But it found "no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at [the dismissal of] meritless claims." *Ibid.* Thus, the anti-SLAPP statute's limited purpose of "protecti[ing] [free speech rights]" sufficiently distinguished it from the Federal Rules to avoid any conflict. *Id.* at 973.

The Ninth Circuit has continued to apply California's anti-SLAPP law in federal court after *Shady Grove*. *Makaeff* v. *Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013). In a denial of rehearing en banc, four judges clarified that California's anti-SLAPP law differed from the New York law at issue in *Shady Grove*. The New York law "directly conflicted" with Rule 23's "one-size-fits-all formula for deciding the class-action question." *Makaeff* v. *Trump Univ., LLC*, 736 F.3d 1180, 1181 (2013) (joint opinion of Wardlaw and Callahan, JJ., concurring in denial of rehearing en banc). By contrast, "Rules 12 and 56 do not provide that a plaintiff is entitled to maintain his suit if their requirements are met; instead, they provide various theories upon which a suit may be disposed of before trial." *Id.* at 1182. Thus, California's anti-SLAPP statute "supplements rather than conflicts with the Federal Rules" "by creating a separate and additional theory upon which certain kinds of suits may be disposed of before trial." *Ibid.*

The Second Circuit reached the same result as the First and Ninth Circuits, noting that "[m]any courts have held that [anti-SLAPP] statutes * * * are to be applied federally [in diversity cases]." *Adelson*, 774 F.3d at 809. The court concluded that the immunity and fee shifting provisions of Nevada's anti-SLAPP statute are "substantive within the meaning of *Erie*" and "do[] not squarely conflict with a valid federal rule." *Ibid.*

The First, Second, and Ninth Circuits have further reasoned that refusing to apply state anti-SLAPP rules would be contrary to "the dual aims of *Erie*." *Godin*, 629 F.3d at 86-87; see *Adelson*, 774 F.3d at 809; *Newsham*, 190 F.3d at 973. Each noted that the failure to apply anti-SLAPP laws would create obvious incentives for forum shopping: plaintiffs would simply bring meritless SLAPP suits in federal rather than state court. *E.g.*, *Godin*, 629 F.3d at 92 ("[W]ere Section 556 not to apply in federal court, the incentives for forum shopping would be strong."); *Newsham*, 190 F.3d at 973 ("[I]f the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum."). The courts concluded that a refusal to apply anti-SLAPP laws would "result in an inequitable administration of justice," *Godin*, 629 F.3d at 92, by placing "litigant[s] otherwise entitled to the protections of the Anti-SLAPP statute * * * [at a] considerable disadvantage in a federal proceeding," *Newsham*, 190 F.3d at 973.

B. Four Circuits Hold That State Anti-SLAPP Provisions Do Not Apply In Federal Court

The Fifth, Tenth, Eleventh, and D.C. Circuits have held that anti-SLAPP laws do not apply in federal court. See*, e.g.*, *Klocke*, 936 F.3d at 245 ("Because the [Texas anti-SLAPP law's] burden-shifting framework imposes additional requirements * * * the state law cannot apply in federal court."); *Los Lobos Renewable Power, LLC* v. *Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018) ("[T]he decision of the district court denying the application of the New Mexico anti-SLAPP statute in this federal diversity action is AFFIRMED."); *Carbone* v. *Cable News Network, Inc.*, 910 F.3d 1345, 1347 (11th Cir. 2018) ("[T]he special-dismissal provision of the Georgia anti-SLAPP statute does not apply in federal court."); *Abbas*, 783 F.3d at 1337 ("A federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision.").

The D.C., Fifth, and Eleventh Circuits have found a direct conflict between state anti-SLAPP early dismissal provisions and the Federal Rules because, they believe, they "answer the same question." The D.C. Circuit held in a decision by then-Judge Kavanaugh that since "the D.C. Anti-SLAPP Act establishes the circumstances under which a court must dismiss a plaintiff's claim before trial," it conflicted with Federal Rules 12 and 56 because they "answer the same question." *Abbas*, 783 F.3d at 1333. Similarly, the Fifth Circuit reasoned that a Federal Rule and state statute

"'answer the same question' when each specifies requirements for a case to proceed at the same stage of litigation." *Klocke*, 936 F.3d at 245. Because Texas's anti-SLAPP statute "imposes additional requirements" for a claim to proceed to trial "beyond those found in Rules 12 and 56," the Fifth Circuit concluded, "the state law cannot apply in federal court." *Ibid.*; see also *Carbone*, 910 F.3d at 1352 ("Rules 8, 12, and 56 answer the question of sufficiency by requiring the plaintiff to allege a claim that is plausible on its face[.] * * * The Georgia anti-SLAPP statute answers the same question.").

The Tenth Circuit reached the same result but using different reasoning. Unlike the Fifth, Eleventh, and D.C. Circuits, which viewed Justice Scalia's plurality opinion in *Shady Grove* as controlling, the Tenth Circuit viewed Justice Stevens's concurrence as "provid[ing] the controlling analysis." *Los Lobos*, 885 F.3d at 668 n.3. The Tenth Circuit recognized that state procedural rules "may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Id.* at 668 (citing *Shady Grove*, 559 U.S. at 419-420 (Stevens, J., concurring in part and concurring in the judgment)). But those state laws "that solely address procedure and do not function as a part of the State's definition of substantive rights and remedies are inapplicable in federal diversity actions." *Ibid.* (internal quotation marks omitted). After examining the text of the New Mexico anti-SLAPP statute, the Tenth Circuit concluded that "the statute is procedural in all its aspects." *Id.* at 673.

* * *

The courts of appeals are intractably split over whether state anti-SLAPP laws apply in federal diversity actions. The Fifth Circuit's rejection of the TCPA in its entirety has deepened this pervasive uncertainty. The "ultimate resolution" of this circuit split "may come only through Supreme Court review." William James Seidleck, Comment, *Anti-SLAPP Statutes and the Federal Rules: Why Preemption Analysis Shows They Should Apply in Federal Diversity Suits*, 166 U. Pa. L. Rev. 547, 551 (2018).

II. The Decision Below Is Wrong

A. The TCPA Applies In Federal Court Because It Does Not "Answer The Same Question" As Any Federal Rule

Federal courts sitting in diversity apply state substantive law unless the state law "answers the same question" as a valid Federal Rule. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). The *Shady Grove* Court used "answers the same question" as shorthand for the test in *Burlington*, which asks whether the scope of the Federal Rule is "sufficiently broad to * * * leav[e] no room for the operation of [the state] law." *Burlington N.R.R. Co.* v. *Woods*, 480 U.S. 1, 4-5 (1987) (internal citation and quotation marks omitted).[2]

[2] All nine Justices in *Shady Grove* agreed that the unanimous opinion in *Burlington* provides the proper test. See *Shady Grove*, 559 U.S. at 421 (Stevens, J., concurring in part and concurring in the judgment) (quoting the same language in *Burlington* as the majority); *id.* at 439 (Ginsburg, J., dissenting) (same).

The Supreme Court has long applied this test with "sensitivity to important state interests." *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996); see, *e.g.*, *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503-504 (2001) (rejecting an interpretation of Rule 41(b) that "would arguably * * * extinguish[]" a substantive state right); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 750-752 (1980) (upholding state statute of limitations in face of potential conflict with Rule 3 out of respect for important "policy determinations found in state law"). While federal courts cannot "contort [a Rule's] text * * * to avert a collision with state law," *Shady Grove*, 559 U.S. at 406, the scope of the Federal Rule must be read narrowly to discourage forum shopping and "to avoid substantial variations [in outcomes] between state and federal litigation," *id.* at 405 n.7 (citation omitted).

Thus, the TCPA applies in federal court unless the Federal Rules, "fairly construed" with "sensitivity to important state interests," leave "no room for [its] operation." *Burlington*, 480 U.S. at 4-5; *Gasperini*, 518 U.S. at 427 n.7.

B. Taken As A Whole, The TCPA Applies In Federal Court

The TCPA applies in federal court because its text and purpose do not conflict with any Federal Rule. The Fifth Circuit's holding to the contrary inappropriately broadens the reach of the Federal Rules, ignores Supreme Court precedent, and disregards important state interests.

1. The TCPA Can Operate Alongside The Federal Rules Without Conflict

Federal Rules 12 and 56 answer different questions than the TCPA. Rule 12(b)(6) concerns the level of factual detail and what content a complaint must contain to avoid dismissal. It answers: "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Rule 56 addresses when a lack of evidentiary support for a claim warrants dismissal. It answers: when "there are [no] genuine factual issues that * * * may reasonably be resolved in favor of either party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). But the Federal Rules are silent as to when the *subject matter* of litigation may warrant dismissal. And so the Texas Legislature supplied a response: when "a legal action is based on * * * a party's exercise of the right of free speech, right to petition, or right of association." Tex. Civ. Prac. & Rem. Code Ann. § 27.003 (West 2015). The Federal Rules simply do not "control the issue before the court," leaving plenty of "room for the [TCPA's] operation." *Burlington*, 480 U.S. at 5.

Because the Federal Rules and the TCPA answer different questions, the absence of any textual conflict between them is unsurprising. Rule 12(b)(6) provides that "a party may assert [as a defense] * * * [the opposing party's] failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12. Rule 56 provides that "[a] party may move for summary judgment" and specifies under what circumstances "the court shall grant" such judgment. Fed. R. Civ. P. 56.

No provision of the TCPA contradicts either of these rules. Rather, § 27.003 of the TCPA establishes an additional circumstance under which "[a] party may file a motion to dismiss," Tex. Civ. Prac. & Rem. Code Ann. § 27.003 (West 2015), and § 27.005 defines the circumstances under which the court must grant such a motion, *id.* § 27.005. This case is thus readily distinguishable from *Shady Grove*, where the Court confronted a New York state law that "flatly contradict[ed]" a Federal Rule. 559 U.S. at 405.

Texas's own procedural rules further demonstrate that the Federal Rules leave "room for the operation of [the TCPA]." *Burlington*, 480 U.S. at 5. The Texas Rules of Civil Procedure include provisions analogous to both Federal Rules 12 and 56, authorizing a motion to dismiss for failure to state a claim and a motion for summary judgment. See Tex. R. Civ. P. 91a ("[A] party may move to dismiss a cause of action on the grounds that it has no basis in law."); Tex. R. Civ. P. 166a ("[Summary] judgment * * * shall be rendered forthwith if * * * there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."). And Texas courts apply these rules alongside the TCPA. See, *e.g.*, *Krasnicki* v. *Tactical Entm't, LLC*, 583 S.W.3d 279, 284 (Tex. App. 2019) (concluding that "[t]he TCPA was not meant to take the place of" summary judgment because the Act applies to "only those lawsuits designed to chill First Amendment rights"); see also *Paulsen* v. *Yarrell*, 537 S.W.3d 224, 231, 234 (Tex. App. 2017) (reviewing both a motion for summary judgment and a motion under

the TCPA). There is no reason to think that application of equivalent Federal Rules would create a conflict where none exists under state law.

2. The Fifth Circuit's Overly Broad View Of The Federal Rules Conflicts With Supreme Court Precedent

In determining whether the TCPA "answers the same question" as the Federal Rules, the Fifth Circuit adopted the broadest possible construction of the question, namely "what are the circumstances under which a court must dismiss a case before trial?" *Klocke*, 936 F.3d at 245. Allowing judges to define the "question" the Federal Rules answer at such a high level of generality risks violating the "twin aims of the *Erie* doctrine": "discourage[ing] forum shopping and avoid[ing] inequitable administration of the laws." *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). Instead, courts should refer to the most specific question the Federal Rules answer, focused on the text of the Rules. Cf. *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 590 (2018) ("We have repeatedly stressed that courts must not define clearly established law [for qualified immunity purposes] at a high level of generality.") (citation and quotation marks omitted); *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) ("[W]e have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest.") (citations omitted).

In defining the question so broadly, the Fifth Circuit diverged from the text of Rules 12 and 56 and gave them preemptive force that this Court has never rec-

ognized. See *Klocke*, 936 F.3d at 245 (The TCPA "answer[s] the same question" as Rules 12 and 56 because "it imposes additional procedural requirements not found in the federal rules."). That logic runs counter to *Shady Grove*, which recognized that state laws, though they may touch on the same general subject matter as the Federal Rules, are not preempted where there is no direct conflict. The Court in *Shady Grove*, for example, held that the state law and Rule 23 answered the same question "whether a class action may proceed for a given suit," but it did "not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23." 559 U.S. at 401. The Court thus recognized the possibility that Rule 23 leaves room for "a law that sets a ceiling on damages (or puts other remedies out of reach) in properly filed class actions." *Ibid.* The clear implication is that states are not categorically barred from imposing additional requirements so long as the requirements do not "direct[ly] conflict" with the Federal Rules. *Walker*, 446 U.S. at 752.

The Fifth Circuit's rule also calls into doubt foundational *Erie* precedents. In *Walker*, the Court found no conflict between Rule 3 and a state law requiring dismissal if the summons was served outside of the state statute of limitations. 446 U.S. at 750-752. Likewise, in *Cohen* v. *Beneficial Indus. Loan Corp.*, the Court found no conflict between then-Rule 23 and a state statute requiring the plaintiff in a shareholder derivative suit to post security as a condition of prosecuting the action. 337 U.S. 541, 544-545, 556-557 (1949). And in *Woods* v. *Interstate Realty Co.*, this

Court applied a state law requiring foreign corporations to formally designate an agent for receiving service of process before suing in the state. 337 U.S. 535, 536-538 (1949). The Fifth Circuit's approach would require the opposite result in each of these cases, since each upheld a state law that identified "circumstances under which a court must dismiss a case before trial." *Klocke*, 936 F.3d at 245.

The Fifth Circuit has already applied this approach to invalidate other important state laws that require pretrial dismissal. See *Passmore* v. *Baylor Health Care Sys.*, 823 F.3d 292, 297-298 (5th Cir. 2016) (holding certificate of merit law conflicted with Rules 26 and 37's provisions for the submission of expert reports because the law imposed requirements not found in the Federal Rules). And other courts adopting equally broad tests have invalidated similar laws. See, *e.g.*, *Gallivan* v. *United States*, 943 F.3d 291, 293-294 (6th Cir. 2019) (invaliding state law that required affidavit to state claim for medical negligence because "the Federal Rules provide a clear answer [that] no affidavit is required").

The Court should reject this overly broad reading of the scope and purpose of Rules 12 and 56. Each rule serves a limited and clearly defined procedural function. Together, they provide mechanisms for a federal court to dismiss suits in which further litigation would waste judicial resources, either because no relief can be granted or because no reasonable jury could find in favor of the plaintiff. Neither Rule evinces any intent to preempt laws allowing early dismissal on distinct

substantive grounds, such as state law grants of immunity from suit.

The TCPA is one such state law. Section 27.003 does not purport to be a "general * * * procedure[] governing all categories of cases." See *Godin*, 629 F.3d at 88. Rather, Section 27.003 permits a motion to dismiss only in response to a particular class of claims: ones "based on * * * a party's exercise of the right of free speech, right to petition, or right of association." Tex. Civ. Prac. & Rem. Code Ann. § 27.003 (West 2015). The question for a court weighing a TCPA motion is whether the movant has satisfied the statutorily defined requirements to secure dismissal of the challenged claim. See *id.* § 27.005. If so, the movant is entitled to dismissal regardless of whether the claimant sufficiently pleaded a claim for relief or whether the claimant would otherwise be entitled to summary judgment.

3. The Fifth Circuit Should Have Analyzed The TCPA As An Affirmative Defense Under Rule 8

Instead of straining to find a conflict with Rules 12 and 56, the Fifth Circuit should have analyzed the TCPA as an affirmative defense under Rule 8. Had it done so, the absence of a conflict between the Federal Rules and the TCPA would have been even clearer.

Rule 8 directs litigants to "affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(c)(1). There can be no doubt that the TCPA provides such a defense. See 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1271 (4th

ed. 2019) (listing "a limitation or bar to the action in state law" as an example of an affirmative defense); see also *Phoenix Trading, Inc.* v. *Loops LLC*, 732 F.3d 936, 942 (9th Cir. 2013) (describing immunity under anti-SLAPP statute as an affirmative defense). That is because the Act conditions dismissal on a showing that the movant has been sued for exercising First Amendment rights, an issue that "cannot [be] raise[d] by a simple denial in the answer" because it falls "outside of the plaintiff's prima facie case." 5 Wright & Miller § 1271. Instead, a SLAPP defendant must "set forth affirmatively" its defense. *Ibid.*

Like Rules 12 and 56, Rule 8 leaves more than enough room for the TCPA to operate. It simply "identifies a nonexhaustive list of affirmative defenses that must be pleaded" and allows statutes like the TCPA to add to the list. *Jones* v. *Bock*, 549 U.S. 199, 212 (2007). In fact, the TCPA's alignment with Rule 8 further shows its compatibility with Rules 12 and 56. Federal courts regularly adjudicate affirmative defenses raised in motions for summary judgment. See, *e.g.*, *Crampton* v. *Weizenbaum*, 757 Fed. Appx. 357, 367-369 (5th Cir. 2018) (per curiam) (affirming district court's grant of summary judgment on affirmative defense). They also resolve affirmative defenses at the motion to dismiss stage. See, *e.g.*, *Wei* v. *University of Wyo. Coll. of Health Sch. Pharmacy*, 759 Fed. Appx. 735, 739 (10th Cir. 2019) ("[A] defendant may raise an affirmative defense by a motion to dismiss for the failure to state a claim.") (citation and internal quotation marks omitted); accord *Estate of Barney* v. *PNC Bank, Nat'l Ass'n*, 714 F.3d 920, 925 (6th Cir. 2013). There is no reason

to treat the TCPA—a clear example of an affirmative defense—any differently.

4. The State's Important Interest In Preventing SLAPP Suits Further Counsels Against Reading The Federal Rules Broadly To Find A Conflict With The TCPA

The absence of any conflict between the TCPA and the Federal Rules is clear. But even if this case presented a closer *Erie* question, the Fifth Circuit disregarded this Court's command to read the Federal Rules with "sensitivity to important state interests," *Gasperini*, 518 U.S. at 427 n.7, and Congress's command to avoid an interpretation that would "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b). Needlessly expanding the scope of the Federal Rules to displace the TCPA undermines Texas's important interest in "encourag[ing] and safeguard-[ing] the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government." Tex. Civ. Prac. & Rem. Code Ann. § 27.002 (West 2015).

Prior to the TCPA, Texas was plagued with frivolous claims designed to discourage individuals from exercising their First Amendment rights. See, *e.g.*, Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 Tex. Tech L. Rev. 633, 637-638 (2018) (describing frivolous lawsuits filed in order to limit speech). The Texas Legislature took testimony from those who had been SLAPP-ed, including an author sued by a real estate developer after writing a book on

eminent domain; a newspaper editor sued for publishing a photograph taken on a public beach and threatened with suit for publishing public records from state agencies; and the president of an advocacy group sued by a building company after organizing protests against the company. SLAPP'ED IN TEXAS.COM, *Citizen Participation Act Takes Aim at Frivolous Lawsuits: Citizens, Journalists and Homeowners Testify in Support.* (Mar. 28, 2011), https://tinyurl.com/y54npnjz. In response to this degradation of First Amendment rights, Texas passed the TCPA, codifying its commitment to promoting free speech and the marketplace of ideas.

Surely these important state interests deserve at least as much protection as the policies behind state preclusion principles and statutes of limitations that counseled narrow readings of the Federal Rules in *Semtek*, 531 U.S. at 503-504, and *Walker*, 446 U.S. at 751-752. Confining the TCPA's reach to state-court litigation empowers unscrupulous parties to file meritless, retaliatory lawsuits whenever a federal forum is available. Fortunately, that is an outcome that the Federal Rules "can reasonably be interpreted to avoid." *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring in part and concurring in the judgment).

C. The TCPA's Individual Provisions Apply In Federal Court

The TCPA should apply in diversity actions because the Act as a whole does not conflict with the Federal Rules. Examining each of the TCPA's provisions individually bolsters this conclusion. The Act prevents

meritless litigation through five features—fee-shifting, burden-shifting, possible monetary deterrence awards, discovery restrictions, and expedited timelines—each of which arise in the context of the special motion to dismiss. Tex. Civ. Prac. & Rem. Code Ann. §§ 27.003-.006, 27.009 (West 2015). Each of these components can apply in federal court without conflicting with the Federal Rules because they do not "answer the same question." In fact, this Court has already approved the use of similar provisions in federal court.

1. The TCPA's Fee-Shifting, Burden-Shifting, And Monetary Deterrence Provisions Apply In Federal Court

A defendant who secures dismissal under the TCPA is entitled to "reasonable attorney's fees." Tex. Civ. Prac. & Rem. Code Ann. § 27.009 (West 2015). There can be no doubt that the TCPA's grant of attorney's fees applies in federal court. As this Court has held, "state law denying the right to attorney's fees or giving a right thereto * * * reflects a substantial policy of the state" and therefore "should be followed" in federal court. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975) (quoting 6 James Wm. Moore et al., *Moore's Federal Practice* ¶ 54.77[2], at 1712-1713 (2d ed. 1974)).

The TCPA's burden-shifting mechanism also applies in federal court. See p. 3, *supra*. This Court and *Erie* commentators agree that the burden of proof—both the party bearing it and the appropriate quantum—is dictated by state law. See, *e.g.*, *Dick* v. *New York Life Ins.*, 359 U.S. 437, 446 (1959) ("Under the Erie rule, presumptions (and their effects) and burden

of proof are 'substantive.'") (internal citation omitted); *Palmer* v. *Hoffman*, 318 U.S. 109, 117 (1943) (similar); see also 5 Wright & Miller § 1272 ("The Erie doctrine continues to dictate that * * * the ultimate burden of proof on an issue is a substantive matter and is to be governed by state law.").

Overlooking this precedent, the Fifth Circuit refuses to apply the TCPA in diversity actions because its "preponderance of the evidence" and "clear and specific evidence" requirements "demand judicial weighing of evidence." *Klocke*, 936 F.3d at 246. But any concern that the TCPA's early dismissal motion requires judges to engage in pretrial fact-finding is overstated. Federal courts routinely examine facts and weigh evidence prior to the start of trial. For instance, courts regularly weigh evidence pretrial in assessing diversity and personal jurisdiction. See, *e.g.*, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own."); 5B Wright & Miller § 1350 ("The district court, not a jury, must weigh the merits of what is presented on a Rule 12(b)(1) motion to dismiss, including resolving any issues of fact, and decide the question of subject matter jurisdiction.") (footnotes omitted). The TCPA does not require examination of evidence beyond what courts already conduct in the diversity and personal jurisdictional inquiries.

The TCPA also entitles a defendant who wins dismissal to a monetary award "sufficient to deter the

party who brought the legal action from bringing similar actions" in the future. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(2) (West 2015). This provision also poses no conflict with the Federal Rules, particularly Rule 11. Sanctions under Rule 11, unlike TCPA deterrence awards, are retrospective and depend on the attorney's behavior in the particular case. As this Court has held, Rule 11 sanctions "are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded." *Business Guides, Inc.* v. *Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 553 (1991). Section 27.009(a)(2) awards, by contrast, *are* tied to the outcome of the litigation, not to a particular attorney's misbehavior. They are available only upon a successful motion for TCPA relief and awardable only if necessary to deter similar filings in the future. In short, they operate prospectively and resemble punitive damages more than Rule 11 sanctions. And, like punitive damages, they supply the rule of decision in federal diversity actions. See *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) ("In a diversity action, * * * the propriety of an award of punitive damages * * * and the factors the jury may consider in determining their amount[] are questions of state law.").

2. The TCPA's Discovery And Timing Provisions Apply In Federal Court

The TCPA's discovery and timing provisions also apply in federal court. To achieve the substantive aim of protecting SLAPP defendants from the burdens of

litigation, the TCPA directs courts to suspend discovery after a special motion to dismiss has been filed. Tex. Civ. Prac. & Rem. Code Ann. § 27.003(c) (West 2015). However, "[o]n a motion by a party or on the court's own motion[,] * * * the court may allow specified and limited discovery relevant to the motion" for "good cause." *Id.* § 27.006(b). These provisions are directly analogous to the discovery procedures routinely employed by federal courts when ruling on qualified immunity—procedures that this Court has applied without any worry that they are inconsistent with or "answer the same question" as the Federal Rules.

Like the TCPA, qualified immunity operates to free those entitled to it "from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009) (citation omitted). And like the TCPA, qualified immunity doctrine instructs courts to "resolve th[e] threshold question" of immunity "before permitting discovery." *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998) (citing *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). When discovery is necessary to resolve the immunity question, it "should be tailored specifically to [that] question," *Anderson* v. *Creighton*, 483 U.S. 635, 647 n.6 (1987), just as discovery in the context of an anti-SLAPP motion should be limited to matters "relevant to the motion." Tex. Civ. Prac. & Rem. Code Ann. § 27.006(b) (West 2015).

This Court has long recognized that federal courts can apply qualified immunity discovery procedures alongside the Federal Rules. See, *e.g.*, *Crawford-El*,

523 U.S. at 597-598 (observing that qualified immunity procedures are consistent with a "'firm application of the Federal Rules'" because "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery") (citation omitted). Insulating government officials from the hardship of discovery is simply an application of Rule 26's directive to consider denying discovery when "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Likewise, the TCPA informs federal courts that the burden of discovery in SLAPP suits will normally outweigh the likely benefit, unless good cause convinces the court otherwise. See Tex. Civ. Prac. & Rem. Code Ann. § 27.006(b) (West 2015). The Federal Rules leave room for restricted discovery when ruling on an anti-SLAPP motion, just as they leave room for restricted discovery when ruling on qualified immunity.[3]

The TCPA's timelines for ruling on an anti-SLAPP motion are equally unproblematic. With some exceptions, a court considering a TCPA motion must hold a hearing on the motion within sixty days of the date the

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[3] Federal courts have also restricted discovery to expedite litigation in other contexts, including actions that may be barred by the statute of limitations. See, *e.g.*, *Riddle* v. *Bank of Am. Corp.*, 588 Fed. Appx. 127, 128-129 (3d Cir. 2014) (affirming district court's grant of summary judgment after it "ordered expedited discovery solely on the statute of limitations"); *Lewis* v. *Bellows Falls Congregation of Jehovah's Witnesses*, No. 1:14-cv-205, 2015 WL 4603366, at *1 (D. Vt. July 30, 2015) (compiling cases where courts "limited early discovery to statute of limitations issues when it appeared likely the case could be ended").

motion was served. Tex. Civ. Prac. & Rem. Code Ann. § 27.004 (West 2015). It then must rule on the motion within thirty days of the hearing. *Id.* § 27.005. Qualified immunity again provides a useful analogy in considering why these provisions do not conflict with any Federal Rule.

This Court has "repeatedly 'stressed the importance of resolving [qualified] immunity questions at the earliest possible stage [of] litigation.'" *Wood* v. *Moss*, 572 U.S. 744, 755 n.4 (2014) (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). Courts, including this one, have exercised their inherent discretion to move up timelines without any concern that doing so conflicts with the Federal Rules. See *Hunter*, 502 U.S. at 228 (declaring that "[i]mmunity ordinarily should be decided by the court long before trial" (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 527-529 (1985)); see also *Garcia* v. *Does*, 779 F.3d 84, 97 (2d Cir. 2015) ("[B]ecause qualified immunity protects officials not merely from liability but from litigation, [it] should be resolved when possible on a motion to dismiss.") (citing *Mitchell*, 472 U.S. at 526).

Federal courts should be similarly willing to apply the timelines of the TCPA. Like qualified immunity, the TCPA requires courts to resolve issues quickly to protect eligible defendants from the burdens of litigation. While it is true that the Act establishes a decision timeline with greater specificity than the "earliest possible stage of litigation" standard for qualified immunity, that is no reason to ignore the substantive immunity from suit afforded to SLAPP defendants by the

Texas legislature. At the very least, the TCPA's timing provisions should be read to apply in the same way as the timing procedures underlying qualified immunity—as a standard directing courts to resolve SLAPP suits as quickly as possible.

Examined individually, the TCPA's provisions do not "answer the same question" as any Federal Rule. This Court already recognizes that many of the TCPA's components apply in diversity actions. If no individual provision conflicts with the Federal Rules, then the TCPA as a whole cannot conflict with them either. The Court should "reject [the] counterintuitive conclusion * * * that the whole is greater than the sum of the parts." *Alexander* v. *United States*, 509 U.S. 544, 558 (1993).

* * *

The TCPA exists to protect substantive First Amendment rights, whereas the Federal Rules exist "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. These rules seek two independent ends, and allowing one to preempt the other frustrates the purposes of both. The Federal Rules do not prohibit states from protecting First Amendment rights.

III. This Recurring Issue Is Of National Importance

Now that a majority of states have adopted anti-SLAPP laws to protect speech and public debate, see Media Law Res. Ctr., *Anti-SLAPP Statutes and Commentary*, https://tinyurl.com/y6qwtg7h (last visited Apr. 10, 2020), federal courts are increasingly facing

the choice whether to apply them in diversity cases. See *Travelers Cas. Ins. Co. of Am.* v. *Hirsh*, 831 F.3d 1179, 1182 (9th Cir. 2016) (Kozinski, J., concurring) (noting that anti-SLAPP "cases have more than tripled over the last ten years"). The disparate treatment by the courts of appeals warrants this Court's intervention.

Speech on public issues "is entitled to special protection" because it "occupies the 'highest rung of the hierarchy of First Amendment values.'" *Connick* v. *Myers*, 461 U.S. 138, 145 (1983) (internal citation omitted). SLAPP suits strike at the freedom of public discourse, "a fundamental principle of the American government." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (quoting *Whitney* v. *California*, 274 U.S. 357, 375 (1927)). The resulting "ripple effect of such suits in our society is enormous." *Gordon* v. *Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), aff'd, 616 N.Y.S.2d 98 (N.Y. App. Div. 1994). They "send a clear message: that there is a 'price' for speaking out politically." George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 6 (1989). Successfully defending against these suits "amounts merely to a pyrrhic victory" because "[t]hose who lack the financial resources and emotional stamina to play out the 'game' face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle." *Gordon*, 590 N.Y.S.2d at 656. "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." *Ibid.*

States adopted anti-SLAPP laws precisely to safeguard speech from these chilling effects. Anti-SLAPP statutes reflect states' "profound * * * commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270. Many anti-SLAPP statutes, including the TCPA, explicitly state that their purpose is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government." Tex. Civ. Prac. & Rem. Code Ann. § 27.002 (West 2015); Colo. Rev. Stat. § 13-20-1101 (2019) (adopting same language). "[T]his participation should not be chilled through abuse of the judicial process" because "it is in the public interest to encourage continued participation in matters of public significance." Cal. Civ. Proc. Code § 425.16(a) (West 2015). Prohibiting SLAPP suits "preserve[s] the constitutional rights of persons * * * and assure[s] the continuation of representative government." Fla. Stat. § 768.295(1) (2015).

The well-recognized divide among the courts of appeals over the application of anti-SLAPP laws in federal court undercuts the efficacy of such laws and foments vertical forum shopping between states and federal courts. Whether a SLAPP suit can proceed depends entirely on the choice of forum. If federal courts fail to apply state anti-SLAPP laws, they will become the "forum of choice for well-heeled private parties who wish to use marginally meritorious litigation to stifle public criticism," Roni A. Elias, *Applying Anti-SLAPP Laws in Diversity Cases: How to Protect the Substantive Public Interest in State Procedural Rules*, 41 T.

Marshall L. Rev. 215, 238 (2016), and thus become overwhelmed by dubious state-law actions designed to chill citizens' First Amendment rights.

Plaintiffs can further forum shop horizontally across federal courts. Strategic plaintiffs will file SLAPP suits in those courts that ignore anti-SLAPP laws, which provides an end-run around even the federal courts that have correctly decided to apply them. See, *e.g.*, *Adelson* v. *Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (analyzing on its own the applicability of Nevada's anti-SLAPP statute in federal court, despite the Ninth Circuit's earlier conclusion that it was applicable); *Lampo Grp., LLC* v. *Paffrath*, No. 3:18-cv-01402, 2019 WL 3305143, at *1-*2 (M.D. Tenn. July 23, 2019) (holding California's anti-SLAPP statute does not apply in federal diversity actions even though Ninth Circuit held the opposite); *Intercon Sols., Inc.* v. *Basel Action Network*, 969 F. Supp. 2d 1026, 1041-1044 (N.D. Ill. 2013) (holding same with respect to Washington anti-SLAPP statute), aff'd on other grounds, 791 F.3d 729 (7th Cir. 2015); see also *Clifford* v. *Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018), appeal filed, No. 18-56351 (9th Cir. Oct. 16, 2018) (considering whether TCPA applies in Ninth Circuit after Fifth Circuit held it inapplicable in *Klocke* v. *Watson*, 936 F.3d 240 (2019)). For instance, a California speaker can rely on the Ninth Circuit to afford her the protection of California's anti-SLAPP law. But if sued in the Fifth Circuit, she loses California's protections *even if* choice-of-law rules require the application of California law.

Allowing federal courts to misapply the *Erie* doctrine will not only lead to courts ignoring anti-SLAPP

laws, but will also imperil other important state substantive laws that use procedural tools to effectuate state policy. As of 2014, for example, twenty-eight States had certificate of merit ("COM") requirements in medical malpractice cases. Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, Nat'l Conf. of State Legs. (June 24, 2014), https://tinyurl.com/vwa4qwn. These laws require plaintiffs to certify that an expert has reviewed the case and believes it meritorious before the case can proceed past the pleadings. Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The* Erie *Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 218, 222-224 (2010). Like anti-SLAPP laws, COM requirements attempt to reduce "the incidence of frivolous lawsuits," as well as cut liability premiums. *Id.* at 221 (citation omitted). The Fifth Circuit's broad reasoning would reject application of these laws in federal court. See *Passmore* v. *Baylor Health Care Sys.*, 823 F.3d 292, 299 (5th Cir. 2016) (denying application of COM law in federal court on ground that it conflicts with Rules 26 and 37); see also *Gallivan* v. *United States*, 943 F.3d 291, 293 (6th Cir. 2019) (refusing to apply state law requiring submission of special affidavit in state claim for medical malpractice because "the Federal Rules provide a clear answer: no affidavit is required").

The Fifth Circuit's decision threatens a dramatic incursion on state sovereignty. It ignores substantive state decisions about how to best protect speech rights

and prevent litigants from weaponizing specious litigation. State speech protections would vanish in federal court, a result that is plainly inconsistent with Congress's intent in ensuring that the Federal Rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Because the Fifth Circuit's decision upsets *Erie*'s deference to states on substantive law and threatens fundamental speech, assembly, and petition rights, this Court should grant certiorari.

IV. This Case Is An Ideal Vehicle For Resolving The Split On The Applicability Of State Anti-SLAPP Laws In Federal Court

This case presents an ideal vehicle for deciding this important issue. The issue has sufficiently percolated in the lower courts. Seven courts of appeals have decided it, they are nearly evenly split, and the opinions on each side largely rely on the same reasoning. P. 5-13, *supra*. The arguments in the courts of appeals have been exhausted. The issue is ripe for this Court's review and only this Court's review can bring uniformity.

Further, there are no procedural or jurisdictional issues counseling against review, and the case at this stage concerns pure questions of law. Whether the TCPA applies in federal court was fully briefed below and decided by the Fifth Circuit.

The conflict over anti-SLAPPs' application in federal court will not go away. The split is clear, and this vehicle squarely presents the issue free from any

threshold questions or issues of fact. The issue warrants this Court's immediate review.

* * *

A majority of states have enacted anti-SLAPP laws in order to deter dubious state-law actions designed to punish people for exercising their First Amendment rights. Refusing to apply those provisions in federal courts would "not only flush away state legislatures' considered decisions on matters of state law, but * * * also put the federal courts at risk of being swept away in a rising tide of frivolous state actions." *Makaeff* v. *Trump Univ., LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013) (Wardlaw & Callahan, JJ., concurring in denial of petition for rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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