No. 19-1272

IN THE
Supreme Court of the United States

THOMAS CHRISTOPHER RETZLAFF,

Petitioner,

v.

JASON LEE VAN DYKE,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENT JASON LEE VAN DYKE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARC J. RANDAZZA
Counsel of Record
JAY M. WOLMAN
RANDAZZA LEGAL GROUP, PLLC
2764 Lake Sahara Dr., Suite 109
Las Vegas, NV 89117
(702) 420-2001
ecf@randazza.com
Counsel for Respondent
Jason Lee Van Dyke

QUESTION PRESENTED

Each state's Anti-SLAPP statute is different. Some have been held to permissibly apply in diversity cases, others have not. There is no uniform statute that gives rise to the differing issues when litigants attempt to apply these statutes in federal court. Each state invests its iteration with its own quirks in procedure, substantive protections, and verbiage. This case is about one state's variation, the Texas Citizens Participation Act ("TCPA") (Pet. App. 13a—20a), which has been before federal courts only a few times.

The sole question presented to this Court is whether the 2013 version of the TCPA applies to state claims being heard in federal court. The only Circuit Court of Appeals to address this statute is the Fifth Circuit.

RELATED PROCEEDINGS

1. *Van Dyke v. Retzlaff,* Case No. 18-2793-431 (Tex. 431st D. Ct.) (Complaint filed Mar. 28, 2018).
2. *Van Dyke v. Retzlaff,* Case No. 4:18:cv-247 (E.D. Tex. removed Apr. 10, 2018) (motion decided Jul. 24, 2018).
3. *Van Dyke v. Retzlaff,* Case No. 18-40710 (5th Cir. Oct. 22, 2019) (affirming July 24, 2018 order)
4. *Van Dyke v. Retzlaff,* Case No. 4:20-mc-0091-ALM (E.D. Tex. filed Jun. 22, 2020) (motion to quash by non-party)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page(s)**

CASES—continued: **Page(s)**

CASES—continued: **Page(s)**

CASES—continued: **Page(s)**

CASES—continued: **Page(s)**

STATUTES

STATUTES—continued: **Page(s)**

RULES

OTHER AUTHORITIES

IN THE
Supreme Court of the United States

NO. 19-1272

THOMAS CHRISTOPHER RETZLAFF,

Petitioner,

v.

JASON LEE VAN DYKE,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is reported at 781 Fed. Appx 368. The memorandum opinion of the district court (Pet. App. 4a–10a) is unreported, but it is available at 2018 U.S. Dist. LEXIS 218669 and 2018 WL 4261193.

STATEMENT

For purposes of this Petition, only the procedural history of this case is relevant. On March 28, 2018, Respondent Jason Lee Van Dyke filed suit against Petitioner Thomas Retzlaff for defamation and related claims. The action was removed to the U.S. District Court for the Eastern District of Texas. (Pet. App. 2a.) On May 22, 2018, Mr. Retzlaff filed a motion

to dismiss Mr. Van Dyke's claims under the Texas Citizens Participation Act ("TCPA") (Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.*). (Pet. App. 2a.) The District Court denied this motion on July 24, 2018, finding that the then-applicable 2013 version of the TCPA did not apply in federal court. (Pet. App. 4a.) Mr. Retzlaff thereupon filed an interlocutory appeal to the Fifth Circuit. (Pet. App. 2a.) While the appeal was pending, the Fifth Circuit, in an unrelated matter, held that the then-applicable version of the TCPA did not apply in diversity cases in federal court.[1] *See Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019). After the parties submitted their briefs, the Fifth Circuit requested supplemental briefs discussing *Klocke*, which the parties filed on October 4 and 9, 2019. (Pet. App. 3a). The Fifth Circuit then issued its decision on October 22, 2019, finding that in light of *Klocke*, the 2013 TCPA did not apply in federal diversity cases. (Pet. App. 1a.) Mr. Retzlaff sought rehearing *en banc*, which the Fifth Circuit denied on December 5, 2019. (Pet. App. 11a.)

---

[1] The TCPA version at issue in this case was enacted in 2013 (the original was passed in 2011). *See* Acts 2011, 82nd Leg., R.S. Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011, and Acts 2013, 83rd Leg., R.S. Ch. 1042 (H.B. 2935), Sec. 1-5, eff. June 14, 2013. The TCPA was again overhauled in 2019. *See* Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 9, eff. September 1, 2019. The 2019 version is not applicable to this case, and is operatively different from the 2011 and 2013 versions. *See* Section III, *infra*.

ARGUMENT

I. THERE IS NO OPERATIVE CIRCUIT SPLIT

a. The Issue on Appeal is Only Whether the 2013 version of the TCPA Applied in Diversity Cases, and There is No Circuit Split on This Issue

Contrary to Mr. Retzlaff's claim, there is no operative circuit split as to whether the TCPA applies in federal court – much less one regarding the 2013 version of the law. Mr. Retzlaff attempts to broaden the scope of this appeal by claiming that the actual question before the Court is whether *all* Anti-SLAPP statutes conflict with the Federal Rules of Civil Procedure. But this is not the issue, nor could it be; Anti-SLAPP statutes vary so much from state to state that such a broad question could not possibly be before this Court, or any court below. As the Ninth Circuit recognized, each state's statute has its own distinctive features. *See Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012) (finding that "deeper inspection has persuaded us that, while all of the [anti-SLAPP] statutes have common elements, there are significant differences as well, so that each state's statutory scheme must be evaluated separately");[2] *see also Intercon Sols., Inc. v. Basel Action Network,* 791 F.3d 729, 732 (7th Cir. 2015) (finding the Washington Anti-SLAPP statute could not be applied, yet observing that the "resolution of questions about how the

[2] In *Metabolic Research*, the Ninth Circuit expressly avoided the *Erie* issue as to the applicability of the Nevada Anti-SLAPP statute, NRS 41.660, in federal court. 693 F.3d at 798 n.4. In *Gardner v. Martino*, the Ninth Circuit expressly held the Oregon Anti-SLAPP statute, Or. Rev. Stat. § 31.150, did not collide with the Federal Rules. 563 F.3d 981, 990-91 (9th Cir. 2009).

procedural aspects of other states' anti-SLAPP statutes work in federal court will have to await some other case.") Though those statutes serve similar purposes, there are distinctions. *Compare* Wash. Rev. Code Ann. §§ 4.24.510 & 4.24.525 and D.C. Code § 16-5502 with Cal. Civ. Proc. Code § 425.16.

With the question properly narrowed, the only support for Mr. Retzlaff's argument is *Clifford v. Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018), where the Central District of California granted a motion to dismiss brought under the 2013 version of the TCPA. But the Central District of California engaged in no analysis of the issue and made no conclusion about the applicability of the 2013 TCPA in federal court. Crucially, defendant Stephanie Clifford failed to argue that the TCPA did not apply in federal court;[3] rather, the contested issue was *which* state's Anti-SLAPP statute applied. *Id*. at 920–21. There was no occasion for that court to address an uncontested issue, and the application of the TCPA in that one case does not represent a conflicting finding in the Ninth Circuit that the TCPA applies in federal court.[4]

Clifford's waiver of the argument that the 2013 TCPA did not apply in federal court is similar to what

---

[3] Ms. Clifford, in her written opposition before the district court, only argued that a motion under the TCPA must be considered either as a Rule 12 motion or Rule 56 motion, necessitating discovery if the latter. *See Clifford v. Trump,* Case No. 2:18-cv-06893 (C.D. Cal. Sept. 3, 2018) (Memorandum in Opposition at 7 & 11). She did not argue it could not apply at all. *See id.* At oral argument, she asserted it should be construed as a summary judgment motion. *See Clifford v. Trump,* Case No. 2:18-cv-06893 (C.D. Cal. Oct. 2, 2018) (Transcript of Hearing of Sept. 24, 2018 at 15:13–18).

[4] Ms. Clifford subsequently raised the issue for the first time on appeal to the Ninth Circuit.

occurred in *Tobinick v. Novella*, 848 F.3d 935 (11th Cir. 2017) *cert. denied* 138 S. Ct. 449 (2017). The California plaintiff there appealed the grant of a special motion to dismiss under California's Anti-SLAPP statute; the plaintiff raised the applicability issue for the first time on appeal and was deemed to have waived the issue. 848 F.3d at 943–45. The Eleventh Circuit subsequently deemed the affirmation of the district court's order in *Tobinick* as non-precedential and, in *Carbone v. Cable News Network, Inc.,* held that Georgia's Anti-SLAPP statute did not apply in federal court. 910 F.3d 1345, 1347 (11th Cir. 2018). Should the Ninth Circuit affirm the district court in *Clifford,* it will be under similar non-binding circumstances and will not give rise to a circuit split on the issue of whether the 2013 TCPA applies in federal diversity cases.

As there are no courts outside the Fifth Circuit that have engaged in a binding substantive analysis as to whether the 2013 TCPA applies in diversity cases, there is no circuit split, and the Court should deny Mr. Retzlaff's Petition.

b. The Circuits that Have Applied Anti-SLAPP Statutes in Diversity Cases Dealt with Laws that Differ from the TCPA

There is no reason for this Court to expand the relevant question here to any general Anti-SLAPP principle. Mr. Retzlaff identifies different Circuits that have come to different conclusions about different state laws, but the courts have found that laws similar to the TCPA do not apply.

It cannot be said that the 2013 version of the TCPA at issue "is comparable to the California 'anti-SLAPP' law (or that of any other state) in all material

respects, nor that textually similar provisions must necessarily be construed the same way." *Serafine v. Blunt*, 466 S.W.3d 352, 387 n.122 (Tex. App. 2015) (Pemberton, J., concurring, distinguishing *Kinney v. BCG Atty. Search, Inc.*, No. 03-12-00579-CV, 2014 Tex. App. LEXIS 3998 (Tex. App. Apr. 11, 2014)). Texas's Anti-SLAPP statute was amended, effective September 1, 2019, which amendments materially changed many of its provisions. As Mr. Van Dyke filed suit in 2018, prior to these amendments, the pre-2019 version of the statute applies to this dispute and will be cited throughout. *Accord Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014) (applying pre-2013 version of Nevada Anti-SLAPP statute because suit was filed under pre-2013 version).[5]

The 2013 version of the TCPA at issue allowed a party to file a motion to dismiss a legal action that is "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association . . . ." Tex. Civ. Prac. & Rem. Code § 27.003(a).[6] The moving party bore the initial burden of showing the plaintiff's suit is "based on, relates to, or is in response to" the defendant's exercise of these rights. *Id.* at § 27.005(b). If the moving party made this showing, the burden then shifted to the non-

---

[5] The Second Circuit in *Adelson* also focused on the issues of immunity and fee shifting, rather than conflict with Rules 12 and 56. 774 F.3d at 809. In fact, it expressly avoided addressing a potential collision between Nevada's discovery stay and Rule 56(d). *Id.* Similarly, in utilizing the California Anti-SLAPP statute, the Second Circuit did not address the collision issue. *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 147–48 (2d Cir. 2013).

[6] All citations to the statute are to the version as it stood prior to the 2019 amendments except where otherwise discussing those amendments.

moving party to "establish[ ] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* at § 27.005(c). Even if the plaintiff met this burden of proof, the court was required to "dismiss a legal action against the moving party if the moving party establishe[d] by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." *Id.* at § 27.005(d). In deciding a TCPA motion, a court was required to consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* at § 27.006(a). The statute required courts to hear and decide a motion under the TCPA within a specified time (*id.* at § 27.004, § 27.005(a)), the filing of a motion automatically stays all discovery (*id.* at § 27.003(c)), and the court was required to award costs, reasonable attorneys' fees, and monetary sanctions to a prevailing movant in an amount the "court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." *Id.* at § 27.009(a)(1)–(2).

The First, Second, and Ninth Circuits all dealt with substantially different statutes. The First Circuit, in *Godin v. Schenks,* found that Maine's Anti-SLAPP statute applied in diversity cases. 629 F.3d 79, 81 (1st Cir. 2010).[7] Maine's law, 14 M.R.S. § 556, provides that a party may bring a special motion to dismiss a claim "based on the moving party's exercise of the moving party's right to petition . . . ." The non-

[7] The applicability of the Massachusetts Anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H, was raised (specifically as to the Seventh Amendment) before the First Circuit, but not adjudicated. *Steinmetz v. Coyle & Caron, Inc. (In re Steinmetz)*, 862 F.3d 128 (1st Cir. 2017).

moving party must "show[ ] that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party." *Id.* Maine's statute was found not to directly collide with or ask the same questions as Federal Rules 12 and 56, because Maine's statute provided a substantive right, including burden of proof allocation and substantive legal defenses "function[ing] to define the scope of the state-created right." 629 F.3d at 89–90 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 423 (2010) (Stevens, J., concurring)). This is in contrast to the 2013 TCPA, whose "burden-shifting framework impose[d] additional requirements beyond those found in Rules 12 and 56 and answer[ed] the same question as those rules." *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019).

The Second Circuit in *Adelson* found that Nevada's Anti-SLAPP statute could be partially applied in federal diversity cases. 774 F.3d at 809. Specifically, the Second Circuit found that the substantive statutory immunity from suit and mandatory fee shifting were "unproblematic." *Id.* The procedural question in *Adelson*, regarding the availability of a stay of discovery, was not decided under the Nevada Anti-SLAPP statute, but rather under Rule 56. *Id.* The Second Circuit did not confront the issue of a potential collision between the operative statute,[8] NRS 41.660, and Rules 12 & 56. Further, the operative statute provided specifically that a special motion to dismiss

[8] In 2013 and 2015, Nevada's Anti-SLAPP statute underwent significant revisions that broadened its scope, among other things. This suit was filed prior to 2013, and so this brief will discuss the pre-2013 version of the statute.

under the statute was to be "[t]reat[ed] . . . as a motion for summary judgment." NRS 41.660(3)(a). This is very different from the TCPA, which not only shifts the burden to a plaintiff to establish his claims, unlike in responding to a summary judgment motion, but also to prove his claims with the higher standard of "clear and specific" evidence. Thus, there is no split between the decisions in *Adelson* and *Klocke*.

Finally, the Ninth Circuit has repeatedly held that California's Anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, applies in federal diversity cases. This statute allows a defendant to file a special motion to strike "[a] cause of action . . . arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." Cal. Civ. Proc. Code § 425.16(b)(1). In opposing a special motion to strike, the plaintiff must "establish[ ] that there is a probability that the plaintiff will prevail on the claim." In analyzing the merits of a plaintiff's claim, California courts use "a summary-judgment-like procedure." *Wallace v. McCubbin*, 196 Cal. App. 4th 1169, 1180–81 (2011); *see Schoendorf v. U.D. Registry, Inc.*, 97 Cal. App. 4th 227, 236 (2002).

Ninth Circuit courts that have applied this statute have treated it as providing a substantive right in the context of either a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or a motion for summary judgment under Rule 56, and they do not weigh the evidence. *See Planned Parenthood Fed'n of Am. v. Ctr. For Med. Progress*, 890 F.3d 828, 833 (9th Cir. 2018); *see also United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) citing *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 819-

21, 33 Cal. Rptr. 2d 446, 452-53 (1994). Furthermore, the Ninth Circuit has applied California's law in only a piecemeal fashion, determining that the procedural aspects are severable. *Contrast Intercon Sols., supra* at 732 (observing that Washington had declared that the procedural aspects of its statute were not severable). The Ninth Circuit has repeatedly held that California's purely procedural elements, such as the stay on discovery and provisions regarding timing, are not to be applied in federal court. *See*, *e.g.*, *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016) (refusing to apply time limit of Cal. Civ. Proc. Code § 425.16(f)); *Metabolife Int'l v. Wornick*, 264 F.3d 832, 845–46 (9th Cir. 2001) (refusing to apply discovery-limiting aspects of Cal. Civ. Proc. Code § 425.16(f) & (g)).

Just as with Nevada's prior statute, the application of California's Anti-SLAPP law differs significantly from the TCPA because of its summary judgment standard. The Texas Supreme Court has clarified that the "clear and specific evidence" standard means "unambiguous, sure, or free from doubt," "explicit or relating to a particular named thing," and that supports a rational inference that the alleged fact is true and lies somewhere between Texas' notice pleading standard and the evidentiary standard to prevail at trial. *In re Lipsky*, 460 S.W.3d 579, 590–91 (Tex. 2015). This requires a court to weigh evidence before trial both in support of and in opposition to legal claims and defenses. *See Rehak Creative Servs. v. Witt*, 404 S.W. 3d 716, 732 (Tex. App. Ct. 2013) (determining that the "record [did] not contain the minimum quantum of clear and specific evidence"). Thus, at the beginning of the case, a plaintiff must satisfy a burden that nears the evidentiary standard required to prevail at trial, well beyond

what would be required under Rule 56, let alone under Rule 12.

The federal courts that have allowed Anti-SLAPP statutes in diversity cases have either dealt with laws that impose requirements completely apart from the merits of a plaintiff's claims (Maine), or that treat an Anti-SLAPP motion as a motion for summary judgment (Nevada and California).[9] The 2013 TCPA did neither. The statute does not impose burdens on a plaintiff that are separate from the merits of his claims; he is instead required to prove each essential element of his claims with "clear and specific evidence." The 2013 TCPA's evidentiary burden was higher than that imposed on plaintiffs by Maine, Nevada, or California's laws, and its burden-shifting framework is inconsistent with a motion to dismiss under Federal Rule 12(b)(6) or a motion for summary judgment under Rule 56. Mr. Retzlaff does not identify any Circuit that has found application of a law similar to the TCPA in federal court is appropriate.

---

[9] The Fifth Circuit itself had previously applied the Louisiana Anti-SLAPP statute in *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164 (5th Cir. 2009). However, in *Klocke*, the Fifth Circuit distinguished *Henry,* noting that the earlier case did not confront the conflict between state and federal law and that it pre-dated this Court's decision in *Shady Grove.* 936 F.3d at 248-249. In *Mitchell v. Hood*, the Fifth Circuit opted to "not decide whether Louisiana's anti-SLAPP law is appropriately asserted in a federal diversity case," deciding the case on alternate grounds. 614 F. App'x 137, 139 n.1 (5th Cir. 2015). Thus, it did not render any precedential decision on the issue until *Klocke.*

c. The Circuits That Have Rejected Application of Anti-SLAPP Statutes in Diversity Cases Dealt with Laws Closer to the TCPA

The Texas courts have explained that the 2013 TCPA protected the rights of citizens to petition and speak on matters of public concerns "by creating a 'set of procedural mechanisms[.]'" *Buckingham Senior Living Cmty., Inc. v. Washington*, No. 01-19-00374-CV, 2020 Tex. App. LEXIS 4230, at *4 (Tex. App. June 4, 2020) (quoting *Serafine, supra* at 369 (Pemberton, J., concurring)). The Eleventh Circuit has found that the motion-to-strike provision of Georgia's Anti-SLAPP statute, O.C.G.A. § 9-11-11.1, does not apply in federal diversity cases. *Carbone v. CNN, Inc.*, 910 F.3d 1345 (11th Cir. 2018). Though Georgia's law contained wording similar to California's statute regarding a plaintiff's burden to show a probability of prevailing on his claims, Georgia courts found that the statute "contemplates a substantive, evidentiary determination of the plaintiff's probability of prevailing on his claims." *Rosser v. Clyatt*, 348 Ga. App. 40, 43 (2018). The *Carbone* court reasoned that the law conflicted with Federal Rules 8, 12, and 56 because the plaintiff's "evidentiary burden is far more demanding than one requiring him only to identify material factual disputes that a jury could reasonably resolve in his favor, and it requires the court to consider whether the factual underpinnings of the plaintiff's claim are likely true." *Carbone*, 910 F.3d at 1351. Just as Georgia's Anti-SLAPP statute imposes an evidentiary requirement beyond the Federal Rules, so did the 2013 TCPA by forcing a plaintiff to make a showing by "clear and specific evidence" beyond what is required by the Federal Rules. The

2013 TCPA was even more explicit about imposing a burden inconsistent with the Federal Rules.

The D.C. Circuit dealt with the District of Columbia's Anti-SLAPP law, D.C. Code § 16-5502. *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015). Similar to Georgia's law, D.C.'s law requires a plaintiff to oppose a special motion to dismiss under the statute by "demonstrat[ing] that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C. Code § 16-5502(b). Justice Kavanaugh, writing for the panel, found the D.C. statute does not apply in federal court and noted that a plaintiff's burden under the law conflicted with Federal Rules 12 and 56 because the Rules "do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal." *Abbas*, 783 F.3d 1328 at 1334. Importantly, the *Abbas* court observed that, unlike with California's statute, "the D.C. Court of Appeals has never interpreted the D.C. Anti-SLAPP Act's likelihood of success standard to simply mirror the standards imposed by Federal Rules 12 and 56." *Id.* at 1335. Again, a motion under the 2013 TCPA was not treated as a motion for summary judgment, and thus the 2013 TCPA was similar to D.C.'s law.

The Tenth Circuit found that New Mexico's Anti-SLAPP law, N.M. Stat. Ann. § 38-2-9.1, was purely procedural and thus did not apply in federal diversity cases. *Los Lobos Renewable Power, LLC v. Ameri-Culture, Inc.*, 885 F.3d 659, 669 (10th Cir. 2018) *cert. denied* 139 S. Ct. 591 (2018). Unlike the other Anti-SLAPP laws addressed by the other Circuits, New Mexico's law provided merely that a party could bring "a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that

shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation." N.M. Stat. Ann. § 38-2-9.1(A). It also allowed for an award of costs and fees if one of these types of motions were granted. *Id.* at § 38-2-9.1(B). Because the New Mexico law did not create a substantive right to immunity from certain kinds of lawsuits, but instead created only a procedural fast-track for qualifying cases, it was merely procedural under *Erie* and did not apply in federal diversity cases. *AmeriCulture*, 885 F.3d at 669. Instructive in this analysis was a decision by the New Mexico Supreme Court emphasizing that the protections of the statute were purely procedural. *Id.* at 669–70 (citing *Cordova v. Cline*, 396 P.3d 159, 162 (N.M. 2017)). New Mexico's statute is materially different from the 2013 TCPA and all other Anti-SLAPP laws considered by the Circuit Courts of Appeals, and *AmeriCulture* does not support Mr. Retzlaff's argument that there is a circuit split regarding Anti-SLAPP statutes.

II. THE 2013 TCPA DID NOT APPLY IN FEDERAL COURT

Even assuming an operative circuit split did exist, the Fifth Circuit has correctly found that the 2013 TCPA did not apply in federal diversity cases because it directly collided with multiple Federal Rules of Civil Procedure. The Fifth Circuit's decision in *Klocke,* as applied in this case, below, is well-grounded.

Many states have enacted Anti-SLAPP statutes as a means for "giving more breathing space for free speech about contentious public issues" by "making it easier to dismiss defamation suits at an early stage of

litigation." *Abbas v. Foreign Policy Groups, LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015); *see also Cuba v. Pylant*, 814 F.3d 701, 707 (5th Cir. 2016). As noble the intent, the 2013 TCPA does not have a place in the federal courts.

Texas's procedural requirements, if anything, were like the California ones not applied by the Ninth Circuit. Former Ninth Circuit judge Alex Kozinski described these requirements as "exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied by the Federal Rules" that federal courts have no business applying. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J., concurring) *reh'g en banc denied* 736 F.3d 1180 (9th Cir. 2013). This inquiry is relevant only if the state rules are substantive, rather than procedural, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). While the majority, if not the entirety, of the 2013 TCPA was procedural, this distinction does not matter because the Rules Enabling Act precludes application of the 2013 TCPA in diversity cases.

"A federal court exercising diversity jurisdiction should not apply a state law or rule if (1) a Federal Rule of Civil Procedure 'answer[s] the same question' as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act." *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398–99 (2010)). Justice Stevens also noted in *Shady Grove* that a valid Federal Rule controls where "the federal rule is 'sufficiently broad to control the issue before the Court,' such that there is a 'direct collision.'" 559 U.S. at 422

(Stevens, J., concurring) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980)).

Federal Rules of Civil Procedure 8, 11, 12, 26, and 56 are valid under the Rules Enabling Act. *See, e.g., Chamberlain v. Giampapa*, 210 F.3d 154, 160 (3rd Cir. 2000) (noting "[t]here is, of course, no contention that Federal Rules 8 and 9 are beyond the scope of the Rules Enabling Act . . . ."); *Bus. Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 552–54 (1991) (Rule 11); *Abbas*, 783 F.3d at 1333 (Rules 12 and 56); *Bearint v. Dorell Juvenile*, 389 F.3d 1339, 1353 (11th Cir. 2004) (noting that portion of Rule 26 would govern in diversity case even if inconsistent with Florida law). Mr. Retzlaff does not argue otherwise. Thus, the only question is whether there is a "direct collision" between the 2013 TCPA and the Federal Rules.

a. The 2013 TCPA Directly Collided with Federal Rules 8 and 12

Mr. Retzlaff did not file his TCPA motion in a manner invoking Rule 12 or any Federal rule—he filed it six days before he filed his Rule 12 motion (asserting lack of personal jurisdiction under Rule 12(b)(2)). A TCPA motion tests a complaint in a way that Rule 12(b)(6) does not. To survive a Rule 12(b)(6) motion, it is generally understood that a "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Lexington Ins. Co. v. S.H.R.M. Catering Servs., Inc.*, 567 F.3d 183, 184 (5th Cir. 2009). "Asking for plausible grounds . . . does not impose a probability requirement at the pleading stage . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Thus, it has been held that, under Rule 12(b)(6), "a well-

pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable," and that recovery is remote and unlikely. *Leal v. McHugh*, 731 F.3d 405, 413 (5th Cir. 2013). Similarly, Rule 8 does not require a plaintiff to provide anything beyond simple "notice pleading."[10] *See, e.g., Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168 (1993) (rejecting a heightened pleading standard under Section 1983). In fact, when a court decides to consider extrinsic evidence in a motion to dismiss, it must convert the motion to dismiss to a motion for summary judgment. Fed. R. Civ. P. 12(d)).

In direct conflict with these rules, the 2013 TCPA *required a court to consider extrinsic evidence.* To defeat a TCPA motion, a plaintiff *must* present extrinsic evidence. A court is required to "consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." Tex. Civ. Prac. & Rem. Code § 27.006(a). A federal court applying the 2013 TCPA would thus be required to disregard Rule 12(b)(6) and automatically treat all motions to dismiss as a motion for summary judgment. This removes a district court's discretion to disregard extrinsic evidence in connection with a motion to dismiss, directly colliding with Rule 12.

Mr. Retzlaff argues the 2013 TCPA did not directly collide with or answer the same question as Rule 12 because it applies only to a specific subset of cases.

---

[10] Mr. Retzlaff argues that the Fifth Circuit should have treated his motion as an affirmative defense under Rule 8. This issue is not ripe – Mr. Retzlaff never filed an answer and affirmative defenses, but rather filed a Rule 12(b)(2) motion days later.

But Rule 12 is broader than the 2013 TCPA, and by necessity they answer the same question: under what circumstances may a defendant in an alleged SLAPP suit dismiss a plaintiff's claims. This same reasoning applies to the inquiry under Rule 56, as well.

Mr. Retzlaff argues that the 2013 TCPA could have been reconciled with the Federal Rules by treating the concept of immunity under the statute as an affirmative defense. (Petition at 20–21.) This is the first time Mr. Retzlaff has made this argument; he did not raise it at the district court or before the Fifth Circuit. Through his failure to make this argument previously, he has forfeited and cannot raise it for the first time here. *See Puckett v. United States*, 556 U.S. 129, 135–36 (2009).

But even if it were not too late for him to make this argument, it makes no sense and would not have assisted him at the district court. Under Fed. R. Civ. P. 12(b)(6), a district court must accept all well-pled factual allegations as true. *See, e.g, Jones v. Bock,* 549 U.S. 199, 215 (2007). A court may grant a Rule 12(b)(6) motion based on an affirmative defense, but only if the applicability of the defense is apparent on the face of the complaint; the court does not consider extrinsic evidence. *See id.* Yet the "affirmative defense" of the TCPA's immunity from suit required consideration of extrinsic evidence, per the terms of the TCPA itself. Tex. Civ. Prac. & Rem. Code § 27.006(a).

Mr. Retzlaff tries to bolster his affirmative defense argument by reference to *Phoenix Trading, Inc. v. Loops LLC*, but this case provides no assistance. 732 F.3d 936 (9th Cir. 2013). It discussed Washington's Anti-SLAPP statute, which explicitly provided that it

grants "immun[ity] from civil liability" for certain qualifying statements. Wash. Rev. Code Ann. § 4.24.510. The Ninth Circuit noted that Washington courts described the statute's protections as an affirmative defense. *Phoenix Trading*, 732 F.3d at 942. This was not a litigated issue before the Ninth Circuit and the collision issue never arose. However, in its later decision interpreting its own law, the Washington Supreme Court determined that the statute violated the right to trial by jury; in so doing, it held that the procedural portions were not severable from the substantive. *See Intercon Sols.*, 791 F.3d at 732 (7th Cir. 2015) (citing *Davis v. Cox*, 183 Wn.2d 269, 275, 351 P.3d 862 (2015)). Not being severable, the Washington statute's procedural provisions caused the entire statute to be in conflict with the Federal rules. The assumptions made by the Ninth Circuit in *Phoenix Trading*, in discussing the Washington statute's parallels to the California Anti-SLAPP statute, would not have survived post-*Davis* scrutiny. 732 F.3d at 942 n.6. By extension, Mr. Retzlaff could not file a 2013 TCPA motion without colliding with the Federal Rules.

b. The 2013 TCPA Directly Collided with Federal Rule 56 and the Right to a Jury Trial

Mr. Retzlaff cannot avoid a collision with Rule 56 either. Rule 56 permits summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Significantly, it is the *moving party* that bears the initial burden. Opposing a motion under Rule 56 only requires a party to show a genuine dispute of material

fact. *See., e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The 2013 TCPA, to the contrary, inverted these burdens. The moving party does bear an initial burden, but it is only to show that the "legal action is based on, relates to, or is in response to" enumerated types of speech-related conduct. Tex. Civ. Prac. & Rem. Code § 27.005(b).[11] Once the moving party meets this burden, the burden shifts to the non-moving party to show a *prima facie* case by "clear and specific" evidence. *Id*. at § 27.005(c). Once the trial court can reach the merits, the non-moving party must perform all the legwork, which directly collides with how burdens are allocated under Rule 56. Even though the moving party bore an initial burden under the TCPA to establish a defense or that the claims are meritless, the statute would still directly collide with Rule 56 because its "clear and specific evidence" requirement exceeds anything a non-moving party must show in a Rule 56 motion.

The Fifth Circuit in *Klocke v. Watson* acknowledged that this burden-shifting was an especially problematic element of the 2013 TCPA, and it was material to the court's decision that the 2013 TCPA did not apply in federal court. 936 F.3d 240, 248-49 (finding that "Texas imposes higher and more

---

[11] The Fifth Circuit previously assumed, without deciding, that the 2013 TCPA could be applied. *See Cuba v. Pylant*, 814 F.3d 701, 706 n.6 (5th Cir. 2016). In *Cuba,* the Fifth Circuit relayed that the movant's burden is under the "preponderance of the evidence standard." 814 F.3d at 711. Summary judgment has a different formulation; it "asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

complex preliminary burdens on the motion to dismiss process and imposes rigorous procedural deadlines"). It compared this burdensome framework with Louisiana's Anti-SLAPP statute, La. C.C.P. Art. 971, which was more compatible with the Federal Rules because it only required a plaintiff to "establish[ ] a probability of success on the claim" and that a non-movant's burden was "functionally equivalent to that under Rule 56." *Id.* at 248–49 (citing *Block v. Tanenhaus*, 815 F.3d 218, 221 (5th Cir. 2016)).

The 2013 TCPA's direct collision is not limited only to Rule 56, but also to the right to a civil jury trial under the Seventh Amendment. The "Seventh Amendment . . . assigns the decisions of disputed fact to the jury." *Gasperini v. Ctr. For Hum.*, 518 U.S. 415, 432 (1996). That is important because this Court has held that in the *Erie* doctrine context, courts should not apply state law that conflicts with overriding federal interests, such as the right to trial by jury for disputed factual questions. *See Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958) (finding that Seventh Amendment rights overrode state interests in allowing judge to determine factual questions in workers' compensation case). Justices Gorsuch and Kavanaugh have previously expressed support for this position. *See* Bryan A. Garner, Carlos Bea, . . . Neil M. Gorsuch, . . . Brett M. Kavanaugh, *et al.*, *The Law of Judicial Precedent* 581 (2016) (stating "a federal court will not apply a state's law or procedure that conflicts with an overriding federal interest, such as the right to trial by jury guaranteed by the Seventh Amendment") (citing *Gasperini*, 518 U.S. at 426; *Byrd*, 356 U.S. at 537–40). Texas courts themselves have avoided this issue. *See, e.g., Shields v. Shields,* No. 05-18-01539-CV, 2019 Tex. App.

LEXIS 7982, at *9 n.6 (Tex. App. Aug. 29, 2019) (abstaining on the issue of right to a jury trial where matter decided on other grounds).

Mr. Retzlaff attempts to dismiss this conflict by noting that federal courts routinely engage in fact-finding and weighing of evidence in pre-trial proceedings such as disputes over diversity and personal jurisdiction. (*See* Petition at 25.) There is a crucial distinction between these proceedings; a TCPA motion is dispositive in nature. To secure a plaintiff's right to a jury trial, Federal Rules 12(b)(6) and 56 do not allow the weighing of evidence in assessing the merits of the claim. Jurisdictional disputes, on the other hand, do not typically result in dismissal with prejudice. A successful TCPA motion dismisses a complaint with prejudice. *See LegacyTexas Bank v. Harlan*, No. 05-18-00039-CV, 2018 Tex. App. LEXIS 4134, 2018 WL 2926397, at *5 (Tex. App.—Dallas June 7, 2018, no pet.) (mem. op.); *Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, No. 05-14-00299-CV, 2015 Tex. App. LEXIS 3209, 2015 WL 1519667, at *3 (Tex. App.—Dallas Apr. 1, 2015, pet. denied) (mem. op.). Thus, it cannot be compared to a motion to resolve a jurisdictional dispute.

Mr. Retzlaff also argues that the burden of proof for a state law claim is dictated by state law, and thus there is no conflict between the 2013 TCPA and the Federal Rules. (Petition at 24.) This attempted sleight-of-hand is logically faulty. A state obviously may apportion the *ultimate* burdens of proof for a state law claim. In fact, a plaintiff constitutionally must bear the burden of proving the types of claims, such as defamation, that would normally implicate the TCPA. However, this burden of proof need only be met at trial, not at the outset of litigation. A state

is not free to decide that a plaintiff must prove the entirety of his case at the outset without the benefit of discovery. Otherwise, the state would violate a plaintiff's constitutional right to a civil jury trial. In arguing for a novel motion practice to resolve substantive matters otherwise appropriate for trial, Mr. Retzlaff unintentionally highlights that the 2013 TCPA was procedural, rather than substantive, and should not be applied under the *Erie* doctrine. This Court has previously held that "[re]allocat[ions] of decisionmaking authority . . . are prototypical procedural rules." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Federal courts should apply federal law in the face of this attempted reallocation. *See Gasperini*, 518 U.S. at 427.

c. The 2013 TCPA Collided with Federal Rule 26 and the Inherent Right of Federal Courts to Manage Their Own Docket and Regulate Discovery

District courts require substantial inherent authority to manage the means and timing of judicial process to effectively address the business of federal courts. *See, e.g., Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988); *U.S. v. Colomb*, 419 U.S. F.3d 292, 299 (5th Cir. 2002). The TCPA interferes with this authority.

First, the 2013 TCPA required that a motion under the statute be heard no later than 90 days following service of the motion, unless the court permits discovery. Tex. Civ. Prac. & Rem. Code § 27.004.[12]

[12] Even when discovery is permitted, the court must still conduct a hearing within 120 days of the motion being filed. *Id.* at § 27.004(c).

The court must then rule on the motion no later than 30 days following the hearing. *Id*. at § 27.005(a); *contrast* 28 U.S.C. § 476(a)(1) (recognizing that motions may be pending for more than six months). The Federal Rules impose no such restriction, and these time limits place TCPA motions on a fast-track that is not supported by any Federal Rule or policy. The mandatory hearing is also inconsistent with a district court's inherent authority, as courts are ordinarily free to grant motions to dismiss or for summary judgment without a hearing. The district court effectively loses all control of its docket once a TCPA motion, and only a TCPA motion, is filed.

Perhaps most egregiously, the filing of a TCPA motion places an automatic complete stay on discovery. *Id*. at § 27.003(c). This directly collides with the normal presumptions under a court's inherent authority and Fed. R. Civ. P. 26, which governs the scope of permitted discovery and the timing of initial disclosures and discovery conferences. The TCPA permits a court to allow "specified and limited discovery relevant to the motion," but only "[o]n a motion by a party or on the court's own motion and on a showing of good cause." *Id*. at § 27.006(b). The presumption that the parties may take discovery is turned on its head and a party must instead show that it is entitled to take discovery. The scope of this "specified and limited discovery" directly collides with the broad scope of discovery allowed under Federal Rule 26(b). The time period in which to conduct discovery is severely constrained as well because the hearing on a TCPA motion must take place within 120 days of the motion being served. Tex. Civ. Prac. & Rem. Code § 27.004(c). Even assuming a party moves for discovery immediately after being served with a TCPA motion and

demonstrates good cause, the TCPA mandates a discovery period far shorter than normal to oppose a motion that is at least as complicated as a motion for summary judgment.

Even the Ninth Circuit, which has found that California's Anti-SLAPP statute generally applies in federal diversity cases, has determined that elements of that law concerned with timing and discovery do not apply in federal court. *See*, *e.g.*, *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016) (refusing to apply time limit of Cal. Civ. Proc. Code § 425.16(f)); *Metabolife Int'l v. Wornick*, 264 F.3d 832, 845–46 (9th Cir. 2001) (refusing to apply discovery-limiting aspects of Cal. Civ. Proc. Code § 425.16(f) & (g)). The 2013 TCPA was silent as to severability. Under Tex. Gov't Code § 311.032(c), severability is permitted if the invalidity does not "affect other provisions or applications of the statute that can be given effect without the invalid provision or application." The operative provisions of the TCPA depend upon the ability to file the specific motion, and the invalidity of one provision precludes the ability to give effect to the others in their absence. *See, e.g.* Tex. Civ. Prac. & Rem. Code § 27.009 (referring to "the moving party"). Mr. Retzlaff does not suggest that, in contrast to California's law, any portion of the 2013 TCPA was severable.

Mr. Retzlaff argues in his Petition that these timing and discovery limitation requirements of the TCPA are compatible with the Federal Rules and the inherent authority of district courts because of the doctrine of qualified immunity. (*See* Petition at 27–30.) This is a wildly off-base analogy. Qualified immunity is a judge-made concept created by this very court. There is no state law or rule colliding with a

Federal Rule. The doctrine of qualified immunity does not command a court to alter how it manages its cases. Courts are certainly encouraged to resolve the issue of qualified immunity at the earliest possible stage, but there is no mandate that they do so. The main case Mr. Retzlaff cites for this proposition, *Crawford-El v. Britton*, even states that a trial court must "*exercise its discretion*" to protect the substance of the qualified immunity defense and protect defendants from unnecessary discovery or trial proceedings. 523 U.S. 574, 598 (1998) (emphasis added). This is completely different from a state statute mandating the timing of motion practice and the course of discovery.

III. THE OPERATIVE VERSION OF THE TCPA NO LONGER EXISTS

A final reason to deny *certiorari* is that the version of the TCPA that applies to this dispute was passed in 2013, but has been superseded. The TCPA was enacted in 2011. The TCPA underwent significant revisions that took effect on September 1, 2019. These revisions changed a number of provisions relevant to the question of whether it applies in federal court. *See* Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 9, eff. September 1, 2019.

First, the amendments changed the moving party's initial burden of proof. Previously, the moving party had to show by a preponderance of the evidence that the plaintiff's suit was based on or in response to protected conduct. Now, however, they need only "demonstrate" this, without an attendant standard of proof. Tex. Civ. Prac. & Rem. Code § 27.005(b). And as to the burden of proof to establish a defense that could defeat a plaintiff's claims despite the plaintiff

meeting his evidentiary burden, the TCPA previously required a defendant to establish "by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." Now, however, the defendant must "establish[ ] an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law," again without an articulated standard of proof. *Id*. at § 27.005(d). This apparent lowering of a defendant's burden under the statute, while keeping the nonmoving party's burden the same, raises new questions as to whether the law directly collides with the Federal Rules.

The amendments modify the kinds of evidence a court must consider in deciding a TCPA motion. Previously, a court was required to consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." The 2019 amendments added to these categories "evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure," which is Texas's summary judgment rule. *Id*. at § 27.006(a). As discussed above, forcing a court to consider and weigh evidence at the initial stages of litigation creates a direct collision with the Federal Rules, and this change only strengthens this collision. In light of these amendments, there is no need for this Court to adjudicate the applicability of the superseded statute in federal courts.

Finally, the amendments changed the mandatory nature of a sanctions award for a successful Anti-SLAPP movant. Previously, a court was required to award sanctions if it granted a motion under the TCPA. Now, however, a court has discretion as to whether to award sanctions. *Id*. at § 27.009(a)(2). This newfound discretion significantly changes the

analysis as to whether the TCPA directly collides with the Federal Rules. In other words: Mr. Retzlaff seeks certiorari on a law that was different from all other Anti-SLAPP laws, which itself is now no longer in place. This Court, rather than taking on an important matter of national importance, would be simply granting certiorari on a matter that would affect merely two people – the litigants in this case alone.

CONCLUSION

In light of the foregoing, Respondent respectfully requests this Court deny the petition for writ of certiorari without further briefing or argument.

This case is not about Anti-SLAPP litigation in federal courts leading to inconsistent outcomes. Different Anti-SLAPP statutes, as legislated by the varying states, treat these issues differently.

Texas passed a law that collided with the federal rules. The Fifth Circuit saw this. However, even the Texas legislature appears to have seen this, and it may have solved the problem. Accordingly, this petition does not seek to clear up a split in the circuits – for only one circuit has ruled on the applicability of the *old* Texas Anti-SLAPP law in federal court. The amended law is not before this Court. There is neither a split nor a matter of great importance to review here.

Respectfully submitted.

Marc J. Randazza
Counsel of Record
Jay M. Wolman
RANDAZZA LEGAL GROUP, PLLC

Counsel for Respondent
Jason Lee Van Dyke

JULY 7, 2020.