No. 19-1272

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

REPLY BRIEF FOR PETITIONER

JEFFREY L. DORRELL
HANSZEN LAPORTE
14201 Memorial Drive
Houston, Texas 77079
(713) 522-9444
jdorrell@hanszenlaporte.com

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dortiz@law.virginia.edu

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES

Page(s)

REPLY BRIEF

Respondent asks this Court to deny review of an important issue on which courts of appeals and commentators agree there is a deep split, see Pet. 6-7 (citing authorities), and that ultimately will "require resolution by the Supreme Court," 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4509 (4th ed. 2019). Respondent spins the question presented as one "that would affect merely two people." Br. in Opp. 28. That would likely surprise the Fifth Circuit, which acknowledged the deep circuit split in *Klocke* v. *Watson*, 936 F.3d 240, 245 (2019) (contrasting D.C. Circuit and its own position with that of First, Second, and Ninth Circuits). One member of this Court has also noted it. *See Abbas* v. *Foreign Policy Grp.*, 783 F.3d 1328, 1335-1336 (D.C. Cir. 2015) (Kavanaugh, J.) (describing conflict then). Ultimately, respondent's novel view rests on two independent, misleading claims: (1) that the Texas Citizens Participation Act ("TCPA") is "different from all other Anti-SLAPP laws" and (2) "is now no longer in place." Br. in Opp. 28. Neither contention is accurate, let alone warrants denial of review.

I. The Minor Differences Among State Anti-SLAPP Laws Are Immaterial To Their Applicability in Federal Court

Respondent asserts that no case could ever helpfully address the applicability of state anti-SLAPP laws in federal court because "each state's statute has its own distinctive features." Br. in Opp. 3 (citing *Metabolic Rsch., Inc.* v. *Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012)). State anti-SLAPP statutes differ, but their distinctions make little or no difference to the circuit split. The problem is not that different

circuits applying the same legal rule to different state provisions have reached different results. The problem is that different circuits apply different *legal rules* to nearly identical state provisions and reach opposite results. This Court has often identified such cases as particularly worthy of review. *See*, *e.g.*, *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995).

Respondent, for example, lists many minor differences between the TCPA and the analogous Maine and California anti-SLAPP statutes that the First and Ninth Circuits held applicable in federal diversity proceedings. See Br. in Opp. 7-11 (listing differences). Those statutes vary in some respects. Indeed, it would be surprising if they did not. Yet, Texas courts have described the TCPA as "essentially identical [to the] California anti-SLAPP statute." *Kinney* v. *BCG Attorney Search, Inc.*, No. 03–12–00579–CV, 2014 WL 1432012, at *6 (Tex. App. Apr. 11, 2014). In just the few weeks since the filing of the brief in opposition, moreover, two circuits have expressly recognized the remarkable family resemblance among state anti-SLAPP statutes. The Second Circuit noted that the statutes it saw as involved in the split, including Texas's, are "analogous to California's. Each raises the bar for plaintiffs to overcome a pretrial dismissal motion." *La Liberte* v. *Reid*, No. 19-3574, 2020 WL 3980223, at *3 n.1 (July 15, 2020).[1] And the Ninth Circuit

[1] *La Liberte* also acknowledges the deep split. It sees the other circuits split 3-2 with the Fifth, Eleventh, and D.C. Circuits holding state anti-SLAPP provisions inapplicable in federal court and the First and Ninth holding the opposite. *See id.* at *3. After *La Liberte*'s holding that California's anti-SLAPP statute does *not* apply in federal court, that split stands at 4-2.

found that "the TCPA is indistinguishable from California's law in all material respects." *Clifford* v. *Trump*, No. 18-56351, 2020 WL 4384081, at *1 (July 31, 2020) (mem.). In short, both circuits share petitioner's view that the state anti-SLAPP statutes centrally involved in the split, including Texas's, are materially identical for purposes of *Erie* analysis.

Moreover, respondent's analysis of each of these circuits' holdings misses the point. Respondent argues the First Circuit does not differ from the Fifth Circuit because "Maine's statute was found [applicable in federal court] because Maine's statute provided a substantive right." Br. in Opp. 8. And it is true that the Fifth Circuit held the TCPA inapplicable in part because it "creates no substantive right." *Klocke*, 936 F.3d at 247 (quoting *Makaeff* v. *Trump Univ., LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring)). But one court's saying that an anti-SLAPP provision is "substantive" while another court says that a nearly identical statute from another state is "procedural" does not show that the statutes are different. Rather, it highlights the precise issue presented in this petition: that the two courts' conflicting approaches to *Erie* cause them to fall on opposite sides of the procedural/substantive line—even when evaluating materially identical provisions.

The Second Circuit's holding also underscores the dangers of SLAPP-tourism. Now a SLAPP-plaintiff who can sue a California defendant in the Second or Fifth Circuits can deny the defendant all the anti-SLAPP protections he would receive in federal court in California. The Second and Fifth Circuits' rulings thus promote horizontal forum shopping, compounding the dangers of vertical forum shopping, which *Erie* recognized and aimed to end.

Respondent's analysis of the Ninth Circuit is no different. In *United States ex rel. Newsham* v. *Lockheed Missiles & Space Co*, that court held that both California's motion to strike, which is equivalent to the TCPA's motion to dismiss, and its allowance of attorney's fees and costs to successful anti-SLAPP movants applied in federal court. 190 F.3d. 963, 972-973 (9th Cir. 1999). Respondent argues that the court did so, in large part, because California's anti-SLAPP provision's summary judgment standard differs from the TCPA's and because they handle disputed facts differently. Br. in Opp. 10. If these factors were the basis of the Ninth Circuit's holding, however, surely the court would have mentioned them somewhere in its analysis. It did not.

Comparison of the actual legal rules used by the various circuits reveals the true conflict. This is seen by examining the legal rules adopted by the Ninth Circuit on the one hand, and the Fifth and D.C. Circuits, on the other. The *Newsham* court explained why the central provisions of California's anti-SLAPP statute applied in federal court:

> We conclude that these provisions and Rules 8, 12, and 56 "can exist side by side ... each controlling its own intended sphere of coverage without conflict." A *qui tam* plaintiff, for example, after being served in federal court with counterclaims like those brought by [the non-movant], may bring a special motion to strike. If successful, the litigant may be entitled to fees. If unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment. We fail to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of

> Rule 8, 12, or 56. In summary, there is no "direct collision" here.

190 F.3d at 972 (quoting *Walker* v. *Armco Steel,* 446 U.S. 740, 752 (1980)). And it rejected the non-movant's argument that California's anti-SLAPP law and the Federal Rules conflicted because they "in some respects, serve similar purposes, namely the expeditious weeding out of meritless claims before trial. This commonality of purpose," it held, "does not constitute a 'direct collision'—there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field.'" *Ibid.* (citations omitted). In short, because the California anti-SLAPP provisions could be applied alongside the Federal Rules there was no conflict, even if they had a common purpose. As the Ninth Circuit has since recognized, it employs a form of typical "conflict preemption" analysis while those on the other side of the split employ a form of broad "field preemption" analysis. *See Clifford*, 2020 WL at *1 (comparing its reasoning with Fifth Circuit's); 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, 557-566 (2018) (arguing that courts finding conflict between the Federal Rules and state provisions apply broad field preemption and those that do not apply narrower conflict preemption).

The Fifth Circuit acknowledged that it adopted its "field preemption" approach from the D.C. Circuit. As the Fifth Circuit explained it:

> In sum, *Shady Grove* and *Abbas*[, the D.C. Circuit case,] hold that a state rule conflicts with a federal procedural rule when it imposes additional procedural requirements not found in the federal rules. The rules "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.

Not surprisingly, dramatically different approaches lead to dramatically different results. Although respondent concludes that it is the difference among state anti-SLAPP statutes that explains the courts' different results, he never supports this conclusion by demonstrating the Ninth Circuit would have held the TCPA inapplicable in federal court or that the Fifth or D.C. Circuits would have held the California anti-SLAPP provisions applicable. Indeed, any doubt about the Ninth's Circuit's application of the TCPA was resolved on July 31, 2020, in *Clifford* v. *Trump*, 2020 WL 4384081, at *1.

Under the Ninth Circuit's standard, if an anti-SLAPP movant can later make a Rule 12 or 56 motion in the usual fashion, there is no conflict between the anti-SLAPP provision and these two rules. As the Fifth Circuit itself acknowledged in *Klocke*, nothing prevents an unsuccessful TCPA movant from making a Rule 12 motion to dismiss or Rule 56 motion for summary judgment. 936 F.3d at 246 ("To be sure, nothing about the TCPA suggests that a party could not file a Rule 12 or 56 motion in federal court alongside a TCPA motion to dismiss."). The Ninth Circuit thus applied the TCPA's central provisions just as it does California's. *Clifford*, 2020 WL 4384081, at *1.

The converse is also true. Under the Fifth and D.C. Circuit's "field preemption" approach, the California anti-SLAPP provision held applicable by the Ninth Circuit would not apply in federal court. The California motion to strike and award of attorney's fees would clearly conflict

with the Federal Rules because they "impose[] additional procedural requirements not found in the federal rules." *Klocke*, 936 F.3d at 245; *see Abbas* v. *Foreign Policy Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015) ("The D.C. Anti–SLAPP Act, in other words, conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial."). Indeed, the Second Circuit recently refused to apply California's anti-SLAPP statute in federal court for exactly this reason. *See La Liberte*, 2020 WL 3980223, at *4 (holding "California's special motion [inapplicable because it] requires the plaintiff to make a showing that the Federal Rules do not").

II. The 2019 Amendments To The TCPA Are Irrelevant To Its Applicability in Federal Court

As respondent repeatedly notes, *e.g.*, Br. in Opp. 2 n.1, 3, and petitioner pointed out, Pet.2 n.1, Texas amended the TCPA in 2019. 2019 Tex. Gen. Laws 961, 961-964; *see* Amy Bresnen & Steve Bresnen, *The 2019 Anti-SLAPP Reform Legislation*, 82 Tex. B.J. 622 (2019) (describing changes). With respect to the Fifth Circuit's legal approach, however, the amended version is identical to the earlier one. "It [still] imposes additional procedural requirements not found in the federal rules," in particular the "TCPA's burden shifting framework and heightened evidentiary standards." *Klocke*, 936 F.3d at 245. Respondent fails to show that the slightly altered version of TCPA would fare any differently in the Fifth Circuit than the old. Under the Fifth Circuit's field-preemption approach, it could not. Respondent likewise makes no argument that the First and Ninth Circuits would refuse to apply the amended version of the TCPA in their courts. Since the amended TCPA can operate in tandem with Rules 12(b)(6) and 56, they would find no conflict.

III. The Fifth Circuit's "Field Preemption" Approach Is Flawed

With respect to the merits, respondent concedes that a "TCPA motion tests a complaint in a way that Rule 12(b)(6) does not," Br. in Opp. 16, and that judges frequently dismiss cases pre-trial after determining facts, *id.* at 22.[2] Respondent also does not contest that the Fifth Circuit's rule (1) would call into question many of this Court's *Erie* precedents, including, *Semtek International Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497 (2001), *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 750-752 (1980), and *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); (2) shows no "sensitivity to important state interests," as *Erie* analysis requires, *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996); promotes both vertical and horizontal forum shopping; undermines the twin aims of *Erie*; and will have many collateral consequences, *see* Pet. 33-34 (describing other important state policies affected).

Respondent instead takes up the sledgehammer of broad field preemption—that the TCPA and the Federal Rules conflict because the TCPA offers a way to reject a specific type of harassing complaint before trial. In other words, since the Federal Rules specify *some* means for rejecting complaints, Rule 12(b)(6) dismissals and Rule 56 summary judgments, they necessarily specify *all* means for doing so. This analysis finds no support in the text of the

---

[2] Respondent tries to avoid the consequences of this second admission by claiming that judges may dismiss actions in these circumstances but not "with prejudice." Br. in Opp. 22. That is simply wrong. In any case, for example, where a judge dismisses an action pre-trial after independent fact-finding on an equitable defense, like unclean hands or laches, she does so "with prejudice."

rules themselves or in any direct conflict between the Federal Rules and TCPA. It merely follows from respondent's theory of what "counts" as a conflict. Under respondent's view, all he has to show is that the TCPA provides an additional means for rejecting some unmeritorious complaints—even if that means complements and does not replace or contradict the Federal Rules. Respondent argues the TCPA's special dismissal mechanism conflicts with Federal Rules, in other words, not because they cannot operate together or the former defeats the aims of the latter, but simply because the Federal Rules fully occupy those areas of federal procedure they touch. *Cf.* Seidleck, 166 U. Pa. L. Rev. at 557-566 (arguing that courts holding particular state provisions inapplicable in federal court because of conflict with the Federal Rules apply broad field preemption).

Respondent makes three further unavailing arguments. First, he argues the TCPA conflicts "[p]erhaps most egregiously" with the Federal Rules because "the filing of a TCPA motion places an automatic complete stay on discovery." Br. in Opp. 24. But as respondent himself admits two sentences later, this is not true: "The TCPA [by its own terms] permits a court to allow 'specified and limited discovery relevant to the motion.'" *Ibid.* (quoting Tex. Civ. Prac. & Rem. Code § 27.006(b)). That the TCPA allows a court to manage and limit discovery poses no conflict with the Federal Rules since they themselves allow federal courts to do so. *See* Pet. 26-28.

Second, respondent claims petitioner forfeited the argument that TCPA's special dismissal provision is authorized as a Rule 8(c) affirmative defense. *See* Br. in Opp. 18. This claim misses the mark. Petitioner has argued all along that

the TCPA does not conflict with the Federal Rules and offers the text of Rule 8(c) as support. Showing that the TCPA is authorized by Rule 8(c) is strong evidence that that TCPA does not conflict with the Federal Rules generally.

Respondent's authority for forfeiture is puzzling in another respect. The one case he cites, *Puckett* v. *United States*, 556 U.S. 129 (2009), *see* Br. in Opp. 18, concerns a case where this Court *did* consider a new argument. The only question was what standard of review applied under Fed. R. Crim. P. 52(b)—de novo or plain error. See *Puckett*, 556 U.S. at 131 ("The question presented by this case is whether a forfeited claim * * * is subject to the plain-error standard of review."). Respondent's invocation of a case interpreting the Rules of Criminal Procedure that holds the opposite of what he argues shows how misguided his forfeiture claim is.

Third, respondent claims the TCPA conflicts not only with the Federal Rules "but also [with] the right to a civil jury trial under the Seventh Amendment." Br. in Opp. 21. The Seventh Amendment, however, only *preserves* the right to trial by jury. U.S. Const. amend. VII ("[I]n suits at common law * * * the right to trial by jury shall be preserved."). It does not create one. The TCPA's special dismissal provision has an ancient pedigree—back to English Chancery and Court of Requests procedures protecting defendants in the common law courts from abuse of process, vexatious suits, and inequitable proceedings. *See, e.g.*, David W. Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539, 557-558, 562, 569, 579 (1986). As early as 1396, for example, Chancery enjoined proceedings in the common law courts for vexatious misuse of process.

See Pynell v. *Underwood*, William Paley Baildon, Select Cases in Chancery A.D. 1364 to 1471, at 20-21 (Selden Society Vol. 10) (W. Baildon ed. 1896) (enjoining lawsuit in common law courts when Chancery defendant had filed prior suits there to harass plaintiff). Needless to say, in none of these suits would there have been trial by jury. The Seventh Amendment thus guarantees no such right in the modern equivalent, which is what the TCPA is. It halts further proceedings when a plaintiff seeks to harass a defendant for his exercise of his First Amendment rights.[3]

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

---

[3] Respondent has, in any event, forfeited his Seventh Amendment argument. He did not raise it in his response to petitioner's TCPA motion in federal district court, *see* Pl.'s Resp. to Def.'s Anti-SLAPP Mot. (filed May 15, 2018) (ECF# 40); the Fifth Circuit did not pass on it in this case, *see* Pet. App. 1a-3a, or in *Klocke*, 936 F.3d 240; and this Court will "not reach [questions] not passed on below," *Padilla* v. *Kentucky*, 559 U.S. 356, 374 (2010).

Respectfully submitted.

JEFFREY L. DORRELL
HANSZEN LAPORTE
14201 Memorial Drive
Houston, Texas 77079
(713) 522-9444
jdorrell@hanszenlaporte.com

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dortiz@law.virginia.edu

AUGUST 2020