NO. 20-602

In the Supreme Court of the United States

STEPHANIE G. CLIFFORD,

Petitioner,

v.

DONALD J. TRUMP,

Respondent.

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

REPLY BRIEF OF PETITIONER

CLARK O. BREWSTER
COUNSEL OF RECORD
GUY A. FORTNEY
MBILIKE M. MWAFULIRWA
BREWSTER & DE ANGELIS PLLC
2617 E. 21ST STREET
TULSA, OK 74114
(918) 742-2021
CBREWSTER@BREWSTERLAW.COM

JANUARY 19, 2021 *COUNSEL FOR PETITIONER*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL RULES

OTHER AUTHORITIES

INTRODUCTION

The decision below holds that a Texas law that governs pretrial dismissal procedures applies in federal court in diversity jurisdiction cases. Respondent does not deny that there is a circuit split between the Fifth and Ninth Circuits. More remarkable still, the Ninth Circuit reached its circuit-splitting decision by applying circuit precedent that sanctions contorting unambiguous state dismissal law to force it to co-exist with the Federal Rules of Civil Procedure—a result at odds with both this Court's precedent and federalism principles. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 403-404 (2010).

To avoid review, Respondent makes three principal arguments, none of which carry the day. First, Respondent attempts to invent vehicle problems by recasting the Ninth Circuit's final judgment below as fact-bound, lacking an adequate record for review, and insignificant because it is unpublished. *See* Br. in Opp. 5-6. But neither claim has merit. To begin, whether Texas pretrial dismissal laws apply in federal court in diversity jurisdiction cases is a question of law. The Ninth Circuit's 9-page opinion fully explains the bases for that court's conclusions. Thus, this Court can review those reasons together with the record on file to answer the question presented. And the unpublished nature of the decision below is inconsequential. *See C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987).

Second, Respondent contends that this case presents an outlier issue and that other cases might present better vehicles. Br. in Opp. 6. But the question

presented is not an outlier. Besides the split between the Fifth and Ninth Circuits, just days ago, the Tenth Circuit also wrestled with the exact question presented in an *interlocutory* appeal. To that list, add the pending cases—that are all in *their interlocutory posture*—in the federal courts in Kansas and North Carolina that have all wrestled with the question presented. But this case—with a ready final judgment—still represents a superior vehicle because, as we show below, this Court disfavors interlocutory reviews.

Third, Respondent contends that the Texas anti-SLAPP statute is a state substantive law. Br. in Opp. 6-7. But precedent belies that claim. The Texas Supreme Court considers the Texas law procedural. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). Also, under this Court's precedent, the anti-SLAPP law's key features—its pretrial dismissal rules—are "ostensibly" procedural. *See Shady Grove*, 559 U.S. at 404. Moreover, because the Federal Rules of Civil Procedure uniformly govern the field of pretrial dismissals in federal court, field preemption and federalism principles preclude complementary state procedural rules.

The Texas anti-SLAPP law's attorney's fees provisions—*that are tied to the state dispositive motion*, and *not any cause of action or claim*—do not change the calculus. As then-Judge Kavanaugh and the Fifth Circuit have recognized, when anti-SLAPP motions are inapplicable because they interfere with the integrated framework for pretrial dismissal in federal court, the state law's attendant attorney's fees provisions are also inapplicable. *See, e.g., Abbas v. Foreign Policy Grp.*, 783 F.3d 1328, 1337 n.5 (D.C. Cir. 2015). That straightforward rule controls here.

The decision below is both wrong and consequential. This Court should grant certiorari.

ARGUMENT

I. THIS CASE PRESENTS AN IDEAL VEHICLE TO REVIEW THE QUESTION PRESENTED.

The Ninth Circuit expressly acknowledged in the decision below that, by applying the Texas Citizens' Participation Act (TCPA), it was creating a circuit split with the Fifth Circuit *over the same statute*. App. 2a. Plus, the decision below stems from a final judgment. *Id.* Thus, this Petition presents the question presented cleanly. But Respondent claims this case is not an ideal vehicle for this Court to grant review because the decision below is unpublished, it merely reaffirmed circuit precedent on a thin factual record, and other cases might present better vehicles for review. *See* Br. in Opp. 5-6. But neither claim has merit.

1. Begin with the unpublished nature of the decision below. This Court has repeatedly made clear that the fact that a decision under review is unpublished is inconsequential to the certiorari calculus. *McCoy*, 484 U.S. at 7 ("[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case."). Indeed, in countless cases, this Court has granted certiorari to review unpublished circuit court decisions that either create (or exacerbate) a circuit split or that conflict with this Court's precedent. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 177 (1997) (reviewing

unpublished decision that exacerbated a circuit split); *Davis v. United States*, 140 S.Ct. 1060, 1061-1062 (2020) (reviewing and reversing unpublished cursory circuit opinion).

The Ninth Circuit's unpublished decision below warrants review because it creates both a circuit split and violates important federalism principles. As noted, the Ninth Circuit reached its decision by contorting unambiguous Texas pretrial dismissal law, to force it to co-exist with the Federal Rules of Civil Procedure. *See* App. 2a-3a. This Court has held that federal courts are powerless to contort unambiguous state law to avoid *Erie* conflicts. *See Shady Grove*, 559 U.S. at 403-404. And a federal court decision that construes or applies an ambiguous state law in conflict with a state high court—like the Ninth Circuit's application of the TCPA below that conflicts with the Supreme of Texas' construction of its own statute—violates federalism principles. *See Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). Either ground warrants this Court's review.

2. Respondent also claims that because the Ninth Circuit's decision below is cursory, then this Court lacks an adequate factual record for meaningful review. *See* Br. in Opp. 5-6. That concern is misguided. The question presented is whether a complementary Texas pretrial dismissal law applies in federal court alongside the Federal Rules of Civil Procedure in diversity jurisdiction cases. *See* Pet. i. That is a straightforward question of law, not fact. *See Guaranty Trust Co. v. York,* 326 U.S. 99, 109 (1945). Thus, for legal questions, it is the state of the law and the *raison d'être* for the holding under review, not an extensive factual record, that merit primary consideration. In any event, this

case has an adequate record. *See, e.g.,* App.1a-45a. To be sure, besides the pleadings and briefs, in the decision below, the Ninth Circuit also gave reasons for its legal holding: it cited and relied on longstanding circuit precedent. App. 2a-3a.

In the past, this Court has granted review and reviewed legal questions from cursory circuit decisions. For example, just last Term, this Court reviewed and reversed a Fifth Circuit unpublished cursory 1-page opinion on the plain error rule under Fed. R. Crim. P. 52(b). *See Davis,* 140 S.Ct. at 1061-1062. Like the decision under review here, the Fifth Circuit's cursory opinion in *Davis* also rested on longstanding circuit precedent. If *Davis*' 1-page unpublished opinion was enough for this Court's review, doubtless a reasoned 9-page Ninth Circuit opinion should also suffice.

3. This Petition does not present an outlier question. Rather, this Petition presents a serious and important question that requires this Court to resolve a conflict among the circuits about whether state anti-SLAPP laws apply in federal courts. *See* Pet. i. That question has "produced disagreement among [federal] judges." *Intercon Sols., Inc. v. Basel Action Network,* 791 F.3d 729, 731 (7th Cir. 2015). That is very true with the Texas anti-SLAPP statute. Besides the cases in the Fifth and Ninth Circuits—that this Petition highlighted—several other cases *all in their interlocutory posture* are also wrestling with the same questions about the Texas anti-SLAPP statute.

The cases below are illustrative. Consider first the Tenth Circuit. Recently, that court grappled with an interlocutory appeal on the TCPA that, like this case, also involved Texas law because of choice-of-law rules. *See Farmland Partners v. Fortunae*, 2021 WL 48786

(10th Cir. Jan. 6, 2021). The key question on the merits was whether the TCPA applies in federal court. *Id.* at *1. Because the district court—even after protracted proceedings—had failed to issue a ruling on the TCPA motion, the Tenth Circuit dismissed the appeal for lack of jurisdiction. *Id.* at **6-7. It then remanded for further proceedings on the same question presented here. *Id.* at *7.[1]

In fact, the same question about the TCPA's applicability has also plagued federal districts courts in Kansas and North Carolina. But most of those cases are in their interlocutory posture. *See, e.g.*, *Platinum Press, Inc. v. Douros-Hawk*, 2018 WL 6435331, at *3 (N.C. Dec. 7, 2018) (denying TCPA motion because statute is inapplicable); *Orchestrate HR, Inc. v. Blue Cross Blue Shield Kan.*, 2019 WL 6327591, at **2-3 (D. Kan. Nov. 26, 2019) (TCPA inapplicable); *Farmlands Partners, Inc. v. Fortunae*, 2019 WL 3456932, at **6-7 (D. Kan. July 31, 2019) (denying TCPA motion without prejudice). Thus, the question presented is not an outlier. This Court's guidance is needed.

4. Even though those other pending interlocutory rulings also address the question presented, this case provides a superior vehicle for review. This case has a

---

[1] To be clear, neither *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020) nor *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019) present better vehicles for review. The petition in *La Liberte* will likely come to this Court at the motion-to-dismiss stage and at an interlocutory posture. *See La Liberte*, 966 F.3d at 83-84. That counsels against this Court granting review. *See N.F.L. v. Ninth Inning, Inc.*, 141 S.Ct. 56, 57 (2020) (Kavanaugh J., statement respecting denial of certiorari). *La Liberte* also involves California, not Texas law. *See La Liberte*, 966 F.3d at 83-84. Finally, as to *Klocke*, the time for seeking certiorari has long expired.

reviewable final judgment addressing the question presented. As shown, those other pending cases will likely present interlocutory appeals addressing the question presented at the motion-to-dismiss stage. This Court has long expressed that it disfavors granting certiorari on such interlocutory orders. *See N.F.L. v. Ninth Inning, Inc.*, 141 S.Ct. 56, 57 (2020) (Kavanaugh, J., statement respecting denial of certiorari) ("[T]he interlocutory posture" of a case "is a factor counseling against this Court's review"); *accord Abbott v. Veasey*, 137 S.Ct. 612, 613 (2017) (Roberts, C.J., statement respecting denial of certiorari). In contrast, this case with its final judgment, represents a superior vehicle for review.

In sum, this Petition presents the question presented and circuit split cleanly. Respondent's suggestions of supposed vehicle problems are unfounded.

II. THE NINTH CIRCUIT'S DECISION IS WRONG AND WARRANTS THIS COURT'S IMMEDIATE REVIEW.

The familiar *Erie* framework requires federal courts to apply the Federal Rules of Civil Procedure when they address the question at hand, even in the wake of complementary state law. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). The TCPA, like Fed. R. Civ. P. 12 and 56, also provides a "procedure for the expedited dismissal of [meritless] suits." *In re Lipsky*, 460 S.W.3d at 586. *Hanna* forecloses the TCPA. Respondent, however, contends that the TCPA is a substantive state statute under *Erie* and, as a result, it is applicable. Br. in Opp. 6-7. Respondent's argument rests on the mere fact that the TCPA makes provision for attorney's fees, and he ignores all the other grave disruptions the Ninth Circuit's approach causes. But on closer inspection, Respondent's argument fails.

1. The TCPA is a procedural statute that does not apply in diversity jurisdiction cases. The Texas Supreme Court, as noted, has characterized the TCPA as merely a state statute directed at early dismissal of meritless lawsuits. *In re Lipsky*, 460 S.W.3d at 586. Even under this Court's precedent, the result is the same: the anti-SLAPP law's key features—its pretrial dismissal rules—are "ostensibly" procedural. *Shady Grove*, 559 U.S. at 404.

2. Moreover, because the Federal Rules of Civil Procedure uniformly govern and occupy the field of pretrial dismissals in federal court, field preemption principles preclude complementary state rules. To begin, the Federal Rules of Civil Procedure preempt their field of operation. *See Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1905 (2019) (Gorsuch, Kavanaugh and Thomas, JJ.) (lead opinion) (outlining the Federal Rules of Civil Procedure's field preemption) (citing *Shady Grove*, 559 U.S. 393); *accord id.* at 1909 (Ginsburg, Kagan, and Sotomayor, JJ., concurring) (agreeing with lead opinion). Specific to dispositive motions, Fed. R. Civ. P. 12, and 56 occupy the field of pretrial dismissal in federal court. *See Klocke*, 936 F.3d at 244-249. When field preemption applies in a given area, as it does with Fed. R. Civ. P. 8, 12, and 56, there is no room for complementary state law. *See, e.g., Arizona v. United States*, 567 U.S. 387, 399, 401 (2012) (when field preemption applies, "even complementary state regulation is impermissible.").

As applied here, the Federal Rules of Civil Procedure preempt the TCPA. The TCPA, like most anti-SLAPP statutes, accomplishes its stated goals "by winnowing claims and defenses in the course of litigation, just like [Fed. R. Civ. P.] Rule 12 and 56."

Carbone v. CNN, 910 F.3d 1345, 1354 (11th Cir. 2018). Thus, however one slices the two sets of laws, they ultimately seek to control the same issue: pretrial dismissal of a lawsuit. *Hanna* and *Shady Grove* leave no doubt that state pretrial dismissal law cannot complement the Federal rules under these circumstances.

3. The Ninth Circuit's silver bullet for avoiding the unavoidable conflict between state anti-SLAPPs and the Federal rules violates federalism. *See* Pet. 21-23. The *Erie* rule is "deeply rooted in notions of federalism." *Boyle v. United Tech. Corp.*, 487 U.S. 500, 517 (1988) (Brennan, J., dissenting). Those notions of federalism require federal courts to respect authoritative constructions of state law by state high courts. *See Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring). Federalism also requires federal courts to avoid contorting unambiguous state law to avoid a collision with a clearly applicable federal rule. *Shady Grove*, 559 U.S. at 403-404 (rejecting "revising state laws * * * [to] [avoid] a potential conflict with a Federal Rule").

The Ninth Circuit's saving interpretation violates all those aspects of federalism. The TCPA is unambiguous that for it to apply, a movant must adduce evidence to trigger its provisions. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b)&(c). That is also the interpretation the Texas Supreme Court has adopted. *See In re Lipsky*, 460 S.W.3d at 590-591. In fact, the TCPA does not draw a distinction between evidence-based and non-evidence-based dispositive motions. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b). But the Ninth Circuit, applying its saving interpretation that lacks any textual anchor, contorts anti-SLAPP laws to mirror Fed. R. Civ. P. 12, while for evidence-based anti-SLAPP motions, Rule 56 standards apply. *Planned*

Parenthood Fed. of Am., Inc. v. Cntr. for Med. Prog., 890 F.3d 828, 834 (9th Cir. 2018). That dramatic judicial revision of unambiguous state law is dangerous and wrong. *Shady Grove*, 559 U.S. at 403-404. The decision below reflects the same flawed reasoning. App. 2a-3a.

4. Respondent is wrong that simply because the TCPA makes provision for attorney's fees then that cures all the ills with the Ninth Circuit's erroneous approach. In fact, in Respondent's view, the provision of attorney's fees alone makes the TCPA substantive for *Erie* purposes. To shore up his position, Respondent relies on statutory labels in the TCPA's title. *See* Br. in Opp. 7 (citing Tex. Civ. Prac. & Rem. § 27.009(a)(1)). While titles and labels are helpful, they are not dispositive because when seeking to determine the interaction of a federal rule and state procedural rules this Court "look[s] *to how a state procedure functions, rather than the particular name that it bears*." *Carey v. Saffold*, 536 U.S. 214, 223 (2002) (emphasis added); *see also generally Guaranty Trust,* 326 U.S. at 109-110 (attaching minimal weight to a state law's label in *Erie* analysis).

When viewed through a functional lens, Respondent's view is wrong. State law provisions permitting an award of attorney's fees can either be substantive or procedural for *Erie* purposes. *Chieftain Royalty Co. v. Enervest Energy Inst. Fund. XIII-A, LLP*, 888 F.3d 455, 460 (10th Cir. 2017), *cert. denied*, 139 S.Ct. 482 (2018). Substantive fees apply in diversity cases, while procedural fees do not. *Id.* Substantive fees are "part and parcel of *the cause of action*" being litigated. *Id.* (emphasis added); *see also* 10 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4509 (4th ed. 2019) ("[W]hen state law provides for the recovery of an attorney's fees *as part of the claim* * * *

the federal court should permit an award of a fee") (emphasis added). But procedural fees are those that courts award for abusive litigation. *See Goodyear Tire & Rubber Co v. Haeger*, 137 S.Ct. 1178, 1186 (2017).

The TCPA does not tie the attorney's fees award *to a specific legal theory*, like a bad faith claim; instead, the Texas Legislature tied the attorney's fees award to the *TCPA dispositive motion*. *See* Tex. Civ. Prac. & Rem. § 27.009(a); *Klocke*, 936 F.3d at 247 n. 6. As then-Judge Kavanaugh and the Fifth Circuit have recognized, *when anti-SLAPP motions* are inapplicable because they interfere with the federal framework for pretrial dismissal in federal court, the state law's attendant attorney's fees provisions—that are *tied to those motions*—are also inapplicable. *See, e.g., Abbas*, 783 F.3d at 1337 n. 5; *Klocke*, 936 F.3d at 247 n. 6. That straightforward rule controls here.

5. Because of the Ninth Circuit's circuit-splitting decision below, there is an anomaly in the law. A losing Texas law defamation plaintiff in the Fifth Circuit faces only federal pretrial dismissal standards with no threat of attorney's fees, costs, and sanctions because of the TCPA. *See Klocke*, 936 F.3d at 244-249. But a losing Texas law defamation plaintiff like Clifford—who lands in the Ninth Circuit (because of conflict-of-law or transfer-of-venue rules)—faces the threat of the TCPA and its attendant attorney's fees, costs, and sanctions. *See Clifford v. Trump*, 818 F. App'x 746, 747 (9th Cir. 2020). This Court needs to review and reject the Ninth Circuit's erroneous precedent.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

CLARK O. BREWSTER
COUNSEL OF RECORD
GUY A. FORTNEY
MBILIKE M. MWAFULIRWA
BREWSTER & DE ANGELIS PLLC
2617 E. 21ST STREET
TULSA, OK 74114
(918) 742-2021
CBREWSTER@BREWSTERLAW.COM

COUNSEL FOR PETITIONER

JANUARY 19, 2021