No. 21-1543

In The
Supreme Court of the United States

JANE DOE aka BEEISM,

Petitioner,

v.

JOMY STERLING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent wrongly claims this case is a poor vehicle for this Court to decide Petitioner's questions, and rewrites the questions presented to make them appear overbroad or unresolvable. This Court should not be swayed by Respondent's straw man arguments related to the scope of the questions presented.

This case implicates the *Erie* doctrine, which is motivated by "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

What could better implicate this doctrine than a case where plaintiff actually forum shopped? Respondent originally filed her claim in state court. Pet. 25 n. 3. When she was unable to obtain Doe's identity via discovery because of California's anti-SLAPP laws, Respondent abandoned the case. *Id.* She later filed this action in federal court, in a blatant attempt to avoid unfavorable state laws.

As it stands, Respondent can use the power of the federal courts to strip Doe of her anonymity without regard for the First Amendment or state laws enacted to protect Doe. Respondent could not achieve the same result in state court. This inequitable administration of laws incentivizes forum shopping for federal courts over state courts and eviscerates constitutional protections. Respondent's arguments are unpersuasive, and this Court should grant certiorari.

ARGUMENT

I. The Petition Does Not Hinge on a "Freewheeling Right to Anonymous Speech"

Respondent claims Petitioner relies on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) to establish an absolute right to anonymous speech. That claim is wrong. Petitioner does not ask this Court to establish a "freewheeling right to anonymous speech." Petitioner does not assume this right exists, nor is the existence of this right an antecedent question to those posed by Petitioner.

This Court has recognized constitutional limits on speech that may be the subject of defamation actions. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990). Petitioner relies on the well-established principles that "[t]rue statements, statements that are not readily capable of being proven false, and statements of pure opinion are protected from defamation actions by the First Amendment." *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) (applying Florida law); *see also Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2015); *Burke v. N.Y.C. Transit Auth.*, 758 F. App'x 192, 195 (2d Cir. 2019); *Avins v. White*, 627 F.2d 637, 642-43 (3d Cir. 1980); *Gibson v. BSA*, 163 F. App'x 206, 212-13 (4th Cir. 2006); *Jolliff v. NLRB*, 513 F.3d 600, 610 (6th Cir. 2008); *Chi. Conservation Ctr. v. Frey*, 40 F. App'x 251, 256 (7th Cir. 2002); *Lauderback v. Am. Broad. Cos.*, 741 F.2d

193, 195 (8th Cir. 1984); *Montgomery v. Risen*, 875 F.3d 709, 713 (2017).

While *McIntyre* did not create an absolute right to anonymous speech, Justice Ginsburg explained that decision found the exercise of state power against someone who "spoke her mind, but sometimes not her name" was "unnecessary, overintrusive, and inconsistent with American ideals" absent a compelling interest. 514 U.S., at 358 (Ginsburg, J., concurring)

McIntyre and this Court's anonymous speech precedent demonstrate that a compelling interest must be established before forcibly de-anonymizing those engaged in protected speech. Though prior cases involved use of legislative power to de-anonymize political speakers, this principle is readily analogous to this case where Respondent seeks to use judicial power to expose Doe for expressing her protected opinion.[1]

Respondent argues the compelling interest in stripping Doe of her anonymity is that Doe has engaged in defamatory speech. Respondent's arguments suffer from a fatal defect – they

[1] As the District Court acknowledged, "[o]f course, [Doe's] opinion that people should not invite minors to their homes for overnight stays or Disney trips is not actionable as a matter of law[.]" Pet. App. 9.

presuppose the speech at issue here is defamatory. Whether a statement is one of fact or opinion, and subject to defamatory interpretation, is a matter of law for the trial court to resolve. *Turner*, 879 F.3d, at 1262-63. This involves construing statements in their totality and within the context of facts otherwise known or available to the reader. *Id.* Internet postings like those at issue in this case are not like newspaper articles with self-contained context.[2] Rather, they exist in a context of other internet postings and other facts available to the reader.

For example, Respondent alleges Doe caused the police to visit Sterling's home. Opp. 3. This is readily contradicted by the public statements of Taylor Sterling, the Respondent's husband, which Doe provided as context for the allegedly defamatory Tweets. Pet. 5-6; Pet. App. 120-26. Under *Turner*, the District Court should have considered the posts proffered by Doe as context in construing the allegedly defamatory Tweets. The District Court determined that "[w]hile some courts require a more searching

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[2] "Courts that have considered the matter have concluded that Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 533 n.5 (6th Cir. 2014).

review [to determine a statement is subject to defamatory interpretation], this approach . . . is not controlling in this jurisdiction." Pet. App. 11.

There is no need to recognize a previously unknown right or establish some "universal standard to apply to all types of speech" for this Court to find that the District Court erred in not considering Doe's proffered evidence that First Amendment limits to defamation rendered her speech unactionable. Nor does this Court have to address other supposedly antecedent issues, as these could be returned to the District Court for resolution under the proper standard articulated by this Court.[3]

Respondent argues that *any* allegation that any snippet of speech is defamatory, no matter how tenuous the claim, is sufficient to strip an individual of their anonymity. If this argument were correct, it would give any enterprising litigant carte blanche to tear away the First Amendment protections of an anonymous speaker. Such a result is plainly contrary to the requirement that a compelling interest be established prior to invading this right. For this reason, certiorari is warranted.

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[3] Another court already found Respondent is a limited public figure in a separate defamation action, where a jury found Respondent's defamation claims lacked merit. Case No. 6:20-cv-01210-GAP-GJK, Doc. 206, 213 (M.D. Fla. Apr. 7, 2022). "Doc." refers to filings in the District Court's docket.

II. Mandamus Was the Only Method to Vindicate Doe's Rights.

Respondent argues this case is unsuitable because it arrived here by denial of mandamus relief. In the Eleventh Circuit, "[d]iscovery orders are ordinarily not final orders that are immediately appealable." *Doe v. United States*, 749 F.3d 999, 1004 (11th Cir. 2014). "Five notable exceptions to this rule exist: the *Perlman* doctrine; the collateral-order doctrine; a certification provided by statute, 28 U.S.C. § 1292(b); a petition for a writ of mandamus; or an appeal of a contempt citation." *Id.* (citation omitted).

Perlman involves a non-party intervenor appealing a discovery order. *See id.* at 1004-05. Twitter or Roblox could have used *Perlman* to seek review in the Eleventh Circuit. Doe could not, nor could Doe have appealed a contempt citation because the subpoenas are not directed towards her. Whether the District Court would have certified an appeal and whether the Eleventh Circuit would have heard it is entirely speculative as both acts are discretionary. 28 U.S.C. § 1292(b).

Respondent argues Doe should have appealed under the collateral order doctrine. This doctrine provides "an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." *Mohawk Indus. v.*

Carpenter, 558 U.S. 100, 105 (2009). In *Mohawk*, plaintiff sought to compel discovery of information covered by defendant's attorney-client privilege. *Id.* at 104. The district court granted plaintiff's request, and defendant sought relief at the Eleventh Circuit by writ of mandamus and by appeal under the collateral order doctrine. *Id.* at 105. The Eleventh Circuit denied mandamus and dismissed the appeal for lack of jurisdiction, holding that an order compelling discovery of a party's privileged information is reviewable upon final judgment. *Id.* at 105.

This Court affirmed the Eleventh Circuit's ruling that discovery orders adverse to a party's privilege are effectively reviewable upon final judgment and thus unappealable under the collateral order doctrine. *Id.* at 107-108. The Eleventh Circuit has since repeatedly affirmed that "*Mohawk* 'foreclosed an interlocutory appeal of an order requiring the disclosure of [privileged] materials' when 'the claimant [of the privilege] [is] a party who could appeal a final judgment.'" *Drummond Co. v. Collingsworth*, 816 F.3d 1319, 1324 (11th Cir. 2016) (quoting *Doe*, 749 F.3d, at 1007); *see also Marigrove, Inc. v. Pinto (In re Aereas)*, No. 15-11596-AA, 2015 U.S. App. LEXIS 23547, at *2 (11th Cir. Aug. 7, 2015) (no jurisdiction over interlocutory appeal of denial of motion to quash subpoenas to third parties); *Williams v. Bank of Am. Corp.*, No. 18-14319-JJ, 2019 U.S. App. LEXIS 1087, at *1 (11th Cir. Jan. 11, 2019) (no jurisdiction over

interlocutory appeal of denial of motion to vacate magistrate's discovery orders).[4]

Respondent's reliance on *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 116 (2d Cir. 2010) is misplaced, as the Second Circuit did not substantially discuss the collateral order doctrine. Further, the First, Sixth, Seventh, Ninth, and Tenth Circuits have agreed with the Eleventh Circuit that the collateral order doctrine forecloses the appeal Doe could have made below. *See Collingsworth*, 816 F.3d, at 1324 (citing cases).

It is exceedingly unlikely that this case could have reached this Court by appeal under the collateral order doctrine. Regardless, this petition is before this Court and the route taken does not render the issues any less salient. This case embodies the precise forum shopping behavior that *Erie* seeks to prevent, brought by a serial defamation litigant. Further, it provides an opportunity for this Court to clarify First Amendment principles as applied to defamation in the digital age. For both these reasons, certiorari should be granted.

III. There is Conflict as to the First Question.

Respondent's claim that there is no conflict as to the first question takes an overly narrow view. Initially, Sup. Ct. R. 10 is instructive, not binding, as to what this Court may consider in granting certiorari.

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[4] Doe does not agree that appeal after final judgment would be a sufficient remedy for disclosure of her identity.

At a minimum, the Tenth Circuit's balancing test in *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987) conflicts with the Eleventh Circuit and District Court's decision here holding no such balancing must be done. Pet. App. 11. Even if not expressly adopted, the Second and Ninth Circuits have at least endorsed two other tests that differ from *Grandbouche*. *Arista Records*, 604 F.3d 110; *Anonymous Online Speakers v. United States Dist. Court* (*In re Anonymous Online Speakers)*, 661 F.3d 1168 (9th Cir. 2011). It is inaccurate to say that no conflict exists among the Circuit Courts of Appeals.

Moreover, "the paucity of appellate precedent is not surprising because discovery disputes are not generally appealable on an interlocutory basis and mandamus review is very limited." *In re Anonymous Online Speakers*, 661 F.3d, at 1175. The Ninth Circuit identified the problem of varying standards across the federal courts in 2011. *Id.* at 1175-76. In more than a decade since there has been no appellate clarity, leaving trial courts to fend for themselves as noted in the Petition. Pet. 8-15. This case presents a rare opportunity to establish clarity on this fundamental First Amendment principle.

IV. There is Conflict as to the Second Question.

Respondent urges this Court to deny certiorari because "this Court cannot answer—in one fell swoop—Petitioner's broad question about the proper application of state anti-SLAPP laws in federal

diversity actions." Opp. 28. This argument fails immediately as Petitioner has only requested this Court consider the anti-SLAPP laws of two states: Florida and California. This argument also disregards the opportunity for this Court to guide the lower courts in the application of anti-SLAPP laws even if these laws are not uniform throughout the nation.

A federal court exercising diversity jurisdiction will not apply a state statute if a Federal Rule of Civil Procedure "answers the question in dispute." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (majority opinion). Contrary to Respondent's arguments, the Circuit Courts of Appeals are conflicted in their interpretation of whether these statutes answer the same questions as the Federal Rules of Civil Procedure.

A first group emphasizes the procedural aspects of state anti-SLAPP statutes, finding these statutes answer the same questions as Fed. R. Civ. Pro. 8, 12, and 56 and are therefore inapplicable. *E.g.*, *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1349 (11th Cir. 2018).

A second group emphasizes the substantive aspects of state anti-SLAPP statutes. Some courts treat anti-SLAPP statutes as effectively a substantive immunity from suit. *E.g. Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1009 (9th Cir. 2017); *see also Black v. Dixie Consumer Prods. LLC*, 835 F.3d 579, 592 (6th Cir. 2016) (discussing treatment of anti-SLAPP

statutes as immunity from suit). Other courts find that anti-SLAPP statutes do not answer the questions posed by Fed. R. Civ. Pro. 8, 12, and 56. *E.g.*, *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010).

Certainly, state statutes at issue differ. Even accounting for differences in statutory language, the Circuit Courts of Appeals have reached divergent conclusions on highly similar statutes.

In *Godin*, the First Circuit found a Maine statute that "create[d] a special process by which a defendant may move to dismiss any claim that arises from the defendant's exercise of the right of petition under either the United States Constitution or the Constitution of Maine," did not conflict with Fed. R. Civ. Pro. 12 or 56. *Godin*, 629 F.3d 79, 82, 89; *see also Steinmetz v. Coyle & Caron, Inc. (In re Steinmetz)*, 862 F.3d 128, 134 (1st Cir. 2017) (upholding application of similar Massachusetts special motion to strike).

In *Carbone*, the Eleventh Circuit found a Georgia statute that created a special motion to strike "claims brought against 'a person or entity arising from any act . . . which could reasonably be construed as an act in furtherance of the person's or entity's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern,'" conflicted with Fed. R. Civ. Pro. 8, 12, and 56. *Carbone*, 910 F.3d 1345, 1348. The Seventh,

Tenth, and DC Circuits have reached similar conclusions on similar statutes. Pet. 22-23.

Disparate treatments of similar statutes aside, there is at least one direct circuit split. The Ninth Circuit reaffirmed its position that the special motion to strike procedures in California's anti-SLAPP statutes do not conflict with Fed. R. Civ. Pro. 8, 12, or 56. *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1140-41 (9th Cir. 2022). However, when considering the same California statute, the Second Circuit found that it did conflict with Fed. R. Civ. Pro. 12 and 56. *La Liberte v. Reid*, 966 F.3d 79, 87 (2d Cir. 2020).

Respondent's argument that no conflict exists is simply untrue. The Second Circuit expressly acknowledged the split in *La Liberte*, noting "the incentive to forum-shop created by a circuit split can be fixed, though not here." *Id.* at 88. Therefore, certiorari is warranted.

* * *

V. Respondent's Identification Argument is Not Compelling.

Respondent claims that Petitioner has all but been identified as Madilynn De La Rosa in the District Court. Opp. 31. Petitioner is not Madilynn De La Rosa. Madilynn De La Rosa is represented by separate counsel below and has declared under penalty of perjury that she is not Doe. Doc. 41, 41-1, 42. Respondent's incorrect belief that she has identified Doe since the filing of the Petition has no bearing on whether this Court should hear this case.

CONCLUSION

Respondent grossly misrepresents the questions presented to claim this is not the right case to address the issues raised. Petitioner's first question relies on well-established First Amendment limitations on defamation and is one that even the District Court acknowledged varies among jurisdictions. Pet. App. 11. Petitioner's second question is limited to two state laws applicable to this case and is one that has produced divergent opinions between Circuit Courts of Appeals. Both questions are substantial and ripe for resolution by this Court.

Respondent finally argues that this Court ought to let other cases of this nature percolate through the lower courts before considering the issues presented. The Ninth Circuit recognized a dozen years ago that similar cases were percolating through the system. *In*

re Anonymous Online Speakers, 661 F.3d, at 1174-75. The time for percolation since then has produced nothing but a dozen years of the use of judicial power to forcibly strip anonymity from those like Doe who "spoke her mind, but sometimes not her name." There need not be a dozen more. This Court should grant certiorari.

Respectfully submitted,

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