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

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* FOR 16 MEDIA ORGANIZATIONS AND ADVOCACY GROUPS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* FOR 16 MEDIA ORGANIZATIONS AND ADVOCACY GROUPS IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37.2, sixteen media organizations and advocacy groups respectfully file this motion for leave of the Court to file the attached *amici curiae* brief in support of the Petitioner.

All counsels of record for the parties received timely notice of the intention to file this brief. On June 26, 2020, Counsel for Petitioner filed a letter of blanket consent for timely filed *amici curiae* briefs in support of petitioner, respondent, or neither party. Respondent, serving as his own Counsel, declined to give consent to file the *amici curiae* brief. While he did not give a reason for the declination, he stated that he "respectfully decline[d] to consent to any amicus brief in this case."

These sixteen media organizations and advocacy groups express their concern over the Fifth Circuit's holding that the Texas Citizen's Participation Act does not apply to diversity cases in federal court. The Fifth Circuit's holding will chill the exercise of the First Amendment rights of press and media organizations, which can have a devastating effect on free speech and public discourse.

The sixteen media organizations and advocacy groups are The Center for Investigative Reporting;

Dow Jones & Company, Inc.; The E.W. Scripps Company; The First Amendment Coalition; Fox Television Stations, LLC; The Georgia Press Association; The Kansas Association of Broadcasters; MPA – Association of Magazine Media; National Federation of Press Women; National Newspaper Association; The National Press Foundation; The National Press Photographers Association; The News Media Alliance; Nexstar Media Group, Inc.; The Radio Television Digital News Association; and Sinclair Broadcast Group, Inc. These media organizations and advocacy groups respectfully assert their legitimate, substantial, and compelling interests in protecting the media and press against meritless lawsuits designed to stifle free speech and public participation.

For these reasons, these sixteen media organizations and advocacy groups respectfully request that this Court grant this Motion for Leave to File the attached *amici curiae* brief in support of the Petitioner.

Respectfully Submitted,

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INTERESTS OF *AMICI CURIAE*[1]

Amici are media organizations and advocacy groups with an interest in protecting the First Amendment rights of freedom of the press. *Amici* have an interest in ensuring that journalists are not sued by plaintiffs employing meritless claims in an attempt to stifle free speech. Some of the *amici* have been forced to defend against these meritless claims previously and/or fear that they may have to defend against future meritless claims in federal courts if the Fifth Circuit precedent is not reversed. Other *amici* advocate for protections for members of the press and other citizens whose First Amendment rights will be harmed if anti-SLAPP laws are not applicable in federal courts.

Many of the *amici* filing this brief filed an *amici curiae* brief in support of Petitioner on the merits of the case before the United States Court of Appeals for the Fifth Circuit. This brief reiterates the concerns of these organizations that not allowing media defendants the protections afforded by anti-SLAPP statutes in federal courts will chill speech.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* affirm that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. Further, pursuant to Sup. Ct. R. 37.2(a), *amici curiae* have timely notified the counsel of record of their intent to file an *amicus* brief in support of Petitioner. Petitioner granted consent to file the brief, while Respondent denied consent.

Amici are The Center for Investigative Reporting; Dow Jones & Company, Inc.; The E.W. Scripps Company; The First Amendment Coalition; Fox Television Stations, LLC; The Georgia Press Association; The Kansas Association of Broadcasters; MPA – Association of Magazine Media; National Federation of Press Women; National Newspaper Association; The National Press Foundation; The National Press Photographers Association; The News Media Alliance; Nexstar Media Group, Inc.; The Radio Television Digital News Association; and Sinclair Broadcast Group, Inc.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Freedom of the press is at the heart of democracy, which requires the public be well informed by a news media that is able to speak freely and without fear of retaliation. A recent increase in frivolous litigation aimed at encumbering media organizations with burdensome costs rather than winning on the merits threatens to chill the exercise of First Amendment rights. Although these "Strategic Litigation Against Public Participation" ("SLAPP") lawsuits lack merit, they can have a devastating effect on free speech and public discourse.

Over the past three decades, a majority of states have enacted anti-SLAPP statutes, which aim to protect citizens and organizations who speak on matters of public concern from retaliatory lawsuits. When a lawsuit is brought with the intention of inhibiting a citizen's free speech rights, anti-SLAPP laws protect those defendants from burdensome litigation by providing an avenue for rapid dismissal of the case. Such laws also discourage meritless lawsuits through fee-shifting provisions in favor of defendants.

The Texas Citizen's Participation Act ("TCPA") was enacted in 2011 with bipartisan support. Tex. Civ. Prac. & Rem. Code Ann. § 27.003. Although the purpose of the TCPA is to protect substantive rights of Texas citizens, the Fifth Circuit has held that the "'TCPA does not apply to diversity cases in federal court.'" *Van Dyke v. Retzlaff*, No. 18-40710, 781 F.

App'x 368, 368–69 (5th Cir. Oct. 22, 2019) (quoting *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019)). In contrast to the First, Second, and Ninth Circuits, the Fifth Circuit has determined the TCPA is a fundamentally procedural rule that conflicts with the Federal Rules of Civil Procedure. *Klocke*, 936 F.3d at 247. Although federal procedural rules supersede conflicting state procedural law in federal diversity cases, according to this Court's precedent, a federal court must apply the substantive laws of the state in which it sits. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Consequently, the crux of this case is whether state anti-SLAPP statutes such as the TCPA are primarily substantive or whether they designate procedural rules that conflict with the Federal Rules of Civil Procedure. In this brief, *amici* provide ample support for the concept that anti-SLAPP statutes should apply in federal courts because they are substantive state laws that protect constitutional rights.

First, states have enacted anti-SLAPP legislation because of their compelling interest in preventing meritless lawsuits from chilling free speech. Such laws have proven to be effective at protecting First Amendment rights without infringing on the rights of plaintiffs to seek redress for true injury. Second, failure to apply state anti-SLAPP laws in federal courts will place uneven burdens on defendants and promote ongoing forum shopping, which erodes First Amendment rights nationwide.

Lack of protection from meritless lawsuits will harm media organizations and have a particularly devastating effect on local media.

Accordingly, *amici* urge this Court to grant certiorari to immediately address this issue, resolve the circuit split, and hold definitively that state anti-SLAPP laws should be applied in federal diversity cases.

ARGUMENT

I. Anti-SLAPP statutes are necessary to protect First Amendment rights.

SLAPP lawsuits stand counter to First Amendment rights as a vexatious form of litigation. By their very nature, this type of lawsuit threatens First Amendment rights by "chill[ing] the right of free expression and free access to government, a double-barreled assault on the core values of our society." Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 971 (1999). SLAPP lawsuits are intended to intimidate defendants with the burden of litigation, thereby eroding First Amendment rights. George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937, 942 (1992). Scholars note that in just a twenty-year period, "thousands have been sued into silence" and the hundreds of thousands more who know about SLAPP lawsuits will "never again participate freely and confidently in the public

issues and governance of their town, state, or country." *Id.* at 944. Thus, lawsuits intended to retaliate against someone exercising their free speech rights not only threaten the defendant through litigation costs and financial hardship, they also seriously impact our representative form of government by "chilling public participation in public debate." Dena M. Richardson, *Power Play: An Examination of Texas's Anti-SLAPP Statute and Its Protection of Free Speech Through Accelerated Dismissal*, 45 ST. MARY'S L.J. 245, 253 (2014).

Because SLAPP lawsuits chill free speech, many states have expressed their compelling interest in protecting the rights of their citizens under their state constitutions and under the First Amendment by enacting anti-SLAPP legislation. Such state laws have proven to be effective. Anti-SLAPP laws are beneficial because they deter plaintiffs from bringing a SLAPP lawsuit and they help to ensure no media organization "will suffocate from the costs of defending itself for doing the important and honest work it has set out to do at the hands of a party that sought to suppress newsworthy information." Nicole Ligon, *Protecting Local News Outlets from Fatal Legal Expenses*, 95 N.Y.U. L. REV. ONLINE (forthcoming 2020) (manuscript at 14), https://tinyurl.com/y8r773eu.

A. SLAPP lawsuits chill free speech and infringe on First Amendment rights of the press and the public.

SLAPP lawsuits are filed with the "precise tactical intent" to silence opposing viewpoints by

initiating financially burdensome and meritless litigation. Richardson, *supra,* at 247. Although frequently disguised as claims for defamation, SLAPP lawsuits are meritless by definition and the vast majority would fail if litigated fully. *Id.*; *see* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists,* REPS. COMM. FOR FREEDOM OF THE PRESS 1, 2 (Summer 2011), https://tinyurl.com/y868da4f. "While meritorious lawsuits seek to right a legal wrong, often the primary motivation behind a SLAPP suit is to stop lawful speech in a strategy to win a political or social battle." Laura L. Prather & Justice J. Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 TEX. TECH L. REV. 633, 635 (2018). Plaintiffs use SLAPP lawsuits to financially burden their critics, subjecting their adversaries to lengthy and expensive litigation until they are forced to abandon their defense. *Id.* at 636.

Because they have the potential to financially devastate defendants, SLAPP lawsuits have a notable chilling effect on free speech. *Id.* Defending defamation lawsuits that get dismissed costs $500,000 on average, which is enough to bankrupt some newspapers. Kelly McBride, *McClatchy Could Hire 10 Reporters for the Money It Will Spend to Get Devin Nunes Lawsuit Dismissed*, POYNTER (Apr. 11, 2019), https://tinyurl.com/y3ffexld. The cost of litigation serves to punish defendants for perfectly legal speech, and fear of similar retaliation deters them from exercising their First Amendment rights to the full extent in the future. *See* Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and*

the Media Defendant, 41 VAL. U.L. REV. 1235, 1240 (2007); *see also* Ligon, *supra* (manuscript at 10) ("When powerful individuals or entities find themselves in the heart of a newsworthy controversy, initiating a lawsuit against one newspaper can intimidate others from reporting on the same scandals for fear of being similarly slapped with legal action.").

More than fifty years ago, this Court noted defamation and libel cases may threaten to stifle free speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) ("[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."). Since *Sullivan*, courts have more frequently recognized the chilling effect of abusive tort claims and have tried to protect the exercise of speakers' First Amendment rights. *See Henry v. Lake Charles Am. Press. LLC*, 566 F.3d 164, 169 (5th Cir. 2007) ("Dismissal of these frivolous tort claims saves defendants the cost and burden of trial and minimizes the chilling effect of these lawsuits.").

Yet powerful individuals, including celebrities and other public figures, can weaponize meritless SLAPP lawsuits to "stifle unwanted publicity," even if the statements made against them are true. Ligon, *supra* (manuscript at 10). For example, before the United States Doping Agency found cyclist Lance Armstrong violated anti-doping rules, Armstrong filed a string of lawsuits against those who accused him of using performance-enhancing drugs. Prather &

Bland, *supra*, at 637. He later admitted to using litigation as an intimidation tactic to "bully" the defendants into silence. *Id.* at 638.

SLAPP lawsuits are especially effective when targeting individuals or small, local media organizations because they allow wealthy plaintiffs to leverage their resources against an opponent with relatively limited resources. For example, the *Carroll Times Herald*, a family-owned newspaper in Iowa, faced extreme financial hardship while defending itself against a meritless defamation claim. Ligon, *supra* (manuscript at 11). The newspaper had published a story about a police officer's past sexual relationships with teenage girls. Meagan Flynn, *A Small-Town Iowa Newspaper Brought Down a Cop. His Failed Lawsuit Has Now Put the Paper in Financial Peril*, WASH. POST (Oct. 10, 2019), https://tinyurl.com/yy4kmb83. The officer sued, but the contents of the article were truthful, making his defamation claim unfounded. *Id.* Although the *Herald* eventually won its case on the merits, it spent $140,000 in out-of-pocket expenses over the course of the year-long litigation and was forced to turn to crowdfunding to stay afloat. *Id.*

The *Herald*'s struggle in the face of a meritless lawsuit is not atypical; SLAPP lawsuits regularly infringe on the First Amendment rights of the press. In Ohio, another local newspaper faced similar hardship after being sued for publishing an article and cartoon that were critical of the plaintiff. *See Murray v. Chagrin Valley Publ. Co.*, 25 N.E.3d 1111, 1114 (Ohio Ct. App. 2018). Despite prevailing in court, the

Chagrin Valley Times suffered financially.[2] While testifying before an Ohio Senate Committee regarding proposed anti-SLAPP legislation, *Chagrin* publisher Kenneth Douthit stated the newspaper's insurance carrier spent $300,000 in its defense, resulting in a permanent increase in the cost of its libel insurance. *Hearing on S.B. 215 Before the S. Comm. on the Judiciary*, 2020 Leg. 133rd Sess. (Ohio Jan. 22, 2020). Douthit also expressed the lawsuit took a toll on his mental health and caused the departure of three *Chagrin* reporters. *Id.* Finally, Douthit spoke directly on the chilling effect of SLAPP lawsuits, saying "we have delayed stories, rewritten stories, and passed on stories if we believe that there may be future ligation." *Id.* The experiences of the *Carroll Times Herald* and *Chagrin Valley Times* demonstrate the power of SLAPP lawsuits to intimidate and financially burden defendants into silence, thereby infringing on their First Amendment rights.

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[2] The court in *Murray* acknowledged the financial harm the lawsuit caused to the *Chagrin Valley Times* and blamed it on Ohio's lack of anti-SLAPP legislation. See *Murray*, 25 N.E.3d at 1124 ("This case illustrates the need for Ohio to join the majority of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech. These suits . . . can be devastating to individual defendants or small news organizations and act to chill criticism and debate.").

B. States have enacted anti-SLAPP legislation to uphold their compelling interest in protecting their citizens' First Amendment rights.

Recognizing the threat SLAPP lawsuits pose to their citizens' free speech rights under the First Amendment and many state constitutions, at least thirty-two states, the District of Columbia, and the territory of Guam have passed anti-SLAPP legislation. Prather & Bland, *supra*, at 635. Texas joined the majority of states in 2011 when the Texas Legislature enacted the TCPA. *Id.* at 635–36. The TCPA, like all anti-SLAPP statutes, creates a mechanism for dismissing meritless lawsuits in the early stages, before the defendants have incurred significant litigation costs. *Id.* at 638; *see* Richardson, *supra*, at 261–62 ("Prior to the TCPA, SLAPP defendants were forced to endure a lengthy and pricey discovery process before filing no-evidence and traditional motions for summary judgment to throw out the SLAPP suit."). The TCPA also requires courts to award successful defendants reasonable attorney's fees and to issue sanctions against plaintiffs who bring meritless lawsuits, making it a strong deterrent against SLAPP lawsuits. Richardson, *supra,* at 265.

The TCPA was enacted "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law." Tex. Civ. Prac. & Rem. Code Ann. § 27.002. The policy aim reflects the state's long-

recognized interest in protecting its citizens' First Amendment rights as a cornerstone of democracy.

In addition to these broader values, several SLAPP lawsuits within Texas directly inspired the state legislature to enact the TCPA. Prather & Bland, *supra*, at 637. The lawsuits filed by Lance Armstrong were perhaps the most high-profile of these cases. *See id.* Another case, *Main v. Royall*, raised serious concerns about the use of SLAPP lawsuits to curtail freedom of the press. 348 S.W.3d 381 (Tex. App. 2011); *See* Prather & Bland, *supra,* at 638. In *Main*, a Dallas developer sued both an author whose book criticized the use of eminent domain to acquire land for private development and a local Texas newspaper that reviewed the book. *Main,* 348 S.W.3d at 384. Although the Texas Court of Appeals eventually reversed the trial court's denial of the defendants' motion for summary judgment, both the author and the newspaper sustained significant economic losses from the litigation. Prather & Bland, *supra,* at 638.

Combined, these and similar cases gave the Texas legislature concrete evidence its citizens' First Amendment rights needed protection, which led to broad, bipartisan support for an anti-SLAPP bill. Prather & Bland, *supra,* at 638–39; *see also* Richardson, *supra*, at 256 (attributing TCPA's bipartisan support to "the framing of the legislation as necessary to citizens who are participating in the free exchange of ideas and to curtail abuses of the legal system") (internal quotations and citation omitted). Overall, in enacting anti-SLAPP legislation, Texas affirmed its interest in protecting freedom of speech

and freedom of the press as guaranteed under the First Amendment and the Texas Constitution. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.002; TEX. CONST. art. I, § 8.

C. Enacted anti-SLAPP laws effectively protect First Amendment rights.

Defendants are much less likely to be burdened by meritless lawsuits in states with anti-SLAPP legislation because these laws provide relief from long and costly litigation. For example, in California, whose anti-SLAPP law "has been the model for broad anti-SLAPP legislation," many defendants have been protected from burdensome lawsuits. Richardson, *supra*, at 255; s*ee, e.g., Paterno v. Super. Ct.* 163 Cal. App. 4th 1342, 1357 (Cal. Ct. App. 2008) (granting journalist's early motion to dismiss without discovery when plaintiff failed to establish good cause for the claim).

Similarly, Nevada's anti-SLAPP law provides that a defendant may file a special motion to dismiss upon showing "the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." Nev. Rev. Stat. § 41.660(3)(a) (2019); *see, e.g., Wynn v. Associated Press*, No. A-18-772715-C, 2018 Nev. Dist. LEXIS 1265, at *2–*5 (8th Jud. Dist. of Nev., Clark County Aug. 23, 2018) (granting defendant's special motion to dismiss under Nevada's anti-SLAPP statute).

Because the Ninth Circuit applies state anti-SLAPP statutes in federal court, such laws enacted by the California and Nevada legislatures are given effect. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999). If not for the Ninth Circuit's precedent, plaintiffs could circumvent these otherwise effective state laws by choosing to file in federal court. *See infra* section II.B.

Texas's anti-SLAPP statute has also proven to be effective at protecting First Amendment rights. Since the TCPA was enacted, defendants have been able to seek early dismissal of meritless lawsuits, thereby avoiding the financial hardship caused by lengthy litigation. *See Better Bus. Bureau of Metro. Dallas v. BH DFW, Inc.*, 402 S.W.3d 299, 305 (Tex. Ct. App. 2013) ("The TCPA provides a means for a defendant, early in the course of a lawsuit, to seek dismissal of certain claims identified in the Act, including a legal action based on, relating to, or in response to a party's exercise of the right to free speech.") (citations omitted).

Prior to *Klocke* and the present case, the Fifth Circuit itself had effectively protected the First Amendment rights of local press by applying state anti-SLAPP laws. In *Henry v. Lake Charles Am. Press, LLC*, the owner of an airport refueling operation filed a defamation lawsuit against a local newspaper. 566 F.3d at 168. The newspaper had published several articles claiming the plaintiff had caused military aircraft engines to fail by providing contaminated fuel. *Id.* Applying Louisiana's anti-SLAPP statute, the

Fifth Circuit reversed the district court's denial of the newspaper's special motion to dismiss. *Id.* While the newspaper made a "prima facie showing that the matter arises from an act in furtherance of his or her right to free speech," the plaintiff did not meet his burden of showing a probability of success on the merits of his claim. *Id.* at 181–82. The holding protected the only local daily newspaper in the town of Lake Charles, Louisiana from the expense of litigating a meritless lawsuit.

In summary, anti-SLAPP laws protect the exercise of First Amendment rights by removing litigation as a tool for plaintiffs to silence their critics. Without the threat of expensive litigation as a consequence of their speech, individuals and media organizations are more likely to speak out on issues of public concern.

II. State anti-SLAPP laws should be applied in federal courts.

This Court has established that a federal court must apply the substantive law of the state in which it sits. *See Guar. Trust Co. v. York*, 326 U.S. 99, 112 (1945) ("The source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States."). *Erie* and its progeny dictate that federal courts must apply state anti-SLAPP laws, and this Court should grant certiorari to definitively resolve this circuit split. Left unresolved, the circuit split 1) places inconsistent burdens on defendants; 2) promotes forum shopping for plaintiffs; and 3) erodes

First Amendment rights and harms media organizations nationwide.

A. The current circuit split places inconsistent burdens on defendants.

Application of a state's anti-SLAPP statute in federal diversity cases depends on whether the statute "answers the same question" as a provision of the Federal Rules of Civil Procedure. *Abbas v. Foreign Policy Grp., LLC*, 78 F.3d 1328, 1333 (D.C. Cir. 2015). A state anti-SLAPP law would not apply if a federal rule is "'sufficiently broad to control the issue before the court' thereby leaving no room for the operation of seemingly conflicting state law." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 421 (2010) (Stevens, J., concurring) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980)). On both sides of the issue, lower courts have grappled with the application of *Shady Grove*. Circuits have adopted different approaches and reached differing conclusions on anti-SLAPP laws' relationship to the Federal Rules of Civil Procedure, leaving litigants with varied results across federal courts nationwide. *See Lampo Grp., LLC v. Paffrath*, No. 3:18 -cv-04102, 2019 U.S. Dist. LEXIS 122523, at *3–4 (M.D. Tenn. July 23, 2019) (comparing cases with contrasting holdings among various circuit courts).

The First, Second,[3] and Ninth Circuits have held federal courts must apply state anti-SLAPP

[3] A split of authority exists within the Second Circuit on the availability of anti-SLAPP laws in federal courts. *Compare*

statutes in federal diversity cases. *See Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014); *Godin v. Schencks*, 629 F.3d 79, 91 (1st Cir. 2010); *Newsham*, 190 F.3d at 973. In contrast, the Fifth, Tenth, Eleventh, and District of Columbia Circuits rejected application of state anti-SLAPP laws in federal diversity cases. *See Klocke,* 936 F.3d at 242*; Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1357 (11th Cir. 2018); *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018); *Abbas*, 783 F.3d at 1337. Practical implications follow as most states' anti-SLAPP statutes operate to dismiss a plaintiff's entire claim, creating a substantive remedy for defendants. *See, e.g.*, Tex. Civ. Prac. & Rem. Code §§ 27.001 *et. seq.*; Cal. Civ. Proc. Code § 425.16(a). Put simply, the availability of anti-SLAPP statutes in federal court could make the difference in saving defendants from costly and time-consuming litigation. Katelyn E. Saner, *Getting Slapp-Ed In Federal Court: Applying State Anti-Slapp Special Motions to Dismiss in Federal Court After "Shady Grove"*, 63 DUKE L.J. 781, 788 (2013).

In practice, this dichotomy among circuits impacts defendants differently, depending on where the plaintiff files the claim. Even without applying a state's anti-SLAPP statute, federal courts may still resolve a case under a 12(b)(6) motion to dismiss. *See Abbas*, 783 F.3d at 1339. However, in circuits that apply state anti-SLAPP laws in federal diversity

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Adelson v. Harris, 774 F.3d 803, 809 (2d Cir. 2014) (applying Nevada's anti-SLAPP law), *with In re Gawker Media LLC*, 571 B.R. 612, 632–33 (Bankr. S.D.N.Y. 2017) (refusing to apply California's anti-SLAPP law)

cases, federal courts can resolve cases more quickly, saving litigants from unnecessary time and expense. *See, e.g.*, *Gardner v. Martino*, 563 F.3d 981 (9th Cir. 2009) (affirming dismissal of claims under a state anti-SLAPP statute). Importantly, the application of a state's anti-SLAPP statute will not deter meritorious litigation. *See, e.g., Godin v. Machiasport Sch. Dep't Bd. of Dirs.*, 831 F. Supp. 2d 380, 387 (D. Me. 2011) (denying anti-SLAPP and summary judgment motions by defendants to resolve issues of fact).

Because of the variability in application of anti-SLAPP laws, cases involving similar legal and factual issues may place different burdens on defendants *solely* by virtue of jurisdiction. In *3M Co. v. Boulter*—a case originating in the District of Columbia—the plaintiff alleged the defendants engaged in a "defamatory media blitz" concerning one of its products. 842 F. Supp. 2d 85, 90 (D.D.C. 2012). The defendants' special motions to dismiss were denied because the court held the anti-SLAPP statute *did not apply* in federal diversity cases. *Id.* at 111. In *Gardner v. Martino*—a case originating in Oregon—the defendant aired her grievances about a product on a radio talk show. 563 F.3d at 982 (9th Cir. 2013). Similar to *3M Co.*, *Gardner* involved the broadcasting of negative comments about a company's product. *Id.* at 983–84. However, *Gardner* held a state's anti-SLAPP statute *will apply* in federal diversity cases. *Id.* at 991. The two cases hinged on the same issue: should a federal court sitting in diversity apply the anti-SLAPP statute of the state in which it sits? Oregon and the District of Columbia have similar anti-SLAPP statutes that allow a defendant to file a

"special motion to dismiss," which sets forth a particularized framework to evaluate statements concerning "issues . . . of public interest." D.C. Code § 16-5502; Or. Rev. Stat. § 31.150(2). Nevertheless, the rights available to the defendants pivoted primarily on jurisdiction: the *Gardner* defendant could invoke state law to quickly seek dismissal of the plaintiff's claims; the *3M* defendants could not. This stark contrast illustrates the practical implications of the circuit split.

B. Failure to apply state anti-SLAPP laws in federal court promotes forum shopping and the inequitable administration of laws in violation of *Erie*'s aims.

The division among circuits promotes forum shopping. When certain federal courts decline to apply state anti-SLAPP statutes, plaintiffs can gain a strategic advantage by filing their claims in those courts. This issue can arise both across circuits (horizontal forum shopping) and more pervasively between state and federal courts within the same state (vertical forum shopping).

Plaintiffs can avoid their own state's anti-SLAPP statutes by choosing to litigate in federal courts in other jurisdictions. According to the Sacramento Bee, Representative Devin Nunes of California has filed multiple lawsuits against news organizations, including a defamation lawsuit against *Esquire* he filed in the Northern District of Iowa. Kate Irby, *Devin Nunes' Lawsuit over Iowa Farm Story*

Called a 'Fishing Expedition' by Esquire Magazine, THE SACRAMENTO BEE (Apr. 24, 2020, 4:51 PM), https://tinyurl.com/y6u4ft2a. None of these lawsuits were filed in either state or federal courts in Nunes' home state of California. *Id.* While Iowa does not have an anti-SLAPP statute, California has one of the strongest anti-SLAPP laws in the nation. *See* Cal. Civ. Proc. Code § 425.16(a); Richardson, *supra* at 255.

The same issue arises across state and federal courts of the same state or territory. As highlighted in *Abbas*, federal courts in the District of Columbia sitting in diversity do not apply the jurisdiction's anti-SLAPP statute. *Compare Abbas*, 78 F.3d at 1333 (declining application of D.C. anti-SLAPP law) *with Doe No. 1 v. Burke*, 91 A.3d 1031, 1045 (D.C. App. 2014) (applying D.C. anti-SLAPP law). Although *Abbas* and *Burke* involved similar circumstances—alleged defamatory statements made available online—possible early dismissal was only available under the District of Columbia's anti-SLAPP law in *Burke* because the case was filed in the D.C. Superior Court. *Burke*, 91 A.3d at 1045.

Thus, when federal courts decline to apply state anti-SLAPP laws, plaintiffs can avoid such laws through vertical forum shopping. For example, in *Carbone*—a case brought in the Northern District of Georgia—the plaintiff could have chosen to file in a variety of venues, including state courts in Florida and Georgia, which both have anti-SLAPP laws. *See Carbone v. Cable News Network, Inc.*, No. 1:16-cv-1720-ODE, 2017 U.S. Dist. LEXIS 216286, at *2–*4 (N.D. Ga. Feb. 14, 2017), *aff'd in part, dismissed in*

part, 910 F.3d 1345 (11th Cir. 2018). If the case had been filed in a Florida or Georgia state court, early dismissal could have been considered under either states' anti-SLAPP statutes. *See* Fla. Stat. § 768.295; Ga. Code Ann. § 9-11-11.1. However, the Eleventh Circuit declined to apply state anti-SLAPP laws, which opens the door for plaintiffs to file strategically in federal court. *See Carbone*, 910 F. 3d. at 1357.

Unless this Court addresses the issue of whether state anti-SLAPP statutes apply in federal courts, such an anomalous result will promote forum shopping in states like Texas as well. The Texas legislature, along with the legislatures of over thirty other states, the District of Columbia, and the territory of Guam, has determined that plaintiffs should not be able to burden defendants with meritless lawsuits. States have made legislative choices to deter these lawsuits, which federal courts should honor. If federal courts do not apply state anti-SLAPP statutes, plaintiffs can create additional burdens on defendants by strategically filing claims in federal courts. The ability of plaintiffs to forum shop leads to the inequitable administration of laws and affects the substantive rights of defendants. *See Hanna*, 380 U.S. at 468. Thus, state anti-SLAPP statutes should be applied in federal diversity cases.

C. Failure to resolve the circuit split erodes First Amendment rights and harms media organizations nationwide.

Leaving the circuit split unresolved will erode anti-SLAPP laws across the nation. Well-resourced plaintiffs—whose primary motivations are to deter speech—can file lawsuits in federal courts in circuits that do not apply anti-SLAPP laws in order to circumvent state laws and exhaust defendants' financial resources. *See* Katelyn E. Saner, *Getting Slapp-Ed In Federal Court: Applying State Anti-Slapp Special Motions to Dismiss in Federal Court After "Shady Grove"*, 63 DUKE L.J. 781, 790 n.60 (2013). Such plaintiffs gain a windfall by side-stepping the proper showing intended by the legislature of the state in which they filed. Moreover, plaintiffs' ability to shop for forums that decline to afford anti-SLAPP protection will undermine state anti-SLAPP statutes throughout the nation, causing media organizations to fear exercising the full extent of their First Amendment rights. This reality has a disproportionate effect on local media organizations, which creates a significant risk of driving them out of business due to legal costs. *See, e.g.*, *Small Newspaper in Iowa Wins a Libel Suit, but Legal Costs May Force It to Close*, FIRST AMEND. WATCH (Oct. 10, 2019), https://tinyurl.com/yc6waqjn.

Constraining media through burdensome lawsuits harms the public in two main ways. First, public participation and uninhibited debate is foundational to democracy. *See Garrison v. Louisiana*,

379 U.S. 64,74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). At a level of societal justice, activism by media organizations plays a key role in public discourse. As evidence of the importance of media organizations, the Department of Homeland Security designated "[w]orkers who support radio, print, internet and television news and media services" as essential workers during the COVID-19 pandemic. U.S. Dep't Homeland Security, Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (Mar. 28, 2020).

Second, local media organizations play an invaluable role in educating and informing the populace. A critical link exists between access to information and civic engagement in local communities. Julie Bosman, *How the Collapse of Local News Is Causing a 'National Crisis'*, N.Y. TIMES (Nov. 20, 2019, 12:13 PM), https://tinyurl.com/rfpcmhw. A study of three different metro areas showed "nearly nine-in-ten residents follow local news closely—and about half do so very closely." *Local News in a Digital Age*, PEW RES. CTR. (Mar. 5, 2015), https://tinyurl.com/yazwrbeg. In addition, the position of media organizations in society is by no means secure. Over 65 million Americans live in counties with fewer than two local newspapers, with many not having a local paper at all. Clara Henrickson, *Local Journalism in Crisis: Why America Must Revive its Local Newsrooms*, BROOKINGS INST. (Nov. 12, 2019), https://tinyurl.com/y8nmlcax. In these counties, a single SLAPP lawsuit could eliminate the only local

media organization for that community, creating an information desert.

Scholars note that "[d]ebate on public issues is distorted when one side is afraid to speak, or when one side is able to shift the efforts of its opponents away from public issues toward private self-defense." Braun, *supra*, at 972. Media organizations play a key role in political accountability. Timothy Besley et al., *Mass Media and Political Accountability*, *in* THE RIGHT TO TELL 45 (Roumeen Islam et al. eds., 2002). "This intimidation, and the personal cost and psychic trauma to victims of the SLAPP technique . . . deters citizens from public service and participation in government and public debate." Braun, *supra*, at 972. Therefore, this Court should resolve the circuit split and determine that state anti-SLAPP statutes apply in federal court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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