# No. _____

In the
# Supreme Court of the United States

**THOMAS CHRISTOPHER RETZLAFF**,
Applicant,

v.

**JASON LEE VAN DYKE**,
Respondent

On Application for Stay

**EMERGENCY APPLICATION FOR A STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI**

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## PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

1. Applicant is Thomas Christopher Retzlaff, defendant in the district court and appellant in the court of appeals.

2. Respondent is Jason Lee Van Dyke, plaintiff in the district court and appellee in the court of appeals.

The related proceedings below are:

1. ***Jason Lee Van Dyke v. Thomas Christopher Retzlaff, et al***,
No. 4-18-CV-247-ALM (E.D.Tex.)
Judgment entered July 24, 2018

2. ***Jason Lee Van Dyke v. Thomas Christopher Retzlaff, et al***,
No. 18-40710 (5th Cir.)
Judgment entered October 22, 2019

## CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29, Applicant Thomas Christopher Retzlaff states that he is a natural person and has no parent companies or public companies with a 10% or greater interest in them.

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# INTRODUCTION

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Justice for the Fifth Circuit:

This Court has three times denied a petition for writ of certiorari to decide whether one of 32[1] states' "anti-SLAPP"[2] statutes applies in federal court[3] under the ***Erie*** doctrine.[4] The case at bar is different—and a first.

Before 2019, three circuits had held a state's anti-SLAPP statute applicable[5] in federal court. Three other circuits had held a state's anti-

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[1] To date, 32 states, the District of Columbia, and Guam have recognized some form of anti-SLAPP protection, either through the enactment of anti-SLAPP statutes or development of common law protections *See* Prather & Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 Tex. L. Rev. 633, 641, n.51.

[2] "SLAPP" was coined in 1992 as a shorthand term for "Strategic Lawsuits Against Public Participation." *See* Pring & Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 938 (1992). Most SLAPP filers lose their suits but succeed in chilling public discussion. *Id*. at 941-44.

[3] ***Mebo Int'l, Inc. v. Yamanaka***, 697 Fed.Appx. 768 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 1449 (2016) (California anti-SLAPP statute applied in federal courts); ***Los Lobos Renewable Power, LLC v. Americulture, Inc.***, 885 F.3d 659 (10th Cir. 2018), *cert. denied*, 2018 WL 34774 (2018) (New Mexico anti-SLAPP statute did not apply in federal courts); ***Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress***, 890 F.3d 828, 833-34 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019) (California anti-SLAPP statute applied in federal courts).

[4] *See* ***Erie R.R. Co. v. Tomkins***, 304 U.S. 64, 78 (1939).

[5] The First, Second, and Ninth Circuits have held anti-SLAPP statutes applicable in federal court. ***Godin v. Schencks***, 629 F.3d 79, 88-92 (1st Cir. 2010); ***Liberty Synergistics Inc. v. Microflo Ltd***., 718 F.3d 138, 148 (2d Cir. 2013); and ***Mebo Int'l***, 697 Fed.Appx. 768 (9th Cir. 2015).

SLAPP statute *not* applicable.[6] However, until now, no two circuits had split on the applicability of the *same state's* anti-SLAPP statute in federal court. Now, they have. With the Fifth Circuit's decision in the case at bar (and the ***Klocke*** case[7] decided weeks earlier and held dispositive of ***Van Dyke***), the Texas anti-SLAPP statute[8] is now applicable in federal courts in the nine states and two territories of the Ninth Circuit, but *not* in federal courts in the three states of the Fifth Circuit—which include Texas.

Furthermore, whether the Texas anti-SLAPP statute applies in federal court will directly affect the outcome of a pending Ninth Circuit case involving adult film star "Stormy Daniels" and President of the United States Donald J. Trump[9]—who is not an "ordinary litigant."[10] And while the President himself is not a party in the case at bar, the Ninth Circuit has been

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[6] The Tenth, Eleventh, and D.C. Circuits have held anti-SLAPP statutes *not* applicable in federal court. ***Abbas v. Foreign Policy Grp., LLC***, 783 F.3d 1328 (D.C. Cir. 2015); ***Los Lobos***, 885 F.3d 659 (10th Cir. 2018), *cert. denied*, 2018 WL 3477416 (2018); ***Carbone v. Cable News Network, Inc***., 910 F.3d 1345 (11th Cir. 2018).

[7] ***Klocke v. Watson***, 936 F.3d 240 (5th Cir. 2019) (Resolving "an issue that has brewed for several years in this circuit," the court held that "the [Texas anti-SLAPP statute known as the "TCPA"] does not apply to diversity cases in federal court.").

[8] TEX. CIV. PRAC. & REM. CODE § 27.001, *et seq*., known as the "Texas Citizens Participation Act," or "TCPA."

[9] *See* ***Clifford v. Trump***, 339 F.Supp.3d 915 (C.D.Cal. 2018) (holding Texas law applicable to plaintiff's defamation claims, applying the TCPA and awarding $293,052.33 in attorney's fees and sanctions to Trump under the TCPA). ***Clifford*** is on appeal to the Ninth Circuit, which has scheduled oral argument for February 4, 2020.

[10] *See* ***Cheney v. U.S. Dist. Court for D.C.***, 542 U.S. 367, 381 (2004), quoting ***United States v. Nixon***, 418 U.S. 683, 715 (1974); *see also* ***Trump v. Hawaii***, 138 S.Ct. 2392, 2418 (2018) (The Court's approach is driven not by concern for any "particular President," but for "the Presidency itself.")

asked to base a reversal in ***Clifford*** on the Fifth Circuit's 2019 ***Klocke*** and ***Van Dyke*** decisions. Thus, the case at bar has implications for the President as a litigant that are inescapable. These merit this Court's attention.

There are no countervailing reasons to alter the status quo during the certiorari stage. The *raison d'etre* of anti-SLAPP statutes is to prevent the chilling effect that SLAPP suits have on free speech and other First Amendment rights. The growing use of SLAPPs to squelch public criticism was so pervasive that the Texas Legislature adopted the TCPA by a unanimous vote in both houses of the Legislature in 2011. If the Fifth Circuit issues its mandate and the district court resumes litigating the case, the chilling effect on Applicant's First Amendment rights will be irreparable, and the Texas Legislature's desire to protect its citizens' exercise of First Amendment rights will be irreversibly thwarted.

## OPINIONS BELOW

The district court's opinion is reported at ***Van Dyke v. Retzlaff****,* 2018 WL 4261193 (E.D.Tex. 2018), and it is reproduced at Appendix ("App.") **Appx. Tab 1**. The Fifth Circuit's opinion is reported at ***Van Dyke v. Retzlaff***, 781 Fed.Appx. 368 (5th Cir. 2019), and it is reproduced at **Appx. Tab 2**. The Fifth Circuit's order denying Retzlaff's petition for rehearing *en banc* is reproduced at **Appx. Tab 3**. The Fifth Circuit's order denying Applicant's motion to stay issuance of the mandate pending the filing and disposition of a petition for writ of certiorari is reproduced at **Appx. Tab 5**.

## JURISDICTION

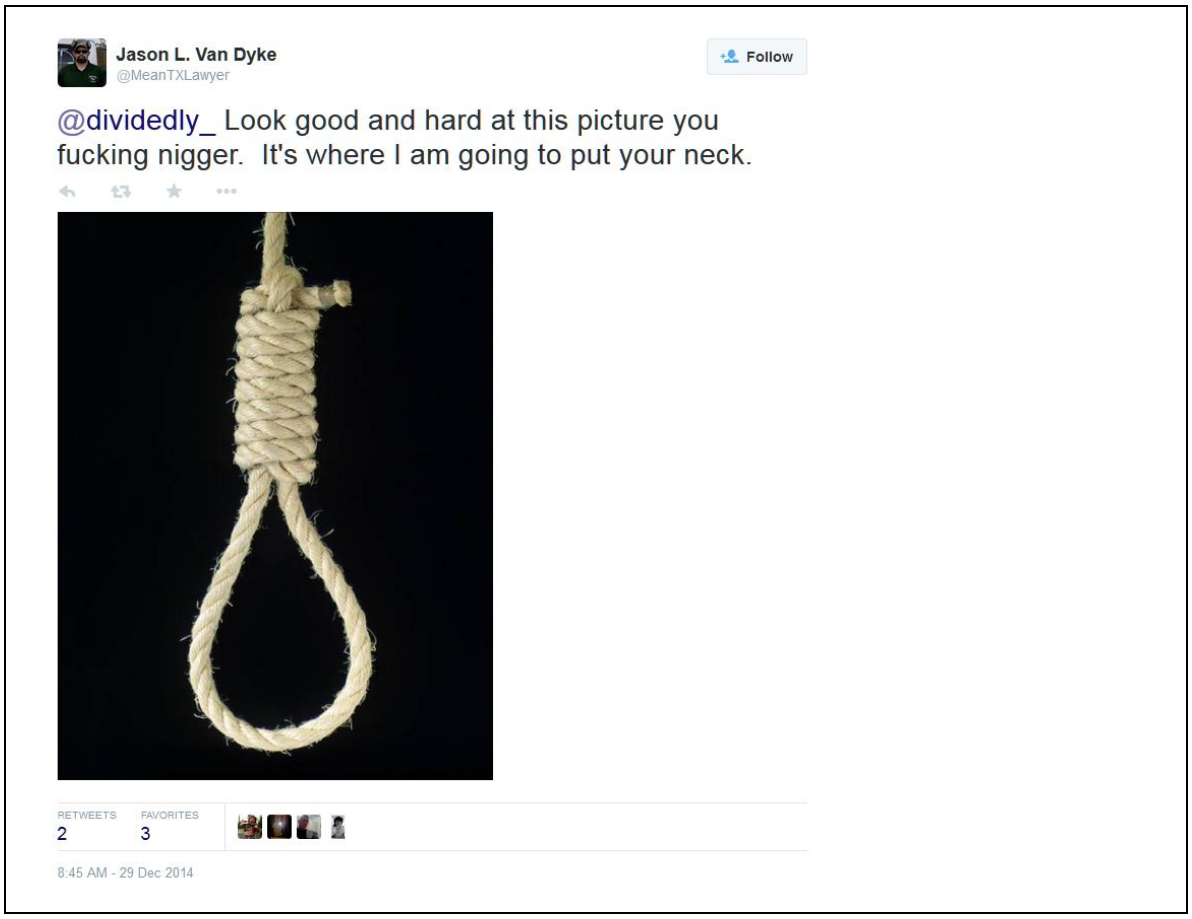
The Fifth Circuit issued its opinion on October 22, 2019. **App. Tab 1**. Applicant filed a timely petition for rehearing *en banc* on November 5, 2019. The Fifth Circuit denied the petition for rehearing *en banc* on December 5, 2019. **App. Tab 4**. On December 19, 2019, Applicant moved the Fifth Circuit to stay its mandate pending the filing and disposition of a petition of certiorari. On December 12, 2019, the Fifth Circuit denied the motion to stay the mandate. **App. Tab 5**. Absent a stay by this Court, the mandate will issue on December 20, 2019. *See* FED. R. APP. 41(b). The Court has jurisdiction to stay issuance of the Fifth Circuit's mandate pending the filing and disposition of a petition for certiorari. *See* 28 U.S.C. § 2101(f).

## STATEMENT OF THE CASE

This case sees the Internet at its worst. The genesis of this $100,000,000.00 defamation suit is perhaps most concisely expressed in a Facebook posting by *pro se* plaintiff-appellee Jason Van Dyke, on November 13, 2019:


Disgraced former attorney Van Dyke sued Applicant for libel, intrusion on seclusion, tortious interference, and other claims after Applicant filed a grievance against Van Dyke with the Texas State Bar and called Van Dyke "a Nazi, racist piece of human shit who has no business being a lawyer."

Retzlaff's comments were constitutionally protected opinions and criticism—albeit with harsh rhetorical hyperbole—for Van Dyke's projecting his violent, racist beliefs onto an Internet audience of 7.5 billion people—with posts such as this:




Van Dyke has never denied publishing this statement. Yet, Van Dyke sued to chill Retzlaff's criticism of Van Dyke for having done so. During the pendency of this suit, Van Dyke[11] was arrested for obstruction of justice and retaliation against a witness for making threats of murder against Retzlaff.

Baseless defamation suits to chill the expression of unfavorable opinions are nothing new. As noted above, courts, scholars, and free speech

[11] Van Dyke has been the leader of a violent white supremacist gang known as "The Proud Boys," who are presently defending a suit over their role in the August 2017 riot in which a young girl was murdered and dozens injured.

advocates have dubbed meritless lawsuits that target the legitimate exercise of the right to engage in truthful speech "Strategic Lawsuits Against Public Participation" (SLAPPs). In Texas, SLAPPs have been used to prevent citizens from testifying at a city council meeting,[12] complaining to a medical board about a doctor,[13] investigating fraud in public education,[14] participating in a political campaign,[15] or, as in the case at bar, advocating against the employment of a violent racist as an assistant district attorney.

Applicant moved to dismiss Van Dyke's claims under an anti-SLAPP statute, the Texas Citizens Participation Act ("TCPA"). On July 24, 2018, the district court issued a memorandum opinion and order denying Applicant's TCPA motion and holding that "the TCPA, regardless if classified as procedural or substantive, does not apply in federal court." (**Appx. Tab 1**.) Applicant timely appealed.

While the case at bar was pending before the Fifth Circuit, another panel of that court resolved the issue also presented in the case at bar—"an issue that has brewed for several years in [the Fifth Circuit]." That panel concluded that "the TCPA does not apply to diversity cases in federal court." ***Klocke v. Watson***, 936 F.3d 240, 242 (5th Cir. 2019). On October 2, 2019,

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[12] ***Means v. ABCABCO, Inc***., 315 S.W.3d 209, 214-15 (Tex. App. 2010).

[13] ***Lewis v. Garraway***, No. D-1-GN-06-001397 (Tex. Dist. Ct. 2006).

the ***Van Dyke*** court directed the parties in the case at bar to file supplemental briefing addressing the effect of ***Klocke*** on the case at bar. Applicant argued that ***Klocke*** did not compel the ***Van Dyke*** panel to affirm the district court and that the panel need not "overrule" the ***Klocke*** panel in order to grant Applicant relief. Applicant urged the Fifth Circuit to analyze Van Dyke's claims under FED. R. CIV. P 12(b)(6) and dismiss them for failure to state a claim. This was an approach that appears first to have been used by the Ninth Circuit in ***Planned Parenthood***, 890 F.3d 828 (9th Cir. 2018). The Van Dyke panel rejected Applicant's argument, held ***Klocke*** dispositive of the case at bar, and affirmed.

For obvious reasons, plaintiffs would prefer to keep the weapon of state anti-SLAPP statutes out of federal court. "Under the ***Erie*** doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." ***Gasperini v. Ctr. For Humanities***, 518 U.S. 415, 427 (1996). Thus, plaintiffs faced with anti-SLAPP motions have vigorously litigated the issue of state anti-SLAPP statute applicability in federal court. Unfortunately, the ***Erie*** doctrine has proven easier to articulate than to apply to these cases. It is time for the Court to resolve this important question.

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[14] ***Williams v. Cordillera Communications, Inc.***, 2014 WL 2611746, at * 3-4 (S.D.Tex. 2014).

[15] ***Farias v. Antuna***, No. 2006-CI-16910 (Tex. Dist. Ct. 2006).

## REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." ***Hollingsworth v. Perry***, 558 U.S. 183, 190 (2010). Applicant meets this test.

### I. There is a reasonable probability that the Court will grant certiorari to determine whether state anti-SLAPP statutes apply in federal court.

As shown in detail above, this petition will present "an important question of federal law that has not been, but should be, settled by the Court." S. Ct. R. 10(c). No less than forty amici representing the largest and most influential media organizations in the world filed a brief in support of Applicant's position in the Fifth Circuit.

Nor is there any reasonable argument that resolution of this important issue turns on settled law. This Court has never decided whether any state anti-SLAPP statute applies in federal court. This is a serious issue given the number of states who now have the statutes, the frequency with which the

issue recurs, the inability of the circuits to agree on even whether the same state's statute applies in federal courts, and the fact that the answer to this question will have a direct impact on a pending case involving the President of the United States. Accordingly, there is a fair prospect that this Court will reverse the Fifth Circuit's decision that anti-SLAPP statutes do not apply in federal courts.

## II. There is a fair prospect that the Court will reverse the Fifth Circuit's decision that state anti-SLAPP statutes do not apply in federal court.

There is also a fair prospect the Court will reverse the judgment below if certiorari is granted. Before 2018, the Ninth Circuit had found no "direct collision" between the California anti-SLAPP statute and federal rules because the statute "supplements rather than conflicts" with the federal rules, creating a "separate and additional theory upon which certain kinds of suits may be disposed of before trial." *See* ***Makaeff v. Trump University, LLC***, 736 F.3d 1180 (9th Cir. 2013). But in ***Planned Parenthood***, the Ninth Circuit charted a new course, eliminating the putative "collision" of anti-SLAPP statutes with Rules 8, 12, and 56 this way:

> **[W]e hold that, on the one hand, when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated. And, on the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the [Rule] 56 standard will apply. But in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court.**

***Planned Parenthood***, 890 F.3d at 834. ***Planned Parenthood*** avoids disregarding a state's substantive law and eviscerating the "twin aims" of the ***Erie*** doctrine.

Applicant asked the Fifth Circuit to apply the ***Planned Parenthood*** approach—that is, to analyze Van Dyke's claims under the standards of FED. R. CIV. P 12(b)(6). The Fifth Circuit declined, held ***Klocke*** dispositive, and affirmed the district court's denial of relief to Applicant. ***Van Dyke*** leaves the resolution of an exceptionally important and recurring issue—the applicability of 32 states' anti-SLAPP statutes in the federal courts of at least seven circuits—in chaos. It has deepened the split among the seven circuits that have addressed different states' anti-SLAPP statutes and caused a direct collision between the two circuits applying the *same state's* statute in a case in which the President of the United States is directly involved.

## III. Applicant will suffer irreparable harm absent a stay.

There is a clear "likelihood of irreparable harm if the judgment is not stayed." ***Philip Morris USA Inc. v. Scott***, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). Without a stay, this SLAPP suit's intended chilling of Applicant's First Amendment expression will occur, mooting this case and irrevocably destroying Applicant's constitutional right speak freely. Certiorari is part of "'the normal course of appellate review,'" and "foreclosure of certiorari review by [the Supreme] Court would impose irreparable harm." ***Garrison v. Hudson***, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord* ***Mikutaitis v. United States***, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers). "The fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure," accordingly "create[s] an irreparable injury." ***John Doe Agency Corp.***, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Preventing mootness thus is "'[p]erhaps the most compelling justification'" for a stay pending certiorari. *Id.*

## IV. The balance of equities and relative harms weigh strongly in favor of granting a stay.

That Applicant will suffer severe, case-mooting harm should end the debate over a stay. Even if this were a "close case," however, the "'balance [of] equities'" strongly favors Applicant. ***Rostker v. Goldberg***, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Stays pending certiorari are relatively "short." ***In re Biaggi***, 478 F.2d 489, 493 (2d Cir. 1973) (Friendly, J.). And Van Dyke can show no reason why he must immediately proceed with his suit. Any "interest" the Van Dyke has proceeding immediately simply "poses no threat of irreparable harm." ***John Doe Agency***, 488 U.S. at 1309.

## PRAYER

For these reasons, Applicant respectfully asks this Court to stay issuance of the Fifth Circuit's mandate pending the filing and disposition of Applicant's petition for certiorari. Additionally, because the mandate will issue on December 20, 2019, Applicants respectfully ask this to Court administratively stay issuance of the mandate pending disposition of this Application.

Respectfully submitted,

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v.

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Respondent

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## APPLICANT'S APPENDICES

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1. Eastern District Court of Texas, July 24, 2018, Opinion.

2. Fifth Circuit Court of Appeals, October 22, 2019, Opinion.

3. Fifth Circuit Court of Appeals, October 22, 2019, Judgment.

4. Fifth Circuit Court of Appeals, December 5, 2019, Order Denying Rehearing *En Banc.*

5. Fifth Circuit Court of Appeals, December 12, 2019, Order Denying Stay of Mandate Pending Petition.

## CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with appellee Jason Van Dyke on December 10, 2019, and he is opposed to this motion.

/s/ Jeffrey Lee Dorrell

**JEFFREY L. DORRELL**

## CERTIFICATE OF SERVICE

I hereby certify that on 12-19, 2019, a true and correct copy of the foregoing was served by first class U.S. mail (postage prepaid) or facsimile transmission in accordance with FED. R. CIV. P. 5(b), unless served by electronic notice via ECF to the following counsel of record at the addresses and telephone numbers shown:

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