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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: January 11, 2021

QUESTION PRESENTED

Did the Ninth Circuit correctly rule that the Texas anti-SLAPP statute, which awards monetary damages to compensate litigants forced to defend meritless SLAPP suits (Strategic Lawsuit Against Public Participation), is a substantive legal rule and thus enforceable in federal court in a diversity action under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)?

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Introduction to Anti-SLAPP Laws,
https://www.rcfp.org/introduction-anti-slapp-guide/#:~:text=As%20of%20fall%202019%2C%2030,New%20York%2C%20 Oklahoma%2C%20Oregon%2C 5

OPINIONS BELOW

Respondent concurs with Petitioner's identification of the U.S. District Court opinion and unpublished Ninth Circuit memorandum disposition below.

JURISDICTION

Respondent concurs with Petitioner's jurisdictional statement.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Respondent concurs that the Texas statutory provisions cited in Petitioner's brief are relevant. Art. III, Sections 1 and 2 of the U.S. Constitution are also relevant and provide:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions,

and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

STATEMENT OF THE CASE

Petitioner Stephanie Clifford, a Texas resident, is an adult film actress and a public figure. In the years 2006, 2011, and 2016, Petitioner publicly denied ever having had an intimate encounter with Respondent Donald J. Trump. In fall 2016, a few weeks before the election in which Respondent was running for President of the United States, Petitioner changed her story and demanded that Respondent pay her money or she would publicly allege that they had had an intimate encounter in 2006. Petitioner allegedly signed a document with Michael Cohen, a former lawyer for Respondent, in which she agreed to be paid $130,000 and not publicize her allegations about a supposed intimate encounter with Respondent in 2006 (the non-disclosure agreement or "NDA"). Petitioner claims she was paid that sum. In March 2018, Petitioner changed her position and decided to breach the NDA and publicly allege that she did in fact have an intimate encounter with Respondent in 2006.

Petitioner hired attorney Michael Avenatti, and filed a lawsuit on March 6, 2018 in California against Respondent, seeking to invalidate the NDA (the "NDA Action"). Petitioner alleged that the NDA was an attempt to silence her from

publicly making a political issue out of the alleged intimate encounter during the 2016 presidential campaign.

Concurrent with filing the NDA Action, Petitioner and Mr. Avenatti took to national television to amplify her claims in the lawsuit and made over 150 media appearances, including an appearance on *60 Minutes*, where Petitioner claimed that sometime in 2011, a stranger supposedly approached her in a parking lot in Las Vegas allegedly stating: "leave Trump alone" and "forget the story", followed by an alleged threat of harm. Petitioner and Mr. Avenatti then appeared on *The View*, where they released a sketch of the alleged person who supposedly approached Petitioner in 2011 in Las Vegas.

Shortly after the appearance on *The View*, a third party Twitter user posted a tweet with a side-by-side image of the sketch released by Petitioner and Mr. Avenatti, next to a photograph of Petitioner's own ex-husband. The images were nearly identical, and the third party remarked in the tweet: "Oops! This is awkward!" about the close resemblance. Respondent saw that tweet, and added his own opinion to it, retweeting the third party's tweet with the caption: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" (the "Tweet").

On April 30, 2018, Petitioner filed this lawsuit in the U.S. District Court for the Southern District of New York against Respondent for defamation, based solely

on the Tweet. Respondent successfully obtained a transfer of the case to the Central District of California (unopposed by Petitioner), where the NDA Action was pending.

On August 27, 2018, Respondent filed a Special Motion to Dismiss/Strike the Complaint pursuant to the Texas Citizen's Participation Act ("TCPA"), an anti-SLAPP statute which requires that a prevailing defendant who obtains an order striking or dismissing a meritless complaint that arises out of the "[e]xercise of the right of free speech" be awarded compensatory damages to reimburse the defendant's attorney's fees. Tex. Civ. Prac. & Rem. Code § 27.001(3), 27.009(a)(1) (section entitled "Damages and Costs"). (Texas substantive law applied to the dispute because Petitioner is a Texas resident and would have suffered any injury from the alleged defamation in Texas.) In the Special Motion, Respondent argued that the Tweet was a protected opinion, and that the public figure Petitioner failed to allege actual malice.

On October 15, 2018, the District Court granted Petitioner's Special Motion, dismissed this action, and held that Respondent was entitled to a compensatory award of attorney's fees under the TCPA because Petitioner's meritless defamation claim qualified as a SLAPP suit under the statute. Pet. App. 1a.

Petitioner appealed. Her appeal argues both the alleged merits of her defamation claim (claiming she pleaded actual malice and that the Tweet was not a

protected opinion), and also the applicability of the TCPA in federal court. The Ninth Circuit summarily rejected Petitioner's arguments and affirmed in a scant nine-page unpublished memorandum. Pet. App. 10a.

ARGUMENT

While Petitioner is correct that there are different approaches taken in the Courts of Appeals to the applicability of anti-SLAPP laws in federal courts, this case does not present the issue squarely. First, the Ninth Circuit's opinion was unpublished and cursory, due to Petitioner's failure to assert a ground for appellate review that even merited significant discussion. As a result, this Court will be without the benefit of a detailed record as to the Ninth Circuit's analysis of the facts or the law.

The issue of federal court jurisdiction over state anti-SLAPP statutes will recur again, likely very soon, and presumably in a case with a published and fully-developed Court of Appeal decision. According to the Reporters' Committee for Freedom of the Press, there are now 30 states with anti-SLAPP laws, *see* Austin Vining & Sarah Matthews, *Introduction to Anti-SLAPP Laws*, at https://www.rcfp.org/introduction-anti-slapp-guide/#:~:text=As%20of%20fall%202019%2C%2030,New%20York%2C%20Oklahoma%2C%20Oregon%2C). In just the past 18 months, there have been two *published* federal Court of Appeals decisions extensively discussing the applicability

of anti-SLAPP suits in federal court: *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020), and *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019). Should this Court decide that it wishes to review an anti-SLAPP case, it will have many future cases to choose from, and can select the case that is best suited for review with a full, carefully analyzed appellate court opinion and record.

Second, this case arises in a highly unusual posture, because it involves the Ninth Circuit's determination of the applicability of the *Texas* anti-SLAPP statute. This occurred because of conflicts of law rules in defamation suits afford heightened significance to the plaintiff's domicile, where the alleged injury is suffered. *Cf. Calder v. Jones*, 465 U.S. 783 (1984) (finding specific personal jurisdiction in California based on defamation plaintiff's residence there, because that was where the injury was suffered). The Ninth Circuit's opinion of whether the *Texas* anti-SLAPP statute applies in the District Courts of that circuit (the Ninth Circuit) is of little legal importance: even if the Ninth Circuit had published its opinion, it would have announced a legal rule that would apply only in the unusual case where a Texas plaintiff litigates her defamation lawsuit in a federal court somewhere in the Ninth Circuit, despite being allowed to file in Texas under the *Calder* rule.

Third, despite the protestations to the contrary in Petitioner's brief, the Court of Appeals was completely correct in its ruling in this case. Petitioner's claim was a classic SLAPP suit (and in fact, after appealing to the Ninth Circuit on the merits of

the defamation ruling, Petitioner notably does not even argue to this Court that she actually pleaded a meritorious defamation claim). Petitioner filed her claim because she had become a political adversary of Respondent during a presidential campaign (both in fall 2016, as well as in 2018, during the early stages of Respondent's re-election campaign) and Respondent's Tweet was a protected opinion about Petitioner's political speech—her defamation lawsuit (this action) was her attempt to punish Respondent for exercising his First Amendment right to engage in protected political commentary: his response to her political speech.

Moreover, the anti-SLAPP statute involved (the TCPA) is substantive rather than procedural. The TCPA offers what it expressly labels as an award of "damages" and costs to compensate a prevailing defendant for the expense of defending an improper, unmeritorious lawsuit that violates his constitutional rights. Tex. Civ. Prac. & Rem. Code § 27.009(a)(1) (section entitled "Damages and Costs"). In *Erie*, the plaintiff forum-shopped and filed in federal court because he would be entitled to damages for ordinary negligence in that forum, and would not be able to recover such damages in state court. That was what led this Court to overrule *Swift v. Tyson*, 41 U.S. 1 (1842), and hold that state substantive law would be applied by federal court in a diversity action. Similarly, here, a holding that the TCPA is "procedural" and inapplicable in federal court would allow plaintiffs to forum shop: to file their state law SLAPP suits in federal court whenever possible,

to avoid paying damages to defendants in state court as required by anti-SLAPP statutes. This is precisely the evil that the *Erie* Court sought to prevent.

The situation here is even more egregious than the facts of *Erie*, because allowing SLAPP suits to be filed in federal court and exempted from substantive state laws like the TCPA, would result in meritless, improper SLAPP suits flooding the federal courts in order to avoid paying damages claims under state anti-SLAPP statutes. Federal courts, which are charged with protecting and enforcing the Bill of Rights, would instead become a tool used by plaintiffs filing SLAPP suits to punish citizens for exercising their First Amendment rights and, in the process, chill the exercise of those constitutional rights.

For these reasons, this case is not suitable or worthy for this Court to review. The petition for certiorari should be denied.

Respectfully submitted,

Dated: January 11, 2021

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