No. 18-40710

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

JASON LEE VAN DYKE,
Plaintiff-Appellee,

v.

THOMAS CHRISTOPHER RETZLAFF,
Defendant-Appellant

On Appeal from the United States District Court
for the Eastern District of Texas
Sherman Division

APPELLANT THOMAS RETZLAFF'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th CIR. R. 28.2.1(b)(2), the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Mr. Thomas Christopher Retzlaff, defendant-appellant
Mr. Jason Lee Van Dyke, plaintiff-appellee *pro se*
"BV Files," a website named as a defendant below
"Via View Files," a website named as a defendant below
Via View Files, L.L.C., an alleged[1] entity named as a defendant below
Jeffrey L. Dorrell, counsel for appellant
Hanszen Laporte, LLP, law firm of counsel for appellant

Pursuant to FED. R. APP. P. 26.1(a), the undersigned counsel of record certifies that there is no parent corporation or publicly held corporation that owns 10% or more of the stock of any corporate party.

HANSZEN LAPORTE

By: /s/ Jeffrey L. Dorrell
JEFFREY L. DORRELL
Attorney of Record for Appellant Thomas Christopher Retzlaff

[1] Appellant has not found an entity by this name chartered in any jurisdiction.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Thomas Christopher Retzlaff respectfully requests oral argument because the issue at stake is of high importance to the policy that will be followed in this Circuit in future cases—does the Texas Citizens Participation Act apply in federal court? Retzlaff believes oral argument would be beneficial to the Court's understanding of both the law and the policy reasons that militate strongly in favor of reversing the district court and reaching the conclusion that so many other courts have reached.

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STATEMENT OF JURISDICTION

Pursuant to the collateral order doctrine, this Court has jurisdiction over an interlocutory appeal of an order denying a TCPA motion to dismiss. 28 U.S.C. § 1291; ***Diamond Consortium, Inc. v. Hammervold, P.L.C.***, 733 Fed. Appx. 151, 154 (5th Cir. 2018); ***NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C***., 745 F.3d 742, 747-48 (5th Cir. 2014); ***Henry v. Lake Charles American Press, LLC***, 566 F.3d 164, 170-71 (5th Cir. 2009). *See also* ***Cohen v. Beneficial Industrial Loan Corp***., 337 U.S. 541, 546 (1949) (recognizing "a small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.").

APPELLANT'S ISSUES PRESENTED FOR REVIEW

Issue 1: **Do state "anti-SLAPP" statutes such as the Texas Citizens Participation Act ("TCPA") apply in federal court?**

A. Is the TCPA Procedural or Substantive?

B. Does the TCPA "Directly Collide" With Other Federal Rules?

STATEMENT OF THE CASE

Nature of the Case. This is a $100,000,000.00 defamation suit brought by attorney Jason Lee Van Dyke *pro se* after appellant Retzlaff filed an allegedly "frivolous" grievance against Van Dyke with the State Bar of Texas. ROA.140 (the second of two paragraphs both numbered "5.3").

Course of Proceedings. No trial was held. Retzlaff moved to dismiss Van Dyke's claims under an anti-SLAPP statute, the Texas Citizens Participation Act ("TCPA"). ROA.730. On July 24, 2018, the district court issued a memorandum opinion and order denying Retzlaff's Second Amended TCPA Motion to Dismiss, holding that "the TCPA, regardless if classified as procedural or substantive, does not apply in federal court." ROA.1052.

STATEMENT OF FACTS

Plaintiff-appellee Jason Van Dyke is a licensed Texas attorney representing himself *pro se*. ROA.730. On March 28, 2018, plaintiff sued defendant-appellant Thomas Retzlaff in the 431st District Court of Texas for libel, intrusion on seclusion, tortious interference with contract, and intentional infliction of emotional distress after Retzlaff filed a grievance against plaintiff with the State Bar of Texas. ROA.22-28. Even before this suit was filed, plaintiff had openly bragged that he had sued "everyone who has ever filed a formal grievance against [him] with the State Bar:"

> **Jason Lee Van Dyke** <jason@vandykelawfirm.com> Tue, Nov 12, 2013 at 5:02 PM
> To: Les Holtzman <57poker.pro@gmail.com>
>
> You stated that I filed a harmful and frivolous lawsuit. That is enough for me. . I will warn you: I have sued everyone who has ever filed a formal grievance against me with the State Bar. If you file some sort of groundless grievance with the State Bar I will make your life a living hell unlike anything you could imagine. I don't take such threats lightly. I will also warn you about that link you sent me: That information is false and defamatory. Any republication of the same by you or anyone under control will get you sued. I'd strongly advise you not to test me.

ROA.1060. It appears plaintiff was continuing his stated policy when he filed the instant suit.

Retzlaff removed the case to the U.S. District Court for the Eastern District of Texas on the basis of diversity of citizenship.[2] ROA.14-15. *See* 28 U.S.C. § 1322(a). Plaintiff did not move to remand.

[2] Van Dyke is a citizen of Texas; Retzlaff is a citizen of Arizona. ROA.15.

On April 10, 2018, Retzlaff filed a *pro se* motion to dismiss Van Dyke's claims under an anti-SLAPP[3] statute, the Texas Citizens Participation Act ("TCPA"). ROA.109. In his Second Amended Complaint filed on April 11, 2018, plaintiff narrowed his suit to alleged statements by Retzlaff in a letter to Hon. Jonathan Bailey of the 431st State District Court (where ***Van Dyke v. Retzlaff*** was pending) and on a "blog" Retzlaff allegedly owns. ROA.138-145. Plaintiff does not identify the statements themselves in the complaint, but *characterizes* them as including the following "statements of fact:"

(i) plaintiff is a Nazi;

(ii) plaintiff is a pedophile;

(iii) plaintiff is a drug addict;

(iv) plaintiff has a criminal record for abusing women; and

(v) plaintiff has committed professional misconduct against Retzlaff.

ROA.141, ¶ 5.9; ROA.143, ¶ 6.2. Based on plaintiff's own *characterizations* of Retzlaff's statements—rather than the statements themselves—plaintiff sues Retzlaff for:

[3] "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." *See* ***Entravision Comm's Corp. v. Salinas***, 487 S.W.3d 276, 278 n.2 (Tex. App.—Corpus Christi 2016, pet. denied).

(i) libel per se;

(ii) intrusion upon seclusion;

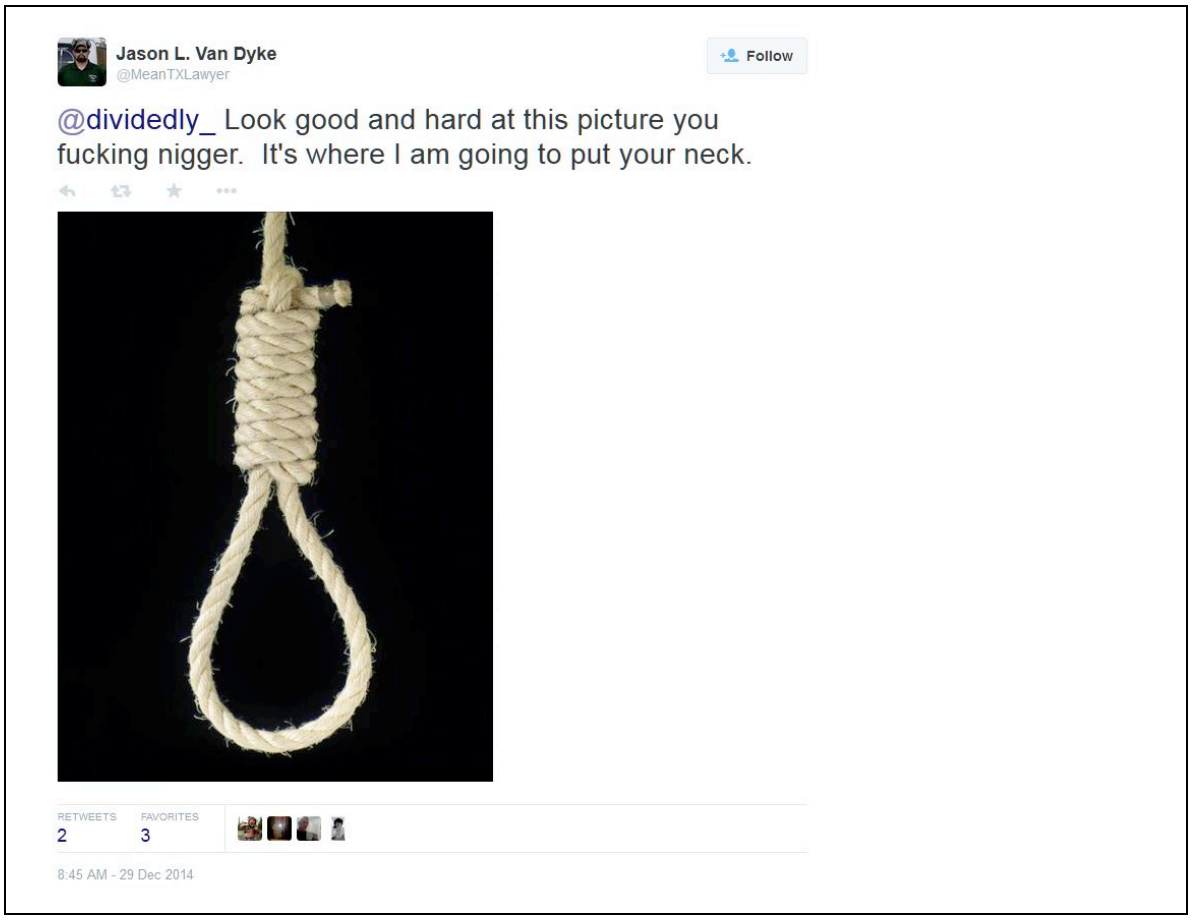
(iii) tortious interference with existing contract (plaintiff's at-will employment by the law firm of Karlseng, Leblanc, & Rich, LLC); and

(iv) intentional infliction of emotion[al] distress. (ROA.144.)

In his May 15, 2018, "Response to Defendant's Anti-SLAPP motion," ROA.565, plaintiff appears to abandon all claims based upon Retzlaff's State Bar grievance against him. ROA.570-571.

In a March 30, 2018, letter to Judge Bailey, Retzlaff wrote, "Jason Lee Van Dyke is a Nazi, racist piece of human shit who has no business being a lawyer." ROA.651. In the same letter to Judge Bailey, Retzlaff also wrote, "No doubt Van Dyke is a pedophile, too. He has that look about him." ROA.652.

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



Yet, plaintiff sued to chill Retzlaff's criticism. The growing use of SLAPPs to squelch public criticism is precisely the reason the Texas Legislature adopted the TCPA by a unanimous vote in both houses in 2011.

After retaining counsel, Retzlaff amended his TCPA motion to dismiss. ROA.730. On July 24, 2018, the district court issued a memorandum opinion and order denying Retzlaff's Second Amended TCPA Motion to Dismiss, holding that "the TCPA, regardless if classified as procedural or substantive, does not apply in federal court." ROA.1052. Retzlaff timely filed a notice of appeal to this Court. ROA.1054.

STANDARD OF REVIEW

A district court's decision to apply state law in federal court is reviewed *de novo*. ***Block v. Tenenhaus***, 867 F.3d 585, 589 (5th Cir. 2017).

SUMMARY OF THE ARGUMENT

Anti-SLAPP statutes apply in federal court under the ***Erie*** doctrine because they represent substantive law enacted by 33 states. The First, Second, and Ninth Circuits agree. Ignoring how state legislatures have limited actions under their own laws would "flush away state legislatures' considered decisions on matters of state law" and cause an avalanche of frivolous suits filed in federal courts by plaintiffs seeking to evade the barriers anti-SLAPP statutes erect. The prospect that this Court might find the TCPA inapplicable in federal court presents the very real possibility that the Texas anti-SLAPP statute will apply in federal courts in the *Ninth* Circuit, but *not* in federal courts in the circuit in which Texas itself resides. This would disserve "the twin aims of the ***Erie*** rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."

Nor does the TCPA "directly collide" with FED. R. CIV. P. 12 and 56 because the TCPA "supplements rather than conflicts" with the federal rules. The TCPA creates a separate and additional theory upon which certain kinds of suits may be disposed of before trial. It asks a different question than the federal rules—whether the claims rest on protected First Amendment activity and whether the plaintiff can meet the substantive requirements the TCPA creates "to protect such activity from strategic, retaliatory lawsuits."

ARGUMENT

Argument and Authorities—Issue 1

Issue 1: Do state "anti-SLAPP" statutes such as the Texas Citizens Participation Act ("TCPA") apply in federal court?

Yes. The TCPA has been referred to as an "across-the-board game-changer in Texas civil litigation,"[4] creating a sweeping dismissal mechanism that extends far beyond the traditional aims of strategic lawsuits targeting First Amendment rights. One pair of authors has called the TCPA the "broadest anti-SLAPP statute in the nation."[5] The TCPA applies to any "lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief" that is based on or relates to a communication made in connection with a "matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3) (defining "exercise of the right of free speech") and (6) (defining "legal action"). A "matter of public concern" is defined expansively to include an issue related to such topics as "health or safety"; economic or community "well-being"; and even a "good, product, or service in the marketplace." *Id*., § 27.001(7) (defining "matter of public concern"). The communication need

[4] ***Serafine v. Blunt***, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring).

[5] April Farris and Matthew Zorn, *Law 360*, "State Anti-SLAPP in Federal Court: An Update From Texas," November 1, 2018.

not even be public to trigger the TCPA's protection. ***Lippincott v. Whisenhunt***, 462 S.W.3d 507, 509 (Tex. 2015). The TCPA also protects a party's exercise of the "right to petition" and the "right of association"—statutory terms that are defined much more broadly than their constitutional counterparts. *See* TEX. CIV. PRAC. & REM. CODE § 27.003(2), (4); *see also* ***Elite Auto Body LLC v. Autocraft Bodywerks, Inc***., 520 S.W.3d 191, 202 (Tex. App.—Austin 2017, pet. dism'd) ("The Texas Supreme Court in Coleman seems to have put to rest any notion that any constitutional connotations of 'right of association,' 'right of free speech,' or 'right to petition' should inform the meaning of the TCPA's corresponding 'exercise of' definitions....").

For obvious reasons, plaintiffs would prefer to keep this weapon out of federal court. Yet, this Court has not yet decided this important and recurring question. *See* ***Diamond Consortium, Inc.***, 733 Fed. Appx. at 154 ("We follow previous panels in assuming without deciding that Texas's anti-SLAPP statute applies in federal court."); ***Block***, 867 F.3d at 589 ("The applicability of state anti-SLAPP statutes in federal court is an important but unresolved issue in this circuit."); ***Cuba v. Pylant***, 814 F.3d 701, 707 (5th Cir. 2016) ("We first review the TCPA framework, which we assume—without deciding—controls as the state substantive law in these diversity

suits.") "Under the ***Erie*** doctrine,[6] federal courts sitting in diversity apply state substantive law and federal procedural law." ***Gasperini v. Ctr. For Humanities***, 518 U.S. 415, 427 (1996). (As noted above, federal jurisdiction in the case at bar is based on diversity of citizenship.) However—as to state anti-SLAPP statutes, at least—the familiar ***Erie*** doctrine has proven easier to articulate than to apply. Both the U.S. circuit courts of appeals and Texas district courts are deeply divided, and clarity has been elusive.

The First, Second, and Ninth Circuits have found that anti-SLAPP statutes apply in federal court as state substantive policy. *See* ***Godin v. Schencks***, 629 F.3d 79, 88-92 (1st Cir. 2010) (Maine anti-SLAPP statute held sufficiently substantive, and declining to apply it would disserve ***Erie*** aims, including prevention of forum shopping); ***Liberty Synergistics Inc. v. Microflo Ltd***., 718 F.3d 138, 148 (2d Cir. 2013) (California's anti-SLAPP statute reflected "substantive policy favoring the special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity"); ***U.S. ex rel. Newsham v. Lockheed Missiles & Space Co***., 190 F.3d 963, 972-73 (9th Cir. 1999) (California's anti-SLAPP statute furthered "substantive" interests and served dual ***Erie***

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

purposes). The Tenth and D.C. Circuits have found anti-SLAPP statutes to be inapplicable under ***Erie*** or the Rules Enabling Act. *See* ***Abbas v. Foreign Policy Grp., LLC***, 783 F.3d 1328 (D.C. Cir. 2015) (holding that D.C. anti-SLAPP law did not apply in federal court under the Rules Enabling Act, without reaching ***Erie***); ***Los Lobos Renewable Power, LLC v. Americulture, Inc.***, 885 F.3d 659, 668-69 (10th Cir. 2018) (New Mexico anti-SLAPP law procedural and therefore did not apply under ***Erie***).

This Court should now speak clearly[7] to decide this frequently recurring issue within the Fifth Circuit—at least until the U.S. Supreme Court resolves the existing split among circuit courts.[8]

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[7] In addition to the case at bar, this Court now has before it two other cases presenting essentially the same question: (i) ***Klocke v. Watson***, No. 17-11320 (5th Cir.) (orally argued September 5, 2018); and (ii) ***Rudkin v. Roger Beasley Imports, Inc***., No. 18-50157 (5th Cir.).

[8] The U.S. Supreme Court recently requested a response to the petition for writ of certiorari in ***Americulture v. Los Lobos Renewable Power, LLC***, 2018 WL 3497538 (July 16, 2018) (No. 18-89). In ***Los Lobos***, despite the circuit split, the Tenth Circuit minced no words in ruling that it "need not rely on any complex ***Erie*** analysis here because, assuming one is able to read, drawing the line between procedure and substance in this case is hardly a 'challenging endeavor.'" ***Los Lobos***, 885 F.3d at 668-69. The ***Los Lobos*** court also held the "plain language of the New Mexico anti-SLAPP statute reveals the law is nothing more than a procedural mechanism designed to expedite the disposal of frivolous lawsuits aimed at threatening free speech rights." *Id*.

A. Is the TCPA Procedural or Substantive?

Substantive. The TCPA uses procedural mechanisms to safeguard important *substantive* rights. As the Ninth Circuit observed in reaffirming that California's anti-SLAPP statute is applicable in federal court:

> **Refusing to recognize [the limitations placed on SLAPPs by seven state legislatures is] bad policy…. If we ignore how state legislatures have limited actions under their own laws, we not only flush away state legislatures' considered decisions on matters of state law, but we also put the federal courts at risk of being swept away in a rising tide of frivolous state actions that would be filed in our circuit's federal courts.**

Makeoff v. Trump University, LLC, 736 F.3d 1180, 1181-87 (9th Cir. 2013). Finding Maine's anti-SLAPP statute applicable in federal court, the First Circuit drew on the Supreme Court's analysis only a short time earlier:

> **In getting at the potential rub in the relationship between a Federal Rule of Procedure and the state law, courts now ask if the federal rule is "sufficiently broad to control the issue before the court**."

Godin, 629 F.3d at 86, quoting ***Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co***., 130 S.Ct. 1431, 1451 (2010) (Stevens, J. concurring). Joined in relevant part by four other justices, Justice Stevens held that whether the federal rule is valid depends not on the federal rule alone, but also on the nature of the state rule it seeks to displace. *Id*., at 1452-53. The critical question is *not* "whether the state law at issue takes the form of what is traditionally described as substantive or procedural," but rather "whether

the state law actually is part of a State's framework of substantive rights or remedies." *Id*., at 1449 [emphasis added].

Justice Stevens also noted that this inquiry "may well bleed back" into the inquiry of whether a federal rule is broad enough to control the issue before the court. *Id*. at 1452. This is so because a federal rule "cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id*. [Emphasis added.] This is the precise issue before the Court in the case at bar. To avoid such a result, the ***Shady Grove*** concurrence concludes, "[w]hen a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result." *Id*.

But four years before ***Shady Grove***, ***Makeoff***, or ***Godin***, *this Court* had already recognized essentially the same important principle. Finding the Louisiana anti-SLAPP statute applicable in federal court, this Court wrote:

> **The purpose of [Louisiana's anti-SLAPP statute] is to free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights. [The anti-SLAPP statute] thus provides a right not to stand trial, as avoiding the costs of trial is the very purpose of the statute.… [I]t … provide[s] defendants the right not to bear the costs of fighting a meritless defamation claim. If [an anti-SLAPP] motion is erroneously denied and unappealable, then the case proceeds to trial and this right is effectively destroyed.**

Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164, 178 (5th Cir. 2009) [emphasis added]. And at least three Texas district courts have also found the TCPA substantive and applied it in federal court. *See* ***Khalil v. Memorial Hermann Health Sys***., 2017 WL 5068157, at *5 (S.D.Tex. Oct. 30, 2017); (finding this Court's application of Louisiana anti-SLAPP statute in ***Henry*** persuasive); ***Banik v. Tamez***, 2017 WL 1228498, at *2 (S.D.Tex. April 4, 2017) ("state anti-SLAPP statutes have been entertained [in this Court] on the ground that they constitute substantive law"); ***Williams v. Cordillera Communications***, 2014 WL 2611746, at *1 (S.D.Tex. 2014) (finding TCPA enforceable in federal courts sitting in diversity). By contrast, the court below ignored this Court's decision in ***Henry*** and relied instead on Judge Graves' dissenting opinion in ***Cuba***. ROA.1051.

The reasoning of the courts finding the TCPA applicable in federal court is consistent with the "outcome determination" test used in this circuit to determine whether a state rule or law is procedural or substantive. ***All***

Plaintiffs v. All Defendants, 645 F.3d 329, 336 (5th Cir. 2011). Under the outcome-determination test, courts consider whether it would "significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court." ***Gasperini***, 518 U.S. at 427. That test, however, "must be guided by 'the twin aims of the ***Erie*** rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" ***Gasperini***, 518 U.S. at 428. A careful analysis of those aims is essential to reaching a correct result in the case at bar.

Given that a California federal district court recently applied the *Texas* anti-SLAPP statute to dismiss Stormy Daniels's defamation claims against President Donald Trump, the prospect that this Court might find the TCPA inapplicable in federal court presents the very real (and absurd) possibility that the Texas anti-SLAPP statute will apply to litigants in federal courts in the seven states of the *Ninth* Circuit, but *not* in federal courts in the circuit in which Texas itself resides. *See* ***Clifford v. Trump***, 2018 WL 4997419 at *5, *6-*8 (C.D.Cal. October 15, 2018) (holding Texas law applicable to plaintiff's defamation claims and applying the TCPA).[9] No more fertile

[9] And such a finding would affect the litigants in the case at bar in a more direct way. On November 8, 2018, plaintiff-appellee Jason Van Dyke filed a *second* lawsuit against defendant-appellant Thomas Retzlaff in Retzlaff's home state of Arizona

ground to incentivize forum-shopping could possibly be plowed. And such a bizarre result would likely become something of a judicial "poster child" for the inequitable administration of laws. Wisdom counsels against it.

Finally, the substantive constitutional protections for free speech should not be relegated to a footnote in a discussion of the TCPA's procedural mechanisms. It is the *sine qua non* of the TCPA. "One of the foundational principles of American democracy is the freedom to comment on matters of public concern." ***Ashcroft v. Free Speech Coal***., 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected … because speech is the beginning of thought.")); *see also* George Washington, quoted in *Great Quotes from Great Leaders* 64 (compiled by Peggy Anderson (1990)) ("If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter."). The First Amendment's protections for speech were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." ***N.Y. Times Co. v. Sullivan***, 376 U.S. 254,

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based on the same nucleus of operative facts. That case was removed to Arizona federal court—in the *Ninth* Circuit—and is now pending as No. 2:18-CV-04003; ***Van Dyke v. Retzlaff***, in the U.S. District Court for the District of Arizona. Retzlaff has filed a motion to dismiss under the *Texas* anti-SLAPP statute on the same grounds as applied by the California federal court to dismiss Stormy Daniels' defamation suit against President Trump in ***Clifford***, 2018 WL 4997419 at *5. Thus, the prospect exists that even if this Court finds the TCPA inapplicable in a *Texas* federal court, the *Arizona* federal court will dismiss the *same* claims based on the *same* Texas statute.

269 (1964); *see* U.S. Const. amend. I ("Congress shall make no law … abridging the freedom of speech"). The Texas Constitution also explicitly protects freedom of expression, declaring that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject … and no law shall ever be passed curtailing the liberty of speech." Tex. Const. art. I, § 8. And it has long been recognized that the rights of free speech guaranteed by the Texas Constitution "are more extensive than those guaranteed by the Federal Constitution." *See, e.g.,* ***KGBT v. Briggs***, 759 S.W.2d 939, 944 (Tex. 1988) (Gonzalez, J., concurring).

This Court cannot sweep state legislatures' limitations on SLAPP suits out of federal courts in this circuit without giving short shrift to the Supreme Court's explication of the ***Erie*** doctrine in ***Shady Grove***, without doing violence to legislative decisions to enact protections for constitutional rights, and without exacerbating an already marked inconsistency that results from different circuits treating the same laws differently. In the case of the TCPA, the Texas Legislature's exercise of its prerogative to significantly expand the protection of its citizens' substantive rights beyond those enshrined in the U.S. Constitution—consistent with Texas's own constitution's broader substantive protections—is entitled to respect. If this is not substantive law, it is difficult to imagine what would be.

B. Does the TCPA "Directly Collide" With Other Federal Rules?

No. The Ninth Circuit has concluded that the California anti-SLAPP statute does not "directly collide" with FED. R. CIV. P. 12 and 56. *See* ***Newsham***, 190 F.3d at 973; ***Makeoff***, 736 F.3d at 1182. In ***Makeoff***, the Ninth Circuit applied the U.S. Supreme Court's analysis in ***Shady Grove*** to determine if the laws conflicted, asking whether the California anti-SLAPP statute "attempts to answer the same question" as the federal rule. ***Makeoff***, 736 F.3d at 1182, citing ***Shady Grove***, 559 U.S. at 393. The Ninth Circuit found no direct collision because California's anti-SLAPP statute "supplements rather than conflicts" with the federal rules by creating a "separate and additional theory upon which certain kinds of suits may be disposed of before trial." ***Makeoff***, 736 F.3d at 1182. This is also true of the TCPA. The TCPA "asks an entirely different question" than that asked by the federal rules—"whether the claims rest on the SLAPP defendant's protected First Amendment activity and whether the plaintiff can meet the substantive requirements" the TCPA creates "to protect such activity from strategic, retaliatory lawsuits." *Id.*

CONCLUSION

The First, Second, and Ninth Circuits agree that anti-SLAPP statutes apply in federal court as substantive law under the ***Erie***. The prospect that this Court might find the TCPA inapplicable in federal court presents the very real possibility that the Texas anti-SLAPP statute will apply in federal courts in the *Ninth* Circuit, but *not* in federal courts in the circuit in which Texas itself resides. This would disserve "the twin aims of the ***Erie*** rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." The TCPA does not "directly collide" with FED. R. CIV. P. 12 and 56 because it "supplements rather than conflicts" with the federal rules. The TCPA asks a different question than the federal rules—whether the claims rest on protected First Amendment activity and whether the plaintiff can meet the substantive requirements the TCPA creates "to protect such activity from strategic, retaliatory lawsuits."

PRAYER

For these reasons, Retzlaff prays that this Court reverse the district court's holding that the TCPA does not apply in federal court under the ***Erie*** doctrine. Retzlaff prays that the Court remand this case to the district court with instructions to apply the TCPA to plaintiff's claims, and for such other and further relief, at law or in equity, as to which it shall show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF WORD-COUNT AND TYPE-VOLUME COMPLIANCE

In compliance with FED. R. APP. P. 32(a)(7)(C), relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this document including headings, footnotes, and quotations but excluding the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, and any certificates of counsel is 3,725. I certify that the typefaces used throughout this document comply with FED. R. APP. P. 32(a)(6).

/s/ Jeffrey L. Dorrell

JEFFREY L. DORRELL

CERTIFICATE OF SERVICE

I hereby certify that on 11-21, 2018, 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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