No. 18-40710

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

JASON LEE VAN DYKE,
Plaintiff-Appellee,

v.

THOMAS CHRISTOPHER RETZLAFF,
also known as Dean Anderson, doing business as BV Files, ViaView Files, L.L.C., and ViaView Files,
Defendant-Appellant

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

APPELLANT'S PETITION FOR REHEARING *EN BANC*

JEFFREY LEE DORRELL
Texas Bar No. 00787386
U.S. (Southern District of Texas) Bar No. 18465
HANSZEN LAPORTE
jdorrell@hanszenlaporte.com
14201 Memorial Drive
Houston, Texas 77079
Telephone: 713-522-9444
FAX: 713-524-2580
ATTORNEYS FOR APPELLANT THOMAS CHRISTOPHER RETZLAFF

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.

Plaintiff-Appellee and Counsel

Jason Lee Van Dyke, plaintiff-appellee *pro se*

Defendant-Appellant and Counsel

Thomas Christopher Retzlaff, defendant-appellant
Jeffrey Lee Dorrell, counsel of record for appellant
Anthony Laurent Laporte, counsel of record for appellant
Kent M. Hanszen, additional counsel for appellant
Rhiannon Jajoo, additional counsel for appellant
William Carl Wilson, former counsel of record for appellant
Hanszen Laporte, LLP, law firm of counsel of record for appellant

Other Defendants Below[1]

Dean Anderson, an alleged alias of appellant
"BV Files," a website named as a defendant below
"ViaView Files," a website named as a defendant below
ViaView Files, LLC, an alleged[2] entity named as a defendant below

Amici Curiae

The Reporters Committee for Freedom of the Press
American Society of News Editors
The Associated Press
The Associated Press News Editors

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[1] None of these defendants was ever served or appeared below. None is a party in the instant appeal. None is known to have counsel.

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

Association of Alternative Newsmedia
California Publishers Association
Reveal From The Center for Investigative Reporting
Courthouse News Service
Dow Jones & Company, Inc.
E.W. Scripps Company
The First Amendment Coalition
First Look Media Works, Inc.
Fox Television Stations, LLC
Freedom of Information Foundation of Texas
Gannett Co., Inc.
Hearst Corporation
International Documentary Association
Investigative Reporting Workshop
The McClatchy Company
The Media Institute
Digital First Media
MPA — The Association of Magazine Media
National Press Photographers Association
National Public Radio, Inc.
The New York Times Company
News Media Alliance
Nexstar Media Group, Inc.
Online News Association
POLITICO
ProPublica
Radio Television Digital News Association
Reporters Without Borders
The Seattle Times Company
Sinclair Broadcast Group, Inc.
Society of Professional Journalists
Texas Association of Broadcasters
Texas Press Association
Tully Center for Free Speech
The Washington Post (formally, WP Company LLC, d/b/a The Washington Post)

Counsel for Amici Curiae

Individual Amicus Counsel

Thomas S. Leatherbury, counsel of record for amici
Margaret Dunlay Terwey, counsel of record for amici
Francis Yang, counsel of record for amici
Bruce D. Brown, of counsel for amici
Katie Townsend, of counsel to amici
Caitlin Vogus, of counsel to amici
Kevin M. Goldberg, additional counsel for amici American Society of News Editors and Association of Alternative Newsmedia
Karen Kaiser, additional counsel for amicus The Associated Press
Jim Ewart, additional counsel for amicus California News Publishers Association
Nikki Moore, additional counsel for amicus California News Publishers Association
D. Victoria Baranetsky, additional counsel for amicus The Center for Investigative Reporting
Rachel Matteo-Boehm, additional counsel for amicus Courthouse News Service
Jason P. Conti, additional counsel for amicus Dow Jones & Company
Jacob P. Goldstein, additional counsel for amicus Dow Jones & Company
David M. Giles, additional counsel for amicus E.W. Scripps Company
David Snyder, additional counsel for amicus First Amendment Coalition
David Bralow, additional counsel for amicus First Look Media Works, Inc.
David M. Keneipp, additional counsel for amicus Fox Television Stations, LLC
Barbara W. Wall, additional counsel for amicus Gannett Co., Inc.
Jonathan Donnellan, additional counsel for amicus Hearst Corporation
Ravi V. Sitwala, additional counsel for amicus Hearst Corporation
Diego Ibarguen, additional counsel for amicus Hearst Corporation
Juan Cornejo, addiional counsel for amicus The McClatchy Company
Kurt Wimmer, additional counsel for amicus The Media Institute
Marshall W. Anstandig, additional counsel for amici Digital First Media and News Media Alliance
James Chadwick, additional counsel for amicus Digital First Media

James Cregan, additional counsel for amicus MPA — The Association of Magazine Media
Mickey H. Osterreicher, additional counsel for amicus National Press Photographers Association
Jonathan Hart, additional counsel for amicus National Public Radio, Inc.
Ashley Messenger, additional counsel for amicus National Public Radio, Inc.
Micah Ratner, additional counsel for amicus National Public Radio, Inc.
David McGraw, additional counsel for amicus The New York Times Company
Thomas R. Burke, additional counsel for amicus Online News Association
Laura R. Handman, additional counsel for amicus Online News Association
Alison Schary, additional counsel for amicus Online News Association
Elizabeth C. Koch, additional counsel for amicus POLITICO LLC
Richard J. Tofel, additional counsel for amicus ProPublica
Kathleen A. Kirby, additional counsel for amicus Radio Television Digital News Association
Bruce E.H. Johnson, additional counsel for amicus The Seattle Times Co.
Barry Faber, additional counsel for amicus Sinclair Broadcast Group, Inc.
Bruce W. Sanford, additional counsel for amicus Society of Professional Journalists
Mark I. Bailen, additional counsel for amicus Society of Professional Journalists
John B. Kennedy, additional counsel for amicus The Washington Post
James A. McLaughlin, additional counsel for amicus The Washington Post
Kalea Clark, additional counsel for amicus The Washington Post

Law Firms of Amicus Counsel

Vinson Elkins, LLP, law firm of counsel of record for amici, Thomas S. Leatherbury, Margaret Dunlavy Terwey, and Francis Yang

Fletcher, Heald & Hildreath, PLC, law firm of additional counsel for amici American Society of News Editors and Association of Alternative Newsmedia, Kevin M. Goldberg

Bryan Cave LLP, law firm of additional counsel for amicus Courthouse News Service, Rachel Matteo-Boehm

Covington & Burling LLP, law firm of additional counsel for amicus The Media Institute, Kurt Wimmer

Sheppard Mullin Richter & Hampton LLP, law firm of additional counsel for amicus Digital First Media, James Chadwick

Davis Wright Tremaine LLP, law firm of additional counsel for amicus Online News Association, Thomas R. Burke, Laura R. Handman, and Alison Schary

Ballard Spahr LLP, law firm of additional counsel for amicus POLITICO LLC, Elizabeth C. Koch

Wiley Rein LLP, law firm of additional counsel for amicus Radio Television Digital News Association, Kathleen A. Kirby

Wright Tremaine LLP, law firm of additional counsel for amicus The Seattle Times Co., Bruce E.H. Johnson

Baker Hostetler LLP, law firm of additional counsel for amicus Society of Professional Journalists, Bruce W. Sanford and Mark I. Bailen

Nonparties Who Appear to Be Financially Interested[3]

The Honorable Donald John Trump, President of the United States
Charles Harder, counsel for The Honorable Donald John Trump
Stephanie Clifford, a/k/a "Stormy Daniels"
Clark O. Brewster, current counsel of record for Stephanie Clifford
Jennifer L. De Angelis, additional counsel for Stephanie Clifford
Guy A. Fortney, additional counsel for Stephanie Clifford
Montgomery L. Lair, additional counsel for Stephanie Clifford
Katie S. Arnold, additional counsel for Stephanie Clifford
Mbilike M. Mwafulirwa, additional counsel for Stephanie Clifford
Michael J. Avenatti, former counsel of record for Stephanie Clifford
Ahmed Ibrahim, former counsel of record for Stephanie Clifford
Avenatti & Associates, APC, law firm of former counsel of record for Stephanie Clifford, Michael J. Avenatti and Ahmed Ibrahim
Brewster & De Angelis, P.L.L.C., law firm of current counsel for Stephanie Clifford, Clark O. Brewster, Jennifer L. De Angelis, Guy A. Fortney, Montgomery L. Lair, Katie S. Arnold, and Mbilike M. Mwafulirwa

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 Lee Dorrell
JEFFREY L. DORRELL
Attorney of Record for Appellant Thomas Christopher Retzlaff

[3] The named parties and counsel are involved in ***Clifford v. Trump***, 339 F.Supp. 915 (M.D.Cal. 2018), now on appeal to the U.S. Court of Appeals for the Ninth Circuit, Cause No. 18-56351. In accordance with 23 years of Ninth Circuit precedent applying the *California* anti-SLAPP statute in federal courts, the district court in ***Clifford*** on October 15, 2018, applied the *Texas* Citizens Participation Act to dismiss Clifford's defamation claims against Trump. *Id*., at 929. On December 11, 2018, the district court awarded Trump **$293,052.33** in "attorney's fees, costs, and sanctions" under the TCPA. 2018 WL 6519029 at *6 (M.D.Cal. 2018) (Appx. Tab 5.). On August 23, 2019, another panel of this Court decided ***Klocke v. Watson***, 936 F.3d 240 (5th Cir. 2019)—held dispositive of the case at bar. Clifford's counsel notified the Ninth Circuit of the ***Klocke*** decision and argued ***Klocke*** supported reversal by the Ninth Circuit in ***Trump***. (**Appx. Tab 6.)** The Ninth Circuit has set oral argument in ***Trump*** for February 2020.

STATEMENT REGARDING *EN BANC* RECONSIDERATION

En banc reconsideration is necessary to maintain the uniformity of the Court's decisions and to consider questions of exceptional importance.

In affirming the district court's holding that Retzlaff is entitled to no relief because the Texas Citizens Participation Act ("TCPA") is inapplicable in federal court, the panel's October 22, 2019, decision[4] parts ways with both another panel of this Court in its September 18, 2019, decision in ***Walker v. Beaumont I.S.D.***, 938 F.3d 724 (5th Cir. 2019), and with the U.S. Court of Appeals for the Ninth Circuit in ***Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress***, 890 F.3d 828, 833-34 (9th Cir. 2018), *cert. denied*, (April 1, 2019). The divergent jurisprudence of ***Klocke***/***Van Dyke*** with these earlier decisions is analyzed more thoroughly below.

[4] The panel's decision in the case at bar (**Appx. Tab 2**) engages in no substantive analysis other than to hold that an earlier panel's August 23, 2019, decision in ***Klocke v. Watson***, 936 F.3d 240 (5th Cir. 2019) (**Appx. Tab 3**) is "dispositive" of the case at bar.

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B. The Panel's Conflict With Another Panel of This Court in *Walker*.

STATEMENT OF THE COURSE OF PROCEEDINGS

This is a $100,000,000.00 defamation suit brought by self-represented former attorney Jason Lee Van Dyke after appellant Retzlaff filed an allegedly "frivolous" grievance against Van Dyke with the State Bar of Texas. No trial was held. Retzlaff 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 Retzlaff's TCPA motion and holding that "the TCPA, regardless if classified as procedural or substantive, does not apply in federal court." (**Appx. Tab 1**.) Retzlaff timely appealed.

On August 23, 2019, while the case at bar was pending before this Court, another panel resolved the issue also presented in the case at bar—"an issue that has brewed for several years in this 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) (**Appx. Tab 3**). On October 2, 2019, the ***Van Dyke*** panel directed the parties in the case at bar to file supplemental briefing addressing the effect of ***Klocke v. Watson***, 936 F.3d 240 (5th Cir. 2019), on the case at bar. In that briefing, Retzlaff argued that ***Klocke*** did not compel the ***Van Dyke*** panel to affirm the district court

and that the panel need not (impermissibly[5]) "overrule" the ***Klocke*** panel in order to grant Retzlaff relief. Retzlaff urged the panel 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 Fed'n of Am., Inc. v. Ctr. For Med. Progress***, 890 F.3d 828 (9th Cir. 2018), *cert. denied*, 139 S.Ct. 1446.[6]

The panel rejected Retzlaff's argument, held ***Klocke*** dispositive of the case at bar, and affirmed. (**Appx. Tab 2**.)

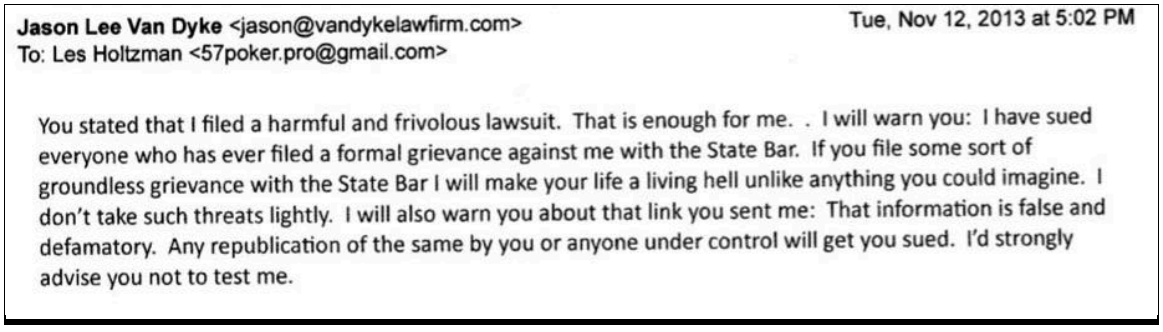
[5] A panel presented with a case that is "factually indistinguishable" from a prior case should reach the same result as did the prior panel under the doctrine of *stare decisis*. ***Brewster v. C.I.R.***, 607 F.2d 1369, 1373 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 991.

[6] The concurrence opinion in ***Planned Parenthood*** was amended by 897 F.3d 1224. The amendment is immaterial to any issue in the case at bar.

STATEMENT OF FACTS

The genesis of this suit is perhaps most concisely expressed in a Facebook posting by *pro se* plaintiff-appellee Jason Van Dyke (ROA.730), just 6 days before this brief was filed:

Disgraced former attorney Van Dyke sued Retzlaff for libel, intrusion on seclusion, tortious interference, and other claims after Retzlaff filed a grievance against Van Dyke with the Texas State Bar. ROA.22-28. Van Dyke has bragged since 2013 that he has 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. Van Dyke continued this policy when he filed the instant suit.

Van Dyke never identified the allegedly-defamatory statements themselves in the complaint, but *characterized* 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 Van Dyke's highly subjective *characterizations* of Retzlaff's alleged statements—rather than the statements themselves—Van Dyke sued Retzlaff for:

(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 response to the TCPA motion, Van Dyke appeared to abandon all claims based upon Retzlaff's bar grievance[7] against him. ROA.570-571.

[7] The grievance resulted in Van Dyke's indefinite suspension by the Texas State Bar.

It is undisputed that Van Dyke formerly led the nationally-known, violent, white supremacist organization known as the "Proud Boys." The Court may take judicial notice that during the pendency of this suit, Van Dyke was arrested for the felony offenses of obstruction of justice and retaliation against a witness for making threats of murder against Retzlaff.

In a March 30, 2018, letter to Texas State District 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 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:

ROA.745. Van Dyke has never denied publishing this statement. Yet, Van Dyke sued to chill Retzlaff's criticism of Van Dyke for having done so.

ARGUMENT

Argument and Authorities—Issue 1

Issue 1: The Applicability of State Anti-SLAPP Statutes in Federal Court Under the *Erie* Doctrine is an Issue of Exceptional Importance.

Baseless defamation suits to chill the expression of unfavorable opinions are nothing new. Courts, scholars, and free speech advocates have dubbed meritless lawsuits that target the legitimate exercise of the right to engage in truthful speech "Strategic Lawsuits Against Public Participation" (SLAPPs).[8] SLAPPs have been used to prevent citizens from testifying at a city council meeting,[9] complaining to a medical board about a doctor,[10] investigating fraud in public education,[11] participating in a political campaign,[12] or, as here, advocating against the employment of a violent racist as an assistant district attorney.

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[8] *See* Pring & Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders* (Introduction to SLAPPs), 12 Bridgeport L. Rev. 937, 938 (1992). Most SLAPP filers lose their suits but succeed in chilling public discussion. *Id*. at 941-44. *See* ***Bilbrey v. Williams***, No. 02-13-00332-CV, 2015 WL 1120921 at *7 (Tex. App.—Fort Worth 2015, no pet.) (memo. op.).

[9] ***Means v. ABCABCO, Inc.***, 315 S.W.3d 209, 214-15 (Tex. App.—Austin 2010, no pet.).

[10] ***Lewis v. Garraway***, No. D-1-GN-06-001397 (201st District Ct., Travis County, Tex., Dec. 19, 2006).

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

[12] ***Farias v. Antuna***, No. 2006-CI-16910 (408th District Ct., Bexar County, Tex. Dec. 5, 2006).

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. 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.[13] The TCPA has been referred to as an "across-the-board game-changer in Texas civil litigation,"[14] 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."[15]

For obvious reasons, plaintiffs would prefer to keep this weapon out of federal court. "Under the ***Erie*** doctrine,[16] 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. As shown below, the familiar ***Erie*** doctrine has proven easier to articulate than to apply to these cases.

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[13] *See* Prather and Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 Tex. L. Rev. 633, 641, n.51.

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

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

A. Seven Circuits Have Addressed the Applicability of State Anti-SLAPP Statutes and Reached Opposite Conclusions.

Before the panel's decision in the case at bar, the First, Second, and Ninth Circuits had 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*** purposes).

The Tenth, Eleventh, and D.C. Circuits had 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.***

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

Americulture, Inc., 885 F.3d 659, 668-69 (10th Cir. 2018), *cert. denied*, 2018 WL 3477416 (2018) (New Mexico anti-SLAPP law procedural and therefore did not apply under ***Erie***); ***Carbone v. Cable News Network, Inc***., 2018 WL 6565917 (11th Cir. 2018). With its recent ***Klocke*** (**Appx. Tab. 3**) and ***Van Dyke*** (**Appx. Tab. 3**) decisions, the Fifth Circuit has become the fourth circuit to hold an anti-SLAPP statute inapplicable in federal court.

Obviously, not all anti-SLAPP statutes are created equal. Until the ***Klocke*** and ***Van Dyke*** decisions, the 3-3 circuit split was between circuits holding that *different states'* anti-SLAPP statutes were (or were not) applicable in federal court under the ***Erie*** doctrine. Now, the split between courts in the Fifth and Ninth Circuits has become a direct collision over the applicability of the *same state's* anti-SLAPP statute—the TCPA of Texas. That is because a California federal court in 2018 applied the TCPA to dismiss pornographic film star Stormy Daniels's defamation suit against President Donald John Trump. *See* ***Clifford v. Trump***, 339 F.Supp.3d 915, 922 (C.D.Cal. 2018) (holding Texas law applicable to plaintiff's defamation claims and applying the TCPA) (**Appx. Tab 4**) and awarding **$293,052.33** in costs, attorney's fees, and sanctions under the TCPA. (**Appx. Tab 5**.)

B. The U.S. Supreme Court Has Denied Certiorari on Both Sides of the Applicability Issue

In 2016, the Supreme Court declined to consider whether the Ninth Circuit erred in holding that the California anti-SLAPP statute *was* applicable in ***Mebo Int'l, Inc. v. Yamanaka***, 136 S.Ct. 1449 (2016). On December 3, 2018, the U.S. Supreme Court denied a petition for writ of certiorari to review the applicability of an anti-SLAPP statute in federal courts in ***Los Lobos Renewable Power, LLC v. Americulture, Inc.***, 885 F.3d 659 (10th Cir. 2018), *cert. denied*, 2018 WL 34774 (2018). In ***Los Lobos***, the Supreme Court declined to consider whether the Tenth Circuit erred in holding that the New Mexico anti-SLAPP statute was *not* applicable. Thus, the Supreme Court has allowed to stand two decisions reaching opposite conclusions on this same issue.

Retzlaff is unable to find any case except the case at bar where two different circuits reached *opposite* conclusions regarding the applicability of the *same* state's anti-SLAPP statute. This issue appears not yet to have been brought to the U.S. Supreme Court.

Argument and Authorities—Issue 2

Issue 2: The Panel's Analysis Conflicts With a Decision of Both Another panel of This Circuit and the Ninth Circuit.

A. The Panel's Conflict With the Ninth Circuit's *Planned Parenthood* Decision

In 1992, California became the first state to adopt an anti-SLAPP statute. Since then, more than 4,200 reported decisions have shaped and clarified the statute making California the largest single repository of federal case authority on the issue before this Court. The California anti-SLAPP statute has many similarities to the TCPA, which was modeled after it.[17] Like TCPA § 27.003, California allows a motion to strike an action directed at the movant's exercise of constitutional rights. CAL. C. C. P. § 425.16(b)(1). (TCPA § 27.003 uses the word "dismiss" instead of the word "strike.") Like TCPA § 27.006, a California court decides the anti-SLAPP motion by reviewing pleadings and affidavits. CAL. C. C. P. § 425.16(a)(2). Like the TCPA, a successful California movant is entitled to recover attorney's fees and costs. *Id*., § 425.16(c)(1). Like the TCPA, California provides that an anti-SLAPP motion stays discovery. *Id*., § 425.16(g). Like Texas, California allows interlocutory appeals. *Id*., § 425.16(i).

[17] Laura Lee Prather & Jane Bland, *The Developing Jurisprudence of the Citizens Participation Act*, 50 TEX. TECH L. REV., 633, 707 (2018).

One of the earliest federal decisions to analyze the "collision-with-federal-rules" argument was ***U.S. ex rel. Newsham v. Lockheed Missiles & Space Co***., 190 F.3d 963, 973 (9th Circ. 1999). The ***Newsham*** court began by asking whether application of California's anti-SLAPP statute in federal court would result in a "direct collision" with FED. R. CIV. P. 8, 12, and 56. *Id*. at 972. The ***Newsham*** court acknowledged that the California anti-SLAPP statute and the federal rules "do, in some respects, serve similar purposes, namely the expeditious weeding out of meritless claims before trial." *Id*. This was not enough for the ***Newsham*** court to find a "collision:"

> **This commonality of purpose, however, does not constitute a "direct collision"—there is no indication that Rules 8, 12, and 56 were intended to "occupy the field" with respect to pretrial procedures aimed at weeding out meritless claims.**

Id. Quoting the U.S. Supreme Court in ***Walker v. Armco Steel***, 446 U.S. 740, 752 (1978), the ***Newsham*** court concluded:

> **[The California anti-SLAPP statute] and Rules 8, 12, and 56 "can exist side by side ... each controlling its own intended sphere of coverage without conflict."**

Newsham, 190 F.3d at 972.

In ***Makaeff v. Trump University, LLC***, 736 F.3d 1180 (9th Cir. 2013), the Ninth Circuit had a chance to reconsider its "collision analysis" in ***Newsham***, but abjured. The ***Makaeff*** court applied the 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. ***Makaeff***, 736 F.3d at 1182, citing ***Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co***., 130 S.Ct. 1431 (2010). 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." ***Makaeff***, 736 F.3d at 1182.

Finally, in ***Mebo Int'l, Inc. v. Yamanaka***, 607 Fed. Appx. 768 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 1449 (2016), the Ninth Circuit was once again asked to "overturn fifteen years of circuit precedent and hold that federal courts cannot apply state anti-SLAPP statutes" in federal court. *Id*. at 769. Citing ***Newsham*** and ***Price v. Stossel***, 620 F.3d 992, 999 (9th Cir. 2010), the ***Yamanaka*** court tersely quoted itself in ***Price***, where it wrote:

> **We have repeatedly held that California's anti-SLAPP statute can be invoked by defendants who are in federal court on the basis of diversity jurisdiction.**

Yamanaka, 607 Fed. Appx. at 769. Some circuits agree with ***Newsham's*** "collision analysis," and others do not. But in 2018, the Ninth Circuit quietly parted ways with ***Newsham*** and took a different tack.

As noted above, the TCPA *itself* was applied by a California court to dismiss a defamation suit in ***Clifford v. Trump***, 339 F.Supp.3d 915

(C.D.Cal. 2018). But ***Clifford*** followed ***Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress***, 890 F.3d 828, 833-34 (9th Cir. 2018), *cert. denied*, (April 1, 2019), where the Ninth Circuit charted a new course. The ***Planned Parenthood*** court eliminated 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—even for courts reviewing a statute in actual conflict with a federal rule, or who reject ***Newsham*** and find state anti-SLAPP statutes *generally* in "collision" with federal rules.

Retzlaff entreated the panel in the case at bar 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)—but the panel declined. Avoiding substantive discussion of Rule 12(b)(6), the panel held ***Klocke*** dispositive and affirmed the district court's denial of any relief to Retzlaff.

B. The Panel's Conflict With Another Panel of This Court in *Walker*

On September 18, 2019, a third panel of this Court (that is, a different panel from either ***Klocke*** or ***Van Dyke***) decided ***Walker v. Beaumont I.S.D.***, 938 F.3d 724 (5th Cir. 2019). The introductory lines of that opinion read:

> **With this appeal, we review the district court's dismissal of the entirety of Appellants' claims pursuant to the Texas Citizens' (sic) Participation Act, ("TCPA"), … and Rule 12 of the Federal Rules of Civil Procedure. For the reasons stated herein, we AFFIRM that dismissal….**

Walker, 938 F.3d at 730. Plaintiffs asserted claims including libel, slander, and tortious interference. *Id.*, at 733. The various defendants moved for dismissal under FED. R. CIV. P 12(b)(6) and/or the TCPA. *Id*.

The district court in ***Walker*** determined that "dismissal of Appellants' claims was warranted regardless of whether its analysis was governed by the TCPA or the FRCP." *Id*., at 736. The ***Walker*** panel noted the ***Klocke*** decision just three weeks earlier (that the TCPA was inapplicable in federal court). *Id*., at 737. After analyzing the plaintiffs' individual causes of action, the ***Walker*** panel affirmed the district court's dismissal. Put another way, the ***Walker*** panel did precisely what Retzlaff asked the panel in the case at bar to do—apply a Rule 12(b)(6) analysis to plaintiff's claims in response to Retzlaff's TCPA motion. That is what the panel in the case at bar should have done.

CONCLUSION

The panel's decision in the case at bar 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. Not only has the panel opinion deepened the split among the seven circuits that have addressed *different states'* anti-SLAPP statutes, it has now caused a direct collision between the Fifth and Ninth Circuits applying the *same state's* statute—the Texas Citizens Participation Act—in a case in which the President of the United States is directly involved in a suit by a porn star. As things now stand, the TCPA applies in federal courts of the nine states and two territories of the Ninth Circuit, but *not* in the federal courts of the state that enacted it. Furthermore, the panel's decision is not consistent with the ***Walker*** panel's use of a Rule 12(b)(6) analysis—as the Ninth Circuit did in ***Planned Parenthood*** and as Retzlaff beseeched the panel in the case at bar also to do. Before continuing down such an uncertain juridical path, the full Court should weigh in.

PRAYER

For these reasons, Retzlaff prays that the Court grant this petition for rehearing *en banc*, and for such other and further relief, at law or in equity, as to which Retzlaff shall show himself justly entitled.

Respectfully submitted,

HANSZEN LAPORTE

By: /s/ Jeffrey Lee Dorrell
Texas Bar No. 00787386
Federal ID #18465
jdorrell@hanszenlaporte.com
14201 Memorial Drive
Houston, Texas 77079
Telephone 713-522-9444
FAX: 713-524-2580
ATTORNEYS FOR APPELLANT THOMAS CHRISTOPHER RETZLAFF

CERTIFICATE OF WORD-COUNT AND TYPE-VOLUME COMPLIANCE

In compliance with FED. R. APP. P. 35(b)(2)(A), 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 3,261. I certify that the typefaces used throughout this document comply with FED. R. APP. P. 32(a)(5) and (6).

/s/ Jeffrey Lee Dorrell

JEFFREY L. DORRELL

CERTIFICATE OF SERVICE

I hereby certify that on 11-19, 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:

Mr. Jason Lee Van Dyke
Appellee, Pro Se
108 Durango Drive
Crossroads, Texas 76227
Telephone: 469-964-5346
FAX: 972-421-1830
jasonleevandyke@gmail.com

Mr. Thomas S. Leatherbury
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3900
Dallas, Texas 75201
Telephone: 214-220-7792
FAX: 214-999-7792
tleatherbury@velaw.com

/s/ Jeffrey Lee Dorrell
JEFFREY L. DORRELL

18-40710

JASON LEE VAN DYKE,

Plaintiff-Appellee,

v.

THOMAS CHRISTOPHER RETZLAFF,
also known as Dean Anderson, **doing business as BV Files**, **ViaView Files, L.L.C., and ViaView Files**,

Defendant-Appellant

APPELLANT'S APPENDICES

1. The District Court's July 24, 2018, Opinion Appealed From.

2. The Panel's October 22, 2019, Opinion in the Case at Bar.

3. The Panel's August 29, 2019, Revised Opinion in ***Klocke v. Watson***.

4. The California District Court's Opinion in ***Clifford v. Trump***.

5. The California District Court's December 11, 2018, Order That Clifford Pay Trump $293,052.33 in "Attorney's Fees, Costs, and Sanctions" Under the TCPA.

6. Clifford's August 26, 2019, Rule 28(j) Letter to the Ninth Circuit in ***Clifford v. Trump*** (arguing that the Ninth Circuit should "apply ***Klocke***, as the Fifth Circuit would have done…, and allow [Clifford's] case to proceed without being hindered by the TCPA").