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
The Honorable Amos L. Mazzant
Case No. 4-18-CV-247-ALM

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 39 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in Rules 28.2.1 and 29.2 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:

1. Jason Lee Van Dyke (pro se)

Defendant-Appellant:

1. Thomas Christopher Retzlaff, also known as Dean Anderson, doing business as BV Files, ViaView Files, L.L.C., and ViaView Files.

Defendant-Appellant's Counsel:

1. Jeffrey Lee Dorrell
2. Anthony L. Laporte
3. William Carlton Wilson

   Hanszen Laporte, LLP

Amici Curiae:

1. **The Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

2. With some 500 members, **American Society of News Editors ("ASNE")** is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

3. **The Associated Press ("AP")** is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, the AP's content can reach more than half of the world's population.

4. **The Associated Press Media Editors ("APME")** is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

5. **Association of Alternative Newsmedia ("AAN")** is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like *The Village Voice* and *Washington City Paper*. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

6. The **California News Publishers Association ("CNPA")** is a nonprofit trade association representing the interests of over 1,300 daily, weekly and student newspapers and news websites throughout California.

7. **Reveal from The Center for Investigative Reporting ("CIR")**, founded in 1977, is the nation's first nonprofit investigative journalism organization. CIR produces investigative journalism for its https://www.revealnews.org website, the Reveal national public radio show and podcast, and various

documentary projects – often in collaboration with other newsrooms across the country.

8. **Courthouse News Service** is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

9. **Dow Jones & Company, Inc.** is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship *Wall Street Journal*; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

10. **The E.W. Scripps Company** serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 33 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

11. The **First Amendment Coalition** is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, it resists excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

12. **First Look Media Works, Inc.** is a new nonprofit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

13. Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States, including five television stations in the State of Texas. The Texas stations are KRIV and KTXH in Houston, KDFW and KDFI in Dallas-Fort Worth (operated by NW Communications of Texas, Inc.) and KTBC in Austin (operated by NW Communications of Austin, Inc.). The 28 stations have a collective market reach of 37.28% percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market, including FOX26Houston.com, FOX26Houston.com/my20-Houston, FOX4News.com, FOX4News.com/kdfi-my27, and FOX7Austin.com. Fox Television Stations, LLC, NW Communications of Texas, Inc. and NW Communications of Austin, Inc., are all indirect subsidiaries of Twenty-First Century Fox, Inc., a publicly held company. No other publicly held company owns 10% or more of the stock of Twenty-First Century Fox, Inc.

14. The **Freedom of Information Foundation of Texas ("FOIFT")** is a nonprofit organization dedicated to ensuring that the public's business is conducted in public and to protecting the liberties of free speech and press guaranteed by the First Amendment. FOIFT assists individual citizens, journalists and government officials through educational seminars, an FOI Hotline, an annual conference, and a speakers bureau.

15. **Gannett Co., Inc.** is a leading news and information company which publishes USA Today and more than 100 local media properties including the *Abilene Reporter-News*, the *Corpus Christi Caller Times*, the *El Paso Times*, the *San Angelo Standard-Times* and the *Times Record News* (Wichita Falls). Each month more than 125 million unique visitors access content from USA Today and Gannett's local media organizations.

16. **Hearst** is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership in cable television networks such as A&E, HISTORY, Lifetime and ESPN; majority ownership of global ratings agency Fitch Group; Hearst Health, a group of medical information and services businesses; 30 television stations such as WCVB-TV in Boston and KCRA-TV in Sacramento, Calif., which reach a combined 19 percent of U.S. viewers; newspapers such as the Houston Chronicle, San Francisco Chronicle

and Albany Times Union; more than 300 magazines around the world including Cosmopolitan, ELLE, Harper's BAZAAR and Car and Driver; digital services businesses such as iCrossing and KUBRA; and investments in emerging digital and video companies such as Complex, BuzzFeed, VICE and AwesomenessTV.

17. The **International Documentary Association ("IDA")** is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

18. The **Investigative Reporting Program ("IRP")** at UC Berkeley's Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as Mother Jones, The New York Times, Los Angeles Times, Time magazine and the San Francisco Chronicle, among others.

19. The **Investigative Reporting Workshop**, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

20. **The McClatchy Company** is a 21st century news and information leader, publisher of iconic brands such as the *Miami Herald*, *The Kansas City Star*, *The Sacramento Bee*, *The Charlotte Observer*, *The (Raleigh) News and Observer*, and the *(Fort Worth) Star-Telegram*. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

21. **The Media Institute** is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

22. **Digital First Media**, dba Digital First Media, publishes the *San Jose Mercury News*, the *East Bay Times*, *St. Paul Pioneer Press*, *The Denver Post* and the *Detroit News* and other community papers throughout the United States, as well as numerous related online news sites.

23. **MPA – The Association of Magazine Media ("MPA")** is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

24. The **National Press Photographers Association ("NPPA")** is a 501(c)(6) nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

25. **National Public Radio, Inc. ("NPR")** is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of 30 million people who listen to NPR programming and newscasts each week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including podcasts

(which see about 19 million unique users each month), social media, mobile applications, and NPR.org (which sees about 37 million unique visitors each month).

26. **The New York Times Company** is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

27. The **News Media Alliance** is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

28. **Nexstar Media Group, Inc. ("Nexstar")** is a leading diversified media company that leverages localism to bring new services and value to consumers and advertisers through its traditional media, digital and mobile media platforms. Nexstar owns, operates, programs or provides sales and other services to 169 television stations and related digital multicast signals reaching 100 markets or approximately 39% of all U.S. television households. Nexstar owns and operates 14 television stations in Texas, including KXAN-TV and KBVO in Austin and KTSM-TV in El Paso.

29. **Online News Association ("ONA")** is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

30. **POLITICO** is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more

than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

31. **ProPublica** is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won four Pulitzer Prizes, most recently the 2017 Pulitzer gold medal for public service. ProPublica is supported primarily by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica's first regional operation, ProPublica Illinois, began publishing in late 2017, and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting.

32. **Radio Television Digital News Association ("RTDNA")** is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

33. **Reporters Without Borders** has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

34. **The Seattle Times Company**, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic* and *Walla Walla Union-Bulletin*, all in Washington state.

35. **Sinclair** is one of the largest and most diversified television broadcasting companies in the country. The Company owns, operates and/or provides services to 191 television stations in 89 markets, including stations producing local news in Abilene, Amarillo, Austin, Beaumont, El Paso, Harlingen and San Antonio. The Company is a leading local news provider in the country and has multiple national networks, live local sports production, as well as stations affiliated with all the major networks.

36. **Society of Professional Journalists ("SPJ")** is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

37. The **Texas Association of Broadcasters** is a nonprofit association that represents more than 1,200 television and radio stations across the state of Texas with a tradition of community-oriented, free, over-the-air broadcasting. The Texas Association of Broadcasters was founded in 1951 and incorporated one year later. TAB performs numerous services on behalf of its members, including advocating for legislation relating to and affecting radio and television broadcasters, advancing Open Government and protecting the First Amendment, as well as publishing guidebooks on various legal issues, including access to public information.

38. The **Texas Press Association** is an industry association representing nearly 400 daily and weekly newspapers across the state of Texas, each of which upholds a strong tradition of journalistic integrity and community service. Texas Press, founded in 1880, performs numerous services on behalf of its members, including sponsoring and promoting legislation and taking legal action to protect the First Amendment and open government.

39. The **Tully Center for Free Speech** began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

40. **The Washington Post (formally, WP Company LLC d/b/a The Washington Post)** is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

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2. Thomas S. Leatherbury, Margaret Dunlay Terwey, and Francis Yang of Vinson & Elkins

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19. Jonathan Hart, Ashley Messenger, and Micah Ratner of National Public Radio, Inc.

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21. Thomas R. Burke, Laura R. Handman, and Alison Schary of Davis Wright Tremaine LLP for Online News Association

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23. Richard J. Tofel of ProPublica

24. Kathleen A. Kirby of Wiley Rein LLP for Radio Television Digital News Association

25. Bruce E. H. Johnson of Davis Wright Tremaine LLP for The Seattle Times Co.

26. Barry Faber of Sinclair Broadcast Group, Inc.

27. Bruce W. Sanford and Mark I. Bailen of Baker & Hostetler LLP for Society of Professional Journalists

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/s/ *Thomas S. Leatherbury*
Attorney of record for *amici curiae*

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are The Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Reveal from The Center for Investigative Reporting, Courthouse News Service, Dow Jones & Company, Inc., The E.W. Scripps Company, 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 Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, 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 LLC, 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, and The Washington Post.

Amici file this brief in support of Defendant-Appellant's argument that the Texas Citizens' Participation Act ("TCPA") applies in federal court. As members and representatives of the news media, *amici* have a strong interest in ensuring that statutory protections against frivolous lawsuits intended to chill and silence speech—so-called "strategic lawsuits against public participation," or "SLAPP" suits—apply in federal courts to ensure a robust, unfettered exchange of ideas as envisioned by the First Amendment.

The issue presented in this case—whether the TCPA may be applied in federal court—has potentially broad ramifications for *amici*, who depend on the protections of the TCPA and similar anti-SLAPP statutes[1] to avoid the costs and burden of litigating meritless claims that infringe their First Amendment rights. *Amici* write to emphasize that anti-SLAPP protections apply to a wide range of speech important to the democratic process and that the TCPA should apply to strategic lawsuits against public participation brought in federal court.[2]

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[1] Louisiana also has an anti-SLAPP statute, La. Code Civ. P. art. 971.

[2] *Amici* also submitted a brief on these issues in *Rudkin v. Roger Beasley Imports, Inc.*, No. 18-50157 (5th Cir. Filed Sep. 5, 2018).

AUTHORITY TO FILE AMICUS BRIEF

Amici have filed a Motion for Leave to File accompanying this amicus brief. *See* Fed. R. App. P. 29(a)(3). No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

American democracy depends upon informed and active citizen participation in public discussion and debate, but a rising tide of frivolous litigation aims to silence that participation by saddling protected speech with the high cost of defending it in court. These "strategic lawsuits against public participation," or "SLAPP" suits, are filed not to win but to intimidate "by increasing the cost of litigation to the point that the citizen party's case will be weakened or abandoned," thereby chilling the exercise of First Amendment rights. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970 (9th Cir. 1999). While SLAPP suits lack merit, the threat of expensive, protracted litigation, alone, can discourage civil discourse. Indeed, since *New York Times Co. v. Sullivan*, First Amendment jurisprudence has recognized that the threat of a lawsuit—even an ultimately unsuccessful one—is a driving force for self-censorship and diminishes the marketplace of ideas. 376 U.S. 254, 279 (1964).

Anti-SLAPP statutes like the TCPA provide media defendants with substantive rights. These statutes protect First Amendment rights by allowing defendants to obtain swift dismissals of SLAPP suits. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 27.003. The laws also discourage plaintiffs from bringing meritless lawsuits to silence their critics by permitting the recovery of fees. *See*,

e.g., *id.* § 27.009. Thirty-two states and the District of Columbia have some version of an anti-SLAPP statute.

In state courts throughout the United States, news organizations frequently depend on the TCPA and other anti-SLAPP statutes to terminate prolonged, expensive litigation brought to retaliate against them for reporting on matters of public concern. Given the nature of the print and online publishing industry, news organizations facing defamation and other similar state-law claims often end up in federal court through diversity or supplemental jurisdiction. Without the benefit of anti-SLAPP protections in federal court, however, journalists and news organizations will confront the very same chilling effect from which they are protected in state court. Not only will this disparity encourage litigious plaintiffs to forum shop, but many journalists and news organizations may choose to remain silent rather than run the risk of protracted federal court litigation.

The First and Ninth Circuits, as well as federal district courts in a majority of jurisdictions that have considered the issue, have found that state anti-SLAPP statutes apply to state claims in federal court. This Court should do the same and hold that the TCPA applies in federal court. Far from conflicting with the Federal Rules of Civil Procedure, the TCPA complements the Rules and creates substantive

rights to ensure that Texas citizens can fully exercise their First Amendment rights without fear.

Accordingly, *amici* urge this Court to reverse the district court's ruling and hold that the TCPA applies in federal court.[3]

ARGUMENT

I. The application of state anti-SLAPP statutes in federal courts fosters and protects the exercise of First Amendment freedoms, including by members of the news media.

A. Anti-SLAPP statutes provide substantive protections against frivolous lawsuits aimed at chilling speech.

Anti-SLAPP statutes guard against a serious threat to constitutionally protected speech and expressive activity: the exorbitant cost of meritless, harassing lawsuits. The Supreme Court warned of litigation's potential chilling effect in *New York Times Co. v. Sullivan*, cautioning that "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U.S. at 279. Such self-censorship "dampens the vigor and limits the variety of public debate." *Id.*; *see also Time, Inc.*

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[3] *Amici* take no position on whether, under the TCPA, Defendant-Appellant's motion to dismiss should have been granted on the merits. *Amici* argue only that the TCPA should be applied in this case.

v. Firestone, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting) (noting that "[t]he specter of [large litigation expenses] may be as potent a force for self-censorship as any threat of an ultimate damages award").

SLAPP plaintiffs attempt to exploit the fears described in *Sullivan* and use the judicial process to chill speech on matters of public concern. Rather than being primarily motivated by a desire to win the litigation, they instead seek to increase legal costs to such an extent that a defendant will be forced to abandon the case and refrain from exercising his or her constitutional rights in the future. *See Newsham*, 190 F.3d at 970–71. Unfortunately, while *Sullivan* and its progeny "substantially lessened the chilling effect" from potential damage awards in tort suits by requiring proof of actual malice in many cases, "they have often failed to protect speakers from the similarly-chilling cost and burden of defending such tort claims." *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 167 (5th Cir. 2009).

Anti-SLAPP statutes fill that void. Echoing the principles of *Sullivan*, the TCPA—like other state anti-SLAPP statutes—"protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). Indeed, an express purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak

freely, associate freely, and otherwise participate in government to the maximum extent permitted by law." Tex. Civ. Prac. & Rem. Code Ann. § 27.002.

Texas is among thirty-two states, plus the District of Columbia, that have acted to curb abusive SLAPPs through legislation. *See* Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 Tex. Tech L. Rev. 633, 635 (2018). To accomplish this task, anti-SLAPP statutes provide for the prompt dismissal of meritless claims, enabling defendants to avoid unnecessary legal expense. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 27.003. Anti-SLAPP statutes also discourage unscrupulous plaintiffs from filing SLAPPs by allowing a successful SLAPP defendant to recover fees and costs. *See, e.g.*, *id.* § 27.009. The combination of these features serves First Amendment principles by protecting the free exchange of ideas and encouraging individuals' full participation in public discourse and debate. *See Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). As the Ninth Circuit has said, "It would be difficult to find a value of a 'high[er] order' than the constitutionally protected rights to free speech and petition that are at the heart of" anti-SLAPP statutes. *DC Comics v. P. Pictures Corp.*, 706

F.3d 1009, 1015–16 (9th Cir. 2013) (quoting *Perry v. Schwarzenegger*, 591 F.3d 1147, 1155–56 (9th Cir. 2010)).

B. Media defendants often invoke anti-SLAPP statutes to seek dismissal of meritless litigation filed in retaliation for reporting on matters of public concern.

Strong anti-SLAPP protections are particularly important to the news media because they allow the media to report on matters of public concern without fear of being subjected to the expense, harassment, and disruption of meritless, retaliatory litigation. Media defendants frequently rely on anti-SLAPP statutes, including the TCPA, to obtain the swift dismissal of such lawsuits.[4] For example:

- Beaumont, Texas, television station KBMT won a TCPA motion dismissing a local pediatrician's defamation claims arising from its reporting on Texas Medical Board disciplinary proceedings against the pediatrician on the grounds that the report was substantially true. *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 712–13 (Tex. 2016).

- Houston, Texas, television station KTRK won a TCPA motion dismissing claims of defamation per se by the former director of a charter school whose charter was revoked by the Texas Education Agency on the grounds that none of the alleged statements were defamatory per se. *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 692 (Tex. App.—Houston [1st dist.] 2013, pet. denied).

[4] Media defendants have also relied on the Louisiana anti-SLAPP statute, La. Code Civ. P. art. 971, to obtain the dismissal of meritless claims. *See, e.g., Alexander v. Times-Picayune LLC*, 221 So. 3d 198, 200 (La. Ct. App. 2017) (affirming the dismissal under Article 971 of a private investigator's defamation claims related to a newspaper's coverage of the government's actions against the investigator for failure to maintain a valid license).

- *The Mineral Wells (Texas) Index* won a TCPA motion dismissing claims of defamation, business disparagement, and tortious interference with contract by an assisted living facility for reporting on state investigations into the facility because the plaintiff failed to make a *prima facie* case for the claims. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 90 (Tex. App.—Houston [1st dist.] 2013, pet. denied), *overruled on other grounds by Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 687–88 (Tex. 2018).[5]

In all of the above examples, Texas courts used the TCPA to promptly dismiss groundless claims brought to retaliate against reporting on matters of public concern. Without the protections of the TCPA in federal court, the threat of protracted litigation and the expense that comes with it could dissuade news organization in Texas from reporting on such matters, weakening public accountability and leaving citizens less informed.

II. The TCPA should apply in federal court because it does not conflict with the Federal Rules and is substantive under *Erie*.

The First and Ninth Circuits, as well as the "vast majority of jurisdictions outside of Texas" that have considered the issue, have applied state anti-SLAPP statutes in diversity cases. Prather & Bland, *supra*, at 712. While the applicability

[5] In *Castleman*, the Supreme Court of Texas held that courts should not rely on California's construction of its commercial-speech exemption in interpreting the TCPA's commercial-speech exemption, as the Court of Appeals had done in *Newspaper Holdings, Inc.*, but concluded that "the Texas exemption, when construed within its own statutory context, carries the same meaning" as the California exemption. 546 S.W.3d at 687.

of the TCPA in federal court remains an "open question" in the Fifth Circuit, *Block v. Tanenhaus*, 867 F.3d 585, 589 n.2 (5th Cir. 2017), this Court has previously applied state anti-SLAPP statutes, or assumed their applicability, in federal court. *See, e.g.*, *Lozovyy v. Kurtz*, 813 F.3d 576, 583 (5th Cir. 2015) (assuming that Louisiana's anti-SLAPP statute, La. Code Civ. P. art. 971, applied in federal court because the plaintiff failed to argue in the district court that the statute did not apply); *Brown v. Wimberly*, 477 F. App'x 214, 216 (5th Cir. 2012) ("This court has adopted the use of the [Louisiana anti-SLAPP] statute in federal court under *Erie*." (citing *Henry*, 566 F.3d at 168–69)); *Henry*, 566 F.3d at 168–69 (stating that the "nominally procedural" Louisiana anti-SLAPP statute "governs this diversity case"). Further, many federal district courts in Texas have applied the TCPA.[6] *See* Prather & Bland, *supra*, at 709 (collecting cases). As courts outside of this Circuit have recognized, anti-SLAPP protections are an important, substantive complement to the Federal Rules that foster the full-throated exercise of First Amendment rights. *See, e.g.*,

[6] Some federal district courts in Texas have held that the TCPA does not apply in certain cases. *See Ins. Safety Consultants LLC v. Nugent*, No. 3:15-CV-2183-B, 2016 WL 2958929, at *5 (N.D. Tex. May 23, 2016) (holding that the TCPA does not apply to federal claims brought in federal court); *Thoroughbred Ventures, LLC v. Disman*, No. 4:18-CV-00318, 2018 WL 3472717, at *3 (E.D. Tex. July 19, 2018) (adopting the reasoning of the dissent in *Cuba* to hold that the TCPA "does not apply in federal court"); *Rudkin v. Roger Beasley Imports, Inc.*, Cause No. A-17-CV-849-LY, 2018 WL 2122896 (W.D. Tex. Jan. 31, 2018). For the reasons explained below, this Court should decide the "open question" and clarify that the TCPA applies in federal court.

Godin v. Schencks, 629 F.3d 79, 88–90 (1st Cir. 2010); *Newsham*, 190 F.3d at 973; *Trudeau v. ConsumerAffairs.com, Inc.*, No. 10 C 7193, 2011 WL 3898041, at *5 (N.D. Ill. Sept. 6, 2011). Consistent application of the TCPA in state and federal court will ensure that SLAPP plaintiffs have no incentive to forum shop in order to subject defendants to meritless lawsuits in federal court.

In deciding whether a state law applies, a federal court sitting in diversity or considering a state law claim based on the court's supplemental jurisdiction,[7] must first ask if there is a conflict between the state law and a valid federal rule—a "direct collision" between the two that "leave[s] no room for the operation of [the state] law." *Walker v. Armco Steel, Corp.*, 446 U.S. 740, 749–50 (1980); *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). If there is no "direct collision," courts then examine whether the state law confers substantive or procedural rights pursuant to *Erie R.R. v. Tompkins*. 304 U.S. 64 (1938); *see also Hanna v. Plumer*, 380 U.S. 460, 471 (1965). In order to make this substantive or

[7] The analysis to determine when to apply state law in federal courts is the same when the federal court is exercising diversity jurisdiction or supplemental jurisdiction over a state law claim. *Felder v. Casey*, 487 U.S. 131, 151 (1988); *see, e.g., Songcharoen v. Plastic & Hand Surgery Assocs., P.L.L.C.*, 636 F. App'x 884, 887 & n.3 (5th Cir. 2016) (per curiam); *Bott v. J.F. Shea Co., Inc.*, 388 F.3d 530, 553 n.3 (5th Cir. 2004).

procedural classification, courts look to the substantive state interests furthered by the state law and the "twin aims" of *Erie*: "the discouragement of forum shopping and the avoidance of the inequitable administration of the laws." *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 395 (5th Cir. 2003) (quoting *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679 (5th Cir. 1991)).

A. The TCPA does not "directly collide" with the Federal Rules.

The Ninth Circuit has concluded that the California anti-SLAPP statute, on which the TCPA is based, *see* Prather & Brand, *supra*, at 707, does not "directly collide" with Federal Rules of Civil Procedure 12 and 56. *Newsham*, 190 F.3d at 973; *Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1182 (9th Cir. 2013). In *Makaeff*, 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. *Makaeff*, 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." *Makaeff*, 736 F.3d at 1182. The same is true with respect to the TCPA. As with the California anti-SLAPP statute, the TCPA "asks an entirely different question" than the Federal

Rules, *i.e.*, "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.*

Similarly, when considering the Maine anti-SLAPP statute, the First Circuit also recognized that the state law and the Federal Rules answered different but related questions. *Godin*, 629 F.3d at 88–89 ("In contrast to the state statute in *Shady Grove*, Section 566 does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function."). Anti-SLAPP statutes, including the TCPA, are a "supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional [expressive] activities." *Id.* at 88.

In addition, the "nominally-procedural" elements of the TCPA, *Henry*, 566 F.3d at 168, are inseparably intertwined with substantive speech rights recognized by the Texas Legislature in enacting the law, which "cautions against finding a direct collision." *Makaeff*, 736 F.3d at 1183–84 (highlighting that a majority of Justices in *Shady Grove* found that state interests are significant in determining whether there is a conflict); *see also Godin*, 629 F.3d at 89 ("Because Section 556 is 'so intertwined with a state right or remedy that it functions to define the scope of the state-created

right,' it cannot be displaced by Rule 12(b)(6) or Rule 56." (quoting *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring))).

Amici recognize that the D.C. Circuit has found that the D.C. anti-SLAPP statute is inapplicable in federal court, holding that it conflicts with Federal Rules of Civil Procedure 12 and 56 because, in its view, the Rules "answer the same question" as the D.C. statute but answer it differently. *See Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333–34, 1337 (D.C. Cir. 2015) (Kavanaugh, J.) (citing *Shady Grove*, 559 U.S. at 398–99).[8] *Amici*, however, urge this Court to follow the lead of the First and Ninth Circuits. As an initial matter, the Texas statute is distinguishable from the D.C. statute and does not create a conflict with the Federal Rules. Under the D.C. statute, the plaintiff must prove that "the claim is likely to succeed on the merits," *id.* at 469, while the TCPA requires only that a plaintiff "establish [by] clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. R. Civ. Prac. & Rem. Code Ann. § 27.005(c). Texas courts have

[8] In *Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729, 730 (7th Cir. 2015), the Seventh Circuit considered the U.S. District Court for the Northern District of Illinois' holding that the Washington anti-SLAPP statute conflicted with the Federal Rules of Civil Procedure. Because the Washington Supreme Court struck down the statute as unconstitutional before the Seventh Circuit could decide the case, the Seventh Circuit found Washington's anti-SLAPP statute inapplicable on the basis of the Washington Supreme Court's decision but left open the question of the applicability of other states' anti-SLAPP statutes in federal courts in the future. *See Intercon Sols., Inc.*, 791 F.3d at 732 ("This circuit's resolution of questions about how the procedural aspects of other states' anti-SLAPP statutes work in federal court will have to await some other case.").

interpreted this standard to be something similar to the Federal Rules' plausibility standard for pleadings. *See In re Lipsky*, 460 S.W.3d at 590–91.

Further, as discussed above, and contrary to the D.C. Circuit Court's conclusion, the Federal Rules and the TCPA ask different questions. While Rules 12 and 56 provide all defendants uniform theories for disposing of suits before trial, the TCPA creates a "separate and additional theory" for disposing of suits for a particular type of defendant—one who is sued for the "exercise of the right of free speech, right to petition, or right of association." Tex. Civ. Prac. & Rem. Code Ann. § 27.003. The question asked when assessing a motion to dismiss under the TCPA involves an inquiry into the defendant's actions not present under a Rule 12 or 56 analysis. In sum, the TCPA complements rather than conflicts with the Federal Rules.

B. The TCPA provides defendants with unique, substantive protection; holding that it is inapplicable in federal court would encourage forum shopping and the inequitable administration of justice.

Because there is no "direct collision" between the TCPA and the Federal Rules, the inquiry turns to whether the TCPA is procedural or substantive under *Erie* and its progeny. To answer this question, courts ask if it "significantly affect[s] 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. . . ."

Hanna, 380 U.S. at 466 (quoting *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945)). Courts also analyze the twin purposes of *Erie*—discouraging forum shopping and the inequitable administration of the law—to resolve the substantive-procedural question. *Hall*, 327 F.3d at 395.

Applying this analysis, it is clear the TCPA provides substantive protection. As the Ninth Circuit has recognized, anti-SLAPP statutes constitute "an additional, unique weapon to the pretrial arsenal [of Rules 12 and 56], a weapon whose sting is enhanced by an entitlement to fees and costs." *Newsham*, 190 F.3d at 973. Unlike the Federal Rules, the TCPA is specifically designed to protect a defendant's substantive constitutional rights "to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law." Tex. Civ. Prac. & Rem. Code Ann. § 27.002. In that way, the TCPA and other anti-SLAPP statutes are "functionally substantive." *See Cuba v. Pylant*, 814 F.3d 701, 706 n.6 (5th Cir. 2016) (stating that, in *Henry*, 566 F.3d at 169, the Court concluded that the Louisiana anti-SLAPP statute was "functionally substantive").[9] The district

[9] In *Cuba*, the Court also noted that there are an "array of state procedural rules surrounding anti-SLAPP motions to dismiss (*viz.* discovery stays, accelerated timetables for decision, and the like)" that may "follow the core anti-SLAPP motion to dismiss into federal court." 814 F.3d at 706 n.6. *Amici* strongly urge the Court to find that they do because the procedural rules are inextricably intertwined with substantive speech rights recognized by the Texas Legislature in enacting the

court's reliance on the dissent in *Cuba* is misplaced because the TCPA does in fact provide substantive rights.

Amici recognize that the Tenth Circuit in *Los Lobos Renewable Power, LLC v. Americulture, Inc.* recently found that New Mexico's anti-SLAPP statute was procedural because it had no impact on the outcome of the merits. 885 F.3d 659, 670 (10th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3038 (U.S. July 18, 2018) (No. 18-89). In its analysis of the New Mexico statute, however, the Tenth Circuit implies that other state anti-SLAPP statutes that shift the burdens of proof—as the TCPA does, Tex. Civ. Prac. & Rem. Code Ann. § 27.005—*could* impact the lawsuit's outcome. *See id.* ("Unlike many other states' anti-SLAPP statutes that shift substantive burdens of proof or alter substantive standards, or both, under no circumstance will the New Mexico anti-SLAPP statute have *any* bearing on the suit's merits determination."). Further, as the District Court for the Southern District of Texas has noted, the TCPA's "procedural features are designed to prevent substantive consequences—the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under

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TCPA. Discovery stays and accelerated timetables for decision are essential to protecting SLAPP defendants and ensuring that their speech is not chilled by the costs of defending against a SLAPP.

state law." *Williams v. Cordillera Commc'ns, Inc.*, No. 2:13-CV-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014).

Further, the failure to apply the TCPA in federal court would encourage forum shopping; thus, the "twin aims" of *Erie* weigh heavily in favor of applying the TCPA in federal court. Not recognizing the TCPA in federal court would "flush away state legislatures' considered decisions on matters of state law" and "put the federal courts at risk of being swept away in a rising tide of frivolous state actions." *Makaeff*, 736 F.3d at 1187.

If the TCPA applied only in state and not federal court, a SLAPP plaintiff would have a significant incentive to bring his suit in federal court. *Id.* Beyond the reach of the TCPA's provisions, he could accomplish his primary goal of burdening his adversary with the fees and costs of defending a SLAPP suit. *See* Prather & Bland, *supra*, at 636, 708. News media organizations are particularly vulnerable to such an evasion of anti-SLAPP protection because they often report on matters of national and international concern, where potential SLAPP plaintiffs may be citizens of another U.S. state or foreign country and could invoke a federal court's diversity jurisdiction. Such a disparity between state and federal courts would operate as an inequitable administration of the law and burden the dockets of the federal courts. A SLAPP defendant would suffer a considerable disadvantage in federal court,

unable to dismiss a meritless claim as quickly as in state court, and unable to recover the fees and costs associated with defending against a SLAPP.

As a result, those currently protected under the TCPA would be forced to carefully consider the risks of reporting or voicing opinions on controversial topics. This would result in a chilling effect upon expression inconsistent with the goals of the First Amendment. *See Henry*, 566 F.3d at 177 ("[The anti-SLAPP statute] aims to serve the substantial public interest of protecting those exercising their First Amendment rights from the chilling effect of defending meritless and abusive tort suits."). Some speakers would stay silent to avoid the risk of expensive and time-consuming litigation. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 2d Dept. 1994) ("Persons who have been outspoken on issues of public importance targeted in such [SLAPP] suits or who have witnessed such suits will often choose in the future to stay silent.")

A determination that the TCPA's protection is unavailable in federal courts would encourage litigants to shop for a federal forum and would significantly disadvantage defendants entitled to anti-SLAPP protection—an outcome that "run[s] squarely against the 'twin aims' of the *Erie* doctrine." *Newsham*, 190 F.3d at 973. Because the TCPA does not directly conflict with the Federal Rules and is

substantive under *Erie*, this Court should join the First and Ninth Circuits in holding that state anti-SLAPP statutes apply in federal court.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas S. Leatherbury, do hereby certify that I have filed the foregoing Brief of *Amici Curiae* (attached to the Motion of *Amici Curiae*) electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system on November 28, 2018.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I, Thomas S. Leatherbury, do hereby certify that the foregoing brief of *amici curiae*:

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Dated: November 28, 2018