No. 03-21-00227-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

ROGER BORGELT; MARK PULLIAM; JAY WILEY

Plaintiffs-Appellants,

v.

CITY OF AUSTIN; MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF AUSTIN; AND AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL 975,

Defendants-Appellees.

On Appeal from the 419th Judicial District Court, Travis County

BRIEF OF AMICUS CURIAE INSTITUTE FOR FREE SPEECH IN SUPPORT OF APPELLANTS

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DISCLOSURE STATEMENT

Counsel for *amicus curiae* certify that the Institute for Free Speech is a nonprofit corporation, has no parent company, subsidiary, or affiliate, and that no publicly held company owns more than 10 percent of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection and defense of the First Amendment rights of speech, assembly, association, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

Protecting litigation speech is a core aspect of the Institute's organizational mission, as is protecting individuals from being compelled to speak in violation of their conscience.

SUMMARY OF THE ARGUMENT

The Texas Legislature intended the Texas Citizens Participation Act[2] ("TCPA") to balance and thus protect the equally important right of access to the courts in a First Amendment suit, and a defendant's First Amendment guarantees of free speech and association.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. No consent is necessary per Rule 11 of the Texas Rules of Appellate Procedure.

[2] TEX. CIV. PRAC. & REM. CODE §§ 27.001-27.011

Neither the Union nor the City have shown that any of the established exceptions for restricting access to these rights apply here. They have not shown that Plaintiffs' claims are baseless—indeed, they cannot make this showing considering the state of the Supreme Court's First Amendment precedent—and they have failed to show that this is a vexatious suit launched as a means to punish defendants with litigation costs.

The Legislature amended the TCPA in 2019, but the trial court's ruling was under the previous version. The trial court's application of the old TCPA violates the precision of regulation required when laws touch upon fundamental First Amendment freedoms, and perpetuating that application would violate a plaintiff's right to access the courts whenever a group's speech or association is even tangentially related to the defendant. Moreover, such application of the TCPA would swallow Texas's fair-notice pleading standard.

Allowing the trial court's decision to stand will chill litigation that protects the rights of all Texans. Given the attorney's fees and costs that may be imposed on plaintiffs under the TCPA, and the risk that these fees will be imposed in any case even indirectly involving a

group's speech or association, public interest groups will be hesitant bring suits to protect Texans' rights. This Court should reverse the trial court's decision as to the TCPA.

ARGUMENT

I. THE TRIAL COURT'S APPLICATION OF THE TCPA BETRAYS THE BALANCE ANTI-SLAPP LAWS MUST MAINTAIN BETWEEN COMPETING FIRST AMENDMENT RIGHTS

Anti-SLAPP laws must walk a fine line between the First Amendment right to petition the government for redress of grievances, and the First Amendment rights to freedom of speech and association. The trial court's interpretation of the TCPA fails to maintain the necessary balance. On the one hand, anti-SLAPP laws protect speakers from lawsuits brought to silence criticism or disfavored ideas—lawsuits generally brought under the guise of "defamation, tortious interference with business relationships, abuse of process, conspiracy, civil rights violations," or nuisance. Comment, Landon A. Wade, *The Texas Citizens Participation Act: A Safe Haven for Media Defendants and Big Business, and a SLAPP in the Face for Plaintiffs with Legitimate Causes of Action*, 47 Tex. Tech. L. Rev. 69, 70-71 (2014).[3] The goal in

[3] https://tinyurl.com/uwdc48e2

filing such a suit is not to win on the merits or help the truth come out, but to "bury the other side in litigation costs to the point that it becomes too financially burdensome" to maintain their speech. *Id.* at 71. On the other hand, the First Amendment also secures the right to access the courts, including to protect oneself against politically motivated torts.

The Texas legislature acknowledged this fine line, declaring that the TCPA's purpose 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 and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002; *see also* TEX. GOV'T CODE § 311.023 (noting that courts may consider the preamble and the "object sought to be attained," "whether or not the statute is considered ambiguous on its face"). In protecting both an individual's right to speak free from the burdensome costs of litigation and the right to access the courts, the legislature must have acknowledged longstanding legal principles regarding the latter.

The United States Supreme Court has held that "the right of access to the courts is an aspect of the First Amendment right to

petition the Government for redress of grievances," a right that "is too important" to suspend even for the purpose of shielding another in "exercising a protected right." *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 741 (1983) (citations omitted). There are, of course, limited exceptions to this right, such as protecting against "the costs of vexatious litigation." *United States v. Alvarez*, 567 U.S. 709, 719 (2012); *cf. id.* at 722 (limiting authority to declare new exceptions). "[M]ere sham" or "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson*, 461 U.S. at 743-44. But the exception for sham litigation is limited to protect plaintiffs' rights to access the courts.

The test for sham litigation requires that suits be "both objectively baseless *and* subjectively motivated by an unlawful purpose." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (emphasis in original); *id.* at 527 (applying in NLRA context). An objectively baseless suit is one in which "no reasonable litigant could realistically expect success on the merits." *Id.* at 526; *Pro. Real Est. Inv., Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993); *see, e.g.*, *Bill Johnson's*, 461 U.S. at 741. A plaintiff who shows "genuine factual issues" should not be

deprived of the right to present evidence and "hav[e] the factual dispute resolved by a jury." *Bill Johnson's*, 461 U.S. at 745. Similarly, a plaintiff should not be prevented as a "matter of law" from suing "if there is *any* realistic chance that the plaintiff's legal theory might be adopted." *Id*. at 747 (emphasis added).

Under these standards for sham litigation, Plaintiffs' suit cannot fall within the ambit of the TCPA's prohibition on "[non]meritorious lawsuits for demonstrable injury." § 27.002. The suit here is not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Pro. Real Est. Inv.,* 508 U.S. at 60 (1993); *see City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 380 (1991) ("A "sham" situation involves a [party] whose activities are "not genuinely aimed at procuring favorable government action."); *BE&K Const.*, 536 U.S. at 536 (2002) (holding regulation unconstitutional because it penalized all litigation initiated for retaliatory motive).

Similar union subsidization challenges based on First Amendment claims have been brought in state and federal courts—and at times succeeded at the highest levels. *See Janus v. AFSCME*, 138 S. Ct. 2448

(2018) (First Amendment challenge to Union subsidies by public employees); *see also Cheatham v. DiCiccio*, 240 Ariz. 314 (Ariz. 2016) (First Amendment challenge mixed with Gift Clause claims over subsidization of Union Release time by public employees and tax payers); *see also Road-Con, Inc. v. City of Philadelphia,* 449 F. Supp. 3d 476 (E.D. Pa. 2020) (First Amendment challenge to city contracting practices that force independent contractors to join and subsidize unions to win work contracts). That courts have seriously addressed the topic demonstrates that legitimate questions of law and fact surround the Gift Clause and the use of taxpayer-funded release time. This lawsuit is not a sham, and it should not have been dismissed, under either the First Amendment or the legislature's intended functioning of the TCPA.

II. THE TRIAL COURT'S APPLICATION OF THE TCPA IMPERMISSIBLY IMPOSES A HEIGHTENED PLEADING STANDARD WHENEVER A GROUP'S SPEECH OR ASSOCIATION IS EVEN TANGENTIALLY INVOLVED

The trial court granted the TCPA motion to dismiss under an older version of the law, one that violated the constitutionally required precision of regulation that protects First Amendment rights from foundering on "the shoals of vagueness." *Buckley v. Valeo*, 424 U.S. 1, 78

(1976) (per curiam). The legislature has since revised the statute, in ways that protect against unconstitutional vagueness and maintain Texas's longstanding fair notice pleading laws. Affirming the trial court's decision, allowing it to define the application of the new language, would perpetuate the old law's constitutional errors.

The old version of the TCPA permitted a motion to dismiss for any legal action that "*relates to*" the "exercise of the right of free speech, right to petition, or right of association." TEX. CIV. PRAC. & REM. CODE § 27.003(a) (amended September 1, 2019) (emphasis added); *see also id.* TEX. CIV. PRAC. & REM. CODE § 27.005(b) (amended September 1, 2019) (directing dismissal for any action that "*relates to*" First Amendment rights (emphasis added)); *id.* TEX. CIV. PRAC. & REM. CODE § 27.001(7) (amended September 1, 2019) (defining "[m]atter of public concern" as any "issue *related to*" matters such as health or safety or goods in the marketplace (emphasis added)). In the First Amendment context, however, "[t]he use of so indefinite a phrase as 'relative to' …fails to clearly mark the boundary between permissible and impermissible speech." *Buckley*, 424 U.S. at 41; *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (requiring precision of regulation so that

individuals may know what is prohibited, particularly where a law "abut[s] upon sensitive areas of basic First Amendment freedoms" (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)) (internal quotation marks omitted)).

The indefinite phrase "relates to" similarly fails to mark the boundary between lawsuits that would trigger the TCPA and those that would not. It would mean that whenever a lawsuit was brought against a group, that group would merely have to claim that the most tangential effects on communications between group members trigger the TCPA's protections for associational activities. And as the trial court allowed, the government would be able to do the same by bringing in a Third-Party intervenor and thus making the TCPA applicable where it expressly states that it should not be applied. *See* § 27.003 ("A party [who may file a motion to dismiss pursuant to the TCPA] does not include a government entity, agency, or an official or employee acting in an official capacity.") In the present case, for example, the Plaintiffs do not challenge the right of Union members to communicate, but the constitutionality of a government benefit. The Union nonetheless

argues that the Act applies because that benefit may subsidize its communications.

Allowing the district court's decision to establish such a broad interpretation of the TCPA's language, especially the new language, would not just violate the precision of regulation required by laws touching on First Amendment Activity. It would undermine the process that the Texas legislature long ago established in the fair pleading standards for civil litigation.

No longer would a plaintiff's burden against a group or corporation be simply to give a "short statement of the cause of action sufficient to give fair notice of the claim involved." *Huff Energy Fund, L.P. v. Longview Energy Co.*, 482 S.W. 3d 184, 218 (Tex. App. 2015) (quoting Tex. R. Civ. P. 47(a)). Instead, whenever a group communication might come into evidence, or whenever a suit might inhibit group communications in some way, a defendant could raise the TCPA and force a plaintiff to demonstrate, without the benefit of discovery, "by clear and specific evidence a prima facie case for each essential element of the claim in question." § 27.005(c); *see also* § 27.003(c).

The Texas Legislature could not have intended, in all litigation involving a corporation or any other group, that the TCPA upend "Texas's more-than-a-century-old-fair notice pleading standard." *Huff Energy Fund*, 482 S.W. 3d at 217. That is, it could not have intended that it would be a "greater obstacle [getting] into the courthouse than to win" in any litigation involving a corporation or group. *In re Lipsky*, 460 S.W.3d, 579, 589 (Tex. 2015). If the Legislature had intended to make such a major change, it would have been more precise in its statutory language. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). And this is particularly true in a case where the legislation is being interpreted to act as a punitive measure against plaintiffs by heaping "court costs and reasonable attorney's fees," as well as "sanctions. . . sufficient to deter" those plaintiffs from bringing a constitutional claim against the government in the future. TEX. CIV. PRAC. & REM. CODE § 27.009.

This is also different than the standard required by Rule 47 of the Texas Rules of Civil Procedure, which demands that in a traditional civil trial a plaintiff need only provide "a short statement of the cause of action sufficient to give fair notice of the claim involved." Tex. R. Civ. P.

47. Rule 45 does allow for pleadings to "contain any other matter which may be required by any law," but it also unequivocally states that "[a]ll pleadings shall be construed so as to do substantial justice." Tex. R. Civ. P. 45.

The Court should overturn the trial court's interpretation, which is clearly unwarranted based on a plain reading of the text and apply the TCPA as it was intended, particularly given the legislature's changes to the law. There are two potential solutions to this issue.

The first solution would be to limit the TCPA's application to suits where the relief requested directly attacks associational freedom, and not where that right is incidentally involved or invoked. Had the lawsuit here targeted employees' attempts to unionize, then it would have directly attacked associative rights and the TCPA could apply. But the lawsuit here does not attack anyone's right to unionize, or to speak to one another. Even if Plaintiffs' suit against the City were successful, the Union's members would be free to pool their own resources and to use their own time to associate with one another.

The second potential solution is that the court should limit the TCPA to the Legislature's intended scope: associative rights related to

participation in government, including advocacy for public issues. *See* TEX. GOV'T CODE § 312.005 ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent"). *See* TEX. GOV'T CODE § 311.021 (Texas law requires that courts must presume that the Legislature intends "compliance with the constitutions of this state and the United States"). *See also* TEX. GOV'T CODE § 311.023 (noting that courts may consider the preamble and "object sought to be attained," "whether or not the statute is considered ambiguous on its face"). The TCPA states that part of its purpose "is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government." § 27.002.

At issue here is how broadly to construe the phrase "associate freely." Because "a word is known by the company it keeps," that phrase should not be given "a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the" TCPA. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (citations and internal quotation marks omitted); *see TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W. 3d 432, 441 (Tex. 2011) (stating that the canon of "*noscitur a sociis*. . .directs that similar terms be interpreted in a similar manner.")

Thus, consonant with the phrases "petition" and "otherwise participate in government," the phrase "associate freely" must be limited to lawsuits that attack the associational rights used in petitioning and participating in government. Indeed, any other interpretation would render the phrase "otherwise participate in government" meaningless, contrary to the demand that a court "not interpret [a] statute in a manner that renders any part of the statute meaningless or superfluous." *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008).

In *Cheniere Energy, Inc. v. Lotfi*, 449 S.W. 3d 210 (Tex. App. 2014), the Texas Court of Appeals rejected a similar attempt to stretch the protection afforded by the TCPA beyond legislative intent. The defendants there moved to dismiss a tortious interference in employment claim, arguing that the TCPA's associational protections applied to them as senior vice president and general counsel, as the suit was based on their attorney/client relationship. *Id.* at 211-12, 215. The court affirmed the denial of the TCPA motion, because giving such broad reach to the association provision would be "contrary to the explicitly stated purpose of the statute, namely, to *balance* the

protection of First Amendment rights against the right all individuals have to file lawsuits to redress their injuries. *Id.* at 216. The Act's rights-balancing requires that communications triggering the TCPA's associational protections "contemplate a larger public purpose." *Id.* (noting that such a purpose is required even by the Act's title). In particular, there must be "some nexus between the communication used to invoke the TCPA and the generally recognized parameters of First Amendment protections." *Id.* And, as discussed above, the lawsuit here only incidentally touches on associative rights, much less those related to participating in government. Accordingly, the required nexus is missing here.

Additionally, recognition of the First Amendment's function further undercuts any pretense of a TCPA claim on behalf of the City of Austin. The Act protects the First Amendment rights of defendants. But the First Amendment exists to protect groups and individuals from government restrictions on speech, and not the other way around. *See* § 27.003 ("A party [who may file a motion to dismiss pursuant to the TCPA] does not include a government entity, agency, or an official or employee acting in an official capacity.")

III. THE FIRST AMENDMENT PROTECTS PUBLIC INTEREST LITIGATION.

The First Amendment protects plaintiffs' right to "[r]esort to the courts to seek vindication of constitutional rights." *NAACP v. Button*, 371 U.S. 415, 443 (1963). And suits by public interest groups to protect such rights fall within the ambit of protected First Amendment activity. *See id.* at 443-44 ("[T]he NAACP and its members are in every practical sense identical. The Association...is but the medium through which its individual members seek to make more effective the expression of their own views. . .[P]articipation in litigation. . .fall[s] within the First Amendment's protections"). But such lawsuits—even though they are essential to protecting our constitutional rights—are generally "neither profitable nor very popular." *Id.* at 443. The trial court's use of the TCPA undermines the ability of public interest suits to thus work for the public benefit.

Public interest groups like the Goldwater Institute, the Texas Public Policy Foundation, the NAACP, and the ACLU, "select[] test cases to advance cherished rights for groups long denied them." Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 Wash. Univ. J. L. & Pol'y 1, 4 (2001). These "cause oriented

associations" have historically fought not just to "secure free speech for particular individuals in isolated instances, but to advance for all people freedom of thought, expression, and association." *Id.* at 4-5.

But individuals and groups will think twice about bringing litigation to protect our cherished freedoms if the trial court's decision is allowed to stand. Not only will all the work and effort that goes into preparing and executing such challenges easily come to nothing, but they may find themselves saddled with attorney's fees and other sanctions—all for attempting to protect the public's constitutional rights. Publicly-spirited organizations and attorneys will hesitate to fight for fundamental rights, if not give up their efforts altogether, were the trial court's application of the TCPA to become a risk of litigating in the public interest.

CONCLUSION

For the foregoing reasons, amicus respectfully urges the Court to reverse the trial court's dismissal under the TCPA.

Dated: February 22, 2022

Respectfully submitted,

By: /s/ Martha Astor

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-limitation of Tex. R. App. P. 9.4(i) because it contains 3359 words.
2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) and the spacing requirements of Tex. R. App. P. 9.4(d) because this brief has been prepared in double spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Martha Astor
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing amicus curiae brief on this date with the Clerk of the Court for the Court of Appeals for the Third Judicial District Austin Texas using the Appellate Electronic Filing system. I hereby certify that the above and foregoing document has been served via email to all counsel of record listed below.

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