CAUSE NO. D-1-GN-16-004307

MARK PULLIAM AND JAY WILEY, *Plaintiffs*, AND THE STATE OF TEXAS, *Intervenor-Plaintiff,* v. CITY OF AUSTIN, TEXAS, MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF AUSTIN, *Defendants*, AND AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL 975, *Intervenor-Defendant*	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 419TH JUDICIAL DISTRICT

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH

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INTEREST OF *AMICUS CURIAE*

Founded by Bradley A. Smith, a former Chairman of the Federal Election Commission, the Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights to speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations, *pro bono,* in cases raising First Amendment objections to the regulation of core political activity. It also files *amicus* briefs in cases affecting First Amendment rights.[1]

INTRODUCTION

With the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code §§ 27.001-27.011 ("TCPA" or "Act"), the Legislature intended to balance and thus protect both a plaintiff's First Amendment right of access and a defendant's First Amendment rights of speech and association. Application of the Act here would violate both the First Amendment and legislative intent.

Defendants have not shown that any of the established exceptions for restricting access rights apply here. They have neither shown that Plaintiffs' claims are baseless, as defined by the United States Supreme Court, nor that Plaintiffs launched a vexatious suit meant to punish defendants with the costs of litigation.

Furthermore, application of the Act here would violate the precision of regulation required when laws touch on fundamental First Amendment freedoms.

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[1] *Amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

Were the Act applied to any litigation that related to any communications between group members in any way, plaintiffs would be unable to determine which suits would trigger the Act and its penalties, and which would not. Moreover, such application of the Act would swallow the State's fair-notice pleading standard.

FACTS

Plaintiffs Mark Pulliam and Jay Wiley sued the City of Austin and the Austin Firefighters Association, Local 975 ("AFA" or "Union"), challenging as a violation of the Texas Constitution's Gift Clause the agreement giving Association Business Leave ("ABL") release time to union representatives.

On November 21, 2016, the Union filed a motion to dismiss under the Act. The Union argued that the Act applied because the "suit relates to the exercise of the right of association, which is the primary activity for which ABL is used." TCPA Motion at 2, *Pulliam v. City of Austin*, No. D-1-GN-16-004307 (Travis Cty. D. Ct. Nov. 21, 2016). In particular, the Union argued that the "lawsuit relates to the AFA membership's use of ABL, which is primarily used to communicate between AFA members." *Id*. at 6; *see also id*. at 7, 8.

The Union also requested that, "[t]o the extent the court determines [Intervenor] State of Texas to be joined to the instant suit," to grant "the same relief . . . against the State of Texas, for the same reasons." TCPA Motion at 1 n.1.

On February 7, 2017, the Court granted the Union's motion "in all respects," dismissing "all claims of Plaintiffs against Defendant . . . in their entirety." TCPA Order, *Pulliam v. City of Austin*, No. D-1-GN-16-004307 (Travis Cty. D. Ct. Feb. 7,

2017). The Court also held that the Union was "entitled to recover its attorneys' fees and costs." *Id*.

After abating the State's appeal for clarification, the Court of Appeals held that this Court had not dismissed the case "with respect to the State's claims." *State v. City of Austin*, No. 03-17-00131-CV, 2017 Tex. App. LEXIS 9510, at *2 (Tex. App. Oct. 11, 2017). The Court of Appeals also dismissed Plaintiffs' appeal for lack of jurisdiction, because "no final judgment ha[d] been signed by the trial court, and claims currently remain pending." *Pulliam v. City of Austin*, No. 03-17-00131-CV, 2017 Tex. App. LEXIS 3325, at *3 (Tex. App. Apr. 14, 2017).

On July 25, 2018, the Union moved to intervene in the continuing action. Then, in the Union and City's joint motion for summary judgment, they argued that issue and claim preclusion bar the Plaintiffs' and the State's claims against both the City as Defendant and the Union as Intervenor-Defendant. *See* Defs.' Mot. at 13-15.

STANDARD OF REVIEW

A court should grant summary judgment only if the moving party "show[s] that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003); *see also* Tex. R. Civ. P. 166a(c).

Furthermore, inasmuch as the Union's TCPA motion is at issue, this Court "retains plenary power over its interlocutory orders until a final judgment is entered." *In re Richards*, 202 S.W.3d 779, 785 (Tex. App. 2006). The party moving for dismissal under the Act must "show[] by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of . . . the right of

association." Tex. Civ. Prac. & Rem. Code § 27.005(b). The nonmoving party must then "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* at § 27.005(c).

ARGUMENT

To the extent that the TCPA is relevant to the parties' summary judgment motions, this Court should limit the scope of the Act: Both the First Amendment and legislative intent make clear that the Act does not apply here.

The Union and the City invoke the Act, incorrectly arguing that this Court's order granting the Union's TCPA motion to dismiss against the Plaintiffs precludes any further relief, to either the Plaintiffs or the State, against either the City or the Union. But, as explained by the Plaintiffs and the State, neither *res judicata* nor collateral estoppel apply here. *See* Plaintiffs' Reply at 6-10. In particular, claim and issue preclusion do not apply because there has been no final judgment in the current case: Collateral estoppel and *res judicata* apply only when "when an issue of ultimate fact has . . . been determined by a valid and final judgment." *State v. Getman*, 255 S.W.3d 381, 384 (Tex. App. 2008); *see Amstadt v. United States Brass Corp.,* 919 S.W.2d 644, 652 (Tex. 1996) (requiring final judgment for *res judicata*).

Furthermore, law of the case would not require a contrary conclusion. This Court has "plenary power" to reconsider or amend its interlocutory order regarding the Union's TCPA motion, as a final judgment in this case has not been entered. *In re Richards*, 202 S.W.3d at 785.

For the following reasons, the Court should use its plenary power to hold that the TCPA cannot apply here.

A. The First Amendment Right of Access and Legislative Intent Preclude Application Here

The TCPA does not apply here: Both legislative intent and the First Amendment require a narrow reading of the Act's scope.

Under Texas law, courts must presume that the Legislature intends "compliance with the constitutions of this state and the United States." Tex. Gov't Code § 311.021. And, in drafting the Act, the Legislature carefully balanced competing constitutional claims. In particular, it declared 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 (emphasis added); *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").

Thus, by its own force and by legislative intent, the First Amendment's Petition Clause carefully protects the right to file lawsuits here, generally following the standards applied to other First Amendment rights. *See Bill Johnson's Restaurants v. National Labor Relations Board*, 461 U.S. 731, 741 (1983) (recognizing "right of access"); *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 389 (2011) (noting that the Petition and Speech Clauses are interpreted together absent "special concerns . . . provid[ing] a sound basis for a distinct analysis"). This includes the First Amendment's proscriptions regarding content-based laws.

"Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Because the Act targets petition rights based on particular content—lawsuits that mention others' communications or association—it is content-based. *See Reed*, 135 S. Ct. at 2227 (A law "is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed."); Tex. Civ. Prac. & Rem. Code § 27.005(b) (directing courts to dismiss actions relating to "(1) the right of free speech; (2) the right to petition; or (3) the right of association").

Anti-SLAPP laws[2] like the TCPA may fall under the exception for protecting rights by curbing "the costs of vexatious litigation." *United States v. Alvarez*, 567 U.S. 709, 719 (2012); *but see id.* at 722 (limiting authority to declare new exceptions). As the United States Supreme Court has long held, however, such exceptions must be carefully limited: "There are weighty countervailing considerations . . . that militate against" laws restricting what the government may consider retaliatory lawsuits. *Bill Johnson's Restaurants*, 461 U.S. at 741.

In particular, the Petition clause's "right of access to a court is too important to be called . . . unfair" and restricted "solely on the ground that" a plaintiff may have "retaliate[d] against [a] defendant for exercising" protected rights. *Id.* at 741-43. Accordingly, to apply the vexatious litigation exception, a court must first investigate whether the suit is baseless or sham litigation. *See id.* at 741 (noting "mere sham"

[2] Laws combatting "Strategic Lawsuits Against Public Participation."

test before dismissing antitrust action); *id*. at 743 (noting "baseless" requirement in labor relations context).

This test requires that a court determine that a lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993); *see, e.g.*, *Bill Johnson's*, 461 U.S. at 741. If a plaintiff can show "genuine factual issues," she 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).

The summary judgment papers demonstrate that this case is neither baseless nor a sham. But, even if the suit were baseless, that alone would not be enough to trigger the vexatious litigation exception. "Retaliatory motive and lack of reasonable basis are *both* essential prerequisites" for laws cutting off access to courts. *Bill Johnson's*, 461 U.S. at 748 (emphasis added).

To satisfy the retaliatory motive requirement, ill will alone is not enough. Evidence must show that the litigation results from a desire to misuse the judicial process, to punish a defendant with the costs of litigation rather than merely winning the requested relief. *See City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 380 (1991); *see also Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. at 60-61; *BE&K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 536 (2002) (holding regulation

unconstitutional because the "standard for imposing liability . . . allow[ed] it to penalize" all litigation initiated for retaliatory motive).

Here, however, there has been no evidence of ill will toward the Union or the City, much less that Plaintiffs wish to punish them with the costs of litigation. Indeed, nothing about Plaintiffs' preferred outcome would work a cognizable harm to the Union. Plaintiffs request a declaration that a benefit given to the Union violates the Texas Constitution. But the requested relief will not prevent union officials from associating or zealously advocating the interests of their members, or from communicating to those ends.

Thus, the vexatious litigation exception cannot apply to this litigation. Accordingly, application of the TCPA here would violate the First Amendment, contradicting the Legislature's intent to balance plaintiffs' and defendants' First Amendment rights.

B. The First Amendment Requires Greater Precision of Regulation

Even if this case were baseless and brought solely to punish the City with litigation costs—and there is no indication that it is—the First Amendment would nonetheless demand greater precision of regulation in its application. *See Buckley v. Valeo*, 424 U.S. 1, 41 (1976) (*per curiam*) (holding that "[p]recision of regulation . . . must be the touchstone in an area so closely touching our most precious freedoms" (brackets in original) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))). "Where the constitutional requirement of definiteness is at stake," courts have an "obligation to construe [a] statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness." *Id*. at 77-78.

The Act permits 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) (emphasis added); *see also id*. § 27.005(b) (directing dismissal for any action that "*relates to*" First Amendment rights (emphasis added)); *id*. § 27.001(7) (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, 108-09 (1972) (requiring precision regulation of 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))).

The indefinite phrase "relates to" similarly fails to mark the boundary between lawsuits that would trigger the Act and those that would not. Rather, whenever, a lawsuit is brought against a group, that group will claim that the most tangential effects on communications between group members trigger the Act's protections for associational activity. 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.

But such a broad interpretation of the Act's language would not just violate the precision of regulation required in laws touching on First Amendment activity: It

undermines the foundation of modern civil litigation. Rather than the simple notice required by Texas's fair pleading standard, heightened pleading would be necessary every time a corporation or group (that is, an associative party) was conceivably involved. 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)). Rather, whenever a defendant group might claim that the suit requires as evidence a group communication or would inhibit group communications in some way, a plaintiff would be forced 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." Tex. Civ. Prac. & Rem. Code § 27.005(c); *see also* Tex. Civ. Prac. & Rem. Code § 27.003(c) (suspending discovery upon filing of a motion to dismiss).

The Legislature cannot 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. If the Legislature had intended to do so, for such a major change, it would have been clearer. And that is particularly true where the Act threatens plaintiffs with "court costs, reasonable attorney's fees, and other expenses," as well as "sanctions . . . sufficient to deter" a plaintiff from bringing actions in the future. Tex. Civ. Prac. & Rem. Code § 27.009. The Legislature may properly deter litigation that is in fact vexatious and that truly threatens a defendant's First Amendment rights. But where the Act sweeps in

lawsuits that fit neither characteristic, such deterrents would unconstitutionally chill protected First Amendment activity.

Thus, as in *Buckley*, the Court should apply a narrowing construction to protect a plaintiff's First Amendment rights and thus protect the Legislature's careful balancing of all parties' rights. Two ways to preserve the Legislature's intent present themselves.

First, the court should limit application of the Act to suits where the relief requested directly attacks the right of association, not where that right is incidentally involved or invoked. For example, had the suit here targeted the legality of employees' attempts to unionize, or the legality of the union's bylaws, the suit would directly attack associative rights and the Act would apply.[3] But, it would not apply where a suit only incidentally touched associative rights or communications between group members, such as by affecting a group's financial resources, or where the defendant's own decisions are the proximate cause of the asserted associative injury, as when individuals choose not to pool their own resources or use their own time for their associative activity.

[3] The Act's definition of the right of association may alone violate Plaintiffs' First Amendment petition rights. The Act defines "Exercise of the right of association" as "as a communication between individuals who join together." Tex. Civ. Prac. & Rem. Code § 27.001(2). But the United States Supreme Court, at least in the First Amendment context, has defined the freedom of association as the "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). That is, it is a freedom to associate or not, to join a group or not. The Plaintiffs have not challenged the ability of union members to associate, and any attempt to twist associational rights outside those bounds would violate Plaintiffs' First Amendment petition rights.

Second, 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 . . . ."). The Act 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*." Tex. Civ. Prac. & Rem. Code § 27.002 (emphasis added); *see* Tex. Gov't Code § 312.006 (requiring that statutes be "construed to achieve their purpose").

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'" Act. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)); *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"); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750 & n.29 (Tex. 2006) (citing *Gustafson* and narrowly construing the term "water damage" because its neighboring terms required "uncommon and catastrophic losses").

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).

Thus, 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 Act beyond legislative intent. The defendants there moved to dismiss a tortious interference in employment claim, arguing that the Act'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 a broad reach to the association provision—to any communication between members of an entity—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 (emphasis in original). The Act's rights-balancing requires that communications triggering the Act'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.

Furthermore, TCPA claims cannot apply to the only original, remaining defendant—the City of Austin. Plaintiffs have not attacked the City's ability to participate in government. Such a claim would be nonsensical. But it would be even more so here, where Plaintiffs have simply challenged whether the City is appropriating funds contrary to the Texas Constitution.

And recognition of the First Amendment's function further undercuts any pretense of a TCPA claim on behalf of the City. The Act protects the First Amendment rights of defendants. But the First Amendment exists to protect groups and individuals from government restrictions on speech, not the other way around. Thus, applied to the City, there is nothing for the Act to protect.

Accordingly, even assuming that the Union could properly seek dismissal, intervene, and then seek dismissal again, and that none of that above arguments applied, the challenge to the City's ability to pay for Associated Business Leave would nonetheless remain.

CONCLUSION

For the above reasons, the Court should cautiously limit the Act's application and hold that it does not apply here.

Dated: February 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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