



Texas Association of Broadcasters

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April 24, 2023

Dear Chairman Leach, Vice Chairman Johnson and House Judiciary and Civil Jurisprudence committee members,

I was Chief Justice of the Supreme Court of Texas and served on that Court from 2001 to 2013. I am also currently Treasurer of the American Law Institute.

I am writing to express my concerns about the unintended consequences passage of SB 896 would inflict on the court system. As I see it, the bill would create a two-tier system in which parties, in certain instances, would be forced to litigate their cases simultaneously at the trial and appellate courts, which will cause significant perils for both litigants and courts.

Since its passage in 2011, the Texas Citizens Participation Act has been the subject of appeals to the Texas Supreme Court about whether the Act was timely asserted and whether an exemption to it applies. Those cases took nearly a decade before the Supreme Court gave definitive answers. That Court ultimately concluded that the trial courts in those cases had erred in finding the TCPA motion untimely or subject to an exemption. *See, e.g., Kinder Morgan SACROC, LP v. Scurry Cnty*, 622 S.W.3d 835 (Tex. 2021), *Montelongo v. Abrea*, 622 S.W.3d 290 (Tex. 2021), *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684 (Tex. 2018).

In each case, if SB 896 had been the law and the stay lifted during the appeals, the parties and the courts would have expended enormous resources only for an appellate court later to decide that the case lacked merit in the first place. Additionally, the litigants would have needlessly spent exponentially more in litigation costs on discovery, trials, and appeals that were all for naught.

SB 896 is troubling in light of the Legislature's extensive modifications to the TCPA in 2019, including the addition of eight new exemptions. The courts will grapple with the validity of these exemptions for decades. A much more efficient result would obtain if litigants were given the right to appeal a trial court's decision immediately. This is why, in my view, the Legislature and this Court have preserved the right to defend against invalid barriers to the Act while staying the trial courts' wasteful prosecution of them. In short, SB 896 could strain an already overburdened court system, curtail the necessary checks and balances provided by Texas appellate courts, and cause needless increases in litigation costs for Texas citizens.

Sincerely,



Wallace B. Jefferson

The undersigned organizations support strong anti-SLAPP laws protecting free speech and commend Texas for having one of the best in the nation.

We are concerned that, in its current form, HB 2781 would undermine the effectiveness of the existing law by altering an essential procedural protection for speakers. The measure would remove the stay of a case under appeal if an anti-SLAPP motion to dismiss is frivolous, untimely, or subject to an exemption.

Trial courts sometimes make mistakes, which is why the right to an immediate appeal of a denied anti-SLAPP motion is so important. Errors often come from trial courts interpreting the law's twelve exemptions. Mistakes in timeliness are made too. For example, the Texas Supreme Court ruled in *Kinder Morgan v. Scurry County* and *Montelongo v. Abrea* that trial courts erred in dismissing anti-SLAPP motions based on timeliness.

But consider the consequences when a court makes a mistake and removes the stay while a speaker appeals the ruling. The litigation costs of defending the lawsuit would increase dramatically because the trial would begin. If the appeal succeeds, the unnecessary trial work burdens the speaker defendant, the plaintiff, the courts, and the taxpayers who fund the court system.

States with the most effective anti-SLAPP laws protect speakers throughout the appeals process, and Texas is among those exemplary states. As currently written, HB 2781 would give an advantage to plaintiffs who file frivolous lawsuits seeking to punish speech, weaken current law, and chill speech.

Sincerely,

Institute for Free Speech
ACLU of Texas
Americans for Prosperity-Texas
Center for Biological Diversity
Competitive Enterprise Institute
Foundation for Individual Rights and Expression (FIRE)
Institute for Justice
National Coalition Against Censorship
National Right to Life
National Taxpayers Union
PEN America
Public Participation Project
The Authors Guild
True Texas Project



March 28, 2023

Via Email

Representative Jeff Leach
Chairman, Judiciary & Civil Jurisprudence Committee
Texas House of Representatives
Room GN.11
P.O. Box 2910
Austin, TX 78768
jeff.leach@house.texas.gov

Re: H.B. No. 2781

Dear Chairman Leach,

Yelp encourages you to amend H.B. No. 2781, which proposes to make certain changes to the motion to dismiss that is authorized under the Texas Citizens Participation Act ("TCPA"). Specifically, Yelp encourages you to preserve the status quo automatic stay during an appeal when the motion to dismiss is denied on grounds that it was not timely filed or because the action is exempt under Civil Practice and Remedies Code section 27.010(a). Accordingly, Yelp supports the deletion of subsections (c-1)(1) and (c-1)(3) from the bill.

As I describe below, Yelp has borne the significant burden and expense of conducting discovery during litigation intended to curb free speech and public participation, before its motion to dismiss was finally resolved in Yelp's favor. Yelp is concerned that its experience is emblematic of the consumer harm that would result if H.B. No. 2781 was adopted without amendment, and writes to share those concerns.

About Yelp

Founded in 2004, Yelp owns and operates Yelp.com, a popular local search website, mobile website, and related mobile applications for users to share information about their communities. Yelp, among other things, provides and publishes a forum for members of the public to read and write reviews about local businesses, services, and other entities including nonprofits and government agencies. One of Yelp's founding principles is that the best source for information about a local community is the community members themselves. As of December 31, 2021, Yelp users have contributed a total of [244 million cumulative reviews](#).¹

Consumers have free speech rights to share their opinions on Yelp, whether positive or critical, about the businesses, services, and other entities with whom they interact. The TCPA helps

¹ Yelp Internal Data, 2021. Contributed reviews include those that are recommended, not recommended, or removed from Yelp's platform.

protect both Yelp and consumers from ill-advised lawsuits that seek to intimidate the consumers and eliminate or otherwise chill their speech. One way it protects Yelp and consumers is by staying discovery before a motion to dismiss a legal action based on the exercise of these rights is finally resolved, including actions “against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.”²

Yelp’s Experience

In 2018, a group of business people—including an interior designer, a tailor, and a urologist—brought a putative class action lawsuit against Yelp in California based on Yelp’s display of business information about the plaintiffs, allegedly without their permission. The plaintiffs sought substantial damages and [an injunction](#) that would have required Yelp to take down its web pages where consumers share their experiences with and opinions about each of the at-issue businesses.

Yelp brought an anti-SLAPP motion³ in response to the lawsuit, but the trial court lifted the automatic discovery stay to allow the plaintiffs to issue written discovery requests to Yelp and to depose a Yelp witness. Yelp [eventually prevailed](#) on the merits of its motion to dismiss, but it came at a substantial cost, with Yelp paying significant legal fees and expending time and other resources to respond to ultimately irrelevant discovery requests, while at the same time also paying significant legal fees and expending other resources relating to the motion to dismiss itself, in its efforts to protect consumers’ rights to express their opinions about plaintiffs’ respective businesses.

Although Yelp’s experience was with a single trial court and not in connection with an appeal, the consequences of lifting the automatic stay were the same as if the matter had been on appeal from denial of a motion to dismiss. As a result of the trial court proceeding not being stayed, Yelp had to spend far more money and time to defeat the plaintiffs’ strategic lawsuit against public participation than it would have had the stay remained in place.

Yelp’s Concerns

Yelp has far more resources available to it to fight unwarranted discovery than does the typical Texas consumer, and it is concerned that a change to Texas state law that will double or triple a consumer’s out-of-pocket cost of pursuing an appeal of an erroneously denied motion to dismiss will discourage meritorious appeals, chilling public participation and stifling consumer

² Civ. Prac. & Rem. Code § 27.010(b)(2).

³ The anti-SLAPP statute (Cal. C.C.P. § 425.16) is California’s version of the TCPA. Like the TCPA, the California anti-SLAPP statute automatically stays discovery while a motion to dismiss is pending and during the appeal of a trial court’s denial of the motion to dismiss. See Cal. C.C.P. § 425.16(g); *Varian Medical Systems, Inc. v. Delfino* 35 Cal.4th 180, 198 (2005).

speech. This is especially true considering that trial courts have erroneously denied motions to dismiss on both [timeliness](#) and [commercial speech exemption](#) grounds in the past.

Those erroneous denials were eventually reversed, but each appeal required the defendants to pursue the matter up to the Supreme Court of Texas. Had these defendants been forced to also incur the costs and expenses of discovery and other trial court proceedings during their appeals—up to and including a trial—they may well have made the reasonable and economically sound decision to abandon their meritorious appeals and prematurely concede defeat as to their free speech rights.

Yelp does not believe that the possibility of eventually recovering court costs and reasonable attorney's fees under Civil Practice and Remedies Code section 27.009(a)(1) adequately addresses these concerns. A potential award of fees and costs is inherently uncertain—particularly during the appeal of a motion to dismiss that has already been denied in the trial court—and in any event the Texas consumer facing such a lawsuit would still have to initially reach into his or her own pockets to pay for the legal fees and costs.

These are not hypothetical concerns for Yelp or consumers, even those who take steps to share their opinions anonymously. In 2022, private party plaintiffs issued legal demands to Yelp seeking information relating to 623 Yelp user accounts. In 2021, plaintiffs issued legal demands to Yelp seeking information relating to 734 such accounts. Yelp developed a microsite at <https://trust.yelp.com/> to report these statistics and to describe its trust and safety investments, which include Yelp's efforts to protect users' personal information in appropriate circumstances. While Yelp ultimately produced information for far fewer accounts, these statistics show that there is no shortage of private party plaintiffs who would seek to improperly use the law to chill consumer speech.

Yelp fears that, without an amendment, the proposed changes to Texas state law would give these plaintiffs another tool to ratchet up the pressure on Texas consumers expressing their constitutionally-protected opinions, making the internet a less useful place for those consumers and for other members of the public who would benefit from access to the opinions.

Thank you for your consideration, and please let us know if Yelp can be of further assistance with this matter.

Sincerely,



James Daire

Associate Director of Legal / jdaire@yelp.com

Yelp Inc. / 350 Mission Street, 10th Floor / San Francisco, CA 94105

cc: Chief of Staff, Lauren Young (lauren.young@house.texas.gov)

March 27, 2023

Via Electronic Mail

Chairman Jeff Leach
House Judiciary Committee
Room GN.11
P.O. Box 2910
Austin, TX 78768
jeff.leach@house.texas.gov

Chairman Leach:

I am the chief legal officer of Las Vegas Review-Journal, Inc.

I write to express our concerns with House Bill 2781. As currently written, HB 2781 would endanger the important free-speech protections in Texas's anti-SLAPP statute and thwart one of the law's core purposes of judicial economy. Weakening those protections will hurt all Texans and stands to have a particularly detrimental effect on media organizations and their ability to keep Texans informed about matters of public concern.

HB 2781 would eliminate the automatic stay of court proceedings when a motion to dismiss is found to be frivolous, untimely, or subject to a statutory exemption. While we understand that dealing with frivolous motions is up to the trial court's discretion, removing the stay for denials based on timeliness and applicability of statutory exemptions, both matters of law that need immediate appellate review, could subject news media organizations and anyone facing a SLAPP suit to needless legal expenses simply for covering or discussing important events in their communities.

Determining the timeliness of a motion to dismiss can be difficult in some cases especially when amended pleadings are involved as in the cases of *Kinder Morgan SACROC, LP v. Scurry Cnty.*¹ and in *Montelongo v. Abrea*.² In both cases, the Texas Supreme Court reversed trial courts that incorrectly ruled on the timeliness of a motion. Determinations of timeliness can also present a problem when determining the way in which statutory abatement periods interact with the anti-SLAPP deadlines. For instance, in the case of *Hearst Newspapers, LLC v. Status Lounge Inc.*, the trial court misapplied the law by insisting the anti-SLAPP motion should have been filed during the abatement period, something which had to be corrected through the appeal process.³ Because the newly added DTPA exemption has a similar abatement period, it is also a prime candidate for confusion by trial courts moving forward. Until these issues can be sorted out by the appellate courts, a stay of the proceedings is the better course of action because it promotes judicial economy and saves on unnecessary time and expense by litigants.

Similarly, trial courts have, at times, struggled to correctly apply the statutory exemptions. The Texas Supreme Court and Texas courts of appeals have overturned trial court rulings that improperly denied motions to dismiss based on incorrect applications of the exceptions. See *Castleman v. Internet Money Ltd.*,⁴ *MacFarland v. Le-Vel Brands LLC*.⁵ Further, because eight new exemptions were added to the anti-SLAPP statute in 2019, Texas courts are just now starting to grapple with the contours of the new exemptions, and a change in the law would be premature at this time.

¹ 622 S.W.3d 835 (Tex. 2021).

² 622 S.W.3d 290 (Tex. 2021).

³ 541 S.W.3d 881 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

⁴ 546 S.W.3d 684 (Tex. 2018).

⁵ No. 05-17-00968-CV, 2018 WL 2213913 (Tex. App.—Dallas May 15, 2018, no pet.).

Eliminating the stay in these cases would leave all Texans without the protections of the statute, even when the trial court has obviously erred in applying the law. This would severely undercut the free-speech protections in the statute, leaving media organizations vulnerable to the legal process when covering controversial issues.

HB 2781 also stands to cause confusion within the court system. Removing the stay would allow trial court proceedings to continue, even as the appellate courts review the denial of a motion to dismiss. When a trial court has erred—as in the above cases—the prevailing party on appeal will be forced to unwind any proceedings that occurred in the trial court. Courts typically seek to avoid these kinds of parallel proceedings, because of the havoc they cause for litigants and judges.

We respectfully ask that HB 2781 be amended so that Texas law continues to recognize the importance of a stay for cases that were dismissed, perhaps wrongly, for supposedly being untimely or subject to an exemption. Making this change would help avoid the collateral consequences for news media organizations and the Texans they strive to serve.

Thank you for your consideration.

Sincerely,

Ben Lipman

Benjamin Zensen Lipman, Chief Legal Officer
Las Vegas Review-Journal, Inc.

blipman@reviewjournal.com

702-383-0224





March 28, 2023

Via Electronic Mail

Chairman Jeff Leach
House Judiciary Committee
Room GN.11
P.O. Box 2910
Austin, TX 78768

Chairman Leach:

We are the editors of the *Houston Chronicle*, the *San Antonio Express-News*, the *Beaumont Enterprise*, and the *Laredo Morning Times*. We write to express our concerns with House Bill 2781. As currently written, HB 2781 would endanger the important free-speech protections in Texas's anti-SLAPP statute and thwart one of the law's core purposes of judicial economy. Weakening those protections stands to have a particularly detrimental effect on media organizations and our ability to keep Texans informed about matters of public concern.

HB 2781 would eliminate the automatic stay of court proceedings when a motion to dismiss is found to be frivolous, untimely, or subject to a statutory exemption. Removing the stay for denials based on timeliness and applicability of statutory exemptions could subject news media organizations to needless legal expenses simply for covering important events in their communities.

No matter how thoughtfully and carefully it may have been drafted, no statute can fully anticipate all circumstances in which it may arise in litigation. The result is that even matters such as the timeliness of an anti-SLAPP motion or the application of a statutory exemption, which may seem straightforward at first glance, often present novel or complex questions of law that have confounded the trial courts, leading to incorrect rulings only corrected upon appellate review.

For instance, in the case of *Hearst Newspapers, LLC v. Status Lounge Inc.*, the *Houston Chronicle* was sued by a local bar over a brief article concerning a shooting that occurred near the establishment. The article, based on public reports from the Houston Police Department, is the kind of reporting that forms the backbone of local news coverage. Plaintiff's claims were completely without merit; as the Court of Appeals later confirmed, the *Chronicle's* article "substantially mirror[ed] the police report." And yet, because the trial court erroneously ruled that the *Chronicle's* motion was untimely,¹ it was almost **five years** before the *Chronicle* was able to get a court to consider the merits of its motion to dismiss and find that the claims were baseless.²

¹ 541 S.W.3d 881 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

² 639 S.W.3d 752 (Tex. App.—Houston [14th Dist.] 2021, no pet.).

Chairman Jeff Leach
House Judiciary Committee
March 28, 2023

In *Status Lounge*, the trial court failed to properly analyze the relationship between the anti-SLAPP deadlines and a statutory abatement period. Trial courts also have struggled to correctly apply the timeliness rule in litigations involving amended pleadings.³ And the Texas Supreme Court and Texas courts of appeals have overturned trial court rulings that improperly denied motions to dismiss based on incorrect applications of the exceptions.⁴

Recent amendments to the anti-SLAPP statute have only compounded the novel and complex issues of statutory interpretation facing the trial courts. Eight new exemptions were added to the anti-SLAPP statute in 2019, and the Texas courts are just now starting to grapple with the contours of the new exemptions. And because the newly added DTPA exemption includes an abatement period, it is a prime candidate for confusion by trial courts moving forward as to the timeliness of anti-SLAPP motions to dismiss. Until these issues can be sorted out by the appellate courts, a stay of the proceedings is the better course of action because it promotes judicial economy and saves on unnecessary time and expense by litigants. Further statutory changes at this time would be premature and would only cause further confusion.

Eliminating the stay in these cases also has the practical effect of severely undermining one of the anti-SLAPP statute's most critical protections: the ability for litigants to seek immediate, interlocutory appellate review of the denial of an anti-SLAPP motion before incurring needless legal expenses. Although anti-SLAPP appeals are considered expedited, it can still take several months for a Court of Appeals to reach its decision. And if further appellate proceedings are involved, it can be *years* before the appellate process reaches its conclusion. For example, in the *Status Lounge* litigation, it took over seven months for the Court of Appeals to correct the trial court's improper denial of the *Chronicle*'s motion to dismiss, and *five years*—and a subsequent appeal—for the *Chronicle* to obtain a decision in its favor on the merits of its motion.

If HB 2781 had been in effect during the *Status Lounge* litigation and other similar cases, the *Chronicle* and other defendants would have been forced to choose between, on the one hand, incurring months or even years of significant legal expenses from simultaneous litigations at the appellate level while also in the throes of costly and intrusive discovery in the trial court, or, on the other hand, pursuing settlement of claims that appellate courts would ultimately deem meritless efforts to punish the lawful exercise of their constitutional rights. The anti-SLAPP statute was enacted specifically to avoid putting defendants in this intolerable situation.

At the same time, HB 2781 threatens to cause needless confusion within the court system. In the absence of a stay, the parties would proceed to discovery in the trial court, even as the appellate courts review the denial of a motion to dismiss. When a trial court has erroneously denied a motion

³ *Kinder Morgan SACROC, LP v. Scurry Cnty*, 622 S.W.3d 835 (2021); *Montelongo v. Abrea*, 622 S.W.3d 290 (2021).

⁴ See *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684 (Tex. 2018); *MacFarland v. Le-Vel Brands LLC*, No. 05-17-00968-CV, 2018 WL 2213913 (Tex. App.—Dallas May 15, 2018, no pet.).

Chairman Jeff Leach
House Judiciary Committee
March 28, 2023

to dismiss—as in the above cases—the defendant’s reward for having prevailed on appeal would be the administrative headache and backbreaking costs of attempting to unwind any proceedings that occurred in the trial court. Courts typically seek to avoid these kinds of parallel proceedings because of the havoc they cause for litigants and judges.

Eliminating the stay in these cases would leave all Texans without the protections of the statute, even when the trial court has obviously erred in applying the law. This would severely undercut the free-speech protections in the statute, leaving, in particular, media organizations vulnerable to the legal process when covering controversial issues of significant interest to Texans.

We had the pleasure of working with your office in 2019 as part of the Protect Free Speech Coalition, and we, once again, appreciate your consideration of our concerns. We respectfully ask that HB 2781 be amended to focus only on frivolous motions to dismiss. Eliminating the stay in those frivolous cases would significantly improve the statute, without the collateral consequences for news media organizations and the Texans we strive to serve.

Thank you for your consideration.

Best regards,

/s/ Maria Reeve
Maria Reeve
Executive Editor
Houston Chronicle

/s/ Marc Duvoisin
Marc Duvoisin
Editor-in-Chief and Senior Vice President
San Antonio Express-News

/s/ Kaitlin Bain
Kaitlin Bain
Editor
Beaumont Enterprise

/s/ Zach Davis
Zach Davis
Managing Editor
Laredo Morning Times



March 28, 2023

Via Electronic Mail

Chairman Jeff Leach
House Judiciary Committee
Room GN.11
P.O. Box 2910
Austin, TX 78768

Chairman Leach:

The News Media Alliance (the “Alliance”) is a nonprofit organization representing news and media publishers, including nearly 2,000 diverse news and magazine publishers across the United States, including Texas, —from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper’s circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

Today, the Alliance writes to express our concerns over House Bill 2781. As currently written, HB 2781 would weaken the vital free speech protections encompassed in Texas’s anti-SLAPP statute, the Texas Citizens Participation Act (“TCPA”). The news and magazine media industries in Texas rely on the protections of the TCPA to ensure that they can provide communities in Texas with valuable, timely, and quality journalism.

HB 2781 would eliminate the automatic stay of proceedings when a motion to dismiss under the TCPA is found to be frivolous, untimely, or subject to a statutory exemption. Currently, the party whose motion to dismiss is denied on such grounds has a right to request interlocutory appellate review of the trial court’s decision. It is important that trial court proceedings are stayed while the appeal is ongoing to avoid potentially unnecessary and wasteful litigation. If the trial court’s proceedings are not stayed and the appellate court reverses the denial of the motion to dismiss, then the activities by the trial court in the interim will be completely futile and a waste of precious court resources.



It is not just a hypothetical scenario that an appellate court could overturn a trial court's decision to grant a motion to dismiss, particularly if decided on the grounds of untimeliness or a statutory exemption which are matters of law that are not always straightforward. In the cases of *Kinder Morgan SACROC, LP v. Scurry Cnty.*¹ and in *Montelongo v. Abrea*², the Texas Supreme Court reversed trial courts that incorrectly ruled on the timeliness of a motion. Similarly, the Texas Supreme Court and Texas courts of appeals have overturned trial court rulings that improperly denied motions to dismiss based on incorrect applications of the statutory exceptions. See *Castleman v. Internet Money Ltd.*;³ *MacFarland v. Le-Vel Brands LLC*.⁴ Texas appellate courts are dealing with legal issues to do with timeliness issues and statutory exemptions, some of which have been newly added to the TCPA in 2019. As such, a stay of proceedings is necessary to allow the appellate courts to properly determine these issues of law and avoid unnecessary expense and litigation.

HB 2781 would force parties to litigate the *same* anti-SLAPP case and motion in two courts, *simultaneously*, which is an affront to judicial economy. As drafted, HB 2781 would weaken the protections of the TCPA which provide pivotal protections for news publishers in Texas. Journalists should be free to report on news and matters of public interest without fear that their work will be threatened by meritless court cases and wasteful and unnecessary litigation.

The Alliance respectfully urges you to consider these concerns and amend HB 2781 to address them accordingly.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Daboffy", written in a cursive style.

Danielle Coffey
Executive Vice President & General Counsel
News/Media Alliance

¹ 622 S.W.3d 835 (Tex. 2021).

² 622 S.W.3d 290 (Tex. 2021).

³ 546 S.W.3d 684 (Tex. 2018).

⁴ No. 05-17-00968-CV, 2018 WL 2213913 (Tex. App.—Dallas May 15, 2018, no pet.).



March 30, 2023

Representative Jeff Leach
Chairman of the House Committee on Judiciary & Civil Jurisprudence
Texas House of Representatives
Room GN.11
P.O. Box 2910
Austin, TX 78768
Via Email

Re: Texas SB 896/HB 2781

Dear Chairman Leach:

The Electronic Frontier Foundation respectfully urges you to oppose SB 896/HB 2781, which would negate the automatic stay of a case under existing law if the anti-SLAPP motion to dismiss was determined to be untimely, frivolous, or subject to an exemption. This bill will waste judicial resources.

The Texas Citizens Participation Act, or TCPA, has been one of the strongest laws in the nation protecting citizens against SLAPP lawsuits, in which the legal claims are a pretext for silencing or punishing individuals who speak up on public matters. The TCPA safeguards “the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law” without impairing a person’s right “to file meritorious lawsuits for demonstrable injury.” TEX. CIV. PRAC. & REM. CODE § 27.002.

Since its passage in 2011, the TCPA has protected a wide variety of Texas residents. It has stopped meritless lawsuits, including a [case against a Dallas couple who were sued by a pet-sitting company](#)¹ over a negative Yelp review; a lawsuit against individuals who used Facebook [to complain about a cosmetic medical treatment](#)²; and two lawyers’

¹ “\$1M lawsuit dismissed against Plano couple who gave 1-star Yelp review to pet-sitting company,” The Dallas Morning News, Aug. 30, 2016. Available at: <https://www.dallasnews.com/news/courts/2016/08/31/1m-lawsuit-dismissed-against-plano-couple-who-gave-1-star-yelp-review-to-pet-sitting-company/>

² “Continued Issues with Nondisparagement Clauses in Form Consumer Contracts,” Paul Alan Levy, Public Citizen Consumer Law & Policy Blog, March 29, 2018. Available at: <https://pubcit.typepad.com/clpblog/2018/03/continued-issues-with-nondisparagement-clauses-in-form-consumer-contracts.html>

attempt to unmask [anonymous speakers who posted online comments](#)³ about Texas' family court system.

The existing automatic stay is integral to the TCPA's protections. While the anti-SLAPP motion is pending, all discovery and other hearings or motions (and thus, burdens on the speaker) are required to be stayed, by default. Otherwise, both the underlying SLAPP and the anti-SLAPP motion would be in litigation at the same time.

Unfortunately, we have grave concerns about the provisions relating to the timeliness of motions and to exemptions. Recent Texas Supreme Court cases such as *Kinder Morgan v. Scurry County*, 622 S.W.3d 835 (Tex. 2021) and *Montelongo v. Abrea*, 622 S.W.3d 290, 293-94 (Tex. 2021), show that both trial courts and courts of appeal can easily decide timeliness issues incorrectly.

Similarly, as to statutory exemptions, the Legislature in 2019 added a list of new exemptions to the TCPA—the contours of which are still being sorted out by the courts. *Castleman v. Internet*, 546 S.W.3d 684 (Tex. 2018) (per curiam), shows how difficult TCPA exemptions can be to parse; though the “commercial speech” exemption was part of the original TCPA, courts were still unsure of its meaning years later. *Id.* at ____ (“The Texas courts of appeals are divided on the proper interpretation and application of this exemption.”).

The point is simple. If this bill were law, the underlying SLAPP suit against the speaker would proceed while the speaker was appealing the denial of the anti-SLAPP motion, and ultimately whoever won on appeal would have to go back to get whatever happened at trial undone, and there would be a tremendous waste of judicial and litigant resources and time.

Respectfully,

Lee Tien
Senior Staff Attorney
Electronic Frontier Foundation

³ DeAngelis v. Protective Parents Coalition, No. 02-16-00216-cv. 556 S.W.3d 836 (2018) Available at: <https://www.leagle.com/decision/intxco20180803562>

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By email

March 30, 2023

Representative Jeff Leach

Chair, House Committee on Judiciary & Civil Jurisprudence

Texas House of Representatives

Room GN.11

P.O. Box 2910

Austin, TX 78768

Re: Concerns about HB 2781 and SB 896.

Dear Chairman Leach,

The Reporters Committee for Freedom of the Press and 44 undersigned media organizations write to express concern with the current drafts of HB 2781 and SB 896. If passed, the proposed legislation would deny some litigants a stay pending appeal if their anti-SLAPP motion to dismiss is deemed by the trial court to be untimely, frivolous, or subject to an exemption. This would create an unfair and wasteful two-tiered system for appeals of anti-SLAPP motions under the Texas Citizen Participation Act (“TCPA”), which would still provide a stay pending appeal of anti-SLAPP motions denied for any other reason. The proposed legislation would thus make it easier to force media outlets and journalists, among others, into expensive and time-consuming discovery before an appeals court has a chance to determine whether any TCPA exemptions apply, whether the defendant followed the TCPA’s timeliness requirements, or whether the anti-SLAPP motion was frivolous.

After it passed in 2011, the TCPA became a model for anti-SLAPP legislation in other states. The law allows courts to quickly dismiss meritless defamation and other lawsuits designed to chill speech. Such meritless actions—so-called Strategic Lawsuits Against Public Participation, or SLAPP suits—are routinely filed by parties with deep pockets without viable claims but with the intent to run up legal costs in order to intimidate or chill speech.

Unflinching journalism is essential to expose wrongdoing and hold powerful public figures and officials to account. A free press and accurate news reporting depend upon journalists to identify, investigate, and report out stories without concern that the subjects in the story could sap their newsroom of resources through a meritless court case.

Many state anti-SLAPP laws, including the TCPA, permit interlocutory appellate review when a trial court denies a defendant’s anti-SLAPP motion, meaning a losing party can appeal that order immediately. Without an opportunity for interlocutory appellate review, the parties would

be forced to proceed with expensive and potentially wasteful litigation until they get a ruling on an appealable order. And, if the trial court ends up getting it wrong on an anti-SLAPP motion, there is no turning back the clock. The court and the parties will have already poured time and money into litigating issues in a case that never should have gone forward. Anti-SLAPP laws are meant to allow for early dismissal of meritless lawsuits intended to drain the pockets of innocent defendants. If immediate appellate review of these matters and a stay of proceedings at the trial court were not permitted, that purpose would be seriously undermined. That is, after all, why the TCPA was amended in 2013 to provide for a stay during appeal.

The Uniform Public Expression Protection Act (“UPEPA”), a model anti-SLAPP law drafted by the Uniform Law Commission which the TCPA roughly mirrors, allows for interlocutory appellate review and stays discovery on the issues being appealed. UPEPA § 4, § 9, *available at* <https://perma.cc/YDR3-XQJ8>. With a few narrow exceptions, UPEPA provides that, once the denial of an anti-SLAPP motion has been appealed, *all* proceedings between all parties in the case are stayed. *Id.* at § 4(c). This “protects a moving party from having to *battle related claims . . . at the same time in two different courts. . .* because the defendant should not be required to try claims in the trial court while appealing other claims from the same case in the appellate court.” *Id.* at § 4 cmt. 3 (emphasis added).

HB 2781 and SB 896 would create exactly this problem, but worse: defendants would not only be forced to litigate one case in two courts at the same time, but they would have to litigate *the same claims* in two courts at the same time. If, for instance, a plaintiff argues that the anti-SLAPP law does not apply to its common law fraud claim (an exemption to the TCPA) and the trial court agrees, a defendant who appeals that order will have to simultaneously make its case to the appeals court that the exception does not apply *while it litigates discovery issues associated with that very claim*. And, if its anti-SLAPP motion is denied on some other basis as to a different set of claims, it must litigate those on appeal too. Stays pending appellate review are routine for a reason. Forcing parties to litigate the same issues in an appellate court and a trial court at the same time is wasteful and unfair.

The proposed legislation would deny a stay if a trial court determines an anti-SLAPP motion to be untimely, frivolous, or subject to an exemption. But those determinations are not always easy to make, and trial courts often get them wrong. The Texas Supreme Court has only recently articulated a test to determine when the sixty-day window to bring a TCPA motion is triggered. *Montelongo v. Abrea*, 622 S.W.3d 290, 296 (Tex. 2021); *Kinder Morgan SACROC, LP v. Scurry Cnty.*, 622 S.W.3d 835, 848 (Tex. 2021). That test starts the sixty-day clock over again when a new pleading adds a new party, alleges new facts, or asserts new legal claims “as to those new parties, facts, or claims.” *Montelongo*, 622 S.W.3d at 293–94. These questions—whether a set of facts, claims, or parties are new or largely the same for due process purposes—are not always straightforward for courts to address. Indeed, in both recent cases on the issue, the Texas Supreme Court reversed the lower court decisions. *Id.* at 302; *Kinder Morgan*, 622 S.W.3d at 851. Intermediate appellate courts in Texas have likewise reversed trial court

decisions on timeliness under the TCPA. *See, e.g., Hearst Newspapers, LLC v. Status Lounge Inc.*, 541 S.W.3d 881, 892 (Tex. App. 2017). If the trial court proceedings in those cases were not stayed while these appeals were being decided, the parties and the court would have endured time-consuming, expensive discovery in meritless cases that should have been dismissed early on.

The statutory exemptions in § 27.010(a) cannot always be applied mechanically either. Texas courts have struggled, at times, to interpret them. Indeed, the Texas Supreme Court has described the commercial speech exemption as “no model of clarity.” *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018); *see also State ex rel. Best v. Harper*, 562 S.W.3d 1, 11–15 (Tex. 2018) (discussing the meaning of the term “enforcement action” under the TCPA, which the statute does not define). In 2019, the state legislature added new exemptions to the list, many of which have barely been litigated, so courts have not had the chance to interpret their scope. *See* 2019 Tex. Sess. Law Serv. Ch. 378 (H.B. 2730) (amending Tex. Civ. Prac. & Rem. Code Ann. § 27.010). And courts interpreting these new exemptions have dealt with hard and unclear cases. *See, e.g., Baylor Scott & White v. Project Rose MSO, LLC*, No. 12-20-00246-CV, 2021 WL 3871957 (Tex. App. Aug. 30, 2021) (discussing whether the statutory fraud exemption applies only to a common law fraud claim “or also to a legal action *based on a* common law fraud claim” and whether an unfair competition claim falls within the trade secrets exemption). Frivolousness can likewise be a tough call at times.

Because these questions can be hard to answer, particularly at the margins, Texas trial courts have at times arrived at the wrong result. Denying a stay in this subset of cases would eliminate any margin for error. It would raise the cost of an incorrect trial court ruling exponentially, generating completely unnecessary litigation and clogging trial court dockets.

Moreover, HB 2781 and SB 896 burden journalists in particular. Those invoking the Texas shield law to protect information obtained through newsgathering from discovery will likely end up litigating on three fronts at once: first, appealing a denial of an anti-SLAPP motion, which will often involve a partial stay of trial court proceedings; second, conducting expensive and potentially entirely unwarranted partial discovery for the claims that are not stayed; and third, litigating how much of the plaintiff’s requests for discovery are covered by the Texas shield law. Tex. Civ. Prac. & Rem. Code Ann. §§ 22.021–22.027; Tex. Code Crim. Proc. Ann. arts. 38.11, 38.111. And, if the appeals court ends up reversing and finding that the suit should be dismissed entirely, the latter two will have been unnecessary.

Journalists in Texas, and across the country, occasionally receive significant criticism for their coverage. Angered by reporting perceived as unflattering, those critics may choose to file a lawsuit against a journalist, even if it lacks merit. Anti-SLAPP laws have been enacted all over the country to give journalists and other defendants substantive and procedural protections against suits filed “not with the goal of prevailing on the merits but, instead, of chilling . . . First Amendment activities.” *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 212 (Tex. App. 2014). Media organizations, particularly

small ones, have a strong interest in a protective and procedurally sound anti-SLAPP regime, without which they may not be able to survive.

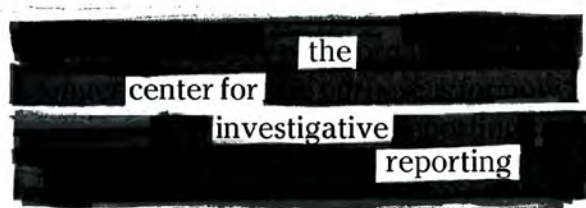
As drafted, HB 2781 and SB 896 will harm journalists in the state by creating a needlessly expensive and burdensome two-tier system for litigating anti-SLAPP motions. We urge you to amend this bill to address these concerns or decline to support it. Please do not hesitate to contact Lisa Zycherman, Deputy Legal Director and Policy Counsel at the Reporters Committee, or Emily Hockett, Technology and Press Freedom Project Legal Fellow, with any questions. They can be reached at lzycherman@rcfp.org and ehockett@rcfp.org.

Sincerely,

Reporters Committee for Freedom of the Press

American Broadcasting Companies, Inc., d/b/a ABC News
The Associated Press
The Atlantic Monthly Group LLC
Axios Media Inc.
BuzzFeed, Inc. d/b/a HuffPost and BuzzFeed News
Cable News Network, Inc.
The Center for Investigative Reporting, d/b/a Reveal
Committee to Protect Journalists
The Dallas Morning News, Inc.
Dow Jones & Company, Inc., the publisher of The Wall Street Journal and Barron's
Foundation for Individual Rights and Expression (FIRE)
First Amendment Coalition
Forbes Media LLC
Fox Television Stations, LLC d/b/a KDFW Fox 4 Dallas; KRIV Fox 26 Houston; KTBC Fox 7 Austin
Freedom of the Press Foundation
Gannett Co., Inc.
Graham Media Group, Houston, Inc. d/b/a KPRC-TV
Graham Media Group, San Antonio, Inc. d/b/a KSAT-TV
Gray Media Group, Inc. d/b/a KBTX, Bryan; KFDA, Amarillo; KLTN/KTRE, Tyler-Lufkin; KOSA, Midland; KSWO, Lawton (Oklahoma) -Wichita Falls; KWTX, Waco; KXII, Sherman
Hearst Corporation
Inter American Press Association
International Documentary Assn.
KTRK Television, Inc.
The Media Institute
Media Law Resource Center
Motion Picture Association, Inc.
National Freedom of Information Coalition
National Newspaper Association

National Press Club Journalism Institute
The National Press Club
National Press Photographers Association
NBCUniversal Media, LLC
The New York Times Company
The News Leaders Association
News/Media Alliance
Penguin Random House LLC
The Philadelphia Inquirer
Pro Publica, Inc.
Sinclair Broadcast Group, Inc. d/b/a KTXS, Abilene; KVII, Amarillo; KEYE, Austin;
KFDM/KBTB, Beaumont; KSCC, Corpus Christi; KFOX/KDBC, El Paso;
WOAI/KABB, San Antonio
Society of Professional Journalists
Student Press Law Center
TEGNA Inc.
Texas Tribune
The Washington Post



March 30, 2023

Rep. Jeff Leach
District 67
300 E. Davis St., #170
McKinney, Texas 75069

Dear Mr. Leach,

I write on behalf of The Center for Investigative Reporting (CIR), the country's oldest nonprofit investigative newsroom that publishes a weekly radio show, "Reveal" on six hundred stations across the country and has received countless journalism awards ranging from multiple News and Documentary Emmys, Edward R. Murrow Awards, Alfred I. DuPont Awards, and George Foster Peabody Awards, as well as being Pulitzer Prize finalists and an Academy Award nominee. I write because CIR is greatly concerned by how SB 896/HB 278 will significantly undermine anti-SLAPP protections in Texas if it is passed in the coming days. CIR urges you oppose this bill.

As written, SB 896/ HB 278 will stymie citizens and newsrooms in Texas from more easily dismissing frivolous lawsuits meant to silence critical speech. This bill removes the stay of a case if the anti-SLAPP motion is determined to be untimely, frivolous, or subject to an exemption. This rule has the catastrophic result of imposing two-tier litigation throughout the state. Media organizations, particularly small ones, like ours would not be able to sustain such a costly, duplicative legal procedure. We speak from experience.

For five years, starting in 2016, CIR was subject to a frivolous defamation lawsuit filed in federal court, that the district court and U.S. Ninth Circuit Court of Appeals both dismissed. *Planet Aid, Inc. v. Ctr. for Investigative Reporting*, No. 3:17-cv-03695, 2021 WL 1110252 (N.D. Cal. Mar. 23, 2021), *aff'd* 44 F.4th 918 (9th Cir. 2022); *see also* Mike Masnick, *Some Good News: Planet Aid Agrees to Pay \$1.9 Million to Settle its SLAPP Suit Against Reveal Even with California's Exceptionally Strong Anti-SLAPP Statute*, TECH DIRT, Oct. 20, 2022, <http://bit.ly/3JY5IUE>. Even with California's exceptionally strong anti-SLAPP statute, our newsroom suffered significant deleterious effects and financial hardship from this lawsuit. *See* D. Victoria Baranetsky and Alexandra Gutierrez, *OP-ED: What a costly lawsuit against investigative against investigative reporting looks like*, Mar. 30, 2021, COLUMBIA JOURN. REV., <http://bit.ly/42SElyw>. We anticipate that newsrooms subject to this new Texas law would be harmed even more by this system permitting costly and potentially vexatious litigation. *See* Masnick *supra*. We strongly

advocate against SB 896/ HB 278 so that other newsrooms are not subject to the same needless harms.

Newsrooms like ours are not the only entities subject to risk from this law. Margaret Sullivan, *The Problem With Cheering for the Dominion Lawsuit Against Fox News*, THE WASH. POST, April 1, 2021, <https://wapo.st/3G3fK02>. If this bill were passed larger newsrooms, the public and judiciary would also suffer immensely from an unnecessary waste of resources as trial proceedings can continue concurrently with related appeals. Even in our case, the judiciary was taxed with years of unnecessary filings, including jurisdictional motions, discovery filings, and appellate briefing. If this Texas law is passed, those kinds of burdens would only be heaped on the additional cost of potential duplicative litigation. The prevailing party on appeal would have to circle back to the trial court to undo what was done, further wasting judicial and litigant resources – to no one's benefit.

For these important reasons, this bill should be opposed.

Sincerely,

A handwritten signature in black ink, appearing to be 'D. Victoria Baranetsky', written over a horizontal line.

D. Victoria Baranetsky
General Counsel
(201) 306-4831
The Center for Investigative Reporting



March 31, 2023

Via Electronic Mail

Chairman Jeff Leach
House Judiciary Committee
Room GN.11
P.O. Box 2910
Austin, TX 78768

Dear Chairman Leach:

The undersigned Better Business Bureaus serving Texas and the International Association of Better Business Bureaus write to express our concerns with House Bill 2781, and to support amending the bill. As currently written, HB 2781 would endanger the important free-speech protections in **the Texas Citizens Participation Act (“TCPA”)**. Weakening those protections could harm the thousands of Texas consumers who provide reviews of local businesses on BBB websites and the Texas consumers and trustworthy businesses who rely on BBB to identify untrustworthy marketplace practices.

About BBB

The BBBs serving Texas are part of a network of nonprofit organizations throughout North America with the common mission of advancing marketplace trust. For more than 100 years, consumers and businesses have relied on BBB self-regulation to set standards for marketplace trust, encourage best practices, identify role models, and call out substandard marketplace behavior. Trustworthy businesses know BBB levels the playing field by alerting consumers to the practices of unethical competitors, and consumers know BBB is an unbiased source of pre-purchase information and fraud alerts.

BBB Business Profiles and other publications include a wealth of information to help consumers make wise buying decisions. BBB issues press releases to advise consumers about significant warning signs or indicators of fraud. BBB publishes a rating that **represents BBB’s opinion of how a business will interact with its customers**. BBB publishes alerts describing information we believe to be important for consumers when deciding whether to transact with a business, such as patterns of consumer complaints, bankruptcy filings, manipulation of consumer reviews, or legal actions by governmental agencies. BBB also allows consumers to publish the narratives of their complaints and

reviews, remaining neutral in these public conversations between a business and its customer to retain the protections provided by Section 230 of the Federal Communications Decency Act.

To effectively serve the business and consumer communities and honestly call out questionable or fraudulent marketplace behavior, BBB often publishes facts or reports of consumer experiences that some businesses find objectionable. Some businesses go so far as to threaten or initiate legal action to try to coerce BBB to remove an alert, rating, or consumer complaints and reviews. Although BBBs are nonprofit organizations with limited resources, we also recognize that we must maintain the integrity of the information we publish and cannot give in to intimidation. For these reasons, we vigorously defend our right to publish important information that protects consumers and trustworthy businesses.

The TCPA is an essential tool that places Texas BBBs in a stronger position to fight intimidation. The TCPA increases costs for businesses who file unwarranted lawsuits and allows BBBs to recover litigation costs that we use to fund our nonprofit mission. TCPA cases send a warning to untrustworthy businesses that attempting to sanitize an accurately unfavorable BBB report can be costly.

Consumer Reviews

Consumer reviews provide the public with important information regarding the experiences of actual customers and their interactions with local businesses. The best **reviews provide accurate, unvarnished information about a consumer's experience.** Maintaining the integrity of these reviews—both positive and negative—helps prospective customers make informed purchasing decisions and distinguish between trustworthy and untrustworthy businesses.

In some cases, companies who receive a bad review try to bully consumers into revising or removing these reviews. While these reviews are typically protected under the law, a company may nonetheless file a legal action to intimidate the consumer into rescinding their review. The TCPA is vital to protecting these consumers when businesses attempt to chill their speech. Similarly, businesses that respond to consumer reviews could face legal action for their comments in response. The TCPA recognizes the harm that this may **cause, and specifically applies to speech “related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.”**¹

¹ TEX. CIV. PRAC. & REM. CODE § 27.010(b)(2).

Chairman Jeff Leach
House Judiciary Committee
March 30, 2023
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HB 2781

Because BBB's marketplace impartiality is essential to our nonprofit mission and benefits all consumers and trustworthy businesses, BBB is scrupulously non-partisan and rarely takes a position supporting or opposing particular legislation. However, we believe we must express our concerns about HB 2781. Revising the law to eliminate the automatic stay could force consumers, small businesses, and BBBs to incur ongoing legal costs as they seek redress of an erroneous decision by a trial court. Recovering these fees is uncertain, and even in the best case, requires a consumer, small business, or BBB to pay out-of-pocket until the case is ultimately resolved.

Faced with these mounting legal bills, consumers and small businesses may simply relent and remove their comments. Increasing the costs of defending unjustified lawsuits would encourage unscrupulous businesses to threaten BBBs with defamation claims to remove true but unfavorable information that consumers need to know. This in turn would cause BBBs to be unnecessarily cautious about publicizing untrustworthy marketplace behavior, leaving trustworthy businesses to be undercut by dishonest competitors and withholding information that would help Texas consumers stay safe from unethical operators and scams. The TCPA was designed, in part, to prevent these outcomes.

These concerns are not hypothetical. BBBs and IABBB frequently receive legal demands relating to consumer reviews and the accurate reports published in Business Profiles.

The BBBs serving Texas and IABBB support amending the bill to eliminate subsections (c-1)(1) and (c-1)(3). This would allow for courts to proceed with cases when a TCPA motion is determined to be frivolous, but maintain the anti-SLAPP protections for consumers, businesses, and BBBs when a trial court makes an error related to timeliness or incorrectly applies an exemption.

Thank you for your consideration.

(Signatories on the following page.)

Chairman Jeff Leach
House Judiciary Committee
March 30, 2023
Page 4

Best regards,

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Kip Morse
Chief Executive Officer
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Don't Make A Mess Out Of The Texas Citizens Participation Act

F forbes.com/sites/jayadkisson/2023/03/27/dont-make-a-mess-out-of-the-texas-citizens-participation-act

March 27, 2023

Jay Adkisson

Contributor ⓘ



Mar 27, 2023, 08:57pm EDT

The TCPA is found at Texas Civil Practice and Remedies Code § 27.001, *et seq.* The TCPA basically provides that if one party files an action some sort of action which infringes upon certain constitutional rights of another party, that second party (movant) may file a motion to dismiss the action of the first party (respondent) in certain circumstances.

I will not go into the entire operation of the TCPA, but will instead here focus upon only the part that is relevant to the proposed amendment.

If the movant's motion to dismiss is unsuccessful, then the movant may appeal under § 27.008 of the TCPA and the corresponding § 51.014(a)(12) that provides for an interlocutory appeal of a trial court's denial of a motion to dismiss. Very importantly, § 51.014(b) provides that while this appeal is ongoing, all other proceedings at the trial court are stayed pending the appeal.

The stay pending the resolution of the appeal is necessary to avoid potential wasted effort by the trial court and the litigants. Otherwise, if the litigation were to proceed before the trial court while the appeal was ongoing, but the appeal later reversed the denial of the TCPA motion, everything that the trial court and the litigants would have done in the interim would be totally wasted activity.

Of course, the respondent who defeated the motion to dismiss wants to get on with their case, but the truth is that the stay pending appeal is probably not going to be very long anyhow, because § 27.008(b) provides that "[a]n appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005." So, if there is a delay in the litigation, it should be only a short one and thus there is no need for a relief from the stay.

The bottom line is that there is nothing wrong with this stay during appeal as it currently exists in the statutes. It doesn't need fixing. Nevertheless, in [SB896/HB2781](#) the Texas legislature is considering tinkering with § 51.014 to limit the application of the stay pending

appeal to three circumstances:

First, where the motion to dismiss failed because it was untimely under § 27.003(b);

Second, where the motion to dismiss not only failed, but was also deemed to be either frivolous or assert solely for the purposes of delay, per § 27.009(b); or

What Are the Duties of A Trustee?

Third, where the motion to dismiss was denied because an exemption to the authorization of the motion existed (such as commercial speech, wrongful death claims, insurance disputes, evictions, etc. — Texas has a bunch of such exemptions) under § 27.010(a).

The reason for this tinkering is implicit: If the TCPA motion to dismiss does not seem like a close call, there is no reason to delay the litigation while the movant (who lost the motion to dismiss) prosecutes what is likely a fruitless appeal.

Except that there is.

The hard truth is that trial courts frequently get things wrong. So frequently, in fact, that states such as Texas have full-time appellate courts with numerous districts to review purported errors by the trial courts. Particularly where the state courts are asked to consider matters with constitutional implications — issues which, unlike the federal courts, they rarely deal with — the state courts have a tendency to err. Plus, once a trial court has made one misjudgment, the effect is usually to snowball and result in other bad rulings that follow, such as sanctioning a party who was right in the first place.

Thus, long ago it was determined that it did not make any sense for litigation at the trial court level to go on at the same time that there was an appeal pending, for the reason that if the appeal ends in a reversal then whatever the courts and the parties were doing up to that point in the trial court becomes a giant pile of wasted judicial resources and efforts. This is the very reason why § 51.014(b) stays activity at the trial court level for interlocutory appeals. Such is even more important in the Anti-SLAPP context, such as with the TCPA, where one of the primary purposes of such statutes in the first place is to conserve the judicial resources of the courts and the parties — and particularly the party against whom abusive litigation has been brought.

However, the single counterargument against allowing the litigation to go forward during the appeal as in the proposed Texas amendment is this: The appeal is not going to last very long anyway, because of the mandate of § 27.008(b) that the appellate court must resolve a TCPA appeal expeditiously. Because the appeal period will be short, there is really no compelling reason to risk wasting judicial resources and the parties' resources in the meantime. The proposed amendment to the TCPA is a solution in search of a problem.

It also must be considered that what the Texas amendment really attempts to do is to negate what amounts to a frivolous appeal by a party that has lost its TCPA motion. However, there is already a remedy for that, which is that the Texas Court of Appeals may itself award monetary sanctions for a frivolous appeal. Thus, if a party files a bogus appeal of the denial of their TCPA motion, the Court of Appeals may award appropriate monetary sanctions, not just against the party who brought the appeal but also against the counsel who filed that appeal. This is a significant deterrent to the bringing of such appeals.

But let us consider what might be done in these circumstances if somebody really just wanted to do something for the sake of doing something. It would not be the proposed Texas amendment. Instead, the appropriate solution would be to allow the Court of Appeals the discretion to lift the stay under § 51.014(b) upon the request of a party or upon its own initiative in the described circumstances.

What happens with all appellate courts, including the Texas Court of Appeals, is that the particular panel makes a decision on the outcome of the appeal pretty quickly. The delay in the Court of Appeals issuing its ruling is that it takes time to write the opinion to support the ruling. If the Court of Appeals knows that it is going to rule to deny the appeal, then the Court of Appeals at that time could lift the stay at the trial court level in anticipation of their future formal decision denying the appeal.

The problem of the stay pending appeal is not a trial court issue, and should not be resolved by changing what goes on with the trial court, but instead is an appellate issue that should properly be resolved (if at all) by allowing the Court of Appeals the option of terminating the stay. One thing is certain: The proposed amendment to the TCPA that automatically terminates the stay is not the way to deal with this issue – if, indeed, an issue actually exists at all.

Jay Adkisson

I am a partner of Adkisson Pitet LLP and licensed to practice law in Arizona, California, Nevada, Oklahoma and Texas.

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April 4, 2023

Via Electronic Mail

Chairman Jeff Leach
House Judiciary Committee
Room GN.11
P.O. Box 2910
Austin, TX 78768

Chairman Leach:

Nexstar is a leading diversified media company that produces and distributes engaging local and national news, sports, and entertainment content across television, streaming and digital platforms, including nearly 300,000 hours of original video content each year. Nexstar owns America's largest local broadcasting group comprised of top network affiliates, with 200 owned or partner stations in 116 U.S. markets reaching 212 million people.

Nexstar's corporate headquarters is located in Irving, Texas, and we have extensive broadcasting operations throughout the state. We own 18 television stations serving 13 markets across Texas, from El Paso to Dallas, and Houston to Brownsville, and we employ more than 1000 Texans. Collectively, our TV stations reach more than 10 million Texas residents and provide live coverage of such events as Governor Abbott's annual "State of the State" address and debates between candidates for statewide office. Our stations are also extremely involved in local Texas communities, helping to raise money for worthy charitable causes, volunteering in the community, and publicizing scores of public service projects that benefit our viewers such as KMID-TV's "Permian Basin Gives Day" in Midland, and KFDX-TV's promotion of the "Alzheimer's Walk" in Wichita Falls.

We write to express our concerns with House Bill 2781. As currently written, HB 2781 would endanger the important free-speech protections in Texas's anti-SLAPP statute and thwart one of the law's core purposes of judicial economy. Weakening those protections stands to have a particularly detrimental effect on media organizations and our ability to keep Texans informed about matters of public concern.

HB 2781 would eliminate the automatic stay of court proceedings when a motion to dismiss is found to be frivolous, untimely, or subject to a statutory exemption. While we agree that a frivolous motion should not receive the benefit of an automatic stay and such rulings are up to the trial court's discretion, removing the stay for denials based on timeliness and applicability of statutory exemptions, both matters of law that need immediate review, could subject news media

organizations to needless legal expenses simply for covering important events in their communities.

Determining the timeliness of a motion to dismiss can be difficult in some cases especially when amended pleadings are involved as in the cases of *Kinder Morgan SACROC, LP v. Scurry Cnty.*¹ and in *Montelongo v. Abrea*.² In both cases, the Texas Supreme Court reversed trial courts that incorrectly ruled on the timeliness of a motion. Determinations of timeliness can also present a problem when determining the way in which statutory abatement periods interact with the anti-SLAPP deadlines. For instance, in the case of *Hearst Newspapers, LLC v. Status Lounge Inc.*, the trial court misapplied the law by insisting the anti-SLAPP motion should have been filed during the abatement period, something which had to be corrected through the appeal process.³ Because the newly added DTPA exemption has a similar abatement period, it is a prime candidate for confusion by trial courts moving forward. Until these issues can be sorted out by the appellate courts, a stay of the proceedings is the better course of action because it promotes judicial economy and saves on unnecessary time and expense by litigants.

Similarly, trial courts have, at times, struggled to correctly apply the statutory exemptions. The Texas Supreme Court and Texas courts of appeals have overturned trial court rulings that improperly denied motions to dismiss based on incorrect applications of the exceptions. See *Castleman v. Internet Money Ltd.*;⁴ *MacFarland v. Le-Vel Brands LLC*.⁵ Further, because eight new exemptions were added to the anti-SLAPP statute in 2019, Texas courts are just now starting to grapple with the contours of the new exemptions, and a change in the law would be premature at this time.

Eliminating the stay in these cases would leave all Texans without the protections of the statute, even when the trial court has obviously erred in applying the law. This would severely undercut the free-speech protections in the statute, leaving media organizations vulnerable to the legal process when covering controversial issues.

HB 2781 also stands to cause confusion within the court system. Removing the stay would allow trial court proceedings to continue, even as the appellate courts review the denial of a motion to dismiss. When a trial court has erred—as in the above cases—the prevailing party on appeal will

¹ 622 S.W.3d 835 (Tex. 2021).

² 622 S.W.3d 290 (Tex. 2021).

³ 541 S.W.3d 881 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

⁴ 546 S.W.3d 684 (Tex. 2018).

⁵ No. 05-17-00968-CV, 2018 WL 2213913 (Tex. App.—Dallas May 15, 2018, no pet.).

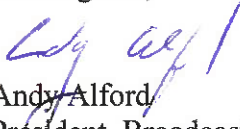
Chairman Jeff Leach
House Judiciary Committee
March 24, 2023
Page 3

be forced to unwind any proceedings that occurred in the trial court. Courts typically seek to avoid these kinds of parallel proceedings, because of the havoc they cause for litigants and judges.

We had the pleasure of working with your office in 2019 as part of the Protect Free Speech Coalition, and we, once again, appreciate your consideration of our concerns. We respectfully ask that HB 2781 be amended to focus only on frivolous motions to dismiss. Eliminating the stay in those frivolous cases would significantly improve the statute, without the collateral consequences for news media organizations and the Texans we strive to serve.

Thank you for your consideration.

Best regards,



Andy Alford
President, Broadcasting

April 19, 2023

Media Liability Advisory Services, LLC
14104 Dearborn Street
Overland Park, KS 66223

To: Representative Jeff Leach
Chair, House Committee on Judiciary & Civil Jurisprudence
Texas House of Representatives
Room GN. 11
P.O. Box 2910
Austin, TX 78768

Via Email

Dear Chairman Leach,

I am writing to express my concern with proposed legislation, SB 896, and the adverse economic impact this legislation could have on the affordability and availability of Media Liability insurance if such amendments are adopted.

I spent my thirty-nine-year career in the insurance business underwriting, marketing and managing business for five insurance companies until I retired in 2020. My first five years were spent in the general Property/Casualty Commercial Lines sector. The next thirty-four years I dedicated my career to the specialized area of Media Liability insurance which provides coverage for claims arising from defamation, infringement of copyright or trademark, invasion of privacy, errors and omissions, and related torts.

Media Liability insurance is known as the professional liability/errors & omissions coverage for media businesses including publishers, broadcasters, advertising agencies, internet/online publishers and others engaged in communications to the public. It is akin to Lawyers Malpractice insurance for attorneys or Medical Malpractice insurance for physicians.

Currently, I am Principal of Media Liability Advisory Services, LLC which provides Media Liability consulting services to insurance companies, insurance brokers and insurance consumers.

Anti-SLAPP statutes serve a much-needed role with respect to the intersection of Media Liability insurance and the First Amendment. When implemented properly, Anti-SLAPP statutes are tools that support the free flow of speech and distribution of information by cutting short lawsuits brought by individuals or entities intent on quashing opposing views by filing meritless legal actions, thereby subjecting defendants to unnecessary, and often onerous, legal costs.

Media Liability insurance is offered by only a limited number of insurance companies when compared to the thousands of insurance companies which offer commercial lines, personal lines, accident & health, and life insurance coverages, (i.e. non-specialized insurance products). As such, the Media Liability underwriting process and the handling of claims is highly specialized.

The underwriting process, (i.e. the process of accepting or rejecting a risk, and setting the terms, conditions and premium under which a risk will be accepted,) involves an analysis of many factors, including but not limited to, editorial experience, type/gist of content, claim history and legal climate, to name a few.

Media Liability claims can be very expensive. Covered costs are incurred at the trial court level, as well as the appellate level. In the majority of claims it is only legal costs that are incurred, without any judgment or settlement. On the whole, legal costs for an average claim generally far outweigh the cost of any judgment or settlement.

Anti-SLAPP statutes allow for the quick disposition of frivolous and meritless claims, prevents the wealthy, influential and others from “bullying” those that have opposing views with unnecessary and costly litigation, and aids in keeping already high legal costs incurred in defending such claims in check. SB 896 will only serve to increase the cost of litigation because by removing the automatic stay at the trial level, now two sets of litigation will run simultaneously, one at the trial level for the underlying claim and the other incurred at the appellate level as the parties prosecute or oppose the ensuing appeal of the trial court’s ruling on the Anti-SLAPP motion.

Insurance companies collect data on their various product portfolios and evaluate the data in a host of micro and macro ways as part of their underwriting, claims and actuarial functions. Because legal expense is a key component of Media Liability claims, insurance companies pay particular attention to claim trends and legal costs and litigation climate on state-by-state basis. The laws of states and associated trends and legal costs resulting from such laws typically place a state in category referred to as a “Favorable Jurisdiction” or “Unfavorable Jurisdiction” which is a component utilized to increase or decrease premium when determining the final premium for a risk. It also can possibly determine whether an insurance product continues to be available in a particular jurisdiction.

The adoption of SB 896 could result in two primary negative outcomes for Texas insurance consumers. First, over time, once the limited number of insurance companies that offer Media Liability insurance notice the increased cost of legal expense in Texas as a result of SB 896, the premiums charged to Texas policy holders will likely increase. On a worst case scenario, insurance companies could withdraw from writing Media Liability insurance in Texas fearing they will not be able to offer their products at a fair price in order to make a profit because of the additional legal expense incurred due to SB 896.

Respectfully, for the reasons described above, I ask that the Texas Legislature reject SB 896.

Sincerely,

Louis Scimecca
Principal
Media Liability Advisory Services, LLC
LS.MLASLLC@gmail.com

GUEST COLUMN: Protect free speech: Don't mess with Texas' anti-SLAPP law

By Will Creeley Apr 24, 2023



Will Creeley



When it comes to criticizing the powerful or politically connected, the First Amendment protects the little guy. No matter who you are or how much money you have in the bank, you have the right to speak your mind. Because the Founders knew all too well the danger of granting the government the power to decide who can and cannot speak, the First Amendment was designed to shield speakers from government retribution.

But these days, the government isn't the only Goliath, and direct censorship isn't the only way to silence dissent. Over time, the rich and powerful learned a new way to shut up their detractors: forcing them to fight off flimsy lawsuits. By burying critics in a blizzard of costly litigation, would-be censors were able to increase the financial stakes of speaking out — even when the claims filed weren't worth the paper they were printed on.

These strategic lawsuits against public participation — SLAPPs, for short — threaten our national commitment to freedom of expression and an informed citizenry. What good are First Amendment rights if exercising them means having to shell out for a lawyer to defend

against a meritless lawsuit?

So in 2011, former Governor Rick Perry signed “anti-SLAPP” legislation, the Texas Citizen Participation Act, into law. It allows Texans named in lawsuits to secure quick dismissals from state courts if the claim against them is based on their exercise of First Amendment rights, while still allowing plaintiffs who can demonstrate they have meritorious claims to proceed.

Put simply, the TCPA allows a speaker threatened by a bogus suit to ask the court for a quick reality check: Are the claims against me legitimate, or is the plaintiff just trying to shut me up? If it's the latter, the court can save defendants a lot of time and money with a speedy dismissal, preserving their ability to speak their minds without fear of going broke.

Texas should be proud to be a national leader in protecting the rights of its residents to stand up and speak out. Other states nationwide have looked to the TCPA in passing their own anti-SLAPP laws. But a proposed amendment to the TCPA now making its way through the state legislature, SB 896, would seriously undermine the law's vital protections.

The TCPA arms innocent Texans with the means to fight back by filing an anti-SLAPP motion before spending a fortune on legal fees in pre-trial filings and discovery. Because protecting free speech is so important, if a court rejects a defendant's anti-SLAPP motion, the TCPA allows for an immediate appeal — and while it's being heard, the proceedings are stayed. That pause in the action spares defendants from having to fight off a potentially meritless lawsuit in two courts at the same time.

But SB 896 would change that, denying defendants a stay when the court deems their anti-SLAPP motion untimely, frivolous, or subject to an exemption. That tweak might sound reasonable at first blush. But determining whether an anti-SLAPP is untimely, frivolous, or exempt involves tough questions of law — questions that trial courts regularly answer incorrectly.

Deciding whether an anti-SLAPP motion is “frivolous” or exempted by statute is no cakewalk for judges. It involves close questions in an evolving area of the law. and even what one might assume to be the most straightforward grounds for denial — timeliness — has proven tricky. In every Texas Supreme Court ruling on timeliness, the lower court’s determination was reversed.

Add it up, and there’s a real chance a trial court’s anti-SLAPP denial won’t stand up after review.

So requiring a speaker to argue these questions on appeal while simultaneously proceeding with discovery in trial court means they’re wasting time and racking up billable hours on two fronts, fighting what might well prove to be a nonsense lawsuit. Even if the speaker wins on appeal, they’ve still lost time and treasure they shouldn’t have, just for exercising their First Amendment rights. That’s exactly the result the TCPA was meant to prevent.

This isn’t an obscure legal threat. If passed, SB 896’s amendment to the TCPA would have real-world consequences for everyday Texans across the political spectrum who dare to criticize the powerful or wealthy. and no matter what news outlet you rely on, journalists are prime targets for lawsuits filed by powerful interests wishing they’d write about something else. In today’s balkanized political climate, small, independent outfits on the right and the left are particularly vulnerable.

The First Amendment protects everyone’s right to participate in public debates, not just those with money or power. The TCPA bulletproofs the exercise of that right against bad-faith litigation from would-be censors. Because it would gut the TCPA — a powerful protection for all Texans — lawmakers should resoundingly reject SB 896.



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April 24, 2023

TO: The Honorable Chairman Leach, Vice-Chair Johnson, and Members of the Committee

RE: Senate Bill 896 (Relating to the Discovery Stay Under the Texas Citizen's Participation Act).

My name is Tom Leatherbury, and I am a trial and appellate lawyer with over 40 years' experience in defending defamation lawsuits and handling cases involving free speech and other First Amendment issues, including issues under the Texas Citizens Participation Act. After a number of years in large law firms, I am a solo practitioner, and I am also the Director of the First Amendment Clinic at SMU Dedman School of Law. I write today on behalf of the Freedom of Information Foundation of Texas and the Texas Press Association. I am a past-President and former board member of the Freedom of Information Foundation of Texas.

I am speaking out against two provisions in Senate Bill 896, which would amend the interlocutory appeal statute to eliminate the appellate discovery stay when the trial court denies a motion to dismiss an action under the Texas Citizens Participation Act under certain circumstances.

We are not opposed to proposed (c-1)(2), which would eliminate the discovery stay when the trial court finds a TCPA motion to dismiss was frivolous or was filed solely intended to delay. This would be consistent with Texas Rule of Appellate Procedure 45, which allows a prevailing party to recover "just damages" if the Court of Appeals determines an appeal is frivolous. We are opposed to the elimination of the discovery stay in proposed (c-1)(1) when the trial court denies a TCPA motion to dismiss as not timely filed and in proposed (c-1)(3) when the trial court denies a TCPA motion because the action is exempt from the Act.

First, a party opposing a TCPA motion to dismiss can obtain discovery upon a showing of good cause, and, in my experience, whenever a TCPA movant raises issues about intent or state of mind or whenever there is another, genuine material factual dispute, trial courts routinely lift the stay and grant discovery. *Dallas Morning News v. Hall*, 579 S.W.3d 370, which I argued and won in the Texas Supreme Court, was just such a case.

We oppose subsections (1) and (3) in the bill because trial courts sometimes get it wrong. And since 2011, the lawbooks are filled with cases where either a court of appeals or the Texas Supreme Court reversed the trial court's denial of a TCPA motion to dismiss. The elimination of the discovery stay when the trial court finds the motion was frivolous or filed solely to delay is broad enough to cover the circumstances in (1) and (3) - motions that are clearly not timely filed and motions in actions that are clearly exempt from the TCPA's coverage.

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On (c-1)(1), the calculation of whether a TCPA motion to dismiss was timely filed seems simple enough, but the *Status Lounge* case from the Houston 14th Court of Appeals (*Hearst Newspapers, LLC v. Status Lounge, Inc.*, 541 S.W.3d 881) shows that it is not. It was not so simple in that case because of the interplay between the TCPA motion filing deadline and the abatement period mandated by the Defamation Mitigation Act, the Texas retraction statute. The *Kinder Morgan Sacroc, LP v. Scurry County* case from the Texas Supreme Court, 622 S.W.3d 885, is another such case, where the TCPA was triggered when the plaintiff amended its pleadings. The trial courts got it wrong in those cases, and the appellate courts reversed. The proposed bill would have required the parties to litigate the case simultaneously in the appellate courts and in the trial court for over a year, with the consequent waste of time and money for the parties and the courts.

On (c-1)(3), while there are lots of appellate decisions construing the TCPA, there is scarce case law on a number of the exemptions, requiring the trial courts to answer questions of first impression without any guidance from the appellate courts. A number of the exemptions were just added in 2019 and have not been interpreted by the appellate courts. Other exemptions, such as the Commercial Speech Exemption, have been interpreted only a few times by appellate courts. Just because the law is uncertain, the parties should not be required to move forward in two forums simultaneously.

Additionally, the discovery stay should be maintained in all cases but those in which the TCPA motion is frivolous or filed solely for delay because it shields usually under resourced parties from having to engage in very costly and time-consuming discovery before an appellate court has graded the trial court's papers. The discovery stay conserves the parties' and the judiciary's resources. The discovery stay should be maintained because it promotes judicial efficiency and economy and avoids the possibility of multiple, simultaneous appellate proceedings in the same case. If the trial court denies the TCPA motion, the movant will file an appeal of that decision and will be responding to and taking discovery in the trial court. If one of the parties is dissatisfied with a trial court discovery ruling, they might have to file a mandamus proceeding, and so they would be litigating the case on three fronts - two on appeal and one in the trial court.

I just received a proposed Committee substitute bill and will submit comments on this substitute through the portal later today. At first review, the substitute compounds the problems of the original bill by imposing additional burdens on the parties and the appellate courts and multiplying litigation. Finally, it bears emphasizing that this proposed bill will generally not apply to cases in which media companies are defendants. Rather, it will apply more frequently in cases where individual Texans or Texas companies are sued to stifle and to chill their freedom of speech, their right to petition, or their right to association. Those Texans deserve the right to have an appellate court decide whether the TCPA applies before they have to engage in full-bore discovery.



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I thank the Committee for your time and your consideration and urge you to eliminate subsections (c-1)(1) and (c-1)(3) from Senate Bill 896.

Respectfully submitted,

/s/ 

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88th Legislature Civil Society Judicial Statewide News Reform to Texas Anti-SLAPP Law Faces Criticisms of ‘Weakening Free Speech Protections’

Supporters are concerned the law is being abused and needs reform, but opponents say those reforms as written jeopardize the law’s free speech protections.

MATT STRINGER

April 25, 2023

The Texas Citizens Participation Act (CPA) has been described as one of the broadest protections in the nation preventing civil litigation from having a “chilling effect” on free speech. Now, First Amendment organizations are warning that pending legislation in the Texas Legislature will strip key protections in the CPA, resulting in serious unintended consequences to free speech and other First Amendment rights.

The CPA is Texas’ version of anti-Strategic Lawsuits Against Public Participation (SLAPP) laws that prevent litigation, such as a defamation lawsuit, from being used to silence someone from exercising their First Amendment-protected rights, including speech, assembly, the press, association, and petition.

According to the Reporters Committee for Freedom of the Press, defendants may file a motion under the CPA to dismiss a lawsuit against them if the lawsuit pertains to their engaging in constitutionally protected activity; while the court reviews the motion, the trial court proceedings are stopped.

This prevents costly legal processes from occurring until the motion to dismiss is ruled upon, even at the appellate level, preventing the defendant from having to fight litigation on two fronts simultaneously.

Senate Bill (SB) 896 by Sen. Bryan Hughes (R-Mineola) and its companion House Bill (HB) 2781 by Rep. Jeff Leach (R-Plano) would amend the CPA, which the lawmakers say is “now being abused to stop legitimate legal claims and to delay proceedings” in other court cases.

According to a statement of intent on SB 896, the legislation would allow a trial court proceeding to continue if a judge rules against a motion to dismiss the case under the CPA and determines the motion was not timely filed, was frivolous, or that the case doesn’t pertain to one of the protected activities — even if the motion to dismiss is under appeal.

Supporters of the bill say abuse of motions to dismiss under the CPA is being used in cases that do not pertain to protected activities, depriving those litigants of other constitutional rights, including a speedy trial process.

Opponents say, however, the bill as worded does not achieve those reforms without severely damaging the First Amendment protections the CPA is intended to provide.

“The unintended consequences of SB 896 are vast and grave in at least four different ways,” nationally recognized First Amendment attorney Laura Prather told The Texan.

Prather alleges the first problem with the bill gives judges the power to discriminate against or penalize a “voice they disagree with” by issuing a dismissal that would allow the trial to proceed while the motion is appealed. Secondly, she says the bill would result in clogging the judicial system by forcing trial courts to deal with proceedings that an appellate court could ultimately dismiss.

Prather’s third point strikes at the heart of the CPA, which is to prevent costly litigation used to chill First Amendment rights, forcing defendants to fight in up to three legal fronts at a time. She stated that the bill “is exactly contrary to the purpose of the Texas Citizens Participation Act.”

Lastly, she said increased litigation costs will result in an increase in media liability insurance premiums, which could result in insurance companies pulling out of that market in the state entirely.

Other organizations have expressed opposition to the bill as well, including the Texas Press Association, the Texas Association of Broadcasters, and the Texas Freedom of Information Foundation.

The News Media Alliance (NMA), which represents some 2,000 media organizations nationwide, published a letter to Leach last month expressing their concern about his bill, writing that it would “weaken the vital free speech protections” encompassed in the CPA.

“The news and magazine media industries in Texas rely on the protections of the CPA to ensure that they can provide communities in Texas with valuable, timely, and quality journalism,” the NMA wrote.

On the other hand, Texans for Lawsuit Reform (TLR) has taken a more supportive stance on the legislation, saying this issue is one where competing constitutional rights are at play.

TLR spokesperson Lucy Nashed told The Texan that “in some cases, the plaintiff’s lawsuit has nothing to do with the First Amendment, but the current statute allows the defendant in that case to interfere with the plaintiff’s Seventh Amendment and Texas Constitutional right to a trial by jury and access to a court. In other words, there are competing constitutional rights at play.”

“As written, a defendant can file a motion to dismiss under the SLAPP statute on the eve of trial, or file a motion to dismiss a case that is plainly outside the scope of that law, and then appeal the trial court’s correct decision overruling that motion,” Nashed said, adding the appeal can delay the case unfairly for months or years and “interferes with the other person’s right to have a dispute decided by an impartial jury in a reasonable amount of time.”

SB 896 passed the Texas Senate with unanimous support in March and is now set for a public hearing Wednesday in the House Judiciary and Civil Jurisprudence Committee.

Neither Hughes nor Leach’s office responded to media requests for this story.



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Jeff Leach, Chairman
Committee on Judiciary & Civil Jurisprudence
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910
Via email: jeff.leach@house.texas.gov

RE: Senate Bill 896 (relating to the automatic stay of proceedings in TCPA motions)

Dear Chairman Leach,

My name is Robert T. Sherwin, and I am a tenured professor at the Texas Tech University School of Law, where I hold the Champions in Advocacy Endowed Professorship. From 2017 through 2020, I served as the Reporter on the Uniform Law Commission's Drafting Committee on Anti-SLAPP Legislation. In that capacity, I was the primary scribe for what ultimately became the Uniform Public Expression Protection Act (UPEPA), which was adopted by the Commission in July 2020. Since then, I have served on the UPEPA Enaction Committee, where I have offered guidance to states considering whether to legislatively adopt the Act. I'm proud to report that it has already been adopted by four states, with six others currently considering it. I research and write extensively on the issue of "litigation bullying," including Strategic Lawsuits Against Public Participation.

I write to express my concerns with SB 896, which seeks to modify the stay provision of Tex. Civ. Prac. & Rem. Code § 51.014(b) as it relates to interlocutory appeals of denials of motions brought under Tex. Civ. Prac. & Rem. Code § 27.003, also known as the Texas Citizens Participation Act (TCPA).

Plainly put, SB 896 is a dangerous bill that threatens to undermine the purpose and operation of the TCPA.

As a full-time litigator prior to entering academia, I understand the general reservations the Bar holds toward interlocutory appeals and stays. I also understand the frustrations of plaintiffs and trial judges who wish to proceed with cases after a TCPA motion is denied. But it's important to understand why the interlocutory appeal provision—and more so, its corresponding stay—is so vital to the operation of an effective anti-SLAPP statute.

If an anti-SLAPP law didn't authorize an interlocutory appeal and stay, then there would be no recourse for a movant—who is typically attempting to protect his or her constitutional rights—when a judge incorrectly denies the motion to dismiss. Because the order denying the motion is interlocutory, he or she wouldn't be able to immediately appeal. The case would proceed as normal, and the movant would have to wait until after a full trial on the merits to challenge the judge's denial of the motion. And here's the rub: Winning the appeal wouldn't provide *any* of the relief the TCPA intends, because the movant—albeit vindicated on appeal—will have nevertheless spent money and time defending itself against the frivolous litigation, and nothing in the statute would allow the movant to recover *those* expenses. Yes, the movant can recover its fees expended in pursuing the motion to dismiss. But those fees expended in the general defense of the case are not recoverable. ***That would be equally true if the law allowed an interlocutory appeal but simultaneously permitted the commencement of the trial or other proceedings in the trial court.*** Movants would be forced to spend unrecoverable valuable time and resources on discovery and trial preparation, effectively having to litigate the case in two courts—trial and appellate.

By illustration, imagine an individual who exercises her right of free speech by posting a social media video detailing how she was attacked by bed bugs at a VRBO rental. She shows undoctored pictures of the bed bugs at the rental and of her bites. The owner of the rental demands she take the video down. When she doesn't, he frivolously sues her for defamation. Her speech would clearly be protected by the TCPA, and she should be entitled to a dismissal of the frivolous case along with an award of her attorney's fees.

The trial judge, however, is new to the bench and misconstrues § 27.010(a)(2)—the so-called “Commercial Speech Exemption” of the TCPA. He denies the defendant's motion to dismiss because he mistakenly believes the TCPA doesn't apply to the defendant's speech given its application to a commercial venture (the VRBO rental).

Fortunately, SB 896 doesn't abridge the defendant's right to immediately appeal the judge's erroneous denial. But *unfortunately*, it does something equally as bad: Because the motion was denied under an exemption, SB 896 allows the case to proceed with discovery and go to trial, which means the defendant will now have to spend time and money defending the action in the trial court while also pursuing her appeal. Even if she can persuade the appellate court to reverse the trial court's improper denial, there's no way for her to get back what she already lost as she had to defend herself at trial. Those attorney's fees—the ones expended on the defense of the case itself, as opposed to the TCPA motion—aren't recoverable under the statute (and nearly impossible to recover under any other provision of Texas law).

The hypothetical I just posed is hardly far-fetched. When our ULC committee debated potential exemptions to the Uniform Act, we decided quite deliberately to keep them at a minimum, in large part because they can be confusing and difficult

for judges to apply. We've certainly seen that in practice here in Texas, as courts have struggled with their applicability and application. Defendants shouldn't be subjected to the perils of frivolous litigation while lower courts sort out the state of the law.

As one federal court has aptly recognized, "If the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision [] reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression. Thus, [anti-SLAPP statutes] protect the defendant *from the burdens of trial*, not merely from ultimate judgments of liability." *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (superseded by statute on unrelated grounds as stated in *Fyk v. Facebook, Inc.*, No. 19-16232, 2020 WL 3124258, at *2 (9th Cir. June 12, 2020)) (emphasis added).

While I certainly have nothing but respect for and faith in our capable state trial judges, SB 896 enables a singular judge to neutralize the protections of the TCPA against a litigant he may not care for. For example, a judge who wants to see a case settle could deny an otherwise meritorious TCPA motion and designate it as untimely filed or frivolous. That would then leave the case outside the protections of the automatic stay, and a defendant would be faced with the proverbial Hobson's choice: expend *unrecoverable* money litigating the case through to trial (while simultaneously appealing the trial court's denial) or agreeing to a "nuisance" settlement to dispose of the case. Even worse, the defendant will likely have to agree to censor herself—for example, by taking down the video in my hypothetical—as part of that settlement. Meanwhile, the judge "gets away" with the erroneous denial because the case settles and is never appealed.

If the purpose of the TCPA is to protect the constitutional rights of Texas citizens, I can assure you that SB 896 does nothing but undermine that aim. It will leave judges free to deny meritorious TCPA motions while the defendants who are supposed to be protected by the law are subjected to costly discovery and trial expenses. To fully implement the goals of an anti-SLAPP law, the right to an interlocutory appeal and corresponding stay of proceedings must be unfettered. We easily recognized as much when drafting the Uniform Public Expression Protection Act, and in Section 4(c) of that Act, provided for a full stay that "remains in effect until the conclusion of the appeal."

I urge you to reject SB 896 in its entirety.

Thank you for the opportunity of correspondence, and please do not hesitate to let me know if I can assist the Legislature in any manner.

Yours truly,

A handwritten signature in black ink, appearing to be 'R. Sherwin', written in a cursive style.

Robert T. Sherwin
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