
No. 02-15-00103-CV

IN THE SECOND COURT OF APPEALS
AT FORT WORTH, TEXAS

TEXAS ETHICS COMMISSION,
Appellant,

v.

MICHAEL QUINN SULLIVAN,
Appellee.

Expedited Appeal from the 158th District Court of Denton County, Texas
Trial Court Cause No. 14-06508-16

AMICUS BRIEF

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STATEMENT OF INTEREST AND IDENTITY OF AMICI CURIAE

Amici Curiae Texas Association of Broadcasters and Texas Press Association respectfully submit this brief of *Amici Curiae* in support of Petitioners the Texas Ethics Commission. *Amici* are media trade organizations that have a heightened interest in the proper application of the Texas Citizens Participation Act (“TCPA”) because their members rely on the TCPA to protect against retaliatory lawsuits brought against them for accurately reporting on matters of public concern.

In accordance with Texas Rule of Appellate Procedure 11(c), *Amici* hereby disclose no counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. This brief was commissioned by the following *Amici*:

The **Texas Association of Broadcasters** is a non-profit association that represents more than 1,300 television and radio stations in Texas with a tradition of community-oriented, free, over-the-air broadcasting. The Texas Association of Broadcasters was founded in 1953 and performs numerous services on behalf of its members, including advocating legislation relating to and affecting radio and television broadcasters and defending open government, as well as publishing guidebooks on various legal issues, including access to public information.

The Texas Press Association (“TPA”) is a non-profit industry association representing nearly 500 daily and weekly newspapers in Texas, each of which upholds a strong tradition of journalistic integrity and community service. TPA, founded more than 130 years ago, performs numerous services on behalf of its members, including advocating legislation relating to free speech and press and taking legal action to protect the First Amendment and open government.

SUMMARY OF ARGUMENT

The case before this Court should be reversed both on procedural and substantive grounds. An anti-SLAPP motion brought pursuant to Texas Citizens Participation Act (“TCPA”)¹ must be brought within 60 days of when a pleading introduces a particular cause of action against the moving party.² The motion herein was untimely; thus, the trial court’s consideration of the motion was error. Further, even if the court were to consider the motion, the statute does not apply to “an enforcement action that is brought in the name of this state.”³ The trial court’s failure to recognize the statutory exemption flies in the face of the legislative intent and stated statutory requirements of the TCPA and is contrary to public policy. The trial court’s ruling effectively allowed a private citizen to, through procedural maneuvering, dismiss an appeal of an administrative action which that citizen himself brought. This ruling, if permitted to stand, dis-effectuates the plain language of the TCPA, and puts the enforcement mechanism for the more than 500 regulated industries in the State of Texas in a state of disarray. The Court’s ruling exposes administrative decisions by governmental entities to turmoil, and turns the legislative intent behind the TCPA on its head. For these reasons, *Amici* urge this Court to reverse the trial court’s decision and render.

¹ [Tex. Civ. Prac. & Rem. Code §§ 27.001](#) *et. seq.*

² [Tex. Civ. Prac. & Rem. Code § 27.003](#).

³ [Tex. Civ. Prac. & Rem. Code § 27.010](#). See [Tex. Const. art. III, § 24a\(a\)](#) (the Texas Ethics Commission is a state agency).

I. ARGUMENT

In 2014, the Texas Ethics Commission (“TEC”) fined Michael Quinn Sullivan (“Sullivan”) for failing to register as a lobbyist. Because this was an administrative action, Sullivan had the right to file a *de novo* appeal of the decision by filing a petition in state district court. Sullivan filed suit to challenge the TEC finding, got the parties re-aligned so as to require the TEC to re-plead the initial administrative charges and then, claiming a new cause of action had been brought against him, filed a motion to dismiss pursuant to the TCPA on the grounds the TEC fine was a legal action based on his right of speech and petition. By creating this procedural posture and by relying on the restriction of the TEC from using prior evidence in a *de novo* appeal, Sullivan was able to usurp substantive consideration of the case and the fine imposed against him. The trial court below granted the motion and dismissed the action. This ruling was incorrect for several reasons.

The plain language of the statute makes it inapplicable in this case, even before exemptions are considered. The petition filed in state court was Sullivan’s petition brought against the TEC, not the other way around, even though the parties were realigned. Therefore, it was not “a legal action *against* the moving party”⁴ as

⁴ [Tex. Civ. Prac. & Rem. Code § 27.005\(b\).](#)

required by the Act. Rather it was a legal action *brought* by the moving party.⁵ Second, the TEC was not “the party bringing the legal action,”⁶ Sullivan was. This was, after all, Sullivan’s appeal. Third, the TEC fine was a fine, not a “legal action” as defined by the TCPA—precisely the reason why there is an exemption for “enforcement actions” in the statute.⁷

To allow Sullivan to sue the TEC to overturn a fine and then move to have the case dismissed under the TCPA flips the statute on its head. If this decision is allowed to stand, the entire system of licensing and regulations of professionals throughout Texas – more than 500 licensed professions, most of which provide for *de novo* appeals of fines in district court – would be a nullity.

The SLAPP statute was never intended to permit one to avoid the enforcement of government fines through procedurally gaming the system. This is why the Texas anti-SLAPP statute expressly does not apply to enforcement actions.⁸ Further, a motion to dismiss under the TCPA must be filed within 60 days

⁵ The Original Petition filed by Sullivan stated that the Cause of Action was a “de novo appeal of the Commissions’ July 21, 2014 Final Order pursuant to Tex. Gov’t Code § 571.133,” a.k.a., his failure to register as a lobbyist. See Plaintiff’s Original Petition, p. 2.

⁶ [Tex. Civ. Prac. & Rem. Code § 27.005\(c\)](#). See also [Martin v. Bravenec, 04-14-00483-CV, 2015 WL 2255139, at *6](#) (Tex. App.—San Antonio May 13, 2015, pet. filed) (explaining that “[i]f the moving party meets [their] burden, the burden shifts to the party bringing the legal action to establish by ‘clear and specific evidence a prima facie case for each essential element of the claim in question.’”) (emphasis added) (quoting Tex. Civ. Prac. & Rem. Code § 27.005(c)).

⁷ [Tex. Civ. Prac. & Rem. Code § 27.010\(a\)](#). A similar provision is contained in the Arizona, California, Louisiana, Oklahoma, Oregon, and Vermont anti-SLAPP statutes. See [AZ ST. § 12-752\(E\)\(2\)](#); [CAL. CIV. PROC. CODE § 425.16\(d\)](#); [LA C.C.P. ART. 971\(E\)](#); [OKLA STAT. ANN. TIT. 12 § 1439](#); [OR. REV. STAT. § 31.155](#); [VT. STAT. ANN. TIT. 12 § 1041\(H\)](#).

⁸ See [Tex. Civ. Prac. & Rem. Code § 27.010\(a\)](#).

of the claim being made, which Sullivan’s motion was not.⁹ The TEC claims originated in the administrative proceeding in 2012 and were not new claims brought by the Agency in district court just because the Court realigned the parties in the case Sullivan filed.¹⁰ The opinion of the trial court ignores Texas law, Texas precedent and the legislative intent and purpose of the TCPA.

A. The TCPA Motion was untimely.

This Court can and should reverse the trial court’s ruling purely on procedural grounds. The Original Petition in this case was filed, by Sullivan, on August 22, 2014.¹¹ The anti-SLAPP motion was filed on January 6, 2015, more than two and a half months after the deadline to file an anti-SLAPP motion. “A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action.”¹² Therefore, the TCPA motion was untimely and should not have been considered or granted.¹³

Though Sullivan argues that the re-alignment of the parties combined with the subsequent First Amended Pleading filed by TEC (now as the Plaintiff)

⁹ See [Tex. Civ. Prac. & Rem. Code § 27.003\(b\)](#).

¹⁰ See, e.g., [In re Estate of Check](#), 438 S.W.3d 829, 837 (Tex. App.—San Antonio 2014, no pet.); [Better Bus. Bureau of Metro. Dallas, Inc. v. Ward](#), 401 S.W.3d 440, 443 (Tex. App.—Dallas 2013, pet. denied).

¹¹ After the court re-aligned the parties, the TEC filed a First Amended Pleading on December 23, 2014.

¹² See [Tex. Civ. Prac. & Rem. Code § 27.003](#).

¹³ Although a court can find that a party has good cause for not timely filing a motion to dismiss, Sullivan did not appear to assert good cause or ask for a finding of good cause. See [Tex. Civ. Prac. & Rem. Code Ann. § 27.003\(b\)](#); [Schimmel v. McGregor](#), 438 S.W.3d 847, 856 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

somehow re-set the anti-SLAPP deadline, this argument fails. Appellate courts in Texas are united in their rejection of attempts to use amendments to the pleadings to reset the strict sixty-day deadline for filing the motion, unless new parties or new claims are added. For example, in the case of *In re Estate of Check*,¹⁴ the movant filed their anti-SLAPP motion after the sixty-day deadline from the date of service of a counterclaim against them, but within sixty days of an amended counterclaim. The Fourth Court of Appeals held that if a party “did not add new parties or claims... there was neither a basis nor a compelling reason to reset the original sixty-day deadline. This interpretation comports with the Act's intent that lawsuits under the Act be dismissed, if at all, early in the litigation.”¹⁵

Like the underlying case in *In re Estate of Check*, there were no new parties, and there were no new claims in TEC's First Amended Pleading. The TEC's action emanated at the administrative level – years ago. The Original Petition filed by Sullivan is where the current Cause of Action arose which is a “*de novo* appeal of the Commissions' July 21, 2014 Final Order pursuant to Tex. Gov't Code § 571.133” (“Final Order”).¹⁶ That Final Order stated that “Sullivan violated section 305.003 of the Government Code by failing to register as a lobbyist in 2010 and

¹⁴ [438 S.W.3d 829, 836](#) (Tex. App.—San Antonio 2014, no pet.).

¹⁵ [Id. at 837](#).

¹⁶ See Plaintiff's Original Petition, p. 2.

2011.¹⁷ The First Amended Pleading lists the same parties and the same claims against Sullivan as “Failure to register as a Lobbyist for Calendar Year 2010” and “Failure to register as a lobbyist for Calendar Year 2011.”¹⁸ These are the exact same claims that were outlined in the Original Petition, and realignment of the parties does not change this fact.

As the El Paso Court of Appeals explained, “[i]t is evident that the Legislature intended to effectuate the purpose of the TCPA by ensuring that courts will dismiss SLAPP suits quickly and without the need for prolonged and costly proceedings.”¹⁹ Sullivan’s interpretation of “legal action” supposes that a motion to dismiss could be filed at almost any point if the parties are realigned because he claims the subsequent pleading qualifies as a ‘legal action.’ There is “nothing in the statute or its history and purpose to indicate the Legislature intended to create a perpetual opportunity to file a motion to dismiss whenever a pleading qualifies as a ‘legal action.’”²⁰

In *Miller Weisbrod*, a law firm was sued for defamation, and was served with a First Amended Petition in August of 2011, but did not file their anti-SLAPP motion for almost nine months. The firm argued that the motion was timely as to a

¹⁷ See TEC’s Response in Opposition to Sullivan’s Chapter 27 Motion to Dismiss, Ex. A.

¹⁸ See TEC’s First Amended Pleading as Realigned Plaintiff, p. 5-6.

¹⁹ [Miller Weisbrod, L.L.P. v. Llamas-Soforo](#), ___ S.W.3d ___, 2014 WL 6679122, at *10 (Tex. App.—El Paso Nov. 25, 2014, no pet.).

²⁰ *Id.*

Second Amended Petition. But the court of appeals held that the timing of the first pleading in which the firm was named as a party was the pleading that started the sixty-day clock. As that court explained, “[i]f we were to adopt the position that any subsequent filed document meets the definition of ‘legal action,’ it would then create an unending opportunity to file a motion to dismiss which would ultimately defeat the purpose of the sixty day deadline.”²¹

Likewise, in *Hicks v. Group & Pension Administrators, Inc.*,²² the Plaintiff filed an amended petition, adding claims and adding defendants. The appeals court held that while the motion was timely as to new claims and new parties, the motion was untimely as to the original claims against the original defendant when filed more than sixty days after the original petition (but within sixty days of the amended petition). As the court in *Hicks* said, the untimeliness on the original claims was because the movant “was on notice [as to various] claims against her in March 2013—over a year before she filed her Motion in June 2014.”²³

Herein, there is no question that Sullivan was on notice of the claims because his own Original Petition named the causes of action the TEC had previously brought against him. Thus, the Original Petition constitutes “the operative pleading [Sullivan] should have responded to;” however, this points out

²¹ See [Miller Weisbrod, L.L.P. v. Llamas-Soforo](#), [S.W.3d](#), 2014 WL 6679122, at *12 (Tex. App.—El Paso Nov. 25, 2014, no pet.).

²² [S.W.3d](#), 2015 WL 5234366, at *5 (Tex. App.—Corpus Christi Sept. 3, 2015, no. pet. h.).

²³ [Hicks](#), [S.W.3d](#), 2015 WL 5234366, at *5.

the fallacy in the trial court's ruling and the judicial tension created by this case because Sullivan would not file a TCPA motion against himself. Mere re-alignment of the parties does not re-open the claims originating at the administrative level in 2012. No new claims or new parties were brought in the Amended Pleading so as to restart the clock on the deadline to file the motion. If Sullivan's gamesmanship is allowed, what would stop a party from bringing a declaratory judgment action, asking the court to realign the parties based on burden of proof, and then winning a dismissal and significant attorney's fees on claims that they themselves initiated? Public policy dictates procedural maneuvering such as this should not create a new manner to avoid substantive considerations by the court and a penalty against the re-aligned plaintiff.

B. The TCPA does not apply to this action because it falls under the TCPA's exemption for enforcement actions.

The Texas Citizens Participation Act does not apply to this case because this case is an enforcement action, which falls under the exemptions to the statute. Sullivan converted this action (that he filed) into one where he is the defendant against a state agency enforcing agency rules. A defendant in an enforcement action cannot thwart such enforcement through the use of an anti-SLAPP motion.²⁴

The TCPA expressly exempts certain lawsuits from its applicability, and Section

²⁴ See, e.g., [Town of Madawaska v. Cayer](#), 103 A. 3d 547, 551, 2014 ME 121, ¶¶13-15 (declining to apply the SLAPP statute to an enforcement action brought by the town against property owners for zoning violations).

27.010(a) of the TCPA exempts enforcement actions brought by the State or law enforcement.²⁵ The reason the enforcement exemption exists is so that the TCPA does not provide a loophole for breaking the law. The Legislature's intent was to permit one to speak freely about matters of public concern, not to re-write administrative law procedure and make it possible for citizens to flout governmental enforcement actions without a substantive review by the courts.

1. This was an enforcement action brought by the State.

The Texas Ethics Commission is a state agency in the legislative branch of government.²⁶ It is charged with administering and enforcing elections laws.²⁷ The matter being appealed by Sullivan herein is the enforcement of lobby laws against him, and the causes of action in the First Amended Pleading are the same claims brought by a state agency at the administrative level against Sullivan for receiving compensation for lobbying activities and failing to register as a lobbyist during 2010 and 2011. No matter what procedural platform the claims appear in, they are, at their core, enforcement actions. The fact that the causes of action are a *de novo*

²⁵ A similar provision is contained in the Arizona, California, Louisiana, Oklahoma, Oregon, and Vermont anti-SLAPP statutes. See [AZ ST. § 12-752\(E\)\(2\)](#); [CAL. CIV. PROC. CODE § 425.16\(d\)](#); [LA C.C.P. ART. 971\(E\)](#); [OKLA STAT. ANN. TIT. 12 § 1439](#); [OR. REV. STAT. § 31.155](#); [VT. STAT. ANN. TIT. 12 § 1041\(h\)](#).

²⁶ [Tex. Const. art. III, § 24a\(a\)](#).

²⁷ [Tex. Gov't Code § 571.061 \(a\)](#) (noting that the commission shall enforce Chapters 302, 303, 305, 572, and 2004; Sections 2152.064 and 2155.003; Subchapter C, Chapter 159, Local Government Code; and Title 15, Election Code).

judicial review of an underlying administrative action does not change their character.

In reality, the action in the trial court below is not an appeal of an enforcement action at all; it is the enforcement action itself.²⁸ The Supreme Court of Texas has explained that a “[t]rial *de novo* [review of an administrative ruling] is not an ‘appeal,’ but is a new and independent action.”²⁹ “Review by trial *de novo* has all the attributes of an original action in the reviewing court. ... Trial *de novo* has been defined as ‘[a] new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below.’”³⁰ While on the one hand Sullivan relies upon this precedent to remove from consideration prior evidence accumulated by the TEC in the proceeding

²⁸ Further, this action was brought by the Attorney General. [Tex. Civ. Prac. & Rem. Code § 27.010\(a\)](#) (the TCPA does not apply to an “enforcement action that is brought...by the attorney general”). As Sullivan himself demonstrated with evidence in his “motion to show authority,” while outside counsel was used, the outside counsel only proceeded upon the approval and permission of the Attorney General. Further, the Attorney General authorizes all payments of outside counsel’s invoices. See Sullivan’s Motion to Show Authority, Exhibit A (“The OAG serves as the state’s legal counsel, therefore the OAG serves as legal counsel to all agencies...Invoices cannot be paid by the agency, regardless of the source of funds used, without the prior approval of the OAG”).

²⁹ See [Key W. Life Ins. Co. v. State Bd. of Ins.](#), 163 Tex. 11, 21, 350 S.W.2d 839, 846 (1961).

³⁰ *Id.* (quoting Black’s Law Dictionary); see also [Woodard v. Office of Atty. Gen.](#), 01-07-00954-CV, 2009 WL 793764, at *2 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, no pet.) (“Judicial review by trial *de novo* is not a traditional appeal, but a new and independent action characterized by all the attributes of an original civil action.”); [Godwin v. Aldine Indep. Sch. Dist.](#), 961 S.W.2d 219, 221 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (“Judicial review by trial *de novo* is not a traditional appeal, but rather a new and independent action characterized by all the attributes of an original civil action”); [Gilder v. Meno](#), 926 S.W.2d 357, 365 (Tex. App.—Austin 1996, writ denied) (Jones, J., dissenting)(“Under a ‘pure trial *de novo*’ review...[t]his type of review is technically not an ‘appeal’ at all, but a new proceeding.”).

below, on the other hand, he appears to distinguish such precedent in an effort to avoid the application of the TCPA exemption.

The plain language of the statute exempts “enforcement action[s] brought in the name of this state” such as this.³¹ When interpreting the TCPA, courts “rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results.”³² It would be absurd for the Legislature to enact an exemption to enforcement actions that could not be applied in practice to the judicial enforcement of such actions. This is particularly true when agency enforcement actions are the primary means of regulating over 500 professions in the State, affecting more than 2.7 million people.³³ Many of those professionals communicate with their clients, as a part of their professional activities, on important matters of public concern, such as health and safety. If the lower court ruling stands, the application of the TCPA in this manner would enable millions of professionals to thwart regulation by filing a *de novo* review of an agency

³¹ [Tex. Civ. Prac. & Rem. Code § 27.010\(a\)](#).

³² [San Jacinto Title Servs. v. Kingsley Properties LP, 452 S.W.3d 343, 346](#) (Tex. App.—Corpus Christi 2013, pet denied) (internal quotation marks and citation omitted).

³³ Interim Report To The 83rd Tex. Leg., 82d Tex. H. Comm. On Gov't Efficiency & Reform, 57-58 (Jan. 2013), *available at* <http://www.house.state.tx.us/media/pdf/committees/reports/82interim/House-Committee-on-Goverement-Efficiency-and-Refrom-Interim-Report.pdf>. *See also Patel v. Texas Dep't of Licensing & Regulation*, __ S.W.3d __, 2015 WL 3982687, at *25 (Tex. June 26, 2015)(noting same). Since that report the number has likely shifted some. *Id. at *15* (noting that hair braiding was deregulated in 2015 by the 84th Legislature).

regulated enforcement action, followed by a TCPA motion to dismiss. Such a holding would certainly create a huge chasm in the enforcement of regulated industries throughout Texas.

2. The legislative history and intent of the statute comports with a finding that this action is exempt from the TCPA.

As the Thirteenth Court of Appeals held in *San Jacinto Title Services of Corpus Christi*, pursuant to Tex. Civ. Prac. & Rem. Code § 27.011(b), the TCPA is to be liberally construed to effectuate its purpose and intent fully.³⁴ The TCPA’s stated purpose is “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” See [Tex. Civ. Prac. & Rem. Code § 27.002](#). The phrase “to the maximum extent permitted by law” informs the judiciary that the statute is not intended to permit or otherwise authorize activities that are not “permitted by law”, such as lobbying without properly registering.

Though Texas’ law enforcement exemption has yet to be interpreted by Texas appellate courts, it is similar in language to California’s section 425.16 (d), which provides that “[t]his section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney

³⁴ [San Jacinto Title Servs., 452 S.W.3d at 346.](#)

General, district attorney, or city attorney, acting as a public prosecutor.”³⁵ The Texas anti-SLAPP statute, in large measure, was patterned after the California law³⁶ because the California statute had been through twenty years of judicial interpretation and legislative modifications to adequately address the competing public interests at play. In applying the exemption, California courts have held, for instance, that even though the California exemption for enforcement actions brought by government attorneys did not specifically include civil actions by a city, the legislative history indicated the purpose of the exemption was to address concern over the statute’s effect on the ability of the government to enforce laws.³⁷ Courts have explained that the California exemption was included to address concerns that the statute “might impair the ability of state and local agencies to enforce certain consumer protection laws ... and protect the consumer and/or public.”³⁸ In California, the enforcement exemption has been applied in several kinds of cases, including one where “the Attorney General filed a complaint

³⁵ [People v. McGraw-Hill Companies, Inc.](#), 228 Cal. App. 4th 1382, 1386, 176 Cal. Rptr. 3d 496, 497 (2014) (internal quotation marks and citation omitted).

³⁶ Compare [Tex. Civ. Prac. & Rem. Code § 27.010\(a\)](#) (the TCPA), with [CAL. CIV. PROC. CODE §425.16 \(d\)](#) (the California anti-SLAPP statute)). See generally, [CAPITOL RESEARCH SERVICES, Legislative History of Chapter 27, Texas Civil Practice and Remedies Code, Entitled: Actions Involving the Exercise of Certain Constitutional Rights](#) (outlining the legislative history of Tex. H.B. 2973, 82d Leg., R.S.(2011)), which is attached hereto as Exhibit A. Because the exemptions in the TCPA addressed this concern, there was little or no discussion of the exemptions in the legislative hearings leading up to the unanimous passage of the TCPA.

³⁷ [City of Long Beach v. California Citizens for Neighborhood Empowerment](#), 111 Cal. App. 4th 302, 3 Cal. Rptr. 3d 473 (2003).

³⁸ [People v. McGraw-Hill Cos., Inc.](#), 228 Cal. App. 4th at 1387 (internal quotation marks and citation omitted).

against attorney Harpreet Brar to obtain an order to make him stop filing lawsuits under California's unfair competition law”³⁹ and another where the state filed a lawsuit for statutory violations related to inflated credit ratings.⁴⁰ Both were held to be enforcement actions.

The classification created by the anti-SLAPP statute’s exemption for enforcement actions bears directly on furthering the State’s legitimate interest in allowing the government to pursue actions to enforce laws, unencumbered by delay, intimidation or distraction.⁴¹ Herein, the enforcement of the TEC fine against Sullivan qualifies as an “enforcement action” which the government should be permitted to pursue and which is exempt from the TCPA under Texas Civil Practices and Remedies Code section 27.010(a). This is exactly the type of claim the Legislature sought to exempt from the TCPA.⁴²

³⁹ [People ex rel. Lockyer v. Brar](#), 115 Cal. App. 4th 1315, 1316, 9 Cal. Rptr. 3d 844, 845 (2004) (holding that the law enforcement exemption applied).

⁴⁰ [People v. McGraw-Hill Companies, Inc.](#), 228 Cal. App. 4th 1382, 1386, 176 Cal. Rptr. 3d 496, 497 (2014).

⁴¹ See, e.g., [People v. Health Labs of N. Am., Inc.](#), 87 Cal. App. 4th 442, 104 Cal. Rptr. 2d 618 (2001).

⁴² Even though the Maine anti-SLAPP statute does not expressly exempt government enforcement actions from its application, the Supreme Judicial Court recognized that the plain meaning of the statute indicates it would not apply in a case where a defendant in a local enforcement action is attempting to thwart such enforcement through the use of an anti-SLAPP motion. See [Town of Madawaska v. Cayer](#), 103 A. 3d 547, 551, 2014 ME. 121, ¶¶13-15.

II.
CONCLUSION AND PRAYER

For the foregoing reasons, Amici respectfully request that the Court grant the appeal and reverse the decision of the trial court and render an opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word 2010 and contains 4,097 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1) on September 23, 2015.

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CERTIFICATE OF SERVICE

I certify that a copy of Amici Curiae's Brief of Amici Curiae in Support of Petitioners' Petition for Review was served on all counsel of record in accordance with the Texas Rule of Appellate Procedure 9.5(b)(1).

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APPENDIX

Tab A: CAPITOL RESEARCH SERVICES, *Legislative History of Chapter 27, Texas Civil Practice and Remedies Code, Entitled: Actions Involving the Exercise of Certain Constitutional Rights* (Outlining the legislative history of Tex. H.B. 2973, 82d Leg., R.S.(2011)).



LEGISLATIVE HISTORY OF
CHAPTER 27, TEXAS CIVIL PRACTICE &
REMEDIES CODE

ACTIONS INVOLVING THE EXERCISE OF
CERTAIN CONSTITUTIONAL RIGHTS

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THE LEGISLATIVE HISTORY OF CHAPTER 27, TEXAS CIVIL PRACTICE AND REMEDIES CODE, ENTITLED: ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

THE LEGISLATIVE HISTORY OF TEX. H.B. 2973, 82D LEG., R.S. (2011)

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THE LEGISLATIVE HISTORY OF CHAPTER 27, TEXAS CIVIL PRACTICE AND REMEDIES CODE, ENTITLED: ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

ISSUES

What was the Legislature's intent behind § 27.010, Exemptions, Civil Practice and Remedies Code?

ABSTRACT

2011

During the 82d Texas Legislature, Chapter 27, entitled "Actions Involving The Exercise Of Certain Constitutional Rights" was added to the Civil Practice and Remedies Code.

Sec. 27.010, Exemptions, was not present in the bill as introduced, but was added in the House Committee Substitute.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods,

services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

See Background, 18, *below*. [Underlining indicates added text.]

The House bill analysis reviewed the background and purpose of the bill.

BACKGROUND AND PURPOSE

Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, the involvement of citizens in the exchange of ideas benefits our society. The Internet has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of public speech. Unfortunately, abuses of the legal system have also grown, including the filing of frivolous lawsuits aimed at silencing these citizens who are participating in the free exchange of ideas. These lawsuits are called strategic lawsuits against public participation.

C.S.H.B. 2973 seeks to encourage greater public participation of Texas citizens through safeguarding the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government by providing for an expedited motion to dismiss frivolous lawsuits aimed at retaliating against someone who exercises the person's right of association, free speech, or right of petition.

Id. 18-19.

The House bill analysis reviewed the provisions of the bill. Regarding §27.010, the analysis stated:

ANALYSIS

....

C.S.H.B. 2973 exempts from the its provisions an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney; a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer; a legal action seeking recovery for bodily injury, wrongful death, or survival or statements

made regarding that legal action. The bill provides that its provisions do not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions and requires its provisions to be construed liberally to effectuate its purpose and intent fully.

Id. 20-21.

The analysis also compared the “original” (H.B. 2973 as filed) to the committee substitute.

COMPARISON OF ORIGINAL AND SUBSTITUTE

....

The substitute contains a provision not included in the original exempting from the bill's provisions a legal action seeking recovery for bodily injury, wrongful death, or survival or statements made regarding that legal action.

Id. 21.

The House Research Organization analysis reviewed the background of H.B. 2973 and summarized its provisions. Regarding the exemption provision, the analysis stated:

The bill would not apply to enforcement actions by the state or a political subdivision, a lawsuit against a person primarily engaged in selling or leasing goods or services when the intended audience was a customer, or a personal injury suit.

Id. 23.

The Senate Research Center bill analysis reviewed the background and purpose of the bill.

AUTHOR'S STATEMENT OF INTENT

Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, involvement of citizens in the exchange of idea benefits our society.

Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our democracy. The Internet age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at

silencing these citizens, have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or "SLAPP" suits.

Twenty-seven states and the District of Columbia have passed similar acts, most commonly known as either "Anti-SLAPP" laws or "Citizen Participation Acts" that allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizen Participation Act would allow defendants—who are sued as a result of exercising their right to free speech or their right to petition the government—to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he had a genuine case for each essential element of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay attorney's fees of the defendant.

C.S.H.B. 2973 amends current law relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

Id. 52.

The analysis also summarized each section of the bill. Regarding § 27.010, the analysis stated:

SECTION BY SECTION ANALYSIS

....

Sec. 27.010. EXEMPTIONS. (a) Provides that this chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) Provides that this chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) Provides that this chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Id. 55.

Sec. 27.020, Exemptions, was not specifically discussed during the public hearings and floor debates on the bill.

The bill's House sponsor explained its purpose during its public hearing.

REP. TODD HUNTER : We have seen through the years what is called SLAPP suits and this bill is basically anti-SLAPP suits – Strategic Lawsuits Against Public Participation, is what a SLAPP suit is. Unfortunately we do have abuse in the legal system at certain times and that basically, trying to silence individuals or groups. This type of law has been passed in 27 jurisdictions and has never repealed. The purpose of the bill is to encourage public participation of Texas citizens and basically to safeguard constitutional rights of persons to petition, speak freely, associate freely and participate in government. It also provides for an expedited motion to dismiss in lawsuits like these that are filed frivolously, mainly aimed at retaliating against one who exercises their freedom of speech or right of petition and it also establishes some important efficiencies to try to handle this matter and it provides for basically dismissal, uh, set up.

See Background, 7, below.

During the Senate public hearing, the Chairman and the expert witness for the bill discussed the types of suits this Chapter would apply to.

CHAIR : What – what is a meritless lawsuit?

PRATHER : If – if the court determines based upon the affidavits that are submitted to substantiate the motion that there is no basis for the suit to go forward, then the court can award – the court can grant the motion. If the court feels like it needs discovery, then the court has the opportunity to ask for limited discovery on the motion.

CHAIR : So how does the court – determine – What – what the guiding principles to consider in determining whether or not to dismiss under the legislation?

PRATHER : What – what they do, it's the same analysis that is done in an anonymous speech case, where somebody comes forward and they want to know what – what the web – web address is behind a person who's posted an anonymous blog. The court looks at the very beginning of the case to determine whether or not there is any basis for the lawsuit. And if they determine that there is a basis for the lawsuit, they can get that anonymous speaker's information. If they don't determine that, then they can't get the anonymous speaker's information. So this just creates the same level playing field for anonymous and non-anonymous speech.

CHAIR : So what you're telling me then, that there's a – is it a body of federal law and state law that – ?

PRATHER : State law – state law. It's in the anonymous posting *In re: Doe case*; it was the case that we set the standard from.

CHAIR : The standard set forth in the bill?

PRATHER : Yes.

CHAIR : Okay, and that standard that's set forth in the bill – is it – is it an accurate – where is it? – [pages turning].

ADAMS : Mr. Chairman, what was your question? I didn't hear.

: Where – where is it in the bill?

CHAIR : The question is the standard, what I would call the guiding principal that the court would follow, is it concluded in the bill, one? And then number two, if it is in bill, is it an accurate codification of the common law?

PRATHER : It is an accurate codification.

CHAIR : And where is this?

PRATHER : – and it is contained in the bill. It's on page 5 of the bill, Section 27.005 – 27.005(b) and (c). And it talks about the prima facie establishment of the elements of the claim.

CHAIR : So in page – on page 5, 25(c) [sic], says - first of all, it starts out in (b) as "the court shall dismiss legal action if the moving party shows by ponderous of the evidence that the legal action is based on, relates to, or is in response to the party's right of free speech, right to petition, and right of association."

PRATHER : Right, the burden is initially on the movant, and then it shifts to the respondent under 27.005(c), and that's where it says, "The court cannot dismiss a legal action if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim." And that's taken directly from the anonymous speech cases.

Id. 28-29.

¹ Ms. Prather may have been referring to *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007).

2013

During the 83d Texas Legislature, H.B. 2935 was enacted to update the Chapter 27, Civil Practice and Remedies Code. The text of the bill conformed Chapter 27 to the interlocutory appeal statute in §51.014, Civil Practice and Remedies Code.

Sec. 27.010, Exemptions, was not amended until the bill was considered on the Senate Floor. Sen. Whitmire offered an amendment that changed § 27.010 as follows:

SECTION ____ . Section 27.010, Civil Practice and Remedies Code, is amended by amending Subsection (b) and adding Subsection (d) to read as follows:

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

See Background, 83, below. [Underlining indicates added text.]

Sen. Whitmire briefly explained his amendment, noting its purpose was to prevent frivolous lawsuits.

SEN. JOHN WHITMIRE : I have an amendment that I believe will be acceptable to the author. Last session Texas joined 28 states and the District of Columbia in enacting various forms of legislation purported aimed at preventing frivolous lawsuits and stif – stifling free speech activities and rights to petition and association. Unfortunately there were some unintended consequences –

ELLIS : It is acceptable, Mr. President –

WHITMIRE : – and a technical correction and I would move adoption of the amendment.

PRESIDENT : Sen. Duncan, for what purpose do you rise, sir?

SEN. ROBERT DUNCAN : To ask the author of the amendment a question –

PRESIDENT : Will Sen. Whitmire yield?

WHITMIRE : Yes, sir. What – what we’ve done, Sen. Duncan, is we’ve worked –

DUNCAN : I can't hear and when you were laying it out –

WHITMIRE : What we've done is work with the press –

PRESIDENT : [Gavel.]

WHITMIRE : – to make certain that the act conforms with the intended purpose of protecting First Amendment rights and does not open the door to other frivolous lawsuits.

DUNCAN : I understand that. I'm just trying to understand how you did it. Okay. Thank you.

Id. 84.

At the conclusion of the proceedings on the bill, The Texas Legislative Council briefly summarized each bill passed by the legislature. Regarding H.B. 2935, the summary stated:

House Bill 2935 amends Civil Practice and Remedies Code provisions relating to legal actions involving a party's exercise of the constitutional rights to petition, to speak freely, or to associate freely. The bill modifies deadlines for setting and holding hearings on motions to dismiss such actions, adds a condition under which the court is required to dismiss such an action, and repeals a provision relating to the deadline for filing appeals or writs concerning these motions. The bill also authorizes a person to appeal from an interlocutory order denying a motion to dismiss and specifies that such an appeal stays all proceedings in the trial court pending resolution of that appeal. The bill exempts a legal action brought under the Insurance Code or arising out of an insurance contract from provisions relating to legal actions involving the exercise of these constitutional rights.

Id. 89.

**THE LEGISLATIVE HISTORY OF
CHAPTER 27, TEXAS CIVIL PRACTICE AND
REMEDIES CODE, ENTITLED:
ACTIONS INVOLVING THE EXERCISE OF
CERTAIN CONSTITUTIONAL RIGHTS**

BACKGROUND

2011: H.B. 2973 Enacted

H.B. 2973 Filed

During the Regular Session of the 82d Texas Legislature, Rep. Hunter filed H.B. 2973, "An Act relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights." Tex. H.B. 2973, As Introduced, 82d Leg., R.S. (2011). [Exhibit 2.]

H.B. 2973, As Introduced, added a new Chapter 27 to the Civil Practice and Remedies Code.

SECTION 1. This Act may be cited as the Citizens Participation Act.

SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 27 to read as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. A hearing on a motion under Section 27.003 must be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An 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.

(c) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action; and

(2) sanctions against the party who brought the legal action and the attorney representing the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action and the attorney from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing the sale or lease of, or a commercial transaction in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

SECTION 3. The change in law made by this Act applies only to a legal action filed on or after the effective date of this Act. A legal action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

Id. [Underlining indicates added text.]

S.B. 1565 Filed

Sen. Ellis filed an identical companion bill, S.B. 1565. Tex. S.B. 1565, As Introduced, 82d Leg., R.S. (2011). [Exhibit 9.]

House Committee Hearings on H.B. 2973

Public Hearing: March 28

H.B. 2973 was referred to the House Judiciary and Civil Jurisprudence Committee. The committee set the bill for a public hearing on March 28. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2973 Before the House Committee on Judiciary and Civil Jurisprudence, 82d Leg. R.S. (March 28, 2011). [Exhibit 11.]

Rep. Hunter, the bill's House sponsor, explained H.B. 2973 to the committee.

REP. TODD HUNTER : Members, some of you have been on the committee before especially Will and Richard. We have seen through the years what is called SLAPP suits and this bill is basically anti-SLAPP suits – Strategic Lawsuits Against Public Participation, is what a SLAPP suit is. Unfortunately we do have abuse in the legal system at certain times and that basically, trying to silence individuals or groups. This type of law has been passed in 27 jurisdictions and has never repealed. The purpose of the bill is to encourage public participation of Texas citizens and basically to safeguard constitutional rights of persons to petition, speak freely, associate freely and participate in government. It also provides for an expedited motion to dismiss in lawsuits like these that are filed frivolously, mainly aimed at retaliating against one who exercises their freedom of speech or right of petition and it also establishes some important efficiencies to try to handle this matter and it provides for basically dismissal, uh, set up. And I'm going to ask Mr. Chairman that, to take the testimony but that you leave the bill pending and I will give you an update through the week, if anybody has any clarification or has suggestions.

Id.

Joe Ellis, representing the Texas Association of Broadcasters, testified in favor of H.B. 2973.

JOE ELLIS : Good afternoon, Mr. Chairman, Members of the committee, thanks for the opportunity to be here today. I represent Texas Association of Broadcasters, I work for KDFW in Dallas, and we hope you'll consider this bill and agree that this is an opportunity to help provide some protection for whistleblowers and this shouldn't be missed, we in the news media we hear from people who have information that is of legitimate public interest, even concerned government officials, law enforcement and lawmakers, yet they fear legal retaliation for coming forward and often those people back down and don't reveal what they know due to this fear and that's a chilling effect that it has on the flow of that valuable information. Other times they do come forward, but they are sued in court in an effort to keep them quiet, another chilling effect that we hope to recognize. When it happens as was mentioned before me, it's

an abuse of our court systems and infringement on peoples' freedom of speech rights.

And let me give you a couple of examples if I may. Last year KDFW did a story addressing the billions of federal tax dollars that are poured into tutoring programs to help underachieving students through the No Child Left Behind Act – companies that profit from this federal money that is passed through the states. We talked to former employees, as well as parents and students who said these tutoring programs offered by one particular company were far too basic and of little help toward academic achievement and supplied basic content the same year after year for returning students. The parents and students and former employees say the company offered up front gift incentives for participating in this program which is a violation of the state and federal rule for these funds. The former employees of the company say they were fired for raising concerns about the company's practices and filing complaints with the state regulatory authorities. School districts even complained about the company's practices, saying they were out of line with regulations but, as KDFW found there is little oversight in the accountability over these funds and companies that are receiving them. The company involved filed suit against two former employees that worked with KDFW and helped provide some information and the suit alleged all kinds of things including defamation and civil conspiracy and that the two former employees were disgruntled and were conspiring with others to basically slander the company. The company also threatened to sue us and sent us a cease and desist order. The two former employees were unable to defend themselves through counsel and were ordered to discontinue communications with us. The lawsuits against those people are still pending.

Yet another example, KDFW in 2008 did a story addressing Medicare fraud and the billions of taxpayers dollars lost every year. With the help of a former employee we exposed a Nigerian national using multiple identities to set up and operate fraudulent home health care businesses. This woman was in the country illegally and ordered deported nearly two decades ago, yet she was able to set up multiple home health care agencies and collect millions of dollars through Medicare for patients who would not typically qualify for home care coverage and for patients who receive no home health care at all. This story exposed shortcomings in the state system of checks for licensing of home care providers. This particular person operating these companies was previously licensed, but was revoked due to some problems and yet she still got multiple licenses afterwards. Yet some employees has reported fraud to the state, but nothing happened. In fact the Texas Department Of Aging And Disability claimed it did its own investigation but turned up nothing, clearing the way for her to continue to receive these funds. In days leading up to our story the person was arrested and

placed in federal custody on immigration fraud charges and Medicaid fraud charges –

CHAIR : Let the record reflect that Rep. Bohac is here. Go ahead.

ELLIS : Okay. Anyway, she was arrested and had fraud charges filed against her and she was eventually sentenced to federal prison and ordered to forfeit assets and pay restitution. However, in the days leading up to our story, her company filed suit against us alleging that former employees were disgruntled and intended to slander the company. The suit made allegations against us and our intentions, which it had no idea what our intentions were. But – anyway, it tried to stop these people from speaking out and our story from running. Luckily, that case was non-suited because that person was eventually arrested and detained and not released on bail.

As a result of that particular situation, Sen. Jane Nelson filed legislation that would strengthen the requirements for people obtaining a health care license in Texas that Senate Bill 78, which is – has moved through the Senate and is now in the House awaiting a committee referral.

One last example if I may and I'll close. Back in 2005 we reported on a Dallas city councilman who is also the treasurer of a non-profit community development corporation. This CDC received federal grant money for community development projects in neglected parts of south Dallas. The council man was ousted from his position as CDC treasurer after it was discovered that he embezzled some \$50,000 by writing checks to himself and family members from the CDC account. The CDC board made attempts to get the money repaid without going to law enforcement or going public, but in response – as our story showed, the council man retaliated by suing the CDC's board chairperson for slander and libel, costing them unnecessary time and stress and money. Meanwhile, the board members were afraid to do anything further about it, fearing the councilman's position of power. That councilman was eventually indicted and convicted in federal court.

CHAIR : Are there any questions for Mr. Ellis? Any questions? Thank you Mr. Ellis.

ELLIS : Ok, thank you very much for being heard. I hope you'll consider this bill so we can have some more protection for whistleblowers out there.

Id.

Brenda Johnson testified in favor of H.B. 2973.

BRENDA JOHNSON : My name is Brenda Johnson. I'm a resident from San Antonio and an HOA resident and litigate in civil litigation.

CHAIR : Okay, tell us – tell us your position.

JOHNSON : Thank you, Chairman. I'm for the bill.

CHAIR : Okay.

JOHNSON : Thank Chairman, Vice Chairman, ladies and gentleman of the committee for this opportunity to tell my story or should I say stories as they appeared in the news. First it was "Homeowners association sues its members, racks up eight thousand dollar legal bill" then, "Residents say HOA election rigged," then "Bully HOA president ousted." Finally, "Ventura HOA president resigns." After 20 years HOA members were shut out of their board meetings, restricted at town hall meetings, and had their annual meetings hijacked. Residents first requested, then demanded to be heard, the board refused. Residents presented the board with a demand to hold a special meeting in according with the by-laws and the board singled out eight residents and sued rather than meet with its constituency. After two years, five lawsuits involving several law firms and an estimated \$300,000 in legal and related fees by all sides, a near riot at our October 2010 annual meeting, a court injunction invalidating that meeting, resignation of the board, a court appointed interim manager, and a court ordered do over annual meeting, homeowners are again able to participate in governing our HOA. We are still assesses the damage and picking up the pieces, but we ended a two-year siege of 1,132 home HOA.

The civil suit that started it all was nothing more than intentional tort in the form of a SLAPP, a Strategic Lawsuit Against Public Participation. Defending this suit required a substantial investment of money, time, and resources. The resulting effect was a chill on member participation in and opened debate on important association issues. This chilling effect was not limited to the eight defendants. Fearful of being a target of future litigation other residents refrained from speaking on or participating in public issues and concerns. Suppression of residents at all association meetings, board meetings, town hall meetings and the annual meeting, and renegeing on promises made at the courthouse to avoid injunctive relief only exacerbated the situation.

The filing of this SLAPP also impeded removal of this runaway board. It further removed the members of this association from the public decision-making process or the forum were both the cause and resolution of the dispute could be determined and placed them before a court where only the alleged effects of the controversy could be determined. Adding insult to injury, there is absolutely no risk to the board in these kinds of suits. They use association

funds to hire an attorney to bring this suit and the association's D&O insurance brought them another firm to defend against the countersuits. Meanwhile homeowners end up paying for both sides of the action. The final bill for legal fees paid by the association for this one suit that started it all is approximately \$170,000. There were more associated actions and costs. These kinds of suits have nothing to do with the merits of the case. It is a classic David and Goliath situation, with discovery costs, motions and counter motions, delay tactics. The HOA would very likely have outspent us and won by default, if one defendant, one of my co-defendants, hadn't taken out a second mortgage on his home to help pay for these costs. The rest of us scraped up as much as we could to make the payments and we're not done yet. Other states have recognized the need for this kind of legislation and I hope that Texas will join their ranks.

Id.

Robin Lent, representing the Texas Association of Broadcasters, testified in favor of H.B. 2973.

ROBIN LENT : My name is Robin Lent, um, I am President of Texas Homeowners for HOA Reform and a member of the HOA Reform Coalition and I am very much for the bill. I am an advocate for homeowners. I have been for some time and I found as I was speaking out against some of the abuses of HOAs and with some of my fellow advocates, we received many threatening letters of litigation. One such SLAPP suit has been filed in Dallas County against John Doe. The person didn't even know who he was filing a lawsuit against and subpoenaed Yahoo and Yahoo declined the invitation and the judge commented that it was a homeowners association, foreclosures, fees, fines that always been public debate in Texas and probably will be until long after we're gone. And so, but that wasn't enough, they went to Hayes County and filed the same lawsuit and that is pending and we don't know what's gonna happen.

But, a lot of times they say that you know, HOA boards should be liable for their actions. I think that as long as advocates have to carry insurance and have to be liable for their actions, we all should be able to have a level playing field. I brought you today letters – threat letters that – we received.

Id.

Carla Main testified in favor of H.B. 2973.

CARLA MAIN : Good Afternoon. My name is Carla Main. I came here from New Jersey to testify in support of this bill. I'm a journalist; I also practice law in New York City so I come to this issue with a background on understanding –

CHAIR : You did not mark on witness form –

MAIN : Yes.

CHAIR : – that you are testifying for, against or neutral. Would you come up and mark it for me please? And you are testifying for the bill? Okay. Thank you.

MAIN : I'm interested in this bill because I am a journalist and I wrote a book. The book was called "Bulldozed." It's about an imminent domain controversy in a city in Texas. The city was Freeport and a year after I wrote this book I was sued in state court in Dallas. This was a book that was generally recognized around the country. It was reviewed in newspapers and magazines all around the country. It won an award for political science writing. It was published by Encounter Books, which is a very serious non-profit publisher that publishes well regarded intellectual books – it is funded by the Bradley Foundation. The person who sued was a real estate developer who was discussed in the book and he sued not just me, but my publisher and a very esteemed professor who wrote a blurb that appeared on the back of the book. He also sued a small community newspaper and a freelance writer who wrote a review of my book. The practical result of having sued that community newspaper and the book reviewer was that we were unable to remove or transfer the case to federal court for a motion to dismiss which would have effectively gotten rid of the case very quickly. That is the type of remedy that this bill would have enable to have if this bill had been in existence at the time.

Instead we have litigated the case now for two and half years. The community newspaper and the freelance writer are no longer defendants in that case, because one week and a day after the time elapsed from when we could have dismissed that case they were let out of the case. They settled with the real estate developer who sued them. We unfortunately are still defendants, myself and my publisher.

I am very fortunate that I have pro bono counsel because without that I do not know what would have happened to me or to my publisher. We are litigating – we are fighting very hard. It has taken an enormous toll on me emotionally, physically – for a journalist, to have my integrity questioned. This was a very carefully researched book.

CHAIR : Let the record reflect that Chairman Thompson is here.

MAIN : This is the kind of book – it was a very serious book. I think about a third of it is, concerns Daniel Webster and James Madison. [Laughter.] And the drafting of the takings clause in the –

Id.

Janet Ahmad, representing Homeowners for Better Building, testified in favor of H.B. 2973.

JANET AHMAD : My name is Janet Ahmad. I'm with Homeowners for Better Building. One thing is all these years that you see me coming to the capital – Thank you Chairman and committee members, I appreciate this opportunity. One thing I have not done is that I have always testified on behalf of others, worked for others. The one thing I didn't do was to tell my story. I am here today to tell what this does for the industry. Homeowners for Better Building organized communities, where homes were falling apart, were cheated. After doing that we had people on the streets in San Antonio, Austin, Houston, Kyle and Dallas – particularly in Dallas. We organized subdivisions to get homes bought back. We also were responsible in 2000 in getting a federal bill on binding arbitration – the abuses of binding arbitration – be addressed by the federal legislature. – 2001 we filed the first every home lemon law. In Dallas particularly. One subdivision in Arlington Texas was built on top of bombs. Bombs from a World War Two bombing range, some were live. The cleanup for the federal government Corps of Engineers was \$6.2 million. Not the builder – the builder failed to do it, although they were told, get an unexploded ordinance contractor to remediate that land. They didn't do it. KB Homes, who built those homes, filed a lawsuit against their own customers – \$20 million and myself. That made us somebody. The *Wall Street Journal* carried the story and their question was always, why would a builder sue their own customers and kept asking, do they do it a lot? The answer to that is, yes. They threaten them or they do it. But they also put into their – into their restrictive covenants, that any sign of any character or any signs of the nature of protests, complaints against the – [inaudible]. This is in the "Buy a House and Shut Up" article by Rick Casey. It's a classic. You need to read it and I have one copy here and if they can make a copy. I'd be happy to give it to you. The –

CHAIR : Just a second. Chairman Thompson you have a question?

REP. SENFRONIA THOMPSON : Ms. Ahmad, it's always good to see you. How does this bill – this bill impact you?

AHMAD : Excuse me?

THOMPSON : How does this bill impact you?

AHMAD : Well, I was sued for racketeering. Racketeering, yes. – \$20 million worth – \$20 million. The racketeering was that protesting was racketeering. You know, its the law that was used on East Coast called RICO, to reign in – or to prosecute the mobsters on the East Coast so it was written in the newspapers when I was sued. But the other homeowners, they got their homes bought back, they got the suit dropped and I'm the only one left on the lawsuit. It's now been since 2002

– since 2002 this lawsuit has been filed. I don't know that KB Homes would sue their own customers again after the bad publicity they got. But we need, it is clear sign that we need to reign in like other states have the ability of the industry file these SLAPP suits.

CHAIR : Ms. Ahmad, lets see if their are any questions for you from the committee. And if you want to give us that article, we will have someone go make some copies.

AHMAD : Yes, and I have um, the SLAPP suit that was filed – something was printed on our website by Nancy Hentschel [phonetic] who could not be here today.

Id.

Laura Prather, representing the Freedom of Information Foundation of Texas, testified in favor of H.B. 2973.

LAURA PRATHER : Good afternoon, Mr. Chairman. Thank you for the opportunity to appear before your committee. We will be handing out to a notebook that looks a little bit like this. This basically has, hopefully all the information about the bill that you may want – with regard to answer any of your questions. As Chairman Hunter indicated, there are 27 other states that have this law on the books and the District of Columbia which recently passed it in December of 2009. This is not a new concept. You've heard examples of where this law is needed. It's not new ground. In the other states that have this law, it has never been repealed. It has amended only to incorporate modern technology and commercial speech exemptions, both of which we have already encompassed in the bill. And in drafting it, we made sure to use specific terms and standards that Texas courts are familiar with. So with this bill, the same standards apply to speech in the – the courts have already applied in the anonymous speech setting as in the non-anonymous speech setting of the one of the standards that was taken from one of the existing court doctrine.

This is a good government bill for a number of reasons. First of all, it promotes constitutional rights of citizens and encourages their continued participation in public debate. It creates a mechanism for getting rid of meritless lawsuits at the outset of the proceedings and it provides for means to help alleviate our already overburdened court system. I'll be available to help answer any questions if this notebook doesn't and I appreciate your time.

Id.

Shane Fitzgerald, representing the Corpus Christi Caller-Times, testified in favor of H.B. 2973.

SHANE FITZGERALD : Good afternoon, Mr. Chairman and committee and thanks for hearing me. My name is Shane Fitzgerald, I'm the vice president of Corpus Christi Caller-Times. I am for the bill and it was interesting a little bit ago when the woman who authored the book named "Bulldozed," it's ironic that that's the name on that book. That's what happens to folks without this bill, they get bulldozed by people who want to basically shut up people who aren't – aren't with them. We're good journalists, newspapers. I'm here representing a medium-size newspaper. Good journalists cover the communities honestly and thoroughly and at times you might find this hard to believe we make people mad, you know, and they want to retaliate and we probably get threatened four to five times a month and if everybody carried out what they were – what they threatened to us, we would be out ten of thousands of dollars that go into reporting on our communities and what we're doing. You know, and often these threats come from public records, information we gather through public records and in the public domain. Last week I get a threat because of some pictures that ran of spring break on a public beach. This woman was sure she could sue us for every dime that we had. We live in a refinery city, where we report diligently on air quality and safety issues and sometimes those readers get upset with us and what we are – and what we're publishing and there is a community responsibility we have to be able to do that openly and without the threat of needless suits. We have to vigorously defend ourselves against these threats because if we don't do and we kowtow to these sorts of threats, it would effect what goes on in our community and whose watching – and whose watching over our community. It's particularly chilling on small papers who don't have the wherewithal that some others do. It can keep watch dog reporters, watch dog, and just the general public who might want to come forward with information – it keeps them quiet. As the media industry we're not asking for special treatment. If we make mistakes there are laws on the books that hold us accountable, but by the same token we don't need to be sued needlessly because somebody is upset and this legislation would solve that.

Id.

Steve Harrison, representing the Texas Trial Lawyers Association, testified on H.B. 2973.

STEVE HARRISON : Thank you, Mr. Chairman. Steve Harrison for the Texas Trial Lawyers Association speaking on the bill. Initially we had some concerns about the wording in some of the bill, but we are happy to report that we're working through this issues and working with Chairman Hunter and would be happy to continue to do so.

Id.

Chairman Jackson listed the names of persons registered on the bill, but not wishing to testify and closed the public hearing.

CHAIR : Good. Any questions for Mr. Harrison? Thank you, Sir. We have a form from Mike Hull, Texas for Lawsuit Reform, for the bill, does not wish to testify. Keith Elkins, Freedom of Information Foundation of Texas, for the bill, does not wish to testify. Mary Lou Durham, lists herself as retired, is for the bill, does not wish to testify. Ed Sterling, Texas Press Association, is for the bill, does not wish to testify. Monty Wynn, Texas Municipal League, for the bill, does not wish to testify. Doug Toney, Texas Press Association, Texas Daily Newspaper Association, for the bill, does not wish to testify. Frank Knaack – Knaack – ACLU of Texas, for the bill, does not wish to testify. David Weinberg, Texas League of Conservative Voters – Conservation Voters, for the bill, does not wish to testify. Arif Panju, Institute for Justice, for the bill, does not wish to testify. Irene Adolph, Coalition for HOA reform, HOA datainc.org, for the bill, does not wish to testify. Ware Wendell, Texas Watch, for the bill, does not wish to testify. Lou Ann Anderson, online producer and state confident, – stateofdenial.com, for the bill, does not wish to testify. Is there anyone else who wishes to testify on, for, or against House Bill 2973? Mr. Chairman?

Id.

Rep. Hunter closed on his bill.

HUNTER : Thank you Mr. Chairman and members I ask you to pend the bill. I'll get back with you and give you an update this week and I close.

Id.

H.B. 2973 was left pending. *Id.*

Public Hearing: April 4

The House Judiciary and Civil Jurisprudence Committee held another public hearing for H.B. 2973 on April 4. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2973 Before the House Committee on Judiciary and Civil Jurisprudence, 82d Leg. R.S. (April 4, 2011). [Exhibit 12.]

Chairman Jackson reminded the committee of the bill.

CHAIR : The Chair lays out House Bill 2973 as pending business. Members, we had adopted this substitute last meeting. This is the – what Chairman Hunter called the SLAPP bill.

Id.

The committee favorably reported the Committee Substitute for H.B. 2973. *Id.*

[NOTE: A substitute is an amendment that replaces the entire bill.]

House Committee Report

The committee prepared a report that included the text of the committee substitute, the committee's bill analysis, and the fiscal notes prepared by the Legislative Budget Board. Tex. H.B. 2973, House Committee Report, 82d Leg., R.S. (2011). [Exhibit 3.]

Subparagraph (A) of the definition of "exercise of the right to petition" was amended by adding "or other" to subdivision (iii).

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

Id. [Underlining indicates added text.]

The House Committee Substitute amended §27.009 by revising Subdivision (a)(2).

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Id. [Underlining indicates added text.]

The House Committee Substitute amended §27.010 by revising Subsection (b) and adding Subsection (c).

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Id. [Underlining indicates added text.]

Bill Analysis

The House Committee prepared a bill analysis a bill analysis for H.B. 2973 *Id.* [HOUSE COMMITTEE ON JUDICIARY AND CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2973, 82d Leg., R.S. – Committee Report–Substituted (2011).

The bill analysis reviewed the background and purpose of the bill.

BACKGROUND AND PURPOSE

Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the

quality of a business, the involvement of citizens in the exchange of ideas benefits our society. The Internet has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of public speech. Unfortunately, abuses of the legal system have also grown, including the filing of frivolous lawsuits aimed at silencing these citizens who are participating in the free exchange of ideas. These lawsuits are called strategic lawsuits against public participation.

C.S.H.B. 2973 seeks to encourage greater public participation of Texas citizens through safeguarding the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government by providing for an expedited motion to dismiss frivolous lawsuits aimed at retaliating against someone who exercises the person's right of association, free speech, or right of petition.

Id. Bill Analysis.

The analysis reviewed the rulemaking authority granted by H.B. 2973.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

Id.

The analysis summarized each section of the bill.

ANALYSIS

C.S.H.B. 2973 amends the Civil Practice and Remedies Code to enact the Citizens Participation Act and to set out its purpose. The bill authorizes a party to file a motion to dismiss a legal action if the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, right to petition, or right of association. The bill requires the motion to dismiss such a legal action to be filed not later than the 60th day after the date of service of the legal action and authorizes the court to extend the time to file the motion on a showing of good cause.

C.S.H.B. 2973 provides, on the filing of the motion to dismiss, that all discovery in the legal action is suspended until the court has ruled on the motion, except that the court may allow, on a motion by a party or on the court's own motion and on a showing of good cause, specified and limited discovery relevant to the motion to dismiss, as provided by the bill in provisions relating to evidence. The bill requires a hearing on the motion to be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

C.S.H.B. 2973 requires the court to rule on the motion to dismiss not later than the 30th day following the date of the hearing on the motion and to dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association. The bill prohibits the court from dismissing the legal action if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

C.S.H.B. 2973 requires the court, in determining whether the legal action should be dismissed, to consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based. The bill requires the court, at the request of the party making a motion to dismiss, to issue findings not later than the 30th day after the date a request is made regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

C.S.H.B. 2973 provides that the motion to dismiss is considered to have been denied by operation of law and the moving party may appeal if the court does not rule on a motion to dismiss on or before the 30th day following the date of the hearing of the motion. The bill requires an appellate court to expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action or from a trial court's failure to rule on that motion on or before the 30th day following the date of the hearing of the motion. The bill requires an appeal or other writ to be filed on or before the 60th day after the date the trial court's order is signed or the time expires, as applicable. The bill requires the court, if the court orders dismissal of a legal action under the bill, to award to the moving party court costs, reasonable attorney's fees, other expenses incurred in defending against the legal action, and sanctions against the party who brought the legal action as the court determines sufficient to deter the party from bringing similar actions. The bill authorizes the court to award court costs and reasonable attorney's fees to the responding party if the court finds that the motion to dismiss is frivolous or solely intended to delay.

C.S.H.B. 2973 exempts from the its provisions an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney; a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer; a legal action seeking recovery for bodily injury, wrongful death, or survival or statements made regarding that legal action. The bill provides that its provisions do

not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions and requires its provisions to be construed liberally to effectuate its purpose and intent fully.

C.S.H.B. 2973 defines "communication," "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," "governmental proceeding," "legal action," "matter of public concern," "official proceeding," and "public servant."

Id.

The analysis noted the effective date of the bill.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2011.

The analysis also compared the "original" (H.B. 2973 as filed) to the committee substitute.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 2973 differs from the original by including in the definition of "exercise of the right to petition" a communication in or pertaining to an executive or other proceeding, whereas the original specifies only a communication pertaining to an executive proceeding. The substitute, in a provision specifying awards to a moving party if the court orders dismissal of an action, differs from the original by omitting a provision included in the original requiring sanctions against the attorney representing the party who brought the legal action.

C.S.H.B. 2973 differs from the original by exempting from the bill's provisions a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer, whereas the original exempts such a legal action if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing the sale or lease of, or a commercial transaction in, the person's goods or services, and the intended audience is an actual or potential buyer or customer. The substitute contains a provision not included in the original exempting from the bill's provisions a legal action seeking recovery for bodily injury, wrongful death, or survival or statements made regarding that legal action.

Id.

House Research Organization Report

The House Research Organization (HRO) also reviewed the bill. HRO is an agency of the Texas House that analyzes bills that come to the House floor for debate. HOUSE RESEARCH ORGANIZATION, H.B. 2973 Bill Analysis (May 2, 2011). [Exhibit 19.]

The HRO analysis noted the subject of H.B. 2973.

SUBJECT:

Dismissing SLAPP suits on free speech, petition, and assembly grounds.

Id.

The HRO analysis reviewed the background of H.B. 2973 and summarized its provisions.

DIGEST:

CSHB 2973 would allow a party to file a motion to dismiss if a lawsuit were based on that party's exercise of the right of free speech, right to petition, or right of association. On the filing of a motion to dismiss, all discovery would be suspended until the court ruled on the motion. The court could allow specified and limited discovery on a motion by a party or on the court's own motion and on a showing of good cause.

A court would be required to grant the motion to dismiss if the moving party showed by a preponderance of the evidence that the lawsuit was based on, related to, or was in response to the party's exercise of the right of free speech, petition, or association. A court could not grant the motion to dismiss if the plaintiff established by clear and specific evidence a prima facie case for each essential element of the claim.

If the court granted the motion to dismiss, the court would be required to award to the moving party:

- court costs, reasonable attorney's fees, and other expenses incurred in defending the lawsuit; and
- sanctions against the plaintiff to deter similar actions.

If the court found the motion to dismiss was frivolous or solely intended to delay, the court could award court costs and reasonable attorney's fees to the responding party.

The motion to dismiss would have to be filed within 60 days after service of process. The deadline could be extended by the court on a showing of

good cause. A hearing on a motion to dismiss would have to be set by 30 days after the date of service of the motion, unless docket conditions required a later hearing. The court would be required to rule on the motion to dismiss by 30 days after the hearing.

The bill would provide for expedited appeal of the motion to dismiss. An appeal would have to be filed within 60 days after the order was signed or the motion was denied by operation of law.

The bill would not apply to enforcement actions by the state or a political subdivision, a lawsuit against a person primarily engaged in selling or leasing goods or services when the intended audience was a customer, or a personal injury suit.

At the request of a party filing a motion to dismiss, the court would be required to issue findings regarding whether the lawsuit was brought to deter or prevent the moving party from exercising constitutional rights and was brought for an improper purpose, including to harass, cause unnecessary delay, or increase litigation costs.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011. The bill would apply only to a legal action filed on or after the effective date.

Id.

The HRO analysis reviewed the arguments of the supporters and opponents of the bill.

SUPPORTERS SAY:

CSHB 2973 would allow a person to file a motion to dismiss if a lawsuit was based on that person's exercise of the right of free speech, petition, or association. Citizen participation benefits society, whether it comes in the form of petitioning the government, writing a news article or blog post, or commenting on the quality of a business.

"SLAPP" suits, or strategic lawsuits against public participation, are frivolous lawsuits aimed at silencing people involved in these forms of citizen participation. In one case, a woman who complained to the Texas State Board of Medical Examiners about a doctor and later complained to a television station was sued by the doctor. The suit eventually was dismissed, but the television station was forced to pay \$100,000 in legal expenses. SLAPP suits chill public debate because they cost money to defend, even if the person being sued was speaking the truth. These suits are particularly problematic for independent voices that are not part of a news or media company. SLAPP suits are becoming more common, in

part because the Internet has created a searchable record of public participation.

Under current law, the victim of a SLAPP suit must rely on a motion for summary judgment. While summary judgment disposes of a controversy before a trial, both parties still must conduct expensive discovery. By allowing a motion to dismiss, CSHB 2973 would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system.

Anti-SLAPP legislation similar to this bill has been passed by 27 states and the District of Columbia.

OPPONENTS SAY:

HB 2973, if interpreted broadly, could be used to intimidate legitimate plaintiffs. It could stifle suits brought legitimately under libel or slander laws because the plaintiff in such suits would have to overcome motions testing its pleadings.

The Senate companion bill contains language that would limit court costs, attorney fees, and other expenses "as justice and equity may require." This language should be added to the House bill to ensure a court could award attorney fees that were lower than what the attorney typically charges, if appropriate.

Id.

The HRO analysis also contained a notes section.

NOTES:

The companion bill, SB 1565 by Ellis, was reported favorably, as substituted, by the Senate State Affairs Committee on April 13.

Id.

House Floor Debate on H.B. 2973

Second Reading: May 3

H.B. 2973 came before the House on May 3. CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the House (Second Reading), 82d Leg. R.S. (May 3, 2011). [Exhibit 13.]

Apparently Rep. Hunter was absent from the floor when H.B. 2973 came up. Rep. Raymond explained the bill.

REP. RICHARD RAYMOND : Thank you, Mr. Speaker, Members. This is Chairman Hunter's bill that provides for expedited motions to dismiss frivolous lawsuits aimed at retaliating against one who exercises his right of association, free speech, or right of petition. Move passage.

Id.

H.B. 2973 was passed on second reading. *Id.* H.J. of Tex., 82d Leg., R.S. 2757 (2011). [Exhibit 20.]

Third Reading: May 4

The next day H.B. 2973 was laid out on third reading. CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the House (Third Reading), 82d Leg. R.S. (May 4, 2011). [Exhibit 14.]

Apparently Rep. Hunter was absent from the floor when H.B. 2973 came up. Rep. Raymond explained the bill.

REP. RICHARD RAYMOND : Thank you, Mr. Speaker, Members. This is the bill protecting a person's rights for petition.

Id.

H.B. 2973 passed on third reading on a record vote of 142 ayes and no nays. *Id.* H.J. of Tex., 82d Leg., R.S. 2837 (2011). [Exhibit 20.]

House Engrossment

After H.B. 2973 had been passed on second and third readings, a new version of the bill was published. The purpose of the House Engrossment is to incorporate the amendments added on the House Floor. Since there were no amendments, the House Engrossment was the same as the House Committee Substitute. Tex. H.B. 2973, House Engrossment, 82d Leg., R.S. (2011). [Exhibit 4.]

Senate Committee Hearings on S.B. 1565

Public Hearing: April 4

Meanwhile the Senate began consideration of the Senate companion bill, S.B. 1565. Tex. S.B. 1565, 82d Leg. R.S., Master Bill History Report (2011). [Exhibit 8.]

H.B. 2973 then crossed over to the Senate where it was referred to the State Affairs Committee, which held a public hearing for the bill on April 4. CAPITOL RESEARCH SERVICES, Hearings on S.B. 1565 Before the Senate Committee on State Affairs, 82d Leg. R.S. (April 4, 2011). [Exhibit 15.]

Sen. Ellis was late for the committee hearing and Sen. Van de Putte explained S.B. 1565 to the committee.

SEN. LETICIA VAN DE PUTTE : Anti-SLAPP legislation, the Anti-Strategic Lawsuits Against Public Participation. This legislation that will protect all Texans petitioning their government or speaking out about matters of public concern. This bill protects the person's First Amendment right to speech, petition, and assembly. The Anti-SLAPP Bill has been adopted in 27 other states and the District of Columbia. This how it works; a lawsuit is filed against an individual who has said or written something the plaintiff doesn't like. The plaintiff is someone with more money or more power because he doesn't like what was said. Even though it was true, he files a lawsuit against the person, seeking damages, truly in the purpose of defiling them. Then the defendant can't afford to defend himself, so they do whatever the plaintiff wants for the suit to be dropped, which is usually a retraction or pulling down any offending statements for the medium where it was published.

The bill protects Texans by creating an Anti-SLAPP motion within 60 days of service of the lawsuit. The motion would point out how the suit was filed without merit. And at that point all discoveries, pre-trial motions, and other pre-trial actions would stop.

Sen. Ellis has an example. In the example, there's an Austin man who applied for a taxi cab franchisee from the city of Austin, was sued for defamation by his former employer for statements a man made at a city council meeting when he tried to get his own franchise. No evidence or summary judgment motion in favor of the defendant was granted, but the case was appealed causing further litigation costs for the defendant.

Members, the differences on the bill as filed and the community substitute are on the definition in section 28.001(4)(a)(iii), added words "or other" concerning executive proceedings. And in the damages and cost section, removed the express option of sanctions against the attorney representing the party. And in the

exemptions section, 27.010(d) modified commercial speech exemption to include sales of insurance projects – products. And indicating that the chapter does not apply to legal actions involving bodily injury, wrongful death, or survival rights.

I believe Senator Ellis has some witnesses here that would be able to answer any questions.

Id.

Don Adams testified in favor of S.B. 1565.

DON ADAMS : Mr. Chairman and Members of the committee thank you very much for letting us testify at the hearing of this bill. I – I certainly didn't know anything about Sen. Patrick's bill, but then I never found knowing what was in the bill kept me from passing legislation through this body. But I do know something about this bill, it is a serious bill that protects the First Amendment rights. Sen. Van de Putte gave a very good example and let me give another example of what it addresses, then I would like to turn - I'm just a sore back lawyer. The lady next to me, right here, is one of the finest First Amendment lawyers that I know and she will go into the detail of the bill.

A young man was at a - lived in an apartment house and he had a parking sticker on his car. He had to have a parking sticker to park there, and the towing company came and towed it away anyway. Well, he went down there and tried to retrieve his car, they said no, you'll have to pay me 280 something dollars. Hello, Sen. Ellis. And he said, but I have a parking sticker. They said too bad. So he put it on his blog about how he'd been mistreated. Well, they filed a lawsuit – a defamation lawsuit against him, his choices were to defend the lawsuit and spend several thousand dollars doing it, to retract what was the truth on the blog, or just simply let them take a default judgment against him and let it haunt him the rest of his life. This bill would give him a fourth option, and that is essentially to file a motion to dismiss. I would like to introduce Ms. Prather now.

Id.

Laura Prather, representing the Freedom of Information Foundation of Texas and the Better Business Bureau of Central Texas, testified in favor of S.B. 1565 and answered committee questions.

LAURA PRATHER : Thank you, Mr. Chairman and Members of the committee, we appreciate having the opportunity to be heard here today.

ADAMS : Thank you for starting the clock over.

PRATHER : Senate Bill 1565 is, as Senator Van de Putte mentioned, it's not a novel concept, it's something that has been adopted in 27 states and in the District of Columbia. None of those statutes have ever been repealed. They have been amended for the purposes of modernizing them for modern technology, and they have been amended for the purpose of commercial speech exemption. In drafting this legislation we made sure to encompass both of those things, so we've modernized it for current technology and we've included – included a commercial speech exemption.

The bill provides for an expedited motion to dismiss and a stay of discovery during this process, so the legal fees to not incurred unnecessarily by the individuals involved in this SLAPP suit. It also provides for fees being awarded when the SLAPP motion is granted or in the contrary, if the SLAPP motion is found to be meritless, fees are – can be awarded by the court back to the plaintiff. In drafting the legislation we took the best of the other states that have this and incorporated best that they have, but also used terms and standards that Texas courts are used to applying, when determining whether there's merit to a claims, in matter involving free speech. In sum, this bill is good government because it promotes constitutional rights and encourages their continued participation in public debate, it creates a mechanism to dispense with meritless lawsuits at the outside of the proceedings, and it provides for a means to elevate some of the burden on our already overburdened court system. If you have any questions, I would be happy to answer them.

CHAIR : What – what is a meritless lawsuit?

PRATHER : If – if the court determines based upon the affidavits that are submitted to substantiate the motion that there is no basis for the suit to go forward, then the court can award – the court can grant the motion. If the court feels like it needs discovery, then the court has the opportunity to ask for limited discovery on the motion.

CHAIR : So how does the court – determine – What – what the guiding principles to consider in determining whether or not to dismiss under the legislation?

PRATHER : What – what they do, it's the same analysis that is done in an anonymous speech case, where somebody comes forward and they want to know what – what the web – web address is behind a person who's posted an anonymous blog. The court looks at the very beginning of the case to determine whether or not there is any basis for the lawsuit. And if they determine that there is a basis for the lawsuit, they can get that anonymous speaker's information. If they don't determine that, then they can't get the anonymous speaker's information. So this just creates the same level playing field for anonymous and non-anonymous speech.

CHAIR : So what you're telling me then, that there's a – is it a body of federal law and state law that – ?

PRATHER : State law – state law. It's in the anonymous posting *In re: Doe case*; it was the case that we set the standard from.

CHAIR : The standard set forth in the bill?

PRATHER : Yes.

CHAIR : Okay, and that standard that's set forth in the bill – is it – is it an accurate – where is it? – [pages turning].

ADAMS : Mr. Chairman, what was your question? I didn't hear.

: Where – where is it in the bill?

CHAIR : The question is the standard, what I would call the guiding principal that the court would follow, is it concluded in the bill, one? And then number two, if it is in bill, is it an accurate codification of the common law?

PRATHER : It is an accurate codification.

CHAIR : And where is this?

PRATHER : – and it is contained in the bill. It's on page 5 of the bill, Section 27.005 – 27.005(b) and (c). And it talks about the prima facie establishment of the elements of the claim.

CHAIR : So in page – on page 5, 25(c) [sic], says - first of all, it starts out in (b) as "the court shall dismiss legal action if the moving party shows by ponderous of the evidence that the legal action is based on, relates to, or is in response to the party's right of free speech, right to petition, and right of association."

PRATHER : Right, the burden is initially on the movant, and then it shifts to the respondent under 27.005(c), and that's where it says, "The court cannot dismiss a legal action if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim." And that's taken directly from the anonymous speech cases.

² Ms. Prather may have been referring to *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007).

CHAIR : So there seems to be some consistent burden of proof here, maybe I'm just reading it wrong. So you're – you're – the moving party – the party moving to dismiss only has to show by a ponderous of the evidence that the legal action is based on relies on or relates to the right of free speech – whatever.

PRATHER : Right, it's not their lawsuit, they're not the one bringing the claim –

CHAIR : The court may not dismiss the action if the party bringing the legal action establishes by clear and specific evidence the prima facie case. And I don't know why we just – I don't understand that. Why are we doing it that way?

PRATHER : Well, the clear and specific –

CHAIR : What is clear and specific evidence standard first?

PRATHER : Sure. The clear and specific standard, Mr. Chairman, is taken from the reporter's privilege cases. It's something that courts are used to applying when it comes to First Amendment issues.

CHAIR : I'm sorry – You have a – you talk very quick, and very fast, and very low, so if you'll –

ADAMS : Listen real slow.

CHAIR : Slow 'er down and put her down in second gear - slow it down a little bit – if you would. We'll plow through this.

PRATHER : The clear and specific evidence is what courts are used to applying when courts are dealing with First Amendment issues. It was adopted in the reports privilege statute; it was taken from the Dallas case of *Dallas Morning News v. Garcia*. And that's – that is a standard that is between preponderance and clear and convincing. It's – it's here because you're dealing with a speech matter and you are dealing with the movant having to establish that they actually have a basis for a claim involving free speech.

CHAIR : Is there – and I don't practice in this area, so I don't know – is there an exception to, in other words – if the movant, the person looking to dismiss the case establishes by a preponderance, so I guess the court's going to have to weight that evidence, the right of free speech, the right to petition, or the right of association. If you establish those three – one of those three things, you're out.

PRATHER : The burden shifts.

CHAIR : The burden shifts and then –

PRATHER : And then the burden –

CHAIR : And then – and then you go forward and you have to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. I'm not sure how I understand how it works. I'm just trying to understand it. I assume it's correct, but I'm trying to understand how it works in the real world.

ADAMS : Mr. Chairman, first of all, the lawsuit that we're talking about is essentially broad –

CHAIR : I understand –

ADAMS : – the rights - the constitutional rights of the defendant. The defendant raises that constitutional right and the motion to dismiss, and it is a motion of dismiss, then the burden shifts to the person who filed the lawsuit. If he or she, by affidavit, can essentially can establish the elements – each elements of their prima facie evidence of their case, then they do not dismiss. If they – if the person, the plaintiff, does not establish that, then the court does dismiss.

CHAIR : I understand that that is how it basically works, I'm just not understanding anecdotally how if you've established one of these three elements – the movant has – then how do you rebut that?

PRATHER : Well, you rebut that by showing you have a basis for your claim. And so what the basis for your claim – I mean – if you're suing – presumably the plaintiff is suing for defamation, or business disparagement, or something along those lines. So they have to establish that they have prima facie evidence of the essentially elements of their claims. So, for instance, they have to establish what they said was false. Not just that they didn't like it, but that it was false. And the problem with these lawsuits is often times they're brought by people who just don't like what was said. It's not that they're false, they just don't like it. Yeah, I'm not sure.

ADAMS : I'm not sure we are reaching his question.

PRATHER : Yeah –

CHAIR : Then I'm going to then see, basically– puts a heightened burden of proof on the plaintiff, to come in and establish clear and specific evidence of prima facie case. Those two just don't seem to go together. Typically I always thought that a prima facie, you establish each element, I guess, by a scintilla. I mean, you could be looking at standard

law, so this is a lot different than that, than your standard case, your regular case.

PRATHER : Well, the scintilla is in the no evidence motion for summary judgment.

CHAIR : Right.

PRATHER : And in a traditional motion for summary judgment it's a different standard that applies, that's the preponderance standard. So what we did was take the same standard that courts are used to applying in First Amendment cases.

CHAIR : And is this is the standard applied in a motion for summary judgment in a no – in a First Amendment case?

PRATHER : Well, that depends on what you're talking about. Actually if you're talking about actual malice, it's clear and convincing evidence of actual malice. And if you're talking about just falsity, it's a ponderous of the evidence. It also gets into nuances into public figures, public officials, whether or not something is privileged under Chapter 73, things like that. So because there is a dichotomy in the law between preponderance and clear and convincing, when it comes to speech cases, clear and specific seems like the logical solution since you don't know if you're going to be having an actual malice case.

CHAIR : Oh, that gets to me to where I'm headed, to a middle ground that we're proposing in this statute?

PRATHER : It's a middle ground that we're proposing the statute that the courts are already used to adopting in First Amendment matters, like the reporter's privilege cases.

CHAIR : Okay. Sen. Ellis.

ELLIS : Thank you. I'm sorry I was a little late. I was chairing Government Organization. For the members of the committee, particularly for all of those who don't practice law in any space, can you walk through what we're trying to solve and walk through the process where you and the Trial Lawyers Association came to some consensus so that this bill would not go into areas of commercial litigation where there is no constitutionally protected right for freedom to speech. First, kind of walk through what we're trying to solve, an example. Maybe apply this to a real live example.

ADAMS : The example, Sen. Ellis that I gave earlier is a real life example of a young man that lived in an apartment house and he had a parking sticker, and he had to have that to park there. The towing company towed his car anyway. He went to get his car and they said,

well, you owe us \$280, or whatever it was. And he said I don't have it. They said, well, you can't have your car, even though he had the perfect right to be there. So he went on his blog and trounced the towing company pretty good. They didn't like it, but everything was the truth. So they filed a defamation case against him. Now his choices at that point is he could spend thousands of dollars defending himself, or he could go on his blog and retract the truth, or he could do nothing and they would take a default judgment against him and he would be hounded the rest of his life, and his credit would be ruined. This statute right here gives a fourth option to someone like that, that is to file a motion to dismiss. We call it a Anti-SLAPP motion, but the truth of the fact it's like the old demurrer. It's a motion to dismiss. The motion to dismiss is based upon the fact that he was exercising his First Amendment right to free speech. So when he establishes by affidavit and his motion to dismiss, that he was exercising his first amendment right, then the towing company got to come back and they've got show that they have a good cause of action, by a different evidentiary standard, which is used in these kind – in First Amendment cases. If they don't show, then the motion to dismiss to granted and he has spent hundreds of dollars instead of thousands of dollars defending him. He hasn't has to go through the other options. This gives him a fourth option and that is a motion to dismiss based upon his First Amendment – exercising his First Amendment rights. That's exactly the example that this bill expresses.

ELLIS : Can you give some examples of how the people in the media, since you all are representing the media, have had problems in this area?

PRATHER : And we've got some witnesses to testify, but I'll give you a few examples, one of which is, Pam Vaught for KTBC is here to talk about.

[Off-mike comment.]

ELLIS : Put your mike down, pull it down a little bit –

PRATHER : Is that better?

ADAMS : I was never accused of not being able to be heard in this chamber. [Laughter.]

PRATHER : One example, we have a witness here today that will testify more about it, is an example brought before you by Pam Vaught for KTBC, she's the news director there, where a patient went to the Texas Board of Medical Examiners to complain about the doctor was essentially getting patients hooked on drugs, and then had a methadone clinic to treat them after the fact. That doctor has previously been sanctioned by the Texas State Board of Medical Examiners. The media brought the story to light after the whistle blower came forward to them.

That's often what happens is whistle blowers go to the media because they may not have the resources or the means to have any other medium hear them. And – So they went ahead and did a broadcast on this. And the doctor turns around and sues both the patient, trying to get the patient to pull back her complaint from the Medical Board, and the television station because they were the conduit for the information. So oftentimes the media gets brought into these disputes simply because they're the conduit for the information that whistle blowers have brought.

In that instance, the television station had to first determine where they going to represent the whistle blower, which is a cost to them and not an obligation of theirs. And then they have to decide, you know, how we are going to most efficiently get rid of this meritless lawsuit? It's meritless because there was nothing false said about the doctor. So they go ahead and assume the cost to defend the whistle blower at their own cost, they file a motion for summary judgment, and the doctor drags it out. He files three different continuances, amends his pleadings three different times, so it takes three times longer to get rid of this lawsuit than it should have. It cost the station over \$100,000, which is real money, that's two reporters maybe three, that could reporting on the community here in Austin, because it comes out of their bottom-line. They don't – They're self-insured, this is not an insurance company paying for it, it's them paying for it out of a local budget. And low and behold, the case gets dismissed, but it takes substantially more time, substantially more cost.

If they hadn't assumed the defense of that individual, she would have been mortgaging her house or out on the street, she had nothing to pay for her defenses. And then the doctor got sanctioned again. There was no basis for the suit.

That's – that's one example where this law would be able to get rid of the case at the outset, not tie up our court system, not cost hundreds of thousands of dollars, and not cause this individual defendant to have sleepless nights about whether or not she would be defended and what would happen.

ADAMS : Tell me, the television station is faced with an interesting strategic decision. Do they just let the woman who can't – doesn't have the money to defend herself or do they just let them take a default judgment against her. And then the deep pockets just sitting there with a default judgment against their co-defendant or the co-defendant is dismissed out for some reason because she can't pay a legal bill or a judgment anyway. And the television station is sitting there naked with a disinterested witness. So they almost have to help defend the person that made the statement that they carried on their station. They get sort of in the corner strategically like that. Right?

PRATHER : Uh-huh.

Id.

Sen. Jackson and Ms. Prather discussed the awarding of attorneys fees.

JACKSON : In the bill on the 7th page under damages and cost, says the courts shall award to the moving party court costs and that type of thing, is that standard where you tell the judge what to award?

PRATHER : As far as fee shifting goes?

JACKSON : Yeah.

PRATHER : Chapter 38 of the Civil Practice and Remedies

–

JACKSON : No, I don't know about that, but I'm just talking about is it customary to tell the judges, in these court actions, how they shall decide and award court costs?

PRATHER : There's two parts to your answer – there – to answer your question. There are statutory provisions that allows for the courts to award attorney fees in certain instances. The second part to your question is, these 27 other states that have Anti-SLAPP laws on the books

–

JACKSON : Okay, I'm not worried about the 27 other states. I'm just asking if this is pretty much standard in the state of Texas, that we tell a judge who – a judge is supposed to do and weigh evidence I guess to weigh a decision –

CHAIR : The bill doesn't tell the judge how much –

JACKSON : We're going to tell them that they shall award one side this list of items –

PRATHER : There are provision for existing laws that tell the judge to award attorney fees, yes.

JACKSON : Okay. So we do that – ?

ADAMS : Well, you did it in that particular instance in that particular statute.

Id.

Sen. Huffman, Chairman Duncan, Mr. Adams, and Ms. Prather discussed the awarding of attorneys fees.

SEN. JOAN HUFFMAN : Okay. On page 7 in section 20.009. It does provide an actual loser pay provision, is it not? If the court determines the frivolous action?

PRATHER : We believe that it's the same standard both ways. It's a provision that provides for attorney fees to be paid against a plaintiff who brought a meritless lawsuit. And in return, it's also a provision that provides for the court to be able to award fees if the Anti-SLAPP motion is deemed to be meritless. So it's the same standards both ways. If it was unmeritorious then the fees go each way.

HUFFMAN : Then you're asking the trial court to make that determination?

PRATHER : Yes.

CHAIR : Well, let me interrupt and correct something here, because the standard is different for awarding attorney fees. Because if the – if the motion to dismiss is meritless meaning it has failed, you don't get attorney's fees; the court has to find that it's frivolous. Whereas in the – against the proponent of the – or the plaintiff in this cause of action, if – if – if they lose on this motion to dismiss, then it might be a close question because they have the standard of going forward in clear and specific evidence. You've got to remember, the motion to dismiss just has to be based on the preponderance evidence. But then the claimant has to come in and prove by clear and specific evidence, which is a higher standard. Then if they lose on it, then it might be a close call, they've got to pay. If they lose on the motion to dismiss, it's a much, much higher standard that the court has to find it was a frivolous motion to dismiss. Which is not true to bilateral or equal opportunity, lose or pay sort of situation, how would you respond to that, Laura?

PRATHER : Well, my point is that if you filed a meritless lawsuit to begin with, so you're Anti-SLAPP motion prevails, then you get the person who is a victim of the meritless lawsuit gets their fees back.

CHAIR : You've filed lawsuits before, we've all filed lawsuits before, and sometimes we have to file lawsuits for a matter of understanding of where we're going, preserving evidence, and other things. And sometimes you get in there and you find out – it just seems to be that it's a lot different here. The standard ought to be if you're going to award attorney fees to both sides, then it ought to be the same standard and I don't think it's the same standard.

PRATHER : So you would prefer that it say clear and specific on both or preponderance on both?

CHAIR : No, I would say on the attorney fees provision it seems to me that you ought to have – you ought to allow the court to determine whether or not they want to at all.

PRATHER : You're talking about 27.009?

CHAIR : Shall to may. And let the court have the discretion to say this is – and have them both be based on frivolous.

PRATHER : I guess what -

CHAIR : Meritless and frivolous are two different things, would you agree?

PRATHER : I don't know if I would agree to that.

CHAIR : If I file a lawsuit and it's hotly contested –

PRATHER : Uh-huh.

CHAIR : – we go to the jury and the jury just disagrees, that means a frivolous lawsuit?

PRATHER : No.

CHAIR : Okay. So if I've been slandered and – and you know I believe that I have been slandered in the court and the court just agrees with me – which this is all there is, the court has taken the place of the jury. Then that's not necessarily frivolous, they lack merit. So why don't you have a frivolous standard apply to both?

ADAMS : Well, Mr. Chairman, the very fact that the – that the case that's filed against someone who's exercising the constitutional right –

CHAIR : You know – I understand that, but what you've got to hear – you've got to judge that's going to be taking the case [sic] of a jury. We are inserting a judge to weigh evidence. I don't know that we do that – I don't think the judge weighs the evidence in – in a motion for summary judgment practice.

ADAMS : Sure they do. Sure – the judge has to weigh the evidence.

CHAIR : No, they don't – you have – you have in a traditional motion for summary judgment is whether you have created a fact issue.

ADAM : Fact issue.

CHAIR : You have created a – or whether or not the facts support the elements of the law – as a matter of law, no evidence. You – this is – what I'm trying to say here, this seems to me and maybe I'm wrong, and I want to hear if I am – that we're actually making – we're taking away the jury in this by allowing the court to make a preponderance of the evidence decision and then if he rules in favor of the motion to dismiss, we're going to award attorney's fees – mandatory. And I just don't think that's balanced.

ADAMS : But Mr. Chairman, when the court finds that the case was in deprecation of the constitution rights of the – of the defendant –

CHAIR : Well, that's not what the court's finding.

ADAMS : He's got – The court has to find that.

CHAIR : I think we want to – I don't want to move this bill until we worked that out. I'm not comfortable with that. I think Senator Jackson has raised an interesting point, and I think we need to look at that provision there. I can understand how you're approaching the evaluation of the – the motion to dismiss, but this award of attorney's fees seems to me to be out of balance. I would like to revisit that with you if we could. Senator Ellis?

Id.

Sen. Ellis and Ms. Prather discussed the providing for the awarding of attorney fees in similar statutes in other states.

ELLIS : Do you know if in those states that have an Anti-SLAPP action they have a comparable provision or not?

PRATHER : Yes, Senator Ellis.

ELLIS : In all of those states?

PRATHER : In a number of those cases it is and worst yet, in many states there's a liquidated damages provision that we obvious didn't put in this statute, which didn't apply. Some other states have a provision that says that you can then file – if you're a victim of a Anti-SLAPP lawsuit, it gives you a private cause of action back. We took a very moderate approach in the provision that we drafted instead of having liquidated damages or a private cause of action, we have the award of attorney's fees. And many states, just have it one way, they don't have it both ways. This has it both ways. Again, for a moderate approach.

ELLIS : I would suggest that you get us a breakdown state-by-state because I'm a pretty good counter –

PRATHER : Sure.

ELLIS : – because I'd like to moderate a little more or this bill will be sitting here a long time.

PRATHER : Yeah. Our belief the standard was the same because you had to find SLAPP motion was meritless.

ELLIS : Here's the bill –

CHAIR : Gentlemen, I understand the bill, but I think that the provision for attorney's fees and this needs to be worked on. And so I'm going to leave the bill pending and hopefully work on it.

ADAMS : I have always found, Mr. Chairman, that it's nice to Chairman comfortable.

ELLIS : I must say I appreciate the Chairman set this bill today because I know there was some travel schedule issues with some of the witnesses, so I do appreciate you, Mr. Chairman, setting the bill today. I think we talked about this last week – you putting it on the agenda.

Id.

Pam Vaught, representing the Texas Association of Broadcasters, testified in favor of S.B. 1565.

PAM VAUGHT : Hello, Mr. Chairman, I'm Pam Vaught, News Director at KTBC representing the Texas Association of Broadcasters. Clearly, we're in favor of this.

Laura Prather outlined the lawsuit we went through involving a whistle blower. A woman who came to us after filing complaints with the Board of Medical Examiners. Clearly people who have means to file lawsuits usually don't call a TV station or another media outlet. They have the means to hire an attorney and go through that privately. She felt like light needed to be shed on this case, so she came to us. As Laura explains it resulted in a lawsuit by the doctor. He ran several pain clinics as well as a methadone clinic. We sent in an employee of the station who did undercover work and found out what the woman alleged in her complaint to the Board of Medical Examiners was true, absolutely. No medical exam was given, Oxytocin prescriptions were handed out, and no questions asked really. The lawsuit dragged out, as Laura said, for several months. It cost us a lot of money that came right out of our bottom line, where we could spend more money covering news here in Austin. And we helped cover the complainant's loss and legal fees because we felt she was the one who came to us with that story and she deserved our help on that.

Id.

Sen. Jackson asked how the bill would apply to bloggers.

JACKSON : I have – excuse me – a question in regard to, in your observation, how this bill would affect bloggers, because just about every TV, radio station has bloggers that are employed by that station. But there are also other people that have bloggers that aren't really aren't affiliated whatsoever with any, what I would call, certified media type engagement or operation. And under current law, if a blogger gets after just whoever, slanders or whatever, that person has a right to file a lawsuit against that blogger, I guess, if they can find him. And I guess you can find him or her if you look for it. How would if this bill goes into law, how would that effect someone outside of your industry in – in trying to pursue them? Would it change anything?

VAUGHT : I will be perfectly honest, I – I don't know. I would talk to our lawyers about that. It hasn't come up for us. We helped this woman out because she came to us with the story. I look at bloggers as being something different. We moderate –

JACKSON : It would effect that, it would effect that -

SHANE FITZGERALD : I think Senator Adam's example on the parking sticker was a good one in that realm. The claims on that blog were essentially true, and needed to be – but he would need to prove that, just like he would do for every day journalist. So I think there's some degree –

JACKSON : Well, I guess that's where kind of I'm going. The point of it is, you're going to end up in court anyway, right? And you're trying to

FITZGERALD : Some of what happens is as journalists – we're seen as having deeper pockets than the average citizen. People will go after us, but I can't tell you how many times – My name is Shane Fitzgerald, I'm the vice president and editor of the Corpus Christi Caller-Times – how many times that we'll have people get angry at some of the journalism we practice and want to retaliate and threaten to sue. A blogger without that, with the E.W. Scripps background or Belo, or another major corporation, those bloggers are more at risk and need to be more careful about how they – what they say and how they go about it. I think a blogger that just writes off the top of his or her head, without any background on that, opens themselves up to a lawsuits that aren't frivolous and that wouldn't apply in this case.

JACKSON : Well, I'm not an attorney, and you can probably tell it, but under current law, if I file suit against a blogger, that can be responded to and make summary judgment asked for by one of the

parties to the judge, and accomplish – may accomplish the same thing that you're trying to do here with this motion? I guess without the – pardon?

CHAIR : Yes, you can file a motion from a traditional summary judgment at any time. You could only file a no evidence motion for a summary judgment after adequate time for discovery. So what they're trying to do is avoid the discovery process.

JACKSON : Shorten of the process and save a little bit of money. Well, I'm certainly a big believer and there's too many lawsuits. And I really find it shocking Sen. Ellis is up here with file a bill to shorten the process. [Laughter.]

ELLIS : I just want to make sure you're telling the truth. When you wake up in your pajamas in the middle of the night – that you'll tell the truth. [Laughter.]

Id.

Arif Panju, representing the Institute for Justice, testified in favor of S.B. 1565.

ARIF PANJU : Thank you and Members of the committee, I'm Arif Panju, I'm an attorney with the Institute for Justice and I practice constitutional litigation here in Austin. I come to this issue with an understanding of our legal system, as well as the importance of the First Amendment.

We represented a SLAPP target. I'm going to tell you her story today. Perhaps the most striking example of disturbing and a growing national trend, a real estate developer launched a lawsuit spree in Texas in response to anyone who dared to shine a spotlight on his involvement in the abuse of eminent domain for private gain. In 2005, not long after the Institute for Justice finished litigating the eminent domain case, *Kelo v. the City of New London* in the U.S. Supreme Court, an investigative journalist, Carla Main, began working on a book. She wanted to see how *Kelo* would affect American communities & tell a story of a single project, and how that story fits into the national drama post-*Kelo*. And she became aware of a controversy in Freeport, Texas involving use of eminent domain for private gain and redevelopment. The city of Freeport was attempting to force out a generations old shrimping business and make way for a luxury marina development. And it was going to be owned and operated by the private company of the real estate developer. When the victims of this eminent domain abuse complained, the developer sued them for defamation. So Carla Main came down to Texas from the East Coast, she did her research and wrote a book. This is the book. It was published in 2007, she named it "*Bulldozed: Kelo, Eminent Domain and the American Lust for Land.*" And it tells the story of eminent domain, the development of the case law. It tells the story of the controversy in Freeport. And it was reviewed in newspapers and

magazines around the country and it won a political science writing award.

About a year after the book was published in 2007, she got a call from her publisher that said she was being sued. We represented her in the SLAPP lawsuit. He didn't just sue her, he sued her publisher. He sued Professor Richard Epstein from The University of Chicago Law School, who wrote a blurb on the back of the book. He also sued the *Galveston Daily* who ran a book review and also the freelance book reviewer that wrote a review on the book. By suing the Texas paper and the Texas freelancer, the developer made it impossible for us to remove this case to a federal court, where we could have moved to dismiss almost immediately. That is precisely the type of remedy that would have been available to us if the Citizen Participation Act was in place and on the books at the time the lawsuit was filed. Exactly one week and day after the time had expired to remove the case to federal court, the developer settled out of court with the *Galveston Daily* and with the freelance reviewer. Eminent domain abuse is a matter of public concern. That's why journalists like Carla Main, who wrote this book, and around Texas to write books about it. The First Amendment protects the right to engage vigorous and at times heated debate –

Id.

Chairman Duncan and Mr. Panju discussed the awarding of attorney fees in federal cases.

CHAIR : I don't want to impede on your First Amendment right, but the timer did it. Let me ask you a question. What we're trying to set up here in this bill is similar to a federal 12(b)(6) motion. And I don't know – are you a lawyer?

PANJU : Yep.

CHAIR : In federal court if you were able to have – if you were able to have removed to federal court and then filed a 12(b) motion, would you have been entitled to attorney fees had you prevailed?

PANJU : If – if we would have been victorious on a 12(b)(6) motion – and we're a public interest law firm – we would have sought attorney's fees. The different vehicle you would bring –

CHAIR : Under what authority would you have sought them ?

PANJU : On this particular case, they would have brought in First Amendment suit – and this is in 2005. We probably would have moved under – well, normally we will seek fees under a catalyst

theory, where there's resulting change of policy. This procedural process is a little different for us since we're defending a lawsuit.

CHAIR : What I'm trying to understand is, and I'll just ask you directly – in a federal lawsuit where you would move – you would have this remedy – a similar remedy, I don't think it's the same, because I'm not sure of the standards are the same in federal court that we're laying out in this bill or the burden proof. But if you prevailed on the 12(b)(6) motion in federal court, in one of these types of lawsuits, would you be entitled to attorney's fees?

PANJU : If we won a 12(b)(6) motion and just got the suit dismissed, most likely we wouldn't even seek attorney's fees.

CHAIR : Why not?

PANJU : And we would prevail on it - It's not something that we seek. There's no Anti-SLAPP federal provision that would allow this to have a vehicle to bring this one. That's the key here.

CHAIR : So there's no federal lawsuit and you have the 12(b)(6) remedy, which is –

PANJU : A procedural device.

CHAIR : But it's not as good as this remedy, is it?

PANJU : It's – I mean – it's definitely not as good as this remedy for this reason. Because these suits are designed to silence, to drag you through court, to drain your money. If you're private person who speaks; you can't even afford to hire an attorney for a few hours. And so it solves its purpose.

CHAIR : What I'm trying to understand is, is whether or not the attorney's fees – you wouldn't even seek attorney's fees, why not?

PANJU : Well, because in our posture as a public interest firm we're a small shop, we don't waste time litigating attorney's fees. We're privately funded and we litigate usually for liberty under Texas or U.S. Constitution. We're on the plaintiff's side. In this particular case, it's unique. I think to answer your question, if we got this dismissed under 12(b)(6) in federal court, 28 USC 1127 provides litigants that are forced to needlessly have their costs increased to defend themselves against this type of lawsuit that's brought against them. The court can get them fees.

CHAIR : Is that a frivolous standard then opposed to –

PANJU : I'm not sure if it's a frivolous standard, it would be a situation where the judge would have the discretion and **it would be reviewed on an abuse of frivolous standard if it was appealed.** But he would make a determination if this litigant had been forced to needlessly increase their fees. So for instance –

CHAIR : That's not the same in this bill. I mean, if you win, it's mandated that you get attorney's fees.

PANJU : But in this particular instance, if a plaintiff had met it's burden and the litigant that brought this SLAPP suit said, hey, you know, I think what was said was false and defamatory, you know, et cetera, but, in fact, it's only opinion. And they fail to meet their burden, this would allow them, the defendant, to recover their court costs and their attorney's fees. And a reason why this is also good is because it does so early in the process, before an extensive amount of fees have incurred. It also is good for judicial economy for the state courts here in Texas, because you're not drawn into a situation where you have to wait six, eight, twelve months before you get to a point where you can dismiss.

Id.

Sen. Deuell and Mr. Panju discussed the bills affect on bloggers.

SEN. ROBERT DEUELL : I don't know who to direct the question to, but a book is a finished product. I mean it's done work. Whereas blogging can be an ongoing process going on for months or even years on a given subject. So is there a different in this bill or SLAPP suits. The book's out, you can't balance it as such. You can perhaps silence a blogger who's doing an ongoing investigation like that. I mean, is there a different here? Sen. Ellis, it's your bill. I'm not a lawyer obviously either, so is there a difference here with this bill with this type – or does it matter? How do you silence someone who has a book out?

PANJU : It doesn't matter because every time a book is printed, you're exerting speech each time. And this particular lawsuit seeks to stop the printing of this book. Whereas, when someone blogs something on the Internet, they're asserting their right to speak on whatever issue they want at that particular time.

DEUELL : This would apply for either medium, right?

PANJU : It would apply to all speech. The First Amendment doesn't distinguish between different types of speech and although – we shouldn't try to discern where speech is good and more protected in one instance using this devise and not. At the end of the day, this is discourse on issues of public concern. It can manifest themselves in a book, in a newspaper article, or in the public domain out at a city council

hearing. This should deserve the same level of protection and the same vehicles to protect them.

ELLIS : And the point was because in a book, as opposed to a blog –

DEUEL : When you're trying to silence someone, if you have a book out the deed is done. If you're blogging and doing an ongoing investigation, you want to stop the blogger, you want to stop the newspaper reporter, there's a difference there, it's not a finished product. Maybe it's a dumb question. I don't –

ELLIS : If it's a blog, Senator, you know it's out, and once it's out you can't pull it back in.

DEUEL : It may be pursuing things – you know, it can develop. I mean the book has been essentially developed over how ever long it took to write the book, it's been printed, it's out there, it's a finished product, you're trying to stop somebody from – I'm just seeing if there's a difference.

ELLIS : Somewhat of a difference, but you would stop it in that you could do a reprint of the book. You'd have to – you couldn't promote it, I guess. I guess you could try to force them to go and correct it.

DEUEL : Is there a difference in a book versus a blog with this bill?

ELLIS : No, Senator.

PANJU : No, there is no difference. I think to make the point, or to distill the point even more, it had a chilling effect on the author. The author is less likely to come down to Texas again and write a book that involves public policy or an issue. You know, the suit is intended to intimidate and silence and you can do that. She's less likely to come down here and write about this topic, or any other topic related to this. And when she testified in the House last year she mentioned that. Encounter Books, the same thing. They have been drug into a lawsuit and now you're chilling speech. And that's the effect these lawsuits have over the long term and if they're consistently brought against publishers and newspapers.

Id.

Shane Fitzgerald, representing the Corpus Christi Caller-Times, testified on S.B. 1565.

SHANE FITZGERALD : Thank you, Mr. Chair, I appreciate the time. Just to kind of follow along on this topic, good journalists cover their

communities honestly and thoroughly. We at the Caller-Times cover Corpus Christi and surrounding areas with a great deal of verve and tenacity in our community. You know, sometimes, believe it or not, the media makes people mad. And they get – they want to retaliate and they're not shy about calling my office or my publisher's office and letting us know. We probably get four to five threats a month that if they were all carried out that would cost us tens of thousands of dollars a month. It already is a substantial cost to us in insurance and having a First Amendment lawyer on retainer.

Often these threats – and most often, these threats are done from reporting from public records and public events. Just last week we had to run some photos out of a Spring Break event on the beach, a very public place. And a woman called me and said I want you to take these pictures off the Internet and run a retraction in your paper for running a picture of my daughter. It was in a public domain and it was a really ridiculous notion, but she felt like she could do that. And she threatened because she had the wherewithal; she was going to file a lawsuit against the – I haven't heard from her as you might imagine. In a city with a lot of refineries, we diligently report safety and air quality reports and sometimes that upsets the leaders of those areas. With this kind of responsibility in our community we have to rigorously defend ourselves. And we know that's the cost of doing business when that – that happens. But for individuals, for whistle blowers, they can't maintain that cost. We've had a couple of good examples of that already today.

Papers of all sizes – the Caller-Times is a medium sizes paper, around 50,000 circulation daily, but even on the smaller ones in the smaller communities where you don't have big – big television stations or others – or other medium covering, it's very important in the smaller markets to be able to report on what's going on around them. And these threats are very real to a paper that's small. And it's very much of a effect on the bottom line. So the fear of retaliation definitely will make them pause and have a chilling effect. The newspaper division – newspapers aren't asking for special treatment. There are laws on the books that hold us accountable if we make mistakes. This law makes sense, we get more threats than we do – than necessary for reporting public records which is generally where they come from. Mr. Chair, thank you for your time.

Id.

Tom Blackwell testified in favor of S.B. 1565.

TOM BLACKWELL : Yes, I'm Tom Blackwell, I live in Dallas County. I've provided separate written testimony with my witness card. In the interest of time, I have prepared some notes in advance. I'm concerned about SLAPP litigation in Texas because I have years of personal experience as the target of it. While I have studied the issue in

some depth, I am not an attorney. I am for this bill. I see this effort as our best opportunity resolve this immediate problem in Texas. In the course of my years of experience with the process, I see several urgent issues. There is a government funding of agencies that must be able to receive information from the public in order to function. SLAPP suits against witnesses and informants are intended to interfere with this. Respectively, that means interference with the budget that taxpayers provide. Timely information of the public is essential for functions that are budgeted to work. SLAPP suits interfere with the civil defendants that are served and also deter additional persons, who might otherwise provide information to government authorities. SLAPP filers have learned that if the FBI is investigating serious criminal activities, all they have to do is stop it is to file a frivolous SLAPP lawsuit in a Texas state court. It is the FBI policy that if any civil lawsuit is brought that they will not proceed further.

The current legal model in Texas for bringing all this to a just conclusion is to involve a SLAPP and a SLAPP-Back lawsuit. The procedure of SLAPP and SLAPP-Back takes years to work its way through the Texas courts. In my case, it took seven or eight years. The SLAPP lawsuit temporary restraining order brought against me was based on a witness affidavit that we proved was forged and altered. By the time we were able to establish those facts, the other side provided a written apology for admitting it, the statute of limitation on the crime of perjury of three years had run out.

Currently there's a history of published decisions showing that the first person to come forward with information to the government is sometimes treated very differently when it comes to civil immunity than a person who comes later once the government preceding is in progress. There's also documented history of concern about some SLAPP suits that are disguised as another kind of suit. We want people who are in trouble with law enforcement agencies to be able to hire an attorney to represent those people to the police or other authorities. We should not tolerate these people bringing frivolous civil lawsuits against witnesses. A large number of other states have resolved this with statute law and so should Texas. I'm available to answer any questions.

Id.

Janet Ahmad, representing the Homeowners for Better Building and HOA Reform, testified in favor of S.B. 1565.

JANET AHMAD : Thank you very much, Chairman, Committee Members. I'm for S.B. 1565. Fourteen years ago when my husband and I bought a new home, in a small-gated community, we discovered the house was not finished and the builder had lied to us. After insulting our intelligence and ignoring us, I put these signs in our front yard. On the second day a SLAPP suit was filed against me. I was served a TRO

initiated by our builder for non-compliance with the CC&R with failure to submit the sign for approval to the architectural review committee – they are the architectural review committee. Long story short, we fell into the builder’s well-orchestrated trap and forced binding arbitration took care of any possibility of holding our builder accountable under the law or a warranty when it wouldn’t cost more than \$1,000 to have completed our home. We spent over \$50,000. The only place that I cannot display these signs is on my own property.

From that experience got closed a successful, small business and established Homeowners For Better Building to pursue full time legislative change to make sure this didn't happen to other people. Naively I thought this would take two years. However I'm still here. We quickly became a national organization. We worked with Congress Gonzales and Rodriguez who filed a binding arbitration bill in Washington. We organized subdivisions, thousands of stories were reported by local states and national news. Our national – one national builder, in particular, dominated the news and homeowners testified calling for a Home Lemon Law. Here at the Capitol, Sen. Van de Putt filed in our behalf. Homeowners took to the streets, demanding that their homes be bought back and they were.

Which brings me to the second SLAPP lawsuit. K.B. Homes filed a \$20 million SLAPP suit against their customers and particularly targeting me for racketeering, claiming that protest is racketeering. That caught the attention of the *Wall Street Journal*. It made us someone. The *Express News* described the allegations as brought under the RICO Act, the same law passed to prosecute East Coast mobsters.

The irony is that very industry that promotes tort reform – what they’ve termed as frivolous lawsuits – are the greatest offenders of filing SLAPP suits. How? The home building industry, in fact, is the founder of the HOA empire of new government. They use the same SLAPP suit tactics on a daily basis to intimidate and force families from their home if they don't pay inflated fees and obey their rules. You have a packet there.

CHAIR : We did distributed your packet.

AHMAD : I'm sorry?

CHAIR : We've distributed your packet and we've got your written testimony.

AHMAD : Yes. Well, there's a case that's very important. It's Col. Harada [phonetic] who was in charge of NATO forces, who came back on a lawsuit two days before they went to trial they had a SLAPP suit filed against them, and it really determined the outcome of that case.

CHAIR : Well, I think your situation – and I'm familiar with it somewhat through the years. It certainly demonstrates the need for this type of legislation. I think hopefully we can get this moving here by next week.

AHMAD : I certainly do appreciate that.

Id.

Chairman Duncan closed the public hearing.

CHAIR : Is there anyone else that would like to testify for or against Senate Bill 1565? Chair hears none. Public testimony is closed. It will be left pending. We'll try to work through some of those minor issues and see if we can get this thing moving next week.

Id.

The committee left the bill pending.

Public Hearing: April 12

The Committee on State Affairs Committee held another public hearing for the bill on April 12. Tex. S.B. 1565, 82d Leg. R.S., Master Bill History Report (2011). [Exhibit 8.]

The committee favorably reported the Committee Substitute for S.B. 1565. *Id.*

[NOTE: A substitute is an amendment that replaces the entire bill.]

Senate Committee Report

The committee prepared a report that included the text of the committee substitute, the committee's bill analysis, and the fiscal notes prepared by the Legislative Budget Board. Tex. S.B. 1565, Senate Committee Report, 82d Tex. Leg., R.S. (2011). [Exhibit 10.]

The Senate Committee Substitute for S.B. 1565 added "or other" to the definition of "Exercise of the right to petition" in 27.001(4). The change was made in subdivision (A)(iii).

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

Id. [Underlining indicates added text.]

The Substitute made several changes to §27.009. In (a)(1), the substitute added “as justice and equity may require”. In (a)(2), the Substitute deleted “and the attorney representing the party who brought the legal action” and “and the attorney”.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Id. [Underlining indicates added text.]

The Substitute changed §27.009 by amending Subsection (b) and adding a new Subsection (c).

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Id. [Underlining indicates added text.]

Bill Analysis

The Senate Research Center prepared a bill analysis for S.B. 1565. *Id.* [SENATE RESEARCH CENTER, BILL ANALYSIS, Tex. S.B. 1565, 82d Leg., R.S. – Committee Report-Substituted (May 14, 2011).]

The bill analysis reviewed the background and purpose of the bill.

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Citizen participation is the heart of democracy. Whether petitioning the government, writing a traditional new article, or commenting on the quality of a business, the involvement of citizens in the exchange of ideas benefits society.

Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of society. The Internet Age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens, have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or "SLAPP" suits.

Twenty-seven states and the District of Columbia have passed laws most commonly known as either "Anti-SLAPP" laws or "Citizen Participation Acts," that allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizen Participation Act would allow defendants who are sued as a result exercising their right to free speech or their right to petition the government to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he or she had a genuine case for each essential element of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay the defendant's attorney's fees.

C.S.S.B. 1565 amends current law relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

Id.

The analysis reviewed the rulemaking power delegated by S.B. 1565.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

Id.

The analysis also summarized each section of the bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Provides that this Act may be cited as the Citizens Participation Act.

SECTION 2. Amends Subtitle B, Title 2, Civil Practice and Remedies Code, by adding Chapter 27, as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. Defines, in this chapter, "communication," "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," "governmental proceeding," "legal action," "matter of public concern," "official proceeding," and "public servant."

Sec. 27.002. PURPOSE. Provides that the purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) Authorizes a party, if a legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, right to petition, or right of association, to file a motion to dismiss the legal action.

(b) Requires that a motion to dismiss a legal action under this section be filed not later than the 60th day after the date of service of the legal action. Authorizes the court to extend the time to file a motion under this section on a showing of good cause.

(c) Provides that except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. Requires that a hearing on a motion under Section 27.003 be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) Requires the court to rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Requires a court, except as provided by Subsection (c), on the motion of a party under Section 27.003, to dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to

the party's exercise of the right of free speech, the right to petition, or the right of association.

(c) Prohibits the court from dismissing a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) Requires the court, in determining whether a legal action should be dismissed under this chapter, to consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) Authorizes the court, on a motion by a party or on the court's own motion and on a showing of a good cause, to allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) Requires the court, at the request of a party making a motion under Section 27.003, to issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) Requires the court to issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) Provides that if a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party is authorized to appeal.

(b) Requires an appellate court to 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.

(c) Requires that an appeal or other writ under this section be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) Requires the court, if it orders dismissal of a legal action under this chapter, to award to the moving party court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action, and sanctions against the party who brought the legal action and the attorney representing the party who brought the legal action as the court determines sufficient to deter the

party who brought the legal action and the attorney from bringing similar actions described in this chapter.

(b) Authorizes the court, if the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, to award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) Provides that this chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) Provides that this chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) Provides that this chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Sec. 27.011. CONSTRUCTION. (a) Provides that this chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) Requires that this chapter be construed liberally to effectuate its purpose and intent fully.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: upon passage or September 1, 2011.

Id.

Senate Floor Debate on S.B. 1565

Second Reading: May 18

S.B. 1565 was placed on the intent calendar and removed several times. It was not considered on the Senate floor. Tex. S.B. 1565, 82d Leg. R.S., Master Bill History Report (2011). [Exhibit 8.]

Senate Committee Hearings on H.B. 2973

Public Hearing: May 12

H.B. 2973 then crossed over to the Senate where it was referred to the State Affairs Committee, which held a public hearing for the bill on May 12. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2973 Before the Senate Committee on State Affairs, 82d Leg. R.S. (May 12, 2011). [Exhibit 16.]

Sen. Ellis explained H.B. 2973 to the committee.

SEN. RODNEY ELLIS : We may have heard it before, Madame Chair. This is the Anti-SLAPP statute, Anti-Strategic Lawsuits Against Public Participation legislation that protections all Texans petitioning the government or speaking out about matters of public concern. This bill creates a bill in Texas, a way for people who have been subjected to SLAPP lawsuits to protect themselves from having to give to a plaintiff who has greater resources or other power rather than spend thousand of dollars defending themselves.

Members, Anti-SLAPP bills have been adopted in 27 other states. They have never been repealed. They have only been amended to address problems that occurred in application.

Basically here's how it works. A lawsuit is filed against an individual who has said or written something the plaintiff doesn't like. Oftentimes the plaintiff is sometimes with more money and more power and because her or she doesn't like what is said or that someone with more money and more power and because that person obviously doesn't like what was said, even though it was true, the person files a lawsuit against the person seeking damages and truly with the purpose of silencing them. Defendants can't afford to defend themselves, so they do whatever the plaintiff wants for the suit to be dropped which is usually a retraction, pulling down any offending statement. So this bill is a well-crafted compromise –

CHAIR : Sen. Ellis, I believe you have a committee substitute.

ELLIS : Yes, that's the committee substitute.

CHAIR : Sen. Ellis sends up the Committee Substitute for Senate [sic] Bill 2973. Senator, will you tell us what's the difference between this and what we had passed out before?

ELLIS : It's almost identical to what we sent up before. The committee substitute which has a couple of changes. On page

7 it strike subsections (a)(1) and replaces it with the following: courts costs
–

CHAIR : Sen. Ellis. We want to recognize Sen. Fraser is in attendance. Thank you – if you'll continue.

ELLIS : It's – it's pretty much the same deal and you'll be happy with it.

CHAIR : Well, thank you, Senator. Members, any questions of Sen. Ellis on the Committee Substitute to House Bill 2973? Any questions? If not – [Gavel] – we'll open testimony on Committee Substitute to House Bill 2973. Is there anyone here that would like to testify for, on, or against Committee Substitute to House Bill 2973? Anyone else want to testify for, on, or against Committee Substitute for House Bill 2973? If not – [Gavel] – public testimony is closed. Senator, we will leave this one pending.

Id.

H.B. 2773 was left pending. *Id.*

Later that day, H.B. 2793 came before the committee for a vote. *Id.*

Chairman Duncan reminded the committee members of the bill.

CHAIR : The Chair pulls up House Bill 2973 by Rep. Hunter – the Senate sponsor, Sen. Ellis relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights also known as SLAPP anti-SLAPP bill. Sen. Ellis has previously sent up a committee substitute. Members, we've heard this both as a Senate bill and now a House Bill.

CHAIR : There being 9 ayes and zero nays, the House Bill – Committee Substitute for House Bill 30 – 2973 will be reported to the full Senate. [Gavel.]

ELLIS : Mr. Chairman, I'd like to put it on Local. It's passed before – unless you –

CHAIR : I think you might want to – bring her done to make sure everybody gets an opportunity to talk about it.

SEN. EDDIE LUCIO : Don't push it. [Laughter.]

Id.

The committee favorably reported the Committee Substitute for H.B. 2973 on a vote of 9 ayes and no nays. *Id.*

[NOTE: A substitute is an amendment that replaces the entire bill.]

Senate Committee Report

The committee prepared a report which included the text of the committee substitute, the committee's bill analysis, and the fiscal notes prepared by the Legislative Budget Board. Tex. H.B. 2973, Senate Committee Report, 82d Tex. Leg., R.S. (2011). [Exhibit 5.]

The Senate Committee Substitute added the phrase “as justice and equity may require” in §27.009(a)(1).

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Id.

Bill Analysis

The Senate Research Center prepared a bill analysis for H.B. 2973. *Id.* [SENATE RESEARCH CENTER, BILL ANALYSIS, Tex. H.B. 2973, 82d Leg., R.S. – Committee Report – Substituted (May 14, 2011).]

The bill analysis reviewed the background and purpose of the bill.

AUTHOR'S STATEMENT OF INTENT

Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, involvement of citizens in the exchange of idea benefits our society.

Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our

democracy. The Internet age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens, have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or "SLAPP" suits.

Twenty-seven states and the District of Columbia have passed similar acts, most commonly known as either "Anti-SLAPP" laws or "Citizen Participation Acts" that allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizen Participation Act would allow defendants—who are sued as a result of exercising their right to free speech or their right to petition the government—to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he had a genuine case for each essential element of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay attorney's fees of the defendant.

C.S.H.B. 2973 amends current law relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

Id.

The analysis reviewed the rulemaking power delegated by H.B. 2973.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

Id.

The analysis also summarized each section of the bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Authorizes this Act to be cited as the Citizens Participation Act.

SECTION 2. Amends Subtitle B, Title 2, Civil Practice and Remedies Code, by adding Chapter 27, as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. Defines, in this chapter, "communication," "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," "governmental proceeding," "legal action," "matter of public concern," "official proceeding," and "public servant."

Sec. 27.002. PURPOSE. Provides that the purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) Authorizes a party, if a legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, right to petition, or right of association, to file a motion to dismiss the legal action.

(b) Requires that a motion to dismiss a legal action under this section be filed not later than the 60th day after the date of service of the legal action. Authorizes the court to extend the time to file a motion under this section on a showing of good cause.

(c) Provides that except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. Requires that a hearing on a motion under Section 27.003 be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) Requires the court to rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Requires a court, except as provided by Subsection (c), on the motion of a party under Section 27.003, to dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

- (1) the right of free speech;
- (2) the right to petition; or
- (3) the right of association.

(c) Prohibits the court from dismissing a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) Requires the court, in determining whether a legal action should be dismissed under this chapter, to consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) Authorizes the court, on a motion by a party or on the court's own motion and on a showing of a good cause, to allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) Requires the court, at the request of a party making a motion under Section 27.003, to issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) Requires the court to issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) Provides that if a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) Requires an appellate court to 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.

(c) Requires that an appeal or other writ under this section be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) Requires the court, if the court orders dismissal of a legal action under this chapter, to award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) Authorizes the court, if the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, to award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) Provides that this chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) Provides that this chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) Provides that this chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Sec. 27.011. CONSTRUCTION. (a) Provides that this chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) Requires that this chapter be construed liberally to effectuate its purpose and intent fully.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: upon passage or September 1, 2011.

Id.

Senate Floor Debate on H.B. 2973

Second Reading: May 18

On May 18, H.B. 2973 was considered on the Senate floor. CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the Senate (Second and Third Readings), 82d Leg. R.S. (May 18, 2011). [Exhibit 17.]

Sen. Ellis explained the bill to the Senate.

SEN. RODNEY ELLIS : Thank you, Mr. President, Members and thank you, Mr. President for your work as co-author of this bill. Members, this is the Anti-SLAPP statute, to protect citizens participation act, which will protect Texans right to speech from frivolous lawsuits. House Bill 2973 passed the House Calendars Committee, passed the House Floor 142 to zero. Members, an Anti-SLAPP – Anti-Strategic Lawsuits Against Public Participation legislation protects all Texans petitioning the government or speaking out about matters of public concern. This bill creates a way for people who have been subjected to SLAPP lawsuits to protect themselves from having to give in to a plaintiff who has greater resources or other power rather than spend thousands of dollars defending themselves.

Members, Anti-SLAPP bills have been adopted in 27 other states. It's a good bill and I appreciate the work of Chairman Duncan and again, you Mr. President, the work of the Trial Lawyers, TLR, the media, and everyone coming to a consensus on this bill. I'd like to suspend the rules to take up and consider Committee Substitute to House Bill 2973.

Id.

The normal procedure for bringing up a bill on the Senate floor on second reading is for the sponsor to briefly explain the bill and then move to suspend the regular order of business. Sen. Ellis moved to suspend the rules. The motion to suspend prevailed. *Id.*

H.B. 2973 passed on second reading without objection. *Id.* S.J. of Tex., 82d Leg., R.S. 2532 (2011). [Exhibit 21.]

Third Reading: May 18

Normally the Senate hears bills on second and third readings on the same day. Since Art. III, § 32 of the Texas Constitution requires readings of bills on three separate days, the Constitution must be suspended. Sen. Ellis moved that the constitutional three-day rule be suspended. The motion prevailed on a record vote of 31 ayes and no nays.

CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the Senate (Second and Third Readings), 82d Leg. R.S. (May 18, 2011). [Exhibit 17.]

H.B. 2973 passed on third reading on a record vote of 31 ayes and no nays. *Id.* S.J. of Tex., 82d Leg., R.S. 2532 (2011). [Exhibit 21.]

House Concurrence on H.B. 2973: May 21

H.B. 2973 returned to the House for approval of the amendments added by the Senate. On May 21, H.B. 2973 with the Senate amendments came before the House. CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the House (Senate Amendments), 82d Leg. R.S. (May 21, 2011). [Exhibit 18.]

Rep. Hunter explained the House amendments.

REP. TODD HUNTER : Mr. Speaker, Members, this was a negotiated bill. The Senate Amendments are basically clarifying language in connection with anti-SLAPP legislation and its for the Freedom of Information folks. So it is pretty well what we passed, with just clarifying information. Move passage. [Pause.] Move to concur with Senate Amendments.

Id.

The motion to concur prevailed by a vote of 141 ayes and 0 nays. *Id.* H.J. of Tex., 82d Leg., R.S. 4623-4627 (2011). [Exhibit 20.]

H.B. 2973 Signed by the Governor

The bill was sent to Gov. Rick Perry, who signed the bill on June 17. Since the bill had been passed by both chambers by a two-thirds majority, the bill was effective immediately. Tex. H.B. 2973, 82d Leg., R.S., Master Bill History (2011). [Exhibit 1.]

[NOTE: Sec. 39 of Article 3 of the Texas Constitution governs the effective date of legislation.

Section 39. Time of taking Effect of Laws; Emergencies; Entry on Journal.

No law passed by the Legislature, except the general appropriations act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals.

Texas Constitution, § 39, Art. 3.

H.B. 2973: Session Law

The final version of H.B. 2973 was published in the session laws.

SECTION 1. This Act may be cited as the Citizens Participation Act.

SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 27 to read as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. A hearing on a motion under Section 27.003 must be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An 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.

(c) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

SECTION 3. The change in law made by this Act applies only to a legal action filed on or after the effective date of this Act. A legal action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

Act of May 21, 2011, 82d Leg., R.S., ch. 341, 2011 Tex. Gen. Laws, 961. [Exhibit 22. Underlining indicates added text.]

H.B. 2973: TLC Summary

Texas Legislative Council published a summary of the final version of H.B. 2973.

Legislative Session: 82(R)

HOUSE BILL 2973

HOUSE AUTHOR: Hunter et al.

EFFECTIVE: 6-17-11

SENATE SPONSOR: Ellis

House Bill 2973 amends the Civil Practice and Remedies Code to authorize a party to a legal action that is based on, relates to, or is in response to the party's exercise of the right of free speech, right of petition, or right of association, to file a motion to dismiss the legal action. The bill establishes procedures relating to a motion to dismiss under this provision and exempts certain legal actions.

TEXAS LEGISLATIVE COUNCIL, *Summary of Enactments, 83rd Legislature, H.B. 2973, 41 (2011).* [Exhibit 23.]

2013: H.B. 2935 Enacted

H.B. 2935 Filed

During the Regular Session of the 83d Texas Legislature, Rep. Hunter filed H.B. 2935, "An Act relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights." Tex. H.B. 2935, As Introduced, 83d Leg., R.S. (2013). [Exhibit 25.]

Section 1 of H.B. 2935, As Introduced, amended subsections (a) and (b) of §51.014, Civil Practice and Remedies Code.

SECTION 1. Sections 51.014(a) and (b), Civil Practice and Remedies Code, are amended to read as follows:

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;

(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351;

[or] (10) grants relief sought by a motion under Section 74.351(l);

(11) denies a motion to dismiss filed under Section 90.007; or

(12) denies a motion to dismiss filed under Section 27.003.

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), [or] (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal.

Id.

Sections 2 and 3 of H.B. 2935, As Introduced, amended subsections (a) and (b) of §51.014, Civil Practice and Remedies Code.

SECTION 2. The change in law made by this Act applies to a denial of a motion to dismiss made on or after the effective date of this Act. A denial of a motion to dismiss made before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

Id. [Underlining indicates added text.]

S.B. 1513 Filed

Sen. Ellis filed an identical companion bill, S.B. 1513. Tex. S.B. 1513, As Introduced, 83d Leg., R.S. (2013). [Exhibit 31.]

House Committee Hearings on H.B. 2935

Public Hearing: April 1

H.B. 2935 was referred to the House Judiciary and Civil Jurisprudence Committee. The committee set the bill for a public hearing on April 1. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2935 Before the House Committee on Judiciary and Civil Jurisprudence, 83d Leg. R.S. (April 1, 2013). [Exhibit 32.]

Rep. Hunter, the bill's House sponsor, explained H.B. 2935 to the committee.

REP. TODD HUNTER : Mr. Chairman and Members, this is a housekeeping piece of legislation that deals with the interlocutory appeal which is the denial of a grant of a motion to dismiss under Chapter 27 of the Civil Practice and Remedies Code. We're having to clarify some language. To expedite this – I am going to ask that you call Laura Prather and she will explain the details and I'll reserve the right to close.

Id.

Laura Prather, representing the Freedom of Information Foundation of Texas, the Texas Press Association, and the Texas Association of Broadcasters, testified in favor of House Bill 2935.

LAURA PRATHER : Good afternoon, my name is Laura Prather. I'm representing – I'm representing the Freedom of Information Foundation of Texas, the Texas Press Association, and the Texas Association of Broadcasters and I am testifying in favor of the bill. What this bill does is it basically, as Chairman Hunter indicated, it is a housekeeping measure. It clarifies the intent of the Legislature from the last session to permit any interlocutory appeal of any denial of the motion to dismiss under Chapter 27. Under the existing law, there has been a split between two courts of appeals. This will clarify the jurisdiction – clarify the jurisdictional issue. It would put the denial of a motion to dismiss under Chapter 27 under the interlocutory appeal language in Chapter 51.0146. It would provide for a stay of discovery during the period of the interlocutory appeal and it would repeal the provision in Chapter 27 that currently conflicts – has conflicting deadlines with the interlocutory appeal statute. Does the committee have any questions?

Id.

Arif Panju, representing the Institute for Justice, testified in favor of House Bill 2935.

ARIF PANJU : Sure. You did a great job. My name is Arif Panju. I'm with the Institute for Justice. We're a constitutional litigation public interest firm and we are in support of this bill. I guess the best thing I could do is give you a for instance in how this would work in practice. A

case that we litigated to the U.S. Supreme Court was an eminent domain case in '05, Kelo versus the City of New London and an author wrote a book about it. Her name was Carla Main. The book is called Bulldozed. And she came to Texas and chronicled a similar thing where a developer came, tried to take a shrimping business and basically through eminent domain had it under his name and had a marina. She was sued by that developer. The publisher was sued. The reviewer of the book was sued and so were newspapers that published the review. These were SLAPP suits intended to shut her up. The Anti-SLAPP statute wasn't in place until this last session. But if it was in place and this bill was in place, we would have been able to file a motion to basically turn over the burden on this developer to show that this was not a SLAPP suit [sic]. It took us a couple of years in defending the author to finally get the Dallas Court of Appeals and get a unanimous verdict saying that the developer had no evidence that he was defamed. So we are in support of this bill. It solidifies the rights individuals to participate in issues of public discourse without fearing that their critique of government power or of public projects or private developers benefiting from them would shut them up through a lawsuit. And so we're supporting 2935 today. I'm happy to answer any questions.

Id.

Shane Fitzgerald, representing the Corpus Christi Caller-Times, testified in favor of House Bill 2935.

SHANE FITZGERALD : Good afternoon, Chairman. My name is Shane Fitzgerald. I'm the vice president of the Corpus Christi Caller-Times. Chairman Hunter, our representative. I'll acknowledge him here. I'll give you just a very brief anecdote of how –

CHAIR : And your position on the bill is?

FITZGERALD : Oh, I'm sorry, we are for the bill.

CHAIR : Very good, sir. Go ahead with your testimony. Thank you.

FITZGERALD : I'll be very brief here. The clean-up language of the bill – the bill is working as intended. We had published a photo of a house shot from a public venue and a woman who owned the house was very upset that we had done that and had threatened to sue us and she was going to take us for millions of dollars for whatever the reason was. And after our attorney talked to her attorney with the Anti-SLAPP legislation in place, she ended up not filing the lawsuit in the first place. And we ended up having a really good conversation about why we do what we do, and why we weren't going to take that photo down and then she seemed to understand. It actually ended up being educational, rather than being all messy in a court of law. So I just wanted to show – offer that

one example up hear that the bill is doing what's intended and that's to lessen the amount of litigation. Questions?

Id.

Rep. Hunter closed on his bill. *Id.*

H.B. 2935 was left pending. *Id.*

Public Hearing: April 8

The House Judiciary and Civil Jurisprudence Committee held another public hearing for H.B. 2935 on April 8. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2935 Before the House Committee on Judiciary and Civil Jurisprudence, 83d Leg. R.S. (April 8, 2013). [Exhibit 33.]

The committee favorably reported the Committee Substitute for H.B. 2935 on a vote of nine ayes and no nays. *Id.*

[NOTE: A substitute is an amendment that replaces the entire bill.]

House Committee Report

The committee prepared a report which included the text of the committee substitute, the committee's bill analysis, and the fiscal notes prepared by the Legislative Budget Board. Tex. H.B. 2935, House Committee Report, 83d Leg., R.S. (2013). [Exhibit 26.]

The House Committee Substitute made no changes to Sections 1 and 3 of the bill.

Section 2 was deleted. The new Section 2 repealed Subsection (c) of §27.008, Civil Practice and Remedies Code.

SECTION 2. Section 27.008(c), Civil Practice and Remedies Code, is repealed.

Id.

Bill Analysis

The House Committee prepared a bill analysis a bill analysis for H.B. 2935 *Id.* [HOUSE COMMITTEE ON JUDICIARY AND CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2935, 83d Leg., R.S. – Committee Report–Substituted (2013).]

The bill analysis reviewed the background and purpose of the bill.

BACKGROUND AND PURPOSE

Recently enacted legislation set out provisions governing the dismissal of actions involving the exercise of the right of free speech, the right to petition, or the right of association. Those provisions provide for certain appeals with respect to a motion to dismiss if the court issues an order on the motion or if the court fails to rule on the motion in the time prescribed. However, interested parties observe that there has been some inconsistency in the interpretation of these provisions by certain appellate courts with respect to whether an interlocutory appeal is allowed in a case in which the motion to dismiss is denied. The purpose of C.S.H.B. 2935 is to clarify the right of a party in such an action to file an interlocutory appeal if the court denies a motion to dismiss the action.

Id.

The analysis reviewed the rulemaking authority granted by H.B. 2935.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

Id.

The analysis summarized each section of the bill.

ANALYSIS

C.S.H.B. 2935 amends the Civil Practice and Remedies Code to authorize a person to appeal from an interlocutory order of a district court, county court at law, or county court that denies a motion to dismiss a legal action that is based on, relates to, or in response to a party's exercise of the right to free speech, right to petition, or right of association. The bill specifies that such an interlocutory appeal stays all proceedings in the trial court pending resolution of the appeal.

C.S.H.B. 2953 repeal a provision relation to the filing deadline for an appeal or other writ regarding a motion to dismiss.

C.S.H.B. 2953 repeals Section 27.008(c), Civil Practice and Remedies Code.

Id.

The analysis noted the effective date of the bill.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2013.

Id.

The analysis also compared the “original” (H.B. 2935 as filed) to the committee substitute.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 2953 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial difference between the introduced and committee substitute version of the bill.

INTRODUCED

HOUSE COMMITTEE
SUBSTITUTE

SECTION 1. Sections 51.014(a) and (b), Civil Practice and Remedies Code, are amended.

SECTION 1. Same as introduced version.

SECTION 2. The change in law made by this Act applies to a denial of a motion to dismiss made on or after the effective date of this Act. A denial of a motion to dismiss made before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

No equivalent provision.

No equivalent provision.

SECTION 2. Section 27.008(c), Civil Practice and Remedies Code, is repealed.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

SECTION 3. Same as introduced version.

Id.

House Research Organization Report

The House Research Organization (HRO) only reviews bills set for debate on the floor of the House (and not bills on the Consent Calendar), therefore there was no HRO report on H.B. 2935.

House Floor Debate on H.B. 2935

Consent Calendar: May 2

H.B. 2935 came before the House on May 2 on the Local and Consent Calendar. CAPITOL RESEARCH SERVICES, Debate on H.B. 2935 On the Floor of the House (Consent Calendar–Second Reading), 83d Leg. R.S. (May 2, 2013). [Exhibit 34.]

H.B. 2935 was passed on second reading without discussion. *Id.* See also H.J. of Tex., 83d Leg., R.S. 2186 (2013). [Exhibit 38.]

At the conclusion of consideration of bills on second reading on the Local and Consent Calendar, all of the bills that were passed on second reading were passed on third reading *en masse* without further discussion. H.J. of Tex., 83d Leg., R.S. 2201, 2206 (2013). [Exhibit 38.]

House Engrossment

After a bill has passed on second and third readings, a new version of the bill is published which incorporates any amendments added on the House Floor. Since no amendments were added to the bill, the House Engrossment was the same as the House Committee Substitute. Tex. H.B. 2935, House Engrossment, 83d Leg. R.S. (2013). [Exhibit 27.]

Senate Committee Hearings on H.B. 2935

Public Hearing: May 13

H.B. 2935 then crossed over to the Senate where it was referred to the State Affairs Committee, which held a public hearing for the bill on May 13. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2935 Before the Senate Committee on State Affairs, 83d Leg. R.S. (May 13, 2013). [Exhibit 35.]

Sen. Ellis explained H.B. 2935 to the committee.

SEN. RODNEY ELLIS : Thank you, Mr. Chairman and Members. This bill passed the House on the Local and Consent Calendar on the floor unanimously. It's a housekeeping bill to clarify the established right to an interlocutory appeal under Chapter 27 of the Civil Practice and Remedies Code that was established under House Bill 2973, which also passed unanimously. Unfortunately, the clear intent of the Legislature has been misinterpreted by one appellate court in Texas and has created a split authority by the courts right now on this jurisdictional issue. This bill squarely places this provision under the interlocutory appeal part of the Code. It also provides for a stay of underlying proceedings while the appellate court reviews the matter. Frankly it makes deadlines to appeal under Chapter 27 consistent with the interlocutory appeal statute. This bill is simply a cleanup measure to the anti-SLAPP statute I offered last session.

Id.

The Chair noted the persons who had registered on the bill.

CHAIR : Yes, sir. Okay. Thank you. I have no questions. We'll open public testimony. I just have this card – yeah – Laura Prather again is just here as a resource witness. So – Is there anyone else that wants to testify – Oh, we do have some non-testifying cards. Excuse me. Brad Parker, TTLA, is for the bill, not wishing to testify. Jeff Cohen, is for the bill, representing Houston Chronicle and Hearst Newspapers, doesn't want to testify. Donnis Baggett, Texas Press Association, is for the bill, not wishing to testify. Don Adams, I guess representing himself, is for the bill, not wishing to testify. Kelley Shannon, the Freedom of Information Foundation of Texas, is for the bill, not wishing to testify. Mike Hull, Texans for Lawsuit Reform, is for the bill, not wishing to testify. And Eric Woomer, the Daily Court Review and Daily Commercial Record, is for the bill, not wishing to testify. Is there anyone else that wants to testify for, on, or against House Bill 2935? If not, we'll close public testimony. [Gavel]. Leave the bill pending.

Id.

The bill was left ending. *Id.*

Later in the day the committee favorably reported the bill on a vote of 8 ayes and no nays. *Id.*

Senate Committee Report

The committee prepared a report that included the text of the bill, the committee's bill analysis, and the fiscal notes prepared by the Legislative Budget Board. Tex. H.B. 2935, Senate Committee Report, 83d Tex. Leg., R.S. (2013). [Exhibit 28.]

Bill Analysis

The Senate Research Center prepared a bill analysis for H.B. 2935. *Id.* [SENATE RESEARCH CENTER, BILL ANALYSIS, Tex. H.B. 2935, 83d Leg., R.S. – Engrossed (May 6, 2013).]

The bill analysis reviewed the background and purpose of the bill.

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

H.B. 2935 clarifies the established right for one to take an interlocutory appeal of the denial or grant of a Motion to Dismiss filed under Chapter 27 (Actions Involving the Exercise of Certain Constitutional Rights) of the Civil Practice and Remedies Code.

The proposal and the original statute passed last session provided for three situations where a party to the cause of action could appeal the interlocutory order disposing of the Motion to Dismiss. First, if the trial court failed to act within the time period in the statute; second, if the trial court granted the motion to dismiss; and third, if the trial court denied the motion to dismiss. In the process of these “motions” going through the court system, the Second Court of Appeals ruled that in the case of a denial of a motion to dismiss signed by a judge, the statute did not allow an interlocutory appeal. Both the Thirteenth and the Fourteenth Courts of Appeals have ruled that the existing statute does provide for the right to an interlocutory appeal under these circumstances. The purpose of this bill is to clarify the legislative intent to provide for an interlocutory appeal in all three of the circumstances outlined in Chapter 27 and to provide for a stay of the underlying proceedings pending the outcome of the appeal.

H.B. 2935 amends current law relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.

Id.

The analysis reviewed the rulemaking power delegated by H.B. 2935.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

Id.

The analysis also summarized each section of the bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Sections 51.014(a) and (b), Civil Practice and Remedies Code, as follows:

(a) Authorizes a person to appeal from an interlocutory order of a district court, county court at law, or county court that, among other actions, denies a motion to dismiss filed under Section 27.003 (Motion to Dismiss).

(b) Provides that an interlocutory appeal under Subsection (a)(3) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure), (5) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that denies a motion for summary judgment that is based on an assertion of immunity for an individual who is an officer or employee of the state or a political subdivision of the state), (8) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except under certain conditions), or (12) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that denies a motion to dismiss filed under Section 27.003) stays all other proceedings in the trial court pending resolution of that appeal.

SECTION 2. Repealer: Section 27.008(c) (relating to requiring that an appeal or other writ under this section be filed on or before the 60th day

after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable), Civil Practice and Remedies Code.

SECTION 3. Effective date: upon passage or September 1, 2013.

Id.

Senate Floor Debate on H.B. 2935

Second Reading: May 22

On May 22, H.B. 2935 was considered on the Senate floor. CAPITOL RESEARCH SERVICES, Debate on H.B. 2935 On the Floor of the Senate (Second and Third Readings), 83d Leg. R.S. (May 22, 2013). [Exhibit 36.]

Sen. Ellis explained the bill to the Senate and answered questions.

SEN. RODNEY ELLIS : Mr. President and Members. This is a clean-up to our Anti-SLAPP statute – Strategic Lawsuits Against Public Participation. The bill passed unanimously out of the House Local and Consent Calendar. It is the same bill that came up and passed the Senate earlier in the session. Unfortunately, the clear intent of the Legislature has been misinterpreted by one appellate court in Texas and has created a split authority by the courts regarding the right of a jurisdictional issue. This is a clean-up bill I move to suspend the rules to take up and consider the House Bill 2935.

Id.

The normal procedure for bringing up a bill on the Senate floor on second reading is for the sponsor to briefly explain the bill and then move to suspend the regular order of business. Sen. Ellis moved to suspend the rules. The motion to suspend prevailed. *Id.*

Sen. John Whitmire offered an amendment.

Floor Amendment No. 1

Amend HB 2935 (senate committee printing) by adding the following appropriately numbered SECTIONS to the bill and renumbering subsequent

SECTIONS of the bill accordingly:

SECTION____. Section 27.004, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th [30th] day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court s' docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

SECTION _____. Section 27.005, Civil Practice and Remedies Code, is amended by adding Subsection (d) to read as follows:

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant s' claim.

SECTION _____. Section 27.010, Civil Practice and Remedies Code, is amended by amending Subsection (b) and adding Subsection (d) to read as follows:

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

S.J. of Tex., 83d Leg., R.S. 2804-2806 (2013). [Exhibit 39. Underlining indicates added text.]

Sen. Whitmire explained his amendment.

SEN. JOHN WHITMIRE : I have an amendment that I believe will be acceptable to the author. Last session Texas joined 28 states and the District of Columbia in enacting various forms of legislation purported aimed at preventing frivolous lawsuits and stif – stifling free speech

activities and rights to petition and association. Unfortunately there were some unintended consequences –

ELLIS : It is acceptable, Mr. President –

WHITMIRE : – and a technical correction and I would move adoption of the amendment.

PRESIDENT : Sen. Duncan, for what purpose do you rise, sir?

SEN. ROBERT DUNCAN : To ask the author of the amendment a question –

PRESIDENT : Will Sen. Whitmire yield?

WHITMIRE : Yes, sir. What – what we’ve done, Sen. Duncan, is we’ve worked –

DUNCAN : I can’t hear and when you were laying it out –

WHITMIRE : What we’ve done is work with the press –

PRESIDENT : [Gavel.]

WHITMIRE : – to make certain that the act conforms with the intended purpose of protecting First Amendment rights and does not open the door to other frivolous lawsuits.

DUNCAN : I understand that. I’m just trying to understand how you did it. Okay. Thank you.

Senate Floor Transcript.

The Whitmire Amendment was adopted. *Id.*

H.B. 2935 passed on second reading. *Id.* S.J. of Tex., 83d Leg., R.S. 2804-2806 (2013). [Exhibit 39.]

Third Reading: May 22

Normally the Senate hears bills on second and third readings on the same day. Since Art. III, § 32 of the Texas Constitution requires readings of bills on three separate days, the Constitution must be suspended. Sen. Ellis moved that the constitutional three-day rule be suspended. The motion prevailed on a record vote of 31 ayes and no nays.

CAPITOL RESEARCH SERVICES, Debate on H.B. 2935 On the Floor of the Senate (Second and Third Readings), 83d Leg. R.S. (May 22, 2013). [Exhibit 36.]

Sen. Ellis moved to temporarily postpone the bill.

ELLIS : Mr. President, I want to hold it here to just let Sen. Duncan read the amendment. And I'll bring it back up after Sen. Williams's bill. Pull it down for about 15 minutes.

PRESIDENT : Members, Senator – Sen. Ellis moves to temporarily postpone consideration of House Bill 2935 for about 15 minutes. Is there objection from any Member? The Chair hears none. So adopted. [Gavel.]

Id.

Later in the session, H.B. 2935 was brought before the Senate for consideration on third reading. *Id.*

Sen. Ellis noted that the concerns of Sen. Duncan and Sen. Huffman had been addressed.

SEN. RODNEY ELLIS : Thank you, Mr. President. I appreciate Chairman Duncan and Sen Huffman. We have addressed those concerns and they are satisfied with the bill. I move final passage of House Bill 2935.

Id.

H.B. 2935 passed on third reading on a record vote of 29 ayes and no nays. *Id.* S.J. of Tex., 83d Leg., R.S. 2805, 2815 (2013). [Exhibit 39.]

House Concurrence on H.B. 2935: May 24

H.B. 2935 returned to the House for approval of the amendments added by the Senate. On May 24, H.B. 2935 with the Senate amendments came before the House. CAPITOL RESEARCH SERVICES, Debate on H.B. 2935 On the Floor of the House (Senate Amendments), 83d Leg. R.S. (May 24, 2013). [Exhibit 37.]

Rep. Hunter explained the House amendments.

REP. TODD HUNTER : Mr. Speaker, Members, this is a negotiated amendment. I move to concur. It sets up the clarifying procedure for interlocutory appeals.

Id.

The motion to concur prevailed. *Id.* H.J. of Tex., 83d Leg., R.S. 4763-4765 (2013). [Exhibit 38.]

H.B. 2935 Signed by the Governor

The bill was sent to Gov. Rick Perry, who signed the bill on June 14. Since the bill had been passed by both chambers by a two-thirds majority, the bill was effective immediately. Tex. H.B. 2935, 83d Leg., R.S., Master Bill History (2013). [Exhibit 24.]

[NOTE: Sec. 39 of Article 3 of the Texas Constitution governs the effective date of legislation.

Section 39. Time of taking Effect of Laws; Emergencies; Entry on Journal.

No law passed by the Legislature, except the general appropriations act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals.

Texas Constitution, § 39, Art. 3.

H.B. 2935: Session Law

The final version of H.B. 2935 was published in the session laws.

SECTION 1. Section 27.004, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th [30th] day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

SECTION 2. Section 27.005, Civil Practice and Remedies Code, is amended by adding Subsection (d) to read as follows:

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

SECTION 3. Section 27.010, Civil Practice and Remedies Code, is amended by amending Subsection (b) and adding Subsection (d) to read as follows:

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

SECTION 4. Sections 51.014(a) and (b), Civil Practice and Remedies Code, are amended to read as follows:

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

- (1) appoints a receiver or trustee;
- (2) overrules a motion to vacate an order that appoints a receiver or trustee;
- (3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;
- (4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;
- (5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;

(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351;

(10) grants relief sought by a motion under Section 74.351(l);
[or]

(11) denies a motion to dismiss filed under Section 90.007; or

(12) denies a motion to dismiss filed under Section 27.003.

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), [or] (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal.

SECTION 5. Section 27.008(c), Civil Practice and Remedies Code, is repealed.

SECTION 6. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws. [Exhibit 40 – The Session Laws are not yet published for the 83d Legislature. Underlining indicates added text.]

H.B. 2935: TLC Summary

Texas Legislative Council published a summary of the final version of H.B. 2935.

Legislative Session: 83(R)

HOUSE BILL 2935

HOUSE AUTHOR: Hunter

EFFECTIVE: June 14, 2013

SENATE SPONSOR: Ellis

House Bill 2935 amends Civil Practice and Remedies Code provisions relating to legal actions involving a party's exercise of the constitutional rights to petition, to speak freely, or to associate freely. The bill modifies deadlines for setting and holding hearings on motions to dismiss such actions, adds a condition under which the court is required to dismiss such an action, and repeals a provision relating to the deadline for filing appeals or writs concerning these motions. The bill also authorizes a person to appeal from an interlocutory order denying a motion to dismiss and specifies that such an appeal stays all proceedings in the trial court pending resolution of that appeal. The bill exempts a legal action brought under the Insurance Code or arising out of an insurance contract from provisions relating to legal actions involving the exercise of these constitutional rights.

TEXAS LEGISLATIVE COUNCIL, *Summary of Enactments, 83rd Legislature, H.B. 2935, 40 (2013).* [Exhibit 41.]

Current Statute (2013)

Texas Legislature On-Line published a summary of the final version of H.B. 2935.

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE B. TRIAL MATTERS

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by Acts 2013, 83d Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 1, eff. June 14, 2013.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

- (1) the right of free speech;
- (2) the right to petition; or
- (3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party

establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by Acts 2013, 83d Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 2, eff. June 14, 2013.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An 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.

(c) Repealed by Acts 2013, 83d Leg., R.S., Ch. 1042, Sec. 5, eff. June 14, 2013.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by Acts 2013, 83d Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 5, eff. June 14, 2013.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by Acts 2013, 83d Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 3, eff. June 14, 2013.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Added by Acts 2011, 82d Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Location of Documents

The original documents compiled in this report can be found in several locations at the Texas Capitol Complex.

Legislative Reference Library (LRL)

Texas Capitol Building, 2d Floor, Austin, Texas 78701
(512) 462-1252

The LRL is the repository for the official file for bills that have been considered by the Legislature since 1973. (Bills from 1836 to 1972 are stored at the State Archives.) These files include the various versions of the bill, floor amendments, and bill analyses. In addition, the LRL maintains copies of House and Senate committee interim reports and other documents produced by the Texas Legislature and Texas state agencies.

Texas House of Representatives Video/Audio Services Department

John H. Reagan Bldg., Room 330
105 West 15th St., Austin, Texas 78701
(512) 463-0920

This office maintains the original copies of tape recordings of the proceedings of the Texas House and its committees from 1973 to the present. It also maintains copies of committee minutes.

Texas Senate Staff Services

Sam Houston Bldg., Room 175
201 East 14th St., Austin, Texas 78701
(512) 463-0430

This office maintains the original copies of tape recordings of the proceedings of the Texas Senate and its committees for the last three sessions. (The remaining Senate tapes are at the State Library.) It also maintains copies of committee minutes that are extant from 1973 to the present. This office maintains copies of transcripts for Senate proceedings which have been transcribed from 1973 to the present.

Texas State Library and Archives

Lorenzo De Zavala Library & Archives Bldg.
1201 Brazos St., Austin, Texas 78701
Reference Room: (512) 463-5455
Archives: (512) 463-5480

The State Archives (1st floor) is the repository for the official files for bills that have been considered by the Legislature from the First Congress in 1836 until the 62d Legislature in 1971–72. (Bills enacted since 1973 are stored at the Legislative Reference Library.)

The Reference Room (Room 300, 3d floor) is the repository for original copies of tape recordings of proceedings of the Texas Senate and its committees since 1973, except the last three sessions (which are at Senate Staff Services).

Exhibits

2011

1. Tex. H.B. 2973, 82d Leg., R.S., Master Bill History Report (2011)
2. Tex. H.B. 2973, As Introduced, 82d Leg., R.S. (2011)
3. Tex. H.B. 2973, House Committee Report, 82d Leg., R.S. (2011)
4. Tex. H.B. 2973, House Engrossment, 82d Leg., R.S. (2011)
5. Tex. H.B. 2973, Senate Committee Report, 82d Leg., R.S. (2011)
6. Tex. H.B. 2973, Senate Amendments, 82d Leg., R.S. (2011)
7. Tex. H.B. 2973, Enrolled, 82d Leg., R.S. (2011)
8. Tex. S.B. 1565, 82d Leg., R.S., Master Bill History Report (2011)
9. Tex. S.B. 1565 As Introduced, 82d Leg., R.S. (2011)
10. Tex. S.B. 1565 Senate Committee Report, 82d Leg., R.S. (2011)
11. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2973 Before the House Committee on Judiciary and Civil Jurisprudence, 82d Leg. R.S. (March 28, 2011)
12. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2973 Before the House Committee on Judiciary and Civil Jurisprudence, 82d Leg. R.S. (April 4, 2011)
13. CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the House (Second Reading), 82d Leg. R.S. (May 3, 2011)
14. CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the House (Third Reading), 82d Leg. R.S. (May 4, 2011)
15. CAPITOL RESEARCH SERVICES, Hearings on S.B. 1565 Before the Senate Committee on State Affairs, 82d Leg. R.S. (April 4, 2011)
16. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2973 Before the Senate Committee on State Affairs, 82d Leg. R.S. (May 12, 2011)
17. CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the Senate (Second and Third Readings), 82d Leg. R.S. (May 18, 2011)

18. CAPITOL RESEARCH SERVICES, Debate on H.B. 2973 On the Floor of the House (Senate Amendments), 82d Leg. R.S. (May 21, 2011)
19. HOUSE RESEARCH ORGANIZATION, H.B. 2973 Bill Analysis (May 2, 2011)
20. H.J. of Tex., 82d Leg., R.S. 2757, 2837, 4623-4627 (2011)
21. S.J. of Tex., 82d Leg., R.S. 2532 (2011)
22. Act of May 21, 2011, 82d Leg., R.S., ch. 341, 2011 Tex. Gen. Laws, 961
23. TEXAS LEGISLATIVE COUNCIL, *Summary of Enactments, 82nd Legislature*, H.B. 2973, 41 (2011)

2013

24. Tex. H.B. 2935, 83d Leg., R.S., Master Bill History Report (2013)
25. Tex. H.B. 2935, As Introduced, 83d Leg., R.S. (2013)
26. Tex. H.B. 2935, House Committee Report, 83d Leg., R.S. (2013)
27. Tex. H.B. 2935, House Engrossment, 83d Leg., R.S. (2013)
28. Tex. H.B. 2935, Senate Committee Report, 83d Leg., R.S. (2013)
29. Tex. H.B. 2935, Senate Amendments, 83d Leg., R.S. (2013)
30. Tex. S.B. 1513, 83d Leg., R.S., Master Bill History Report (2013)
31. Tex. S.B. 1513 As Introduced, 83d Leg., R.S. (2013)
32. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2935 Before the House Committee on Judiciary and Civil Jurisprudence, 83d Leg. R.S. (April 1, 2013)
33. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2935 Before the House Committee on Judiciary and Civil Jurisprudence, 83d Leg. R.S. (April 8, 2013)
34. CAPITOL RESEARCH SERVICES, Debate on H.B. 2935 On the Floor of the House (Consent Calendar–Second Reading), 83d Leg. R.S. (May 2, 2013)
35. CAPITOL RESEARCH SERVICES, Hearings on H.B. 2935 Before the Senate Committee on State Affairs, 83d Leg. R.S. (May 13, 2013)
36. CAPITOL RESEARCH SERVICES, Debate on H.B. 2935 On the Floor of the Senate (Second and Third Readings), 83d Leg. R.S. (May 22, 2013)

37. CAPITOL RESEARCH SERVICES, Debate on H.B. 2935 On the Floor of the House (Senate Amendments), 83d Leg. R.S. (May 24, 2013)
38. H.J. of Tex., 83d Leg., R.S. 2186, 2201, 2206, 4763-4765 (2013)
39. S.J. of Tex., 83d Leg., R.S. 2804-2805, 2815 (2013)
40. Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws (Not yet published)
41. TEXAS LEGISLATIVE COUNCIL, *Summary of Enactments, 83rd Legislature*, H.B. 2935, 40 (2013)

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THE LEGISLATIVE HISTORY OF TEX. H.B. 2973, 82ND LEG., R.S. (2011)

EXHIBITS



Bill: HB 2973

Legislative Session: 82(R)

Author: Hunter

[Add to Bill List](#)

Actions: (descending date order)

Viewing Votes: [Most Recent House Vote](#) | [Most Recent Senate Vote](#)

Description	Comment	Date ▼	Time	Journal Page
E Effective immediately		06/17/2011		
E Signed by the Governor		06/17/2011		6919
E Sent to the Governor		05/25/2011		5964
S Signed in the Senate		05/24/2011		3430
H Signed in the House		05/24/2011		5382
H Reported enrolled		05/24/2011	07:45 AM	5764
S House concurs in Senate amendment(s)-reported		05/21/2011		2808
H Text of Senate Amendment(s)		05/21/2011		4623
H Statement(s) of vote recorded in Journal		05/21/2011		4623
H Record vote	RV#1232	05/21/2011		4623
H House concurs in Senate amendment(s)		05/21/2011		4623
H Senate Amendments Analysis distributed		05/18/2011	07:10 PM	
H Senate Amendments distributed		05/18/2011	07:07 PM	
H Senate passage as amended reported		05/18/2011		4183
S Record vote		05/18/2011		2532
S Passed		05/18/2011		2532
S Read 3rd time		05/18/2011		2532
S Record vote		05/18/2011		2532
S Three day rule suspended		05/18/2011		2532
S Vote recorded in Journal		05/18/2011		2532
S Read 2nd time & passed to 3rd reading		05/18/2011		2532
S Rules suspended-Regular order of business		05/18/2011		2532
S Placed on intent calendar		05/17/2011		
S Committee report printed and distributed		05/16/2011	11:16 AM	
S Reported favorably as substituted		05/16/2011		2375
S Considered in public hearing		05/12/2011		
S Scheduled for public hearing on . . .		05/12/2011		
S Referred to State Affairs		05/09/2011		2145
S Read first time		05/09/2011		2145
S Received from the House		05/05/2011		1768
H Reported engrossed		05/05/2011	07:45 AM	3178
H Statement(s) of vote recorded in Journal		05/04/2011		2837
H Record vote	RV#689	05/04/2011		2837
H Passed		05/04/2011		2837
H Read 3rd time		05/04/2011		2837
H Passed to engrossment		05/03/2011		2757
H Read 2nd time		05/03/2011		2757
H Placed on General State Calendar		05/02/2011		
H Considered in Calendars		04/28/2011		
H Committee report sent to Calendars		04/12/2011		
H Committee report distributed		04/11/2011	04:13 PM	
H Comte report filed with Committee Coordinator		04/11/2011		1686
H Reported favorably as substituted		04/04/2011		
H Committee substitute considered in committee		04/04/2011		

H Considered in public hearing	04/04/2011	
H Left pending in committee	03/28/2011	
H Committee substitute considered in committee	03/28/2011	
H Testimony taken/registration(s) recorded in committee	03/28/2011	
H Considered in public hearing	03/28/2011	
H Scheduled for public hearing on . . .	03/28/2011	
H Referred to Judiciary & Civil Jurisprudence	03/17/2011	858
H Read first time	03/17/2011	858
H Filed	03/10/2011	

By: Hunter

H.B. No. 2973

A BILL TO BE ENTITLED

AN ACT

relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as the Citizens Participation Act.

SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 27 to read as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

- 1 (i) a judicial proceeding;
2 (ii) an official proceeding, other than a
3 judicial proceeding, to administer the law;
4 (iii) an executive proceeding before a
5 department of the state or federal government or a subdivision of
6 the state or federal government;
7 (iv) a legislative proceeding, including a
8 proceeding of a legislative committee;
9 (v) a proceeding before an entity that
10 requires by rule that public notice be given before proceedings of
11 that entity;
12 (vi) a proceeding in or before a managing
13 board of an educational or eleemosynary institution supported
14 directly or indirectly from public revenue;
15 (vii) a proceeding of the governing body of
16 any political subdivision of this state;
17 (viii) a report of or debate and statements
18 made in a proceeding described by Subparagraph (iii), (iv), (v),
19 (vi), or (vii); or
20 (ix) a public meeting dealing with a public
21 purpose, including statements and discussions at the meeting or
22 other matters of public concern occurring at the meeting;
23 (B) a communication in connection with an issue
24 under consideration or review by a legislative, executive,
25 judicial, or other governmental body or in another governmental or
26 official proceeding;
27 (C) a communication that is reasonably likely to

1 encourage consideration or review of an issue by a legislative,
2 executive, judicial, or other governmental body or in another
3 governmental or official proceeding;

4 (D) a communication reasonably likely to enlist
5 public participation in an effort to effect consideration of an
6 issue by a legislative, executive, judicial, or other governmental
7 body or in another governmental or official proceeding; and

8 (E) any other communication that falls within the
9 protection of the right to petition government under the
10 Constitution of the United States or the constitution of this
11 state.

12 (5) "Governmental proceeding" means a proceeding,
13 other than a judicial proceeding, by an officer, official, or body
14 of this state or a political subdivision of this state, including a
15 board or commission, or by an officer, official, or body of the
16 federal government.

17 (6) "Legal action" means a lawsuit, cause of action,
18 petition, complaint, cross-claim, or counterclaim or any other
19 judicial pleading or filing that requests legal or equitable
20 relief.

21 (7) "Matter of public concern" includes an issue
22 related to:

23 (A) health or safety;

24 (B) environmental, economic, or community
25 well-being;

26 (C) the government;

27 (D) a public official or public figure; or

1 (E) a good, product, or service in the
2 marketplace.

3 (8) "Official proceeding" means any type of
4 administrative, executive, legislative, or judicial proceeding
5 that may be conducted before a public servant.

6 (9) "Public servant" means a person elected, selected,
7 appointed, employed, or otherwise designated as one of the
8 following, even if the person has not yet qualified for office or
9 assumed the person's duties:

10 (A) an officer, employee, or agent of government;

11 (B) a juror;

12 (C) an arbitrator, referee, or other person who
13 is authorized by law or private written agreement to hear or
14 determine a cause or controversy;

15 (D) an attorney or notary public when
16 participating in the performance of a governmental function; or

17 (E) a person who is performing a governmental
18 function under a claim of right but is not legally qualified to do
19 so.

20 Sec. 27.002. PURPOSE. The purpose of this chapter is to
21 encourage and safeguard the constitutional rights of persons to
22 petition, speak freely, associate freely, and otherwise
23 participate in government to the maximum extent permitted by law
24 and, at the same time, protect the rights of a person to file
25 meritorious lawsuits for demonstrable injury.

26 Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is
27 based on, relates to, or is in response to a party's exercise of the

1 right of free speech, right to petition, or right of association,
2 that party may file a motion to dismiss the legal action.

3 (b) A motion to dismiss a legal action under this section
4 must be filed not later than the 60th day after the date of service
5 of the legal action. The court may extend the time to file a motion
6 under this section on a showing of good cause.

7 (c) Except as provided by Section 27.006(b), on the filing
8 of a motion under this section, all discovery in the legal action is
9 suspended until the court has ruled on the motion to dismiss.

10 Sec. 27.004. HEARING. A hearing on a motion under Section
11 27.003 must be set not later than the 30th day after the date of
12 service of the motion unless the docket conditions of the court
13 require a later hearing.

14 Sec. 27.005. RULING. (a) The court must rule on a motion
15 under Section 27.003 not later than the 30th day following the date
16 of the hearing on the motion.

17 (b) Except as provided by Subsection (c), on the motion of a
18 party under Section 27.003, a court shall dismiss a legal action
19 against the moving party if the moving party shows by a
20 preponderance of the evidence that the legal action is based on,
21 relates to, or is in response to the party's exercise of:

22 (1) the right of free speech;

23 (2) the right to petition; or

24 (3) the right of association.

25 (c) The court may not dismiss a legal action under this
26 section if the party bringing the legal action establishes by clear
27 and specific evidence a prima facie case for each essential element

1 of the claim in question.

2 Sec. 27.006. EVIDENCE. (a) In determining whether a legal
3 action should be dismissed under this chapter, the court shall
4 consider the pleadings and supporting and opposing affidavits
5 stating the facts on which the liability or defense is based.

6 (b) On a motion by a party or on the court's own motion and
7 on a showing of good cause, the court may allow specified and
8 limited discovery relevant to the motion.

9 Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a
10 party making a motion under Section 27.003, the court shall issue
11 findings regarding whether the legal action was brought to deter or
12 prevent the moving party from exercising constitutional rights and
13 is brought for an improper purpose, including to harass or to cause
14 unnecessary delay or to increase the cost of litigation.

15 (b) The court must issue findings under Subsection (a) not
16 later than the 30th day after the date a request under that
17 subsection is made.

18 Sec. 27.008. APPEAL. (a) If a court does not rule on a
19 motion to dismiss under Section 27.003 in the time prescribed by
20 Section 27.005, the motion is considered to have been denied by
21 operation of law and the moving party may appeal.

22 (b) An appellate court shall expedite an appeal or other
23 writ, whether interlocutory or not, from a trial court order on a
24 motion to dismiss a legal action under Section 27.003 or from a
25 trial court's failure to rule on that motion in the time prescribed
26 by Section 27.005.

27 (c) An appeal or other writ under this section must be filed

1 on or before the 60th day after the date the trial court's order is
2 signed or the time prescribed by Section 27.005 expires, as
3 applicable.

4 Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders
5 dismissal of a legal action under this chapter, the court shall
6 award to the moving party:

7 (1) court costs, reasonable attorney's fees, and other
8 expenses incurred in defending against the legal action; and

9 (2) sanctions against the party who brought the legal
10 action and the attorney representing the party who brought the
11 legal action as the court determines sufficient to deter the party
12 who brought the legal action and the attorney from bringing similar
13 actions described in this chapter.

14 (b) If the court finds that a motion to dismiss filed under
15 this chapter is frivolous or solely intended to delay, the court may
16 award court costs and reasonable attorney's fees to the responding
17 party.

18 Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply
19 to an enforcement action that is brought in the name of this state
20 or a political subdivision of this state by the attorney general, a
21 district attorney, a criminal district attorney, or a county
22 attorney.

23 (b) This chapter does not apply to a legal action brought
24 against a person primarily engaged in the business of selling or
25 leasing goods or services, if the statement or conduct from which
26 the claim arises is a representation of fact made for the purpose of
27 promoting, securing, or completing the sale or lease of, or a

1 commercial transaction in, the person's goods or services, and the
2 intended audience is an actual or potential buyer or customer.

3 Sec. 27.011. CONSTRUCTION. (a) This chapter does not
4 abrogate or lessen any other defense, remedy, immunity, or
5 privilege available under other constitutional, statutory, case,
6 or common law or rule provisions.

7 (b) This chapter shall be construed liberally to effectuate
8 its purpose and intent fully.

9 SECTION 3. The change in law made by this Act applies only
10 to a legal action filed on or after the effective date of this Act.
11 A legal action filed before the effective date of this Act is
12 governed by the law in effect immediately before that date, and that
13 law is continued in effect for that purpose.

14 SECTION 4. This Act takes effect immediately if it receives
15 a vote of two-thirds of all the members elected to each house, as
16 provided by Section 39, Article III, Texas Constitution. If this
17 Act does not receive the vote necessary for immediate effect, this
18 Act takes effect September 1, 2011.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION

March 26, 2011

TO: Honorable Jim Jackson, Chair, House Committee on Judiciary & Civil Jurisprudence

FROM: John S O'Brien, Director, Legislative Budget Board

IN RE: HB2973 by Hunter (Relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.), **As Introduced**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to provide for the handling of lawsuits based on an individual's exercise of rights of free speech, petition or association. To the extent the bill would amend court procedures, the bill may result in the expedition of such cases, but any positive impact on judicial workloads or fiscal implication to the state is not anticipated to be significant. The bill would take immediate effect if the bill receives two-thirds the vote of all members in both houses. Otherwise, the bill would take effect September 1, 2011.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: JOB, JT, TB, KKR

By: Hunter, Raymond

H.B. No. 2973

Substitute the following for H.B. No. 2973:

By: Hartnett

C.S.H.B. No. 2973

A BILL TO BE ENTITLED

1 AN ACT

2 relating to encouraging public participation by citizens by
3 protecting a person's right to petition, right of free speech, and
4 right of association from meritless lawsuits arising from actions
5 taken in furtherance of those rights.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

7 SECTION 1. This Act may be cited as the Citizens
8 Participation Act.

9 SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies
10 Code, is amended by adding Chapter 27 to read as follows:

11 CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
12 CONSTITUTIONAL RIGHTS

13 Sec. 27.001. DEFINITIONS. In this chapter:

14 (1) "Communication" includes the making or submitting
15 of a statement or document in any form or medium, including oral,
16 visual, written, audiovisual, or electronic.

17 (2) "Exercise of the right of association" means a
18 communication between individuals who join together to
19 collectively express, promote, pursue, or defend common interests.

20 (3) "Exercise of the right of free speech" means a
21 communication made in connection with a matter of public concern.

22 (4) "Exercise of the right to petition" means any of
23 the following:

24 (A) a communication in or pertaining to:

- 1 (i) a judicial proceeding;
2 (ii) an official proceeding, other than a
3 judicial proceeding, to administer the law;
4 (iii) an executive or other proceeding
5 before a department of the state or federal government or a
6 subdivision of the state or federal government;
7 (iv) a legislative proceeding, including a
8 proceeding of a legislative committee;
9 (v) a proceeding before an entity that
10 requires by rule that public notice be given before proceedings of
11 that entity;
12 (vi) a proceeding in or before a managing
13 board of an educational or eleemosynary institution supported
14 directly or indirectly from public revenue;
15 (vii) a proceeding of the governing body of
16 any political subdivision of this state;
17 (viii) a report of or debate and statements
18 made in a proceeding described by Subparagraph (iii), (iv), (v),
19 (vi), or (vii); or
20 (ix) a public meeting dealing with a public
21 purpose, including statements and discussions at the meeting or
22 other matters of public concern occurring at the meeting;
23 (B) a communication in connection with an issue
24 under consideration or review by a legislative, executive,
25 judicial, or other governmental body or in another governmental or
26 official proceeding;
27 (C) a communication that is reasonably likely to

1 encourage consideration or review of an issue by a legislative,
2 executive, judicial, or other governmental body or in another
3 governmental or official proceeding;

4 (D) a communication reasonably likely to enlist
5 public participation in an effort to effect consideration of an
6 issue by a legislative, executive, judicial, or other governmental
7 body or in another governmental or official proceeding; and

8 (E) any other communication that falls within the
9 protection of the right to petition government under the
10 Constitution of the United States or the constitution of this
11 state.

12 (5) "Governmental proceeding" means a proceeding,
13 other than a judicial proceeding, by an officer, official, or body
14 of this state or a political subdivision of this state, including a
15 board or commission, or by an officer, official, or body of the
16 federal government.

17 (6) "Legal action" means a lawsuit, cause of action,
18 petition, complaint, cross-claim, or counterclaim or any other
19 judicial pleading or filing that requests legal or equitable
20 relief.

21 (7) "Matter of public concern" includes an issue
22 related to:

23 (A) health or safety;

24 (B) environmental, economic, or community
25 well-being;

26 (C) the government;

27 (D) a public official or public figure; or

1 (E) a good, product, or service in the
2 marketplace.

3 (8) "Official proceeding" means any type of
4 administrative, executive, legislative, or judicial proceeding
5 that may be conducted before a public servant.

6 (9) "Public servant" means a person elected, selected,
7 appointed, employed, or otherwise designated as one of the
8 following, even if the person has not yet qualified for office or
9 assumed the person's duties:

10 (A) an officer, employee, or agent of government;

11 (B) a juror;

12 (C) an arbitrator, referee, or other person who
13 is authorized by law or private written agreement to hear or
14 determine a cause or controversy;

15 (D) an attorney or notary public when
16 participating in the performance of a governmental function; or

17 (E) a person who is performing a governmental
18 function under a claim of right but is not legally qualified to do
19 so.

20 Sec. 27.002. PURPOSE. The purpose of this chapter is to
21 encourage and safeguard the constitutional rights of persons to
22 petition, speak freely, associate freely, and otherwise
23 participate in government to the maximum extent permitted by law
24 and, at the same time, protect the rights of a person to file
25 meritorious lawsuits for demonstrable injury.

26 Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is
27 based on, relates to, or is in response to a party's exercise of the

1 right of free speech, right to petition, or right of association,
2 that party may file a motion to dismiss the legal action.

3 (b) A motion to dismiss a legal action under this section
4 must be filed not later than the 60th day after the date of service
5 of the legal action. The court may extend the time to file a motion
6 under this section on a showing of good cause.

7 (c) Except as provided by Section 27.006(b), on the filing
8 of a motion under this section, all discovery in the legal action is
9 suspended until the court has ruled on the motion to dismiss.

10 Sec. 27.004. HEARING. A hearing on a motion under Section
11 27.003 must be set not later than the 30th day after the date of
12 service of the motion unless the docket conditions of the court
13 require a later hearing.

14 Sec. 27.005. RULING. (a) The court must rule on a motion
15 under Section 27.003 not later than the 30th day following the date
16 of the hearing on the motion.

17 (b) Except as provided by Subsection (c), on the motion of a
18 party under Section 27.003, a court shall dismiss a legal action
19 against the moving party if the moving party shows by a
20 preponderance of the evidence that the legal action is based on,
21 relates to, or is in response to the party's exercise of:

22 (1) the right of free speech;

23 (2) the right to petition; or

24 (3) the right of association.

25 (c) The court may not dismiss a legal action under this
26 section if the party bringing the legal action establishes by clear
27 and specific evidence a prima facie case for each essential element

1 of the claim in question.

2 Sec. 27.006. EVIDENCE. (a) In determining whether a legal
3 action should be dismissed under this chapter, the court shall
4 consider the pleadings and supporting and opposing affidavits
5 stating the facts on which the liability or defense is based.

6 (b) On a motion by a party or on the court's own motion and
7 on a showing of good cause, the court may allow specified and
8 limited discovery relevant to the motion.

9 Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a
10 party making a motion under Section 27.003, the court shall issue
11 findings regarding whether the legal action was brought to deter or
12 prevent the moving party from exercising constitutional rights and
13 is brought for an improper purpose, including to harass or to cause
14 unnecessary delay or to increase the cost of litigation.

15 (b) The court must issue findings under Subsection (a) not
16 later than the 30th day after the date a request under that
17 subsection is made.

18 Sec. 27.008. APPEAL. (a) If a court does not rule on a
19 motion to dismiss under Section 27.003 in the time prescribed by
20 Section 27.005, the motion is considered to have been denied by
21 operation of law and the moving party may appeal.

22 (b) An appellate court shall expedite an appeal or other
23 writ, whether interlocutory or not, from a trial court order on a
24 motion to dismiss a legal action under Section 27.003 or from a
25 trial court's failure to rule on that motion in the time prescribed
26 by Section 27.005.

27 (c) An appeal or other writ under this section must be filed

1 on or before the 60th day after the date the trial court's order is
2 signed or the time prescribed by Section 27.005 expires, as
3 applicable.

4 Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders
5 dismissal of a legal action under this chapter, the court shall
6 award to the moving party:

7 (1) court costs, reasonable attorney's fees, and other
8 expenses incurred in defending against the legal action; and

9 (2) sanctions against the party who brought the legal
10 action as the court determines sufficient to deter the party who
11 brought the legal action from bringing similar actions described in
12 this chapter.

13 (b) If the court finds that a motion to dismiss filed under
14 this chapter is frivolous or solely intended to delay, the court may
15 award court costs and reasonable attorney's fees to the responding
16 party.

17 Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply
18 to an enforcement action that is brought in the name of this state
19 or a political subdivision of this state by the attorney general, a
20 district attorney, a criminal district attorney, or a county
21 attorney.

22 (b) This chapter does not apply to a legal action brought
23 against a person primarily engaged in the business of selling or
24 leasing goods or services, if the statement or conduct arises out of
25 the sale or lease of goods, services, or an insurance product or a
26 commercial transaction in which the intended audience is an actual
27 or potential buyer or customer.

1 (c) This chapter does not apply to a legal action seeking
2 recovery for bodily injury, wrongful death, or survival or to
3 statements made regarding that legal action.

4 Sec. 27.011. CONSTRUCTION. (a) This chapter does not
5 abrogate or lessen any other defense, remedy, immunity, or
6 privilege available under other constitutional, statutory, case,
7 or common law or rule provisions.

8 (b) This chapter shall be construed liberally to effectuate
9 its purpose and intent fully.

10 SECTION 3. The change in law made by this Act applies only
11 to a legal action filed on or after the effective date of this Act.
12 A legal action filed before the effective date of this Act is
13 governed by the law in effect immediately before that date, and that
14 law is continued in effect for that purpose.

15 SECTION 4. This Act takes effect immediately if it receives
16 a vote of two-thirds of all the members elected to each house, as
17 provided by Section 39, Article III, Texas Constitution. If this
18 Act does not receive the vote necessary for immediate effect, this
19 Act takes effect September 1, 2011.

BILL ANALYSIS

C.S.H.B. 2973
By: Hunter
Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, the involvement of citizens in the exchange of ideas benefits our society. The Internet has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of public speech. Unfortunately, abuses of the legal system have also grown, including the filing of frivolous lawsuits aimed at silencing these citizens who are participating in the free exchange of ideas. These lawsuits are called strategic lawsuits against public participation.

C.S.H.B. 2973 seeks to encourage greater public participation of Texas citizens through safeguarding the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government by providing for an expedited motion to dismiss frivolous lawsuits aimed at retaliating against someone who exercises the person's right of association, free speech, or right of petition.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2973 amends the Civil Practice and Remedies Code to enact the Citizens Participation Act and to set out its purpose. The bill authorizes a party to file a motion to dismiss a legal action if the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, right to petition, or right of association. The bill requires the motion to dismiss such a legal action to be filed not later than the 60th day after the date of service of the legal action and authorizes the court to extend the time to file the motion on a showing of good cause.

C.S.H.B. 2973 provides, on the filing of the motion to dismiss, that all discovery in the legal action is suspended until the court has ruled on the motion, except that the court may allow, on a motion by a party or on the court's own motion and on a showing of good cause, specified and limited discovery relevant to the motion to dismiss, as provided by the bill in provisions relating to evidence. The bill requires a hearing on the motion to be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

C.S.H.B. 2973 requires the court to rule on the motion to dismiss not later than the 30th day following the date of the hearing on the motion and to dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association. The bill prohibits the court from dismissing the legal action if the party bringing the legal action establishes by clear and specific evidence a prima facie case

for each essential element of the claim in question.

C.S.H.B. 2973 requires the court, in determining whether the legal action should be dismissed, to consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based. The bill requires the court, at the request of the party making a motion to dismiss, to issue findings not later than the 30th day after the date a request is made regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

C.S.H.B. 2973 provides that the motion to dismiss is considered to have been denied by operation of law and the moving party may appeal if the court does not rule on a motion to dismiss on or before the 30th day following the date of the hearing of the motion. The bill requires an appellate court to expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action or from a trial court's failure to rule on that motion on or before the 30th day following the date of the hearing of the motion. The bill requires an appeal or other writ to be filed on or before the 60th day after the date the trial court's order is signed or the time expires, as applicable. The bill requires the court, if the court orders dismissal of a legal action under the bill, to award to the moving party court costs, reasonable attorney's fees, other expenses incurred in defending against the legal action, and sanctions against the party who brought the legal action as the court determines sufficient to deter the party from bringing similar actions. The bill authorizes the court to award court costs and reasonable attorney's fees to the responding party if the court finds that the motion to dismiss is frivolous or solely intended to delay.

C.S.H.B. 2973 exempts from the its provisions an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney; a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer; a legal action seeking recovery for bodily injury, wrongful death, or survival or statements made regarding that legal action. The bill provides that its provisions do not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions and requires its provisions to be construed liberally to effectuate its purpose and intent fully.

C.S.H.B. 2973 defines "communication," "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," "governmental proceeding," "legal action," "matter of public concern," "official proceeding," and "public servant."

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 2973 differs from the original by including in the definition of "exercise of the right to petition" a communication in or pertaining to an executive or other proceeding, whereas the original specifies only a communication pertaining to an executive proceeding. The substitute, in a provision specifying awards to a moving party if the court orders dismissal of an action, differs from the original by omitting a provision included in the original requiring sanctions against the attorney representing the party who brought the legal action.

C.S.H.B. 2973 differs from the original by exempting from the bill's provisions a legal action brought against a person primarily engaged in the business of selling or leasing goods or

services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer, whereas the original exempts such a legal action if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing the sale or lease of, or a commercial transaction in, the person's goods or services, and the intended audience is an actual or potential buyer or customer. The substitute contains a provision not included in the original exempting from the bill's provisions a legal action seeking recovery for bodily injury, wrongful death, or survival or statements made regarding that legal action.

WITNESS LIST

HB 2973

HOUSE COMMITTEE REPORT

Judiciary & Civil Jurisprudence Committee

March 28, 2011 - 2:00 PM or upon final adjourn./recess

For :

Ahmad, Janet (Home Owner for Better Building, President)
Ellis, Joe (Tx Association of Broadcaster)
Fitzgerald, Shane (FOIFT)
Johnson, Brenda (Self)
Lent, Robin (Coalition HOA Reform)
Main, Carla (Self)
Prather, Laura (BBB, FOIFT, TDNA & TAB)

On :

Harrison, Steve (Self; Texas Trial Lawyers Association)

Registering, but not testifying:

For :

Adolph, Irene (Self; Coalition of HOA Reform
HOADATA.ORG)
Anderson, Lou Ann (Self)
Durham, Mary Lou (Self)
Elkins, Keith (Freedom of Information Foundation of Texas)
Hull, Mike (Texans for Lawsuit Reform)
Knaack, Frank (ACLU of Texas)
Panju, Arif (Institute for Justice)
Schneider, Michael (Texas Association of Broadcasters)
Smith, Tom 'Smitty' (Public Citizen)
Sterling, Ed (Texas Press Association)
Toney, Doug (Texas Press Association
Texas Daily Newspaper Association)
Weinberg, David (Texas League of Conservation Voters)
Wendell, Ware (Texas Watch)
Wilson, Andy (Public Citizen, Inc)
Wynn, Monty (Texas Municipal League)

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION

April 9, 2011

TO: Honorable Jim Jackson, Chair, House Committee on Judiciary & Civil Jurisprudence

FROM: John S O'Brien, Director, Legislative Budget Board

IN RE: HB2973 by Hunter (relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.), **Committee Report 1st House, Substituted**

<p>No significant fiscal implication to the State is anticipated.</p>
--

The bill would amend the Civil Practice and Remedies Code to provide for the handling of lawsuits based on an individual's exercise of rights of free speech, petition or association. To the extent the bill would amend court procedures, the bill may result in the expedition of such cases, but any positive impact on judicial workloads or fiscal implication to the state is not anticipated to be significant. The bill would take immediate effect if the bill receives two-thirds the vote of all members in both houses. Otherwise, the bill would take effect September 1, 2011.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: JOB, TB, JT, KKR

By: Hunter, Raymond, Hochberg,
Martinez Fischer, et al.

H.B. No. 2973

A BILL TO BE ENTITLED

1 AN ACT

2 relating to encouraging public participation by citizens by
3 protecting a person's right to petition, right of free speech, and
4 right of association from meritless lawsuits arising from actions
5 taken in furtherance of those rights.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

7 SECTION 1. This Act may be cited as the Citizens
8 Participation Act.

9 SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies
10 Code, is amended by adding Chapter 27 to read as follows:

11 CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
12 CONSTITUTIONAL RIGHTS

13 Sec. 27.001. DEFINITIONS. In this chapter:

14 (1) "Communication" includes the making or submitting
15 of a statement or document in any form or medium, including oral,
16 visual, written, audiovisual, or electronic.

17 (2) "Exercise of the right of association" means a
18 communication between individuals who join together to
19 collectively express, promote, pursue, or defend common interests.

20 (3) "Exercise of the right of free speech" means a
21 communication made in connection with a matter of public concern.

22 (4) "Exercise of the right to petition" means any of
23 the following:

24 (A) a communication in or pertaining to:

- 1 (i) a judicial proceeding;
2 (ii) an official proceeding, other than a
3 judicial proceeding, to administer the law;
4 (iii) an executive or other proceeding
5 before a department of the state or federal government or a
6 subdivision of the state or federal government;
7 (iv) a legislative proceeding, including a
8 proceeding of a legislative committee;
9 (v) a proceeding before an entity that
10 requires by rule that public notice be given before proceedings of
11 that entity;
12 (vi) a proceeding in or before a managing
13 board of an educational or eleemosynary institution supported
14 directly or indirectly from public revenue;
15 (vii) a proceeding of the governing body of
16 any political subdivision of this state;
17 (viii) a report of or debate and statements
18 made in a proceeding described by Subparagraph (iii), (iv), (v),
19 (vi), or (vii); or
20 (ix) a public meeting dealing with a public
21 purpose, including statements and discussions at the meeting or
22 other matters of public concern occurring at the meeting;
23 (B) a communication in connection with an issue
24 under consideration or review by a legislative, executive,
25 judicial, or other governmental body or in another governmental or
26 official proceeding;
27 (C) a communication that is reasonably likely to

1 encourage consideration or review of an issue by a legislative,
2 executive, judicial, or other governmental body or in another
3 governmental or official proceeding;

4 (D) a communication reasonably likely to enlist
5 public participation in an effort to effect consideration of an
6 issue by a legislative, executive, judicial, or other governmental
7 body or in another governmental or official proceeding; and

8 (E) any other communication that falls within the
9 protection of the right to petition government under the
10 Constitution of the United States or the constitution of this
11 state.

12 (5) "Governmental proceeding" means a proceeding,
13 other than a judicial proceeding, by an officer, official, or body
14 of this state or a political subdivision of this state, including a
15 board or commission, or by an officer, official, or body of the
16 federal government.

17 (6) "Legal action" means a lawsuit, cause of action,
18 petition, complaint, cross-claim, or counterclaim or any other
19 judicial pleading or filing that requests legal or equitable
20 relief.

21 (7) "Matter of public concern" includes an issue
22 related to:

23 (A) health or safety;

24 (B) environmental, economic, or community
25 well-being;

26 (C) the government;

27 (D) a public official or public figure; or

1 (E) a good, product, or service in the
2 marketplace.

3 (8) "Official proceeding" means any type of
4 administrative, executive, legislative, or judicial proceeding
5 that may be conducted before a public servant.

6 (9) "Public servant" means a person elected, selected,
7 appointed, employed, or otherwise designated as one of the
8 following, even if the person has not yet qualified for office or
9 assumed the person's duties:

10 (A) an officer, employee, or agent of government;

11 (B) a juror;

12 (C) an arbitrator, referee, or other person who
13 is authorized by law or private written agreement to hear or
14 determine a cause or controversy;

15 (D) an attorney or notary public when
16 participating in the performance of a governmental function; or

17 (E) a person who is performing a governmental
18 function under a claim of right but is not legally qualified to do
19 so.

20 Sec. 27.002. PURPOSE. The purpose of this chapter is to
21 encourage and safeguard the constitutional rights of persons to
22 petition, speak freely, associate freely, and otherwise
23 participate in government to the maximum extent permitted by law
24 and, at the same time, protect the rights of a person to file
25 meritorious lawsuits for demonstrable injury.

26 Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is
27 based on, relates to, or is in response to a party's exercise of the

1 right of free speech, right to petition, or right of association,
2 that party may file a motion to dismiss the legal action.

3 (b) A motion to dismiss a legal action under this section
4 must be filed not later than the 60th day after the date of service
5 of the legal action. The court may extend the time to file a motion
6 under this section on a showing of good cause.

7 (c) Except as provided by Section 27.006(b), on the filing
8 of a motion under this section, all discovery in the legal action is
9 suspended until the court has ruled on the motion to dismiss.

10 Sec. 27.004. HEARING. A hearing on a motion under Section
11 27.003 must be set not later than the 30th day after the date of
12 service of the motion unless the docket conditions of the court
13 require a later hearing.

14 Sec. 27.005. RULING. (a) The court must rule on a motion
15 under Section 27.003 not later than the 30th day following the date
16 of the hearing on the motion.

17 (b) Except as provided by Subsection (c), on the motion of a
18 party under Section 27.003, a court shall dismiss a legal action
19 against the moving party if the moving party shows by a
20 preponderance of the evidence that the legal action is based on,
21 relates to, or is in response to the party's exercise of:

22 (1) the right of free speech;

23 (2) the right to petition; or

24 (3) the right of association.

25 (c) The court may not dismiss a legal action under this
26 section if the party bringing the legal action establishes by clear
27 and specific evidence a prima facie case for each essential element

1 of the claim in question.

2 Sec. 27.006. EVIDENCE. (a) In determining whether a legal
3 action should be dismissed under this chapter, the court shall
4 consider the pleadings and supporting and opposing affidavits
5 stating the facts on which the liability or defense is based.

6 (b) On a motion by a party or on the court's own motion and
7 on a showing of good cause, the court may allow specified and
8 limited discovery relevant to the motion.

9 Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a
10 party making a motion under Section 27.003, the court shall issue
11 findings regarding whether the legal action was brought to deter or
12 prevent the moving party from exercising constitutional rights and
13 is brought for an improper purpose, including to harass or to cause
14 unnecessary delay or to increase the cost of litigation.

15 (b) The court must issue findings under Subsection (a) not
16 later than the 30th day after the date a request under that
17 subsection is made.

18 Sec. 27.008. APPEAL. (a) If a court does not rule on a
19 motion to dismiss under Section 27.003 in the time prescribed by
20 Section 27.005, the motion is considered to have been denied by
21 operation of law and the moving party may appeal.

22 (b) An appellate court shall expedite an appeal or other
23 writ, whether interlocutory or not, from a trial court order on a
24 motion to dismiss a legal action under Section 27.003 or from a
25 trial court's failure to rule on that motion in the time prescribed
26 by Section 27.005.

27 (c) An appeal or other writ under this section must be filed

1 on or before the 60th day after the date the trial court's order is
2 signed or the time prescribed by Section 27.005 expires, as
3 applicable.

4 Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders
5 dismissal of a legal action under this chapter, the court shall
6 award to the moving party:

7 (1) court costs, reasonable attorney's fees, and other
8 expenses incurred in defending against the legal action; and

9 (2) sanctions against the party who brought the legal
10 action as the court determines sufficient to deter the party who
11 brought the legal action from bringing similar actions described in
12 this chapter.

13 (b) If the court finds that a motion to dismiss filed under
14 this chapter is frivolous or solely intended to delay, the court may
15 award court costs and reasonable attorney's fees to the responding
16 party.

17 Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply
18 to an enforcement action that is brought in the name of this state
19 or a political subdivision of this state by the attorney general, a
20 district attorney, a criminal district attorney, or a county
21 attorney.

22 (b) This chapter does not apply to a legal action brought
23 against a person primarily engaged in the business of selling or
24 leasing goods or services, if the statement or conduct arises out of
25 the sale or lease of goods, services, or an insurance product or a
26 commercial transaction in which the intended audience is an actual
27 or potential buyer or customer.

1 (c) This chapter does not apply to a legal action seeking
2 recovery for bodily injury, wrongful death, or survival or to
3 statements made regarding that legal action.

4 Sec. 27.011. CONSTRUCTION. (a) This chapter does not
5 abrogate or lessen any other defense, remedy, immunity, or
6 privilege available under other constitutional, statutory, case,
7 or common law or rule provisions.

8 (b) This chapter shall be construed liberally to effectuate
9 its purpose and intent fully.

10 SECTION 3. The change in law made by this Act applies only
11 to a legal action filed on or after the effective date of this Act.
12 A legal action filed before the effective date of this Act is
13 governed by the law in effect immediately before that date, and that
14 law is continued in effect for that purpose.

15 SECTION 4. This Act takes effect immediately if it receives
16 a vote of two-thirds of all the members elected to each house, as
17 provided by Section 39, Article III, Texas Constitution. If this
18 Act does not receive the vote necessary for immediate effect, this
19 Act takes effect September 1, 2011.

BILL ANALYSIS

Senate Research Center
82R18255 CAE-D

H.B. 2973
By: Hunter et al. (Ellis)
State Affairs
5/10/2011
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, involvement of citizens in the exchange of idea benefits our society.

Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our democracy. The Internet age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens, have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or "SLAAP" suits.

Twenty-seven states and the District of Columbia have passed similar acts, most commonly known as either "Anti-SLAPP" laws or "Citizen Participation Acts" that allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizen Participation Act would allow defendants—who are sued as a result of exercising their right to free speech or their right to petition the government—to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he had a genuine case for each essential element of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay attorney's fees of the defendant.

H.B. 2973 amends current law relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Authorizes this Act to be cited as the Citizens Participation Act.

SECTION 2. Amends Subtitle B, Title 2, Civil Practice and Remedies Code, by adding Chapter 27, as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. Defines, in this chapter, "communication", "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," "governmental proceeding," "legal action," "matter of public concern," "official proceeding," and "public servant."

Sec. 27.002. PURPOSE. (a) Provides that the purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate feely,

and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) Authorizes a party, if a legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, right to petition, or right of association, to file a motion to dismiss the legal action.

(b) Requires that a motion to dismiss a legal action under this section be filed not later than the 60th day after the date of service of the legal action. Authorizes the court to extend the time to file a motion under this section on a showing of good cause.

(c) Provides that except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. Requires that a hearing on a motion under Section 27.003 be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) Requires the court to rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Requires a court, except as provided by Subsection (c), on the motion of a party under Section 27.003, to dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

(c) Prohibits the court from dismissing a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) Requires the court, in determining whether a legal action should be dismissed under this chapter, to consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) Authorizes the court, on a motion by a party or on the court's own motion and on a showing of a good cause, to allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) Requires the court, at the request of a party making a motion under Section 27.003, to issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) Requires the court to issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) Provides that if a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) Requires an appellate court to 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.

(c) Requires that an appeal or other writ under this section be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) Requires the court, if the court orders dismissal of a legal action under this chapter, to award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) Authorizes the court, if the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, to award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) Provides that this chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) Provides that this chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) Provides that this chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Sec. 27.011. CONSTRUCTION. (a) Provides that this chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) Requires that this chapter be construed liberally to effectuate its purpose and intent fully.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: upon passage or September 1, 2011.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION

May 10, 2011

TO: Honorable Robert Duncan, Chair, Senate Committee on State Affairs

FROM: John S O'Brien, Director, Legislative Budget Board

IN RE: HB2973 by Hunter (Relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.), **As Engrossed**

<p>No significant fiscal implication to the State is anticipated.</p>
--

The bill would amend the Civil Practice and Remedies Code to provide for the handling of lawsuits based on an individual's exercise of rights of free speech, petition or association. To the extent the bill would amend court procedures, the bill may result in the expedition of such cases, but any positive impact on judicial workloads or fiscal implication to the state is not anticipated to be significant. The bill would take immediate effect if the bill receives two-thirds the vote of all members in both houses. Otherwise, the bill would take effect September 1, 2011.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: JOB, KJG, TB, JT, KKR

1-1 By: Hunter, et al (Senate Sponsor - Ellis) H.B. No. 2973
1-2 (In the Senate - Received from the House May 5, 2011;
1-3 May 9, 2011, read first time and referred to Committee on
1-4 State Affairs; May 16, 2011, reported adversely, with favorable
1-5 Committee Substitute by the following vote: Yeas 9, Nays 0;
1-6 May 16, 2011, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR H.B. No. 2973 By: Ellis

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to encouraging public participation by citizens by
1-11 protecting a person's right to petition, right of free speech, and
1-12 right of association from meritless lawsuits arising from actions
1-13 taken in furtherance of those rights.

1-14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-15 SECTION 1. This Act may be cited as the Citizens
1-16 Participation Act.

1-17 SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies
1-18 Code, is amended by adding Chapter 27 to read as follows:

1-19 CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
1-20 CONSTITUTIONAL RIGHTS

1-21 Sec. 27.001. DEFINITIONS. In this chapter:

1-22 (1) "Communication" includes the making or submitting
1-23 of a statement or document in any form or medium, including oral,
1-24 visual, written, audiovisual, or electronic.

1-25 (2) "Exercise of the right of association" means a
1-26 communication between individuals who join together to
1-27 collectively express, promote, pursue, or defend common interests.

1-28 (3) "Exercise of the right of free speech" means a
1-29 communication made in connection with a matter of public concern.

1-30 (4) "Exercise of the right to petition" means any of
1-31 the following:

1-32 (A) a communication in or pertaining to:

1-33 (i) a judicial proceeding;

1-34 (ii) an official proceeding, other than a
1-35 judicial proceeding, to administer the law;

1-36 (iii) an executive or other proceeding
1-37 before a department of the state or federal government or a
1-38 subdivision of the state or federal government;

1-39 (iv) a legislative proceeding, including a
1-40 proceeding of a legislative committee;

1-41 (v) a proceeding before an entity that
1-42 requires by rule that public notice be given before proceedings of
1-43 that entity;

1-44 (vi) a proceeding in or before a managing
1-45 board of an educational or eleemosynary institution supported
1-46 directly or indirectly from public revenue;

1-47 (vii) a proceeding of the governing body of
1-48 any political subdivision of this state;

1-49 (viii) a report of or debate and statements
1-50 made in a proceeding described by Subparagraph (iii), (iv), (v),
1-51 (vi), or (vii); or

1-52 (ix) a public meeting dealing with a public
1-53 purpose, including statements and discussions at the meeting or
1-54 other matters of public concern occurring at the meeting;

1-55 (B) a communication in connection with an issue
1-56 under consideration or review by a legislative, executive,
1-57 judicial, or other governmental body or in another governmental or
1-58 official proceeding;

1-59 (C) a communication that is reasonably likely to
1-60 encourage consideration or review of an issue by a legislative,
1-61 executive, judicial, or other governmental body or in another
1-62 governmental or official proceeding;

1-63 (D) a communication reasonably likely to enlist

2-1 public participation in an effort to effect consideration of an
2-2 issue by a legislative, executive, judicial, or other governmental
2-3 body or in another governmental or official proceeding; and

2-4 (E) any other communication that falls within the
2-5 protection of the right to petition government under the
2-6 Constitution of the United States or the constitution of this
2-7 state.

2-8 (5) "Governmental proceeding" means a proceeding,
2-9 other than a judicial proceeding, by an officer, official, or body
2-10 of this state or a political subdivision of this state, including a
2-11 board or commission, or by an officer, official, or body of the
2-12 federal government.

2-13 (6) "Legal action" means a lawsuit, cause of action,
2-14 petition, complaint, cross-claim, or counterclaim or any other
2-15 judicial pleading or filing that requests legal or equitable
2-16 relief.

2-17 (7) "Matter of public concern" includes an issue
2-18 related to:

2-19 (A) health or safety;

2-20 (B) environmental, economic, or community
2-21 well-being;

2-22 (C) the government;

2-23 (D) a public official or public figure; or

2-24 (E) a good, product, or service in the
2-25 marketplace.

2-26 (8) "Official proceeding" means any type of
2-27 administrative, executive, legislative, or judicial proceeding
2-28 that may be conducted before a public servant.

2-29 (9) "Public servant" means a person elected, selected,
2-30 appointed, employed, or otherwise designated as one of the
2-31 following, even if the person has not yet qualified for office or
2-32 assumed the person's duties:

2-33 (A) an officer, employee, or agent of government;

2-34 (B) a juror;

2-35 (C) an arbitrator, referee, or other person who
2-36 is authorized by law or private written agreement to hear or
2-37 determine a cause or controversy;

2-38 (D) an attorney or notary public when
2-39 participating in the performance of a governmental function; or

2-40 (E) a person who is performing a governmental
2-41 function under a claim of right but is not legally qualified to do
2-42 so.

2-43 Sec. 27.002. PURPOSE. The purpose of this chapter is to
2-44 encourage and safeguard the constitutional rights of persons to
2-45 petition, speak freely, associate freely, and otherwise
2-46 participate in government to the maximum extent permitted by law
2-47 and, at the same time, protect the rights of a person to file
2-48 meritorious lawsuits for demonstrable injury.

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2-50 based on, relates to, or is in response to a party's exercise of the
2-51 right of free speech, right to petition, or right of association,
2-52 that party may file a motion to dismiss the legal action.

2-53 (b) A motion to dismiss a legal action under this section
2-54 must be filed not later than the 60th day after the date of service
2-55 of the legal action. The court may extend the time to file a motion
2-56 under this section on a showing of good cause.

2-57 (c) Except as provided by Section 27.006(b), on the filing
2-58 of a motion under this section, all discovery in the legal action is
2-59 suspended until the court has ruled on the motion to dismiss.

2-60 Sec. 27.004. HEARING. A hearing on a motion under Section
2-61 27.003 must be set not later than the 30th day after the date of
2-62 service of the motion unless the docket conditions of the court
2-63 require a later hearing.

2-64 Sec. 27.005. RULING. (a) The court must rule on a motion
2-65 under Section 27.003 not later than the 30th day following the date
2-66 of the hearing on the motion.

2-67 (b) Except as provided by Subsection (c), on the motion of a
2-68 party under Section 27.003, a court shall dismiss a legal action
2-69 against the moving party if the moving party shows by a

3-1 preponderance of the evidence that the legal action is based on,
3-2 relates to, or is in response to the party's exercise of:

- 3-3 (1) the right of free speech;
- 3-4 (2) the right to petition; or
- 3-5 (3) the right of association.

3-6 (c) The court may not dismiss a legal action under this
3-7 section if the party bringing the legal action establishes by clear
3-8 and specific evidence a prima facie case for each essential element
3-9 of the claim in question.

3-10 Sec. 27.006. EVIDENCE. (a) In determining whether a legal
3-11 action should be dismissed under this chapter, the court shall
3-12 consider the pleadings and supporting and opposing affidavits
3-13 stating the facts on which the liability or defense is based.

3-14 (b) On a motion by a party or on the court's own motion and
3-15 on a showing of good cause, the court may allow specified and
3-16 limited discovery relevant to the motion.

3-17 Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a
3-18 party making a motion under Section 27.003, the court shall issue
3-19 findings regarding whether the legal action was brought to deter or
3-20 prevent the moving party from exercising constitutional rights and
3-21 is brought for an improper purpose, including to harass or to cause
3-22 unnecessary delay or to increase the cost of litigation.

3-23 (b) The court must issue findings under Subsection (a) not
3-24 later than the 30th day after the date a request under that
3-25 subsection is made.

3-26 Sec. 27.008. APPEAL. (a) If a court does not rule on a
3-27 motion to dismiss under Section 27.003 in the time prescribed by
3-28 Section 27.005, the motion is considered to have been denied by
3-29 operation of law and the moving party may appeal.

3-30 (b) An appellate court shall expedite an appeal or other
3-31 writ, whether interlocutory or not, from a trial court order on a
3-32 motion to dismiss a legal action under Section 27.003 or from a
3-33 trial court's failure to rule on that motion in the time prescribed
3-34 by Section 27.005.

3-35 (c) An appeal or other writ under this section must be filed
3-36 on or before the 60th day after the date the trial court's order is
3-37 signed or the time prescribed by Section 27.005 expires, as
3-38 applicable.

3-39 Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders
3-40 dismissal of a legal action under this chapter, the court shall
3-41 award to the moving party:

3-42 (1) court costs, reasonable attorney's fees, and other
3-43 expenses incurred in defending against the legal action as justice
3-44 and equity may require; and

3-45 (2) sanctions against the party who brought the legal
3-46 action as the court determines sufficient to deter the party who
3-47 brought the legal action from bringing similar actions described in
3-48 this chapter.

3-49 (b) If the court finds that a motion to dismiss filed under
3-50 this chapter is frivolous or solely intended to delay, the court may
3-51 award court costs and reasonable attorney's fees to the responding
3-52 party.

3-53 Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply
3-54 to an enforcement action that is brought in the name of this state
3-55 or a political subdivision of this state by the attorney general, a
3-56 district attorney, a criminal district attorney, or a county
3-57 attorney.

3-58 (b) This chapter does not apply to a legal action brought
3-59 against a person primarily engaged in the business of selling or
3-60 leasing goods or services, if the statement or conduct arises out of
3-61 the sale or lease of goods, services, or an insurance product or a
3-62 commercial transaction in which the intended audience is an actual
3-63 or potential buyer or customer.

3-64 (c) This chapter does not apply to a legal action seeking
3-65 recovery for bodily injury, wrongful death, or survival or to
3-66 statements made regarding that legal action.

3-67 Sec. 27.011. CONSTRUCTION. (a) This chapter does not
3-68 abrogate or lessen any other defense, remedy, immunity, or
3-69 privilege available under other constitutional, statutory, case,

4-1 or common law or rule provisions.

4-2 (b) This chapter shall be construed liberally to effectuate
4-3 its purpose and intent fully.

4-4 SECTION 3. The change in law made by this Act applies only
4-5 to a legal action filed on or after the effective date of this Act.
4-6 A legal action filed before the effective date of this Act is
4-7 governed by the law in effect immediately before that date, and that
4-8 law is continued in effect for that purpose.

4-9 SECTION 4. This Act takes effect immediately if it receives
4-10 a vote of two-thirds of all the members elected to each house, as
4-11 provided by Section 39, Article III, Texas Constitution. If this
4-12 Act does not receive the vote necessary for immediate effect, this
4-13 Act takes effect September 1, 2011.

4-14

* * * * *

BILL ANALYSIS

Senate Research Center
82R21739 CAE-D

C.S.S.B. 1565
By: Ellis, Eltife
State Affairs
4/12/2011
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Citizen participation is the heart of democracy. Whether petitioning the government, writing a traditional new article, or commenting on the quality of a business, the involvement of citizens in the exchange of ideas benefits society.

Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of society. The Internet Age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens, have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or "SLAPP" suits.

Twenty-seven states and the District of Columbia have passed laws most commonly known as either "Anti-SLAPP" laws or "Citizen Participation Acts," that allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizen Participation Act would allow defendants who are sued as a result exercising their right to free speech or their right to petition the government to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he or she had a genuine case for each essential element of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay the defendant's attorney's fees.

C.S.S.B. 1565 amends current law relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Provides that this Act may be cited as the Citizens Participation Act.

SECTION 2. Amends Subtitle B, Title 2, Civil Practice and Remedies Code, by adding Chapter 27, as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. Defines, in this chapter, "communication," "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," "governmental proceeding," "legal action," "matter of public concern," "official proceeding," and "public servant."

Sec. 27.002. PURPOSE. Provides that the purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely,

and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) Authorizes a party, if a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, to file a motion to dismiss the legal action.

(b) Requires that a motion to dismiss a legal action under this section be filed not later than the 60th day after the date of service of the legal action. Authorizes the court to extend the time to file a motion under this section on a showing of good cause.

(c) Provides that except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. Requires that a hearing on a motion under Section 27.003 be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) Requires the court to rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Requires a court, except as provided by Subsection (c), on the motion of a party under Section 27.003, to dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association.

(c) Prohibits the court from dismissing a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) Requires the court, in determining whether a legal action should be dismissed under this chapter, to consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) Authorizes the court, on a motion by a party or on the court's own motion and on a showing of good cause, to allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) Requires the court, at the request of a party making a motion under Section 27.003, to issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) Requires the court to issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) Provides that if a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party is authorized to appeal.

(b) Requires an appellate court to 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.

(c) Requires that an appeal or other writ under this section be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) Requires the court, if it orders dismissal of a legal action under this chapter, to award to the moving party court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action, and sanctions against the party who brought the legal action and the attorney representing the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action and the attorney from bringing similar actions described in this chapter.

(b) Authorizes the court, if the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, to award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) Provides that this chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) Provides that this chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) Provides that this chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Sec. 27.011. CONSTRUCTION. (a) Provides that this chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) Requires that this chapter be construed liberally to effectuate its purpose and intent fully.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: upon passage or September 1, 2011.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION

April 12, 2011

TO: Honorable Robert Duncan, Chair, Senate Committee on State Affairs

FROM: John S O'Brien, Director, Legislative Budget Board

IN RE: SB1565 by Ellis (Relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.), **Committee Report 1st House, Substituted**

<p>No significant fiscal implication to the State is anticipated.</p>
--

The bill would amend the Civil Practice and Remedies Code to provide for the handling of lawsuits based on an individual's exercise of rights of free speech, petition or association. To the extent the bill would amend court procedures, the bill may result in the expedition of such cases, but any positive impact on judicial workloads or fiscal implication to the state is not anticipated to be significant. The bill would take immediate effect if the bill receives two-thirds the vote of all members in both houses. Otherwise, the bill would take effect September 1, 2011.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: JOB, KJG, TB, KKR, JT

1 AN ACT

2 relating to encouraging public participation by citizens by
3 protecting a person's right to petition, right of free speech, and
4 right of association from meritless lawsuits arising from actions
5 taken in furtherance of those rights.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

7 SECTION 1. This Act may be cited as the Citizens
8 Participation Act.

9 SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies
10 Code, is amended by adding Chapter 27 to read as follows:

11 CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
12 CONSTITUTIONAL RIGHTS

13 Sec. 27.001. DEFINITIONS. In this chapter:

14 (1) "Communication" includes the making or submitting
15 of a statement or document in any form or medium, including oral,
16 visual, written, audiovisual, or electronic.

17 (2) "Exercise of the right of association" means a
18 communication between individuals who join together to
19 collectively express, promote, pursue, or defend common interests.

20 (3) "Exercise of the right of free speech" means a
21 communication made in connection with a matter of public concern.

22 (4) "Exercise of the right to petition" means any of
23 the following:

24 (A) a communication in or pertaining to:

- 1 (i) a judicial proceeding;
2 (ii) an official proceeding, other than a
3 judicial proceeding, to administer the law;
4 (iii) an executive or other proceeding
5 before a department of the state or federal government or a
6 subdivision of the state or federal government;
7 (iv) a legislative proceeding, including a
8 proceeding of a legislative committee;
9 (v) a proceeding before an entity that
10 requires by rule that public notice be given before proceedings of
11 that entity;
12 (vi) a proceeding in or before a managing
13 board of an educational or eleemosynary institution supported
14 directly or indirectly from public revenue;
15 (vii) a proceeding of the governing body of
16 any political subdivision of this state;
17 (viii) a report of or debate and statements
18 made in a proceeding described by Subparagraph (iii), (iv), (v),
19 (vi), or (vii); or
20 (ix) a public meeting dealing with a public
21 purpose, including statements and discussions at the meeting or
22 other matters of public concern occurring at the meeting;
23 (B) a communication in connection with an issue
24 under consideration or review by a legislative, executive,
25 judicial, or other governmental body or in another governmental or
26 official proceeding;
27 (C) a communication that is reasonably likely to

1 encourage consideration or review of an issue by a legislative,
2 executive, judicial, or other governmental body or in another
3 governmental or official proceeding;

4 (D) a communication reasonably likely to enlist
5 public participation in an effort to effect consideration of an
6 issue by a legislative, executive, judicial, or other governmental
7 body or in another governmental or official proceeding; and

8 (E) any other communication that falls within the
9 protection of the right to petition government under the
10 Constitution of the United States or the constitution of this
11 state.

12 (5) "Governmental proceeding" means a proceeding,
13 other than a judicial proceeding, by an officer, official, or body
14 of this state or a political subdivision of this state, including a
15 board or commission, or by an officer, official, or body of the
16 federal government.

17 (6) "Legal action" means a lawsuit, cause of action,
18 petition, complaint, cross-claim, or counterclaim or any other
19 judicial pleading or filing that requests legal or equitable
20 relief.

21 (7) "Matter of public concern" includes an issue
22 related to:

23 (A) health or safety;

24 (B) environmental, economic, or community
25 well-being;

26 (C) the government;

27 (D) a public official or public figure; or

1 (E) a good, product, or service in the
2 marketplace.

3 (8) "Official proceeding" means any type of
4 administrative, executive, legislative, or judicial proceeding
5 that may be conducted before a public servant.

6 (9) "Public servant" means a person elected, selected,
7 appointed, employed, or otherwise designated as one of the
8 following, even if the person has not yet qualified for office or
9 assumed the person's duties:

10 (A) an officer, employee, or agent of government;

11 (B) a juror;

12 (C) an arbitrator, referee, or other person who
13 is authorized by law or private written agreement to hear or
14 determine a cause or controversy;

15 (D) an attorney or notary public when
16 participating in the performance of a governmental function; or

17 (E) a person who is performing a governmental
18 function under a claim of right but is not legally qualified to do
19 so.

20 Sec. 27.002. PURPOSE. The purpose of this chapter is to
21 encourage and safeguard the constitutional rights of persons to
22 petition, speak freely, associate freely, and otherwise
23 participate in government to the maximum extent permitted by law
24 and, at the same time, protect the rights of a person to file
25 meritorious lawsuits for demonstrable injury.

26 Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is
27 based on, relates to, or is in response to a party's exercise of the

1 right of free speech, right to petition, or right of association,
2 that party may file a motion to dismiss the legal action.

3 (b) A motion to dismiss a legal action under this section
4 must be filed not later than the 60th day after the date of service
5 of the legal action. The court may extend the time to file a motion
6 under this section on a showing of good cause.

7 (c) Except as provided by Section 27.006(b), on the filing
8 of a motion under this section, all discovery in the legal action is
9 suspended until the court has ruled on the motion to dismiss.

10 Sec. 27.004. HEARING. A hearing on a motion under Section
11 27.003 must be set not later than the 30th day after the date of
12 service of the motion unless the docket conditions of the court
13 require a later hearing.

14 Sec. 27.005. RULING. (a) The court must rule on a motion
15 under Section 27.003 not later than the 30th day following the date
16 of the hearing on the motion.

17 (b) Except as provided by Subsection (c), on the motion of a
18 party under Section 27.003, a court shall dismiss a legal action
19 against the moving party if the moving party shows by a
20 preponderance of the evidence that the legal action is based on,
21 relates to, or is in response to the party's exercise of:

22 (1) the right of free speech;

23 (2) the right to petition; or

24 (3) the right of association.

25 (c) The court may not dismiss a legal action under this
26 section if the party bringing the legal action establishes by clear
27 and specific evidence a prima facie case for each essential element

1 of the claim in question.

2 Sec. 27.006. EVIDENCE. (a) In determining whether a legal
3 action should be dismissed under this chapter, the court shall
4 consider the pleadings and supporting and opposing affidavits
5 stating the facts on which the liability or defense is based.

6 (b) On a motion by a party or on the court's own motion and
7 on a showing of good cause, the court may allow specified and
8 limited discovery relevant to the motion.

9 Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a
10 party making a motion under Section 27.003, the court shall issue
11 findings regarding whether the legal action was brought to deter or
12 prevent the moving party from exercising constitutional rights and
13 is brought for an improper purpose, including to harass or to cause
14 unnecessary delay or to increase the cost of litigation.

15 (b) The court must issue findings under Subsection (a) not
16 later than the 30th day after the date a request under that
17 subsection is made.

18 Sec. 27.008. APPEAL. (a) If a court does not rule on a
19 motion to dismiss under Section 27.003 in the time prescribed by
20 Section 27.005, the motion is considered to have been denied by
21 operation of law and the moving party may appeal.

22 (b) An appellate court shall expedite an appeal or other
23 writ, whether interlocutory or not, from a trial court order on a
24 motion to dismiss a legal action under Section 27.003 or from a
25 trial court's failure to rule on that motion in the time prescribed
26 by Section 27.005.

27 (c) An appeal or other writ under this section must be filed

1 on or before the 60th day after the date the trial court's order is
2 signed or the time prescribed by Section 27.005 expires, as
3 applicable.

4 Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders
5 dismissal of a legal action under this chapter, the court shall
6 award to the moving party:

7 (1) court costs, reasonable attorney's fees, and other
8 expenses incurred in defending against the legal action as justice
9 and equity may require; and

10 (2) sanctions against the party who brought the legal
11 action as the court determines sufficient to deter the party who
12 brought the legal action from bringing similar actions described in
13 this chapter.

14 (b) If the court finds that a motion to dismiss filed under
15 this chapter is frivolous or solely intended to delay, the court may
16 award court costs and reasonable attorney's fees to the responding
17 party.

18 Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply
19 to an enforcement action that is brought in the name of this state
20 or a political subdivision of this state by the attorney general, a
21 district attorney, a criminal district attorney, or a county
22 attorney.

23 (b) This chapter does not apply to a legal action brought
24 against a person primarily engaged in the business of selling or
25 leasing goods or services, if the statement or conduct arises out of
26 the sale or lease of goods, services, or an insurance product or a
27 commercial transaction in which the intended audience is an actual

1 or potential buyer or customer.

2 (c) This chapter does not apply to a legal action seeking
3 recovery for bodily injury, wrongful death, or survival or to
4 statements made regarding that legal action.

5 Sec. 27.011. CONSTRUCTION. (a) This chapter does not
6 abrogate or lessen any other defense, remedy, immunity, or
7 privilege available under other constitutional, statutory, case,
8 or common law or rule provisions.

9 (b) This chapter shall be construed liberally to effectuate
10 its purpose and intent fully.

11 SECTION 3. The change in law made by this Act applies only
12 to a legal action filed on or after the effective date of this Act.
13 A legal action filed before the effective date of this Act is
14 governed by the law in effect immediately before that date, and that
15 law is continued in effect for that purpose.

16 SECTION 4. This Act takes effect immediately if it receives
17 a vote of two-thirds of all the members elected to each house, as
18 provided by Section 39, Article III, Texas Constitution. If this
19 Act does not receive the vote necessary for immediate effect, this
20 Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I certify that H.B. No. 2973 was passed by the House on May 4, 2011, by the following vote: Yeas 142, Nays 0, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 2973 on May 21, 2011, by the following vote: Yeas 141, Nays 0, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2973 was passed by the Senate, with amendments, on May 18, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION

May 18, 2011

TO: Honorable Joe Straus, Speaker of the House, House of Representatives

FROM: John S O'Brien, Director, Legislative Budget Board

IN RE: HB2973 by Hunter (Relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.), **As Passed 2nd House**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to provide for the handling of lawsuits based on an individual's exercise of rights of free speech, petition or association. To the extent the bill would amend court procedures, the bill may result in the expedition of such cases, but any positive impact on judicial workloads or fiscal implication to the state is not anticipated to be significant. The bill would take immediate effect if the bill receives two-thirds the vote of all members in both houses. Otherwise, the bill would take effect September 1, 2011.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: JOB, SD, KJG, TB, JT, KKR

[History](#)[Text](#)[Actions](#)[Companions](#)[Amendments](#)[Authors](#)[Sponsors](#)[Captions](#)[Bill Stages](#)**Bill:** SB 1565

Legislative Session: 82(R)

Author: Ellis

[Add to Bill List](#)**Actions:** (descending date order)

Description	Comment	Date ▼	Time	Journal Page
S Not again placed on intent calendar		05/09/2011		
S Placed on intent calendar		05/06/2011		
S Not again placed on intent calendar		05/05/2011		
S Placed on intent calendar		05/04/2011		
S Not again placed on intent calendar		05/03/2011		
S Placed on intent calendar		04/29/2011		
S Not again placed on intent calendar		04/28/2011		
S Placed on intent calendar		04/26/2011		
S Not again placed on intent calendar		04/19/2011		
S Placed on intent calendar		04/18/2011		
S Committee report printed and distributed		04/13/2011	03:41 PM	
S Reported favorably as substituted		04/13/2011		1085
S Considered in public hearing		04/12/2011		
S Scheduled for public hearing on . . .		04/12/2011		
S Posting rule suspended		04/12/2011		1046
S Left pending in committee		04/04/2011		
S Testimony taken in committee		04/04/2011		
S Considered in public hearing		04/04/2011		
S Scheduled for public hearing on . . .		04/04/2011		
S Referred to State Affairs		03/23/2011		702
S Read first time		03/23/2011		702
S Filed		03/10/2011		
S Received by the Secretary of the Senate		03/10/2011		

By: Ellis, Eltife

S.B. No. 1565

A BILL TO BE ENTITLED

1 AN ACT
2 relating to encouraging public participation by citizens by
3 protecting a person's right to petition, right of free speech, and
4 right of association from meritless lawsuits arising from actions
5 taken in furtherance of those rights.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

7 SECTION 1. This Act may be cited as the Citizens
8 Participation Act.

9 SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies
10 Code, is amended by adding Chapter 27 to read as follows:

11 CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
12 CONSTITUTIONAL RIGHTS

13 Sec. 27.001. DEFINITIONS. In this chapter:

14 (1) "Communication" includes the making or submitting
15 of a statement or document in any form or medium, including oral,
16 visual, written, audiovisual, or electronic.

17 (2) "Exercise of the right of association" means a
18 communication between individuals who join together to
19 collectively express, promote, pursue, or defend common interests.

20 (3) "Exercise of the right of free speech" means a
21 communication made in connection with a matter of public concern.

22 (4) "Exercise of the right to petition" means any of
23 the following:

24 (A) a communication in or pertaining to:

- 1 (i) a judicial proceeding;
2 (ii) an official proceeding, other than a
3 judicial proceeding, to administer the law;
4 (iii) an executive proceeding before a
5 department of the state or federal government or a subdivision of
6 the state or federal government;
7 (iv) a legislative proceeding, including a
8 proceeding of a legislative committee;
9 (v) a proceeding before an entity that
10 requires by rule that public notice be given before proceedings of
11 that entity;
12 (vi) a proceeding in or before a managing
13 board of an educational or eleemosynary institution supported
14 directly or indirectly from public revenue;
15 (vii) a proceeding of the governing body of
16 any political subdivision of this state;
17 (viii) a report of or debate and statements
18 made in a proceeding described by Subparagraph (iii), (iv), (v),
19 (vi), or (vii); or
20 (ix) a public meeting dealing with a public
21 purpose, including statements and discussions at the meeting or
22 other matters of public concern occurring at the meeting;
23 (B) a communication in connection with an issue
24 under consideration or review by a legislative, executive,
25 judicial, or other governmental body or in another governmental or
26 official proceeding;
27 (C) a communication that is reasonably likely to

1 encourage consideration or review of an issue by a legislative,
2 executive, judicial, or other governmental body or in another
3 governmental or official proceeding;

4 (D) a communication reasonably likely to enlist
5 public participation in an effort to effect consideration of an
6 issue by a legislative, executive, judicial, or other governmental
7 body or in another governmental or official proceeding; and

8 (E) any other communication that falls within the
9 protection of the right to petition government under the
10 Constitution of the United States or the constitution of this
11 state.

12 (5) "Governmental proceeding" means a proceeding,
13 other than a judicial proceeding, by an officer, official, or body
14 of this state or a political subdivision of this state, including a
15 board or commission, or by an officer, official, or body of the
16 federal government.

17 (6) "Legal action" means a lawsuit, cause of action,
18 petition, complaint, cross-claim, or counterclaim or any other
19 judicial pleading or filing that requests legal or equitable
20 relief.

21 (7) "Matter of public concern" includes an issue
22 related to:

23 (A) health or safety;

24 (B) environmental, economic, or community
25 well-being;

26 (C) the government;

27 (D) a public official or public figure; or

1 (E) a good, product, or service in the
2 marketplace.

3 (8) "Official proceeding" means any type of
4 administrative, executive, legislative, or judicial proceeding
5 that may be conducted before a public servant.

6 (9) "Public servant" means a person elected, selected,
7 appointed, employed, or otherwise designated as one of the
8 following, even if the person has not yet qualified for office or
9 assumed the person's duties:

10 (A) an officer, employee, or agent of government;

11 (B) a juror;

12 (C) an arbitrator, referee, or other person who
13 is authorized by law or private written agreement to hear or
14 determine a cause or controversy;

15 (D) an attorney or notary public when
16 participating in the performance of a governmental function; or

17 (E) a person who is performing a governmental
18 function under a claim of right but is not legally qualified to do
19 so.

20 Sec. 27.002. PURPOSE. The purpose of this chapter is to
21 encourage and safeguard the constitutional rights of persons to
22 petition, speak freely, associate freely, and otherwise
23 participate in government to the maximum extent permitted by law
24 and, at the same time, protect the rights of a person to file
25 meritorious lawsuits for demonstrable injury.

26 Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is
27 based on, relates to, or is in response to a party's exercise of the

1 right of free speech, right to petition, or right of association,
2 that party may file a motion to dismiss the legal action.

3 (b) A motion to dismiss a legal action under this section
4 must be filed not later than the 60th day after the date of service
5 of the legal action. The court may extend the time to file a motion
6 under this section on a showing of good cause.

7 (c) Except as provided by Section 27.006(b), on the filing
8 of a motion under this section, all discovery in the legal action is
9 suspended until the court has ruled on the motion to dismiss.

10 Sec. 27.004. HEARING. A hearing on a motion under Section
11 27.003 must be set not later than the 30th day after the date of
12 service of the motion unless the docket conditions of the court
13 require a later hearing.

14 Sec. 27.005. RULING. (a) The court must rule on a motion
15 under Section 27.003 not later than the 30th day following the date
16 of the hearing on the motion.

17 (b) Except as provided by Subsection (c), on the motion of a
18 party under Section 27.003, a court shall dismiss a legal action
19 against the moving party if the moving party shows by a
20 preponderance of the evidence that the legal action is based on,
21 relates to, or is in response to the party's exercise of:

22 (1) the right of free speech;

23 (2) the right to petition; or

24 (3) the right of association.

25 (c) The court may not dismiss a legal action under this
26 section if the party bringing the legal action establishes by clear
27 and specific evidence a prima facie case for each essential element

1 of the claim in question.

2 Sec. 27.006. EVIDENCE. (a) In determining whether a legal
3 action should be dismissed under this chapter, the court shall
4 consider the pleadings and supporting and opposing affidavits
5 stating the facts on which the liability or defense is based.

6 (b) On a motion by a party or on the court's own motion and
7 on a showing of good cause, the court may allow specified and
8 limited discovery relevant to the motion.

9 Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a
10 party making a motion under Section 27.003, the court shall issue
11 findings regarding whether the legal action was brought to deter or
12 prevent the moving party from exercising constitutional rights and
13 is brought for an improper purpose, including to harass or to cause
14 unnecessary delay or to increase the cost of litigation.

15 (b) The court must issue findings under Subsection (a) not
16 later than the 30th day after the date a request under that
17 subsection is made.

18 Sec. 27.008. APPEAL. (a) If a court does not rule on a
19 motion to dismiss under Section 27.003 in the time prescribed by
20 Section 27.005, the motion is considered to have been denied by
21 operation of law and the moving party may appeal.

22 (b) An appellate court shall expedite an appeal or other
23 writ, whether interlocutory or not, from a trial court order on a
24 motion to dismiss a legal action under Section 27.003 or from a
25 trial court's failure to rule on that motion in the time prescribed
26 by Section 27.005.

27 (c) An appeal or other writ under this section must be filed

1 on or before the 60th day after the date the trial court's order is
2 signed or the time prescribed by Section 27.005 expires, as
3 applicable.

4 Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders
5 dismissal of a legal action under this chapter, the court shall
6 award to the moving party:

7 (1) court costs, reasonable attorney's fees, and other
8 expenses incurred in defending against the legal action; and

9 (2) sanctions against the party who brought the legal
10 action and the attorney representing the party who brought the
11 legal action as the court determines sufficient to deter the party
12 who brought the legal action and the attorney from bringing similar
13 actions described in this chapter.

14 (b) If the court finds that a motion to dismiss filed under
15 this chapter is frivolous or solely intended to delay, the court may
16 award court costs and reasonable attorney's fees to the responding
17 party.

18 Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply
19 to an enforcement action that is brought in the name of this state
20 or a political subdivision of this state by the attorney general, a
21 district attorney, a criminal district attorney, or a county
22 attorney.

23 (b) This chapter does not apply to a legal action brought
24 against a person primarily engaged in the business of selling or
25 leasing goods or services, if the statement or conduct from which
26 the claim arises is a representation of fact made for the purpose of
27 promoting, securing, or completing the sale or lease of, or a

1 commercial transaction in, the person's goods or services, and the
2 intended audience is an actual or potential buyer or customer.

3 Sec. 27.011. CONSTRUCTION. (a) This chapter does not
4 abrogate or lessen any other defense, remedy, immunity, or
5 privilege available under other constitutional, statutory, case,
6 or common law or rule provisions.

7 (b) This chapter shall be construed liberally to effectuate
8 its purpose and intent fully.

9 SECTION 3. The change in law made by this Act applies only
10 to a legal action filed on or after the effective date of this Act.
11 A legal action filed before the effective date of this Act is
12 governed by the law in effect immediately before that date, and that
13 law is continued in effect for that purpose.

14 SECTION 4. This Act takes effect immediately if it receives
15 a vote of two-thirds of all the members elected to each house, as
16 provided by Section 39, Article III, Texas Constitution. If this
17 Act does not receive the vote necessary for immediate effect, this
18 Act takes effect September 1, 2011.

BILL ANALYSIS

Senate Research Center
82R11078 CAE-D

S.B. 1565
By: Ellis, Eltife
State Affairs
3/29/2011
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Citizen participation is the heart of democracy. Whether petitioning the government, writing a traditional new article, or commenting on the quality of a business, the involvement of citizens in the exchange of ideas benefits society.

Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of society. The Internet Age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens, have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or "SLAPP" suits.

Twenty-seven states and the District of Columbia have passed laws most commonly known as either "Anti-SLAPP" laws or "Citizen Participation Acts," that allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizen Participation Act would allow defendants who are sued as a result exercising their right to free speech or their right to petition the government to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he or she had a genuine case for each essential element of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay the defendant's attorney's fees.

As proposed, S.B. 1565 amends current law relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Provides that this Act may be cited as the Citizens Participation Act.

SECTION 2. Amends Subtitle B, Title 2, Civil Practice and Remedies Code, by adding Chapter 27, as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. Defines, in this chapter, "communication," "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," "governmental proceeding," "legal action," "matter of public concern," "official proceeding," and "public servant."

Sec. 27.002. PURPOSE. Provides that the purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely,

and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) Authorizes a party, if a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, to file a motion to dismiss the legal action.

(b) Requires that a motion to dismiss a legal action under this section be filed not later than the 60th day after the date of service of the legal action. Authorizes the court to extend the time to file a motion under this section on a showing of good cause.

(c) Provides that except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. Requires that a hearing on a motion under Section 27.003 be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) Requires the court to rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Requires a court, except as provided by Subsection (c), on the motion of a party under Section 27.003, to dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association.

(c) Prohibits the court from dismissing a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) Requires the court, in determining whether a legal action should be dismissed under this chapter, to consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) Authorizes the court, on a motion by a party or on the court's own motion and on a showing of good cause, to allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) Requires the court, at the request of a party making a motion under Section 27.003, to issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) Requires the court to issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) Provides that if a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party is authorized to appeal.

(b) Requires an appellate court to 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.

(c) Requires that an appeal or other writ under this section be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) Requires the court, if it orders dismissal of a legal action under this chapter, to award to the moving party court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action, and sanctions against the party who brought the legal action and the attorney representing the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action and the attorney from bringing similar actions described in this chapter.

(b) Authorizes the court, if the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, to award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) Provides that this chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) Provides that this chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing the sale or lease of, or a commercial transaction in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 27.011. CONSTRUCTION. (a) Provides that this chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) Requires that this chapter be construed liberally to effectuate its purpose and intent fully.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: upon passage or September 1, 2011.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION

April 1, 2011

TO: Honorable Robert Duncan, Chair, Senate Committee on State Affairs

FROM: John S O'Brien, Director, Legislative Budget Board

IN RE: SB1565 by Ellis (Relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.), **As Introduced**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to provide for the handling of lawsuits based on an individual's exercise of rights of free speech, petition or association. To the extent the bill would amend court procedures, the bill may result in the expedition of such cases, but any positive impact on judicial workloads or fiscal implication to the state is not anticipated to be significant. The bill would take immediate effect if the bill receives two-thirds the vote of all members in both houses. Otherwise, the bill would take effect September 1, 2011.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: JOB, KJG, TB, KKR, JT

1-1 By: Ellis, Eltife S.B. No. 1565
1-2 (In the Senate - Filed March 10, 2011; March 23, 2011, read
1-3 first time and referred to Committee on State Affairs;
1-4 April 13, 2011, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 8, Nays 0; April 13, 2011,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1565 By: Ellis

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to encouraging public participation by citizens by
1-11 protecting a person's right to petition, right of free speech, and
1-12 right of association from meritless lawsuits arising from actions
1-13 taken in furtherance of those rights.

1-14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-15 SECTION 1. This Act may be cited as the Citizens
1-16 Participation Act.

1-17 SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies
1-18 Code, is amended by adding Chapter 27 to read as follows:

1-19 CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN
1-20 CONSTITUTIONAL RIGHTS

1-21 Sec. 27.001. DEFINITIONS. In this chapter:

1-22 (1) "Communication" includes the making or submitting
1-23 of a statement or document in any form or medium, including oral,
1-24 visual, written, audiovisual, or electronic.

1-25 (2) "Exercise of the right of association" means a
1-26 communication between individuals who join together to
1-27 collectively express, promote, pursue, or defend common interests.

1-28 (3) "Exercise of the right of free speech" means a
1-29 communication made in connection with a matter of public concern.

1-30 (4) "Exercise of the right to petition" means any of
1-31 the following:

1-32 (A) a communication in or pertaining to:

1-33 (i) a judicial proceeding;

1-34 (ii) an official proceeding, other than a
1-35 judicial proceeding, to administer the law;

1-36 (iii) an executive or other proceeding
1-37 before a department of the state or federal government or a
1-38 subdivision of the state or federal government;

1-39 (iv) a legislative proceeding, including a
1-40 proceeding of a legislative committee;

1-41 (v) a proceeding before an entity that
1-42 requires by rule that public notice be given before proceedings of
1-43 that entity;

1-44 (vi) a proceeding in or before a managing
1-45 board of an educational or eleemosynary institution supported
1-46 directly or indirectly from public revenue;

1-47 (vii) a proceeding of the governing body of
1-48 any political subdivision of this state;

1-49 (viii) a report of or debate and statements
1-50 made in a proceeding described by Subparagraph (iii), (iv), (v),
1-51 (vi), or (vii); or

1-52 (ix) a public meeting dealing with a public
1-53 purpose, including statements and discussions at the meeting or
1-54 other matters of public concern occurring at the meeting;

1-55 (B) a communication in connection with an issue
1-56 under consideration or review by a legislative, executive,
1-57 judicial, or other governmental body or in another governmental or
1-58 official proceeding;

1-59 (C) a communication that is reasonably likely to
1-60 encourage consideration or review of an issue by a legislative,
1-61 executive, judicial, or other governmental body or in another
1-62 governmental or official proceeding;

1-63 (D) a communication reasonably likely to enlist

2-1 public participation in an effort to effect consideration of an
 2-2 issue by a legislative, executive, judicial, or other governmental
 2-3 body or in another governmental or official proceeding; and
 2-4 (E) any other communication that falls within the
 2-5 protection of the right to petition government under the
 2-6 Constitution of the United States or the constitution of this
 2-7 state.

2-8 (5) "Governmental proceeding" means a proceeding,
 2-9 other than a judicial proceeding, by an officer, official, or body
 2-10 of this state or a political subdivision of this state, including a
 2-11 board or commission, or by an officer, official, or body of the
 2-12 federal government.

2-13 (6) "Legal action" means a lawsuit, cause of action,
 2-14 petition, complaint, cross-claim, or counterclaim or any other
 2-15 judicial pleading or filing that requests legal or equitable
 2-16 relief.

2-17 (7) "Matter of public concern" includes an issue
 2-18 related to:

- 2-19 (A) health or safety;
- 2-20 (B) environmental, economic, or community
- 2-21 well-being;
- 2-22 (C) the government;
- 2-23 (D) a public official or public figure; or
- 2-24 (E) a good, product, or service in the
- 2-25 marketplace.

2-26 (8) "Official proceeding" means any type of
 2-27 administrative, executive, legislative, or judicial proceeding
 2-28 that may be conducted before a public servant.

2-29 (9) "Public servant" means a person elected, selected,
 2-30 appointed, employed, or otherwise designated as one of the
 2-31 following, even if the person has not yet qualified for office or
 2-32 assumed the person's duties:

- 2-33 (A) an officer, employee, or agent of government;
- 2-34 (B) a juror;
- 2-35 (C) an arbitrator, referee, or other person who
- 2-36 is authorized by law or private written agreement to hear or
- 2-37 determine a cause or controversy;
- 2-38 (D) an attorney or notary public when
- 2-39 participating in the performance of a governmental function; or
- 2-40 (E) a person who is performing a governmental
- 2-41 function under a claim of right but is not legally qualified to do
- 2-42 so.

2-43 Sec. 27.002. PURPOSE. The purpose of this chapter is to
 2-44 encourage and safeguard the constitutional rights of persons to
 2-45 petition, speak freely, associate freely, and otherwise
 2-46 participate in government to the maximum extent permitted by law
 2-47 and, at the same time, protect the rights of a person to file
 2-48 meritorious lawsuits for demonstrable injury.

2-49 Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is
 2-50 based on, relates to, or is in response to a party's exercise of the
 2-51 right of free speech, right to petition, or right of association,
 2-52 that party may file a motion to dismiss the legal action.

2-53 (b) A motion to dismiss a legal action under this section
 2-54 must be filed not later than the 60th day after the date of service
 2-55 of the legal action. The court may extend the time to file a motion
 2-56 under this section on a showing of good cause.

2-57 (c) Except as provided by Section 27.006(b), on the filing
 2-58 of a motion under this section, all discovery in the legal action is
 2-59 suspended until the court has ruled on the motion to dismiss.

2-60 Sec. 27.004. HEARING. A hearing on a motion under Section
 2-61 27.003 must be set not later than the 30th day after the date of
 2-62 service of the motion unless the docket conditions of the court
 2-63 require a later hearing.

2-64 Sec. 27.005. RULING. (a) The court must rule on a motion
 2-65 under Section 27.003 not later than the 30th day following the date
 2-66 of the hearing on the motion.

2-67 (b) Except as provided by Subsection (c), on the motion of a
 2-68 party under Section 27.003, a court shall dismiss a legal action
 2-69 against the moving party if the moving party shows by a

3-1 preponderance of the evidence that the legal action is based on,
3-2 relates to, or is in response to the party's exercise of:

- 3-3 (1) the right of free speech;
- 3-4 (2) the right to petition; or
- 3-5 (3) the right of association.

3-6 (c) The court may not dismiss a legal action under this
3-7 section if the party bringing the legal action establishes by clear
3-8 and specific evidence a prima facie case for each essential element
3-9 of the claim in question.

3-10 Sec. 27.006. EVIDENCE. (a) In determining whether a legal
3-11 action should be dismissed under this chapter, the court shall
3-12 consider the pleadings and supporting and opposing affidavits
3-13 stating the facts on which the liability or defense is based.

3-14 (b) On a motion by a party or on the court's own motion and
3-15 on a showing of good cause, the court may allow specified and
3-16 limited discovery relevant to the motion.

3-17 Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a
3-18 party making a motion under Section 27.003, the court shall issue
3-19 findings regarding whether the legal action was brought to deter or
3-20 prevent the moving party from exercising constitutional rights and
3-21 is brought for an improper purpose, including to harass or to cause
3-22 unnecessary delay or to increase the cost of litigation.

3-23 (b) The court must issue findings under Subsection (a) not
3-24 later than the 30th day after the date a request under that
3-25 subsection is made.

3-26 Sec. 27.008. APPEAL. (a) If a court does not rule on a
3-27 motion to dismiss under Section 27.003 in the time prescribed by
3-28 Section 27.005, the motion is considered to have been denied by
3-29 operation of law and the moving party may appeal.

3-30 (b) An appellate court shall expedite an appeal or other
3-31 writ, whether interlocutory or not, from a trial court order on a
3-32 motion to dismiss a legal action under Section 27.003 or from a
3-33 trial court's failure to rule on that motion in the time prescribed
3-34 by Section 27.005.

3-35 (c) An appeal or other writ under this section must be filed
3-36 on or before the 60th day after the date the trial court's order is
3-37 signed or the time prescribed by Section 27.005 expires, as
3-38 applicable.

3-39 Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders
3-40 dismissal of a legal action under this chapter, the court shall
3-41 award to the moving party:

3-42 (1) court costs, reasonable attorney's fees, and other
3-43 expenses incurred in defending against the legal action as justice
3-44 and equity may require; and

3-45 (2) sanctions against the party who brought the legal
3-46 action as the court determines sufficient to deter the party who
3-47 brought the legal action from bringing similar actions described in
3-48 this chapter.

3-49 (b) If the court finds that a motion to dismiss filed under
3-50 this chapter is frivolous or solely intended to delay, the court may
3-51 award court costs and reasonable attorney's fees to the responding
3-52 party.

3-53 Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply
3-54 to an enforcement action that is brought in the name of this state
3-55 or a political subdivision of this state by the attorney general, a
3-56 district attorney, a criminal district attorney, or a county
3-57 attorney.

3-58 (b) This chapter does not apply to a legal action brought
3-59 against a person primarily engaged in the business of selling or
3-60 leasing goods or services, if the statement or conduct arises out of
3-61 the sale or lease of goods, services, or an insurance product or a
3-62 commercial transaction in which the intended audience is an actual
3-63 or potential buyer or customer.

3-64 (c) This chapter does not apply to a legal action seeking
3-65 recovery for bodily injury, wrongful death, or survival or to
3-66 statements made regarding that legal action.

3-67 Sec. 27.011. CONSTRUCTION. (a) This chapter does not
3-68 abrogate or lessen any other defense, remedy, immunity, or
3-69 privilege available under other constitutional, statutory, case,

4-1 or common law or rule provisions.

4-2 (b) This chapter shall be construed liberally to effectuate

4-3 its purpose and intent fully.

4-4 SECTION 3. The change in law made by this Act applies only
4-5 to a legal action filed on or after the effective date of this Act.
4-6 A legal action filed before the effective date of this Act is
4-7 governed by the law in effect immediately before that date, and that
4-8 law is continued in effect for that purpose.

4-9 SECTION 4. This Act takes effect immediately if it receives
4-10 a vote of two-thirds of all the members elected to each house, as
4-11 provided by Section 39, Article III, Texas Constitution. If this
4-12 Act does not receive the vote necessary for immediate effect, this
4-13 Act takes effect September 1, 2011.

4-14

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BILL ANALYSIS

Senate Research Center
82R21739 CAE-D

C.S.S.B. 1565
By: Ellis, Eltife
State Affairs
4/12/2011
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Citizen participation is the heart of democracy. Whether petitioning the government, writing a traditional new article, or commenting on the quality of a business, the involvement of citizens in the exchange of ideas benefits society.

Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of society. The Internet Age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens, have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or "SLAPP" suits.

Twenty-seven states and the District of Columbia have passed laws most commonly known as either "Anti-SLAPP" laws or "Citizen Participation Acts," that allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizen Participation Act would allow defendants who are sued as a result exercising their right to free speech or their right to petition the government to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he or she had a genuine case for each essential element of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay the defendant's attorney's fees.

C.S.S.B. 1565 amends current law relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

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SECTION 1. Provides that this Act may be cited as the Citizens Participation Act.

SECTION 2. Amends Subtitle B, Title 2, Civil Practice and Remedies Code, by adding Chapter 27, as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. Defines, in this chapter, "communication," "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," "governmental proceeding," "legal action," "matter of public concern," "official proceeding," and "public servant."

Sec. 27.002. PURPOSE. Provides that the purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely,

and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) Authorizes a party, if a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, to file a motion to dismiss the legal action.

(b) Requires that a motion to dismiss a legal action under this section be filed not later than the 60th day after the date of service of the legal action. Authorizes the court to extend the time to file a motion under this section on a showing of good cause.

(c) Provides that except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. Requires that a hearing on a motion under Section 27.003 be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) Requires the court to rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Requires a court, except as provided by Subsection (c), on the motion of a party under Section 27.003, to dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association.

(c) Prohibits the court from dismissing a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) Requires the court, in determining whether a legal action should be dismissed under this chapter, to consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) Authorizes the court, on a motion by a party or on the court's own motion and on a showing of good cause, to allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) Requires the court, at the request of a party making a motion under Section 27.003, to issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) Requires the court to issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) Provides that if a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party is authorized to appeal.

(b) Requires an appellate court to 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.

(c) Requires that an appeal or other writ under this section be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) Requires the court, if it orders dismissal of a legal action under this chapter, to award to the moving party court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action, and sanctions against the party who brought the legal action and the attorney representing the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action and the attorney from bringing similar actions described in this chapter.

(b) Authorizes the court, if the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, to award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) Provides that this chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) Provides that this chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) Provides that this chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Sec. 27.011. CONSTRUCTION. (a) Provides that this chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) Requires that this chapter be construed liberally to effectuate its purpose and intent fully.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: upon passage or September 1, 2011.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION

April 12, 2011

TO: Honorable Robert Duncan, Chair, Senate Committee on State Affairs

FROM: John S O'Brien, Director, Legislative Budget Board

IN RE: SB1565 by Ellis (Relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.), **Committee Report 1st House, Substituted**

<p>No significant fiscal implication to the State is anticipated.</p>
--

The bill would amend the Civil Practice and Remedies Code to provide for the handling of lawsuits based on an individual's exercise of rights of free speech, petition or association. To the extent the bill would amend court procedures, the bill may result in the expedition of such cases, but any positive impact on judicial workloads or fiscal implication to the state is not anticipated to be significant. The bill would take immediate effect if the bill receives two-thirds the vote of all members in both houses. Otherwise, the bill would take effect September 1, 2011.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: JOB, KJG, TB, KKR, JT

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HEARINGS ON S.B. 1565 BEFORE
THE SENATE COMMITTEE ON STATE AFFAIRS
82ND LEG., R.S.
(APRIL 4, 2011)

THE SENATE COMMITTEE ON STATE AFFAIRS:

Sen. Robert Duncan, Chair

Sen. Robert Deuell, Vice Chair

Sen. Rodney Ellis

Sen. Troy Fraser

Sen. Joan Huffman

Sen. Mike Jackson

Sen. Eddie Lucio, Jr.

Sen. Leticia Van de Putte

Sen. Tommy Williams

PROCEEDINGS:

[The public hearing on H.B. 2973 began 1 hour, 6 minutes, and 39 seconds into the committee's morning session.]

[Sen. Robert Duncan, Chair of the Senate Committee on State Affairs, in the Chair.]

CHAIR : The Chair lays out Senate Bill 1656 by Ellis relating to the encouraging public participation by citizens, by protecting a person's right to petition, the right of free speech and right of association from meritless lawsuits arising from action taking in furtherance with those rights. So Sen. Van de Putte you are recognized - I think this is also known as the SLAPP.

SEN. LETICIA VAN DE PUTTE : It is.

CHAIR : Or Anti-SLAPP.

VAN DE PUTTE : Anti-SLAPP. Thank you, Mr. Chairman and members. I appreciate the opportunity to lay down Senator Ellis's bill. There is a committee substitute.

CHAIR : Okay. Let's go ahead and Senator Van de Putte sends up a committee substitute for Senate Bill 1565 and Members will – the discussion – and hopefully the testimony will be in regards to the substitute to Senate Bill 1565. Sen. Van de Putte?

VAN DE PUTTE : Thank you, Mr. Chairman and Members, for Senate Bill 1656, or the Anti-SLAPP –

CHAIR : 1565.

VAN DE PUTTE : Oh, I'm sorry – 1565.

CHAIR : Go ahead.

VAN DE PUTTE : Anti-SLAPP legislation, the Anti-Strategic Lawsuits Against Public Participation. This legislation that will protect all Texans petitioning their government or speaking out about matters of public concern. This bill protects the person's First Amendment right to speech, petition, and assembly. The Anti-SLAPP Bill has been adopted in 27 other states and the District of Columbia. This how it works; a lawsuit is filed against an individual who has said or written something the plaintiff doesn't like. The plaintiff is someone with more money or more power because he doesn't like what was said. Even though it was true, he files a lawsuit against the person, seeking damages, truly in the purpose of defiling them. Then the defendant can't afford to defend himself, so they do whatever the plaintiff wants for the suit to be dropped, which is usually a retraction or pulling down any offending statements for the medium where it was published.

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1 what was the truth on the blog, or just simply let them take a default judgment against him
2 and let it haunt him the rest of his life. This bill would give him a fourth option, and that is
3 essentially to file a motion to dismiss. I would like to introduce Ms. Prather now.

4 CHAIR : The Chair recognizes Laura Prather.

5 LAURA PRATHER : Thank you, Mr. Chairman and Members of the committee,
6 we appreciate having the opportunity to be heard here today.

7 ADAMS : Thank you for starting the clock over.

8 PRATHER : Senate Bill 1565 is, as Senator Van de Putte mentioned, it's
9 not a novel concept, it's something that has been adopted in 27 states and in the District of
10 Columbia. None of those statutes have ever been repealed. They have been amended for the
11 purposes of modernizing them for modern technology, and they have been amended for the
12 purpose of commercial speech exemption. In drafting this legislation we made sure to
13 encompass both of those things, so we've modernized it for current technology and we've
14 included – included a commercial speech exemption.

15 The bill provides for an expedited motion to dismiss and a
16 stay of discovery during this process, so the legal fees to not incurred unnecessarily by the
17 individuals involved in this SLAPP suit. It also provides for fees being awarded when the
18 SLAPP motion is granted or in the contrary, if the SLAPP motion is found to be meritless,
19 fees are – can be awarded by the court back to the plaintiff. In drafting the legislation we took
20 the best of the other states that have this and incorporated best that they have, but also used
21 terms and standards that Texas courts are used to applying, when determining whether
22 there's merit to a claims, in matter involving free speech. In sum, this bill is good government
23 because it promotes constitutional rights and encourages their continued participation in
24 public debate, it creates a mechanism to dispense with meritless lawsuits at the outside of the
25 proceedings, and it provides for a means to elevate some of the burden on our already
26 overburdened court system. If you have any questions, I would be happy to answer them.

27 CHAIR : What – what is a meritless lawsuit?

28 PRATHER : If – if the court determines based upon the affidavits that
29 are submitted to substantiate the motion that there is no basis for the suit to go forward, then
30 the court can award – the court can grant the motion. If the court feels like it needs discovery,
31 then the court has the opportunity to ask for limited discovery on the motion.

32 CHAIR : So how does the court – determine – What – what the
33 guiding principles to consider in determining whether or not to dismiss under the
34 legislation?

35 PRATHER : What – what they do, it's the same analysis that is done in

1 an anonymous speech case, where somebody comes forward and they want to know what –
2 what the web – web address is behind a person who's posted an anonymous blog. The court
3 looks at the very beginning of the case to determine whether or not there is any basis for the
4 lawsuit. And if they determine that there is a basis for the lawsuit, they can get that
5 anonymous speaker's information. If they don't determine that, then they can't get the
6 anonymous speaker's information. So this just creates the same level playing field for
7 anonymous and non-anonymous speech.

8 CHAIR : So what you're telling me then, that there's a – is it a body
9 of federal law and state law that – ?

10 PRATHER : State law – state law. It's in the anonymous posting In re:
11 Doe case; it was the case that we set the standard from.

12 CHAIR : The standard set forth in the bill?

13 PRATHER : Yes.

14 CHAIR : Okay, and that standard that's set forth in the bill – is it – is
15 it an accurate – where is it? – [pages turning].

16 ADAMS : Mr. Chairman, what was your question? I didn't hear.

17 : Where – where is it in the bill?

18 CHAIR : The question is the standard, what I would call the guiding
19 principal that the court would follow, is it concluded in the bill, one? And then number two,
20 if it is in bill, is it an accurate codification of the common law?

21 PRATHER : It is an accurate codification.

22 CHAIR : And where is this?

23 PRATHER : – and it is contained in the bill. It's on page 5 of the bill,
24 Section 27.005 – 27.005(b) and (c). And it talks about the prima facie establishment of the
25 elements of the claim.

26 CHAIR : So in page – on page 5, 25(c) [sic], says - first of all, it starts
27 out in (b) as "the court shall dismiss legal action if the moving party shows by ponderous of
28 the evidence that the legal action is based on, relates to, or is in response to the party's right
29 of free speech, right to petition, and right of association."

30 PRATHER : Right, the burden is initially on the movant, and then it
31 shifts to the respondent under 27.005(c), and that's where it says, "The court cannot dismiss a
32 legal action if the party bringing the legal action establishes by clear and specific evidence a
33 prima facie case for each essential element of the claim." And that's taken directly from the
34 anonymous speech cases.

¹ Ms. Prather may have been referring to *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007).

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1 CHAIR : So there seems to be some consistent burden of proof here,
2 maybe I'm just reading it wrong. So you're – you're – the moving party – the party moving to
3 dismiss only has to show by a ponderous of the evidence that the legal action is based on
4 relies on or relates to the right of free speech – whatever.

5 PRATHER : Right, it's not their lawsuit, they're not the one bringing the
6 claim –

7 CHAIR : The court may not dismiss the action if the party bringing
8 the legal action establishes by clear and specific evidence the prima facie case. And I don't
9 know why we just – I don't understand that. Why are we doing it that way?

10 PRATHER : Well, the clear and specific –

11 CHAIR : What is clear and specific evidence standard first?

12 PRATHER : Sure. The clear and specific standard, Mr. Chairman, is
13 taken from the reporter's privilege cases. It's something that courts are used to applying
14 when it comes to First Amendment issues.

15 CHAIR : I'm sorry – You have a – you talk very quick, and very fast,
16 and very low, so if you'll –

17 ADAMS : Listen real slow.

18 CHAIR : Slow 'er down and put her down in second gear - slow it
19 down a little bit – if you would. We'll plow through this.

20 PRATHER : The clear and specific evidence is what courts are used to
21 applying when courts are dealing with First Amendment issues. It was adopted in the
22 reports privilege statute; it was taken from the Dallas case of *Dallas Morning News v. Garcia*.
23 And that's – that is a standard that is between preponderance and clear and convincing. It's –
24 it's here because you're dealing with a speech matter and you are dealing with the movant
25 having to establish that they actually have a basis for a claim involving free speech.

26 CHAIR : Is there – and I don't practice in this area, so I don't know –
27 is there an exception to, in other words – if the movant, the person looking to dismiss the case
28 establishes by a preponderance, so I guess the court's going to have to weight that evidence,
29 the right of free speech, the right to petition, or the right of association. If you establish those
30 three – one of those three things, you're out.

31 PRATHER : The burden shifts.

32 CHAIR : The burden shifts and then –

33 PRATHER : And then the burden –

34 CHAIR : And then – and then you go forward and you have to
35 establish by clear and specific evidence a prima facie case for each essential element of the

1 claim in question. I'm not sure how I understand how it works. I'm just trying to understand
2 it. I assume it's correct, but I'm trying to understand how it works in the real world.

3 ADAMS : Mr. Chairman, first of all, the lawsuit that we're talking
4 about is essentially broad –

5 CHAIR : I understand –

6 ADAMS : – the rights - the constitutional rights of the defendant. The
7 defendant raises that constitutional right and the motion to dismiss, and it is a motion of
8 dismiss, then the burden shifts to the person who filed the lawsuit. If he or she, by affidavit,
9 can essentially can establish the elements – each elements of their prima facie evidence of
10 their case, then they do not dismiss. If they – if the person, the plaintiff, does not establish
11 that, then the court does dismiss.

12 CHAIR : I understand that that is how it basically works, I'm just not
13 understanding anecdotally how if you've established one of these three elements – the
14 movant has – then how do you rebut that?

15 PRATHER : Well, you rebut that by showing you have a basis for your
16 claim. And so what the basis for your claim – I mean – if you're suing – presumably the
17 plaintiff is suing for defamation, or business disparagement, or something along those lines.
18 So they have to establish that they have prima facie evidence of the essentially elements of
19 their claims. So, for instance, they have to establish what they said was false. Not just that
20 they didn't like it, but that it was false. And the problem with these lawsuits is often times
21 they're brought by people who just don't like what was said. It's not that they're false, they
22 just don't like it. Yeah, I'm not sure.

23 ADAMS : I'm not sure we are reaching his question.

24 PRATHER : Yeah –

25 CHAIR : Then I'm going to then see, basically– puts a heightened
26 burden of proof on the plaintiff, to come in and establish clear and specific evidence of prima
27 facie case. Those two just don't seem to go together. Typically I always thought that a prima
28 facie, you establish each element, I guess, by a scintilla. I mean, you could be looking at
29 standard law, so this is a lot different than that, than your standard case, your regular case.

30 PRATHER : Well, the scintilla is in the no evidence motion for summary
31 judgment.

32 CHAIR : Right.

33 PRATHER : And in a traditional motion for summary judgment it's a
34 different standard that applies, that's the preponderance standard. So what we did was take
35 the same standard that courts are used to applying in First Amendment cases.

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1 CHAIR : And is this is the standard applied in a motion for
2 summary judgment in a no – in a First Amendment case?

3 PRATHER : Well, that depends on what you're talking about. Actually
4 if you're talking about actual malice, it's clear and convincing evidence of actual malice. And
5 if you're talking about just falsity, it's a ponderous of the evidence. It also gets into nuances
6 into public figures, public officials, whether or not something is privileged under Chapter 73,
7 things like that. So because there is a dichotomy in the law between preponderance and clear
8 and convincing, when it comes to speech cases, clear and specific seems like the logical
9 solution since you don't know if you're going to be having an actual malice case.

10 CHAIR : Oh, that gets to me to where I'm headed, to a middle
11 ground that we're proposing in this statute?

12 PRATHER : It's a middle ground that we're proposing the statute that
13 the courts are already used to adopting in First Amendment matters, like the reporter's
14 privilege cases.

15 CHAIR : Okay. Sen. Ellis.

16 ELLIS : Thank you. I'm sorry I was a little late. I was chairing
17 Government Organization. For the members of the committee, particularly for all of those
18 who don't practice law in any space, can you walk through what we're trying to solve and
19 walk through the process where you and the Trial Lawyers Association came to some
20 consensus so that this bill would not go into areas of commercial litigation where there is no
21 constitutionally protected right for freedom to speech. First, kind of walk through what we're
22 trying to solve, an example. Maybe apply this to a real live example.

23 ADAMS : The example, Sen. Ellis that I gave earlier is a real life
24 example of a young man that lived in an apartment house and he had a parking sticker, and
25 he had to have that to park there. The towing company towed his car anyway. He went to get
26 his car and they said, well, you owe us \$280, or whatever it was. And he said I don't have it.
27 They said, well, you can't have your car, even though he had the perfect right to be there. So
28 he went on his blog and trounced the towing company pretty good. They didn't like it, but
29 everything was the truth. So they filed a defamation case against him. Now his choices at that
30 point is he could spend thousands of dollars defending himself, or he could go on his blog
31 and retract the truth, or he could do nothing and they would take a default judgment against
32 him and he would be hounded the rest of his life, and his credit would be ruined. This statute
33 right here gives a fourth option to someone like that, that is to file a motion to dismiss. We
34 call it a Anti-SLAPP motion, but the truth of the fact it's like the old demurrer. It's a motion to
35 dismiss. The motion to dismiss is based upon the fact that he was exercising his First

1 Amendment right to free speech. So when he establishes by affidavit and his motion to
2 dismiss, that he was exercising his first amendment right, then the towing company got to
3 come back and they've got show that they have a good cause of action, by a different
4 evidentiary standard, which is used in these kind – in First Amendment cases. If they don't
5 show, then the motion to dismiss to granted and he has spent hundreds of dollars instead of
6 thousands of dollars defending him. He hasn't has to go through the other options. This gives
7 him a fourth option and that is a motion to dismiss based upon his First Amendment –
8 exercising his First Amendment rights. That's exactly the example that this bill expresses.

9 ELLIS : Can you give some examples of how the people in the
10 media, since you all are representing the media, have had problems in this area?

11 PRATHER : And we've got some witnesses to testify, but I'll give you a
12 few examples, one of which is, Pam Vaught for KTBC is here to talk about.

13 [Off-mike comment.]

14 ELLIS : Put your mike down, pull it down a little bit –

15 PRATHER : Is that better?

16 ADAMS : I was never accused of not being able to be heard in this
17 chamber. [Laughter.]

18 PRATHER : One example, we have a witness here today that will testify
19 more about it, is an example brought before you by Pam Vaught for KTBC, she's the news
20 director there, where a patient went to the Texas Board of Medical Examiners to complain
21 about the doctor was essentially getting patients hooked on drugs, and then had a
22 methadone clinic to treat them after the fact. That doctor has previously been sanctioned by
23 the Texas State Board of Medical Examiners. The media brought the story to light after the
24 whistle blower came forward to them. That's often what happens is whistle blowers go to the
25 media because they may not have the resources or the means to have any other medium hear
26 them. And – So they went ahead and did a broadcast on this. And the doctor turns around
27 and sues both the patient, trying to get the patient to pull back her complaint from the
28 Medical Board, and the television station because they were the conduit for the information.
29 So oftentimes the media gets brought into these disputes simply because they're the conduit
30 for the information that whistle blowers have brought.

31 In that instance, the television station had to first
32 determine where they going to represent the whistle blower, which is a cost to them and not
33 an obligation of theirs. And then they have to decide, you know, how we are going to most
34 efficiently get rid of this meritless lawsuit? It's meritless because there was nothing false said
35 about the doctor. So they go ahead and assume the cost to defend the whistle blower at their

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1 question. There are statutory provisions that allows for the courts to award attorney fees in
2 certain instances. The second part to your question is, these 27 other states that have Anti-
3 SLAPP laws on the books –

4 JACKSON : Okay, I'm not worried about the 27 other states. I'm just
5 asking if this is pretty much standard in the state of Texas, that we tell a judge who – a judge
6 is supposed to do and weigh evidence I guess to weigh a decision –

7 CHAIR : The bill doesn't tell the judge how much –

8 JACKSON : We're going to tell them that they shall award one side this
9 list of items –

10 PRATHER : There are provision for existing laws that tell the judge to
11 award attorney fees, yes.

12 JACKSON : Okay. So we do that – ?

13 ADAMS : Well, you did it in that particular instance in that particular
14 statute.

15 CHAIR : Sen. Huffman.

16 SEN. JOAN HUFFMAN: Okay. On page 7 in section 20.009. It does provide an actual
17 loser pay provision, is it not? If the court determines the frivolous action?

18 PRATHER : We believe that it's the same standard both ways. It's a
19 provision that provides for attorney fees to be paid against a plaintiff who brought a
20 meritless lawsuit. And in return, it's also a provision that provides for the court to be able to
21 award fees if the Anti-SLAPP motion is deemed to be meritless. So it's the same standards
22 both ways. If it was unmeritorious then the fees go each way.

23 HUFFMAN : Then you're asking the trial court to make that
24 determination?

25 PRATHER : Yes.

26 CHAIR : Well, let me interrupt and correct something here, because
27 the standard is different for awarding attorney fees. Because if the – if the motion to dismiss
28 is meritless meaning it has failed, you don't get attorney's fees; the court has to find that it's
29 frivolous. Whereas in the – against the proponent of the – or the plaintiff in this cause of
30 action, if – if – if they lose on this motion to dismiss, then it might be a close question because
31 they have the standard of going forward in clear and specific evidence. You've got to
32 remember, the motion to dismiss just has to be based on the preponderance evidence. But
33 then the claimant has to come in and prove by clear and specific evidence, which is a higher
34 standard. Then if they lose on it, then it might be a close call, they've got to pay. If they lose
35 on the motion to dismiss, it's a much, much higher standard that the court has to find it was a

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1 frivolous motion to dismiss. Which is not true to bilateral or equal opportunity, lose or pay
2 sort of situation, how would you respond to that, Laura?

3 PRATHER : Well, my point is that if you filed a meritless lawsuit to
4 begin with, so you're Anti-SLAPP motion prevails, then you get the person who is a victim of
5 the meritless lawsuit gets their fees back.

6 CHAIR : You've filed lawsuits before, we've all filed lawsuits before,
7 and sometimes we have to file lawsuits for a matter of understanding of where we're going,
8 preserving evidence, and other things. And sometimes you get in there and you find out – it
9 just seems to be that it's a lot different here. The standard ought to be if you're going to award
10 attorney fees to both sides, then it ought to be the same standard and I don't think it's the
11 same standard.

12 PRATHER : So you would prefer that it say clear and specific on both or
13 preponderance on both?

14 CHAIR : No, I would say on the attorney fees provision it seems to
15 me that you ought to have – you ought to allow the court to determine whether or not they
16 want to at all.

17 PRATHER : You're talking about 27.009?

18 CHAIR : Shall to may. And let the court have the discretion to say
19 this is – and have them both be based on frivolous.

20 PRATHER : I guess what -

21 CHAIR : Meritless and frivolous are two different things, would you
22 agree?

23 PRATHER : I don't know if I would agree to that.

24 CHAIR : If I file a lawsuit and it's hotly contested –

25 PRATHER : Uh-huh.

26 CHAIR : – we go to the jury and the jury just disagrees, that means a
27 frivolous lawsuit?

28 PRATHER : No.

29 CHAIR : Okay. So if I've been slandered and – and you know I
30 believe that I have been slandered in the court and the court just agrees with me – which this
31 is all there is, the court has taken the place of the jury. Then that's not necessarily frivolous,
32 they lack merit. So why don't you have a frivolous standard apply to both?

33 ADAMS : Well, Mr. Chairman, the very fact that the – that the case
34 that's filed against someone who's exercising the constitutional right –

35 CHAIR : You know – I understand that, but what you've got to hear

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1 – you've got to judge that's going to be taking the case [sic] of a jury. We are inserting a judge
2 to weigh evidence. I don't know that we do that – I don't think the judge weighs the
3 evidence in – in a motion for summary judgment practice.

4 ADAMS : Sure they do. Sure – the judge has to weigh the evidence.

5 CHAIR : No, they don't – you have – you have in a traditional
6 motion for summary judgment is whether you have created a fact issue.

7 ADAM : Fact issue.

8 CHAIR : You have created a – or whether or not the facts support the
9 elements of the law – as a matter of law, no evidence. You – this is – what I'm trying to say
10 here, this seems to me and maybe I'm wrong, and I want to hear if I am – that we're actually
11 making – we're taking away the jury in this by allowing the court to make a preponderance
12 of the evidence decision and then if he rules in favor of the motion to dismiss, we're going to
13 award attorney's fees – mandatory. And I just don't think that's balanced.

14 ADAMS : But Mr. Chairman, when the court finds that the case was
15 in predegradation of the constitution rights of the – of the defendant –

16 CHAIR : Well, that's not what the court's finding.

17 ADAMS : He's got – The court has to find that.

18 CHAIR : I think we want to – I don't want to move this bill until we
19 worked that out. I'm not comfortable with that. I think Senator Jackson has raised an
20 interesting point, and I think we need to look at that provision there. I can understand how
21 you're approaching the evaluation of the – the motion to dismiss, but this award of attorney's
22 fees seems to me to be out of balance. I would like to revisit that with you if we could.
23 Senator Ellis?

24 ELLIS : Do you know if in those states that have an Anti-SLAPP
25 action they have a comparable provision or not?

26 PRATHER : Yes, Senator Ellis.

27 ELLIS : In all of those states?

28 PRATHER : In a number of those cases it is and worst yet, in many
29 states there's a liquidated damages provision that we obvious didn't put in this statute, which
30 didn't apply. Some other states have a provision that says that you can then file – if you're a
31 victim of a Anti-SLAPP lawsuit, it gives you a private cause of action back. We took a very
32 moderate approach in the provision that we drafted instead of having liquidated damages or
33 a private cause of action, we have the award of attorney's fees. And many states, just have it
34 one way, they don't have it both ways. This has it both ways. Again, for a moderate
35 approach.

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1 ELLIS : I would suggest that you get us a breakdown state-by-state
2 because I'm a pretty good counter –

3 PRATHER : Sure.

4 ELLIS : – because I'd like to moderate a little more or this bill will
5 be sitting here a long time.

6 PRATHER : Yeah. Our belief the standard was the same because you
7 had to find SLAPP motion was meritless.

8 ELLIS : Here's the bill –

9 CHAIR : Gentlemen, I understand the bill, but I think that the
10 provision for attorney's fees and this needs to be worked on. And so I'm going to leave the
11 bill pending and hopefully work on it.

12 ADAMS : I have always found, Mr. Chairman, that it's nice to
13 Chairman comfortable.

14 ELLIS : I must say I appreciate the Chairman set this bill today
15 because I know there was some travel schedule issues with some of the witnesses, so I do
16 appreciate you, Mr. Chairman, setting the bill today. I think we talked about this last week –
17 you putting it on the agenda.

18 CHAIR : I favor the bill, it's not that – this is an interesting concept
19 and I think that this thing will work. All right, we have a lot more witnesses, so let's go ahead
20 and do those witnesses. Pam Vaught, Texas Association of Broadcasters; Shane Fitzgerald,
21 Corpus Christi Caller-Times; Arif Panju, Institute for Justice.

22 PAM VAUGHT : Hello, Mr. Chairman, I'm Pam Vaught, News Director at
23 KTBC representing the Texas Association of Broadcasters. Clearly, we're in favor of this.

24 Laura Prather outlined the lawsuit we went through
25 involving a whistle blower. A woman who came to us after filing complaints with the Board
26 of Medical Examiners. Clearly people who have means to file lawsuits usually don't call a TV
27 station or another media outlet. They have the means to hire an attorney and go through that
28 privately. She felt like light needed to be shed on this case, so she came to us. As Laura
29 explains it resulted in a lawsuit by the doctor. He ran several pain clinics as well as a
30 methadone clinic. We sent in an employee of the station who did undercover work and
31 found out what the woman alleged in her complaint to the Board of Medical Examiners was
32 true, absolutely. No medical exam was given, Oxytocin prescriptions were handed out, and
33 no questions asked really. The lawsuit dragged out, as Laura said, for several months. It cost
34 us a lot of money that came right out of our bottom line, where we could spend more money
35 covering news here in Austin. And we helped cover the complainant's loss and legal fees

1 because we felt she was the one who came to us with that story and she deserved our help on
2 that.

3 CHAIR : Any questions? All right. I appreciate that. I think the bill –
4 you know – we should pass the bill and just make sure it's balanced and fair as well. Sen.
5 Jackson.

6 JACKSON : I have – excuse me – a question in regard to, in your
7 observation, how this bill would affect bloggers, because just about every TV, radio station
8 has bloggers that are employed by that station. But there are also other people that have
9 bloggers that aren't really aren't affiliated whatsoever with any, what I would call, certified
10 media type engagement or operation. And under current law, if a blogger gets after just
11 whoever, slanders or whatever, that person has a right to file a lawsuit against that blogger, I
12 guess, if they can find him. And I guess you can find him or her if you look for it. How
13 would if this bill goes into law, how would that effect someone outside of your industry in –
14 in trying to pursue them? Would it change anything?

15 VAUGHT : I will be perfectly honest, I – I don't know. I would talk to
16 our lawyers about that. It hasn't come up for us. We helped this woman out because she
17 came to us with the story. I look at bloggers as being something different. We moderate –

18 JACKSON : It would effect that, it would effect that -

19 SHANE FITZGERALD : I think Senator Adam's example on the parking sticker was
20 a good one in that realm. The claims on that blog were essentially true, and needed to be –
21 but he would need to prove that, just like he would do for every day journalist. So I think
22 there's some degree –

23 JACKSON : Well, I guess that's where kind of I'm going. The point of it
24 is, you're going to end up in court anyway, right? And you're trying to

25 FITZGERALD : Some of what happens is as journalists – we're seen as
26 having deeper pockets than the average citizen. People will go after us, but I can't tell you
27 how many times – My name is Shane Fitzgerald, I'm the vice president and editor of the
28 Corpus Christi Caller-Times – how many times that we'll have people get angry at some of
29 the journalism we practice and want to retaliate and threaten to sue. A blogger without that,
30 with the E.W. Scripps background or Belo, or another major corporation, those bloggers are
31 more at risk and need to be more careful about how they – what they say and how they go
32 about it. I think a blogger that just writes off the top of his or her head, without any
33 background on that, opens themselves up to a lawsuits that aren't frivolous and that
34 wouldn't apply in this case.

35 JACKSON : Well, I'm not an attorney, and you can probably tell it, but

1 under current law, if I file suit against a blogger, that can be responded to and make
2 summary judgment asked for by one of the parties to the judge, and accomplish – may
3 accomplish the same thing that you're trying to do here with this motion? I guess without the
4 – pardon?

5 CHAIR : Yes, you can file a motion from a traditional summary
6 judgment at any time. You could only file a no evidence motion for a summary judgment
7 after adequate time for discovery. So what they're trying to do is avoid the discovery process.

8 JACKSON : Shorten of the process and save a little bit of money. Well,
9 I'm certainly a big believer and there's too many lawsuits. And I really find it shocking Sen.
10 Ellis is up here with file a bill to shorten the process. [Laughter.]

11 ELLIS : I just want to make sure you're telling the truth. When you
12 wake up in your pajamas in the middle of the night – that you'll tell the truth. [Laughter.]

13 CHAIR : Yes, we need to – Mr. Fitzgerald.

14 ARIF PANJU : Thank you and Members of the committee, I'm Arif Panju,
15 I'm an attorney with the Institute for Justice and I practice constitutional litigation here in
16 Austin. I come to this issue with an understanding of our legal system, as well as the
17 importance of the First Amendment.

18 We represented a SLAPP target. I'm going to tell you her
19 story today. Perhaps the most striking example of disturbing and a growing national trend, a
20 real estate developer launched a lawsuit spree in Texas in response to anyone who dared to
21 shine a spotlight on his involvement in the abuse of eminent domain for private gain. In 2005,
22 not long after the Institute for Justice finished litigating the eminent domain case, *Kelo v. the*
23 *City of New London* in the U.S. Supreme Court, an investigative journalist, Carla Main, began
24 working on a book. She wanted to see how *Kelo* would affect American communities & tell a
25 story of a single project, and how that story fits into the national drama post-*Kelo*. And she
26 became aware of a controversy in Freeport, Texas involving use of eminent domain for
27 private gain and redevelopment. The city of Freeport was attempting to force out a
28 generations old shrimping business and make way for a luxury marina development. And it
29 was going to be owned and operated by the private company of the real estate developer.
30 When the victims of this eminent domain abuse complained, the developer sued them for
31 defamation. So Carla Main came down to Texas from the East Coast, she did her research and
32 wrote a book. This is the book. It was published in 2007, she named it "*Bulldozed: Kelo,*
33 *Eminent Domain and the American Lust for Land.*" And it tells the story of eminent domain, the
34 development of the case law. It tells the story of the controversy in Freeport. And it was
35 reviewed in newspapers and magazines around the country and it won a political science

1 writing award.

2 About a year after the book was published in 2007, she got
3 a call from her publisher that said she was being sued. We represented her in the SLAPP
4 lawsuit. He didn't just sue her, he sued her publisher. He sued Professor Richard Epstein
5 from The University of Chicago Law School, who wrote a blurb on the back of the book. He
6 also sued the *Galveston Daily* who ran a book review and also the freelance book reviewer
7 that wrote a review on the book. By suing the Texas paper and the Texas freelancer, the
8 developer made it impossible for us to remove this case to a federal court, where we could
9 have moved to dismiss almost immediately. That is precisely the type of remedy that would
10 have been available to us if the Citizen Participation Act was in place and on the books at the
11 time the lawsuit was filed. Exactly one week and day after the time had expired to remove
12 the case to federal court, the developer settled out of court with the *Galveston Daily* and with
13 the freelance reviewer. Eminent domain abuse is a matter of public concern. That's why
14 journalists like Carla Main, who wrote this book, and around Texas to write books about it.

15 The First Amendment protects the right to engage vigorous and at times heated debate –
16 CHAIR : I don't want to impede on your First Amendment right, but
17 the timer did it. Let me ask you a question. What we're trying to set up here in this bill is
18 similar to a federal 12(b)(6) motion. And I don't know – are you a lawyer?

19 PANJU : Yep.

20 CHAIR : In federal court if you were able to have – if you were able
21 to have removed to federal court and then filed a 12(b) motion, would you have been entitled
22 to attorney fees had you prevailed?

23 PANJU : If – if we would have been victorious on a 12(b)(6) motion –
24 and we're a public interest law firm – we would have sought attorney's fees. The different
25 vehicle you would bring –

26 CHAIR : Under what authority would you have sought them ?

27 PANJU : On this particular case, they would have brought in First
28 Amendment suit – and this is in 2005. We probably would have moved under – well,
29 normally we will seek fees under a catalyst theory, where there's resulting change of policy.
30 This procedural process is a little different for us since we're defending a lawsuit.

31 CHAIR : What I'm trying to understand is, and I'll just ask you
32 directly – in a federal lawsuit where you would move – you would have this remedy – a
33 similar remedy, I don't think it's the same, because I'm not sure of the standards are the same
34 in federal court that we're laying out in this bill or the burden proof. But if you prevailed on
35 the 12(b)(6) motion in federal court, in one of these types of lawsuits, would you be entitled

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1 to attorney's fees?

2 PANJU : If we won a 12(b)(6) motion and just got the suit dismissed,
3 most likely we wouldn't even seek attorney's fees.

4 CHAIR : Why not?

5 PANJU : And we would prevail on it - It's not something that we
6 seek. There's no Anti-SLAPP federal provision that would allow this to have a vehicle to
7 bring this one. That's the key here.

8 CHAIR : So there's no federal lawsuit and you have the 12(b)(6)
9 remedy, which is -

10 PANJU : A procedural device.

11 CHAIR : But it's not as good as this remedy, is it?

12 PANJU : It's - I mean - it's definitely not as good as this remedy for
13 this reason. Because these suits are designed to silence, to drag you through court, to drain
14 your money. If you're private person who speaks; you can't even afford to hire an attorney
15 for a few hours. And so it solves its purpose.

16 CHAIR : What I'm trying to understand is, is whether or not the
17 attorney's fees - you wouldn't even seek attorney's fees, why not?

18 PANJU : Well, because in our posture as a public interest firm we're
19 a small shop, we don't waste time litigating attorney's fees. We're privately funded and we
20 litigate usually for liberty under Texas or U.S. Constitution. We're on the plaintiff's side. In
21 this particular case, it's unique. I think to answer your question, if we got this dismissed
22 under 12(b)(6) in federal court, 28 USC 1127 provides litigants that are forced to needlessly
23 have their costs increased to defend themselves against this type of lawsuit that's brought
24 against them. The court can get them fees.

25 CHAIR : Is that a frivolous standard then opposed to -

26 PANJU : I'm not sure if it's a frivolous standard, it would be a
27 situation where the judge would have the discretion and it would be reviewed on an abuse of
28 frivolous standard if it was appealed. But he would make a determination if this litigant had
29 been forced to needlessly increase their fees. So for instance -

30 CHAIR : That's not the same in this bill. I mean, if you win, it's
31 mandated that you get attorney's fees.

32 PANJU : But in this particular instance, if a plaintiff had met it's
33 burden and the litigant that brought this SLAPP suit said, hey, you know, I think what was
34 said was false and defamatory, you know, et cetera, but, in fact, it's only opinion. And they
35 fail to meet their burden, this would allow them, the defendant, to recover their court costs

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1 and their attorney's fees. And a reason why this is also good is because it does so early in the
2 process, before an extensive amount of fees have incurred. It also is good for judicial
3 economy for the state courts here in Texas, because you're not drawn into a situation where
4 you have to wait six, eight, twelve months before you get to a point where you can dismiss.

5 CHAIR : Sen. Deuell.

6 SEN. ROBERT DEUELL: I don't know who to direct the question to, but a book is a
7 finished product. I mean it's done work. Whereas blogging can be an ongoing process going
8 on for months or even years on a given subject. So is there a different in this bill or SLAPP
9 suits. The book's out, you can't balance it as such. You can perhaps silence a blogger who's
10 doing an ongoing investigation like that. I mean, is there a different here? Sen. Ellis, it's your
11 bill. I'm not a lawyer obviously either, so is there a difference here with this bill with this type
12 – or does it matter? How do you silence someone who has a book out?

13 PANJU : It doesn't matter because every time a book is printed,
14 you're exerting speech each time. And this particular lawsuit seeks to stop the printing of this
15 book. Whereas, when someone blogs something on the Internet, they're asserting their right
16 to speak on whatever issue they want at that particular time.

17 DEUELL : This would apply for either medium, right?

18 PANJU : It would apply to all speech. The First Amendment doesn't
19 distinguish between different types of speech and although – we shouldn't try to discern
20 where speech is good and more protected in one instance using this device and not. At the
21 end of the day, this is discourse on issues of public concern. It can manifest themselves in a
22 book, in a newspaper article, or in the public domain out at a city council hearing. This
23 should deserve the same level of protection and the same vehicles to protect them.

24 ELLIS : And the point was because in a book, as opposed to a blog
25 –

26 DEUELL : When you're trying to silence someone, if you have a book
27 out the deed is done. If you're blogging and doing an ongoing investigation, you want to stop
28 the blogger, you want to stop the newspaper reporter, there's a difference there, it's not a
29 finished product. Maybe it's a dumb question. I don't –

30 ELLIS : If it's a blog, Senator, you know it's out, and once it's out
31 you can't pull it back in.

32 DEUELL : It may be pursuing things – you know, it can develop. I
33 mean the book has been essentially developed over how ever long it took to write the book,
34 it's been printed, it's out there, it's a finished product, you're trying to stop somebody from –
35 I'm just seeing if there's a difference.

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1 ELLIS : Somewhat of a difference, but you would stop it in that you
2 could do a reprint of the book. You'd have to – you couldn't promote it, I guess. I guess you
3 could try to force them to go and correct it.

4 DEUELL : Is there a difference in a book versus a blog with this bill?

5 ELLIS : No, Senator.

6 PANJU : No, there is no difference. I think to make the point, or to
7 distill the point even more, it had a chilling effect on the author. The author is less likely to
8 come down to Texas again and write a book that involves public policy or an issue. You
9 know, the suit is intended to intimidate and silence and you can do that. She's less likely to
10 come down here and write about this topic, or any other topic related to this. And when she
11 testified in the House last year she mentioned that. Encounter Books, the same thing. They
12 have been drug into a lawsuit and now you're chilling speech. And that's the effect these
13 lawsuits have over the long term and if they're consistently brought against publishers and
14 newspapers.

15 CHAIR : Okay, let me do a little housekeeping here. You never –
16 actually, I didn't call you, I called another witness. So say your name and who you represent.

17 PANJU : Sure, my name is Arif Panju, I'm with the Institute for
18 Justice.

19 CHAIR : Okay, so when they're typing this up they have to go all the
20 way back just to put your name in, but that was my fault. Is there any other questions of Mr.
21 Panju? All right, thank you. Mr. Fitzgerald.

22 SHANE FITZGERALD : Thank you, Mr. Chair, I appreciate the time. Just to kind of
23 follow along on this topic, good journalists cover their communities honestly and thoroughly.
24 We at the Caller-Times cover Corpus Christi and surrounding areas with a great deal of
25 verve and tenacity in our community. You know, sometimes, believe it or not, the media
26 makes people mad. And they get – they want to retaliate and they're not shy about calling
27 my office or my publisher's office and letting us know. We probably get four to five threats a
28 month that if they were all carried out that would cost us tens of thousands of dollars a
29 month. It already is a substantial cost to us in insurance and having a First Amendment
30 lawyer on retainer.

31 Often these threats – and most often, these threats are
32 done from reporting from public records and public events. Just last week we had to run
33 some photos out of a Spring Break event on the beach, a very public place. And a woman
34 called me and said I want you to take these pictures off the Internet and run a retraction in
35 your paper for running a picture of my daughter. It was in a public domain and it was a

1 really ridiculous notion, but she felt like she could do that. And she threatened because she
2 had the wherewithal; she was going to file a lawsuit against the – I haven't heard from her as
3 you might imagine. In a city with a lot of refineries, we diligently report safety and air quality
4 reports and sometimes that upsets the leaders of those areas. With this kind of responsibility
5 in our community we have to rigorously defend ourselves. And we know that's the cost of
6 doing business when that – that happens. But for individuals, for whistle blowers, they can't
7 maintain that cost. We've had a couple of good examples of that already today.

8 Papers of all sizes – the Caller-Times is a medium sizes
9 paper, around 50,000 circulation daily, but even on the smaller ones in the smaller
10 communities where you don't have big – big television stations or others – or other medium
11 covering, it's very important in the smaller markets to be able to report on what's going on
12 around them. And these threats are very real to a paper that's small. And it's very much of a
13 effect on the bottom line. So the fear of retaliation definitely will make them pause and have a
14 chilling effect. The newspaper division – newspapers aren't asking for special treatment.
15 There are laws on the books that hold us accountable if we make mistakes. This law makes
16 sense, we get more threats than we do – than necessary for reporting public records which is
17 generally where they come from. Mr. Chair, thank you for your time.

18 CHAIR : Thank you. Are there any questions for Mr. Fitzgerald? All
19 right, I appreciate you being here today. The Chair calls Robin Lent, Janet Ahmad and Tom
20 Blackwell.

21 [Off-mike comments]

22 CHAIR : Okay, we have Robin Lent.

23 JANET AHMAD : Robin Lent is in another committee hearing on HOA
24 reform.

25 CHAIR : Let the record reflect Mr. Lent was called and see if he can
26 get back before we close the bill out. Mr. Blackwell?

27 TOM BLACKWELL : Yes, I'm Tom Blackwell, I live in Dallas County. I've
28 provided separate written testimony with my witness card. In the interest of time, I have
29 prepared some notes in advance. I'm concerned about SLAPP litigation in Texas because I
30 have years of personal experience as the target of it. While I have studied the issue in some
31 depth, I am not an attorney. I am for this bill. I see this effort as our best opportunity resolve
32 this immediate problem in Texas. In the course of my years of experience with the process, I
33 see several urgent issues. There is a government funding of agencies that must be able to
34 receive information from the public in order to function. SLAPP suits against witnesses and
35 informants are intended to interfere with this. Respectively, that means interference with the

1 short, we fell into the builder's well-orchestrated trap and forced binding arbitration took
2 care of any possibility of holding our builder accountable under the law or a warranty when
3 it wouldn't cost more than \$1,000 to have completed our home. We spent over \$50,000. The
4 only place that I cannot display these signs is on my own property.

5 From that experience got closed a successful, small
6 business and established Homeowners For Better Building to pursue full time legislative
7 change to make sure this didn't happen to other people. Naively I thought this would take
8 two years. However I'm still here. We quickly became a national organization. We worked
9 with Congress Gonzales and Rodriguez who filed a binding arbitration bill in Washington.
10 We organized subdivisions, thousands of stories were reported by local states and national
11 news. Our national – one national builder, in particular, dominated the news and
12 homeowners testified calling for a Home Lemon Law. Here at the Capitol, Sen. Van de Putt
13 filed in our behalf. Homeowners took to the streets, demanding that their homes be bought
14 back and they were.

15 Which brings me to the second SLAPP lawsuit. K.B.
16 Homes filed a \$20 million SLAPP suit against their customers and particularly targeting me
17 for racketeering, claiming that protest is racketeering. That caught the attention of the *Wall*
18 *Street Journal*. It made us someone. The *Express News* described the allegations as brought
19 under the RICO Act, the same law passed to prosecute East Coast mobsters.

20 The irony is that very industry that promotes tort reform –
21 what they've termed as frivolous lawsuits – are the greatest offenders of filing SLAPP suits.
22 How? The home building industry, in fact, is the founder of the HOA empire of new
23 government. They use the same SLAPP suit tactics on a daily basis to intimidate and force
24 families from their home if they don't pay inflated fees and obey their rules. You have a
25 packet there.

26 CHAIR : We did distributed your packet.

27 AHMAD : I'm sorry?

28 CHAIR : We've distributed your packet and we've got your written
29 testimony.

30 AHMAD : Yes. Well, there's a case that's very important. It's Col.
31 Harada [phonetic] who was in charge of NATO forces, who came back on a lawsuit two days
32 before they went to trial they had a SLAPP suit filed against them, and it really determined
33 the outcome of that case.

34 CHAIR : Well, I think your situation – and I'm familiar with it
35 somewhat through the years. It certainly demonstrates the need for this type of legislation. I

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1 think hopefully we can get this moving here by next week.

2 AHMAD : I certainly do appreciate that.

3 CHAIR : Thank you and your signs are pretty high tech signs that
4 you have there.

5 AHMAD : They're quite nice. So I'll just make sure that you get a look
6 at them. I drug them out of the garage.

7 CHAIR: : Well you can show them here at the Texas Capital.

8 AHMAD: : Thank you.

9 CHAIR : Any questions for Ms. Ahmad? All right, thank you very
10 much for your presence today.

11 AHMAD : Thank you.

12 CHAIR : Is there anyone else that would like to testify for or against
13 Senate Bill 1565? Chair hears none. Public testimony is closed. It will be left pending. We'll
14 try to work through some of those minor issues and see if we can get this thing moving next
15 week.

16 ELLIS: : Thank you, Mr. Chairman. Thank you, Sen. Jackson. We
17 will get work done –

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**HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND
CIVIL PRACTICE
82ND LEG., R.S.
(MARCH 28, 2011)**

HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
82ND LEG., R.S.
(MARCH 28, 2011)

THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE:

Rep. Jim Jackson, Chair

Rep. Tryon D. Lewis, Vice-Chair

Rep. Rep. Dwayne Bohac

Rep. Joaquin Castro

Rep. Sarah Davis

Rep. Will Hartnett

Rep. Jerry Madden

Rep. Richard Pena Raymond

Rep. Connie Scott

Rep. Senfronia Thompson

Rep. Beverly Woolley

PROCEEDINGS:

[The public hearing on H.B. 2973 began 4 minutes and 15 seconds into the committee meeting.]

[Rep. Jim Jackson, Chair of the House Committee on Judiciary and Civil Practice, in the Chair.]

CHAIR : Chair calls up House Bill 2973. Chair lays up House Bill 2973. Rep. Hartnett moves that the substitute from House Bill 2973 be adopted. Is there any objection? There being no objections, the substitute is adopted. Chair calls on Chairman Hunter to explain the bill.

REP. TODD HUNTER : Members, some of you have been on the committee before especially Will and Richard. We have seen through the years what is called SLAPP suits and this bill is basically anti-SLAPP suits – Strategic Lawsuits Against Public Participation, is what a SLAPP suit is. Unfortunately we do have abuse in the legal system at certain times and that basically, trying to silence individuals or groups. This type of law has been passed in 27 jurisdictions and has never repealed. The purpose of the bill is to encourage public participation of Texas citizens and basically to safeguard constitutional rights of persons to petition, speak freely, associate freely and participate in government. It also provides for an expedited motion to dismiss in lawsuits like these that are filed frivolously, mainly aimed at retaliating against one who exercises their freedom of speech or right of petition and it also establishes some important efficiencies to try to handle this matter and it provides for basically dismissal, uh, set up. And I'm going to ask Mr. Chairman that, to take the testimony but that you leave the bill pending and I will give you an update through the week, if anybody has any clarification or has suggestions.

CHAIR : Thank you Mr. Chairman. Are there any questions before we hear testimony from witnesses? The Chair calls – Wendell – Ware Wendell is for the bill does not wish to testify. Are there other –? Sean Jordan?

CLERK : [Off-mike comments]

CHAIR : Oh that's the last one, okay. Oh, we got a whole list of them here. Michael Schneider, is for the bill, does not wish to testify. Ted Melina Rabb, is against the bill, does not wish to testify. Joe Ellis? Is Joe Ellis here? Mr. Ellis – How are you doing?

JOE ELLIS : [Off-mike.] I'm doing great. How are you, sir?

CHAIR : If you would give us your name, who you represent and

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1 your position on the bill.

2 ELLIS : Good afternoon, Mr. Chairman, Members of the committee,
3 thanks for the opportunity to be here today. I represent Texas Association of Broadcasters, I
4 work for KDFW in Dallas, and we hope you'll consider this bill and agree that this is an
5 opportunity to help provide some protection for whistleblowers and this shouldn't be
6 missed, we in the news media we hear from people who have information that is of
7 legitimate public interest, even concerned government officials, law enforcement and
8 lawmakers, yet they fear legal retaliation for coming forward and often those people back
9 down and don't reveal what they know due to this fear and that's a chilling effect that it has
10 on the flow of that valuable information. Other times they do come forward, but they are
11 sued in court in an effort to keep them quiet, another chilling effect that we hope to
12 recognize. When it happens as was mentioned before me, it's an abuse of our court systems
13 and infringement on peoples' freedom of speech rights.

14 And let me give you a couple of examples if I may. Last
15 year KDFW did a story addressing the billions of federal tax dollars that are poured into
16 tutoring programs to help underachieving students through the No Child Left Behind Act –
17 companies that profit from this federal money that is passed through the states. We talked to
18 former employees, as well as parents and students who said these tutoring programs offered
19 by one particular company were far too basic and of little help toward academic achievement
20 and supplied basic content the same year after year for returning students. The parents and
21 students and former employees say the company offered up front gift incentives for
22 participating in this program which is a violation of the state and federal rule for these funds.
23 The former employees of the company say they were fired for raising concerns about the
24 company's practices and filing complaints with the state regulatory authorities. School
25 districts even complained about the company's practices, saying they were out of line with
26 regulations but, as KDFW found there is little oversight in the accountability over these funds
27 and companies that are receiving them. The company involved filed suit against two former
28 employees that worked with KDFW and helped provide some information and the suit
29 alleged all kinds of things including defamation and civil conspiracy and that the two former
30 employees were disgruntled and were conspiring with others to basically slander the
31 company. The company also threatened to sue us and sent us a cease and desist order. The
32 two former employees were unable to defend themselves through counsel and were ordered
33 to discontinue communications with us. The lawsuits against those people are still pending.

34 Yet another example, KDFW in 2008 did a story
35 addressing Medicare fraud and the billions of taxpayers dollars lost every year. With the help

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1 of a former employee we exposed a Nigerian national using multiple identities to set up and
2 operate fraudulent home health care businesses. This woman was in the country illegally and
3 ordered deported nearly two decades ago, yet she was able to set up multiple home health
4 care agencies and collect millions of dollars through Medicare for patients who would not
5 typically qualify for home care coverage and for patients who receive no home health care at
6 all. This story exposed shortcomings in the state system of checks for licensing of home care
7 providers. This particular person operating these companies was previously licensed, but
8 was revoked due to some problems and yet she still got multiple licenses afterwards. Yet
9 some employees has reported fraud to the state, but nothing happened. In fact the Texas
10 Department Of Aging And Disability claimed it did its own investigation but turned up
11 nothing, clearing the way for her to continue to receive these funds. In days leading up to our
12 story the person was arrested and placed in federal custody on immigration fraud charges
13 and Medicaid fraud charges –

14 CHAIR : Let the record reflect that Rep. Bohac is here. Go ahead.

15 ELLIS : Okay. Anyway, she was arrested and had fraud charges
16 filed against her and she was eventually sentenced to federal prison and ordered to forfeit
17 assets and pay restitution. However, in the days leading up to our story, her company filed
18 suit against us alleging that former employees were disgruntled and intended to slander the
19 company. The suit made allegations against us and our intentions, which it had no idea what
20 our intentions were. But – anyway, it tried to stop these people from speaking out and our
21 story from running. Luckily, that case was non-suited because that person was eventually
22 arrested and detained and not released on bail.

23 As a result of that particular situation, Sen. Jane Nelson
24 filed legislation that would strengthen the requirements for people obtaining a health care
25 license in Texas that Senate Bill 78, which is – has moved through the Senate and is now in
26 the House awaiting a committee referral.

27 One last example if I may and I'll close. Back in 2005 we
28 reported on a Dallas city councilman who is also the treasurer of a non-profit community
29 development corporation. This CDC received federal grant money for community
30 development projects in neglected parts of south Dallas. The counsel man was ousted from
31 his position as CDC treasurer after it was discovered that he embezzled some \$50,000 by
32 writing checks to himself and family members from the CDC account. The CDC board made
33 attempts to get the money repaid without going to law enforcement or going public, but in
34 response – as our story showed, the counsel man retaliated by suing the CDC's board
35 chairperson for slander and libel, costing them unnecessary time and stress and money.

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1 Meanwhile, the board members were afraid to do anything further about it, fearing the
2 councilman's position of power. That councilman was eventually indicted and convicted in
3 federal court.

4 CHAIR : Are there any questions for Mr. Ellis? Any questions?
5 Thank you Mr. Ellis.

6 ELLIS : Ok, thank you very much for being heard. I hope you'll
7 consider this bill so we can have some more protection for whistleblowers out there.

8 CHAIR : This can be and will be for some people here a pretty
9 emotional issue. Please try to limit your testimony to about three minutes and be very direct
10 and tell us what we need to hear, because we are going to have a long night tonight. Chair
11 calls Brenda Johnson. Ms. Johnson, give us your name, who you represent and your position
12 on the bill.

13 BRENDA JOHNSON : My name is Brenda Johnson. I'm a resident from San
14 Antonio and an HOA resident and litigate in civil litigation.

15 CHAIR : Okay, tell us – tell us your position.

16 JOHNSON : Thank you, Chairman. I'm for the bill.

17 CHAIR : Okay.

18 JOHNSON : Thank Chairman, Vice Chairman, ladies and gentleman of
19 the committee for this opportunity to tell my story or should I say stories as they appeared in
20 the news. First it was "Homeowners association sues its members, racks up eight thousand
21 dollar legal bill" then, "Residents say HOA election rigged," then "Bully HOA president
22 ousted." Finally, "Ventura HOA president resigns." After 20 years HOA members were shut
23 out of their board meetings, restricted at town hall meetings, and had their annual meetings
24 hijacked. Residents first requested, then demanded to be heard, the board refused. Residents
25 presented the board with a demand to hold a special meeting in according with the by-laws
26 and the board singled out eight residents and sued rather than meet with its constituency.
27 After two years, five lawsuits involving several law firms and an estimated \$300,000 in legal
28 and related fees by all sides, a near riot at our October 2010 annual meeting, a court
29 injunction invalidating that meeting, resignation of the board, a court appointed interim
30 manager, and a court ordered do over annual meeting, homeowners are again able to
31 participate in governing our HOA. We are still assesses the damage and picking up the
32 pieces, but we ended a two-year siege of 1,132 home HOA.

33 The civil suit that started it all was nothing more than
34 intentional tort in the form of a SLAPP, a Strategic Lawsuit Against Public Participation.
35 Defending this suit required a substantial investment of money, time, and resources. The

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1 and we don't know what's gonna happen.

2 But, a lot of times they say that you know, HOA boards
3 should be liable for their actions. I think that as long as advocates have to carry insurance and
4 have to be liable for their actions, we all should be able to have a level playing field. I brought
5 you today letters – threat letters that – we received.

6 CHAIR : Any questions? Any questions of Ms. Lent? Any questions
7 for Ms. Lent? Thank you Ms. Lent. Carla Main.

8 CARLA MAIN : Good Afternoon. My name is Carla Main. I came here from
9 New Jersey to testify in support of this bill. I'm a journalist; I also practice law in New York
10 City so I come to this issue with a background on understanding –

11 CHAIR : You did not mark on witness form –

12 MAIN : Yes.

13 CHAIR : – that you are testifying for, against or neutral. Would you
14 come up and mark it for me please? And you are testifying for the bill? Okay. Thank you.

15 MAIN : I'm interested in this bill because I am a journalist and I
16 wrote a book. The book was called "Bulldozed." It's about an imminent domain controversy
17 in a city in Texas. The city was Freeport and a year after I wrote this book I was sued in state
18 court in Dallas. This was a book that was generally recognized around the country. It was
19 reviewed in newspapers and magazines all around the country. It won an award for political
20 science writing. It was published by Encounter Books, which is a very serious non-profit
21 publisher that publishes well regarded intellectual books – it is funded by the Bradley
22 Foundation. The person who sued was a real estate developer who was discussed in the book
23 and he sued not just me, but my publisher and a very esteemed professor who wrote a blurb
24 that appeared on the back of the book. He also sued a small community newspaper and a
25 freelance writer who wrote a review of my book. The practical result of having sued that
26 community newspaper and the book reviewer was that we were unable to remove or transfer
27 the case to federal court for a motion to dismiss which would have effectively gotten rid of
28 the case very quickly. That is the type of remedy that this bill would have enable to have if
29 this bill had been in existence at the time.

30 Instead we have litigated the case now for two and half
31 years. The community newspaper and the freelance writer are no longer defendants in that
32 case, because one week and a day after the time elapsed from when we could have dismissed
33 that case they were let out of the case. They settled with the real estate developer who sued
34 them. We unfortunately are still defendants, myself and my publisher.

35 I am very fortunate that I have pro bono counsel because

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1 without that I do not know what would have happened to me or to my publisher. We are
2 litigating – we are fighting very hard. It has taken an enormous toll on me emotionally,
3 physically – for a journalist, to have my integrity questioned. This was a very carefully
4 researched book.

5 CHAIR : Let the record reflect that Chairman Thompson is here.

6 MAIN : This is the kind of book – it was a very serious book. I think
7 about a third of it is, concerns Daniel Webster and James Madison. [Laughter.] And the
8 drafting of the takings clause in the –

9 CHAIR : Let's see if we have any questions. Any questions for Ms.
10 Lent? Thank you for coming.

11 MAIN : Thank you.

12 CHAIR : Janet Ahmad. Janet Ahmad. How are you doing?

13 JANET AHMAD : Doing well, thank you.

14 CHAIR : Good

15 AHMAD : My name is Janet Ahmad. I'm with Homeowners for Better
16 Building. One thing is all these years that you see me coming to the capital – Thank you
17 Chairman and committee members, I appreciate this opportunity. One thing I have not done
18 is that I have always testified on behalf of others, worked for others. The one thing I didn't do
19 was to tell my story. I am here today to tell what this does for the industry. Homeowners for
20 Better Building organized communities, where homes were falling apart, were cheated. After
21 doing that we had people on the streets in San Antonio, Austin, Houston, Kyle and Dallas –
22 particularly in Dallas. We organized subdivisions to get homes bought back. We also were
23 responsible in 2000 in getting a federal bill on binding arbitration – the abuses of binding
24 arbitration – be addressed by the federal legislature. – 2001 we filed the first every home
25 lemon law. In Dallas particularly. One subdivision in Arlington Texas was built on top of
26 bombs. Bombs from a World War Two bombing range, some were live. The cleanup for the
27 federal government Corps of Engineers was \$6.2 million. Not the builder – the builder failed
28 to do it, although they were told, get an unexploded ordinance contractor to remediate that
29 land. They didn't do it. KB Homes, who built those homes, filed a lawsuit against their own
30 customers – \$20 million and myself. That made us somebody. The *Wall Street Journal* carried
31 the story and their question was always, why would a builder sue their own customers and
32 kept asking, do they do it a lot? The answer to that is, yes. They threaten them or they do it.
33 But they also put into their – into their restrictive covenants, that any sign of any character or
34 any signs of the nature of protests, complaints against the – [inaudible]. This is in the "Buy a
35 House and Shut Up" article by Rick Casey. It's a classic. You need to read it and I have one

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1 copy here and if they can make a copy. I'd be happy to give it to you. The –
2 CHAIR : Just a second. Chairman Thompson you have a question?
3 REP. SENFRONIA THOMPSON : Ms. Ahmad, it's always good to see you. How
4 does this bill – this bill impact you?
5 AHMAD : Excuse me?
6 THOMPSON : How does this bill impact you?
7 AHMAD : Well, I was sued for racketeering. Racketeering, yes. – \$20
8 million worth – \$20 million. The racketeering was that protesting was racketeering. You
9 know, its the law that was used on East Coast called RICO, to reign in – or to prosecute the
10 mobsters on the East Coast so it was written in the newspapers when I was sued. But the
11 other homeowners, they got their homes bought back, they got the suit dropped and I'm the
12 only one left on the lawsuit. It's now been since 2002 – since 2002 this lawsuit has been filed. I
13 don't know that KB Homes would sue their own customers again after the bad publicity they
14 got. But we need, it is clear sign that we need to reign in like other states have the ability of
15 the industry file these SLAPP suits.
16 CHAIR : Ms. Ahmad, lets see if their are any questions for you from
17 the committee. And if you want to give us that article, we will have someone go make some
18 copies.
19 AHMAD : Yes, and I have um, the SLAPP suit that was filed –
20 something was printed on our website by Nancy Hentschel [phonetic] who could not be here
21 today.
22 CHAIR : You'll be around so we will get it back to you. Any
23 questions? Thank you, Ma'am.
24 AHMAD : Thank you.
25 CHAIR : Laura Prather. Tell us your name, who you represent, and
26 your position on the bill.
27 LAURA PRATHER : Good afternoon, Mr. Chairman. Thank you for the
28 opportunity to appear before your committee. We will be handing out to a notebook that
29 looks a little bit like this. This basically has, hopefully all the information about the bill that
30 you may want – with regard to answer any of your questions. As Chairman Hunter
31 indicated, there are 27 other states that have this law on the books and the District of
32 Columbia which recently passed it in December of 2009. This is not a new concept. You've
33 heard examples of where this law is needed. It's not new ground. In the other states that have
34 this law, it has never been repealed. It has amended only to incorporate modern technology
35 and commercial speech exemptions, both of which we have already encompassed in the bill.

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1 And in drafting it, we made sure to use specific terms and standards that Texas courts are
2 familiar with. So with this bill, the same standards apply to speech in the – the courts have
3 already applied in the anonymous speech setting as in the non-anonymous speech setting of
4 the one of the standards that was taken from one of the existing court doctrine.

5 This is a good government bill for a number of reasons.
6 First of all, it promotes constitutional rights of citizens and encourages their continued
7 participation in public debate. It creates a mechanism for getting rid of meritless lawsuits at
8 the outset of the proceedings and it provides for means to help alleviate our already
9 overburdened court system. I'll be available to help answer any questions if this notebook
10 doesn't and I appreciate your time.

11 CHAIR : Any questions for Mrs. Prather? Any questions? Thank
12 you, Ma'am.

13 PRATHER : Thank you.

14 CHAIR : Shane Fitzgerald. Mr. Fitzgerald, tell us your name, who
15 you represent, and your position on the bill.

16 SHANE FITZGERALD : Good afternoon, Mr. Chairman and committee and thanks
17 for hearing me. My name is Shane Fitzgerald, I'm the vice president of Corpus Christi Caller-
18 Times. I am for the bill and it was interesting a little bit ago when the woman who authored
19 the book named "Bulldozed," it's ironic that that's the name on that book. That's what
20 happens to folks without this bill, they get bulldozed by people who want to basically shut
21 up people who aren't – aren't with them. We're good journalists, newspapers. I'm here
22 representing a medium-size newspaper. Good journalists cover the communities honestly
23 and thoroughly and at times you might find this hard to believe we make people mad, you
24 know, and they want to retaliate and we probably get threatened four to five times a month
25 and if everybody carried out what they were – what they threatened to us, we would be out
26 ten of thousands of dollars that go into reporting on our communities and what we're doing.
27 You know, and often these threats come from public records, information we gather through
28 public records and in the public domain. Last week I get a threat because of some pictures
29 that ran of spring break on a public beach. This woman was sure she could sue us for every
30 dime that we had. We live in a refinery city, where we report diligently on air quality and
31 safety issues and sometimes those readers get upset with us and what we are – and what
32 we're publishing and there is a community responsibility we have to be able to do that
33 openly and without the threat of needless suits. We have to vigorously defend ourselves
34 against these threats because if we don't do and we kowtow to these sorts of threats, it would
35 effect what goes on in our community and whose watching – and whose watching over our

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1 community. It's particularly chilling on small papers who don't have the wherewithal that
2 some others do. It can keep watch dog reporters, watch dog, and just the general public who
3 might want to come forward with information – it keeps them quiet. As the media industry
4 we're not asking for special treatment. If we make mistakes there are laws on the books that
5 hold us accountable, but by the same token we don't need to be sued needlessly because
6 somebody is upset and this legislation would solve that.

7 CHAIR : Any questions for Mr. Fitzgerald? Any questions? Thank
8 you.

9 FITZGERALD : Thank you.

10 CHAIR : Steve Harrison. Steve, give us your name, who you
11 represent, and your position on the bill.

12 STEVE HARRISON : Thank you, Mr. Chairman. Steve Harrison for the Texas
13 Trial Lawyers Association speaking on the bill. Initially we had some concerns about the
14 wording in some of the bill, but we are happy to report that we're working through this
15 issues and working with Chairman Hunter and would be happy to continue to do so.

16 CHAIR : Good. Any questions for Mr. Harrison? Thank you, Sir. We
17 have a form from Mike Hull, Texas for Lawsuit Reform, for the bill, does not wish to testify.
18 Keith Elkins, Freedom of Information Foundation of Texas, for the bill, does not wish to
19 testify. Mary Lou Durham, lists herself as retired, is for the bill, does not wish to testify. Ed
20 Sterling, Texas Press Association, is for the bill, does not wish to testify. Monty Wynn, Texas
21 Municipal League, for the bill, does not wish to testify. Doug Toney, Texas Press Association,
22 Texas Daily Newspaper Association, for the bill, does not wish to testify. Frank Knaack –
23 Knaack – ACLU of Texas, for the bill, does not wish to testify. David Weinberg, Texas League
24 of Conservative Voters – Conservation Voters, for the bill, does not wish to testify. Arif Panju,
25 Institute for Justice, for the bill, does not wish to testify. Irene Adolph, Coalition for HOA
26 reform, HOAdatinc.org, for the bill, does not wish to testify. Ware Wendell, Texas Watch,
27 for the bill, does not wish to testify. Lou Ann Anderson, online producer and state confident,
28 – stateofdenial.com, for the bill, does not wish to testify. Is there anyone else who wishes to
29 testify on, for, or against House Bill 2973? Mr. Chairman?

30 HUNTER : Thank you, Mr. Chairman and Members. I ask you to pend
31 the bill. I'll get back with you and give you an update this week and I close.

32 CHAIR : Thank you, Mr. Chairman. Any questions? The Chair
33 withdraws the substitute of House Bill 2973. House Bill 2973 will be left pending at this
34 time.

35

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(MARCH 28, 2011)

1 [The public hearing on H.B. 2973 concluded 37 minutes and 20 seconds into the committee
2 meeting.]

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DEBATE ON H.B. 2973
ON THE FLOOR OF THE TEXAS HOUSE
(SECOND READING)
82ND LEG., R.S.
(MAY 3, 2011)

DEBATE ON H.B. 2973
ON THE FLOOR OF THE TEXAS HOUSE
(SECOND READING)
82ND LEG., R.S.
(MAY 3, 2011)

PROCEEDINGS:

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[Debate on H.B. 2973 at 8 hours, 29 minutes, and 27 seconds into the House Session.]

[Rep. Joe Strauss, Speaker of the Texas House of Representatives, in the Chair.]

SPEAKER : The Chair lays out on second reading House Bill 2973. The Clerk will read the bill.

CLERK : H.B. 2973 by Hunter relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

SPEAKER : The Chair recognizes Rep. Raymond.

REP. RICHARD RAYMOND : Thank you, Mr. Speaker, Members. This is Chairman Hunter's bill that provides for expedited motions to dismiss frivolous lawsuits aimed at retaliating against one who exercises his right of association, free speech, or right of petition. Move passage.

SPEAKER : Anyone wishing to speak for or against House Bill 2973? If not, the question occurs on passage to engrossment of House Bill 2973. All those in favor say, "Aye." Those opposed, "No." The ayes have it and House Bill 2973 is passed to engrossment. [Gavel.]

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DEBATE ON H.B. 2973
ON THE FLOOR OF THE TEXAS HOUSE
(SENATE AMENDMENTS)
82ND LEG., R.S.
(MAY 21, 2011)

DEBATE ON H.B. 2973
ON THE FLOOR OF THE TEXAS HOUSE
(SENATE AMENDMENTS)
82ND LEG., R.S.
(MAY 21, 2011)

PROCEEDINGS:

[Debate on H.B. 2973 at 28 minutes, and 43 seconds into the House Session.]

[Rep. Kuempel in the Chair.]

SPEAKER : The Chair calls up H.B. 2973 with Senate Amendments. The Clerk will read the bill.

CLERK : H.B. 2973 by Hunter relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

SPEAKER : The Chair recognizes Rep. Hunter.

REP. TODD HUNTER : Mr. Speaker, Members, this was a negotiated bill. The Senate Amendments are basically clarifying language in connection with anti-SLAPP legislation and its for the Freedom of Information folks. So it is pretty well what we passed, with just clarifying information. Move passage. [Pause.] Move to concur with Senate Amendments.

SPEAKER : Rep. Hunter moves to concur with Senate Amendments with House Bill 2973. The vote is on the motion to concur, Members. It is a record vote. The Clerk will ring the bell. [Bell.] Show Rep. Aycock voting "Aye." Have all voted? Have all voted? [Gavel.] There being 141 ayes, zero nays, H.B. 2973 is finally passed.

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DEBATE ON H.B. 2973
ON THE FLOOR OF THE TEXAS SENATE
(SECOND AND THIRD READINGS)
82ND LEG., R.S.
(MAY 18, 2011)

PROCEEDINGS:

[Debate on S.B. 2953 resumed 1 hour, 59 minutes, and 25 seconds into the floor session.]

[Sen. Eltife in the Chair.]

PRESIDENT : Sen. Ellis, you are recognized for a motion to suspend the regular order of business on Committee Substitute for House Bill 2973.

SEN. RODNEY ELLIS : Thank you, Mr. President, Members and thank you, Mr. President for your work as co-author of this bill. Members, this is the Anti-SLAPP statute, to protect citizens participation act, which will protect Texans right to speech from frivolous lawsuits. House Bill 2973 passed the House Calendars Committee, passed the House Floor 142 to zero. Members, an Anti-SLAPP – Anti-Strategic Lawsuits Against Public Participation legislation protects all Texans petitioning the government or speaking out about matters of public concern. This bill creates a bill in Texas a way for people who have been subjected to SLAPP lawsuits to protect themselves from having to give in to a plaintiff who has greater resources or other power rather than spend thousands of dollars defending themselves.

Members, Anti-SLAPP bills have been adopted in 27 other states. It's a good bill and I appreciate the work of Chairman Duncan and again, you Mr. President, the work of the Trial Lawyers, TLR, the media, and everyone coming to a consensus on this bill. I'd like to suspend the rules to take up and consider Committee Substitute to House Bill 2973.

PRESIDENT : Sen. Ellis moves suspension of the regular order of business to take up and consider the Committee Substitute for House Bill 2973. Is there objection? The Chair hears none. The rules are suspended. [Gavel] The Chair lays out on second reading Committee Substitute for House Bill 2935. The Secretary will read the Caption.

SECRETARY OF THE SENATE (PATSY SPAW) : Committee Substitute for House Bill 2935 relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits.

PRESIDENT : Sen, Ellis, you are recognized for a motion.

ELLIS : Mr. President, I move passage to third reading.

PRESIDENT : Sen. Ellis now moves passage to third reading. Is there objection? The Chair hears none. Committee substitute for House Bill 2973 is passed to third

DEBATE ON H.B. 2973
ON THE FLOOR OF THE TEXAS SENATE
(SECOND AND THIRD READINGS)
82ND LEG., R.S.
(MAY 18, 2011)

1 reading. [Gavel.] Sen. Ellis, you are recognized for a motion to suspend the constitutional
2 rule.

3 ELLIS : I move to suspend the three-day rule, Mr. President.

4 PRESIDENT : Secretary, call the roll.

5 SECRETARY : Birdwell. Carona. Davis. –

6 PRESIDENT : There being 31 ayes and zero nays, the rule is suspended.

7 [Gavel.] The Chair lays out on third reading and final passage Committee Substitute for
8 House Bill 2973. The Secretary will please read the caption.

9 SECRETARY : Committee Substitute for House Bill 2973 relating to
10 encouraging public participation by citizens by protecting a person's right to petition from
11 meritless lawsuits.

12 PRESIDENT : Sen. Ellis, you are recognized for a motion.

13 ELLIS : In honor – In honor of my co-sponsor, Sen. Eltife, I move
14 final passage.

15 PRESIDENT : Sen. Ellis now moves final passage in honor of his co-
16 sponsor, Eltife, of House Bill 2973. The Secretary will call the roll.

17 SECRETARY OF THE SENATE : Birdwell. Carona. Davis. Deuell. Duncan. –

18 PRESIDENT : [Gavel.] – 31 ayes and zero nays, Committee Substitute for
19 House Bill 2973 is finally passed. [Gavel.] Congratulations, Sen. Ellis.

20 ELLIS : Thank you, Mr. President.

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HEARINGS ON H.B. 2973 BEFORE THE SENATE COMMITTEE ON STATE AFFAIRS 82ND LEG., R.S. (MAY 12, 2011)

HEARINGS ON H.B. 2973 BEFORE
THE SENATE COMMITTEE ON STATE AFFAIRS
82ND LEG., R.S.
(MAY 12, 2011)

THE SENATE COMMITTEE ON STATE AFFAIRS:

Sen. Robert Duncan, Chair

Sen. Robert Deuell, Vice Chair

Sen. Rodney Ellis

Sen. Troy Fraser

Sen. Joan Huffman

Sen. Mike Jackson

Sen. Eddie Lucio, Jr.

Sen. Leticia Van de Putte

Sen. Tommy Williams

PROCEEDINGS:

[The public hearing on H.B. 2973 began 15 minutes, and 55 seconds into the committee's morning session.]

[Sen. Leticia Van de Putte in the Chair.]

CHAIR : The Chair calls up House Bill 2973 by Rep. Hunter relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights. Recognize Sen. Ellis on a bill that I think we have heard before.

SEN. RODNEY ELLIS : We may have heard it before, Madame Chair. This is the Anti-SLAPP statute, Anti-Strategic Lawsuits Against Public Participation legislation that protections all Texans petitioning the government or speaking out about matters of public concern. This bill creates a bill in Texas, a way for people who have been subjected to SLAPP lawsuits to protect themselves from having to give to a plaintiff who has greater resources or other power rather than spend thousand of dollars defending themselves.

Members, Anti-SLAPP bills have been adopted in 27 other states. They have never been repealed. They have only been amended to address problems that occurred in application.

Basically here's how it works. A lawsuit is filed against an individual who has said or written something the plaintiff doesn't like. Oftentimes the plaintiff is sometimes with more money and more power and because her or she doesn't like what is said or that someone with more money and more power and because that person obviously doesn't like what was said, even though it was true, the person files a lawsuit against the person seeking damages and truly with the purpose of silencing them. Defendants can't afford to defend themselves, so they do whatever the plaintiff wants for the suit to be dropped which is usually a retraction, pulling down any offending statement. So this bill is a well-crafted compromise –

CHAIR : Sen. Ellis, I believe you have a committee substitute.

ELLIS : Yes, that's the committee substitute.

CHAIR : Sen. Ellis sends up the Committee Substitute for Senate [sic] Bill 2973. Senator, will you tell us what's the difference between this and what we had passed out before?

ELLIS : It's almost identical to what we sent up before. The

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1 committee substitute which has a couple of changes. On page 7 it strike subsections (a)(1) and
2 replaces it with the following: courts costs –

3 CHAIR : Sen. Ellis. We want to recognize Sen. Fraser is in
4 attendance. Thank you – if you’ll continue.

5 ELLIS : It’s – it’s pretty much the same deal and you’ll be happy
6 with it.

7 CHAIR : Well, thank you, Senator. Members, any questions of Sen.
8 Ellis on the Committee Substitute to House Bill 2973? Any questions? If not – [Gavel] – we’ll
9 open testimony on Committee Substitute to House Bill 2973. Is there anyone here that would
10 like to testify for, on, or against Committee Substitute to House Bill 2973? Anyone else want
11 to testify for, on, or against Committee Substitute for House Bill 2973? If not – [Gavel] –
12 public testimony is closed. Senator, we will leave this one pending.

13
14 [The public hearing on H.B. 2973 resumed 31 minutes, and 5 seconds into the committee’s
15 afternoon session.]

16
17 [Sen. Robert Duncan, Chair of the Senate Committee on State Affairs, in the Chair.]

18
19 CHAIR : The Chair pulls up House Bill 2973 by Rep. Hunter – the
20 Senate sponsor, Sen. Ellis relating to encouraging public participation by citizens by
21 protecting a person’s right to petition, right of free speech, and right of association from
22 meritless lawsuits arising from actions taken in furtherance of those rights also known as
23 SLAPP anti-SLAPP bill. Sen. Ellis has previously sent up a committee substitute. Members,
24 we’ve heard this both as a Senate bill and now a House Bill. Is there any objection to the
25 adoption of the committee substitute Sen. Ellis sent up earlier today? The Chair hears none.
26 The substitute is adopted. [Gavel.] Now Sen. Ellis moves that House Bill 2973 do not pass but
27 the committee substitute in lieu thereof do pass and be printed. The Clerk will call the roll.

28 CLERK : Duncan.

29 CHAIR : Aye.

30 CLERK : Deuell.

31 SEN. ROBERT DEUELL: Aye.

32 CLERK : Ellis.

33 SEN. RODNEY ELLIS : Aye.

34 CLERK : Fraser. Huffman. Jackson. Lucio.

35 SEN. EDDIE LUCIO JR : Aye.

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- 1 CLERK : Van de Putte. Williams.
2 CHAIR : There being 9 ayes and zero nays, the House Bill –
3 Committee Substitute for House Bill 30 – 2973 will be reported to the full Senate. [Gavel.]
4 ELLIS : Mr. Chairman, I'd like to put it on Local. It's passed before
5 – unless you –
6 CHAIR : I think you might want to – bring her done to make sure
7 everybody gets an opportunity to talk about it.
8 SEN. EDDIE LUCIO : Don't push it. [Laughter.]

- SUBJECT:** Dismissing SLAPP suits on free speech, petition, and assembly grounds
- COMMITTEE:** Judiciary and Civil Jurisprudence — committee substitute recommended
- VOTE:** 10 ayes — Jackson, Lewis, Bohac, Castro, S. Davis, Hartnett, Madden, Raymond, Scott, Thompson
- 0 nays
- 1 absent — Woolley
- WITNESSES:** For — Shane Fitzgerald and Laura Prather, Freedom of Information Foundation of Texas; Joe Ellis and Laura Prather, Texas Association of Broadcasters; Laura Prather, Better Business Bureau and Texas Daily Newspaper Association; Janet Ahmad, HomeOwners for Better Building; Robin Lent, Coalition of HOA Reform; Carla Main; Brenda Johnson; (*Registered, but did not testify:* Keith Elkins, Freedom of Information Foundation of Texas; Mike Hull, Texans for Lawsuit Reform; Frank Knaack, ACLU of Texas; Arif Panju, Institute for Justice; Michael Schneider, Texas Association of Broadcasters; Tom “Smitty” Smith, Public Citizen; Ed Sterling and Doug Toney, Texas Press Association; Doug Toney, Texas Daily Newspaper Association; David Weinberg, Texas League of Conservation Voters; Ware Wendell, Texas Watch; Andy Wilson, Public Citizen, Inc.; Monty Wynn, Texas Municipal League; Irene Adolph, Coalition of HOA Reform, hoadata.org; Lou Ann Anderson; Mary Lou Durham)
- Against — None
- On — Steve Harrison, Texas Trial Lawyers Association
- DIGEST:** CSHB 2973 would allow a party to file a motion to dismiss if a lawsuit were based on that party’s exercise of the right of free speech, right to petition, or right of association. On the filing of a motion to dismiss, all discovery would be suspended until the court ruled on the motion. The court could allow specified and limited discovery on a motion by a party or on the court’s own motion and on a showing of good cause.

A court would be required to grant the motion to dismiss if the moving party showed by a preponderance of the evidence that the lawsuit was based on, related to, or was in response to the party's exercise of the right of free speech, petition, or association. A court could not grant the motion to dismiss if the plaintiff established by clear and specific evidence a prima facie case for each essential element of the claim.

If the court granted the motion to dismiss, the court would be required to award to the moving party:

- court costs, reasonable attorney's fees, and other expenses incurred in defending the lawsuit; and
- sanctions against the plaintiff to deter similar actions.

If the court found the motion to dismiss was frivolous or solely intended to delay, the court could award court costs and reasonable attorney's fees to the responding party.

The motion to dismiss would have to be filed within 60 days after service of process. The deadline could be extended by the court on a showing of good cause. A hearing on a motion to dismiss would have to be set by 30 days after the date of service of the motion, unless docket conditions required a later hearing. The court would be required to rule on the motion to dismiss by 30 days after the hearing.

The bill would provide for expedited appeal of the motion to dismiss. An appeal would have to be filed within 60 days after the order was signed or the motion was denied by operation of law.

The bill would not apply to enforcement actions by the state or a political subdivision, a lawsuit against a person primarily engaged in selling or leasing goods or services when the intended audience was a customer, or a personal injury suit.

At the request of a party filing a motion to dismiss, the court would be required to issue findings regarding whether the lawsuit was brought to deter or prevent the moving party from exercising constitutional rights and was brought for an improper purpose, including to harass, cause unnecessary delay, or increase litigation costs.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011. The bill would apply only to a legal action filed on or after the effective date.

**SUPPORTERS
SAY:**

CSHB 2973 would allow a person to file a motion to dismiss if a lawsuit was based on that person's exercise of the right of free speech, petition, or association. Citizen participation benefits society, whether it comes in the form of petitioning the government, writing a news article or blog post, or commenting on the quality of a business.

"SLAPP" suits, or strategic lawsuits against public participation, are frivolous lawsuits aimed at silencing people involved in these forms of citizen participation. In one case, a woman who complained to the Texas State Board of Medical Examiners about a doctor and later complained to a television station was sued by the doctor. The suit eventually was dismissed, but the television station was forced to pay \$100,000 in legal expenses. SLAPP suits chill public debate because they cost money to defend, even if the person being sued was speaking the truth. These suits are particularly problematic for independent voices that are not part of a news or media company. SLAPP suits are becoming more common, in part because the Internet has created a searchable record of public participation.

Under current law, the victim of a SLAPP suit must rely on a motion for summary judgment. While summary judgment disposes of a controversy before a trial, both parties still must conduct expensive discovery. By allowing a motion to dismiss, CSHB 2973 would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system.

Anti-SLAPP legislation similar to this bill has been passed by 27 states and the District of Columbia.

**OPPONENTS
SAY:**

HB 2973, if interpreted broadly, could be used to intimidate legitimate plaintiffs. It could stifle suits brought legitimately under libel or slander laws because the plaintiff in such suits would have to overcome motions testing its pleadings.

The Senate companion bill contains language that would limit court costs, attorney fees, and other expenses “as justice and equity may require.” This language should be added to the House bill to ensure a court could award attorney fees that were lower than what the attorney typically charges, if appropriate.

NOTES:

The companion bill, SB 1565 by Ellis, was reported favorably, as substituted, by the Senate State Affairs Committee on April 13.

HOUSE JOURNAL

EIGHTY-SECOND LEGISLATURE, REGULAR SESSION

PROCEEDINGS

SIXTY-SEVENTH DAY — TUESDAY, MAY 3, 2011

The house met at 1 p.m. and was called to order by the speaker pro tempore.

The roll of the house was called and a quorum was announced present (Record 629).

Present — Mr. Speaker; Aliseda; Allen; Alonzo; Alvarado; Anchia; Anderson, C.; Anderson, R.; Aycock; Beck; Berman; Bohac; Bonnen; Branch; Brown; Burkett; Burnam; Button; Cain; Callegari; Carter; Castro; Chisum; Christian; Coleman; Cook; Craddick; Creighton; Crownover; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Driver; Dukes; Dutton; Eiland; Eissler; Elkins; Farias; Farrar; Fletcher; Flynn; Frullo; Gallego; Garza; Geren; Giddings; Gonzales, L.; Gonzales, V.; Gonzalez; Gooden; Guillen; Gutierrez; Hamilton; Hancock; Hardcastle; Harless; Harper-Brown; Hartnett; Hernandez Luna; Hilderbran; Hochberg; Hopson; Howard, C.; Howard, D.; Huberty; Hughes; Hunter; Isaac; Jackson; Johnson; Keffer; King, P.; King, S.; King, T.; Kleinschmidt; Kolkhorst; Kuempel; Landtroop; Larson; Laubenberg; Lavender; Legler; Lewis; Lozano; Lucio; Lyne; Madden; Mallory Caraway; Margo; Marquez; Martinez; Martinez Fischer; McClendon; Menendez; Miles; Miller, D.; Miller, S.; Morrison; Muñoz; Murphy; Naishtat; Nash; Oliveira; Orr; Otto; Parker; Patrick; Paxton; Peña; Perry; Phillips; Pickett; Pitts; Price; Quintanilla; Raymond; Reynolds; Riddle; Ritter; Rodriguez; Schwertner; Scott; Sheets; Sheffield; Shelton; Simpson; Smith, T.; Smith, W.; Smithee; Solomons; Strama; Taylor, L.; Taylor, V.; Thompson; Torres; Truitt; Turner; Veasey; Villarreal; Vo; Walle; Weber; White; Woolley; Workman; Zedler; Zerwas.

LEAVES OF ABSENCE GRANTED

On motion of Representative McClendon and by unanimous consent, all members who were granted leaves of absence on the previous legislative day were granted leaves for this legislative day.

RULES SUSPENDED

Representative McClendon moved to suspend all necessary rules to take up and consider at this time, on third reading and final passage, the bills on the local, consent, and resolutions calendar which were considered on the previous legislative day.

The motion prevailed.

CSHB 2735 ON SECOND READING
(by Madden)

CSHB 2735, A bill to be entitled An Act relating to procedures for certain persons charged with an administrative violation of a condition of release from the Texas Department of Criminal Justice on parole or to mandatory supervision.

CSHB 2735 was passed to engrossment.

HB 2826 ON SECOND READING
(by Murphy and Coleman)

HB 2826, A bill to be entitled An Act relating to the issuance of a certificate for a municipal setting designation.

HB 2826 was passed to engrossment.

HB 2940 ON SECOND READING
(by T. King)

HB 2940, A bill to be entitled An Act relating to the form of death certificates and fetal death certificates.

HB 2940 was passed to engrossment. (Sheffield recorded voting no.)

CSHB 2963 ON SECOND READING
(by Crownover)

CSHB 2963, A bill to be entitled An Act relating to deadlines for the Railroad Commission of Texas to review certain applications for surface coal mining operation permits.

Representative Crownover moved to postpone consideration of **CSHB 2963** until 8 a.m. Friday, May 6.

The motion prevailed.

CSHB 2973 ON SECOND READING
(by Hunter, Raymond, Hochberg, Martinez Fischer, et al.)

CSHB 2973, A bill to be entitled An Act relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

CSHB 2973 was passed to engrossment.

CSHB 2902 ON SECOND READING
(by Zerwas)

CSHB 2902, A bill to be entitled An Act relating to the release of extraterritorial jurisdiction by certain general-law municipalities.

Amendment No. 1

Representative Martinez offered the following amendment to **CSHB 2902**:

HOUSE JOURNAL

EIGHTY-SECOND LEGISLATURE, REGULAR SESSION

PROCEEDINGS

SIXTY-EIGHTH DAY — WEDNESDAY, MAY 4, 2011

The house met at 10 a.m. and was called to order by the speaker.

The roll of the house was called and a quorum was announced present (Record 660).

Present — Mr. Speaker; Aliseda; Allen; Alonzo; Alvarado; Anchia; Anderson, C.; Anderson, R.; Aycock; Beck; Berman; Bohac; Bonnen; Branch; Brown; Burkett; Burnam; Button; Cain; Callegari; Carter; Castro; Chisum; Christian; Coleman; Cook; Craddick; Creighton; Crownover; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Driver; Dukes; Dutton; Eiland; Eissler; Elkins; Farias; Farrar; Fletcher; Flynn; Frullo; Gallego; Garza; Geren; Giddings; Gonzales, L.; Gonzales, V.; Gonzalez; Gooden; Guillen; Gutierrez; Hamilton; Hancock; Hardcastle; Harless; Harper-Brown; Hartnett; Hernandez Luna; Hilderbran; Hopson; Howard, C.; Howard, D.; Huberty; Hughes; Hunter; Isaac; Jackson; Johnson; Keffer; King, P.; King, S.; Kleinschmidt; Kolkhorst; Kuempel; Landtroop; Larson; Laubenberg; Lavender; Legler; Lewis; Lozano; Lucio; Lyne; Madden; Mallory Caraway; Margo; Marquez; Martinez; Martinez Fischer; McClendon; Menendez; Miles; Miller, D.; Miller, S.; Morrison; Muñoz; Murphy; Naishtat; Nash; Oliveira; Orr; Otto; Parker; Patrick; Paxton; Peña; Perry; Phillips; Pickett; Pitts; Price; Quintanilla; Raymond; Reynolds; Riddle; Ritter; Rodriguez; Schwertner; Scott; Sheets; Sheffield; Shelton; Simpson; Smith, T.; Smith, W.; Smithee; Solomons; Strama; Taylor, L.; Taylor, V.; Thompson; Torres; Truitt; Turner; Veasey; Villarreal; Vo; Walle; Weber; White; Woolley; Workman; Zedler; Zerwas.

Absent — Hochberg; King, T.

The invocation was offered by Dr. Clark A. Mahoney, pastor, Hillister Baptist Church, Hillister, as follows:

Our dear benevolent Father, we give you thanks this day for this place where we now stand, for the decisions that have been made in this honorable house. Being thankful for our great leaders of the past, and for these great men and women who have been chosen by you and appointed by the state to govern for the people of the great, great State of Texas. We humbly beseech you, praying for divine wisdom.

Grant these, your leaders, to accomplish not only the will of the people, but your perfect will. May each representative from all parties work together in cooperation to accomplish the many tasks set before them this day. I ask for your blessings of health and for prosperity upon all of those in this chamber. Would you reward them for their sacrificial and tireless service for the people of our

Absent — Gutierrez; Oliveira.

HB 2973 ON THIRD READING
(by Hunter, Raymond, Hochberg, Martinez Fischer, et al.)

HB 2973, A bill to be entitled An Act relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

HB 2973 was passed by (Record 689): 142 Yeas, 0 Nays, 2 Present, not voting.

Yeas — Aliseda; Allen; Alonzo; Alvarado; Anchia; Anderson, C.; Anderson, R.; Aycock; Beck; Berman; Bohac; Branch; Brown; Burkett; Burnam; Button; Cain; Callegari; Carter; Castro; Chisum; Christian; Coleman; Cook; Craddick; Creighton; Crownover; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Driver; Dukes; Dutton; Eiland; Eissler; Elkins; Farias; Farrar; Fletcher; Flynn; Frullo; Gallego; Garza; Geren; Giddings; Gonzales, L.; Gonzales, V.; Gonzalez; Gooden; Guillen; Hamilton; Hancock; Hardcastle; Harless; Harper-Brown; Hartnett; Hernandez Luna; Hilderbran; Hochberg; Howard, C.; Howard, D.; Huberty; Hughes; Hunter; Isaac; Jackson; Johnson; Keffer; King, P.; King, S.; King, T.; Kleinschmidt; Kolkhorst; Kuempel; Landtroop; Larson; Laubenberg; Lavender; Legler; Lewis; Lozano; Lucio; Lyne; Madden; Mallory Caraway; Margo; Marquez; Martinez; Martinez Fischer; McClendon; Menendez; Miles; Miller, D.; Miller, S.; Muñoz; Murphy; Nash; Orr; Otto; Parker; Patrick; Paxton; Peña; Perry; Phillips; Pickett; Pitts; Price; Quintanilla; Raymond; Reynolds; Riddle; Ritter; Rodriguez; Schwertner; Scott; Sheets; Sheffield; Shelton; Simpson; Smith, T.; Smith, W.; Smithee; Solomons; Strama; Taylor, L.; Taylor, V.; Thompson; Torres; Turner; Veasey; Villarreal; Vo; Walle; Weber; White; Woolley; Workman; Zedler; Zerwas.

Present, not voting — Mr. Speaker; Bonnen(C).

Absent, Excused — Hopson; Morrison; Truitt.

Absent — Gutierrez; Naishtat; Oliveira.

STATEMENT OF VOTE

When Record No. 689 was taken, I was in the house but away from my desk. I would have voted yes.

Naishtat

HB 2902 ON THIRD READING
(by Zerwas)

HB 2902, A bill to be entitled An Act relating to the release of extraterritorial jurisdiction by certain general-law municipalities.

HB 2902 was passed by (Record 690): 140 Yeas, 0 Nays, 2 Present, not voting.

HOUSE JOURNAL

EIGHTY-SECOND LEGISLATURE, REGULAR SESSION

PROCEEDINGS

EIGHTY-SECOND DAY — SATURDAY, MAY 21, 2011

The house met at 10 a.m. and was called to order by the speaker.

The roll of the house was called and a quorum was announced present (Record 1230).

Present — Mr. Speaker; Aliseda; Allen; Alonzo; Anchia; Anderson, C.; Anderson, R.; Aycock; Beck; Berman; Bohac; Bonnen; Branch; Brown; Burkett; Burnam; Button; Cain; Callegari; Carter; Castro; Chisum; Christian; Coleman; Cook; Craddick; Creighton; Crownover; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Driver; Dukes; Dutton; Eiland; Eissler; Elkins; Farias; Farrar; Fletcher; Flynn; Frullo; Gallego; Garza; Geren; Giddings; Gonzales, L.; Gonzales, V.; Gonzalez; Gooden; Guillen; Gutierrez; Hamilton; Hancock; Hardcastle; Harless; Harper-Brown; Hartnett; Hernandez Luna; Hilderbran; Hochberg; Hopson; Howard, C.; Howard, D.; Huberty; Hughes; Hunter; Isaac; Jackson; Johnson; Keffer; King, P.; King, S.; King, T.; Kleinschmidt; Kolkhorst; Kuempel; Landtroop; Larson; Laubenberg; Lavender; Legler; Lewis; Lozano; Lucio; Lyne; Madden; Mallory Caraway; Margo; Marquez; Martinez; Martinez Fischer; McClendon; Menendez; Miles; Miller, D.; Miller, S.; Morrison; Muñoz; Murphy; Naishtat; Nash; Oliveira; Orr; Otto; Parker; Patrick; Paxton; Peña; Perry; Phillips; Pickett; Pitts; Price; Quintanilla; Raymond; Reynolds; Riddle; Ritter; Rodriguez; Schwertner; Scott; Sheets; Sheffield; Shelton; Simpson; Smith, T.; Smith, W.; Smithee; Solomons; Strama; Taylor, L.; Taylor, V.; Thompson; Torres; Truitt; Turner; Veasey; Villarreal; Vo; Walle; Weber; White; Woolley; Workman; Zedler; Zerwas.

Absent — Alvarado.

Invocations were offered by Bill Rasco, pulpit minister, Spring Creek Church of Christ, Tomball, and Kerry Baker, rabbi, Austin.

The speaker recognized Representative Berman who led the house in the pledges of allegiance to the United States and Texas flags.

REGULAR ORDER OF BUSINESS SUSPENDED

On motion of Representative Fletcher and by unanimous consent, the reading and referral of bills was postponed until just prior to adjournment.

Texas delegation to Congress with the request that this resolution be entered in the Congressional Record as a memorial to the Congress of the United States of America.

HB 2973 - HOUSE CONCURS IN SENATE AMENDMENTS
TEXT OF SENATE AMENDMENTS

Representative Hunter called up with senate amendments for consideration at this time,

HB 2973, A bill to be entitled An Act relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

Representative Hunter moved to concur in the senate amendments to **HB 2973**.

The motion to concur in the senate amendments to **HB 2973** prevailed by (Record 1232): 141 Yeas, 0 Nays, 2 Present, not voting.

Yeas — Aliseda; Allen; Alonzo; Anchia; Anderson, C.; Anderson, R.; Aycock; Beck; Berman; Bohac; Bonnen; Branch; Brown; Burkett; Burnam; Button; Cain; Callegari; Carter; Castro; Chisum; Christian; Coleman; Cook; Craddick; Creighton; Crownover; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Driver; Dukes; Dutton; Eiland; Eissler; Elkins; Farias; Farrar; Fletcher; Flynn; Frullo; Gallego; Garza; Geren; Giddings; Gonzales, L.; Gonzales, V.; Gonzalez; Gooden; Guillen; Gutierrez; Hamilton; Hancock; Hardcastle; Harless; Harper-Brown; Hartnett; Hilderbran; Hochberg; Hopson; Howard, C.; Howard, D.; Huberty; Hughes; Hunter; Isaac; Jackson; Keffer; King, P.; King, S.; King, T.; Kleinschmidt; Kolkhorst; Landtroop; Larson; Laubenberg; Lavender; Legler; Lewis; Lozano; Lucio; Madden; Mallory Caraway; Margo; Marquez; Martinez; Martinez Fischer; McClendon; Menendez; Miller, D.; Miller, S.; Morrison; Muñoz; Murphy; Nash; Oliveira; Orr; Otto; Parker; Patrick; Paxton; Peña; Perry; Phillips; Pickett; Pitts; Price; Quintanilla; Reynolds; Riddle; Ritter; Rodriguez; Schwertner; Scott; Sheets; Sheffield; Shelton; Simpson; Smith, T.; Smith, W.; Smithee; Solomons; Strama; Taylor, L.; Taylor, V.; Thompson; Torres; Truitt; Turner; Veasey; Villarreal; Vo; Walle; Weber; White; Woolley; Workman; Zedler; Zerwas.

Present, not voting — Mr. Speaker; Kuempel(C).

Absent, Excused — Hernandez Luna.

Absent — Alvarado; Johnson; Lyne; Miles; Naishtat; Raymond.

STATEMENT OF VOTE

When Record No. 1232 was taken, I was temporarily out of the house chamber. I would have voted yes.

Alvarado

Senate Committee Substitute

CSHB 2973, A bill to be entitled An Act relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as the Citizens Participation Act.

SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 27 to read as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Sec. 27.004. HEARING. A hearing on a motion under Section 27.003 must be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

- (1) the right of free speech;
- (2) the right to petition; or
- (3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An 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.

(c) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

SECTION 3. The change in law made by this Act applies only to a legal action filed on or after the effective date of this Act. A legal action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

HB 3342 - HOUSE CONCURS IN SENATE AMENDMENTS TEXT OF SENATE AMENDMENTS

Representative Naishtat called up with senate amendments for consideration at this time,

HB 3342, A bill to be entitled An Act relating to representation of and by the state and joinder of the state in certain mental health proceedings.

SENATE JOURNAL

EIGHTY-SECOND LEGISLATURE — REGULAR SESSION

AUSTIN, TEXAS

PROCEEDINGS

SIXTY-SECOND DAY

(Wednesday, May 18, 2011)

The Senate met at 11:06 a.m. pursuant to adjournment and was called to order by Senator Eltife.

The roll was called and the following Senators were present: Birdwell, Carona, Davis, Deuell, Duncan, Ellis, Eltife, Estes, Fraser, Gallegos, Harris, Hegar, Hinojosa, Huffman, Jackson, Lucio, Nelson, Nichols, Ogden, Patrick, Rodriguez, Seliger, Shapiro, Uresti, Van de Putte, Watson, Wentworth, West, Whitmire, Williams, Zaffirini.

The Presiding Officer announced that a quorum of the Senate was present.

The Reverend Denny Henderson, Hill Country Bible Church UT, Austin, offered the invocation as follows:

Father, we recognize today that You are intimately acquainted with our every need and our every challenge. As the psalmist wrote, You have humbled Yourself to know the things of heaven and the things of Earth. (Psalm 113:6) So nothing is a surprise to You, nor are You apathetic toward the affairs of man. We affirm this morning that You have blessed us richly and that every good and perfect gift is from You. We acknowledge both Your goodness in our abundance and Your faithfulness in our challenges. I pray this morning that You will give wisdom to those who lead our great state. As Your elected public servants, may each lead with compassion, conviction, and integrity, placing the good of the people above their own interests. Give them divine wisdom and unity in their decision-making. I pray for their families, who have also sacrificed for the good of others. May Your blessing and comfort be present in their everyday life. Grant each man and woman here this morning the courage to lead the people of Texas honorably. Equip them for complete usefulness and service for others. May they steward their leadership well. We praise You in advance for Your complete faithfulness, and, God, may You bless Texas. Amen.

Senator Whitmire moved that the reading of the Journal of the proceedings of the previous day be dispensed with and the Journal be approved as printed.

The motion prevailed without objection.

The bill was read third time and was passed by the following vote: Yeas 31, Nays 0.

COMMITTEE SUBSTITUTE
HOUSE BILL 2973 ON SECOND READING

On motion of Senator Ellis and by unanimous consent, the regular order of business was suspended to take up for consideration **CSHB 2973** at this time on its second reading:

CSHB 2973, Relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

The bill was read second time and was passed to third reading by a viva voce vote.

All Members are deemed to have voted "Yea" on the passage to third reading.

COMMITTEE SUBSTITUTE
HOUSE BILL 2973 ON THIRD READING

Senator Ellis moved that Senate Rule 7.18 and the Constitutional Rule requiring bills to be read on three several days be suspended and that **CSHB 2973** be placed on its third reading and final passage.

The motion prevailed by the following vote: Yeas 31, Nays 0.

The bill was read third time and was passed by the following vote: Yeas 31, Nays 0.

HOUSE BILL 2007 ON SECOND READING

On motion of Senator Davis and by unanimous consent, the regular order of business was suspended to take up for consideration **HB 2007** at this time on its second reading:

HB 2007, Relating to payment by the Benbrook Water Authority for certain damages caused by the authority's operation of a sanitary sewer system.

The bill was read second time and was passed to third reading by a viva voce vote.

All Members are deemed to have voted "Yea" on the passage to third reading.

HOUSE BILL 2007 ON THIRD READING

Senator Davis moved that Senate Rule 7.18 and the Constitutional Rule requiring bills to be read on three several days be suspended and that **HB 2007** be placed on its third reading and final passage.

The motion prevailed by the following vote: Yeas 31, Nays 0.

The bill was read third time and was passed by the following vote: Yeas 31, Nays 0.

GENERAL AND SPECIAL LAWS
OF
THE STATE OF TEXAS

Passed By The
REGULAR SESSION
of the
EIGHTY-SECOND LEGISLATURE

Convened at the
City of Austin, January 11, 2011

and

Adjourned May 30, 2011

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(e) ~~All [After the expiration of the probationary term of the individual's employment, all] criminal history record information obtained about an individual under Subsection (b) shall be destroyed by the *coordinating board or by the* chief of police of the institution of higher education, *as applicable, as soon as practicable after the individual becomes employed in a security-sensitive position and after the expiration of any probationary term of employment or, if the individual is not hired for a security-sensitive position, after the information is used for its authorized purpose.*~~

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

Passed by the House on April 26, 2011: Yeas 148, Nays 0, 2 present, not voting; passed by the Senate on May 19, 2011: Yeas 31, Nays 0.

Approved June 17, 2011.

Effective June 17, 2011.

CHAPTER 341

H.B. No. 2973

AN ACT

relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. This Act may be cited as the Citizens Participation Act.

SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 27 to read as follows:

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Sec. 27.002. **PURPOSE.** The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. **MOTION TO DISMISS.** (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) *Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.*

Sec. 27.004. HEARING. A hearing on a motion under Section 27.003 must be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) *Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:*

- (1) *the right of free speech;*
- (2) *the right to petition; or*
- (3) *the right of association.*

(c) *The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.*

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) *On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.*

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) *The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.*

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) *An 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.*

(c) *An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.*

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

- (1) *court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and*
- (2) *sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.*

(b) *If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.*

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) *This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer.*

(c) *This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.*

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

SECTION 3. The change in law made by this Act applies only to a legal action filed on or after the effective date of this Act. A legal action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

Passed by the House on May 4, 2011: Yeas 142, Nays 0, 2 present, not voting; the House concurred in Senate amendments to H.B. No. 2973 on May 21, 2011: Yeas 141, Nays 0, 2 present, not voting; passed by the Senate, with amendments, on May 18, 2011: Yeas 31, Nays 0.

Approved June 17, 2011.

Effective June 17, 2011.

CHAPTER 342

H.B. No. 2978

AN ACT

relating to the applicability of open meetings requirements to certain meetings of the governing board of a county hospital or county hospital authority.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 551.085(a), Government Code, is amended to read as follows:

(a) This chapter does not require the governing board of a municipal hospital, municipal hospital authority, *county hospital*, *county hospital authority*, hospital district created under general or special law, or nonprofit health maintenance organization created under Section 534.101, Health and Safety Code, to conduct an open meeting to deliberate:

(1) pricing or financial planning information relating to a bid or negotiation for the arrangement or provision of services or product lines to another person if disclosure of the information would give advantage to competitors of the hospital, hospital district, or nonprofit health maintenance organization; or

(2) information relating to a proposed new service or product line of the hospital, hospital district, or nonprofit health maintenance organization before publicly announcing the service or product line.

SECTION 2. This Act takes effect September 1, 2011.

Passed by the House on May 3, 2011: Yeas 140, Nays 4, 1 present, not voting; passed by the Senate on May 19, 2011: Yeas 31, Nays 0.

Approved June 17, 2011.

Effective September 1, 2011.

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**HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND
CIVIL PRACTICE
82ND LEG., R.S.
(APRIL 4, 2011)**

HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
82ND LEG., R.S.
(APRIL 4, 2011)

THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE:

Rep. Jim Jackson, Chair

Rep. Tryon D. Lewis, Vice-Chair

Rep. Rep. Dwayne Bohac

Rep. Joaquin Castro

Rep. Sarah Davis

Rep. Will Hartnett

Rep. Jerry Madden

Rep. Richard Pena Raymond

Rep. Connie Scott

Rep. Senfronia Thompson

Rep. Beverly Woolley

HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
82ND LEG., R.S.
(APRIL 4, 2011)

PROCEEDINGS:

[The public hearing on H.B. 2973 began 2 hours, 59 minutes and 45 seconds into the committee meeting.]

[Rep. Jim Jackson, Chair of the House Committee on Judiciary and Civil Practice, in the Chair.]

CHAIR : The Chair lays out House Bill 2973 as pending business. Members, we had adopted this substitute last meeting. This is the – what Chairman Hunter called the SLAPP bill. Rep. Madden moves that House Bill 2973 as substituted, be reported to the full House with the recommendation that it do pass and be printed and placed on the General Calendar. The Clerk will call the roll.

CLERK : Chairman Jackson

CHAIR : Aye.

CLERK : Judge Lewis

REP. TRYON LEWIS : Aye.

CLERK : Rep. Castro

REP. JOAQUIN CASTRO : Aye.

CLERK : Rep. Davis.

REP. SARAH DAVIS : Aye.

CLERK : Rep. Hartnett.

REP. WILL HARTNETT: Aye.

CLERK : Chairman Madden

REP. JERRY MADDEN : Aye.

CLERK : Chairman Raymond.

REP. RICHARD PENA RAYMOND : Aye.

CLERK : Rep. Scott.

REP. CONNIE SCOTT : Aye.

CLERK : Chairman Thompson.

REP. SENFRONIA THOMPSON : Aye.

CLERK : Speaker Woolley.

REP. BEVERLY WOOLLEY : Aye.

CLERK : Rep. Bohac

REP. DEWAYNE BOHAC : Aye.

HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
82ND LEG., R.S.
(APRIL 4, 2011)

1

CLERK : There being ten ayes and one absence, the motion prevails.

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**HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND
CIVIL PRACTICE
82ND LEG., R.S.
(MARCH 28, 2011)**

HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
82ND LEG., R.S.
(MARCH 28, 2011)

THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE:

Rep. Jim Jackson, Chair

Rep. Tryon D. Lewis, Vice-Chair

Rep. Rep. Dwayne Bohac

Rep. Joaquin Castro

Rep. Sarah Davis

Rep. Will Hartnett

Rep. Jerry Madden

Rep. Richard Pena Raymond

Rep. Connie Scott

Rep. Senfronia Thompson

Rep. Beverly Woolley

HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
82ND LEG., R.S.
(MARCH 28, 2011)

PROCEEDINGS:

[The public hearing on H.B. 2973 began 4 minutes and 15 seconds into the committee meeting.]

[Rep. Jim Jackson, Chair of the House Committee on Judiciary and Civil Practice, in the Chair.]

CHAIR : Chair calls up House Bill 2973. Chair lays up House Bill 2973. Rep. Hartnett moves that the substitute from House Bill 2973 be adopted. Is there any objection? There being no objections, the substitute is adopted. Chair calls on Chairman Hunter to explain the bill.

REP. TODD HUNTER : Members, some of you have been on the committee before especially Will and Richard. We have seen through the years what is called SLAPP suits and this bill is basically anti-SLAPP suits – Strategic Lawsuits Against Public Participation, is what a SLAPP suit is. Unfortunately we do have abuse in the legal system at certain times and that basically, trying to silence individuals or groups. This type of law has been passed in 27 jurisdictions and has never repealed. The purpose of the bill is to encourage public participation of Texas citizens and basically to safeguard constitutional rights of persons to petition, speak freely, associate freely and participate in government. It also provides for an expedited motion to dismiss in lawsuits like these that are filed frivolously, mainly aimed at retaliating against one who exercises their freedom of speech or right of petition and it also establishes some important efficiencies to try to handle this matter and it provides for basically dismissal, uh, set up. And I'm going to ask Mr. Chairman that, to take the testimony but that you leave the bill pending and I will give you an update through the week, if anybody has any clarification or has suggestions.

CHAIR : Thank you Mr. Chairman. Are there any questions before we hear testimony from witnesses? The Chair calls – Wendell – Ware Wendell is for the bill does not wish to testify. Are there other –? Sean Jordan?

CLERK : [Off-mike comments]

CHAIR : Oh that's the last one, okay. Oh, we got a whole list of them here. Michael Schneider, is for the bill, does not wish to testify. Ted Melina Rabb, is against the bill, does not wish to testify. Joe Ellis? Is Joe Ellis here? Mr. Ellis – How are you doing?

JOE ELLIS : [Off-mike.] I'm doing great. How are you, sir?

CHAIR : If you would give us your name, who you represent and

HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
82ND LEG., R.S.
(MARCH 28, 2011)

1 your position on the bill.

2 ELLIS : Good afternoon, Mr. Chairman, Members of the committee,
3 thanks for the opportunity to be here today. I represent Texas Association of Broadcasters, I
4 work for KDFW in Dallas, and we hope you'll consider this bill and agree that this is an
5 opportunity to help provide some protection for whistleblowers and this shouldn't be
6 missed, we in the news media we hear from people who have information that is of
7 legitimate public interest, even concerned government officials, law enforcement and
8 lawmakers, yet they fear legal retaliation for coming forward and often those people back
9 down and don't reveal what they know due to this fear and that's a chilling effect that it has
10 on the flow of that valuable information. Other times they do come forward, but they are
11 sued in court in an effort to keep them quiet, another chilling effect that we hope to
12 recognize. When it happens as was mentioned before me, it's an abuse of our court systems
13 and infringement on peoples' freedom of speech rights.

14 And let me give you a couple of examples if I may. Last
15 year KDFW did a story addressing the billions of federal tax dollars that are poured into
16 tutoring programs to help underachieving students through the No Child Left Behind Act –
17 companies that profit from this federal money that is passed through the states. We talked to
18 former employees, as well as parents and students who said these tutoring programs offered
19 by one particular company were far too basic and of little help toward academic achievement
20 and supplied basic content the same year after year for returning students. The parents and
21 students and former employees say the company offered up front gift incentives for
22 participating in this program which is a violation of the state and federal rule for these funds.
23 The former employees of the company say they were fired for raising concerns about the
24 company's practices and filing complaints with the state regulatory authorities. School
25 districts even complained about the company's practices, saying they were out of line with
26 regulations but, as KDFW found there is little oversight in the accountability over these funds
27 and companies that are receiving them. The company involved filed suit against two former
28 employees that worked with KDFW and helped provide some information and the suit
29 alleged all kinds of things including defamation and civil conspiracy and that the two former
30 employees were disgruntled and were conspiring with others to basically slander the
31 company. The company also threatened to sue us and sent us a cease and desist order. The
32 two former employees were unable to defend themselves through counsel and were ordered
33 to discontinue communications with us. The lawsuits against those people are still pending.

34 Yet another example, KDFW in 2008 did a story
35 addressing Medicare fraud and the billions of taxpayers dollars lost every year. With the help

HEARINGS ON H.B. 2973 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
82ND LEG., R.S.
(MARCH 28, 2011)

1 of a former employee we exposed a Nigerian national using multiple identities to set up and
2 operate fraudulent home health care businesses. This woman was in the country illegally and
3 ordered deported nearly two decades ago, yet she was able to set up multiple home health
4 care agencies and collect millions of dollars through Medicare for patients who would not
5 typically qualify for home care coverage and for patients who receive no home health care at
6 all. This story exposed shortcomings in the state system of checks for licensing of home care
7 providers. This particular person operating these companies was previously licensed, but
8 was revoked due to some problems and yet she still got multiple licenses afterwards. Yet
9 some employees has reported fraud to the state, but nothing happened. In fact the Texas
10 Department Of Aging And Disability claimed it did its own investigation but turned up
11 nothing, clearing the way for her to continue to receive these funds. In days leading up to our
12 story the person was arrested and placed in federal custody on immigration fraud charges
13 and Medicaid fraud charges –

14 CHAIR : Let the record reflect that Rep. Bohac is here. Go ahead.

15 ELLIS : Okay. Anyway, she was arrested and had fraud charges
16 filed against her and she was eventually sentenced to federal prison and ordered to forfeit
17 assets and pay restitution. However, in the days leading up to our story, her company filed
18 suit against us alleging that former employees were disgruntled and intended to slander the
19 company. The suit made allegations against us and our intentions, which it had no idea what
20 our intentions were. But – anyway, it tried to stop these people from speaking out and our
21 story from running. Luckily, that case was non-suited because that person was eventually
22 arrested and detained and not released on bail.

23 As a result of that particular situation, Sen. Jane Nelson
24 filed legislation that would strengthen the requirements for people obtaining a health care
25 license in Texas that Senate Bill 78, which is – has moved through the Senate and is now in
26 the House awaiting a committee referral.

27 One last example if I may and I'll close. Back in 2005 we
28 reported on a Dallas city councilman who is also the treasurer of a non-profit community
29 development corporation. This CDC received federal grant money for community
30 development projects in neglected parts of south Dallas. The counsel man was ousted from
31 his position as CDC treasurer after it was discovered that he embezzled some \$50,000 by
32 writing checks to himself and family members from the CDC account. The CDC board made
33 attempts to get the money repaid without going to law enforcement or going public, but in
34 response – as our story showed, the counsel man retaliated by suing the CDC's board
35 chairperson for slander and libel, costing them unnecessary time and stress and money.

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1 Meanwhile, the board members were afraid to do anything further about it, fearing the
2 councilman's position of power. That councilman was eventually indicted and convicted in
3 federal court.

4 CHAIR : Are there any questions for Mr. Ellis? Any questions?
5 Thank you Mr. Ellis.

6 ELLIS : Ok, thank you very much for being heard. I hope you'll
7 consider this bill so we can have some more protection for whistleblowers out there.

8 CHAIR : This can be and will be for some people here a pretty
9 emotional issue. Please try to limit your testimony to about three minutes and be very direct
10 and tell us what we need to hear, because we are going to have a long night tonight. Chair
11 calls Brenda Johnson. Ms. Johnson, give us your name, who you represent and your position
12 on the bill.

13 BRENDA JOHNSON : My name is Brenda Johnson. I'm a resident from San
14 Antonio and an HOA resident and litigate in civil litigation.

15 CHAIR : Okay, tell us – tell us your position.

16 JOHNSON : Thank you, Chairman. I'm for the bill.

17 CHAIR : Okay.

18 JOHNSON : Thank Chairman, Vice Chairman, ladies and gentleman of
19 the committee for this opportunity to tell my story or should I say stories as they appeared in
20 the news. First it was "Homeowners association sues its members, racks up eight thousand
21 dollar legal bill" then, "Residents say HOA election rigged," then "Bully HOA president
22 ousted." Finally, "Ventura HOA president resigns." After 20 years HOA members were shut
23 out of their board meetings, restricted at town hall meetings, and had their annual meetings
24 hijacked. Residents first requested, then demanded to be heard, the board refused. Residents
25 presented the board with a demand to hold a special meeting in according with the by-laws
26 and the board singled out eight residents and sued rather than meet with its constituency.
27 After two years, five lawsuits involving several law firms and an estimated \$300,000 in legal
28 and related fees by all sides, a near riot at our October 2010 annual meeting, a court
29 injunction invalidating that meeting, resignation of the board, a court appointed interim
30 manager, and a court ordered do over annual meeting, homeowners are again able to
31 participate in governing our HOA. We are still assesses the damage and picking up the
32 pieces, but we ended a two-year siege of 1,132 home HOA.

33 The civil suit that started it all was nothing more than
34 intentional tort in the form of a SLAPP, a Strategic Lawsuit Against Public Participation.
35 Defending this suit required a substantial investment of money, time, and resources. The

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1 and we don't know what's gonna happen.

2 But, a lot of times they say that you know, HOA boards
3 should be liable for their actions. I think that as long as advocates have to carry insurance and
4 have to be liable for their actions, we all should be able to have a level playing field. I brought
5 you today letters – threat letters that – we received.

6 CHAIR : Any questions? Any questions of Ms. Lent? Any questions
7 for Ms. Lent? Thank you Ms. Lent. Carla Main.

8 CARLA MAIN : Good Afternoon. My name is Carla Main. I came here from
9 New Jersey to testify in support of this bill. I'm a journalist; I also practice law in New York
10 City so I come to this issue with a background on understanding –

11 CHAIR : You did not mark on witness form –

12 MAIN : Yes.

13 CHAIR : – that you are testifying for, against or neutral. Would you
14 come up and mark it for me please? And you are testifying for the bill? Okay. Thank you.

15 MAIN : I'm interested in this bill because I am a journalist and I
16 wrote a book. The book was called "Bulldozed." It's about an imminent domain controversy
17 in a city in Texas. The city was Freeport and a year after I wrote this book I was sued in state
18 court in Dallas. This was a book that was generally recognized around the country. It was
19 reviewed in newspapers and magazines all around the country. It won an award for political
20 science writing. It was published by Encounter Books, which is a very serious non-profit
21 publisher that publishes well regarded intellectual books – it is funded by the Bradley
22 Foundation. The person who sued was a real estate developer who was discussed in the book
23 and he sued not just me, but my publisher and a very esteemed professor who wrote a blurb
24 that appeared on the back of the book. He also sued a small community newspaper and a
25 freelance writer who wrote a review of my book. The practical result of having sued that
26 community newspaper and the book reviewer was that we were unable to remove or transfer
27 the case to federal court for a motion to dismiss which would have effectively gotten rid of
28 the case very quickly. That is the type of remedy that this bill would have enable to have if
29 this bill had been in existence at the time.

30 Instead we have litigated the case now for two and half
31 years. The community newspaper and the freelance writer are no longer defendants in that
32 case, because one week and a day after the time elapsed from when we could have dismissed
33 that case they were let out of the case. They settled with the real estate developer who sued
34 them. We unfortunately are still defendants, myself and my publisher.

35 I am very fortunate that I have pro bono counsel because

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1 without that I do not know what would have happened to me or to my publisher. We are
2 litigating – we are fighting very hard. It has taken an enormous toll on me emotionally,
3 physically – for a journalist, to have my integrity questioned. This was a very carefully
4 researched book.

5 CHAIR : Let the record reflect that Chairman Thompson is here.

6 MAIN : This is the kind of book – it was a very serious book. I think
7 about a third of it is, concerns Daniel Webster and James Madison. [Laughter.] And the
8 drafting of the takings clause in the –

9 CHAIR : Let's see if we have any questions. Any questions for Ms.
10 Lent? Thank you for coming.

11 MAIN : Thank you.

12 CHAIR : Janet Ahmad. Janet Ahmad. How are you doing?

13 JANET AHMAD : Doing well, thank you.

14 CHAIR : Good

15 AHMAD : My name is Janet Ahmad. I'm with Homeowners for Better
16 Building. One thing is all these years that you see me coming to the capital – Thank you
17 Chairman and committee members, I appreciate this opportunity. One thing I have not done
18 is that I have always testified on behalf of others, worked for others. The one thing I didn't do
19 was to tell my story. I am here today to tell what this does for the industry. Homeowners for
20 Better Building organized communities, where homes were falling apart, were cheated. After
21 doing that we had people on the streets in San Antonio, Austin, Houston, Kyle and Dallas –
22 particularly in Dallas. We organized subdivisions to get homes bought back. We also were
23 responsible in 2000 in getting a federal bill on binding arbitration – the abuses of binding
24 arbitration – be addressed by the federal legislature. – 2001 we filed the first every home
25 lemon law. In Dallas particularly. One subdivision in Arlington Texas was built on top of
26 bombs. Bombs from a World War Two bombing range, some were live. The cleanup for the
27 federal government Corps of Engineers was \$6.2 million. Not the builder – the builder failed
28 to do it, although they were told, get an unexploded ordinance contractor to remediate that
29 land. They didn't do it. KB Homes, who built those homes, filed a lawsuit against their own
30 customers – \$20 million and myself. That made us somebody. The *Wall Street Journal* carried
31 the story and their question was always, why would a builder sue their own customers and
32 kept asking, do they do it a lot? The answer to that is, yes. They threaten them or they do it.
33 But they also put into their – into their restrictive covenants, that any sign of any character or
34 any signs of the nature of protests, complaints against the – [inaudible]. This is in the "Buy a
35 House and Shut Up" article by Rick Casey. It's a classic. You need to read it and I have one

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1 copy here and if they can make a copy. I'd be happy to give it to you. The –
2 CHAIR : Just a second. Chairman Thompson you have a question?
3 REP. SENFRONIA THOMPSON : Ms. Ahmad, it's always good to see you. How
4 does this bill – this bill impact you?
5 AHMAD : Excuse me?
6 THOMPSON : How does this bill impact you?
7 AHMAD : Well, I was sued for racketeering. Racketeering, yes. – \$20
8 million worth – \$20 million. The racketeering was that protesting was racketeering. You
9 know, its the law that was used on East Coast called RICO, to reign in – or to prosecute the
10 mobsters on the East Coast so it was written in the newspapers when I was sued. But the
11 other homeowners, they got their homes bought back, they got the suit dropped and I'm the
12 only one left on the lawsuit. It's now been since 2002 – since 2002 this lawsuit has been filed. I
13 don't know that KB Homes would sue their own customers again after the bad publicity they
14 got. But we need, it is clear sign that we need to reign in like other states have the ability of
15 the industry file these SLAPP suits.
16 CHAIR : Ms. Ahmad, lets see if their are any questions for you from
17 the committee. And if you want to give us that article, we will have someone go make some
18 copies.
19 AHMAD : Yes, and I have um, the SLAPP suit that was filed –
20 something was printed on our website by Nancy Hentschel [phonetic] who could not be here
21 today.
22 CHAIR : You'll be around so we will get it back to you. Any
23 questions? Thank you, Ma'am.
24 AHMAD : Thank you.
25 CHAIR : Laura Prather. Tell us your name, who you represent, and
26 your position on the bill.
27 LAURA PRATHER : Good afternoon, Mr. Chairman. Thank you for the
28 opportunity to appear before your committee. We will be handing out to a notebook that
29 looks a little bit like this. This basically has, hopefully all the information about the bill that
30 you may want – with regard to answer any of your questions. As Chairman Hunter
31 indicated, there are 27 other states that have this law on the books and the District of
32 Columbia which recently passed it in December of 2009. This is not a new concept. You've
33 heard examples of where this law is needed. It's not new ground. In the other states that have
34 this law, it has never been repealed. It has amended only to incorporate modern technology
35 and commercial speech exemptions, both of which we have already encompassed in the bill.

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1 And in drafting it, we made sure to use specific terms and standards that Texas courts are
2 familiar with. So with this bill, the same standards apply to speech in the – the courts have
3 already applied in the anonymous speech setting as in the non-anonymous speech setting of
4 the one of the standards that was taken from one of the existing court doctrine.

5 This is a good government bill for a number of reasons.
6 First of all, it promotes constitutional rights of citizens and encourages their continued
7 participation in public debate. It creates a mechanism for getting rid of meritless lawsuits at
8 the outset of the proceedings and it provides for means to help alleviate our already
9 overburdened court system. I'll be available to help answer any questions if this notebook
10 doesn't and I appreciate your time.

11 CHAIR : Any questions for Mrs. Prather? Any questions? Thank
12 you, Ma'am.

13 PRATHER : Thank you.

14 CHAIR : Shane Fitzgerald. Mr. Fitzgerald, tell us your name, who
15 you represent, and your position on the bill.

16 SHANE FITZGERALD : Good afternoon, Mr. Chairman and committee and thanks
17 for hearing me. My name is Shane Fitzgerald, I'm the vice president of Corpus Christi Caller-
18 Times. I am for the bill and it was interesting a little bit ago when the woman who authored
19 the book named "Bulldozed," it's ironic that that's the name on that book. That's what
20 happens to folks without this bill, they get bulldozed by people who want to basically shut
21 up people who aren't – aren't with them. We're good journalists, newspapers. I'm here
22 representing a medium-size newspaper. Good journalists cover the communities honestly
23 and thoroughly and at times you might find this hard to believe we make people mad, you
24 know, and they want to retaliate and we probably get threatened four to five times a month
25 and if everybody carried out what they were – what they threatened to us, we would be out
26 ten of thousands of dollars that go into reporting on our communities and what we're doing.
27 You know, and often these threats come from public records, information we gather through
28 public records and in the public domain. Last week I get a threat because of some pictures
29 that ran of spring break on a public beach. This woman was sure she could sue us for every
30 dime that we had. We live in a refinery city, where we report diligently on air quality and
31 safety issues and sometimes those readers get upset with us and what we are – and what
32 we're publishing and there is a community responsibility we have to be able to do that
33 openly and without the threat of needless suits. We have to vigorously defend ourselves
34 against these threats because if we don't do and we kowtow to these sorts of threats, it would
35 effect what goes on in our community and whose watching – and whose watching over our

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1 community. It's particularly chilling on small papers who don't have the wherewithal that
2 some others do. It can keep watch dog reporters, watch dog, and just the general public who
3 might want to come forward with information – it keeps them quiet. As the media industry
4 we're not asking for special treatment. If we make mistakes there are laws on the books that
5 hold us accountable, but by the same token we don't need to be sued needlessly because
6 somebody is upset and this legislation would solve that.

7 CHAIR : Any questions for Mr. Fitzgerald? Any questions? Thank
8 you.

9 FITZGERALD : Thank you.

10 CHAIR : Steve Harrison. Steve, give us your name, who you
11 represent, and your position on the bill.

12 STEVE HARRISON : Thank you, Mr. Chairman. Steve Harrison for the Texas
13 Trial Lawyers Association speaking on the bill. Initially we had some concerns about the
14 wording in some of the bill, but we are happy to report that we're working through this
15 issues and working with Chairman Hunter and would be happy to continue to do so.

16 CHAIR : Good. Any questions for Mr. Harrison? Thank you, Sir. We
17 have a form from Mike Hull, Texas for Lawsuit Reform, for the bill, does not wish to testify.
18 Keith Elkins, Freedom of Information Foundation of Texas, for the bill, does not wish to
19 testify. Mary Lou Durham, lists herself as retired, is for the bill, does not wish to testify. Ed
20 Sterling, Texas Press Association, is for the bill, does not wish to testify. Monty Wynn, Texas
21 Municipal League, for the bill, does not wish to testify. Doug Toney, Texas Press Association,
22 Texas Daily Newspaper Association, for the bill, does not wish to testify. Frank Knaack –
23 Knaack – ACLU of Texas, for the bill, does not wish to testify. David Weinberg, Texas League
24 of Conservative Voters – Conservation Voters, for the bill, does not wish to testify. Arif Panju,
25 Institute for Justice, for the bill, does not wish to testify. Irene Adolph, Coalition for HOA
26 reform, HOAdatinc.org, for the bill, does not wish to testify. Ware Wendell, Texas Watch,
27 for the bill, does not wish to testify. Lou Ann Anderson, online producer and state confident,
28 – stateofdenial.com, for the bill, does not wish to testify. Is there anyone else who wishes to
29 testify on, for, or against House Bill 2973? Mr. Chairman?

30 HUNTER : Thank you, Mr. Chairman and Members. I ask you to pend
31 the bill. I'll get back with you and give you an update this week and I close.

32 CHAIR : Thank you, Mr. Chairman. Any questions? The Chair
33 withdraws the substitute of House Bill 2973. House Bill 2973 will be left pending at this
34 time.

35

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1 [The public hearing on H.B. 2973 concluded 37 minutes and 20 seconds into the committee
2 meeting.]

Legislative Session: 82(R)

House Bill 2973

Effective: 6-17-11

House Author: Hunter et al.

Senate Sponsor: Ellis

House Bill 2973 amends the Civil Practice and Remedies Code to authorize a party to a legal action that is based on, relates to, or is in response to the party's exercise of the right of free speech, right of petition, or right of association, to file a motion to dismiss the legal action. The bill establishes procedures relating to a motion to dismiss under this provision and exempts certain legal actions.

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THE LEGISLATIVE HISTORY OF TEX. H.B. 2935, 83RD LEG., R.S. (2013)

**Bill:** [HB 2935](#)**Legislative Session:** 83(R) **Council Document:** 83R 11080 SCL-F [Add to Bill List](#) [Add to Alert List](#)**Last Action:** 06/14/2013 E Effective immediately**Caption Version:** Enrolled**Caption Text:** Relating to a legal action involving the exercise of certain constitutional rights.**Author:** Hunter**Sponsor:** Ellis**Cosponsor:****Subjects:** Civil Remedies & Liabilities (I0065)
Courts--Civil Procedure (I0135)
Courts--County & Statutory (I0115)
Courts--District (I0120)**House Committee:** [Judiciary & Civil Jurisprudence](#)**Status:** Out of committee**Vote:** Ayes=9 Nays=0 Present Not Voting=0 Absent=0**Senate Committee:** [State Affairs](#)**Status:** Out of committee**Vote:** Ayes=8 Nays=0 Present Not Voting=0 Absent=1**Actions:** (descending date order)Viewing Votes: [Most Recent House Vote](#) | [Most Recent Senate Vote](#)

Description	Comment	Date ▼	Time	Journal Page
E Effective immediately		06/14/2013		
E Signed by the Governor		06/14/2013		5442
E Sent to the Governor		05/27/2013		5440
S Signed in the Senate		05/27/2013		3861
H Signed in the House		05/27/2013		5434
H Reported enrolled		05/26/2013	06:46 PM	5439
S House concurs in Senate amendment(s)-reported		05/24/2013		3251
H Text of Senate Amendment(s)		05/24/2013		4763
H Statement(s) of vote recorded in Journal		05/24/2013		4764
H Record vote	RV#1245	05/24/2013		4764
H House concurs in Senate amendment(s)		05/24/2013		4763
H Senate Amendments Analysis distributed		05/23/2013	06:15 PM	
H Senate Amendments distributed		05/23/2013	06:13 PM	
H Senate passage as amended reported		05/23/2013		4536
S Record vote		05/22/2013		2815
S Passed		05/22/2013		2815
S Laid out as postponed business		05/22/2013		2815
S Postponed		05/22/2013		2805
S Read 3rd time		05/22/2013		2805
S Record vote		05/22/2013		2805
S Three day rule suspended		05/22/2013		2805

S	Vote recorded in Journal		05/22/2013	2805
S	Passed to 3rd reading as amended		05/22/2013	2805
S	Vote recorded in Journal		05/22/2013	2805
S	Amended		05/22/2013	2805
S	Amendment(s) offered	FA1 Whitmire	05/22/2013	2804
S	Read 2nd time		05/22/2013	2804
S	Rules suspended-Regular order of business		05/22/2013	2804
S	Placed on intent calendar		05/15/2013	
S	Committee report printed and distributed		05/14/2013	11:19 AM
S	Reported favorably w/o amendments		05/14/2013	1808
S	Considered in public hearing		05/13/2013	
S	Scheduled for public hearing on . . .		05/13/2013	
S	Referred to State Affairs		05/07/2013	1574
S	Read first time		05/07/2013	1574
S	Received from the House		05/06/2013	1446
H	Reported engrossed		05/03/2013	11:56 AM
H	Nonrecord vote recorded in Journal		05/02/2013	2206
H	Record vote	RV#437	05/02/2013	2206
H	Passed		05/02/2013	2206
H	Read 3rd time		05/02/2013	2206
H	Nonrecord vote recorded in Journal		05/02/2013	2186
H	Passed to engrossment		05/02/2013	2186
H	Read 2nd time		05/02/2013	2186
H	Placed on Local, Consent, and Res. Calendar		05/02/2013	
H	Considered in Local & Consent Calendars		04/29/2013	
H	Comm. report sent to Local & Consent Calendar		04/15/2013	
H	Committee report distributed		04/15/2013	08:10 AM
H	Comte report filed with Committee Coordinator		04/12/2013	1561
H	Reported favorably as substituted		04/08/2013	
H	Recommended to be sent to Local & Consent		04/08/2013	
H	Committee substitute considered in committee		04/08/2013	
H	Considered in public hearing		04/08/2013	
H	Left pending in committee		04/01/2013	
H	Testimony taken/registration(s) recorded in committee		04/01/2013	
H	Committee substitute considered in committee		04/01/2013	
H	Considered in public hearing		04/01/2013	
H	Scheduled for public hearing on . . .		04/01/2013	
H	Referred to Judiciary & Civil Jurisprudence		03/19/2013	816
H	Read first time		03/19/2013	816
H	Filed		03/07/2013	

By: Hunter

H.B. No. 2935

A BILL TO BE ENTITLED

1 AN ACT

2 relating to the interlocutory appeal of a denial of a motion to
3 dismiss in an action involving the exercise of certain
4 constitutional rights.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Sections 51.014(a) and (b), Civil Practice and
7 Remedies Code, are amended to read as follows:

8 (a) A person may appeal from an interlocutory order of a
9 district court, county court at law, or county court that:

10 (1) appoints a receiver or trustee;

11 (2) overrules a motion to vacate an order that
12 appoints a receiver or trustee;

13 (3) certifies or refuses to certify a class in a suit
14 brought under Rule 42 of the Texas Rules of Civil Procedure;

15 (4) grants or refuses a temporary injunction or grants
16 or overrules a motion to dissolve a temporary injunction as
17 provided by Chapter 65;

18 (5) denies a motion for summary judgment that is based
19 on an assertion of immunity by an individual who is an officer or
20 employee of the state or a political subdivision of the state;

21 (6) denies a motion for summary judgment that is based
22 in whole or in part upon a claim against or defense by a member of
23 the electronic or print media, acting in such capacity, or a person
24 whose communication appears in or is published by the electronic or

1 print media, arising under the free speech or free press clause of
2 the First Amendment to the United States Constitution, or Article
3 I, Section 8, of the Texas Constitution, or Chapter 73;

4 (7) grants or denies the special appearance of a
5 defendant under Rule 120a, Texas Rules of Civil Procedure, except
6 in a suit brought under the Family Code;

7 (8) grants or denies a plea to the jurisdiction by a
8 governmental unit as that term is defined in Section 101.001;

9 (9) denies all or part of the relief sought by a motion
10 under Section 74.351(b), except that an appeal may not be taken from
11 an order granting an extension under Section 74.351;

12 (10) grants relief sought by a motion under Section
13 74.351(1); ~~or~~

14 (11) denies a motion to dismiss filed under Section
15 90.007; or

16 (12) denies a motion to dismiss filed under Section
17 27.003.

18 (b) An interlocutory appeal under Subsection (a), other
19 than an appeal under Subsection (a)(4), stays the commencement of a
20 trial in the trial court pending resolution of the appeal. An
21 interlocutory appeal under Subsection (a)(3), (5), ~~or~~ (8), or
22 (12) also stays all other proceedings in the trial court pending
23 resolution of that appeal.

24 SECTION 2. The change in law made by this Act applies to a
25 denial of a motion to dismiss made on or after the effective date of
26 this Act. A denial of a motion to dismiss made before the effective
27 date of this Act is governed by the law in effect immediately before

1 the effective date of this Act, and that law is continued in effect
2 for that purpose.

3 SECTION 3. This Act takes effect immediately if it receives
4 a vote of two-thirds of all the members elected to each house, as
5 provided by Section 39, Article III, Texas Constitution. If this
6 Act does not receive the vote necessary for immediate effect, this
7 Act takes effect September 1, 2013.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 83RD LEGISLATIVE REGULAR SESSION

March 31, 2013

TO: Honorable Tryon D. Lewis, Chair, House Committee on Judiciary & Civil Jurisprudence

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: **HB2935** by Hunter (Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.), **As Introduced**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to allow an appeal from an interlocutory order denying a motion to dismiss based on the exercise of certain constitutional rights. The Office of Court Administration reports that although the bill may increase the number of appeals to the district court, no significant fiscal impact to the court system is anticipated.

The change in law would apply only to a denial of a motion to dismiss made after the bill's effective date. The bill would take effect immediately if receiving a two-thirds vote of each house, otherwise the bill would take effect September 1, 2013.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: UP, CL, AM

By: Hunter

H.B. No. 2935

Substitute the following for H.B. No. 2935:

By: Thompson of Harris

C.S.H.B. No. 2935

A BILL TO BE ENTITLED

1 AN ACT
2 relating to the interlocutory appeal of a denial of a motion to
3 dismiss in an action involving the exercise of certain
4 constitutional rights.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Sections 51.014(a) and (b), Civil Practice and
7 Remedies Code, are amended to read as follows:

8 (a) A person may appeal from an interlocutory order of a
9 district court, county court at law, or county court that:

10 (1) appoints a receiver or trustee;

11 (2) overrules a motion to vacate an order that
12 appoints a receiver or trustee;

13 (3) certifies or refuses to certify a class in a suit
14 brought under Rule 42 of the Texas Rules of Civil Procedure;

15 (4) grants or refuses a temporary injunction or grants
16 or overrules a motion to dissolve a temporary injunction as
17 provided by Chapter 65;

18 (5) denies a motion for summary judgment that is based
19 on an assertion of immunity by an individual who is an officer or
20 employee of the state or a political subdivision of the state;

21 (6) denies a motion for summary judgment that is based
22 in whole or in part upon a claim against or defense by a member of
23 the electronic or print media, acting in such capacity, or a person
24 whose communication appears in or is published by the electronic or

1 print media, arising under the free speech or free press clause of
2 the First Amendment to the United States Constitution, or Article
3 I, Section 8, of the Texas Constitution, or Chapter 73;

4 (7) grants or denies the special appearance of a
5 defendant under Rule 120a, Texas Rules of Civil Procedure, except
6 in a suit brought under the Family Code;

7 (8) grants or denies a plea to the jurisdiction by a
8 governmental unit as that term is defined in Section 101.001;

9 (9) denies all or part of the relief sought by a motion
10 under Section 74.351(b), except that an appeal may not be taken from
11 an order granting an extension under Section 74.351;

12 (10) grants relief sought by a motion under Section
13 74.351(1); ~~or~~

14 (11) denies a motion to dismiss filed under Section
15 90.007; or

16 (12) denies a motion to dismiss filed under Section
17 27.003.

18 (b) An interlocutory appeal under Subsection (a), other
19 than an appeal under Subsection (a)(4), stays the commencement of a
20 trial in the trial court pending resolution of the appeal. An
21 interlocutory appeal under Subsection (a)(3), (5), ~~or~~ (8), or
22 (12) also stays all other proceedings in the trial court pending
23 resolution of that appeal.

24 SECTION 2. Section 27.008(c), Civil Practice and Remedies
25 Code, is repealed.

26 SECTION 3. This Act takes effect immediately if it receives
27 a vote of two-thirds of all the members elected to each house, as

C.S.H.B. No. 2935

1 provided by Section 39, Article III, Texas Constitution. If this
2 Act does not receive the vote necessary for immediate effect, this
3 Act takes effect September 1, 2013.

BILL ANALYSIS

C.S.H.B. 2935
By: Hunter
Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Recently enacted legislation set out provisions governing the dismissal of actions involving the exercise of the right of free speech, the right to petition, or the right of association. Those provisions provide for certain appeals with respect to a motion to dismiss if the court issues an order on the motion or if the court fails to rule on the motion in the time prescribed. However, interested parties observe that there has been some inconsistency in the interpretation of these provisions by certain appellate courts with respect to whether an interlocutory appeal is allowed in a case in which the motion to dismiss is denied. The purpose of C.S.H.B. 2935 is to clarify the right of a party in such an action to file an interlocutory appeal if the court denies a motion to dismiss the action.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2935 amends the Civil Practice and Remedies Code to authorize a person to appeal from an interlocutory order of a district court, county court at law, or county court that denies a motion to dismiss a legal action that is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association. The bill specifies that such an interlocutory appeal stays all proceedings in the trial court pending resolution of the appeal.

C.S.H.B. 2935 repeals a provision relating to the filing deadline for an appeal or other writ regarding a motion to dismiss.

C.S.H.B. 2935 repeals Section 27.008(c), Civil Practice and Remedies Code.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2013.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 2935 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED	HOUSE COMMITTEE SUBSTITUTE
SECTION 1. Sections 51.014(a) and (b), Civil Practice and Remedies Code, are	SECTION 1. Same as introduced version.

amended.

SECTION 2. The change in law made by this Act applies to a denial of a motion to dismiss made on or after the effective date of this Act. A denial of a motion to dismiss made before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

No equivalent provision.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

No equivalent provision.

SECTION 2. Section 27.008(c), Civil Practice and Remedies Code, is repealed.

SECTION 3. Same as introduced version.

WITNESS LIST

HB 2935

HOUSE COMMITTEE REPORT

Judiciary & Civil Jurisprudence Committee

April 1, 2013 - 2:00 PM or upon final adjourn./recess

For :

Fitzgerald, Shane (Self; Freedom of Information Foundation of Texas)
Panju, Arif (Institute for Justice)
Prather, Laura (Self; Freedom of information foundation of texas, texas press association
and texas broadcast association)

Registering, but not testifying:

For :

Baggett, Donnis (Self; Texas Press Association)
Borders, Gary (Self; Freedom of Information Foundation of Texas)
Byrd, Jason (Texas Trial Lawyers Association)
Chadwick, Ashley (Freedom of Information Foundation of Texas)
Hiott, Debbie (Self; Texas Press Association, Austin American-Statesman)
Hull, Mike (Texans for Lawsuit Reform)
Kaufman, Lisa (Texas Civil Justice League)
Perry, Steve (Chevron USA)
Schneider, Michael (Texas Association of Broadcasters)
Woomer, Eric (Daily Court Review & Daily Commercial Record)

SUMMARY OF COMMITTEE ACTION

HB 2935

April 1, 2013 2:00 PM - or upon final adjourn./recess

Considered in public hearing

Committee substitute considered in committee

Testimony taken/registration(s) recorded in committee

Left pending in committee

April 8, 2013 2:00 PM - or upon final adjourn./recess

Considered in public hearing

Committee substitute considered in committee

Recommended to be sent to Local & Consent

Reported favorably as substituted

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 83RD LEGISLATIVE REGULAR SESSION

April 12, 2013

TO: Honorable Tryon D. Lewis, Chair, House Committee on Judiciary & Civil Jurisprudence

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: HB2935 by Hunter (Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.), **Committee Report 1st House, Substituted**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to allow an appeal from an interlocutory order denying a motion to dismiss based on the exercise of certain constitutional rights. The bill would repeal the Civil Practice and Remedies Code Section 27.008(c) relating to the timeline for certain appeals. The Office of Court Administration reports that although the bill may increase the number of appeals to the district court, no significant fiscal impact to the court system is anticipated.

The change in law would apply only to a denial of a motion to dismiss made after the bill's effective date. The bill would take effect immediately if receiving a two-thirds vote of each house, otherwise the bill would take effect September 1, 2013.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: UP, TB, CL, AM

By: Hunter

H.B. No. 2935

A BILL TO BE ENTITLED

AN ACT

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2 relating to the interlocutory appeal of a denial of a motion to
3 dismiss in an action involving the exercise of certain
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7 Remedies Code, are amended to read as follows:

8 (a) A person may appeal from an interlocutory order of a
9 district court, county court at law, or county court that:

10 (1) appoints a receiver or trustee;

11 (2) overrules a motion to vacate an order that
12 appoints a receiver or trustee;

13 (3) certifies or refuses to certify a class in a suit
14 brought under Rule 42 of the Texas Rules of Civil Procedure;

15 (4) grants or refuses a temporary injunction or grants
16 or overrules a motion to dissolve a temporary injunction as
17 provided by Chapter 65;

18 (5) denies a motion for summary judgment that is based
19 on an assertion of immunity by an individual who is an officer or
20 employee of the state or a political subdivision of the state;

21 (6) denies a motion for summary judgment that is based
22 in whole or in part upon a claim against or defense by a member of
23 the electronic or print media, acting in such capacity, or a person
24 whose communication appears in or is published by the electronic or

1 print media, arising under the free speech or free press clause of
2 the First Amendment to the United States Constitution, or Article
3 I, Section 8, of the Texas Constitution, or Chapter 73;

4 (7) grants or denies the special appearance of a
5 defendant under Rule 120a, Texas Rules of Civil Procedure, except
6 in a suit brought under the Family Code;

7 (8) grants or denies a plea to the jurisdiction by a
8 governmental unit as that term is defined in Section 101.001;

9 (9) denies all or part of the relief sought by a motion
10 under Section 74.351(b), except that an appeal may not be taken from
11 an order granting an extension under Section 74.351;

12 (10) grants relief sought by a motion under Section
13 74.351(1); ~~or~~

14 (11) denies a motion to dismiss filed under Section
15 90.007; or

16 (12) denies a motion to dismiss filed under Section
17 27.003.

18 (b) An interlocutory appeal under Subsection (a), other
19 than an appeal under Subsection (a)(4), stays the commencement of a
20 trial in the trial court pending resolution of the appeal. An
21 interlocutory appeal under Subsection (a)(3), (5), ~~or~~ (8), or
22 (12) also stays all other proceedings in the trial court pending
23 resolution of that appeal.

24 SECTION 2. Section 27.008(c), Civil Practice and Remedies
25 Code, is repealed.

26 SECTION 3. This Act takes effect immediately if it receives
27 a vote of two-thirds of all the members elected to each house, as

H.B. No. 2935

1 provided by Section 39, Article III, Texas Constitution. If this
2 Act does not receive the vote necessary for immediate effect, this
3 Act takes effect September 1, 2013.

BILL ANALYSIS

Senate Research Center
83R19343 SCL-F

H.B. 2935
By: Hunter (Ellis)
State Affairs
5/6/2013
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

H.B. 2935 clarifies the established right for one to take an interlocutory appeal of the denial or grant of a Motion to Dismiss filed under Chapter 27 (Actions Involving the Exercise of Certain Constitutional Rights) of the Civil Practice and Remedies Code.

The proposal and the original statute passed last session provided for three situations where a party to the cause of action could appeal the interlocutory order disposing of the Motion to Dismiss. First, if the trial court failed to act within the time period in the statute; second, if the trial court granted the motion to dismiss; and third, if the trial court denied the motion to dismiss. In the process of these “motions” going through the court system, the Second Court of Appeals ruled that in the case of a denial of a motion to dismiss signed by a judge, the statute did not allow an interlocutory appeal. Both the Thirteenth and the Fourteenth Courts of Appeals have ruled that the existing statute does provide for the right to an interlocutory appeal under these circumstances. The purpose of this bill is to clarify the legislative intent to provide for an interlocutory appeal in all three of the circumstances outlined in Chapter 27 and to provide for a stay of the underlying proceedings pending the outcome of the appeal.

H.B. 2935 amends current law relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Sections 51.014(a) and (b), Civil Practice and Remedies Code, as follows:

(a) Authorizes a person to appeal from an interlocutory order of a district court, county court at law, or county court that, among other actions, denies a motion to dismiss filed under Section 27.003 (Motion to Dismiss).

(b) Provides that an interlocutory appeal under Subsection (a)(3) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure), (5) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that denies a motion for summary judgment that is based on an assertion of immunity for an individual who is an officer or employee of the state or a political subdivision of the state), (8) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except under certain conditions), or (12) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that denies a motion to dismiss filed under Section 27.003) stays all other proceedings in the trial court pending resolution of that appeal.

SECTION 2. Repealer: Section 27.008(c) (relating to requiring that an appeal or other writ under this section be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable), Civil Practice and Remedies Code.

SECTION 3. Effective date: upon passage or September 1, 2013.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 83RD LEGISLATIVE REGULAR SESSION

May 23, 2013

TO: Honorable Joe Straus, Speaker of the House, House of Representatives

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: **HB2935** by Hunter (Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.), **As Passed 2nd House**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to allow an appeal from an interlocutory order denying a motion to dismiss based on the exercise of certain constitutional rights. The bill would repeal the Civil Practice and Remedies Code Section 27.008(c) relating to the timeline for certain appeals. The bill also amends Civil Practice and Remedies Code provisions relating to hearings, discovery procedure, and evidentiary standards in certain cases.

The bill would take effect immediately if receiving a two-thirds vote of each house, otherwise the bill would take effect September 1, 2013. Although it is anticipated that the bill may increase the number of appeals, no significant fiscal impact to the court system is expected to result from the bill.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: UP, AG, AM, TB, CL

1-1 By: Hunter (Senate Sponsor - Ellis) H.B. No. 2935
 1-2 (In the Senate - Received from the House May 6, 2013;
 1-3 May 7, 2013, read first time and referred to Committee on State
 1-4 Affairs; May 14, 2013, reported favorably by the following vote:
 1-5 Yeas 8, Nays 0; May 14, 2013, sent to printer.)

1-6 COMMITTEE VOTE

	Yea	Nay	Absent	PNV
1-7				
1-8	X			
1-9	X			
1-10	X			
1-11	X			
1-12	X			
1-13	X			
1-14	X			
1-15	X			
1-16			X	

1-17 A BILL TO BE ENTITLED
 1-18 AN ACT

1-19 relating to the interlocutory appeal of a denial of a motion to
 1-20 dismiss in an action involving the exercise of certain
 1-21 constitutional rights.

1-22 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-23 SECTION 1. Sections 51.014(a) and (b), Civil Practice and
 1-24 Remedies Code, are amended to read as follows:

1-25 (a) A person may appeal from an interlocutory order of a
 1-26 district court, county court at law, or county court that:

1-27 (1) appoints a receiver or trustee;

1-28 (2) overrules a motion to vacate an order that
 1-29 appoints a receiver or trustee;

1-30 (3) certifies or refuses to certify a class in a suit
 1-31 brought under Rule 42 of the Texas Rules of Civil Procedure;

1-32 (4) grants or refuses a temporary injunction or grants
 1-33 or overrules a motion to dissolve a temporary injunction as
 1-34 provided by Chapter 65;

1-35 (5) denies a motion for summary judgment that is based
 1-36 on an assertion of immunity by an individual who is an officer or
 1-37 employee of the state or a political subdivision of the state;

1-38 (6) denies a motion for summary judgment that is based
 1-39 in whole or in part upon a claim against or defense by a member of
 1-40 the electronic or print media, acting in such capacity, or a person
 1-41 whose communication appears in or is published by the electronic or
 1-42 print media, arising under the free speech or free press clause of
 1-43 the First Amendment to the United States Constitution, or Article
 1-44 I, Section 8, of the Texas Constitution, or Chapter 73;

1-45 (7) grants or denies the special appearance of a
 1-46 defendant under Rule 120a, Texas Rules of Civil Procedure, except
 1-47 in a suit brought under the Family Code;

1-48 (8) grants or denies a plea to the jurisdiction by a
 1-49 governmental unit as that term is defined in Section 101.001;

1-50 (9) denies all or part of the relief sought by a motion
 1-51 under Section 74.351(b), except that an appeal may not be taken from
 1-52 an order granting an extension under Section 74.351;

1-53 (10) grants relief sought by a motion under Section
 1-54 74.351(1); ~~or~~

1-55 (11) denies a motion to dismiss filed under Section
 1-56 90.007; or

1-57 (12) denies a motion to dismiss filed under Section
 1-58 27.003.

1-59 (b) An interlocutory appeal under Subsection (a), other
 1-60 than an appeal under Subsection (a)(4), stays the commencement of a
 1-61 trial in the trial court pending resolution of the appeal. An

2-1 interlocutory appeal under Subsection (a)(3), (5), [~~or~~] (8), or
2-2 (12) also stays all other proceedings in the trial court pending
2-3 resolution of that appeal.

2-4 SECTION 2. Section 27.008(c), Civil Practice and Remedies
2-5 Code, is repealed.

2-6 SECTION 3. This Act takes effect immediately if it receives
2-7 a vote of two-thirds of all the members elected to each house, as
2-8 provided by Section 39, Article III, Texas Constitution. If this
2-9 Act does not receive the vote necessary for immediate effect, this
2-10 Act takes effect September 1, 2013.

2-11

* * * * *

WITNESS LIST

HB 2935
Senate Committee Report
State Affairs

May 13, 2013 - 9:00 AM

Registering, but not testifying:

FOR:

Adams, Don (Self) , Horseshoe Bay, TX
Baggett, Donnis (Texas Press Association), Waco, TX
Cohen, Jeff (Houston Chronicle and Hearst Newspapers), Houston, TX
Hull, Mike (Texans for Lawsuit Reform), Austin, TX
Parker, Brad (TTLA), Bedford, TX
Shannon, Kelley (Freedom of Information Foundation of Texas), Austin, TX
Woomer, Eric (Daily Court Review and Daily Commercial Record), Austin, TX

ON:

Prather, Laura (FOIFT & BBB's of Central Texas), Austin, TX

House Bill 2935
Senate Amendments
Section-by-Section Analysis

HOUSE VERSION

SENATE VERSION (IE)

CONFERENCE

No equivalent provision.

SECTION __. Section 27.004, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th [~~30th~~] day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003. [FA1]

No equivalent provision.

SECTION __. Section 27.005, Civil Practice and Remedies Code, is amended by adding Subsection (d) to read as follows:

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim. [FA1]

No equivalent provision.

SECTION __. Section 27.010, Civil Practice and Remedies Code, is amended by amending Subsection (b) and adding

House Bill 2935
Senate Amendments
Section-by-Section Analysis

HOUSE VERSION

SENATE VERSION (IE)

CONFERENCE

Subsection (d) to read as follows:

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract. [FA1]

SECTION 1. Sections 51.014(a) and (b), Civil Practice and Remedies Code, are amended to read as follows:

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or

SECTION 1. Same as House version.

House Bill 2935
Senate Amendments
Section-by-Section Analysis

HOUSE VERSION

free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;

(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351;

(10) grants relief sought by a motion under Section 74.351(l);
[~~or~~]

(11) denies a motion to dismiss filed under Section 90.007; or
(12) denies a motion to dismiss filed under Section 27.003.

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), [~~or~~] (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal.

SECTION 2. Section 27.008(c), Civil Practice and Remedies Code, is repealed.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

SENATE VERSION (IE)

SECTION 2. Same as House version.

SECTION 3. Same as House version.

CONFERENCE

SENATE AMENDMENTS

2nd Printing

By: Hunter

H.B. No. 2935

A BILL TO BE ENTITLED

1 AN ACT

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15 (4) grants or refuses a temporary injunction or grants
16 or overrules a motion to dissolve a temporary injunction as
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19 on an assertion of immunity by an individual who is an officer or
20 employee of the state or a political subdivision of the state;

21 (6) denies a motion for summary judgment that is based
22 in whole or in part upon a claim against or defense by a member of
23 the electronic or print media, acting in such capacity, or a person
24 whose communication appears in or is published by the electronic or

1 print media, arising under the free speech or free press clause of
2 the First Amendment to the United States Constitution, or Article
3 I, Section 8, of the Texas Constitution, or Chapter 73;

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5 defendant under Rule 120a, Texas Rules of Civil Procedure, except
6 in a suit brought under the Family Code;

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11 an order granting an extension under Section 74.351;

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H.B. No. 2935

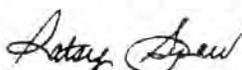
1 provided by Section 39, Article III, Texas Constitution. If this
2 Act does not receive the vote necessary for immediate effect, this
3 Act takes effect September 1, 2013.

ADOPTED

FLOOR AMENDMENT NO. 1

MAY 22 2013

BY: 


Secretary of the Senate

1 Amend H.B. No. 2935 (senate committee printing) by adding
2 the following appropriately numbered SECTIONS to the bill and
3 renumbering subsequent SECTIONS of the bill accordingly:

4 SECTION _____. Section 27.004, Civil Practice and Remedies
5 Code, is amended to read as follows:

6 Sec. 27.004. HEARING. (a) A hearing on a motion under
7 Section 27.003 must be set not later than the 60th [~~30th~~] day
8 after the date of service of the motion unless the docket
9 conditions of the court require a later hearing, upon a showing
10 of good cause, or by agreement of the parties, but in no event
11 shall the hearing occur more than 90 days after service of the
12 motion under Section 27.003, except as provided by Subsection
13 (c).

14 (b) In the event that the court cannot hold a hearing in
15 the time required by Subsection (a), the court may take judicial
16 notice that the court's docket conditions required a hearing at
17 a later date, but in no event shall the hearing occur more than
18 90 days after service of the motion under Section 27.003, except
19 as provided by Subsection (c).

20 (c) If the court allows discovery under Section 27.006(b),
21 the court may extend the hearing date to allow discovery under
22 that subsection, but in no event shall the hearing occur more
23 than 120 days after the service of the motion under Section
24 27.003.

25 SECTION _____. Section 27.005, Civil Practice and Remedies
26 Code, is amended by adding Subsection (d) to read as follows:

27 (d) Notwithstanding the provisions of Subsection (c), the
28 court shall dismiss a legal action against the moving party if
29 the moving party establishes by a preponderance of the evidence

1 each essential element of a valid defense to the nonmovant's
2 claim.

3 SECTION ____ . Section 27.010, Civil Practice and Remedies
4 Code, is amended by amending Subsection (b) and adding
5 Subsection (d) to read as follows:

6 (b) This chapter does not apply to a legal action brought
7 against a person primarily engaged in the business of selling or
8 leasing goods or services, if the statement or conduct arises
9 out of the sale or lease of goods, services, or an insurance
10 product, insurance services, or a commercial transaction in
11 which the intended audience is an actual or potential buyer or
12 customer.

13 (d) This chapter does not apply to a legal action brought
14 under the Insurance Code or arising out of an insurance
15 contract.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 83RD LEGISLATIVE REGULAR SESSION

May 23, 2013

TO: Honorable Joe Straus, Speaker of the House, House of Representatives

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: HB2935 by Hunter (Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.), **As Passed 2nd House**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to allow an appeal from an interlocutory order denying a motion to dismiss based on the exercise of certain constitutional rights. The bill would repeal the Civil Practice and Remedies Code Section 27.008(c) relating to the timeline for certain appeals. The bill also amends Civil Practice and Remedies Code provisions relating to hearings, discovery procedure, and evidentiary standards in certain cases.

The bill would take effect immediately if receiving a two-thirds vote of each house, otherwise the bill would take effect September 1, 2013. Although it is anticipated that the bill may increase the number of appeals, no significant fiscal impact to the court system is expected to result from the bill.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: UP, AG, AM, TB, CL

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 83RD LEGISLATIVE REGULAR SESSION

May 10, 2013

TO: Honorable Robert Duncan, Chair, Senate Committee on State Affairs

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: HB2935 by Hunter (Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.), **As Engrossed**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to allow an appeal from an interlocutory order denying a motion to dismiss based on the exercise of certain constitutional rights. The bill would repeal the Civil Practice and Remedies Code Section 27.008(c) relating to the timeline for certain appeals. The Office of Court Administration reports that although the bill may increase the number of appeals to the district court, no significant fiscal impact to the court system is anticipated.

The change in law would apply only to a denial of a motion to dismiss made after the bill's effective date. The bill would take effect immediately if receiving a two-thirds vote of each house, otherwise the bill would take effect September 1, 2013.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: UP, AG, TB, CL, AM

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 83RD LEGISLATIVE REGULAR SESSION

April 12, 2013

TO: Honorable Tryon D. Lewis, Chair, House Committee on Judiciary & Civil Jurisprudence

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: HB2935 by Hunter (Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.), **Committee Report 1st House, Substituted**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to allow an appeal from an interlocutory order denying a motion to dismiss based on the exercise of certain constitutional rights. The bill would repeal the Civil Practice and Remedies Code Section 27.008(c) relating to the timeline for certain appeals. The Office of Court Administration reports that although the bill may increase the number of appeals to the district court, no significant fiscal impact to the court system is anticipated.

The change in law would apply only to a denial of a motion to dismiss made after the bill's effective date. The bill would take effect immediately if receiving a two-thirds vote of each house, otherwise the bill would take effect September 1, 2013.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: UP, TB, CL, AM

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 83RD LEGISLATIVE REGULAR SESSION

March 31, 2013

TO: Honorable Tryon D. Lewis, Chair, House Committee on Judiciary & Civil Jurisprudence

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: HB2935 by Hunter (Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.), **As Introduced**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to allow an appeal from an interlocutory order denying a motion to dismiss based on the exercise of certain constitutional rights. The Office of Court Administration reports that although the bill may increase the number of appeals to the district court, no significant fiscal impact to the court system is anticipated.

The change in law would apply only to a denial of a motion to dismiss made after the bill's effective date. The bill would take effect immediately if receiving a two-thirds vote of each house, otherwise the bill would take effect September 1, 2013.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: UP, CL, AM

By: Hunter

H.B. No. 2935

A BILL TO BE ENTITLED

1 AN ACT
2 relating to the interlocutory appeal of a denial of a motion to
3 dismiss in an action involving the exercise of certain
4 constitutional rights.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Sections 51.014(a) and (b), Civil Practice and
7 Remedies Code, are amended to read as follows:

8 (a) A person may appeal from an interlocutory order of a
9 district court, county court at law, or county court that:

- 10 (1) appoints a receiver or trustee;
- 11 (2) overrules a motion to vacate an order that
12 appoints a receiver or trustee;
- 13 (3) certifies or refuses to certify a class in a suit
14 brought under Rule 42 of the Texas Rules of Civil Procedure;
- 15 (4) grants or refuses a temporary injunction or grants
16 or overrules a motion to dissolve a temporary injunction as
17 provided by Chapter 65;
- 18 (5) denies a motion for summary judgment that is based
19 on an assertion of immunity by an individual who is an officer or
20 employee of the state or a political subdivision of the state;
- 21 (6) denies a motion for summary judgment that is based
22 in whole or in part upon a claim against or defense by a member of
23 the electronic or print media, acting in such capacity, or a person
24 whose communication appears in or is published by the electronic or

1 print media, arising under the free speech or free press clause of
2 the First Amendment to the United States Constitution, or Article
3 I, Section 8, of the Texas Constitution, or Chapter 73;

4 (7) grants or denies the special appearance of a
5 defendant under Rule 120a, Texas Rules of Civil Procedure, except
6 in a suit brought under the Family Code;

7 (8) grants or denies a plea to the jurisdiction by a
8 governmental unit as that term is defined in Section 101.001;

9 (9) denies all or part of the relief sought by a motion
10 under Section 74.351(b), except that an appeal may not be taken from
11 an order granting an extension under Section 74.351;

12 (10) grants relief sought by a motion under Section
13 74.351(1); ~~or~~

14 (11) denies a motion to dismiss filed under Section
15 90.007; or

16 (12) denies a motion to dismiss filed under Section
17 27.003.

18 (b) An interlocutory appeal under Subsection (a), other
19 than an appeal under Subsection (a)(4), stays the commencement of a
20 trial in the trial court pending resolution of the appeal. An
21 interlocutory appeal under Subsection (a)(3), (5), ~~or~~ (8), or
22 (12) also stays all other proceedings in the trial court pending
23 resolution of that appeal.

24 SECTION 2. Section 27.008(c), Civil Practice and Remedies
25 Code, is repealed.

26 SECTION 3. This Act takes effect immediately if it receives
27 a vote of two-thirds of all the members elected to each house, as

H.B. No. 2935

1 provided by Section 39, Article III, Texas Constitution. If this
2 Act does not receive the vote necessary for immediate effect, this
3 Act takes effect September 1, 2013.

BILL ANALYSIS

Senate Research Center
83R19343 SCL-F

H.B. 2935
By: Hunter (Ellis)
State Affairs
5/6/2013
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

H.B. 2935 clarifies the established right for one to take an interlocutory appeal of the denial or grant of a Motion to Dismiss filed under Chapter 27 (Actions Involving the Exercise of Certain Constitutional Rights) of the Civil Practice and Remedies Code.

The proposal and the original statute passed last session provided for three situations where a party to the cause of action could appeal the interlocutory order disposing of the Motion to Dismiss. First, if the trial court failed to act within the time period in the statute; second, if the trial court granted the motion to dismiss; and third, if the trial court denied the motion to dismiss. In the process of these “motions” going through the court system, the Second Court of Appeals ruled that in the case of a denial of a motion to dismiss signed by a judge, the statute did not allow an interlocutory appeal. Both the Thirteenth and the Fourteenth Courts of Appeals have ruled that the existing statute does provide for the right to an interlocutory appeal under these circumstances. The purpose of this bill is to clarify the legislative intent to provide for an interlocutory appeal in all three of the circumstances outlined in Chapter 27 and to provide for a stay of the underlying proceedings pending the outcome of the appeal.

H.B. 2935 amends current law relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Sections 51.014(a) and (b), Civil Practice and Remedies Code, as follows:

(a) Authorizes a person to appeal from an interlocutory order of a district court, county court at law, or county court that, among other actions, denies a motion to dismiss filed under Section 27.003 (Motion to Dismiss).

(b) Provides that an interlocutory appeal under Subsection (a)(3) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure), (5) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that denies a motion for summary judgment that is based on an assertion of immunity for an individual who is an officer or employee of the state or a political subdivision of the state), (8) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except under certain conditions), or (12) (relating to authorizing a person to appeal from an interlocutory order of a district court, county court at law, or county court that denies a motion to dismiss filed under Section 27.003) stays all other proceedings in the trial court pending resolution of that appeal.

SECTION 2. Repealer: Section 27.008(c) (relating to requiring that an appeal or other writ under this section be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable), Civil Practice and Remedies Code.

SECTION 3. Effective date: upon passage or September 1, 2013.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 83RD LEGISLATIVE REGULAR SESSION

May 23, 2013

TO: Honorable Joe Straus, Speaker of the House, House of Representatives

FROM: Ursula Parks, Director, Legislative Budget Board

IN RE: **HB2935** by Hunter (Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.), **As Passed 2nd House**

No significant fiscal implication to the State is anticipated.

The bill would amend the Civil Practice and Remedies Code to allow an appeal from an interlocutory order denying a motion to dismiss based on the exercise of certain constitutional rights. The bill would repeal the Civil Practice and Remedies Code Section 27.008(c) relating to the timeline for certain appeals. The bill also amends Civil Practice and Remedies Code provisions relating to hearings, discovery procedure, and evidentiary standards in certain cases.

The bill would take effect immediately if receiving a two-thirds vote of each house, otherwise the bill would take effect September 1, 2013. Although it is anticipated that the bill may increase the number of appeals, no significant fiscal impact to the court system is expected to result from the bill.

Local Government Impact

No significant fiscal implication to units of local government is anticipated.

Source Agencies: 212 Office of Court Administration, Texas Judicial Council

LBB Staff: UP, AG, AM, TB, CL

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**HEARINGS ON H.B. 2935 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND
CIVIL PRACTICE
83RD LEG., R.S.
(APRIL 1, 2013)**

HEARINGS ON H.B. 2935 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
83RD LEG., R.S.
(APRIL 1, 2013)

THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE:

Rep. Tryon Lewis, Chair

Rep. Jessica Farrar, Vice-Chair

Rep. Marsha Farney

Rep. Lance Gooden

Rep. Ana Hernandez Luna

Rep. Todd Hunter

Rep. Ken King

Rep. Richard Raymond

Rep. Senfronia Thompson

PROCEEDINGS:

[The public hearing on H.B. 2973 began 1 hour, 27 minutes and 10 seconds into the committee meeting.]

[Rep. Jim Jackson, Chair of the House Committee on Judiciary and Civil Practice, in the Chair.]

CHAIR : The Chair lays out House Bill 2935. Recognizes Chairman Hunter to explain his bill. Also there is the committee substitute which the Chair offers up at this time for H.B. 2935 and I'll request that Chairman Hunter explain his bill.

REP. TODD HUNTER : Mr. Chairman and Members, this is a housekeeping piece of legislation that deals with the interlocutory appeal which is the denial of a grant of a motion to dismiss under Chapter 27 of the Civil Practice and Remedies Code. We're having to clarify some language. To expedite this – I am going to ask that you call Laura Prather and she will explain the details and I'll reserve the right to close.

CHAIR : Thank you. Members, any questions for the Chairman? If not, let's call go ahead and call Laura Prather. Ms. Prather, after saying your name, what – who you are here representing, your position on the bill, then you may give your testimony.

LAURA PRATHER : Good afternoon, my name is Laura Prather. I'm representing – I'm representing the Freedom of Information Foundation of Texas, the Texas Press Association, and the Texas Association of Broadcasters and I am testifying in favor of the bill. What this bill does is it basically, as Chairman Hunter indicated, it is a housekeeping measure. It clarifies the intent of the Legislature from the last session to permit any interlocutory appeal of any denial of the motion to dismiss under Chapter 27. Under the existing law, there has been a split between two courts of appeals. This will clarify the jurisdiction – clarify the jurisdictional issue. It would put the denial of a motion to dismiss under Chapter 27 under the interlocutory appeal language in Chapter 51.0146. It would provide for a stay of discovery during the period of the interlocutory appeal and it would repeal the provision in Chapter 27 that currently conflicts – has conflicting deadlines with the interlocutory appeal statute. Does the committee have any questions?

CHAIR : Any questions, Members? Thank you very much for coming forward.

PRATHER : Thank you.

CHAIR : We also have a witness affirmation form from Arif Panju. If

HEARINGS ON H.B. 2935 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
83RD LEG., R.S.
(APRIL 1, 2013)

1 you will come forward please and state your name correctly for the record and who you are
2 representing, what your position is and please give your testimony.

3 ARIF PANJU : Sure. You did a great job. My name is Arif Panju. I'm with
4 the Institute for Justice. We're a constitutional litigation public interest firm and we are in
5 support of this bill. I guess the best thing I could do is give you a for instance in how this
6 would work in practice. A case that we litigated to the U.S. Supreme Court was an eminent
7 domain case in '05, Kelo versus the City of New London and an author wrote a book about it.
8 Her name was Carla Main. The book is called Bulldozed. And she came to Texas and
9 chronicled a similar thing where a developer came, tried to take a shrimping business and
10 basically through eminent domain had it under his name and had a marina. She was sued by
11 that developer. The publisher was sued. The reviewer of the book was sued and so were
12 newspapers that published the review. These were SLAPP suits intended to shut her up. The
13 Anti-SLAPP statute wasn't in place until this last session. But if it was in place and this bill
14 was in place, we would have been able to file a motion to basically turn over the burden on
15 this developer to show that this was not a SLAPP suit [sic]. It took us a couple of years in
16 defending the author to finally get the Dallas Court of Appeals and get a unanimous verdict
17 saying that the developer had no evidence that he was defamed. So we are in support of this
18 bill. It solidifies the rights individuals to participate in issues of public discourse without
19 fearing that their critique of government power or of public projects or private developers
20 benefiting from them would shut them up through a lawsuit. And so we're supporting 2935
21 today. I'm happy to answer any questions.

22 CHAIR : Members, are there any questions? Thank you Mr. Panju
23 for coming forward. We also have a witness affirmation form from Shane Fitzgerald. Mr.
24 Fitzgerald, please come forward, state your name, who you are hear representing, and your
25 position on the bill.

26 SHANE FITZGERALD : Good afternoon, Chairman. My name is Shane Fitzgerald.
27 I'm the vice president of the Corpus Christi Caller-Times. Chairman Hunter, our
28 representative. I'll acknowledge him here. I'll give you just a very brief anecdote of how –

29 CHAIR : And you position on the bill is?

30 FITZGERALD : Oh, I'm sorry, we are for the bill.

31 CHAIR : Very good, sir. Go ahead with your testimony. Thank you.

32 FITZGERALD : I'll be very brief here. The clean-up language of the bill –
33 the bill is working as intended. We had published a photo of a house shot from a public
34 venue and a woman who owned the house was very upset that we had done that and had
35 threatened to sue us and she was going to take us for millions of dollars for whatever the

HEARINGS ON H.B. 2935 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
83RD LEG., R.S.
(APRIL 1, 2013)

1 reason was. And after our attorney talked to her attorney with the Anti-SLAPP legislation in
2 place, she ended up not filing the lawsuit in the first place. And we ended up having a really
3 good conversation about why we do what we do, and why we weren't going to take that
4 photo down and then she seemed to understand. It actually ended up being educational,
5 rather than being all messy in a court of law. So I just wanted to show – offer that one
6 example up hear that the bill is doing what's intended and that's to lessen the amount of
7 litigation. Questions?

8 CHAIR : Thank you, sir. Members, any questions of Mr. Fitzgerald?
9 Thank you very much, Mr. Fitzgerald for coming forward. I believe that's all of the witness
10 affirmation forms we have. Is there anyone else here who wishes to testify on, for, or against
11 House Bill 2935? Seeing and hearing none, then the Chair recognized Chairman Hunter to
12 close on House Bill 2935.

13 HUNTER : I close.

14 CHAIR : Thank you. Members, any questions? If not, thank you,
15 Chairman. The Chair withdraws the Committee Substitute for House Bill 2935 which will be
16 left pending at this time.

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**HEARINGS ON H.B. 2935 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND
CIVIL PRACTICE
83RD LEG., R.S.
(APRIL 8, 2013)**

HEARINGS ON H.B. 2935 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
83RD LEG., R.S.
(APRIL 8, 2013)

THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE:

Rep. Tryon Lewis, Chair

Rep. Jessica Farrar, Vice-Chair

Rep. Marsha Farney

Rep. Lance Gooden

Rep. Ana Hernandez Luna

Rep. Todd Hunter

Rep. Ken King

Rep. Richard Raymond

Rep. Senfronia Thompson

HEARINGS ON H.B. 2935 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
83RD LEG., R.S.
(APRIL 8, 2013)

PROCEEDINGS:

[The public hearing on H.B. 2973 began 7 minutes and 22 seconds into the committee meeting.]

[Rep. Tryon Lewis, Chair of the House Committee on Judiciary and Civil Practice, in the Chair.]

CHAIR : We next turn to House Bill 2935 by Chairman Hunter. The Chair lays out House Bill 2935 as pending business. Chairwoman Thompson moves that – offers the committee substitute and moves the substitute to House Bill 2935 be adopted. Is there any objection? There being no objection, the substitute is adopted. Rep. Farney moves House Bill 2973 as substituted, be reported to the full House with the recommendation that it do pass and be printed and placed on the Local and Consent Calendar. The Clerk will call the roll.

CLERK : Judge Lewis

REP. TRYON LEWIS : Aye.

CLERK : Vice Chair Farrar.

REP. JESSICA FARRAR : Aye.

CLERK : Rep. Farney.

REP. MARSHA FARNEY : Aye.

CLERK : Rep. Gooden.

REP. LANCE GOODEN : Aye.

CLERK : Rep. Hernandez Luna.

REP. ANA HERNANDEZ LUNA : Aye.

CLERK : Chairman Hunter.

REP. TODD HUNTER : Aye.

CLERK : Rep. King

REP. TRACY KING : Aye.

CLERK : Chairman Raymond.

REP. RICHARD RAYMOND : Aye.

CLERK : Chairman Thompson.

REP. SENFRONIA THOMPSON : Aye.

CLERK : Nine ayes, zero nays.

CHAIR : There being nine ayes, zero nays, the motion prevails.

HEARINGS ON H.B. 2935 BEFORE
THE HOUSE COMMITTEE ON JUDICIARY AND CIVIL PRACTICE
83RD LEG., R.S.
(APRIL 8, 2013)

1 [Gavel.]

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DEBATE ON H.B. 2935
ON THE FLOOR OF THE TEXAS HOUSE
(SECOND READING – CONSENT
CALENDAR)
83RD LEG., R.S.
(MAY 2, 2013)

DEBATE ON H.B. 2935
ON THE FLOOR OF THE TEXAS HOUSE
(SECOND READINGS – CONSENT CALENDAR)
83RD LEG., R.S.
(MAY 2, 2013)

PROCEEDINGS:

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[Debate on H.B. 2935 at 1 hours, 57 minutes, and 8 seconds into the House Session. Although bills on the Local and Consent Calendar usually a considered only briefly, on this occasion, the bills on this calendar were considered much more hurriedly than usual.]

[Rep. Dennis Bonnen in the Chair.]

SPEAKER : The Chair recognizes Rep. Hunter to explain House Bill 2935.

HUNTER :

SPEAKER : Is there any objection to consideration of House Bill 2935? The Chair hearing none. The Clerk will read the bill.

CLERK : H.B. 1869 by Hunter

SPEAKER : The Chair recognizes Rep. Hunter.

REP. TODD HUNTER : –

SPEAKER : The question occurs on the passage of House Bill 2935 to third reading. Is there any objection? The Chair hearing none. [Gavel.] All those in favor vote, “Aye.”

HOUSE : Aye.

SPEAKER : All those against say, “Nay.” The ayes have it and House Bill 1869 is passed to engrossment.

[Debate on H.B. 1869 concluded at 3 hours, 0 minutes, and 8 seconds into the House Session.]

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HEARINGS ON H.B. 2935 BEFORE THE SENATE COMMITTEE ON STATE AFFAIRS 83RD LEG., R.S. (MAY 13, 2013)

HEARINGS ON H.B. 2935 BEFORE
THE SENATE COMMITTEE ON STATE AFFAIRS
83RD LEG., R.S.
(MAY 13, 2013)

THE SENATE COMMITTEE ON STATE AFFAIRS:

Sen. Robert Duncan, Chair

Sen. Robert Deuell, Vice Chair

Sen. Rodney Ellis

Sen. Troy Fraser

Sen. Joan Huffman

Sen. Eddie Lucio, Jr.

Sen. Robert Nichols

Sen. Leticia Van de Putte

Sen. Tommy Williams

PROCEEDINGS:

[The public hearing on H.B. 2973 began 17 minutes, and 50 seconds into the committee's morning session.]

[Sen. Robert Deuell in the Chair.]

CHAIR : Okay. The Chair lays out Senate – or House Bill 2935 by Hunter and recognizes the Senate sponsor, Sen. Ellis.

SEN. RODNEY ELLIS : Thank you, Mr. Chairman and Members. This bill passed the House on the Local and Consent Calendar on the floor unanimously. It's a housekeeping bill to clarify the established right to an interlocutory appeal under Chapter 27 of the Civil Practice and Remedies Code that was established under House Bill 2973, which also passed unanimously. Unfortunately, the clear intent of the Legislature has been misinterpreted by one appellate court in Texas and has created a split authority by the courts right now on this jurisdictional issue. This bill squarely places this provision under the interlocutory appeal part of the Code. It also provides for a stay of underlying proceedings while the appellate court reviews the matter. Frankly it makes deadlines to appeal under Chapter 27 consistent with the interlocutory appeal statute. This bill is simply a cleanup measure to the anti-SLAPP statute I offered last session.

CHAIR : Yes, sir. Okay. Thank you. I have no questions. We'll open public testimony. I just have this card – yeah – Laura Prather again is just here as a resource witness. So – Is there anyone else that wants to testify – Oh, we do have some non-testifying cards. Excuse me. Brad Parker, TTLA, is for the bill, not wishing to testify. Jeff Cohen, is for the bill, representing Houston Chronicle and Hearst Newspapers, doesn't want to testify. Donniss Baggett, Texas Press Association, is for the bill, not wishing to testify. Don Adams, I guess representing himself, is for the bill, not wishing to testify. Kelley Shannon, the Freedom of Information Foundation of Texas, is for the bill, not wishing to testify. Mike Hull, Texans for Lawsuit Reform, is for the bill, not wishing to testify. And Eric Woomer, the Daily Court Review and Daily Commercial Record, is for the bill, not wishing to testify. Is there anyone else that wants to testify for, on, or against House Bill 2935? If not, we'll close public testimony [gavel]. Leave the bill pending.

HEARINGS ON H.B. 2935 BEFORE
THE SENATE COMMITTEE ON STATE AFFAIRS
83RD LEG., R.S.
(MAY 13, 2013)

1 [The public hearing on H.B. 2935 resumed 9 minutes, and 50 seconds into the committee's
2 afternoon session.]

3
4 [Sen. Robert Duncan, Chair of the Senate Committee on State Affairs, in the Chair.]

5
6 CHAIR : We have House Bill 2935 by Rep. Hunter – Senate sponsor,
7 Ellis, relating to the interlocutory appeal of a denial of a motion to dismiss in an action
8 involving the exercise of certain constitutional rights. Sen. Ellis moves that House Bill 2973 be
9 referred to the full Senate with the recommendation that it do pass and be printed. The Clerk
10 will call the roll.

11 CLERK : Sen. Duncan.

12 CHAIR : Aye.

13 CLERK : Sen. Deuell.

14 SEN. ROBERT DEUELLE : Aye.

15 CLERK : Sen. Ellis.

16 SEN RODNEY ELLIS : Aye.

17 CLERK : Sen. Fraser.

18 SEN. TROY FRASER : Aye.

19 CLERK : Sen. Huffman.

20 SEN. JOAN HUFFMAN : Aye.

21 CLERK : Sen. Lucio.

22 SEN. EDDIE LUCIO JR : Aye.

23 CLERK : Sen. Nichols.

24 SEN. ROBERT NICHOLS : Aye.

25 CLERK : Sen. Van de Putte.

26 SEN. LETICIA VAN DE PUTTE : Aye.

27 CLERK : Sen. Williams. Eight ayes.

28 CHAIR : There being 8 ayes and no nays, the House Bill 2973 will be
29 reported to the full Senate.

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DEBATE ON S.B. 2935
ON THE FLOOR OF THE TEXAS SENATE
(SECOND AND THIRD READINGS)
83RD LEG., R.S.
(MAY 22, 2013)

PROCEEDINGS:

[Debate on S.B. 2953 commenced 3 hours, 10 minutes, and 15 seconds into the Part II of the floor session.]

[Lt. Gov. David Dewhurst, President of the Texas Senate, in the Chair.]

PRESIDENT : Sen. Ellis? Are you ready on 2935 or do you need more time? The amendment's up here. Are you ready? The Chair recognizes Sen. Ellis for a motion to suspend the Senate's regular order of business to take up and consider House Bill 2935.

SEN. RODNEY ELLIS : Mr. President and Members. This is a clean-up to our Anti-SLAPP statute – Strategic Lawsuits Against Public Participation. The bill passed unanimously out of the House Local and Consent Calendar. It is the same bill that came up and passed the Senate earlier in the session. Unfortunately, the clear intent of the Legislature has been misinterpreted by one appellate court in Texas and has created a split authority by the courts regarding the right of a jurisdictional issue. This is a clean-up bill, I move to suspend the rules to take up and consider the House Bill 2935.

PRESIDENT : Members, you've heard the motion by Sen. Ellis. Is there objection from any Member? The Chair hears no objection from any Member and the rules are suspended. [Gavel.] The Chair lays out on second reading House Bill 2935. The Secretary will read the Caption.

SECRETARY OF THE SENATE (PATSY SPAW) : House Bill 2935 relating to interlocutory appeal of a denial of a motion to dismiss an action involving the right to exercise certain constitutional rights.

PRESIDENT : Thank you, Madame Secretary. The Chair recognizes – the Chair lays out Floor Amendment No. 1 by Sen. Watson.

ELLIS : Whitmire.

PRESIDENT : The Secretary will read the amendment.

SECRETARY : Floor Amendment No. 1.

PRESIDENT : The Chair recognizes Sen. –

ELLIS : Whitmire/Eltife – I'm sorry – Whitmire/Eltife amendment.

PRESIDENT : Excuse me – the Chair recognizes Sen. Whitmire to explain Floor Amendment 1.

DEBATE ON S.B. 2935
ON THE FLOOR OF THE TEXAS SENATE
(SECOND AND THIRD READINGS)
83RD LEG., R.S.
(MAY 22, 2013)

1 SEN. JOHN WHITMIRE : I have an amendment that I believe will be acceptable to
2 the author. Last session Texas joined 28 states and the District of Columbia in enacting
3 various forms of legislation purported aimed at preventing frivolous lawsuits and stif –
4 stifling free speech activities and rights to petition and association. Unfortunately there were
5 some unintended consequences –

6 ELLIS : It is acceptable, Mr. President –

7 WHITMIRE : – and a technical correction and I would move adoption of
8 the amendment.

9 PRESIDENT : Sen. Duncan, for what purpose do you rise, sir?

10 SEN. ROBERT DUNCAN : To ask the author of the amendment a question –

11 PRESIDENT : Will Sen. Whitmire yield?

12 WHITMIRE : Yes, sir. What – what we’ve done, Sen. Duncan, is we’ve
13 worked –

14 DUNCAN : I can’t hear and when you were laying it out –

15 WHITMIRE : What we’ve done is work with the press –

16 PRESIDENT : [Gavel.]

17 WHITMIRE : – to make certain that the act conforms with the intended
18 purpose of protecting First Amendment rights and does not open the door to other frivolous
19 lawsuits.

20 DUNCAN : I understand that. I’m just trying to understand how you
21 did it. Okay. Thank you.

22 ELLIS : It is acceptable.

23 PRESIDENT : The Chair recognizes Sen. Ellis on Floor Amendment 1.

24 ELLIS : It is acceptable, Mr. President.

25 PRESIDENT : The issue before us is Floor Amendment 1 by Sen.
26 Whitmire. It is acceptable to the author, Sen. Ellis. Is there objection from any Member? The
27 Chair hears no objection from any Member and Floor Amendment No. 1 is adopted. [Gavel.]
28 The Chair recognizes Sen. Ellis for a motion.

29 ELLIS : Mr. President, I move passage to third reading.

30 PRESIDENT : Thank you. Members, you’ve heard the motion by Sen.
31 Ellis. Is there objection from any Member? The Chair hears no objection from any Member
32 and House Bill 2935 as amended passes to third reading. The Chair recognizes Sen. Ellis to
33 suspend the constitutional rule that the bill be read on three several days. – I’ve just
34 recognized you on a motion to suspend the constitutional rule that bills be read on three

DEBATE ON S.B. 2935
ON THE FLOOR OF THE TEXAS SENATE
(SECOND AND THIRD READINGS)
83RD LEG., R.S.
(MAY 22, 2013)

1 several days.

2 ELLIS : So moved, Mr. President.

3 PRESIDENT : Members, you've heard the motion by Sen. Ellis. The
4 Secretary will call the roll.

5 SECRETARY : Birdwell. Campbell. Carona. Davis. Deuell. Duncan. Ellis.
6 Eltife. Estes. Fraser. Garcia. –

7 PRESIDENT : There being 31 ayes and no nays, the rule is suspended.
8 [Gavel.] The Chair lays out on third reading and final passage House Bill 2935 as amended.
9 The Secretary will read the amendment – will read the caption.

10 SECRETARY : House Bill 2935 relating to interlocutory appeal of a denial
11 of a motion to dismiss an action involving the right to exercise certain constitutional rights.

12 PRESIDENT : Thank you, Madame Secretary. The Chair recognizes Sen.
13 Ellis for a motion.

14 ELLIS : Mr. President, I want to hold it here to just let Sen. Duncan
15 read the amendment. And I'll bring it back up after Sen. Williams's bill. Pull it down for
16 about 15 minutes.

17 PRESIDENT : Members, Senator – Sen. Ellis moves to temporarily
18 postpone consideration of House Bill 2935 for about 15 minutes. Is there objection from any
19 Member? The Chair hears none. So adopted. [Gavel.]

20

21 [Debate on S.B. 2953 resumed 3 hours, 46 minutes, and 40 seconds into Part II of the floor
22 session.]

23

24 [Lt. Gov. David Dewhurst, President of the Texas Senate, in the Chair.]

25

26 PRESIDENT : Sen. Ellis? Members, the Chair recognizes Sen. Ellis on a
27 matter of postponed business to take up – to take up House Bill 2935.

28 SEN. RODNEY ELLIS : Thank you, Mr. President.

29 PRESIDENT : Hold a second. All right. We're on final passage. The Chair
30 recognizes Sen. Ellis for a motion

31 ELLIS : Thank you, Mr. President. I appreciate Chairman Duncan
32 and Sen Huffman. We have addressed those concerns and they are satisfied with the bill. I
33 move final passage of House Bill 2935.

34 PRESIDENT : Thank you, Senator. Thank you, Sen. Duncan. Thank you,

DEBATE ON S.B. 2935
ON THE FLOOR OF THE TEXAS SENATE
(SECOND AND THIRD READINGS)
83RD LEG., R.S.
(MAY 22, 2013)

1 Sen. – Sen. Huffman. Members, you heard the motion by Sen. Ellis. The Secretary will call the
2 roll.

3 SECRETARY OF THE SENATE : Birdwell. Campbell. Carona. Davis. Deuell. Duncan.
4 Ellis. Eltife. Estes. Fraser. Garcia. Hancock. Hegar. Hinojosa. Huffman. –

5 PRESIDENT : [Gavel.] There being 29 ayes and no nays, House Bill 2935
6 as amended is finally passed. [Gavel.]

7 ELLIS : Thank you, Mr. President and thank you, Members.

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DEBATE ON H.B. 2935
ON THE FLOOR OF THE TEXAS HOUSE
(SENATE AMENDMENTS)
83RD LEG., R.S.
(MAY 24, 2013)

PROCEEDINGS:

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[Debate on H.B. 2935 at 3 hours, 14 minutes, and 5 seconds into the House Session.]

[Rep. Dennis Bonnen in the Chair.]

SPEAKER : With the House's permission, the Chair would like to call up House Bill 2935 that's eligible at 6:30. Is there any objection? The Chair hears none. The Clerk will read the bill.

CLERK : H.B. 1869 by Hunter relating to the interlocutory appeal of a denial of a motion to dismiss in acts involving the exercise of certain constitutional rights.

SPEAKER : The Chair recognizes Rep. Hunter.

REP. TODD HUNTER : Mr. Speaker, Members, this is a negotiated amendment. I move to concur. It sets up the clarifying procedure for interlocutory appeals.

[Off-mike comments.]

SPEAKER : Members, it's a record vote. Clerk will ring the bill. [Bell.] Have all voted? [Gavel.] There being 135 ayes and 3 nays, the bill finally passes.

HOUSE JOURNAL

EIGHTY-THIRD LEGISLATURE, REGULAR SESSION

PROCEEDINGS

SIXTY-SECOND DAY (CONTINUED) — THURSDAY, MAY 2, 2013

The house met at 10 a.m. and was called to order by the speaker.

The roll of the house was called and a quorum was announced present (Record 435).

Present — Mr. Speaker; Allen; Alonzo; Alvarado; Anchia; Anderson; Ashby; Aycock; Bell; Bohac; Bonnen, D.; Bonnen, G.; Branch; Burkett; Burnam; Button; Callegari; Canales; Capriglione; Carter; Clardy; Coleman; Collier; Cook; Cortez; Craddick; Creighton; Crownover; Dale; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Dukes; Dutton; Eiland; Elkins; Fallon; Farias; Farney; Farrar; Fletcher; Flynn; Frank; Frullo; Geren; Giddings; Goldman; Gonzales; González, M.; Gonzalez, N.; Gooden; Guerra; Guillen; Gutierrez; Harless; Harper-Brown; Hernandez Luna; Herrero; Hilderbran; Howard; Huberty; Hughes; Hunter; Isaac; Johnson; Kacal; Keffer; King, K.; King, P.; King, S.; King, T.; Kleinschmidt; Klick; Kolkhorst; Krause; Kuempel; Larson; Laubenberg; Lavender; Leach; Lewis; Longoria; Lozano; Lucio; Márquez; Martinez; Martinez Fischer; McClendon; Menéndez; Miles; Miller, D.; Miller, R.; Moody; Morrison; Muñoz; Murphy; Naishtat; Nevárez; Orr; Otto; Paddie; Parker; Patrick; Perez; Perry; Phillips; Pickett; Pitts; Price; Raney; Ratliff; Raymond; Reynolds; Riddle; Ritter; Rodriguez, E.; Rodriguez, J.; Rose; Sanford; Schaefer; Sheets; Sheffield, J.; Sheffield, R.; Simmons; Simpson; Smith; Smithee; Springer; Stephenson; Stickland; Strama; Taylor; Thompson, E.; Thompson, S.; Toth; Turner, C.; Turner, E.S.; Turner, S.; Villalba; Villarreal; Vo; Walle; White; Workman; Wu; Zedler; Zerwas.

Absent, Excused — Oliveira.

The speaker recognized Representative Goldman who introduced Dr. Robert Pearle, pastor, Birchman Baptist Church, Fort Worth, who offered the invocation as follows:

Our Eternal God of grace and Divine Lawgiver, we come to you for the grace another day will require to discharge our duties and responsibilities. Help us to recognize our own inadequacies, that we may not lean on our own understanding, but acknowledge you in all our ways that you would direct our paths. Preserve our understanding from the subtlety of error, that we may apply our hearts to wisdom. Grant us strength to walk in the truth and light of your word. Guard us from being swayed by the allurements of power and popularity that would hinder us from doing the noble thing. Remind us that we are stewards

INTRODUCTION OF GUESTS

The chair recognized Representative Callegari who introduced William F. Fendley and members of his family.

(Speaker pro tempore in the chair)

LOCAL, CONSENT, AND RESOLUTIONS CALENDAR SECOND READING

The following bills were laid before the house, read second time, and passed to third reading (members registering votes are shown following the caption), and the following resolutions were laid before the house on committee report:

SB 162 (Flynn - House Sponsor), A bill to be entitled An Act relating to the occupational licensing of spouses of members of the military and the eligibility requirements for certain occupational licenses issued to applicants with military experience.

CSSB 166 (Larson - House Sponsor), A bill to be entitled An Act relating to the use by certain health care providers of electronically readable information from a driver's license or personal identification certificate.

SB 274 (Eiland - House Sponsor), A bill to be entitled An Act relating to permits for oversize and overweight vehicles in a certain county.

Amendment No. 1

Representative Eiland offered the following amendment to **SB 274**:

Amend **SB 274** (house committee printing) on page 1, line 15, by striking "10 [located in the Cedar Crossing Business Park]" and substituting "10, including the portion of the frontage road located in the Cedar Crossing Business and Industrial Park".

Amendment No. 1 was adopted.

SB 276 (Crownover - House Sponsor), A bill to be entitled An Act relating to the authority of certain transportation authorities to create a local government corporation. (Capriglione, Sanford, Schaefer, and Simpson recorded voting no.)

SB 649 (S. Thompson - House Sponsor), A bill to be entitled An Act relating to the exemption of certain property from seizure by creditors. (Simpson recorded voting no.)

CSSB 748 (Geren - House Sponsor), A bill to be entitled An Act relating to the use of certain tax revenue to enhance and upgrade convention center facilities, multipurpose arenas, venues, and related infrastructure in certain municipalities.

CSSB 820 (Guillen - House Sponsor), A bill to be entitled An Act relating to the management, breeding, and destruction of deer and to procedures regarding certain deer permits.

SB 852 (Smithee - House Sponsor), A bill to be entitled An Act relating to availability of certain property and casualty insurance forms.

Amendment No. 1

Representative Perry offered the following amendment to **HB 2688**:

Amend **HB 2688** (house committee printing) as follows:

(1) On page 6, strike lines 6-7.

(2) On page 8, line 17, strike "2015" and substitute "2014".

Amendment No. 1 was adopted.

CSHB 2704 (by Callegari), A bill to be entitled An Act relating to bids for construction contracts for certain conservation and reclamation districts.

CSHB 2718 (by Guillen), A bill to be entitled An Act relating to the cultural and fine arts district program administered by the Texas Commission on the Arts. (Capriglione, Goldman, Hunter, Krause, Kleinschmidt, Lavender, Leach, Parker, Perry, Sanford, Schaefer, Simmons, Simpson, Springer, Stickland, and Taylor recorded voting no.)

CSSB 1489 (Phillips - House Sponsor), in lieu of **HB 2743**, A bill to be entitled An Act relating to the powers and jurisdiction of a regional mobility authority. (Capriglione, Goldman, Isaac, Schaefer, Simmons, Simpson, and Taylor recorded voting no.)

Representative Phillips moved to lay **HB 2743** on the table subject to call, and the motion prevailed.

HB 2749 (by Parker), A bill to be entitled An Act relating to promulgation by the supreme court of standard forms for use in certain expedited foreclosure proceedings.

CSHB 2766 (by Hunter), A bill to be entitled An Act relating to the exclusion of certain flow-through funds in determining total revenue for purposes of the franchise tax.

CSHB 2806 (by Geren), A bill to be entitled An Act relating to delinquent payment of an alcoholic beverage retailer's account for liquor. (Schaefer and Simpson recorded voting no.)

CSHB 2912 (by S. Thompson), A bill to be entitled An Act relating to decedents' estates.

CSHB 2913 (by S. Thompson), A bill to be entitled An Act relating to trusts.

CSHB 2935 (by Hunter), A bill to be entitled An Act relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights. (Schaefer and Simpson recorded voting no.)

HB 2947 (by Harper-Brown), A bill to be entitled An Act relating to the notice provided by a purchaser of a motor vehicle of the designated county of title issuance.

HB 2995 was withdrawn and, pursuant to Rule 6, Section 24 of the House Rules, was returned to the Committee on Local and Consent Calendars.

HOUSE JOURNAL

EIGHTY-THIRD LEGISLATURE, REGULAR SESSION

PROCEEDINGS

SIXTY-THIRD DAY — THURSDAY, MAY 2, 2013

The house met at 2 p.m. and was called to order by the speaker pro tempore.

The roll of the house was called and a quorum was announced present (Record 436).

Present — Mr. Speaker; Allen; Alonzo; Alvarado; Anchia; Anderson; Ashby; Aycock; Bell; Bohac; Bonnen, D.; Bonnen, G.; Branch; Burkett; Burnam; Button; Callegari; Canales; Capriglione; Carter; Clardy; Coleman; Collier; Cook; Cortez; Craddick; Creighton; Crownover; Dale; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Dukes; Dutton; Eiland; Elkins; Fallon; Farias; Farney; Farrar; Fletcher; Flynn; Frank; Frullo; Geren; Giddings; Goldman; Gonzales; González, M.; Gonzalez, N.; Gooden; Guerra; Guillen; Gutierrez; Harless; Harper-Brown; Hernandez Luna; Herrero; Hilderbran; Howard; Huberty; Hughes; Hunter; Isaac; Johnson; Kacal; Keffer; King, K.; King, P.; King, S.; King, T.; Kleinschmidt; Klick; Kolkhorst; Krause; Kuempel; Larson; Laubenberg; Lavender; Leach; Lewis; Longoria; Lozano; Lucio; Márquez; Martínez; Martínez Fischer; McClendon; Menéndez; Miles; Miller, D.; Miller, R.; Moody; Morrison; Muñoz; Murphy; Naishtat; Nevárez; Orr; Otto; Paddie; Parker; Patrick; Perez; Perry; Phillips; Pickett; Pitts; Price; Raney; Ratliff; Raymond; Reynolds; Riddle; Ritter; Rodriguez, E.; Rodriguez, J.; Rose; Sanford; Schaefer; Sheets; Sheffield, J.; Sheffield, R.; Simmons; Simpson; Smith; Smithee; Springer; Stephenson; Stickland; Strama; Taylor; Thompson, E.; Thompson, S.; Toth; Turner, C.; Turner, E.S.; Turner, S.; Villalba; Villarreal; Vo; Walle; White; Workman; Wu; Zedler; Zerwas.

Absent, Excused — Oliveira.

LEAVES OF ABSENCE GRANTED

On motion of Representative S. Thompson and by unanimous consent, all members who were granted leaves of absence on the previous legislative day were granted leaves for this legislative day.

RULES SUSPENDED

Representative S. Thompson moved to suspend all necessary rules to take up and consider at this time, on third reading and final passage, the bills on the local, consent, and resolutions calendar which were considered on the previous legislative day.

The motion prevailed.

MOTION FOR ONE RECORD VOTE

On motion of Representative S. Thompson and by unanimous consent, the house agreed to use the first record vote taken for all those bills on the local, consent, and resolutions calendar that require a record vote on third reading and final passage, with the understanding that a member may record an individual vote on any bill with the journal clerk.

LOCAL, CONSENT, AND RESOLUTIONS CALENDAR THIRD READING

The following bills which were considered on second reading on the previous legislative day on the local, consent, and resolutions calendar were laid before the house, read third time, and passed by the following record vote (members registering votes and the results of the vote are shown following bill number).

(Record 437): 147 Yeas, 0 Nays, 2 Present, not voting.

Yeas — Allen; Alonzo; Alvarado; Anchia; Anderson; Ashby; Aycock; Bell; Bohac; Bonnen, G.; Branch; Burkett; Burnam; Button; Callegari; Canales; Capriglione; Carter; Clardy; Coleman; Collier; Cook; Cortez; Craddick; Creighton; Crownover; Dale; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Dukes; Dutton; Eiland; Elkins; Fallon; Farias; Farney; Farrar; Fletcher; Flynn; Frank; Frullo; Geren; Giddings; Goldman; Gonzales; González, M.; Gonzalez, N.; Gooden; Guerra; Guillen; Gutierrez; Harless; Harper-Brown; Hernandez Luna; Herrero; Hilderbran; Howard; Huberty; Hughes; Hunter; Isaac; Johnson; Kacal; Keffer; King, K.; King, P.; King, S.; King, T.; Kleinschmidt; Klick; Kolkhorst; Krause; Kuempel; Larson; Laubenberg; Lavender; Leach; Lewis; Longoria; Lozano; Lucio; Márquez; Martinez; Martinez Fischer; McClendon; Menéndez; Miles; Miller, D.; Miller, R.; Moody; Morrison; Muñoz; Murphy; Naishtat; Nevárez; Orr; Otto; Paddie; Parker; Patrick; Perez; Perry; Phillips; Pickett; Pitts; Price; Raney; Ratliff; Raymond; Reynolds; Riddle; Ritter; Rodriguez, E.; Rodriguez, J.; Rose; Sanford; Schaefer; Sheets; Sheffield, J.; Sheffield, R.; Simmons; Simpson; Smith; Smithee; Springer; Stephenson; Stickland; Strama; Taylor; Thompson, E.; Thompson, S.; Toth; Turner, C.; Turner, E.S.; Turner, S.; Villalba; Villarreal; Vo; Walle; White; Workman; Wu; Zedler; Zerwas.

Present, not voting — Mr. Speaker; Bonnen, D.(C).

Absent, Excused — Oliveira.

SB 162

SB 166

SB 274

SB 276 (Capriglione, Sanford, Schaefer, and Simpson - no) (143 - 4 - 2)

SB 649 (Simpson - no) (146 - 1 - 2)

SB 748

HB 2424**HB 2448** (Schaefer - no) (146 - 1 - 2)**HB 2474** (Taylor - no) (146 - 1 - 2) (Carter requested to be recorded voting no after the deadline established by Rule 5, Section 52 of the House Rules.)**HB 2478** (Anderson and Flynn - no) (145 - 2 - 2)**HB 2482** (Anderson, Flynn, Schaefer, and Simpson - no) (143 - 4 - 2)**HB 2537** (Krause, Schaefer, and Simpson - no) (144 - 3 - 2)**HB 2549****HB 2550** (Goldman, Leach, R. Sheffield, Simmons, and Springer - no) (142 - 5 - 2)**HB 2580** (Capriglione, Harless, Schaefer, and Simpson - no) (143 - 4 - 2)**SB 655****HB 2610** (Schaefer and Simpson - no) (145 - 2 - 2)**HB 2619****HB 2621****HB 2645** (Schaefer and Simpson - no) (145 - 2 - 2)**HB 2688****HB 2704****HB 2718** (Capriglione, Goldman, Hunter, Krause, Kleinschmidt, Lavender, Leach, Parker, Perry, Sanford, Schaefer, Simmons, Simpson, Springer, Stickland, and Taylor - no) (131 - 16 - 2)**SB 1489** (Capriglione, Goldman, Isaac, Schaefer, Simmons, Simpson, and Taylor - no) (140 - 7 - 2)**HB 2749****HB 2766****HB 2806** (Schaefer and Simpson - no) (145 - 2 - 2)**HB 2912****HB 2913****HB 2935** (Schaefer and Simpson - no) (145 - 2 - 2)**HB 2947****HB 3028****HB 3063** (Simpson - no) (146 - 1 - 2)**HB 3066** (Simpson - no) (146 - 1 - 2)**HB 3067** (Simpson - no) (146 - 1 - 2)**HB 3097**

[History](#)[Text](#)[Actions](#)[Companions](#)[Amendments](#)[Authors](#)[Sponsors](#)[Captions](#)[Bill Stages](#)**Bill:** [SB 1513](#)

Legislative Session: 83(R)

Author: Ellis

[Add to Bill List](#) | [Add to Alert List](#)**Actions:** (descending date order)

Description	Comment	Date ▼	Time	Journal Page
S Referred to State Affairs		03/19/2013		532
S Read first time		03/19/2013		532
S Filed		03/08/2013		
S Received by the Secretary of the Senate		03/08/2013		

By: Ellis

S.B. No. 1513

A BILL TO BE ENTITLED

1 AN ACT
2 relating to the interlocutory appeal of a denial of a motion to
3 dismiss in an action involving the exercise of certain
4 constitutional rights.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Sections 51.014(a) and (b), Civil Practice and
7 Remedies Code, are amended to read as follows:

8 (a) A person may appeal from an interlocutory order of a
9 district court, county court at law, or county court that:

- 10 (1) appoints a receiver or trustee;
- 11 (2) overrules a motion to vacate an order that
12 appoints a receiver or trustee;
- 13 (3) certifies or refuses to certify a class in a suit
14 brought under Rule 42 of the Texas Rules of Civil Procedure;
- 15 (4) grants or refuses a temporary injunction or grants
16 or overrules a motion to dissolve a temporary injunction as
17 provided by Chapter 65;
- 18 (5) denies a motion for summary judgment that is based
19 on an assertion of immunity by an individual who is an officer or
20 employee of the state or a political subdivision of the state;
- 21 (6) denies a motion for summary judgment that is based
22 in whole or in part upon a claim against or defense by a member of
23 the electronic or print media, acting in such capacity, or a person
24 whose communication appears in or is published by the electronic or

1 print media, arising under the free speech or free press clause of
2 the First Amendment to the United States Constitution, or Article
3 I, Section 8, of the Texas Constitution, or Chapter 73;

4 (7) grants or denies the special appearance of a
5 defendant under Rule 120a, Texas Rules of Civil Procedure, except
6 in a suit brought under the Family Code;

7 (8) grants or denies a plea to the jurisdiction by a
8 governmental unit as that term is defined in Section 101.001;

9 (9) denies all or part of the relief sought by a motion
10 under Section 74.351(b), except that an appeal may not be taken from
11 an order granting an extension under Section 74.351;

12 (10) grants relief sought by a motion under Section
13 74.351(1);

14 (10-a) denies a motion to dismiss filed under Section
15 27.003; or

16 (11) denies a motion to dismiss filed under Section
17 90.007.

18 (b) An interlocutory appeal under Subsection (a), other
19 than an appeal under Subsection (a)(4), stays the commencement of a
20 trial in the trial court pending resolution of the appeal. An
21 interlocutory appeal under Subsection (a)(3), (5), ~~(8)~~, or
22 (10-a) also stays all other proceedings in the trial court pending
23 resolution of that appeal.

24 SECTION 2. The change in law made by this Act applies to a
25 denial of a motion to dismiss made on or after the effective date of
26 this Act. A denial of a motion to dismiss made before the effective
27 date of this Act is governed by the law in effect immediately before

1 the effective date of this Act, and that law is continued in effect
2 for that purpose.

3 SECTION 3. This Act takes effect immediately if it receives
4 a vote of two-thirds of all the members elected to each house, as
5 provided by Section 39, Article III, Texas Constitution. If this
6 Act does not receive the vote necessary for immediate effect, this
7 Act takes effect September 1, 2013.

SENATE JOURNAL

EIGHTY-THIRD LEGISLATURE — REGULAR SESSION

AUSTIN, TEXAS

PROCEEDINGS

SIXTY-THIRD DAY

(Continued)

(Wednesday, May 22, 2013)

AFTER RECESS

The Senate met at 10:55 a.m. and was called to order by Senator Eltife.

Pastor Don Duncan, Tree of Life Church, New Braunfels, offered the invocation as follows:

Dear heavenly Father, I come to You today asking for Your hand and Your blessing on the men and women of the Senate of the great State of Texas. I thank You for their commitment and sacrifice in serving the people. I'm reminded of the example You set, Lord, in scriptures when You said, I did not come to be served but to serve. May that same heart be in them, the heart of a servant. As they give themselves to the great responsibility of leading this state, I pray that You are with them every step of the way. I pray that they feel Your presence and allow Your spirit to lead them and guide them through the many difficult decisions that need to be made. I pray that You give them the ability to see beyond personal wants and desires and see the path that is best for all, and I pray they all can work together to fulfill their calling. Heavenly Father, they have such a great responsibility in what they are called to do. So, I ask You to come alongside them and equip them and empower them to perform it. Help them realize that they are not alone but that You are just a prayer away. Let them know that when they seek You they will find You, and when they knock, You will answer. May they tap into the grace that You provide to perform their sacred duties and responsibilities, and may they always ask, What would You have us do, Lord? Father, Your word says in Proverbs 24:3-4, By wisdom a house is built, and through understanding it is established; through knowledge its rooms are filled. I thank You that through wisdom these men and women are building this house, this great State of Texas, on all of our behalf. Your word says that when we lack wisdom, all we need is to ask for it and it is given liberally. So, I ask You for wisdom for these Senators to build this house. I pray for understanding that it may be established. May they have a greater understanding of the needs of the people of the State of Texas. I pray that they have a greater understanding of You and Your ways so they may lead us in line with Your

(A) that the vehicle is in a parking space in which the vehicle is not authorized to be parked;

(B) a description of all other unauthorized areas in the parking facility;

(C) that the vehicle will be towed at the expense of the owner or operator of the vehicle if it remains in an unauthorized area of the parking facility; and

(D) a telephone number that is answered 24 hours a day to enable the owner or operator of the vehicle to locate the vehicle; and

(2) a notice is mailed after the notice is attached to the vehicle as provided by Subdivision (1) to the owner of the vehicle by certified mail, return receipt requested, to the last address shown for the owner according to the vehicle registration records of the Texas Department of Motor Vehicles [~~Transportation~~], or if the vehicle is registered in another state, the appropriate agency of that state.

SECTION 3. The changes in law made by this Act apply only to a notice mailed on or after September 1, 2013. A notice mailed before September 1, 2013, is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect September 1, 2013.

The amendment was read.

Senator Carona moved to concur in the House amendment to **SB 1053**.

The motion prevailed by the following vote: Yeas 31, Nays 0.

HOUSE BILL 2935 ON SECOND READING

On motion of Senator Ellis and by unanimous consent, the regular order of business was suspended to take up for consideration **HB 2935** at this time on its second reading:

HB 2935, Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.

The bill was read second time.

Senator Whitmire offered the following amendment to the bill:

Floor Amendment No. 1

Amend **HB 2935** (senate committee printing) by adding the following appropriately numbered SECTIONS to the bill and renumbering subsequent SECTIONS of the bill accordingly:

SECTION _____. Section 27.004, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th [~~30th~~] day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

SECTION _____. Section 27.005, Civil Practice and Remedies Code, is amended by adding Subsection (d) to read as follows:

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

SECTION _____. Section 27.010, Civil Practice and Remedies Code, is amended by amending Subsection (b) and adding Subsection (d) to read as follows:

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

WHITMIRE
ELTIFE

The amendment to **HB 2935** was read and was adopted by a viva voce vote.

All Members are deemed to have voted "Yea" on the adoption of Floor Amendment No. 1.

On motion of Senator Ellis and by unanimous consent, the caption was amended to conform to the body of the bill as amended.

HB 2935 as amended was passed to third reading by a viva voce vote.

All Members are deemed to have voted "Yea" on the passage to third reading.

HOUSE BILL 2935 ON THIRD READING

Senator Ellis moved that Senate Rule 7.18 and the Constitutional Rule requiring bills to be read on three several days be suspended and that **HB 2935** be placed on its third reading and final passage.

The motion prevailed by the following vote: Yeas 31, Nays 0.

The bill was read third time.

Senator Ellis moved to temporarily postpone further consideration of **HB 2935**.

The motion prevailed.

Question — Shall **HB 2935** be finally passed?

**COMMITTEE SUBSTITUTE
HOUSE BILL 437 ON SECOND READING**

On motion of Senator Seliger and by unanimous consent, the regular order of business was suspended to take up for consideration **CSHB 437** at this time on its second reading:

CSHB 437, Relating to career and technical education and workforce development grant programs.

The bill was read second time.

Senator Seliger offered the following amendment to the bill:

Floor Amendment No. 1

Amend **CSHB 437** (Senate Committee Printing) in SECTION 3 of the bill, on page 3, lines 58 and 59 by striking subsection (c).

The amendment to **CSHB 437** was read and was adopted by a viva voce vote.

All Members are deemed to have voted "Yea" on the adoption of Floor Amendment No. 1.

On motion of Senator Seliger and by unanimous consent, the caption was amended to conform to the body of the bill as amended.

CSHB 437 as amended was passed to third reading by a viva voce vote.

All Members are deemed to have voted "Yea" on the passage to third reading.

**COMMITTEE SUBSTITUTE
HOUSE BILL 437 ON THIRD READING**

Senator Seliger moved that Senate Rule 7.18 and the Constitutional Rule requiring bills to be read on three several days be suspended and that **CSHB 437** be placed on its third reading and final passage.

The motion prevailed by the following vote: Yeas 31, Nays 0.

The bill was read third time and was passed by the following vote: Yeas 31, Nays 0.

MESSAGE FROM THE HOUSE

HOUSE CHAMBER

Austin, Texas

Wednesday, May 22, 2013 - 1

The Honorable President of the Senate
Senate Chamber
Austin, Texas

Mr. President:

I am directed by the house to inform the senate that the house has taken the following action:

THE HOUSE HAS PASSED THE FOLLOWING MEASURES:

- SB 21** Williams Sponsor: Creighton
Relating to drug screening or testing as a condition for the receipt of unemployment compensation benefits by certain individuals.
(Committee Substitute/Amended)
- SB 107** West Sponsor: Johnson
Relating to the disclosure by a court of criminal history record information that is the subject of an order of nondisclosure.
(Amended)
- SB 126** Nelson Sponsor: Davis, John
Relating to the creation of a mental health and substance abuse public reporting system.
(Amended)
- SB 141** Huffman Sponsor: Davis, Sarah
Relating to the requirements for issuance of a license to practice orthotics and prosthetics.
- SB 220** Birdwell Sponsor: Anchia
Relating to the abolition of the office of the fire fighters' pension commissioner and the transfer and disposition of its functions relating to the Texas Emergency Services Retirement System and the Texas local firefighters retirement systems.
- SB 347** Seliger Sponsor: Lewis
Relating to funding for the operations of the Texas Low-Level Radioactive Waste Disposal Compact Commission.
(Amended)
- SB 460** Deuell Sponsor: Coleman
Relating to inclusion of instruction in the detection and education of students with mental or emotional disorders in the requirements for educator training programs.
(Amended)
- SB 485** Ellis Sponsor: Parker
Relating to the sales tax exemption period for clothing and footwear.
- SB 492** Lucio Sponsor: Sheffield, J. D.
Relating to the licensing and regulation of prescribed pediatric extended care centers; providing penalties; imposing fees.
(Committee Substitute/Amended)
- SB 549** Williams Sponsor: Carter
Relating to penalties for engaging in organized criminal activity.
(Amended)
- SB 646** Deuell Sponsor: Naishtat
Relating to court-ordered outpatient mental health services.
(Committee Substitute)
- SB 736** Watson Sponsor: Smithee
Relating to insurance rating and underwriting practices and declinations based on certain consumer inquiries.

- SB 976** West Sponsor: Branch
Relating to the temporary approval of an institution to participate in the tuition equalization grant program.
- SB 987** Hegar Sponsor: Harless
Relating to allowing the attorney general to obtain an injunction against a municipality or county that adopts prohibited regulations regarding firearms, ammunition, or firearm supplies.
- SB 993** Deuell Sponsor: King, Susan
Relating to the creation of the Texas Nonprofit Council to assist with faith-based and community-based initiatives.
(Amended)
- SB 1003** Carona Sponsor: Guillen
Relating to a review of and report regarding the use of adult and juvenile administrative segregation in facilities in this state.
(Committee Substitute/Amended)
- SB 1044** Rodríguez Sponsor: Walle
Relating to access to criminal history record information by certain entities, including certain local government corporations, public defender's offices, and the office of capital writs, and to an exemption for those offices from fees imposed for processing inquiries for that information.
- SB 1173** West Sponsor: White
Relating to procedures for the sentencing and placement on community supervision of defendants charged with the commission of a state jail felony.
(Committee Substitute/Amended)
- SB 1216** Eltife Sponsor: Davis, Sarah
Relating to the creation of a standard request form for prior authorization of medical care or health care services.
(Amended)
- SB 1234** Whitmire Sponsor: Price
Relating to the prevention of truancy and the offense of failure to attend school.
(Committee Substitute/Amended)
- SB 1292** Ellis Sponsor: Turner, Sylvester
Relating to DNA testing of biological evidence in certain capital cases.
(Amended)
- SB 1368** Davis Sponsor: Alvarado
Relating to contracts by certain state governmental entities that involve the exchange or creation of public information.
(Amended)
- SB 1388** Carona Sponsor: Bohac
Relating to identity recovery services; imposing a fee.
(Committee Substitute)
- SB 1475** Duncan Sponsor: Zerwas
Relating to a jail-based restoration of competency pilot program.
- SB 1567** Davis Sponsor: Eiland
Relating to coverage of certain persons under an automobile insurance policy.

- SB 1643** Williams Sponsor: Alvarado
Relating to the monitoring of prescriptions for certain controlled substances; providing penalties.
(Committee Substitute/Amended)
- SB 1672** Taylor Sponsor: Eiland
Relating to the business of travel insurance; authorizing penalties.
- SB 1702** Taylor Sponsor: Bonnen, Dennis
Relating to residential property insured by the Texas Windstorm Insurance Association.
(Amended)
- SB 1705** Campbell Sponsor: Parker
Relating to the administration of certain examinations required to obtain a driver's license.
- SB 1747** Uresti Sponsor: Keffer
Relating to funding and donations for county transportation projects, including projects of county energy transportation reinvestment zones.
(Committee Substitute/Amended)
- SB 1769** Rodríguez Sponsor: White
Relating to the creation of an advisory committee to examine the fingerprinting practices of juvenile probation departments.
- SB 1771** Campbell Sponsor: Kuempel
Relating to the expansion of the boundaries of the Cibolo Creek Municipal Authority.
- SB 1795** Watson Sponsor: Guillen
Relating to the regulation of navigators for health benefit exchanges.
(Amended)
- SB 1812** Duncan Sponsor: Otto
Relating to the determination of state contributions for participation by certain junior college employees in the state employees group benefits program, the Teacher Retirement System of Texas, and the Optional Retirement Program.

Respectfully,

/s/Robert Haney, Chief Clerk
House of Representatives

BILLS AND RESOLUTIONS SIGNED

The President announced the signing of the following enrolled bills and resolutions in the presence of the Senate after the captions had been read:

HB 4, HB 124, HB 217, HB 343, HB 705, HB 719, HB 724, HB 978, HB 1133, HB 1228, HB 1294, HB 1297, HB 1318, HB 1494, HB 1712, HB 1752, HB 1775, HB 1843, HB 2020, HB 2473, HB 2636, HB 2766, HB 2792, HB 2840, HB 3086, HB 3105, HB 3116, HB 3233, HB 3256, HB 3805, HB 3941, HCR 112, HCR 120, HCR 125, HCR 126, HJR 87.

**COMMITTEE SUBSTITUTE
HOUSE BILL 1128 ON SECOND READING**

Senator Garcia moved to suspend the regular order of business to take up for consideration **CSHB 1128** at this time on its second reading:

CSHB 1128, Relating to posting suggestions and ideas on cost-efficiency on certain state agency websites.

The motion prevailed by the following vote: Yeas 25, Nays 6.

Yeas: Campbell, Carona, Davis, Deuell, Ellis, Eltife, Estes, Fraser, Garcia, Hancock, Hegar, Hinojosa, Huffman, Lucio, Patrick, Rodriguez, Schwertner, Seliger, Taylor, Uresti, Van de Putte, Watson, West, Whitmire, Zaffirini.

Nays: Birdwell, Duncan, Nelson, Nichols, Paxton, Williams.

The bill was read second time and was passed to third reading by the following vote: Yeas 23, Nays 8.

Yeas: Campbell, Carona, Davis, Deuell, Ellis, Eltife, Estes, Fraser, Garcia, Hegar, Hinojosa, Lucio, Patrick, Rodriguez, Schwertner, Seliger, Taylor, Uresti, Van de Putte, Watson, West, Whitmire, Zaffirini.

Nays: Birdwell, Duncan, Hancock, Huffman, Nelson, Nichols, Paxton, Williams.

**COMMITTEE SUBSTITUTE
HOUSE BILL 1128 ON THIRD READING**

Senator Garcia moved that Senate Rule 7.18 and the Constitutional Rule requiring bills to be read on three several days be suspended and that **CSHB 1128** be placed on its third reading and final passage.

The motion prevailed by the following vote: Yeas 25, Nays 6.

Yeas: Campbell, Carona, Davis, Deuell, Ellis, Eltife, Estes, Fraser, Garcia, Hancock, Hegar, Hinojosa, Huffman, Lucio, Patrick, Rodriguez, Schwertner, Seliger, Taylor, Uresti, Van de Putte, Watson, West, Whitmire, Zaffirini.

Nays: Birdwell, Duncan, Nelson, Nichols, Paxton, Williams.

The bill was read third time and was passed by the following vote: Yeas 23, Nays 8.

Yeas: Campbell, Carona, Davis, Deuell, Ellis, Eltife, Estes, Fraser, Garcia, Hegar, Hinojosa, Lucio, Patrick, Rodriguez, Schwertner, Seliger, Taylor, Uresti, Van de Putte, Watson, West, Whitmire, Zaffirini.

Nays: Birdwell, Duncan, Hancock, Huffman, Nelson, Nichols, Paxton, Williams.

SENATE BILL 24 WITH HOUSE AMENDMENTS

Senator Hinojosa called **SB 24** from the President's table for consideration of the House amendments to the bill.

The President laid the bill and the House amendments before the Senate.

Floor Amendment No. 1

Amend **SB 24** by adding an appropriately numbered SECTION to the bill, to read as follows:

(1) On page 2, line 5, between "Chapter 74" and ";", insert ", subject to the provisions of that subchapter regarding the location of certain facilities and programs of the health science center".

(2) Strike SECTION 2 of the bill (page 10, lines 10 to 20) and substitute the following SECTION 2:

SECTION 2. CONFORMING AMENDMENT. Section 74.751(a), Education Code, is amended to read as follows:

(a) The board of regents of The University of Texas System may operate The University of Texas Health Science Center–South Texas as provided by Section 79.02 [a component institution of The University of Texas System] with its [main campus and] administrative offices to be located in Hidalgo and Cameron Counties [County]. The health science center shall [may] consist of a medical school, as provided by Section 74.752, other health and health-related degree programs, and related programs and facilities as the board considers appropriate.

(3) SECTION _____. Section 74.752, Education Code, is amended to read as follows:

Sec. 74.752. MEDICAL SCHOOL. (a) The medical school [~~If The University of Texas Health Science Center–South Texas is established under Section 74.751, The University of Texas Medical School–South Texas may be~~] established as a component of the health science center and as a component institution of The University of Texas System under the management and control of the board of regents of The University of Texas System is subject to this section. The offices overseeing undergraduate medical education shall be located in Hidalgo County and the offices overseeing graduate medical education shall be located in Cameron County. The board shall ensure that educational programs for first-year and second-year students shall be primarily located in Hidalgo County, and the educational programs for third-year and fourth-year students shall be primarily located in Cameron County; and the educational programs for all medical students shall take full advantage of the existing educational facilities and programs at The University of Texas–Pan American's Edinburg campus or successor campus, The University of Texas at Brownsville campus or successor campus, and the Lower Rio Grande Valley Regional Academic Health Center established under Subchapter L, Chapter 74, in Harlingen and Edinburg. Graduate medical education programs and activities shall be conducted throughout the region.

(4) Strike SECTION 5 of the bill (page 12, line 24, to page 13, line 26) and renumber subsequent SECTION of the bill accordingly.

Floor Amendment No. 2

Amend **SB 24** (house committee report) as follows:

On page 2, between lines 23 and 24, by adding the following:

(f) The board has all the powers and duties provided by prior law, as that law existed at the time the applicable university or other entity was abolished, in regard to:

(1) The University of Texas at Brownsville, The University of Texas–Pan American, and any other institution, college, school, or entity abolished under the Act authorizing creation of the university; and

(2) any facility, operation, or program that is transferred to the university under that Act.

(g) The board may impose and collect any fee authorized by prior law, as that law existed at the time the applicable university was abolished, for The University of Texas at Brownsville or The University of Texas–Pan American, as determined by the board and subject to the limitations provided by the prior law authorizing the fee. The abolition of The University of Texas at Brownsville and The University of Texas–Pan American does not affect any pledge of revenue from a fee made by or on behalf of either of those universities to pay obligations issued in connection with facilities for which the fee was imposed and the obligations were issued.

The amendments were read.

Senator Hinojosa moved to concur in the House amendments to **SB 24**.

The motion prevailed by the following vote: Yeas 31, Nays 0.

REMARKS ORDERED PRINTED

On motion of Senator Lucio and by unanimous consent, the remarks by Senators Hinojosa, Lucio, and Zaffirini regarding **SB 24** were ordered reduced to writing and printed in the *Senate Journal* as follows:

Senator Hinojosa: Thank you, Mr. President and Members. Senate Bill 24 is the bill that merged and created a new university in South Texas by merging The University of Texas–Pan American and The University of Texas Brownsville. And the amendment that we have is the amendment that reflects the agreement reached by the Rio Grande Valley delegation which sets up a medical school in South Texas. The amendment adds language that now states a specific location for the offices and educational programs of the medical school. And at this time, I would like to yield to my good friend, Senator Eddie Lucio, who worked very closely with the Valley delegation to make this a reality. Senator Lucio.

Senator Lucio: Thank you, Mr. President. Thank you, Senator Hinojosa. Members, I want to say I'm extremely delighted to rise and join my colleagues today in concurring in House changes to Senate Bill 24. As you all know, the creation of a new, first-class university in the Rio Grande Valley has been our biggest priority this session. We started this session with a goal of creating a new university that will span the entire Rio Grande Valley. Along the way, we had some contentious details to work out, but we resolved them. I need to commend our Rio Grande Valley delegation for working so hard through the legislative process to resolve any differences. In particular, I want to thank my colleagues in the House for forging today's compromise language. The passage of Senate Bill 24, Members, will mark a historic day for the Rio Grande Valley. The Rio Grande Valley will soon become a center for multinational education, medicine, and industry. This legislation is the first step toward creating the Valley's only Tier One research university. The UT system and our delegation envision a university with state-of-the-art resources and the ability to attract top-notch faculty. The impact this legislation will have in creating educational

opportunities in the Valley cannot be overstated. Currently, no UT system emerging research university has a medical school integrated into its campus. I expect that this new school will quickly become eligible for national research grant dollars. This school will also be eligible for the Permanent University Fund money, which can be applied to building new lecture space and cutting-edge research facilities. All of these factors will make this new campus highly sought after by research faculty from all over the globe. This legislation, Members, may also mark the start of emerging industry related to the university. The Rio Grande Valley is already one of the largest and fastest growing areas of the state. I fully expect the new university will attract students and professionals interested in international and bicultural programs. From this, for example, a vibrant health care industry or port industry may be strengthened. The inclusion of the future South Texas School of Medicine as part of this new university marks the culmination of decades of work expanding higher education and, in particular, medical education in the Rio Grande Valley. I take great pride in the fact that the bill to create The University of Texas at Brownsville was one of the first bills I passed when I took office in the Senate. To improve access to quality health care in the Valley, I also was very fortunate to author legislation to create the Regional Academic Health Center in Harlingen. Finally, during the 81st session, I authored legislation to transition to RAHC, the Regional Academic Health Center, into a stand-alone medical school and health science center, with your help. Today, I'm proud to join Senator Hinojosa and Senator Seliger, Zaffirini, as a joint author on Senate Bill 24. Today also marks a culmination of an entire session's worth of hard work from the UT system and members of the Valley's legislative delegation. I would like to thank Chairman Gene Powell, Chancellor Francisco Cigarroa, and the UT system for setting us a bold new vision of the Valley and for pledging to support the new university with a \$100 million investment over the next 10 years to accelerate the pace of creating the future South Texas School of Medicine. I want to thank UT Brownsville President Juliet Garcia and UT Pan American President Robert Nelsen for their tireless advocacy on behalf of the new university. I'd also like to thank our local government and business leaders for supporting this legislation. There's so many to list right now, but they know who they are and I hope to God they're listening. I'm grateful to our leadership, Governor Perry, Governor Dewhurst, Speaker Straus, Chairmen Seliger and Branch, for their assistance. I also need to thank my good friend, Senator Chuy Hinojosa, as well as State Representative René Oliveira, the Dean of the Valley delegation in the House, Ryan Guillen, Armando Martinez, Sergio Muñoz, Jr., Terry Canales, Bobby Guerra, and Oscar Longoria for their hard work and leadership. Finally, Members, I'm thankful to my son, Representative Eddie Lucio III, who in the darkest and most challenging moments of this development demonstrated incredible leadership by bringing stakeholders together to achieve consensus. I'm humbled that the next generation of leaders have become the torchbearers of higher education. Building the medical school and expanding the RAHC was always intended to be a regional project. I'm so happy that we stand united as a delegation today. Again, Members, passage of Senate Bill 24 will mark the beginning of a new day for the Rio Grande Valley. Today, people come to the Valley because of our history. Tomorrow they will come, be coming to the Valley to watch us make history. Thank you, Mr. President and Members. Thank you, and I yield to Senator Zaffirini.

Senator Zaffirini: Thank you, Mr. President. Mr. President and Members, it is with great joy that I rise to join Senator Hinojosa and Senator Lucio in thanking all of you, Governor Dewhurst, and every Member of this body for your support in passing this historic legislation. This is really about Texas. The focus is on South Texas, but what is good for South Texas is good for our great state. And while the focus has been on Cameron and Hidalgo counties, I'm proud that it also includes Starr County, which is in my district, and we'll have an academic center as part of this effort and, of course, our campus in Laredo that's affiliated with the UT Health Science Center at San Antonio. It's a great day for South Texas. It's a great day for the State of Texas, and thank each of you from the bottom of our hearts for your role in making this day a reality. Thank you, Mr. President and Members.

Senator Hinojosa: Today, May 22nd, 2013, I am making a formal motion to concur with the changes made to Senate Bill 24 in the House of Representatives in support of a compromise plan that merges UT Pan American and UT Brownsville and creates a freestanding medical school. SB 24 was amended last week to reflect the negotiated plan reached by the Valley delegation that specifies the medical school educational programs for first-year and second-year programs shall be primarily located in Hidalgo County, and the educational programs for third-year and fourth-year students shall be primarily located in Cameron County. Also, offices overseeing undergraduate medical education should be located in Hidalgo County, and offices overseeing the graduates' residency programs should be located in Cameron County. Finally, the language ensures that educational programs for all medical students will take full advantage of the existing educational facilities at UT Pan American, UT Brownsville, and the Lower Rio Grande Valley Regional Academic Health Center. Senate Bill 24 has been our priority all session long. I thank Chairman Kel Seliger for letting me manage this bill through the legislative process. I thank my colleagues, Senator Eddie Lucio, Jr., and Senator Judith Zaffirini, who are my joint authors, for their counsel and guidance. I express sincere thanks to Chairman Powell and Chancellor Cigarroa of The University of Texas System. I also express gratitude to Governor Rick Perry and Lieutenant Governor David Dewhurst for their support throughout the entire process. I am proud of the tremendous bipartisan support we had in both the House and the Senate; legislators have come together to invest in education and in the people of South Texas. Although there were contentious issues, it was no different than other legislation that is complicated with various moving parts. Negotiating, the "give and take," is part of the process when various stakeholders are involved. In the end, we all came together on an agreement that takes a regional approach and maximizes the RAHC, UT Brownsville in Cameron County, and UT Pan American in Hidalgo County to the benefit of not only South Texas but the whole State of Texas. I thank the entire Valley delegation, especially the Hidalgo County legislators for advocating and supporting this legislation. Representatives Mando Martinez, Sergio Muñoz, Terry Canales, Bobby Guerra, and Oscar Longoria proved themselves through their hard work, perseverance, and leadership. I also thank Chairman René Oliveira and Representative Eddie Lucio III for their leadership and willingness to negotiate and compromise by doing what is best for all of South Texas. The expansion of educational opportunities will create greater access to health care, and the related health care businesses that the medical school will attract will be a

great boost to our quality of life in the Valley. There will be more jobs, lower poverty levels, higher educational levels, more health care services, more doctors, more access to those doctors, and more resources to serve the unique and critical needs of the people of the Valley. I am proud that we stand united as a delegation embracing a regional mindset. The vision of a new university and a medical school has united our Valley community proving that we can transform a dream into a reality.

HOUSE BILL 2935 ON THIRD READING

The President laid before the Senate **HB 2935** by Senator Ellis on its third reading. The bill had been read third time and further consideration temporarily postponed:

HB 2935, Relating to the interlocutory appeal of a denial of a motion to dismiss in an action involving the exercise of certain constitutional rights.

Question — Shall **HB 2935** be finally passed?

HB 2935 was finally passed by the following vote: Yeas 31, Nays 0.

COMMITTEE SUBSTITUTE HOUSE BILL 1025 ON SECOND READING

Senator Williams moved to suspend the regular order of business to take up for consideration **CSHB 1025** at this time on its second reading:

CSHB 1025, Relating to making supplemental appropriations and reductions in appropriations and giving direction and adjustment authority regarding appropriations.

The motion prevailed by the following vote: Yeas 29, Nays 2.

Yeas: Birdwell, Campbell, Carona, Davis, Deuell, Duncan, Ellis, Eltife, Estes, Fraser, Garcia, Hancock, Hegar, Hinojosa, Huffman, Lucio, Nelson, Nichols, Rodríguez, Schwertner, Seliger, Taylor, Uresti, Van de Putte, Watson, West, Whitmire, Williams, Zaffirini.

Nays: Patrick, Paxton.

The bill was read second time.

Senator Williams offered the following amendment to the bill:

Floor Amendment No. 1

Amend **CSHB 1025** (senate committee printing) by striking all below the enacting clause and substituting the following:

SECTION 1. APPROPRIATION REDUCTION: TEXAS PUBLIC FINANCE AUTHORITY. The unencumbered appropriations from undedicated or dedicated portions of the general revenue fund to the Texas Public Finance Authority for use during the state fiscal biennium ending August 31, 2013, for bond debt service payments made by Chapter 1355 (H.B. 1), Acts of the 82nd Legislature, Regular Session, 2011 (the General Appropriations Act), including appropriations authorized under Rider 2 to the bill pattern of the appropriations to the authority, are reduced by a

Legislative Session: 83(R)

House Bill 2935
Effective: 6-14-13

House Author: Hunter
Senate Sponsor: Ellis

House Bill 2935 amends Civil Practice and Remedies Code provisions relating to legal actions involving a party's exercise of the constitutional rights to petition, to speak freely, or to associate freely. The bill modifies deadlines for setting and holding hearings on motions to dismiss such actions, adds a condition under which the court is required to dismiss such an action, and repeals a provision relating to the deadline for filing appeals or writs concerning these motions. The bill also authorizes a person to appeal from an interlocutory order denying a motion to dismiss and specifies that such an appeal stays all proceedings in the trial court pending resolution of that appeal. The bill exempts a legal action brought under the Insurance Code or arising out of an insurance contract from provisions relating to legal actions involving the exercise of these constitutional rights.

 KeyCite Yellow Flag - Negative Treatment

Distinguished by [In re Estate of Check](#), Tex.App.-San Antonio, July 9, 2014

401 S.W.3d 440
Court of Appeals of Texas,
Dallas.

[BETTER BUSINESS BUREAU OF METROPOLITAN DALLAS, INC.](#), Appellant

v.

[Lloyd WARD](#), Appellee.

No. 05-12-00575-CV. | May 15, 2013. | Rehearing Overruled June 27, 2013. |

Synopsis

Background: Law firm and attorney filed complaint against nonprofit business-rating corporation for libel, slander, and related claims arising out of corporation's assignment of "F" rating to law firm. The County Court at Law No. 3, Dallas County, [Sally Montgomery, J.](#), denied corporation's motion to dismiss claims against attorney, and corporation appealed.

Holdings: The Court of Appeals, [Fillmore, J.](#), held that:

[1] Court of Appeals had jurisdiction over interlocutory appeal;

[2] motion to dismiss claims by attorney was timely filed; and

[3] corporation's assignment of "F" rating to law firm was matter of "public concern," within meaning of Texas Citizens Participation Act (TCPA).

Reversed and rendered in part; remanded.

See also, [402 S.W.3d 299, 2013 WL 2077636](#).

West Headnotes (3)

[1] **Appeal and Error**  [On motion for dismissal or nonsuit](#)

The Court of Appeals had jurisdiction over interlocutory appeal from order denying nonprofit business-rating corporation's motion to dismiss law firm attorney's claims for libel, slander, and other claims arising out of corporation's assignment of "F" rating to law firm.

[3 Cases that cite this headnote](#)

[2] **Pretrial Procedure**  [Time for motion; condition of cause](#)

Sixty-day limitations period governing motion to dismiss amended complaint for libel, slander, and related claims arising out of nonprofit business-rating corporation's assignment of "F" rating to law firm, which amended complaint added law firm attorney as plaintiff, began to run from date corporation was served with amended complaint, not

from date corporation was served with original complaint filed by law firm, where motion merely sought dismissal of attorney's individual claims, and not dismissal of law firm's claims. [V.T.C.A., Civil Practice & Remedies Code § 27.003\(b\)](#).

[4 Cases that cite this headnote](#)

[3] **Pleading** [🔑 Frivolous pleading](#)

Pleading [🔑 Application and proceedings thereon](#)

Nonprofit business-rating corporation's assignment of "F" rating to law firm was related to good, product, or service in marketplace, and therefore, related to matter of "public concern," within meaning of Texas Citizens Participation Act (TCPA), and thus, law firm attorney had to present clear and sufficient evidence to establish prima facie claims for libel, slander, and related claims arising out of publication of "F" rating. [V.T.C.A., Civil Practice & Remedies Code § 27.005\(c\)](#).

[5 Cases that cite this headnote](#)

Attorneys and Law Firms

***441** [David C. Myers](#), Jackson Walker LLP, [Stephanie Sparks](#), [Henry Colin LeCroy](#), Dallas, TX, for Appellant.

[Christopher M. Weil](#), [Lloyd E. Ward](#), Lloyd Ward & Associates, P.C., Dallas, TX, for Appellee.

Before Justices MOSELEY, [FILLMORE](#), and [MYERS](#).

OPINION

Opinion by Justice [FILLMORE](#).

This accelerated interlocutory appeal arises from a defamation and negligence action brought by Lloyd Ward (Ward) against the Better Business Bureau of Metropolitan Dallas, Inc. (the BBB). The BBB moved to dismiss the action pursuant to the Texas Citizens Participation Act (TCPA) which provides a means for dismissal of actions involving the exercise of certain constitutional rights. *See* [TEX. CIV. PRAC. & REM.CODE ANN. §§ 27.001–.011](#) (West Supp.2012). In a written order, the trial court denied the motion to dismiss. We conclude we have jurisdiction over this appeal, and that the trial court erred by denying the BBB's motion to dismiss. We reverse the trial court's order and render judgment granting the BBB's motion to dismiss pursuant to the TCPA. We remand this case to the trial court for further proceedings consistent with [section 27.009\(a\) of the civil practice and remedies code](#) and for further proceedings relating to the claims of Lloyd Ward & Associates, P.C. (the Ward Law Firm).

Background

The BBB, a nonprofit corporation founded in 1920, states that its goal and primary mission is to promote ethical business practices through voluntary self-regulation by businesses. The BBB provides several services to the general public, including publication of consumer alerts, publication of business reviews, and complaint processing. The BBB states the information it provides to the general public enables consumers to make informed decisions in marketplace transactions.

The BBB publishes business reviews relating to both accredited and non-accredited businesses in its territory. According to *442 Christopher Burgess, vice president and chief compliance officer of the BBB, a business review may contain a letter grade rating of the business ranging from “A+” to “F,” representing the BBB’s opinion of the business. The rating is the computer-generated product of a “grading system” comprised of sixteen elements, including the number of complaints against the business, whether the business responds to the complaints, and whether the complaints are resolved. Under the “grading system,” points are deducted when a business fails to respond to or to resolve a complaint. A business rating may change as new data is added to the BBB computer program.

According to Lee Stallings, vice president—director of the complaint resolution department of the BBB, if a consumer complaint satisfies the BBB’s intake procedures, the complaint will be forwarded to the business for a response. Under the BBB’s policies, the business has twenty-two days to respond to the complaint. Between June 21, 2010 and February 11, 2011, the BBB received eighteen complaints concerning the Ward Law Firm. Of those complaints, six did not meet the BBB’s intake procedures, were determined to be invalid, were not forwarded to the Ward Law Firm, and did not factor into the BBB’s business rating of the Ward Law Firm. The remaining twelve complaints were forwarded by the BBB to the Ward Law Firm. The BBB received responses to eleven of those complaints from the Ward Law Firm, and the BBB closed eight complaints as either resolved or assumed resolved. Three of the twelve complaints were closed as unresolved.

According to Burgess, on January 6, 2010 and January 25, 2010, the BBB made a standard business inquiry to the Ward Law Firm but no response was received from the firm. Stallings stated that, based “primarily” on the one unanswered complaint and the three unresolved complaints, the BBB assigned a business rating of “F” to the Ward Law Firm on February 11, 2011. According to Burgess, the “F” rating was published in the BBB’s business review of the Ward Law Firm, with “standardized text used for this situation.” The business review stated that factors that lowered the business rating included one or more unanswered complaints. According to Stallings, between the BBB’s business review of the Ward Law Firm on February 11, 2011 and May 4, 2011, the BBB received thirteen more complaints concerning the firm. The BBB did not receive a response from the Ward Law Firm to two of those complaints.

On May 13, 2011, the Ward Law Firm filed a lawsuit against the BBB based upon the BBB’s business rating of “F” assigned to the firm. On January 25, 2012, an amended petition was filed in which Ward was added as a plaintiff.¹ The Ward Law Firm and Ward asserted causes of action against the BBB for statutory and common law libel, common law slander, negligence, and gross negligence and sought a permanent injunction preventing the BBB from including the Ward Law Firm or Ward in the BBB’s business listing service, “electronic or otherwise.” The BBB filed a motion to dismiss Ward’s claims under the TCPA. The BBB argued it was entitled to dismissal of Ward’s individual lawsuit *443 because (1) Ward’s claims are based on, related to, or in response to the BBB’s exercise of its right of free speech, and (2) Ward could not establish by clear and specific evidence a prima facie case for each element of his claims. Without stating the basis for the ruling, the trial court signed a written order denying the BBB’s motion to dismiss Ward’s claims.

¹ According to Ward’s response to the BBB’s motion to dismiss, “Plaintiff instituted a civil action” against the BBB in March 2010 based upon the BBB’s “F” business rating of the Ward Law Firm, and in April 2010, the BBB and “Plaintiff” entered into a settlement, the BBB removed the “F” business rating of the Ward Law Firm, and “Plaintiff” dismissed that lawsuit. It is unclear whether the “plaintiff” in the prior lawsuit was the Ward Law Firm or Ward.

Jurisdiction

[1] Ward filed a motion to dismiss this interlocutory appeal. Relying on *Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519 (Tex.App.-Fort Worth 2012, pet. filed), Ward contends chapter 27 of the civil practice and remedies code does not provide for an interlocutory appeal from a trial court’s written ruling on a motion to dismiss and, as a result, this Court does not have jurisdiction to consider the BBB’s appeal. In our opinion in *Better Business Bureau of Metropolitan Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 306–07 (Tex.App.-Dallas 2013, no pet. h.), issued contemporaneously with our opinion in this

case, we disagreed with *Jennings* and concluded we have jurisdiction over an interlocutory appeal from a timely signed order denying a motion to dismiss under the TCPA. Therefore, we reject Ward's argument to the contrary.

[2] Ward further argues in support of his motion to dismiss this interlocutory appeal that the BBB's motion to dismiss pursuant to chapter 27 was untimely filed because it was not filed within sixty days of service of the legal action filed by the Ward Law Firm against the BBB. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.003\(b\)](#) (motion to dismiss a legal action under this section must be filed not later than the sixtieth day after the date of service of the legal action). We are not persuaded by Ward's second argument.

The Ward Law Firm's original petition against the BBB was filed on May 13, 2011, prior to the June 17, 2011 effective date of chapter 27. See Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 3, 2011 Tex. Gen. Laws 960, 963 (“The change in law made by this Act applies only to a legal action filed on or after the effective date [June 17, 2011] of this Act. A legal action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.”). After the effective date of the TCPA, Ward was added as a party plaintiff in the amended petition filed January 25, 2012. The definition of “legal action” in the statute is broad and evidences a legislative intent to treat any claim by any party on an individual and separate basis. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.001\(6\)](#) (“ “Legal action” means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.”). Accordingly, when Ward served the BBB with an amended petition asserting his individual claims, the BBB had sixty days from service to seek dismissal of Ward's individual claims pursuant to chapter 27. The record confirms that the BBB's motion to dismiss sought dismissal of Ward's individual claims and did not seek dismissal of the Ward Law Firm's claims against the BBB. It is undisputed that the BBB filed its motion to dismiss Ward's individual claims within sixty days of service of the amended petition which added Ward as a plaintiff. We conclude this Court has jurisdiction over this interlocutory appeal of the trial court's order denying the BBB's motion to dismiss Ward's individual claims under the TCPA.

Analysis

In its sole issue, the BBB argues the trial court erred by denying the BBB's *444 motion to dismiss under the TCPA. Resolution of this issue turns on whether the TCPA applies to business ratings made by the BBB.

Standard of Review

We review questions of statutory construction de novo. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex.2011). When construing a statute, our primary objective is to ascertain and give effect to the Legislature's intent. [TEX. GOV'T CODE ANN. § 312.005](#) (West 2005); *Molinet*, 356 S.W.3d at 411. “We look first to the statute's language to determine that intent, as we consider it ‘a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.’ ” *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex.2008) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex.1999)); see also *Molinet*, 356 S.W.3d at 411. We consider the statute as a whole rather than focusing upon individual provisions. *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex.2011). If a statute is unambiguous, we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results. *Id.* (citing *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care*, 145 S.W.3d 170, 177 (Tex.2004)).

Applicability of the TCPA to the BBB's Business Review

[3] In our opinion in *BH DFW, Inc.*, issued contemporaneously with this opinion, we concluded the BBB's business review, including an “F” rating of a business, related to a good, product, or service in the marketplace and, therefore, related to a matter of public concern as defined by the TCPA. See *BH DFW, Inc.*, 402 S.W.3d at 307–08; see also [TEX. CIV. PRAC. &](#)

REM.CODE ANN. § 27.001(7)(E). We further concluded the BBB's communication of the business review to the public was an exercise of the BBB's right to free speech as defined by the TCPA. See *BH DFW, Inc.*, 402 S.W.3d at 308–09; see also TEX. CIV. PRAC. & REM.CODE ANN. § 27.001(3) (“ ‘Exercise of right to free speech’ means a communication made in connection with a matter of public concern.”); *Avila v. Larrea*, 394 S.W.3d 646, 657–58 (Tex.App.-Dallas 2012, pet. filed) (applying TCPA to defamation claim brought by attorney against television station and reporter); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, No. 01–12–00581–CV, 2013 WL 1867104, at *7 (Tex.App.-Houston [1st Dist.] May 2, 2013, no pet. h.) (applying TCPA to claims for defamation, business disparagement, and tortious interference with contract against newspaper and source for information contained in newspaper articles).

Because the TCPA applies to a business review communicated to the public by the BBB, Ward had the burden of establishing by clear and specific evidence a prima facie case for each essential element of his claims. See TEX. CIV. PRAC. & REM.CODE ANN. § 27.005(c). The TCPA provides no guidance as to the quantum of proof necessary to constitute clear and specific evidence of a prima facie case for each essential element of a claim. Ward, however, failed to argue in his appellate brief that he established by clear and specific evidence a prima facie case for each essential element of any of his claims for statutory and common law libel, common law slander, negligence, and gross negligence in response to the BBB's motion to dismiss before the trial court. Rather, he contends on appeal that “[b]ecause the BBB was not entitled to seek protection under Chapter 27 from [Ward's] claims, [Ward] was not required to demonstrate the essential elements” of his claims. Ward's *445 argument is that the BBB did not meet its burden to show by a preponderance of the evidence that Ward's claims are based on, relate to, or are in response to the BBB's exercise of its right of free speech, and, therefore, the burden did not shift to Ward to establish by clear and specific evidence a prima facie case for each essential element of his claims. Further, in his response in the trial court to the BBB's motion to dismiss, Ward included no argument pertaining to his negligence or gross negligence claims or his request for a permanent injunction. In support of his defamation claims, he merely set out the elements of the claims, and concluded after a discussion of the elements of defamation that “the actions by [the BBB] are defamation per se, and [the BBB is] liable for damages as a jury may determine are appropriate.” He cited no evidence to support each element of his defamation claims.

We conclude the TCPA applied to Ward's claims against the BBB. Further, we conclude Ward failed to carry his burden under the TCPA to establish by clear and specific evidence a prima facie case for each essential element of his claims. Accordingly, the trial court erred by denying the BBB's motion to dismiss under the TCPA.

Conclusion

We conclude we have jurisdiction over this interlocutory appeal. Additionally, we resolve the BBB's sole issue in its favor. We reverse the trial court's order, render judgment dismissing Ward's claims against the BBB pursuant to the TCPA, and remand this case to the trial court for further proceedings consistent with section 27.009(a) of the civil practice and remedies code, see TEX. CIV. PRAC. & REM.CODE ANN. § 27.009(a), and for further proceedings relating to Lloyd Ward & Associates, P.C.'s claims against the BBB.

All Citations

401 S.W.3d 440

 KeyCite Yellow Flag - Negative Treatment

Disagreed With by [City of Colton v. Singletary](#), Cal.App. 4 Dist., May 30, 2012

111 Cal.App.4th 302
Court of Appeal, Second District, Division 7, California.

CITY OF LONG BEACH, Plaintiff and Appellant,

v.

CALIFORNIA CITIZENS FOR [NEIGHBORHOOD EMPOWERMENT](#), et al., Defendants and Respondents.

No. B162197. | Aug. 14, 2003. | Rehearing Denied Sept. 5, 2003. | Review Denied Nov. 25, 2003.

Synopsis

Background: City brought action against fundraising group and treasurer, requesting damages and injunction to prevent group from making expenditures in support of mayoral candidates. Group filed special motion to strike under strategic lawsuit against public participation (anti-SLAPP) statute, and the Superior Court, Los Angeles County, No. BC272177, [Kenneth R. Freeman, J.](#), granted the motion. City appealed.

[Holding:] The Court of Appeal, [Woods, J.](#), held that statute did not apply to action, even though statute's exemption did not specifically include civil actions by a city.

Reversed and remanded with directions.

West Headnotes (12)

[1] **Appeal and Error**  [Cases Triable in Appellate Court](#)

Statutory construction presents a question of law reviewed de novo.

[1 Cases that cite this headnote](#)

[2] **Statutes**  [Purpose and intent](#)

The court's role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law.

[Cases that cite this headnote](#)

[3] **Statutes**  [Plain Language; Plain, Ordinary, or Common Meaning](#)

In determining Legislative intent, the court looks first to the words of the statute, giving the language its usual, ordinary meaning.

[1 Cases that cite this headnote](#)

[4] **Statutes**  [Plain language; plain, ordinary, common, or literal meaning](#)

If there is no ambiguity in the language of a statute, the court presumes the Legislature meant what it said, and the plain meaning of the statute governs.

[1 Cases that cite this headnote](#)

[5] **Statutes** 🔑 Context

Statutes 🔑 Superfluosness

Statutes 🔑 Statutory scheme in general

The Court considers portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.

[2 Cases that cite this headnote](#)

[6] **Statutes** 🔑 Superfluosness

A construction of a statute making some words surplusage is to be avoided.

[1 Cases that cite this headnote](#)

[7] **Statutes** 🔑 Relation to plain, literal, or clear meaning; ambiguity

The language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.

[2 Cases that cite this headnote](#)

[8] **Statutes** 🔑 Literal, precise, or strict meaning; letter of the law

The intent of a statute prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.

[Cases that cite this headnote](#)

[9] **Statutes** 🔑 Construing together; harmony

The foremost task of statutory construction is ascertainment of the legislative intent, including consideration of the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.

[7 Cases that cite this headnote](#)

[10] **Statutes** 🔑 Purpose

When interpreting a statute, the court must always give due regard to the object to be achieved and the evil to be prevented by the legislation.

[1 Cases that cite this headnote](#)

[11] **Statutes** 🔑 Legislative Construction

Although a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act, that expression may properly be considered together with other factors in arriving at the true legislative intent existing when the prior act was passed.

[2 Cases that cite this headnote](#)

[12] **District and Prosecuting Attorneys** 🔑 Prosecution or defense of civil actions

Pleading 🔑 Frivolous pleading

Torts 🔑 Particular cases

Strategic lawsuit against public participation (anti-SLAPP) statute did not apply to city's action against fundraising group to enforce campaign expenditure laws, even though statute's exemption for enforcement actions brought by government attorneys did not specifically include civil actions by a city; legislative history indicated that purpose of exemption was to address concern over statute's effect on ability of state and local governments to enforce consumer protection laws, and history indicated that purpose of law was to prevent lawsuits aimed at stifling free speech and silencing opponents. [West's Ann.Cal.C.C.P. § 425.16\(d\)](#).

See 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 962 et seq.

[11 Cases that cite this headnote](#)

Attorneys and Law Firms

****474 *303 Robert E. Shannon**, City Attorney, and Michelle Gardner, Deputy City Attorney, for Plaintiff and Appellant.

Reed & Davidson, [Dana W. Reed](#) and [Bradley W. Hertz](#) for Defendants and Respondents.

Opinion

***304 WOODS, J.**

Appellant City of Long Beach (the City) timely appealed from the order of the trial court dismissing the City's complaint for damages and injunctive relief against respondents ****475 California Citizens for Neighborhood Empowerment (CCNE)** and its treasurer, Kinde Durkee. The City argues its complaint was not subject to the special motion to strike made pursuant to [Code of Civil Procedure section 1 425.16](#). The City also argues, assuming arguendo that [section 425.16](#) does apply, it demonstrated a clear probability that it would prevail on the merits, as required by the statute.

¹ Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

The legislative history of [section 425.16](#) makes it clear the statute was never intended to apply to matters such as this enforcement action.

Accordingly, we reverse and remand with directions.

FACTUAL AND PROCEDURAL HISTORY

On April 17, 2002, the City filed a complaint against CCNE and Durkee. The complaint's first cause of action alleged that prior to the April 9, 2002, election for mayor of Long Beach, CCNE accepted campaign contributions from individuals for the purpose of making independent expenditures in support of one of the mayoral candidates and that certain of those contributions were in excess of the limit set forth in sections 2.01.310 and 2.01.610 of the Long Beach Municipal Code (LBMC).²

² LBMC section 2.01.310 provides that no “person” (defined to include any individual, organization, or political action committee) shall make a contribution in support of or in opposition to a candidate in a city election in excess of \$600. LBMC section 2.01.610 provides that no “person” who makes an independent expenditure in support of or in opposition to a candidate in a city election shall accept any contribution in excess of \$600. (According to the code, the original limit set forth in the statute was later raised to \$600.)

The complaint’s second cause of action alleged that CCNE failed to timely notify the Long Beach City Clerk and all other candidates of independent expenditures made by CCNE in support of or in opposition to any candidate, as required by LBMC section 2.01.630. The third cause of action sought injunctive relief from further violations.

CCNE thereafter filed a special motion to strike the complaint pursuant to [section 425.16](#),³ claiming the lawsuit was aimed at denying CCNE its ***305** constitutionally protected freedom of speech.⁴ The trial court granted the motion to strike, holding that [section 425.16](#) was applicable to the instant complaint and that the City had failed to offer a prima facie showing of facts that would, if proven, support a judgment.

³ Under [section 425.16, subdivision \(b\)\(1\)](#), a “cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike.” The statute defines an “act in furtherance” as including “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ [425.16, subd. \(e\)\(4\)](#).) [Section 425.16](#) is frequently referred to as the “anti-SLAPP” statute, the initials SLAPP standing for Strategic Lawsuit Against Public Participation.

⁴ The constitutionality of the City statute was not raised below, and therefore we do not address it here.

DISCUSSION

I. Section 425.16 Is Not Applicable Here.

A. Standard of Review.

[1] The primary issue in this case is one of statutory construction. Statutory ****476** construction presents a question of law which this court reviews de novo. ([Haas v. Meisner \(2002\) 103 Cal.App.4th 580, 585–586, 126 Cal.Rptr.2d 843.](#))

B. Rules of Statutory Construction.

[2] [3] [4] [5] [6] The court’s “role in construing a statute is to ascertain the Legislature’s intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [Citation.]” ([Hunt v. Superior Court \(1999\) 21 Cal.4th 984, 1000, 90 Cal.Rptr.2d 236, 987 P.2d 705.](#)) “Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.” ([Curle v. Superior Court \(2001\) 24 Cal.4th 1057, 1063, 103 Cal.Rptr.2d 751, 16 P.3d 166.](#)) “[A] construction making some words surplusage is to be avoided.” ([Watkins v. Real Estate Commissioner \(1960\) 182 Cal.App.2d 397, 400, 6 Cal.Rptr. 191.](#))

[7] [8] Application of these rules is sometimes difficult, however. For example, other rules of construction teach that the “ ‘ ‘language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.’ ’ ” ([Younger v. Superior Court \(1978\) 21 Cal.3d 102, 113, 145 Cal.Rptr. 674, 577 P.2d 1014.](#)) Thus, “ ‘[t]he intent prevails over the letter, and the letter will, if possible, be so read as to ***306** conform to the spirit of the act.’ ” ([People v. Pieters \(1991\) 52 Cal.3d 894, 899, 276 Cal.Rptr. 918, 802 P.2d 420.](#))

[9] [10] Our foremost task remains ascertainment of the legislative intent, including consideration of “the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.” ([Clean Air Constituency v. California](#)

State Air Resources Bd. (1974) 11 Cal.3d 801, 814, 114 Cal.Rptr. 577, 523 P.2d 617.) We must always give due regard to “the object to be achieved and the evil to be prevented by the legislation.” (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159, 278 Cal.Rptr. 614, 805 P.2d 873.)

C. The Parties' Contentions.

Appellant contends the anti-SLAPP statute was not intended to apply to this enforcement action. Respondents disagree, pointing out that the language of the statute specifically exempts “enforcement actions *brought in the name of the people of the State of California* by the Attorney General, district attorney, or city attorney, *acting as a public prosecutor*.” (Emphasis added.) (§ 425.16, subd. (d).) Respondents argue that the plaintiff herein is “City of Long Beach, a municipal corporation,” not “the people of the State of California,” and that the Long Beach City Attorney is not “acting as a public prosecutor,” since the proceeding is a civil action, not a criminal case. Thus, respondents conclude, the complaint is not exempted by the language of section 425.16, subdivision (d), as it is a civil action brought by a municipality.

Appellant argues that through its city attorney, it is responsible for enforcing municipal laws on behalf of its residents—a subset of “the people of the State of California.” Appellant argues that interpreting section 425.16, subdivision (d) to exempt only criminal prosecutions would clearly exalt form over substance and result in the unsupportable conclusion that section 425.16 applies to the civil enforcement provisions of the City statute, but not ***477** the optional criminal enforcement provisions.⁵

⁵ The LBMC sets out both criminal and civil penalties for any violation of the Long Beach Campaign Reform Act's provisions. (See §§ 2.01.1110–2.01.1120.)

D. Legislative History of Section 425.16.

An examination of the origins of section 425.16 reveals that respondents' arguments, while imaginative, are flawed, and if accepted, would result in the stretching of the statute far beyond the bounds originally intended by the Legislature.

[11] ***307** Unfortunately, there is no discussion in the legislative history as to why the authors of section 425.16 chose to use the particular language “enforcement actions *brought in the name of the people of the State of California* by the Attorney General, district attorney, or city attorney, *acting as a public prosecutor*” in subdivision (d). (Emphasis added.) However, the identical language was later added to section 998, which covers the withholding or augmenting of costs following rejection or acceptance of an offer to compromise, and the legislative history of that statute sheds light on the origin of the exemption as well as the policy reasons for its inclusion.⁶

⁶ “Although a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act, that expression may properly be considered together with other factors in arriving at the true legislative intent existing when the prior act was passed.” (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470, 128 Cal.Rptr. 1, 546 P.2d 289; see *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 788, 286 Cal.Rptr. 57 [“Although subsequent legislation cannot change the meaning of an earlier enactment, it does supply an indication of legislative intent which may be considered with other factors in arriving at the true intent existing when the legislation was enacted.”].)

The legislative history of section 998 explains that the provision was originally included in section 425.16 at the request of the Attorney General, not to provide an exemption that otherwise would have been nonexistent, but rather to confirm the existence of the prosecutorial exemption assumed by the drafters. (Sen. Judiciary Com., Analysis of California Assembly Bill No. 732 (2001–2002 Res. Sess.), July 3, 2001, p. 5.) Further, it was intended that the 998 exception apply broadly to “civil enforcement actions” seeking injunctions, restitution and civil penalties, but not damages. Thus, in 2001 the Legislature understood the language at issue in this case (albeit in the context of section 998) to encompass the type of lawsuit now before us.

[12] Respondents argue that only those civil enforcement actions brought literally in the name of the People of the State of California by a government lawyer acting as a public prosecutor fall within the ambit of the section 425.16, subdivision (d) exception. There is no question that subdivision (d) applies to civil enforcement actions. (See *People v. Health Laboratories of*

North America, Inc. (2001) 87 Cal.App.4th 442, 446–447, 104 Cal.Rptr.2d 618.) The issue is whether it applies only to those civil enforcement actions initiated in the name of the People of the State of California or, notwithstanding the literal language of the subdivision, applies more broadly to any civil enforcement action initiated by a city attorney, county counsel, district attorney or attorney general to enforce laws intended to protect the public.

As discussed in *Health Laboratories*, an examination of the legislative history of section 425.16 shows there was concern on the part of the state *308 Attorney General that the statute as initially introduced (without the exemption) might impair the **478 ability of state and local agencies to enforce certain consumer protection laws. (*People v. Health Laboratories of North America, Inc.*, *supra*, 87 Cal.App.4th at pp. 446–447, 104 Cal.Rptr.2d 618.) The version finally signed into law contained the exemption at issue here. Although, as respondents point out, the literal language of the exemption does refer to actions “brought in the name of the people of the State of California,” it is reasonable to infer that the measure was designed to address the Attorney General’s concern, which extended to all civil actions brought by state and local agencies to enforce laws aimed at consumer and/or public protection.

To plainly ascertain the Legislature’s intent in passing the statute, though, further inquiry is necessary. In signing the original bill into law, then-Governor Pete Wilson stated, “This legislation will give courts new powers to throw out frivolous lawsuits whose only intent is to cut off public debate and stifle free speech.” (“Governor Signs Measure to Curb ‘SLAPP Suits,’” L.A. Daily Journal, Sept. 18, 1992.) According to the legislative history of section 425.16, SLAPP suits “are generally suits for malicious prosecution or interference with economic opportunity brought by property owners or developers against those speaking out against their development plans.” (Governor’s Off. of Planning and Research, Enrolled Bill Rep. on Sen. Bill No. 1264 (1991–1992 Reg. Sess.), as amended June 29, 1992, p. 3.) The author of the legislation, then-Senator Bill Lockyer, believed “these lawsuits are intended primarily to ‘chill’ the valid exercise of the right of free speech and are filed for the sole purpose of intimidating legitimate protestors.” (*Ibid.*)

In its comments on the proposed legislation, the Assembly Subcommittee on the Administration of Justice stated that “SLAPP suits are not filed with the intent to obtain a final judgment on the merits, but, rather, to force defendants to incur defense costs and, consequently, remove their opposition to a controversial development project, for example. The purpose of SLAPP suits is to intimidate and silence the opponents of SLAPP suit plaintiffs.” (Assem. Subcom. on the Admin. of J., Rep. on Senate Bill No. 1264 (1991–1992 Reg. Sess.), as amended March 26, 1992, p. 4.)

In contrast, as the court pointed out in *Health Laboratories*, “a public prosecutor’s enforcement action is not motivated by a retaliatory attempt to gain a personal advantage over a defendant who has challenged his or her economic ambition. The prosecutor’s motive derives from the constitutional mandate to assure that the laws of the state are uniformly enforced and to prosecute any violation of these laws, so that order is preserved and the public interest protected.” (*People v. Health Laboratories of North America, Inc.*, *supra*, 87 Cal.App.4th at p. 450, 104 Cal.Rptr.2d 618.) The court observed, “Nothing in the *309 legislative history of section 425.16 implies that the problem the Legislature sought to rectify thereby was created by prosecutors bringing meritless enforcement actions.” (*Ibid.*)

We also note that following respondents’ reasoning, any political committee could avoid having to comply with local election laws simply by declaring itself a “statewide” committee and making nominal contributions to candidates in various locales. As noted above, it is clear this result is not what the Legislature intended to achieve in passing the anti-SLAPP statute, and respondents cannot use section 425.16 as a shield behind which to hide from otherwise valid local election regulations.

Accordingly, we conclude that appellant’s action was exempt from the anti-SLAPP statute and that the court erred in **479 finding the statute applicable. Given our holding, we need not address other issues raised by the parties.

DISPOSITION

The order is reversed, and the matter is remanded to the trial court with directions to enter an order denying respondents' motion to strike. Appellant to recover costs on appeal.

We concur: [PERLUSS](#), P.J., and [MU#NOZ \(AURELIO\)](#), J. *

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

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926 S.W.2d 357
Court of Appeals of Texas,
Austin.

Barbara GILDER, Appellant,

v.

Lionel R. MENO, Commissioner of Education for the State of Texas and
Central Education Agency; and [Aquilla Independent School District](#), Appellees.

No. 03-95-00080-CV. | June 26, 1996. | Rehearing Overruled Aug. 14, 1996.

Teacher brought action against Commissioner of Education seeking judicial review of Commissioner's order affirming school board's decision not to renew her contract. The District Court, Travis County, 98th Judicial District, [Mary Pearl Williams, J.](#), affirmed Commissioner's order. Teacher appealed. The Court of Appeals, [Bea Ann Smith, J.](#), held that: (1) substantial evidence scope of review does not require Commissioner to conduct new evidentiary hearing in reviewing every local school board decision not to renew teacher's contract, and (2) teacher's hearings before school board of trustees did not violate due process.

Affirmed.

[Jones, J.](#), dissents.

West Headnotes (5)

[1] [Administrative Law and Procedure](#)  [Administrative review](#)

[Education](#)  [Administrative review](#)

Rule that on appeals from local school board decisions not to renew teacher's contract under Term Contract Nonrenewal Act (TCNA), Commissioner of Education is required to conduct substantial evidence review of decision on record of appeal but on motion of either party, Commissioner may order additional evidence does not require Commissioner to conduct new evidentiary hearing in reviewing every local school board decision not to renew teacher's contract. [V.T.C.A., Education Code § 21.209](#) (Repealed); 8 Tex.Reg. 2756, 2759.

[5 Cases that cite this headnote](#)

[2] [Administrative Law and Procedure](#)  [Administrative review](#)

[Education](#)  [Judicial review](#)

[Education](#)  [Appeals from decisions](#)

Administrative Procedures Act (APA) provisions governing review of agency decisions do not apply when Commissioner of Education is reviewing decision of local school board. [V.T.C.A., Government Code § 2001.174](#).

[2 Cases that cite this headnote](#)

[3] [Administrative Law and Procedure](#)  [Education](#)

Education 🔑 Scope of review

Since Commissioner of Education is officer charged with administration of appeals under Term Contract Nonrenewal Act (TCNA), Court of Appeals accords his interpretation of TCNA deference because of his expertise and experience in dealing with practical problems of preserving local decision making while still providing for appeal to state administrative body. [V.T.C.A., Education Code § 21.201 et seq.](#) (Repealed).

1 Cases that cite this headnote

[4] Administrative Law and Procedure 🔑 Trial De Novo**Administrative Law and Procedure** 🔑 Substantial evidence

Under judicially created “substantial-evidence-de-novo” review for administrative decisions, reviewing tribunal conducts evidentiary hearing for limited purpose of determining whether at time questioned order was entered there then existed sufficient facts to justify agency's order. [V.T.C.A., Government Code § 2001.174.](#)

5 Cases that cite this headnote

[5] Administrative Law and Procedure 🔑 Elements and essentials in general**Constitutional Law** 🔑 Notice and hearing; proceedings and review**Education** 🔑 Conduct of hearing

Teacher's hearings before school board of trustees regarding nonrenewal of her teaching contract in which neither teacher nor board members testified did not violate due process where teacher was afforded two hearings, one on issue of bias and one on her deficiencies as teacher, she was represented by counsel at both hearings and chose not to present any evidence herself or through witnesses at either hearing. [U.S.C.A. Const.Amend. 5.](#)

1 Cases that cite this headnote

Attorneys and Law Firms

***357** [Truman W. Dean, Jr.](#), Austin, for Appellant.

***358** [James W. Deatherage](#), Power & Deatherage, Irving, for Aquilla Independent School Dist.

Dan Morales, Atty. Gen., Mab Fitz–Gerald, Asst. Atty. Gen., Admin. Law Section, Austin, for Com'r and Cent. Educ. Agency.

Before [CARROLL](#), C.J., and [JONES](#) and [B.A. SMITH](#), JJ.

Opinion

[BEA ANN SMITH](#), Justice.

Appellant Barbara Gilder sued former Commissioner of Education Lionel Meno and the Central Education Agency (collectively “the Commissioner”), as well as the Aquilla Independent School District (“AISD”), for judicial review of the Commissioner's order affirming a decision by the AISD school board (“the board”) to nonrenew Gilder's teaching contract under the Term Contract Nonrenewal Act (“TCNA”), 67th Leg., R.S., ch. 765, § 2, 1981 Tex. Gen. Laws 2847 ([Tex. Educ.Code Ann. §§ 21.201–.211](#), since repealed and recodified at [Tex. Educ.Code Ann. §§ 21.201–.213](#) (West 1996)). The district court upheld the Commissioner's order. On appeal to this Court, Gilder complains, in part, that the district court erred in affirming the Commissioner's order because she was not allowed to present evidence to the Commissioner. We will affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Gilder was employed by AISD as a special education teacher under a series of one-year contracts; during the course of her employment she received numerous notices of deficiencies in her job performance. Early in the 1984–85 school year, she received a formal unsatisfactory evaluation of her teaching performance; throughout the year she received additional notices of deficiencies. Acting upon the superintendent's recommendation, in March 1985 the board of trustees of AISD issued to Gilder a “notice of proposed nonrenewal.” Gilder timely requested a hearing before the board. *See* 1981 Tex. Gen. Laws 2847, 2848 (formerly [Tex. Educ.Code Ann. § 21.205](#), since repealed and recodified at [Tex. Educ.Code Ann. § 21.207](#)). Prior to that hearing, the board granted Gilder's request for a hearing on the recusal of three board members. At the recusal hearing on April 18, 1985, Gilder offered no evidence, stating that her witnesses and she chose not to testify. On April 25, 1985, the board conducted an evidentiary hearing on the merits of the recommendation that her contract not be renewed. Although she was represented by counsel and was given the opportunity to cross-examine witnesses and present her own witnesses, Gilder again chose not to offer any evidence on her own behalf and not to refute any evidence presented by the superintendent. After this hearing, which continued over a five-day period, the board voted 7–0 to adopt the superintendent's recommendation not to renew Gilder's contract.

Gilder filed a petition for review with the Commissioner alleging that the board's decision was arbitrary, capricious, unlawful, and not supported by substantial evidence. *See* 1981 Tex. Gen. Laws 2847, 2848 (formerly [Tex. Educ.Code Ann. § 21.207\(a\)](#), since repealed and recodified at [Tex. Educ.Code Ann. § 21.209](#)). In June 1985, AISD filed a certified copy of the record of the hearings before the school board. *See* 8 Tex. Reg. 2756, 2759 (1983) (formerly 19 Tex. Admin. Code § 157.64, *repealed by* 18 Tex. Reg. 1928 (1993); current version found at [19 Tex. Admin. Code § 157.1071 \(West 1995\)](#)). Although the Commissioner's rules allow an appellant to object to the local record within thirty days, Gilder filed no objection. *See id.* Five months later Gilder filed a motion for a hearing, alleging that she had additional evidence which was material, relevant and not unduly repetitious. *See id.* The motion contained no reference to the substance of the evidence, the names of witnesses, or any reason why such evidence had not been presented earlier. The Commissioner denied the request for an evidentiary hearing and after reviewing the record from the local board, concluded that the decision not to renew Gilder's contract was supported by substantial evidence and was not arbitrary, capricious, or unlawful. Gilder filed suit for judicial review and the district court affirmed the Commissioner's order.

*359 DISCUSSION

On appeal Gilder alleges in two points of error that she was entitled to a hearing before the Commissioner, without a showing of good cause. In two additional points of error, she attacks the constitutionality of the hearing she received before the school board, alleging that she did not receive the process she was due at that hearing and that she was under no obligation to testify as a witness.

[1] We will first address what sort of review the Commissioner is required to conduct in appeals from local school board decisions under the TCNA. Gilder contends that the district court erred in affirming the Commissioner's order because the Commissioner conducted a review based solely on the record made before the local board, rather than granting Gilder the evidentiary hearing that she requested. The precise issue is whether the scope of review mandated by the TCNA requires the Commissioner to conduct a new evidentiary hearing in reviewing every local school board decision not to renew a teacher's contract.

The Commissioner has adopted rules for reviewing decisions of local school boards made pursuant to the TCNA. Those rules permit a teacher to present evidence to the Commissioner only in limited circumstances:

All allegations by the teacher that the decision of the board of trustees was arbitrary, capricious, unlawful, or not supported by substantial evidence shall be resolved by a review of the record of appeal; however, on the motion of either party, the commissioner of education may order that additional evidence be taken to supplement the transcript if it appears that such party has evidence to offer which is material, relevant, and not unduly repetitious, which that party, for good cause, was unable to adduce at the local hearing.

8 Tex. Reg. 2756, 2759 (1983) (formerly 19 Tex. Admin. Code § 157.64(b), since repealed and recodified). Based on Gilder's failure to satisfy the "good cause" requirement of rule 157.64(b), the Commissioner denied Gilder's motion for an evidentiary hearing and conducted a review based solely on the record made before the AISD school board, only permitting Gilder to file a written brief in support of her petition. Gilder assails rule 157.64(b) as inconsistent with the TCNA, which she interprets as requiring the Commissioner to conduct a new evidentiary hearing in every appeal from a decision not to renew a teacher contract.

[2] We turn to the language of the statute. Under the current law, enacted in 1995, the Commissioner is entitled to look only to the record of the board hearing in conducting a substantial evidence review. *See* [Tex. Educ.Code Ann. § 21.301\(c\)](#) (West 1996). But this appeal is governed by the version of the statute in place at the time of the Commissioner's review in 1987 and 1988. At that time [section 21.207\(a\)](#) provided:

If the teacher is aggrieved by the decision of the board of trustees, he may appeal to the State Commissioner of Education pursuant to Section 11.13 of this code. The commissioner may not substitute his judgment for that of the board of trustees, unless the decision below was arbitrary, capricious, unlawful, or not supported by substantial evidence.

1981 Tex. Gen. Laws 2847, 2848 ([Tex. Educ.Code Ann. § 21.207\(a\)](#), since repealed and recodified at [Tex. Educ.Code Ann. § 21.209](#)). The reference to former [section 11.13 of the Education Code](#) does not provide any standard of review,¹ but the second sentence *360 clearly contemplates a substantial evidence review, using as it does the same language set forth in the APA provision for substantial evidence review. *See* [Tex. Gov't Code Ann. § 2001.174](#) (West 1996).² Although the APA provisions governing review of agency decisions do not apply when the Commissioner is reviewing the decision of a local school board, *see* [Board of Trustees of Big Spring Firemen's Relief & Retirement Fund v. Firemen's Pension Comm'r](#), 808 S.W.2d 608, 611 (Tex.App.—Austin 1991, no writ), the APA, first enacted in 1976 as APTRA, was available as a model for how agency action is to be reviewed at the time the TCNA was enacted in 1981. By using substantially the same words the APA utilized to replace the worrisome "substantial-evidence-de-novo review," we think the TCNA was following the APA's lead in dictating a review in which the Commissioner would look only to the record made before the local board to determine whether that body's findings are reasonably supported by substantial evidence.³

¹ *See* Act of August 21, 1986, 2d C.S., ch. 4, § 3, 1986 Tex. Gen. Laws 6, 11 ([Tex. Educ.Code Ann. § 11.13\(a\)](#), since repealed and recodified at [Tex. Educ. Ann. § 7.057](#) (West 1996)). Former [section 11.13\(a\)](#) merely grants the right of appeal to "any person aggrieved by ... decisions of a board of trustees" but says nothing about what the standard of review shall be:

(a) Except in cases of student disciplinary actions under [Section 21.301](#) or [21.3011](#) of this code, persons having any matter of dispute among them arising under the school laws of Texas or any person aggrieved by the school laws of Texas or by actions or decisions of any board of trustees or board of education may appeal in writing to the commissioner of education, who, after due notice to the parties interested, shall hold a hearing and render a decision without cost to the parties involved, but nothing contained in this section shall deprive any party of any legal remedy.

See also [Central Educ. Agency v. Upshur Co. Comm'rs Court](#), 731 S.W.2d 559, 561 (Tex.1987).

² When this suit was instituted, the statutory provisions governing administrative procedures, including the review of agency orders, were contained in the Administrative Procedure and Texas Register Act (APTRA), 64th Leg., R.S., ch. 61, 1975 Tex. Gen. Laws 136. Because the subsequent recodification of APTRA into the APA did not substantively change the law, we will refer to the APA for convenience. *See* Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 47, 1993 Tex. Gen. Laws 583, 986.

3 The dissent argues that the language found in [section 21.207\(a\)](#) mirrors the language used by the supreme court in *Upshur*, which created something akin to substantial evidence de novo review of county commissioners' decisions regarding the detachment and annexation of territory between school districts. We note that the *Upshur* decision in 1987 would not have been available as a model for the legislature to follow when it drafted the TCNA in 1981, if indeed the legislature should ever be presumed to take note of specific citations buried in a court decision, as contrasted with an outcome of a court opinion.

[3] By adopting rule 157.64(b), requiring an appellant to show good cause before being granted a new evidentiary hearing, the Commissioner has so interpreted the TCNA former [section 21.207\(a\)](#). Indeed, the procedure for taking new evidence outlined in rule 157.64(b) appears to have been patterned after the procedure described in the APA:

A party may apply to the court to present additional evidence. If the court is satisfied that the additional evidence is material and *that there were good reasons for the failure to present it in the proceeding before the state agency*, the court may order that the additional evidence be taken before the agency on conditions determined by the court. The agency may change its findings and decision by reason of the additional evidence and shall file the additional evidence and any changes, new findings, or decisions with the reviewing court.

[Tex. Gov't Code Ann. § 2001.175\(c\)](#) (West 1996) (emphasis added). Given the similarities between the language of former [section 21.207\(a\)](#) and the language of the APA, we think the Commissioner correctly understood the TCNA to dictate a substantial evidence standard of review that is consistent with the procedure outlined in rule 157.64(b). The Commissioner is the officer charged with administration of appeals under the TCNA. We accord his interpretation of the statute deference because of his expertise and experience in dealing with the practical problems of preserving local decision-making while still providing for an appeal to a state administrative body. See *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex.1994) (construction of statute by agency charged with its enforcement entitled to serious consideration, so long as construction is reasonable and does not contradict plain language of statute); *Calvert v. Thompson*, 339 S.W.2d 685, 688–89 (Tex.Civ.App.—Austin 1960, writ ref'd).

Our own reading of the statute, in light of existing case law, supports the Commissioner's interpretation. First, we note the similarity of the language between the TCNA and the APA language that provides for substantial evidence review based solely on the agency record. Former [section 21.207\(a\)](#) provides that “[t]he commissioner may not substitute his judgment for that of the board of trustees, unless the decision below was arbitrary, capricious, unlawful, or not supported by substantial evidence.” 1981 Tex. Gen. Laws 2847, 2848 ([Tex. Educ.Code Ann. § 21.207\(a\)](#), since repealed and recodified at [*361 Tex. Educ.Code Ann. § 21.209](#)). Similarly, the APA provides as follows:

The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions committed to agency discretion but may affirm the decision of the agency in whole or in part and shall reverse or remand the cause for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusion, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) not reasonably supported by substantial evidence in view of the reliable and probative evidence in the [agency] record as a whole; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[Tex. Gov't Code Ann. § 2001.174](#) (West 1996).

[4] Under the judicially created “substantial-evidence-de-novo” review, the reviewing tribunal “conducts an evidentiary hearing for the limited purpose of determining ‘whether at the time the questioned order was entered there then existed sufficient facts to justify the agency’s order.’ ” *Big Spring*, 808 S.W.2d at 612 (quoting *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex.1966)). The rationale behind this much-criticized form of judicial review⁴ appears to grow out of a separation of powers question and judicial suspicion of the fact-finding abilities of administrative agencies. This peculiar form of review requires the reviewing court to decide a hypothetical question: whether there exists at the time of judicial review a lawful basis in fact for what the agency did at an earlier time. By conducting a second evidentiary hearing, the court severely undermines the authority and usefulness of the evidentiary hearing conducted by the agency. The APA as enacted in 1976 was designed to confine judicial review to the record compiled in the agency proceeding, permitting the courts to conduct an evidentiary hearing only in limited circumstances. By using almost identical language to describe the Commissioner’s scope of review of teacher employment disputes, we believe the TCNA sought to confine that review to the record created at the local board proceeding except in rare circumstances. Provisions containing this language generally create review by an appellate administrative body that is judicial in nature, to be determined on the record made by the parties before the original body. See 73A C.J.S.2d *Public Administrative Law and Procedure* § 170b (1983). Given this widespread understanding of the language included in section 21.207(a), we cannot agree with the dissent that the Commissioner exceeded his authority by limiting the evidentiary hearings on appeals from adverse decisions under the TCNA.

⁴ See generally Robert W. Hamilton & J.J. Jewett, III, *The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 Tex. L.Rev. 285, 295–302 (1976); Thomas M. Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239, 247–59 (1969); Abner Eddins Lipscomb, *Judicial Control of Administrative Action in Texas*, The Baylor Bulletin, Law Number, Vol. XLI, No. 3, 25–28 (1938).

Our reading of the statute is bolstered by the act’s provision that the local board must hold an evidentiary hearing in all decisions not to renew a teacher’s contract. 1981 Tex. Gen. Laws 2847, 2848 (Tex. Educ.Code Ann. § 21.205, since repealed and recodified at Tex. Educ.Code Ann. § 21.207). Former section 21.205 delegates to the board of trustees the primary responsibility of deciding who shall and shall not teach in its local schools. To require the Commissioner to hold another evidentiary hearing would nullify this local proceeding, in derogation of the principle that these decisions should be made locally, subject only to the state agency’s review to assure that the teacher was afforded proper procedural and legal safeguards. By providing for substantial evidence review of local board decisions, the TCNA wisely enables the Commissioner to assure a uniform interpretation of the relevant statutes *362 and regulations across the state while preserving local autonomy in its proper sphere.

We do not believe that preserving this decision-making process at the local level poses the dangers suggested by the dissent. The Commissioner will always have a record from the school board for his review, whether or not the teacher presents evidence or testifies; the record will consist of the evaluations that led to the non-renewal, the superintendent’s recommendations, and the actions of the school board. When the record is deficient or unfair, former section 157.64 provides that the aggrieved party can object to the record, and then ask that the record be supplemented by new evidentiary hearings before the Commissioner, but only for “good cause.” Thus, for example, a party unable to present evidence locally due to the board’s lack of subpoena power could seek to present that evidence to the Commissioner, pointing to the lack of subpoena power as establishing “good cause.”

The circumstances of the present appeal well illustrate how requiring the Commissioner to hold an evidentiary hearing without “good cause” would undermine local decision-making in the matter of teacher employment. Although afforded a hearing at her request to recuse three school board members, in addition to a hearing on the merits of her employment, Gilder refused to put on any evidence of bias or retaliation or any evidence in support of her teaching performance, or to refute any of the superintendent’s evidence of her teaching deficiencies. It is evidence of bias and retaliation that she then sought to present to the Commissioner,⁵ having voluntarily decided not to present this evidence to the local school board at either hearing. To allow a teacher to lie behind the log and not present her case until the matter reaches the state agency, without good cause, would make a mockery of the local board hearing and would transfer the real decision-making to the Commissioner at the state level. This runs afoul of the statute’s delegation of teacher employment decisions to local school boards. Former section 21.203 explicitly provides that the board of trustees of each school district may choose not to renew any teacher’s contract,

shall establish policies which establish reasons for nonrenewal, and shall establish procedures for receiving recommendations from its school administrators regarding the nonrenewal of teaching contracts. *See* 1981 Tex. Gen. Laws 2847 ([Tex. Educ.Code Ann. § 21.203](#), since repealed).

5 The motion for hearing before the Commissioner contains the following allegation: “specifically, Petitioner seeks to adduce evidence concerning the bias of Respondent’s school board members. Respondent refused to allow Petitioner an opportunity to present such evidence at the local hearing. Respondent’s Board members’ bias precluded Petitioner from receiving a fair and impartial hearing.”

Mindful of the pernicious effect that “substantial-evidence-de-novo” review has had on agency decision-making, we are unpersuaded by the dissent’s insistence that Texas case law compels us to read this scope of review into the TCNA. We begin by noting that this highly criticized form of review was created by courts concerned about a separation of powers question in the context of judicial review of agency action, a concern that has no bearing on this question of the scope of one agency’s review of another agency’s action. We therefore reject the dissent’s “virtual presumption of substantial-evidence-de-novo review.” Certainly nothing in the statute mandates such a review; indeed, as we have noted the language of the TCNA so closely parallels the APA’s creation of substantial evidence review, coming just five years after that specific legislative rejection of the substantial-evidence-de-novo review, that we find legislative intent to prescribe an appellate scope of review confined to the record of the board proceeding in appeals of contract nonrenewal decisions.

Nor are we persuaded that the supreme court’s decision in *Central Educ. Agency v. Upshur County Comm’rs Court*, 731 S.W.2d 559, 561–62 (Tex.1987), mandates a substantial-evidence-de-novo review under the TCNA. That decision concerned the state agency’s review of a commissioners court’s decision to detach and annex property between school districts. The court began by noting, as we have mentioned, that former [section 11.13\(a\) of the Education Code](#) provides generally for appeals to the Commissioner *363 but does not specify what the scope of that review shall be. The *Upshur* court held that the original decision-making power is committed to the county officials, and while the Commissioner *may* conduct an evidentiary hearing solely for the purpose of determining whether there was fraud, bad faith, abuse of discretion by the county official and whether their decision is supported by substantial evidence, this is to be an appellate scope of review as opposed to a re-determination of the case in its entirety. It did not hold that the Commissioner *must* hold such a hearing in every appeal. Only in a footnote, on which the dissent places what seems to be undue reliance, does the court mention that the Commissioner’s review of detachment and annexation decisions is “akin to the substantial evidence trial de novo review.” 731 S.W.2d at 562, n. 2. Certainly any reliance on *Mercer v. Ross*, mentioned in the same footnote, is misplaced as that case involved a statute that specifically provided for the *court’s* substantial-evidence-de-novo review of Texas Employment Commission decisions. *See Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex.1986).

What is most significant is that *Upshur* and the other decision that the dissent relies on, *Nueces Canyon Consol. Indep. Sch. Dist. v. Central Educ. Agency*, 917 S.W.2d 773 (Tex.1996), both involve the Commissioner’s review of detachment and annexation decisions under the general mandate of former [section 11.13\(a\)](#), which lacks any mention of a standard of review. In *Cypress–Fairbanks v. Texas Educ. Agency*, 797 S.W.2d 336, 340 (Tex.App.—Austin 1990), *rev’d on other grounds*, 830 S.W.2d 88 (Tex.1992), we noted that teacher contract nonrenewal appeals to the Commissioner are *expressly* limited to an appellate standard of review under former [section 21.207](#), unlike the detachment/annexation decisions governed solely by former [section 11.13\(a\) of the Education Code](#), as in *Upshur*. The TCNA provides that a teacher’s contract will be renewed from year to year unless the statutory provisions for non-renewal are followed. 1981 Tex. Gen. Laws 2847, 2848 (formerly [Tex. Educ.Code Ann. § 21.203](#)). The legislature could create this specific benefit for teachers but at the same time limit the scope of review that a state administrative agency could exercise over a school board’s decision not to renew a teacher’s contract. We understand this to be the legislative intent of former [section 21.207\(a\)](#). In placing so much reliance on *Upshur*, the dissent ignores this critical distinction between the general provision of [section 11.13\(a\)](#) concerning any person aggrieved under the school laws of this state, and the more specific provision of [section 21.207\(a\)](#) governing only teachers aggrieved under the TCNA.

Furthermore, we must not overlook the context of the *Upshur* decision, in which the court held that the Commissioner exceeded his authority by substituting his judgment for that of the county officials to whom the statute delegated the responsibility for annexation and detachment decisions. *Upshur* rejected a pure de novo review by which the Commissioner reversed the county

officials on policy grounds, even though the county officials followed the law. The thrust of the *Upshur* decision was to uphold the authority delegated to the county officials and to direct the Commissioner not to substitute his opinion for that of the local agency. *Upshur*, 731 S.W.2d at 561. Without resorting to the language of footnote 2, there is no explicit holding in *Upshur* that rejects a substantial evidence standard of review. Such a rejection cannot be gleaned from *Upshur's* observation that the Commissioner *may* hold an evidentiary hearing “solely for the purpose of determining whether there was fraud, bad faith or an abuse of discretion in the decision of the county commissioners and whether their decision is supported by substantial evidence.” *Id.* at 562. By holding that the Commissioner must conduct an evidentiary hearing in this appeal for a teacher who refuses to present evidence to the local board and chooses instead to argue her case to the Commissioner, the dissent ignores the teaching of *Upshur*, the APA, and the TCNA, that the reviewing agency cannot substitute its judgment for the local agency's judgment if its decision is supported by substantial evidence and if it accorded appellant the procedural and legal safeguards to which she was entitled.

*364 We hold that rule 157.64(b), which requires an appealing party to show “good cause” for the need to present evidence to the Commissioner is wholly consistent with the scope of review mandated by former section 21.207(a) and overrule the first two points of error.

[5] In her third point of error, Gilder complains that she was deprived of due process in her hearing before the board of trustees. We disagree. Gilder was afforded two hearings, one on the issue of bias, and another on the merits of her deficiencies as a teacher. She was represented at each hearing but chose not to present any evidence herself or through the witnesses she brought with her or through cross-examination of the superintendent's witnesses by her representative. Gilder complains that she was not given an opportunity to “voir dire” the board members, and that the board members were not required to testify. Without any evidence establishing an issue of bias, neither the board members nor Gilder were required to testify. See *Vandygriff v. First Sav. & Loan*, 617 S.W.2d 669, 673 (Tex.1981) (court presumes agency performs duties in compliance with law); *Lone Star Greyhound Park v. Racing Comm'n*, 863 S.W.2d 742, 752 (Tex.App.—Austin 1993, writ denied) (court presumes lack of bias on part of agency decision-makers). Gilder decided to put forward no evidence of bias at her peril, apparently hoping to present such evidence later to the Commissioner. We find that given the state of the record there was no violation of her rights. Likewise, we find no procedural irregularities at the hearing on the merits of her teaching abilities. If the superintendent asserted these deficiencies against her in retaliation for her prior filing of grievances or membership in the Texas State Teacher Association as she alleges, she declined to offer any evidence to substantiate this claim. Again she declined to offer evidence at her peril. We overrule the third point of error. Likewise, we find no merit in the fourth point of error complaining that Gilder was unjustly compelled to testify as an adverse witness. Gilder had the opportunity to refute the superintendent's allegations of her teaching deficiencies, through her own testimony or the testimony of others. She chose to do neither. Based on the meager record this created, her appeal was dismissed. This in no way constituted error, and we overrule the fourth point of error.

CONCLUSION

Finding no error, we affirm the trial court's judgment.

JONES, Justice, dissenting.

I respectfully dissent.

This is, at its core, a statutory-construction case. There are two simple propositions that control the outcome of this appeal. First, more than a half-century of case law requires that “inter-agency appeals” to the Commissioner of Education be conducted with a new evidentiary hearing. Second, when it was enacted in 1981, the Term Contract Nonrenewal Act (“TCNA”) did not alter that requirement.

FACTUAL AND PROCEDURAL BACKGROUND

The majority's statement of the factual and procedural background is essentially correct. Gilder was employed by Aquilla Independent School District ("AISD") as a special education teacher under a one-year term contract for the 1984–85 school year. After AISD sent Gilder a "notice of proposed nonrenewal," she properly requested a hearing before the board. Following a hearing, the board voted unanimously to nonrenew Gilder's contract. Gilder filed a petition for review with the Commissioner alleging that the board's decision was arbitrary, capricious, unlawful, and not supported by substantial evidence; she later filed a motion expressly requesting an evidentiary hearing, at least in part to develop evidence of bias and retaliation.

The Commissioner's rules for reviewing TCNA decisions of local school boards permit a teacher to present evidence to the Commissioner only in very limited circumstances:

All allegations by the teacher that the decision of the board of trustees was arbitrary, capricious, unlawful, or not supported by substantial evidence *shall be resolved by a review of the record of appeal*; *365 however, on the motion of either party, the commissioner of education may order that additional evidence be taken to supplement the transcript if it appears that such party has evidence to offer which is material, relevant, and not unduly repetitious, which that party, for good cause, was unable to adduce at the local hearing.

8 Tex. Reg. 2756, 2759 (1983) (emphasis added) (formerly 19 Tex. Admin. Code § 157.64(b), *repealed by* 18 Tex. Reg. 1928 (1993); current version found at [19 T.A.C. § 157.1071 \(West 1995\)](#)).

Concluding that Gilder had failed to satisfy the "good cause" requirement of rule 157.64(b), the Commissioner denied her request for an evidentiary hearing, permitting her only to file a written brief in support of her petition. After conducting a review based exclusively on the record made before the AISD board, the Commissioner denied the appeal and held that the board's decision was supported by substantial evidence and was not arbitrary, capricious, or unlawful. Gilder filed the present suit for judicial review of the Commissioner's order. The district court affirmed.

TYPES OF REVIEW OF AGENCY ACTION

Texas has recognized four types of review of agency action: (1) pure trial de novo, (2) pure substantial evidence, (3) substantial evidence de novo, and (4) a special rate-case classification referred to as "de novo fact trial." See [Board of Trustees of Big Spring Fireman's Relief & Retirement Fund v. Firemen's Pension Comm'r](#), 808 S.W.2d 608, 611 (Tex.App.-Austin 1991, no writ); see also James R. Eissinger, [Judicial Review of Findings of Fact in Contested Cases Under APTRA](#), 42 Baylor L.Rev. 1, 11 (1990). The last type of review listed above does not apply to a proceeding such as the present one.

Under a "pure trial de novo" review, the decision of the lower agency or board is automatically vacated upon the taking of an appeal, and the reviewing tribunal not only hears new evidence, but also substitutes its discretion and judgment for that of the lower body. This type of review is technically not an "appeal" at all, but a new proceeding. See [Central Educ. Agency v. Upshur County Comm'rs Court](#), 731 S.W.2d 559, 561 (Tex.1987).

Under a "pure substantial evidence" review, the reviewing tribunal looks only at the record made before the fact-finding body, *i.e.*, the agency or board, to determine whether that body's findings are reasonably supported by substantial evidence. [Imperial Am. Resources Fund, Inc. v. Railroad Comm'n](#), 557 S.W.2d 280, 285 (Tex.1977).

Under a "substantial evidence de novo" review, the reviewing tribunal likewise seeks to determine whether the findings made by the local agency or board are reasonably supported by substantial evidence and are otherwise lawful. The reviewing tribunal

is not, however, confined to the record made below; rather, it receives evidence at a new hearing and, *from that body of evidence*, determines as a question of law whether the findings of the agency or board are lawful and supported by substantial evidence. See *Firemen's & Policemen's Civ. Serv. v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex.1984); *Big Spring*, 808 S.W.2d at 612. “[T]he reviewing tribunal conducts an evidentiary hearing for the limited purpose of determining ‘whether at the time the questioned order was entered there then existed sufficient facts to justify the agency's order.’ ” *Big Spring*, 808 S.W.2d at 612 (quoting *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex.1966)). In determining whether the fact-finder's decision is reasonably supported by substantial evidence and is otherwise lawful, the reviewing tribunal considers only the evidence introduced at the review hearing, which may or may not include the administrative record, if any, made by the agency or local board. *Big Spring*, 808 S.W.2d at 612; see generally *Railroad Comm'n v. Shell Oil Co.*, 139 Tex. 66, 161 S.W.2d 1022 (1942); *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424 (1946); Thomas M. Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw.L.J. 239, 241–43 (1969). Thus, despite the introduction of new evidence at the review hearing, the inquiry in a substantial-evidence-de-novo review is purely a question of law, and the proceeding is truly an “appeal.” See *Brinkmeyer*, 662 S.W.2d at 956. Consequently, *366 the reviewing tribunal may not substitute its judgment for that of the agency on controverted issues of fact. *Texas State Bd. of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 116 (Tex.1988); *Brinkmeyer*, 662 S.W.2d at 956. The decision of the fact-finding body has a presumption of validity, and the party seeking to set aside that body's decision has the burden of showing that at the time of the original proceeding substantial evidence did not exist to support the previous decision. *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex.1986). Whatever its flaws, substantial evidence de novo was the prevailing method of judicial review in this state from the 1930's until the enactment of the APA in 1975.

To fully appreciate the distinction between the various types of administrative review, it is necessary to understand three different aspects of the review of agency decisions:

Over the years in Texas, the terms “trial de novo” and “substantial evidence rule” have been applied primarily to three aspects of judicial review of administrative agency decisions. First, does the filing of an appeal from an agency decision automatically vacate the agency order or does the order continue in effect unless otherwise stayed or vacated? Second, does the reviewing court review the agency decision on the record compiled before the agency or does it take evidence “anew” in court? Third, does the reviewing court or trier of fact substitute its discretion “anew” in lieu of the agency's determination on questions of fact committed to agency discretion by the Legislature, or does it sustain those determinations if reasonably supported by substantial evidence?

Dudley D. McCalla, *The Administrative Procedure and Texas Register Act*, 28 Baylor L.Rev. 445, 464–65 (1976). Thus, the types of administrative review discussed above are distinguished precisely by their different treatment of these three aspects of review. A review wherein the agency's decision is automatically vacated, new evidence is taken, and the reviewing body substitutes its discretion for that of the agency is pure-de-novo review. At the opposite end of the spectrum, a review wherein the agency's decision is not automatically vacated, the reviewing body looks only at the agency record, and the agency's decision is upheld if supported by substantial evidence is pure-substantial-evidence review. Texas's unique creation, substantial-evidence-de-novo review, is a hybrid: it resembles pure-substantial-evidence review in that the agency's decision is not automatically vacated and is upheld if supported by substantial evidence; it resembles pure-de-novo review in that new evidence is heard by the reviewing body.

For our purposes, the second and third aspects of review identified by Mr. McCalla are the important ones. The second aspect is essentially procedural, referring simply to whether new evidence is heard and used by the reviewing body. The third aspect, on the other hand, relates to the standard by which the reviewing body determines whether the lower agency decision should be upheld. This standard is the same irrespective of which procedure is used, *i.e.*, whether the reviewing body hears new evidence, as in substantial-evidence-de-novo review, or looks only at the record compiled before the lower agency, as in pure-substantial-evidence review. As Mr. McCalla explains in a later article, “The term ‘substantial evidence’ has nothing to do with the first [vacation of decision] and second [new evidence] aspects of judicial review; it refers to the quantum of evidence necessary to sustain an agency order or finding. The more accurate terminology is the substantial evidence ‘test.’ ” Dudley D. McCalla, *Judicial Review of Agency Orders*, in *State Bar of Texas, Advanced Administrative Law Course Manual U, U–2* (1990).

The Commissioner's rule at issue here requires that, except in extraordinary circumstances, the review of a TCNA decision of a local school board "shall be resolved by a review of the record of appeal." By its terms and by the way the Commissioner applied it in this case, the rule imposes a pure-substantial-evidence review on TCNA appeals to the Commissioner.

INTER-AGENCY REVIEW BEFORE THE TCNA

The types of review discussed above are used regardless of whether the reviewing ***367** body is a court or a higher agency. Accordingly, the general rules hammered out over the years by courts for conducting judicial review of agency orders provide a helpful analogy in determining how inter-agency appeals should be carried out.

Before the APA was enacted in 1975, review of agency decisions "on the record" was essentially unheard of in Texas.¹ Judicial review of agency decisions in Texas was generally conducted by the substantial-evidence-de-novo method. *See* Reavley, *supra*, at 239–41. As will be discussed below, most if not all inter-agency appeals were conducted by a pure-de-novo review. Enacted by the legislature in 1975 and effective January 1, 1976, the Administrative Procedure Act ("APA")² mandated a pure-substantial-evidence review for judicial review of those agency decisions coming within the purview of the Act. *See* APA § 2001.174, .175. Not all agencies, however, come within the purview of the Act. For example, in 1981, the legislature expressly removed decisions of the Texas Employment Commission from the reach of the APA. *See* Act of April 16, 1981, 67th Leg., R.S., ch. 76, § 2, 1981 Tex. Gen. Laws 168, 168 (Tex.Rev.Civ.Stat. Ann. art. 6252–13a, § 21(g), since repealed and codified at Tex. Gov't Code Ann. § 2001.224 (West Pamph.1996)).

¹ The sole exception seems to have been judicial review under the Texas Savings and Loan Act, 58th Leg., R.S., ch. 113, sec. 1, § 11.12(5)(b), 1963 Tex. Gen. Laws 269, 299 (Tex. Rev. Civ. Stat. Ann. art. 852a, § 11.12(5)(b), since amended). *See Gerst v. Nixon*, 411 S.W.2d 350, 353–57 (Tex.1966).

² Tex. Gov't Code Ann. §§ 2001.001–902 (West Pamph.1996). When this suit was instituted, the statutory provisions governing administrative procedures, including the review of agency orders, were contained in the Administrative Procedure and Texas Register Act (APTRA), 64th Leg., R.S., ch. 61, 1975 Tex. Gen. Laws 136. Because the subsequent recodification of APTRA into the APA did not substantively change the law, I refer to the APA for convenience. *See* Act of May 4, 1993, 73rd Leg., R.S., ch. 268, § 47, 1993 Tex. Gen. Laws 583, 986.

Regarding judicial review of administrative decisions to which the APA does not apply, Texas courts have consistently held that the proper approach is to revert to the pre-APA substantial-evidence-de-novo review. *See West Gulf Maritime Ass'n v. Sabine Pilots Ass'n*, 617 S.W.2d 744, 747 (Tex.Civ.App.-Beaumont 1981, writ ref'd n.r.e.); *Texas Employment Comm'n v. City of Houston*, 616 S.W.2d 255, 258–59 (Tex.Civ.App.-Houston [1st Dist.]), writ ref'd n.r.e. per curiam, 618 S.W.2d 329 (Tex.1981); *see also Mercer*, 701 S.W.2d at 831; *Brinkmeyer*, 662 S.W.2d at 955–56; *City of Harlingen v. Lucio*, 770 S.W.2d 7, 8 (Tex.App.-Corpus Christi 1989, writ denied); *Valentino v. City of Houston*, 674 S.W.2d 813, 816 (Tex.Civ.App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Instant Photo, Inc. v. Texas Employment Comm'n*, 650 S.W.2d 196, 197–98 (Tex.App.-San Antonio 1983, no writ); *City of San Antonio v. Flores*, 619 S.W.2d 601, 602 (Tex.Civ.App.-Houston [14th Dist.] 1981, writ ref'd n.r.e.). Commentators and administrative law practitioners have agreed. *See* Eissinger, *supra*, at 11–13; W. Wendall Hall, *Standards of Appellate Review in Civil Cases*, 21 St. Mary's L.J. 865, 929 (1990); Robert W. Hamilton & J.J. Jewett, III, *The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 Tex. L.Rev. 285, 311 (1976); *see also* L. Kirk Kridner, *Scope of Judicial Review of Agency Decisions In Contested Cases*, in State Bar of Texas, Advanced Administrative Law Course Manual T, T–6 (1992); Dudley D. McCalla, *Judicial Review of Agency Orders*, in State Bar of Texas, Advanced Administrative Law Course Manual U, U–11 (1990); Larry E. Temple, *Judicial Review—A Review of the Substantial Evidence Rule and Trial De Novo*, in State Bar of Texas, Advanced Administrative Law Course Manual Q, Q–10 (1989).

Because a local school board does not have statewide jurisdiction, it is not an “agency” for purposes of the APA. See *Big Spring*, 808 S.W.2d at 611; *West Gulf Maritime*, 617 S.W.2d at 747. Accordingly, the APA provisions governing review of agency decisions do not apply when the Commissioner is reviewing the decision of a local school board. *Id.* Thus, as with non-APA judicial review, logic dictates that inter-agency review should *368 continue to be conducted by the rules in place before the enactment of the APA. As a practical matter, this means that the standard and procedure to be used in an inter-agency appeal are determined by the substantive statutes related to the relevant agency. Cf. Michael J. Tomsu, *Judicial Review of Administrative Decisions in Contested Cases*, in State Bar of Texas, Advanced Administrative Law Course Manual S, S–8 (1994).

As a general proposition, Texas courts have long held that “[t]he substantial evidence rule applies to appeals taken from an administrative agency to the courts, and not to appeals from lower to higher administrative agencies.” See *Lorena Indep. Sch. Dist. No. 907 v. Rosenthal Common Sch. Dist. No. 007*, 421 S.W.2d 491, 493 (Tex.Civ.App.-Waco 1967, writ ref’d n.r.e.); accord *Temple Indep. Sch. Dist. v. State Bd. of Educ.*, 493 S.W.2d 543, 544 (Tex.Civ.App.-Austin 1973, no writ). The reference to the “substantial evidence rule” in such statements is clearly to the *third* aspect of administrative review, *i.e.*, whether the reviewing body substitutes its judgment for that of the lower agency or board. Thus, it appears that inter-agency appeals were generally conducted by a pure-de-novo review, *i.e.*, the decision of the lower agency was effectively vacated by the appeal, and the higher agency heard new evidence and substituted its findings and judgment for that of the lower agency.

With that proposition as a backdrop, it is necessary to review the statutes relevant to Gilder’s inter-agency appeal. The general statutory authorization for appeals to the Commissioner from decisions of local school boards is contained in former [section 11.13\(a\) of the Education Code](#):

[A]ny person aggrieved by the school laws of Texas or by actions or decisions of any board of trustees or board of education may appeal in writing to the commissioner of education, who, after due notice to the parties interested, shall hold a hearing and render a decision....

Tex. Educ.Code, 61st Leg., R.S., ch. 889, sec. 1, § 11.13(a), 1969 Tex. Gen. Laws 2735, 2757 (Tex. Educ.Code Ann. § 11.13(a), since repealed and recodified at [Tex. Educ.Code Ann. § 7.057 \(West 1996\)](#)).

[Section 11.13\(a\)](#) does not specify the type of hearing the Commissioner must provide or the nature of review the Commissioner is to conduct. The predecessor to [section 11.13\(a\)](#) was first enacted in 1949. See Act of May 3, 1949, 51st Leg., R.S., ch. 299, Art. VII, Sec. 1, 1949 Tex. Gen. Laws 537, 545 (Tex.Rev.Civ. Stat. Ann. art. 2654–7, § 1, since repealed and now codified at [Tex. Educ.Code Ann. § 7.057 \(West 1996\)](#)). As early as the 1950’s, the Commissioner promulgated policies and procedures that required a trial-type evidentiary hearing in appeals from decisions of local school boards. See Handbook for Local School Officials, Bulletin 603, Texas Education Agency, September 1959, Chapter XVIII (“Hearings & Appeals”), pp. 158–64. Even after the 1975 enactment of the APA, the Central Education Agency adopted formal rules that maintained the requirement that appeals to the Commissioner from actions or decisions of lower boards or officials be resolved after an evidentiary hearing. See 1 Tex. Reg. 1050, 1053–56 (1976). Appeals from the Commissioner to the State Board of Education, on the other hand, were to be conducted “on the record, briefs and oral argument only.” See 1 Tex. Reg. 1056, 1057 (1976).

In 1987, the supreme court held in a non-TCNA appeal that the Commissioner’s review of a school-related decision of a county commissioners court should be a substantial-evidence-de-novo review. See *Upshur County*, 731 S.W.2d at 562. The members of the supreme court were all in agreement that a de novo procedure should be used. The disagreement revolved around the standard to be applied by the Commissioner: the majority favored substantial evidence de novo (*i.e.*, giving deference to the county commissioners’ findings and decision), while the dissenters favored pure de novo (*i.e.*, no deference). The only mention of substantial-evidence review “on the record” was a cursory disapproval of that form of review in appeals to the Commissioner. See *id.* at 562 n. 2 (“the Commissioner [is] not so limited”).

There is no question about the type of review ordered in *Upshur County*. The supreme *369 court stated that in reviewing a school-related decision of a county commissioners court under [section 11.13\(a\)](#), the Commissioner is to conduct an evidentiary hearing “solely for the purpose of determining whether there was fraud, bad faith or an abuse of discretion in the decision of

the county commissioners and whether their decision is supported by substantial evidence.” *Id.* at 562. The court described the review to be conducted by the Commissioner as “akin to the substantial evidence trial *de novo*.” *Id.* at 562 n. 2. Recently, the supreme court was even more definite in its description, stating that *Upshur County* interpreted section 11.13(a) as requiring the Commissioner to conduct “a substantial evidence *de novo* administrative hearing.” *Nueces Canyon Consol. Indep. Sch. Dist. v. Central Educ. Agency*, 917 S.W.2d 773, 776 (Tex.1996).

Thus, outside the TCNA, the Commissioner has traditionally used and is required to use a *de novo* hearing procedure (either pure *de novo* or substantial evidence *de novo*) in reviewing school-related decisions of local boards and agencies. The dispositive issue in the present case, therefore, is whether the TCNA, as enacted in 1981, mandated a new, pure-substantial-evidence procedure for inter-agency appeals taken under that statute.

DID THE TCNA REQUIRE A DIFFERENT PROCEDURE?

The TCNA itself contains an express provision bearing on teacher appeals from decisions of local school boards. Former section 21.207(a) of the Education Code provides:

If the teacher is aggrieved by the decision of the board of trustees, he may appeal to the State Commissioner of Education pursuant to Section 11.13 of this code. The commissioner may not substitute his judgment for that of the board of trustees, unless the decision below was arbitrary, capricious, unlawful, or not supported by substantial evidence.

Term Contract Nonrenewal Act, 67th Leg., R.S., ch. 765, sec. 2, § 21.207, 1981 Tex. Gen. Laws 2847, 2848 (Tex. Educ.Code Ann. § 21.207(a), since repealed and recodified in amended form at Tex. Educ.Code Ann. § 21.209(a) (West 1996)).

The first sentence of section 21.207(a) simply invokes section 11.13 of the Education Code, so under the holding of *Upshur County* it obviously does not require a pure-substantial-evidence review.

The majority focus, therefore, on the second sentence of section 21.207(a) as the sole statutory support for their conclusion that the TCNA mandates a pure-substantial-evidence review by the Commissioner. The majority's reliance is misplaced. Although the second sentence of section 21.207(a) clearly requires a “substantial evidence” *standard* or *test*, that alone is no indication whatsoever that the legislature intended the commissioner's review to be restricted to the local school board record. As discussed above, both pure-substantial-evidence review and substantial-evidence-*de-novo* review utilize a substantial-evidence *test*. But section 21.207(a) does not address the question of *procedure*, which is the critical distinction between the two types of review: From what body of evidence is the review to be made, the record made before the local board or a new record made before the Commissioner? Thus, the second sentence of section 21.207(a) is completely consistent with the substantial-evidence-*de-novo* review held by the supreme court in *Upshur County* to be mandated by section 11.13(a). Only by ignoring the distinction between the standard to be applied and the procedure to be used can the majority read the second sentence of section 21.207(a) as requiring a pure-substantial-evidence review.

In addition, courts are obliged to construe statutory language in the context of the statute as a whole rather than as an isolated provision. *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex.1994). In the present case, an examination of the other relevant provisions of the TCNA confirms that the legislature cannot have intended to require a pure-substantial-evidence review by the Commissioner. The hearing procedures to be used by local school boards are contained in former sections 21.205 and 21.206 of the Education Code:

*370 § 21.205. Hearing

- (a) If the teacher desires a hearing after receiving notice of the proposed nonrenewal, the teacher shall notify the board of trustees in writing within 10 days after receiving the notice of nonrenewal. The board shall provide for a hearing to be held

within 15 days after receiving written notice from the teacher requesting a hearing. Such hearing shall be closed unless an open hearing is requested by the employee.

(b) The hearing shall be conducted in accordance with rules promulgated by the district.

§ 21.206. Decision of Board

(a) If the teacher fails to request a hearing, the board shall take such action as it deems lawful and appropriate and shall notify the employee in writing of that action within 15 days of the expiration of the 10–day period for requesting a hearing.

(b) If the teacher requests a hearing, the board shall take such action as it deems lawful and appropriate and shall notify the teacher in writing of that action within 15 days following the conclusion of the hearing.

Term Contract Nonrenewal Act, 67th Leg., R.S., ch. 765, sec. 2, §§ 21.205, .206, 1981 Tex. Gen. Laws 2847, 2848 (Tex. Educ.Code Ann. §§ 21.205, .206, since repealed and recodified in amended form at Tex. Educ.Code Ann. §§ 21.207, .208 (West 1996)).

Thus, the first circumstance to be considered is that unless the teacher expressly requests it, the local school board need not hold a hearing at all. Nor does the statute require that any hearing be recorded. Without a recorded hearing, there would be no record for the Commissioner to review. Yet an aggrieved teacher's right to appeal to the Commissioner may not be conditioned on having requested and participated in a hearing before the local board. *Havner v. Meno*, 867 S.W.2d 130, 133–34 (Tex.App.-Austin 1993, no writ). The majority do not explain how the Commissioner would conduct a pure-substantial-evidence review in the absence of a local record.

Other circumstances are also significant. Section 21.205 provides that, unless the teacher expressly requests an open hearing, any hearing held “shall be closed”; moreover, any such hearing must be conducted “in accordance with rules promulgated by the district,” with no minimum requirements for what those rules should provide. Thus, even if a hearing of some sort were provided, gaps in the TCNA would create a substantial risk that the teacher would not be afforded an opportunity to make a full and complete record for the Commissioner to review. Indeed, even the most fair-minded district could not assure a full and complete record, because local school districts do not have subpoena power and so cannot guarantee the presence of crucial witnesses and documents.

In short, not only is the statutory language of the TCNA consistent with a substantial-evidence-de-novo review, the statutory scheme created by the TCNA is wholly inconsistent with a review limited to the record of the local school board.³

³ Recent amendments to the TCNA again confirm the legislature's earlier intent. In 1995 the legislature amended the TCNA to add language expressly restricting the Commissioner's review in at least some appeals to “the local record.” See Educ.Code §§ 21.209, .301(c) (West 1996). In conjunction with that change, however, the legislature also added extensive hearing procedures at the local board level. See Educ.Code §§ 21.251–.260 (West 1996). Among other things, the new provisions require the hearing to be conducted before a trained and certified hearing examiner who has the power to issue subpoenas for the attendance of witnesses and the production of documents, both for the hearing itself and for pre-hearing depositions and other means of discovery. The new provisions also require the hearing to be recorded by a certified shorthand reporter.

The cornerstone of the majority's analysis is the fact that the TCNA used language, similar to terms used in the APA just six years earlier, requiring that the Commissioner's review must be a “substantial evidence” review. From that, they conclude that the legislature must have intended that an inter-agency review under the TCNA be conducted using the same procedure required for judicial review under the APA. In so concluding, however, the majority again ignore the crucial distinction between the *standard* *371 to be applied and the *procedure* to be used. In the APA, the legislature placed the standard to be applied and the procedure to be used in separate provisions. See Administrative Procedure and Texas Register Act, 64th Leg., R.S., ch. 61, § 19(d), (e), 1975 Tex. Gen. Laws 136, 147 (Tex.Rev.Civ.Stat.Ann. § 19(d), (e), since repealed and recodified at Tex. Gov't Code Ann. §§ 2001.174, .175(e) (West Pamph.1996)). Indeed, because the review standard is the same for both substantial evidence

de novo and pure substantial evidence, the true innovation in the APA was that it expressly changed Texas's historically used *procedure*.

The TCNA, on the other hand, specified the standard to be applied but made no mention whatsoever of a procedure to be used, even though the APA provided a perfect model of how to specify both the standard and the procedure. Thus, there is no support, logical or otherwise, for the majority's conclusion that the specification in the TCNA of the review standard implies a new and radically different procedure. In fact, just the opposite is true. Because the APA had so recently used language specifically mandating a new procedure in *judicial* review, it is clear the members of the legislature knew how to do so when they so desired. That they chose *not* to specify a particular procedure in the TCNA can only be construed as affirmatively indicating a desire not to change the existing procedure in such cases.

Finally, the majority argue that allowing a teacher appealing under the TCNA to present new evidence to the Commissioner "would transfer the real decision-making to the Commissioner at the state level." This statement reveals a fundamental misunderstanding of substantial-evidence-de-novo review. As discussed above, under substantial-evidence-de-novo review the agency order being reviewed is given precisely the same deference as in a pure-substantial-evidence review, *i.e.*, it will be set aside only if it is arbitrary, capricious, unlawful, or not reasonably supported by substantial evidence in the record. Any teacher who hopes to "lay behind the log" at the school district level in order to present his or her best case to the Commissioner in a substantial-evidence-de-novo review is foolish indeed.

I would hold that the Commissioner, by following the procedure set forth in rule 157.64(b), used an incorrect review procedure and unreasonably restricted Gilder's right to a substantial-evidence-de-novo review of the AISD board's order. Accordingly, I would hold that the Commissioner acted in violation of [sections 21.207\(a\) and 11.13\(a\) of the Education Code](#) when he dismissed Gilder's appeal without allowing her to present evidence. I would reverse the judgment of the district court and render judgment that the cause be remanded to the Commissioner for the purpose of conducting a substantial-evidence-de-novo review of the AISD board's order.

All Citations

926 S.W.2d 357, 111 Ed. Law Rep. 1031

 KeyCite Yellow Flag - Negative Treatment

Opinion Supplemented on Rehearing by [Godwin v. Aldine Independent School Dist.](#), Tex.App.-Hous. (1 Dist.), August 21, 1997

961 S.W.2d 219
Court of Appeals of Texas,
Houston (1st Dist.).

Jerry GODWIN d/b/a Quality Concrete, and Randall Keith Godwin, Appellants,

v.

ALDINE INDEPENDENT SCHOOL DISTRICT, Appellee.

No. 01-96-00313-CV. | Jan. 23, 1997. | Rehearing Overruled Dec. 4, 1997.

Taxpayers appealed tax master's ruling recommending judgment in favor of taxing authorities for delinquent ad valorem taxes on personal and business personal property. The 270th District Court Harris County, [Richard Hall, J.](#), dismissed appeal and entered judgment based on tax master's ruling. Taxpayers appealed. The Court of Appeals, [Hedges, J.](#), held that: (1) referring court did not lose jurisdiction over the case when hearing was not held within 45 days of initial appeal, and (2) on appeal de novo, taxing authorities had burden to go forward.

Reversed and remanded.

West Headnotes (3)

[1] **Taxation**  [Proceedings for Review and Parties](#)

Statute providing that court which has referred delinquent tax case to master in chancery “shall” hold hearing on all appeals not later than the 45th day after the date on which initial appeal was filed with referring court does not deprive referring court of jurisdiction over the case when hearing is not commenced or completed before 45th day; rather, provision gives appealing party a vehicle to compel prompt adjudication of appeal. [V.T.C.A., Tax Code § 33.74\(g\)](#).

[5 Cases that cite this headnote](#)

[2] **Appeal and Error**  [Cases Triable in Appellate Court](#)

Judicial review by trial de novo is not a traditional appeal, but rather new and independent action characterized by all attributes of original civil action. [V.T.C.A., Government Code § 2001.173\(a\)](#).

[3 Cases that cite this headnote](#)

[3] **Taxation**  [Trial De Novo](#)

Taxation  [Burden of Proof](#)

On appeal de novo of tax master's ruling recommending judgment in favor of taxing authorities, taxing authorities had burden to go forward. [V.T.C.A., Government Code § 2001.173\(a\)](#); [Vernon's Ann.Texas Rules Civ.Proc., Rules 262, 265\(a\)](#).

[5 Cases that cite this headnote](#)

Attorneys and Law Firms

*219 [Kenneth C. Kobobel](#), Houston, for appellants.

Sherri B. Manuel, Houston, for appellee.

Before [HEDGES](#), [COHEN](#) and [TAFT](#), JJ.

OPINION

[HEDGES](#), Justice.

Appellants, Jerry Godwin d/b/a Quality Concrete and Randall Keith Godwin, appeal a judgment against them for delinquent ad valorem taxes on personal and business personal property. The trial court dismissed appellants' notice of appeal and entered judgment based on the tax master's ruling in favor of the following taxing authorities: Aldine Independent School District, Harris County Hospital District, North Harris Montgomery Community College, Harris County Emergency Service District # 1, Harris County Rural Fire Prevention District # 25, Harris County, Harris County Flood Control District, Harris County Department of Education, and Harris County Port Authority (the "taxing authorities"). We reverse and remand.

In three points of error, appellants contend that the trial court erred in dismissing their de novo appeal and entering judgment against them because (1) the taxing authorities offered no evidence at the trial de novo, (2) the trial court incorrectly placed the burden of proof on appellants at the trial de novo, and (3) appellants timely objected to the visiting judge presiding over the proceeding.

Facts

On May 7, 1993, appellee, Aldine Independent School District, filed suit against appellant, *220 Jerry Godwin d/b/a Quality Concrete, to collect delinquent ad valorem taxes on personal and business personal property. The other taxing authorities who were parties to this suit intervened to collect delinquent taxes on the same property. Upon Jerry Godwin's death, the trial court issued a scire facias citation to his son, Randall Keith Godwin, as sole heir. Randall answered, and the case was heard before a tax master on June 20, 1995. On July 24, 1995, the tax master recommended judgment for the taxing authorities and gave notice to the parties. On August 2, 1995, appellants filed notice of appeal to the trial court. The trial court had already adopted the tax master's recommendation that same day. On September 15, 1995, the trial court set aside its judgment, and at the request of appellants, a de novo hearing was scheduled for September 18, 1995.

On September 18, the judge of the 270th District Court, Judge Richard Hall, was functioning as ancillary judge for Harris County. A visiting judge, Judge Pat Lykos, was hearing Judge Hall's regular docket. Judge Lykos called the 270th Court's trial docket at 9:00 a.m., and counsel for appellants and counsel for the taxing authorities all announced that they were ready to proceed. While counsel for one of the taxing authorities stepped out of the courtroom to inform her co-counsel that the case was going to be heard that day, Judge Lykos again called the case. The attorneys representing appellants, still present in the courtroom, informed the judge that they were "adversarial." Apparently misunderstanding that comment to mean that one of these attorneys represented a taxing authority, Judge Lykos sent them to the court coordinator to schedule the evidentiary hearing for 1:00 p.m. the same day. Without informing the taxing authorities, attorneys for appellants rescheduled the hearing for September 22 and left the court.

When one of the taxing authorities' attorneys learned that the hearing was rescheduled, she informed Judge Lykos, and appellants' attorneys were called back to the court. With all parties represented, Judge Lykos conducted a hearing. At midafternoon, several hours into the hearing, the attorney for Randall Godwin presented a written objection to the assignment

of Judge Lykos to the case. The motion had been filed that morning. He also orally objected to Judge Lykos' presiding over the hearing. Judge Lykos terminated the hearing without evidence on appellants' tax liability from either party. On November 3, 1995, Judge Hall dismissed appellants' appeal and reinstated the August 2 judgment in favor of the taxing authorities.

In point of error two, appellants argue that the trial court erred in dismissing their appeal and entering judgment against them because the trial court erroneously placed the burden of proof on appellants to go forward in the evidentiary hearing.

Adjudication and Appeal of Delinquent Tax Suits

The Tax Code provides that a court in which a suit for delinquent tax is pending may refer the case to a master in chancery. [TEX. TAX CODE ANN. § 33.71](#) (Vernon 1992). The master is authorized to conduct evidentiary proceedings and recommend a final judgment. *Id.* Any party to the delinquent tax suit is entitled to a hearing by the judge of the referring court if, within 10 days after the tax master gives notice of his or her findings and recommendation, an appeal of the master's report is filed with the referring court. [TEX. TAX CODE ANN. § 33.74\(a\)](#) (Vernon 1992). “On appeal to the referring court, the parties may present witnesses as in a hearing de novo only on those issues raised in the appeal.” [TEX. TAX CODE ANN. § 33.74\(d\)](#) (Vernon 1992). The statute provides that the referring court “shall hold a hearing on all appeals not later than the 45th day after the date on which the initial appeal was filed with the referring court.” [TEX. TAX CODE ANN. § 33.74\(g\)](#) (Vernon 1992).

45th Day Requirement

[1] All parties and both judges were uncertain about the meaning of the statutory dictate that the referring court “shall hold a hearing ... not later than the 45th day ...” after the notice of appeal. The confusion is understandable, because there is no explanatory authority. The parties seemed unclear about whether the court lost jurisdiction over the appeal at the end of forty-five days.

*221 We have researched this question and have found no authority directly on point. In order to find analogous authority, we looked to the Family Code, which provides for master in chancery adjudication almost identical to the one described in the Tax Code. *See* [TEX.FAM.CODE ANN. § 201.001 et seq.](#) (Vernon 1996). An appeal of the family court master's recommendation is allowed upon timely filing of notice of appeal with the referring court, which “shall hold a hearing on all appeals not later than the 30th day after the date on which the initial appeal was filed with the referring court.” [TEX.FAM.CODE ANN. § 201.015\(f\)](#) (Vernon 1996).

The parties in the appeal before us seemed to construe the word “shall” in [TEX. TAX CODE ANN. § 33.74\(g\)](#) (Vernon 1992) as depriving the referring court of jurisdiction over the appeal if the hearing is either not commenced on or before the 45th day or is not completed by that date. A similar issue in the context of an appeal of a family court master's finding was addressed in *Ex parte Brown*, 875 S.W.2d 756 (Tex.App.—Fort Worth 1994, no writ). In that habeas corpus proceeding, the petitioner contended that the trial court had lost jurisdiction to rule on his appeal when it held the evidentiary hearing provided for in [TEX.FAM.CODE ANN. § 201.015\(f\)](#) (Vernon 1996) beyond the 30–day prescribed period. The Fort Worth Court of Appeals found that the 30–day hearing procedure was designed to “require the prompt resolution of appeals of masters' rulings.” *Brown*, 875 S.W.2d at 760. While the court interpreted “shall” as mandatory, that directive did not mean that the referring court lost jurisdiction if it failed to hear an appeal from a master's ruling within 30 days of the notice of appeal. *Id.* The mandatory provision gives the appealing party a mechanism with which to compel a referring court to hear an appeal promptly. *Id.*; *see State v. \$435,000*, 842 S.W.2d 642, 644 (Tex.1992) (construing similar language in civil forfeiture statute as mandatory).

Analogously, we believe that while the language regarding timeliness of the hearing in [section 33.74\(g\)](#) is mandatory, a referring court is not divested of jurisdiction if it fails to comply. Rather, the provision gives the appealing party a vehicle to compel prompt adjudication of the appeal. Accordingly, the referring court could have held the evidentiary hearing after the 45th day without jurisdictional consequences.

Burden of Going Forward

Appellants complain that the trial court dismissed their appeal and entered judgment against them based on an erroneous shifting of the burden of going forward. We agree.

[2] In an appeal de novo, the reviewing court shall conduct a trial de novo in the same manner as all other civil suits. [TEX. GOV'T CODE ANN. § 2001.173\(a\)](#) (Vernon 1988). Judicial review by trial de novo is not a traditional appeal, but rather a new and independent action characterized by all the attributes of an original civil action. *Key Western Life Ins. v. State Board of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 846 (1961); *see also Central Educ. Agency v. Upshur Co. Comm'rs Ct.*, 731 S.W.2d 559, 561 (Tex.1987). The party upon whom the burden of proof rests has the burden to go forward with evidence first. [TEX.R.CIV.P. 262, 265\(a\)](#).

[3] Clearly the taxing authorities had the burden to go forward with evidence in this trial de novo to establish appellants' liability. The trial court's recitation in its judgment that "the defendants did not produce witnesses" and that "the defendants were not ready for trial" indicates that the trial court dismissed the appeal because the appellants failed to proceed. That notion erroneously placed the burden on appellants to establish their defense before the taxing authorities had established their prima facie case of liability.

In reciting in the judgment that the 45 days had run, the trial court affirmed its belief that it lost jurisdiction over the appeal after the 45th day. We have held that the trial court's jurisdiction over the appeal continued after that date. Therefore, the failure to complete a trial de novo by the end of the 45-day period was not fatal to the appeal and was an improper basis for dismissing the appeal.

We sustain point of error two.

***222** In light of our disposition of point of error two, we need not consider points of error one and three.

We reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.

All Citations

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Court of Appeals of Texas,
Corpus Christi-Edinburg.

Gloria Hicks, Appellant,

v.

[Group & Pension Administrators, Inc.](#), Appellee.

Gulf Coast Division, Inc. and Bay Area Healthcare Group, Ltd., Appellants,

v.

[Group & Pension Administrators, Inc.](#), Appellee.

NUMBER 13–14–00607–CV, NUMBER 13–14–00608–CV | Delivered and filed September 3, 2015

On appeal from the 94th District Court of Nueces County, Texas.

Attorneys and Law Firms

[James Robert Wetwiska](#), [Murry B. Cohen](#), [Kathryn Semmler](#), for Appellant.

[William J. Akins](#), [Bryan D. Pollard](#), for Appellee.

Before Chief Justice [Valdez](#), and Justices [Rodriguez](#), and [Garza](#)

OPINION

Memorandum Opinion by Justice [Garza](#)

*1 In these consolidated interlocutory appeals,¹ appellants Gloria Hicks (“Hicks”), Bay Area Healthcare Group, Ltd. (“BAHG”), and Gulf Coast Division, Inc. (“GCD”) appeal the trial court’s orders denying their motions to dismiss (“the Motions”) that were filed pursuant to the Texas Citizens’ Participation Act (“TCPA” or “the Act”), set forth in chapter 27 of the civil practice and remedies code.² See [TEX. CIV. PRAC. & REM.CODE ANN. § 7.003](#) (West, Westlaw through Ch. 46, 2015 R.S.); *id.* § 51.014(a)(12) (West, Westlaw through Ch. 46, 2015 R.S.) (providing for the interlocutory appeal of an order denying a motion to dismiss filed under [section 27.003](#)). The Motions were filed in response to a lawsuit filed by appellee, Group and Pension Administrators, Inc. (“GPA”), against the appellants. Hicks and the Hospital Defendants contend that the trial court erred in denying their Motions.

¹ In appellate cause number 13–14–607–CV, the appellant is Gloria Hicks. In appellate cause number 13–14–608–CV, the appellants are Bay Area Healthcare Group, Ltd. (“BAHG”) and Gulf Coast Division, Inc. (“GCD”). BAHG owns and operates Corpus Christi Medical Center, a hospital system. GCD is an affiliate of HCA, Inc., a Nashville-based owner and operator of hospitals. We refer to BAHG and GCD collectively as “the Hospital Defendants.” Pursuant to GPA’s unopposed motion to consolidate the appeals, we have consolidated the appeals.

² The TCPA is also known as the Anti–SLAPP statute. See *In re Estate of Check*, 438 S.W.3d 829, 830 (Tex.App.—San Antonio 2014, no pet.). “SLAPP” is an acronym for “Strategic Lawsuit Against Public Participation.” *Id.* at 830 n.1.

In appellate cause number 13–14–607–CV, we affirm that part of the trial court's order denying Hicks's Motion to dismiss GPA's claims of business disparagement and tortious interference with prospective relations against her. We reverse that part of the trial court's order denying Hicks's Motion to dismiss GPA's claims of conspiracy and joint enterprise and coercion of a public servant against her and render judgment dismissing those claims against Hicks. In appellate cause number 13–14–608–CV, we reverse the trial court's order denying the Hospital Defendants' Motion to dismiss GPA's claims against them and render judgment dismissing those claims. We remand both causes for further proceedings consistent with this opinion, including consideration by the trial court of an award under section 27.009 of the TCPA of costs and fees relating to the Motions to dismiss. *See id.* § 27.009 (West, Westlaw through Ch. 46, 2015 R.S.).

I. BACKGROUND

In October 2012, GPA was one of four finalists to be awarded a contract to serve as the third-party administrator of Corpus Christi Independent School District's ("CCISD") self-funded health insurance plan. GPA asserts that on Friday, October 26, 2012, Xavier Gonzalez, an assistant superintendent of CCISD, advised GPA representatives that GPA would be awarded the third-party administrator contract on Monday, October 29, 2012.

*2 Hicks, a Corpus Christi resident active in the community, is a member of the board of trustees for Corpus Christi Medical Center ("CCMC").³ Hicks learned of CCISD's decision to award the contract to GPA on Friday, October 26, 2012. That afternoon, Hicks sent the following email to six school board members and the superintendent of CCISD:

I am on the Board of Directors for Corpus Christi Medical Center, which includes Bay Area Hospital, Doctors Regional, ER in Portland, ER in Calallen. The message that I would like to convey is that our hospitals have worked with GPA in the past and they are very difficult with all Healthcare providers. If CCISD does elect to go with GPA[,] we will be forced to bill CCISD employees. The billing difficulties are so bad we are unable to file claims and get them paid. It is a bad situation that I wanted to make you aware of. Thank you.⁴

³ CCMC is the d/b/a for BAHG.

⁴ On Saturday afternoon, October 27, Hicks sent essentially the same email to four CCISD school board members (three of whom had received the Friday email) and to the administrative assistant to the superintendent.

Late in the afternoon on Friday, October 26, assistant superintendent Gonzalez notified a GPA representative that CCISD had decided to award the contract to a different bidder. On Monday, October 29, the school board met as scheduled and awarded the contract to a different bidder.

On March 4, 2013, GPA sued Hicks asserting claims for defamation/libel, defamation/libel per se, business disparagement, and tortious interference with a prospective business relationship. Hicks was served with the lawsuit on March 18, 2013.

On April 3, 2014, GPA filed an amended petition adding the Hospital Defendants, removing the defamation/libel claims, retaining the business disparagement and tortious interference claims, and adding claims for conspiracy, joint enterprise, and coercion of a public servant. *See* [TEX. PENAL CODE ANN. § 36.03\(a\)\(1\)](#) (West, Westlaw through Ch. 46, 2015 R.S.).

Hicks filed her Motion pursuant to [section 27.003\(b\) of the civil practice and remedies code](#) on June 2, 2014. *See* [TEX. CIV. PRAC. & REM.CODE ANN. § 27.003\(b\)](#). Hicks argued that her Motion was timely because it was filed within sixty days of the date she was served with GPA's amended petition. *See id.* (providing that a motion to dismiss must be filed within sixty days "after the date of service of the legal action"). On August 19, 2014, GPA filed a response to the Motion in which it argued, among other things, that Hicks's Motion must be denied because she failed to file her Motion within sixty days of the date she was served with GPA's original petition. Hicks filed a reply to GPA's response.

On June 16, 2014, the Hospital Defendants filed their Motion pursuant to [section 27.003\(b\)](#). The Hospital Defendants noted that the Motion was timely as it was filed within sixty days of April 16, 2014, the date of service of GPA's amended petition. *See id.* The Hospital Defendants argued that the basis for GPA's claims against them—Hicks's emails—are communications that are protected under the TCPA. The Hospital Defendants also argued that GPA cannot establish “by clear and specific evidence a prima facie case for each essential element” of its claims. *See id.* § 27.005(c) (West, Westlaw through Ch. 46, 2015 R.S.) (providing that a court must dismiss claims if, after a defendant shows that claims relate to the defendant's rights to free speech, petition, or association, a plaintiff cannot establish a prima facie case for each element of claim). GPA filed a response to the Hospital Defendants' Motion, arguing that: (1) its claims are not covered by the TCPA under the “commercial speech” exception, *see id.* § 27.010(b); (2) Hicks's emails are not covered by the TCPA “because they amount to criminal coercion”; (3) the Hospital Defendants failed to meet their burden to show that Hicks's emails are covered by the TCPA; and (4) GPA made a prima facie showing as to each essential element of its claims. The Hospital Defendants filed a reply in support of their Motion.

*3 On August 28, 2014, the trial court held a hearing on both Hicks's and the Hospital Defendants' Motions. At the hearing, the Hospital Defendants preserved their right to request damages pursuant to section 27.009(1) of the TCPA. *See id.* § 27.009(1) (providing that if a court orders dismissal, it shall award court costs and attorneys' fees to moving party). On September 23, 2014, by separate orders, the trial court denied both Motions without stating the basis for its rulings. This interlocutory consolidated appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

The TCPA provides a mechanism for early dismissal of suits based on a party's exercise of the right of free speech, the right to petition, or the right of association. *See id.* § 27.003. [Section 27.003](#) allows a litigant to seek dismissal of a “legal action” that is “based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association.” *Id.* § 27.003(a). A “ ‘legal action’ means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.” *Id.* § 27.001(6) (West, Westlaw through Ch. 46, 2015 R.S.). “The statute broadly defines ‘the exercise of the right of free speech’ as ‘a communication made in connection with a matter of public concern.’ ” *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex.2015) (per curiam) (citing [TEX. CIV. PRAC. & REM.CODE ANN. § 27.001\(3\)](#) (West, Westlaw through Ch. 46, 2015 R.S.)). “Under this definition, the right of free speech has two components: (1) the exercise must be made in a communication and (2) the communication must be made in connection with a matter of public concern.” *Id.* “[T]he statute defines ‘communication’ as ‘the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.’ ” *Id.* (citing [TEX. CIV. PRAC. & REM.CODE ANN. § 27.001\(1\)](#) (West, Westlaw through Ch. 46, 2015 R.S.)). Thus, the statute defines “communication” to include any form or medium—regardless of whether the communication takes a public or private form. *Id.* A “matter of public concern” is defined by the statute to include issues related to health or safety, community well-being, and the provision of services in the marketplace, among other things. *See* [TEX. CIV. PRAC. & REM.CODE ANN. § 27.001\(7\)](#) (West, Westlaw through Ch. 46, 2015 R.S.).

The Act imposes the initial burden on the movant to establish by a preponderance of the evidence “that the legal action is based on, relates to, or is in response to the party's exercise” of the right of free speech, the right to petition, or the right of association. *Id.* § 27.005(b). The Act then shifts the burden to the nonmovant, allowing the nonmovant to avoid dismissal only by “establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(c). The requirement that a plaintiff present “clear and specific evidence” of “each essential element” means that “a plaintiff must provide enough detail to show the factual basis for its claim.” *In re Lipsky*, 460 S.W.3d 579, 591 (Tex.2015) (orig.proceeding). “Though the TCPA initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence.” *Id.* When determining whether to dismiss the legal action, the court must consider “the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.” [TEX. CIV. PRAC. & REM.CODE ANN. § 27.006\(a\)](#). The court may allow specified and limited

discovery relevant to the motion on a showing of good cause, but otherwise all discovery in the legal action is suspended until the court has ruled on the motion to dismiss. *Id.* §§ 27.003, .006(b).

*4 Under section 27.006 of the TCPA, the trial court may consider pleadings as evidence. *Id.* § 27.006(a). The TCPA does not require a movant to present testimony or other evidence to satisfy the movant's evidentiary burden. *Serafine v. Blunt*, — S.W.3d —, —, No. 03–12–00726–CV, 2015 WL 3941219, at *4 (Tex.App.—Austin June 26, 2015, no pet. h.).

We review de novo questions of statutory construction. We consider de novo the legal question of whether the movant has established by a preponderance of the evidence that the challenged legal action is covered under the Act. We also review de novo a trial court's determination of whether a nonmovant has presented clear and specific evidence establishing a prima facie case for each essential element of the challenged claims.

Id. at —, 2015 WL 3941219, at *2 (internal citations omitted).

III. DISCUSSION

A. Hicks's Motion to Dismiss

1. Jurisdiction

As an initial matter, we must address whether we have jurisdiction over Hicks's interlocutory appeal. In its brief, GPA argues that this Court lacks jurisdiction over Hicks's appeal because “[t]he TCPA does not grant the right of interlocutory appeal from the denial of a *motion for leave* to file a motion to dismiss.” (Emphasis added.) In support of its argument, GPA cites *Summersett v. Jaiyeola*, 438 S.W.3d 84, 91 (Tex.App.—Corpus Christi 2013, pet. denied). In *Summersett*, the defendant filed a motion for leave to file a motion to dismiss outside the sixty-day window from the return of service, arguing that service was improper. *Id.* at 88. Following a hearing, the trial court stated, “[t]he only order I'm entering today is that the Motion for Leave is denied.” *Id.* at 91. This Court found that we lacked jurisdiction over the appeal because “[a] trial court's denial of a motion for leave or a motion for extension of time to file a motion to dismiss is neither a ruling on the merits of the motion to dismiss, nor a denial ‘by operation of law’ of a motion to dismiss.” *Id.* at 91–92.

We find GPA's reliance on *Summersett* is misplaced. Here, Hicks filed a motion to dismiss; she did not file a motion for leave to file her motion to dismiss. Similarly, the trial court's order denying her motion to dismiss explicitly stated that “Defendant's motion to dismiss is hereby DENIED.” GPA argues that after Hicks filed her motion to dismiss and GPA filed a response, Hicks filed a “reply” in support of her motion, in which she argued, alternatively, that the trial court should consider her motion to dismiss because the court can extend the time to file a motion on a showing of good cause. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b) (West, Westlaw through Ch. 46, 2015 R.S.). GPA argues that by doing so, Hicks “directly asked the trial court to grant her leave[.]” According to GPA, “[t]he trial court could have denied the motion because it decided not to grant leave for Hicks to file an untimely motion.” We are unpersuaded by GPA's argument. As noted, the Motion requested dismissal, not leave to file, and the order denying the Motion explicitly denied the motion to dismiss. The civil practice and remedies code expressly provides for interlocutory appeal of a trial court's order denying a motion to dismiss filed under the TCPA. See *id.* § 51.014(a)(12). We conclude that we have jurisdiction over this appeal and proceed to consider the remaining appellate issues.

2. Trial Court's Denial of Hicks's Motion

*5 By a single issue, Hicks contends that the trial court erred in denying her Motion to dismiss because: (1) she established that GPA's claims arose out of her exercise of free speech and right to petition the government; and (2) GPA failed to establish by “clear and specific evidence” a prima facie case for each element of its claims. By sub-issues, she further argues: (1) her Motion was timely filed because it was filed within sixty days after the date of service of GPA's amended petition; and (2)

GPA's claims are not exempt from application of the TCPA either by the "commercial speech" exemption or because the speech constitutes criminal coercion of a public servant.

a. Timeliness of Hicks's Motion

We begin with Hicks's sub-issue by which she contends that her Motion to dismiss was timely filed because it was filed within sixty days after service of GPA's amended petition. The statute requires that a motion to dismiss must be filed within sixty days of the "legal action." See *TEX. CIV. PRAC. & REM.CODE ANN. § 27.003(b)*. "Legal action" is defined as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id.* § 27.001(6). Hicks argues that GPA's amended petition "reformulat[ed] the entire litigation" because it added the Hospital Defendants and asserted new claims against her for conspiracy with the Hospital Defendants and for tortious interference on the basis of "coercion of a public servant." Hicks also argues that she "could not have filed her motion to dismiss within sixty days after service of GPA's Original Petition without the risk of waiving her venue challenges."

We are unpersuaded that Hicks's arguments prevail as to all of GPA's claims. GPA's amended petition added new claims against Hicks for conspiracy and joint enterprise and coercion of a public servant. However, the business disparagement and tortious interference claims asserted in GPA's amended petition—claims based on Hicks's emails—were also made in its original petition. Thus, Hicks was on notice that GPA was asserting business disparagement and tortious interference claims against her in March 2013—over a year before she filed her Motion in June 2014.

In support of her argument that her Motion was timely filed, Hicks cites *Better Bus. Bureau of Metro. Dallas, Inc. ("BBB") v. Ward*, 401 S.W.3d 440, 443 (Tex.App.—Dallas 2013, pet. denied). In *Ward*, a law firm sued the BBB based on the BBB's business rating of "F" assigned to the firm. *Id.* at 442. The suit was filed before the effective date of the TCPA. Months later, after the effective date of the TCPA, Ward joined as a party plaintiff in an amended petition. *Id.* at 443. The BBB filed a motion to dismiss Ward's individual claims against the BBB—the claims added after the effective date of the TCPA—but did not seek dismissal of the law firm's claims against the BBB. *Id.* The trial court denied the BBB's motion to dismiss. *Id.* The Dallas Court of Appeals found that "[t]he definition of 'legal action' in the statute is broad and evidences a legislative intent to treat any claim by any party on an individual and separate basis." *Id.* (citing *Tex. Civ. Prac. & Rem.Code Ann. § 27.001(6)*). The court found that the TCPA applied to the BBB's business review and that the trial court erred in denying the BBB's motion to dismiss under the TCPA. *Id.* at 445.

In *In re Estate of Check*, the San Antonio Court of Appeals rejected the categorical argument that Hicks makes here: that a motion to dismiss is timely filed if filed within sixty days of an amended petition. 438 S.W.3d 829, 836 (Tex.App.—San Antonio 2014, no pet.). The *Check* Court found that "such an interpretation would lead to absurd results not intended by the Legislature." *Id.* The court noted that to permit the filing of any substantive pleading to

*6 reset the deadline for a motion to dismiss ... is irrational and at odds with one of the purposes of the Act, which is to allow a defendant *early In the lawsuit* to dismiss claims that seek to inhibit a defendant's constitutional rights to petition, speak freely, associate freely, and participate in government as permitted by law.

Id. In *Check*, the movant asserted that his motion to dismiss was timely filed because it was filed within sixty days of service of the nonmovant's amended counterclaim. *Id.* The movant cited *Ward* in support of his argument that the amended counterclaim reset the sixty-day deadline. *Id.* at 837. The *Check* court, however, concluded that *Ward* "actually undermine [d]" the movant's position. The court noted that in *Ward*, the amended petition had asserted new claims; therefore, "because the plaintiff had added new claims, a new deadline was mandated." *Id.* The *Check* court explained, "[e]xtrapolating from *Ward*, in the absence of new parties or claims, the deadline for filing a motion to dismiss would run from the date of service of the original 'legal action.'" *Id.* The court then distinguished *Ward* on the ground that the *Check* nonmovant's amended counterclaim had *not* added new parties or claims. See *Id.* Therefore, the court concluded that the movant's motion to dismiss was untimely. *Id.*

In *James v. Calkins*, the First Court of Appeals determined that the plaintiffs' claims asserted in an amended petition—filed after the effective date of the TCPA—were based on different factual allegations than those in the original petition. 446 S.W.3d 135, 146 (Tex.App.—Houston [1st Dist.] 2014, pet. filed). The *Calkins* court found that all of the causes of action in the amended petition “included substantively different factual allegations” and were new causes of action; therefore, the TCPA applied to all of the claims. *Id.*

In *Miller Weisbrod, LLP v. Llamas-Soforo*, the El Paso Court of Appeals also rejected the position that Hicks urges us to adopt here: to define the term “legal action” broadly to include any subsequent pleading filed in a lawsuit. No. 08–12–00278–CV, — S.W.3d —, —, 2014 WL 6679122, at *9 (Tex.App.—El Paso Nov. 25, 2014, no pet.). In *Miller Weisbrod*, a law firm that was added as a defendant in a first amended petition argued that its motion to dismiss was timely filed because it was filed within sixty days of a second amended petition that added two individual defendants. *Id.* The El Paso Court disagreed, stating that, “[w]e see nothing in the statute or its history and purpose to indicate the Legislature intended to create a perpetual opportunity to file a motion to dismiss whenever a pleading qualifies as a ‘legal action’ under Section 27.001(6).” *Id.* at —, 2014 WL 6679122 at *10. The court noted that the law firm was named as a defendant and served with the first amended petition, which triggered the law firm's sixty-day deadline for filing a motion to dismiss under the TCPA. *Id.* at —, 2014 WL 6679122 at *11. Because the law firm did not file its motion within the sixty-day deadline, the El Paso Court found that it was not timely filed. *Id.*

In the present case, Hicks argues—as did the law firm in *Miller Weisbrod*—that her motion to dismiss was timely filed because it was filed within sixty days of GPA's amended petition. We agree with the *Ward* court's statement that “[t]he definition of ‘legal action’ in the statute is broad and evidences a legislative intent to treat any claim by any party on an individual and separate basis.” *Ward*, 401 S.W.3d at 443. As noted, GPA's original petition asserted claims of business disparagement and tortious interference with prospective relations against Hicks, and those claims were retained in GPA's amended petition.⁵ As to those two claims, therefore, Hicks's sixty-day deadline to file a motion to dismiss was triggered when she was served with GPA's original petition and her Motion, filed over a year later, was untimely filed as to those two claims. See *In re Estate of Check*, 438 S.W.3d at 836; *Miller Weisbrod, LLP*, — S.W.3d at —, 2014 WL 6679122, at *11. Accordingly, we overrule Hicks's timeliness sub-issue as it pertains to her Motion to dismiss GPA's business disparagement and tortious interference with prospective relations claims against her.

⁵ All of GPA's claims are factually based on Hicks's emails.

*7 GPA's amended petition, however, asserted two new claims against Hicks: “conspiracy and joint enterprise” and criminal coercion of a public servant. See TEX. PENAL CODE ANN. § 36.03(a)(1) (West, Westlaw through Ch. 46, 2015 R.S.). Both claims are—like GPA's business disparagement and tortious interference claims—based on Hicks's emails. In its “conspiracy and joint enterprise” claim, GPA asserts that Hicks and the Hospital Defendants “combined or collaborated their efforts to engage in the unlawful practices [of business disparagement and tortious interference with prospective relations].” GPA asserts that “[a]ll of the defendants, or, alternatively, at least one of the defendants, committed an unlawful, overt act or acts to further the object or course of action.... At least one defendants, [sic] though more likely all of the defendants respectively, committed a tort against GPA while acting within the scope of the enterprise.” Although no “tort” or “unlawful” act is specifically identified, the only conduct complained of is Hicks's emails.

GPA's “coercion of a public servant” claim is included in a section added to GPA's tortious interference with prospective relations claim. Specifically, GPA alleged that:

Defendants coerced seven members of the CCISD Board of Trustees and the CCISD Superintendent with a threat to retaliate against CCISD through a campaign of direct billing CCISD teachers if CCISD contracted with GPA as CCISD intended to do. Using this threat as a means of coercion, Defendants influenced public servants, i.e. the CCISD Board of Trustees and the CCISD Superintendent, in the specific exercise of their official powers and the specific performance of their official duties.

Because these two claims against Hicks were first asserted in GPA's amended petition, we conclude that Hicks's Motion to dismiss was timely filed as to these two claims. *See In re Estate of Check*, 438 S.W.3d at 837; *Ward*, 401 S.W.3d at 445.

Accordingly, we sustain Hicks's timeliness sub-issue as it pertains to GPA's conspiracy and joint enterprise and coercion of a public servant claims against her. We therefore proceed to determine whether the trial court erred in denying Hicks's Motion as to those claims under the TCPA.

b. Application of TCPA to GPA's Conspiracy and Coercion Claims

We next determine whether Hicks established by a preponderance of the evidence that the TCPA applies to her statements. *See Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b)*. Section 27.003 provides that a party may file a motion to dismiss if a legal action “is based on, relates to, or is in response to [that] party's exercise of the right of free speech, right to petition, or right of association.” *Id.* § 27.003(a). Section 27.001(3) defines “exercise of the right of free speech” as “a communication made in connection with a matter of public concern.” *Id.* § 27.001(3). “Matter of public concern” is defined as including an issue related to “health or safety,” “environmental, economic, or community well-being,” and “a good, product, or service in the marketplace.” *Id.* § 27.001(7)(A), (B), (E). “Exercise of the right to petition” is defined as including a communication pertaining to “a proceeding of the governing body of any political subdivision of this state.” *Id.* § 27.001(4)(A)(vii). Section 27.005(b) provides that a court “shall dismiss a legal action against a moving party if the moving party shows by a preponderance of the evidence” that the action is based on, relates to, or is in response to the moving party's exercise of the right of free speech, right to petition, or right of association. *Id.* § 27.005(b).

The record shows that Hicks's emails related to whether, if CCISD selected GPA as its third-party administrator, insurance claims made by CCISD's teachers would be promptly and satisfactorily paid. Hicks's email expressed concern that GPA's past performance as being “difficult” with health care providers likely would result in CCISD's employees being billed for health care costs. We conclude that Hicks's emails related to the health and economic well-being of CCISD's employees and also related to a “service” offered by GPA in the marketplace. *See id.* § 27.001(7)(A), (B), (E). We conclude, based on the facts alleged in GPA's pleadings and in response to Hicks's Motion, that Hicks met her initial burden of showing by a preponderance of the evidence that her statements were made in connection with a matter of public concern and that GPA's conspiracy and coercion of a public servant claims relate to those statements so that the TCPA applies to those claims. *See id.* § 27.001(3), (7)(A), (B), (E), 27.005(b); *see In re Lipsky*, 460 S.W.3d at 586.

*8 GPA contends that Hicks's emails do not relate to the exercise of her right to free speech or the right to petition because: (1) the TCPA applies only to public speech, and Hicks's emails were private speech; (2) Hicks's statements are exempt from the TCPA under the commercial speech exemption under section 27.010(b), *see Tex. Civ. Prac. & Rem. Code Ann. § 27.010(b)*; and (3) Hicks's emails constitute criminal coercion under the penal code and therefore fall outside the protection of the TCPA. *See TEX. PENAL CODE ANN. § 36.03(a)(1)*. After the parties filed briefs, the Texas Supreme Court rejected GPA's first argument in *Lippincott*, 462 S.W.3d at 509. The Court held that the statutory definition of “communication” includes both public and private communication. *See id.*

GPA also argues that the TCPA does not apply to Hicks's statements because the statements fall within the “commercial speech” exemption. Section 27.010(b) provides that:

This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

TEX. CIV. PRAC. & REM. CODE ANN. § 27.010 (West, Westlaw through Ch. 46, 2015 R.S.). Section 27.010(b) thus provides, in relevant part, that a statement is exempt from the TCPA if the action is against a person primarily engaged in selling services

and the statement arises from the sale of services. *See id.* This provision has been construed such that, for the exemption to apply, the statement must be made for the purpose of securing sales in the goods or services of the person making the statement. *See Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88–89 (Tex.App.—Houston [1st Dist.] 2013, *pet. denied*). The party asserting the exemption (here GPA) bears the burden of proving its applicability. *Id.* at 89.

GPA argues that Hicks's emails fall within the commercial speech exemption because she was a member of the Hospital Defendants' Board of Directors and the Hospital Defendants “primarily engage in the business of selling healthcare services.” According to GPA, “Hicks, on behalf of the Hospital Defendants, endeavored to place her hospitals at an advantageous position to sell healthcare services at higher reimbursements—that would be paid by CCISD's self-funded insurance plan.” Hicks responds that as an unpaid member of the hospital's governing board, she “was not selling anything.” Hicks notes that “[t]he only services at issue were third[-]party insurance companies' services, and only GPA was selling them.” GPA continues to assert that Hicks and the Hospital Defendants had an economic interest in the CCISD board's decision to award the insurance contract to a different provider. Even assuming, without deciding, that GPA's assertion is correct—that Hicks and the Hospital Defendants stood to gain if the CCISD board chose a different provider—that does not alter the fact that Hicks was not “a person primarily engaged in the business of selling or leasing goods or services.” *See* TEX. CIV. PRAC. & REM.CODE ANN. § 27.010(b); *see also Schimmel v. McGregor*, 438 S.W.3d 847, 857–58 (Tex.App.—Houston [1st Dist.] 2014, *pet. denied*) (finding that a lawyer's statements that allegedly induced the City of Galveston to back out of an agreement to purchase properties was not commercial speech because his intended audience, the City, was not a “potential buyer or customer” of his services). We conclude that GPA has failed to establish the applicability of the “commercial speech” exemption. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 27.010(b); *Schimmel*, 438 S.W.3d at 857–58.

*9 We next address GPA's argument that Hicks's emails do not constitute protected conduct under the TCPA because “they amount to criminal coercion.” A person commits the offense of coercion of a public servant if he “influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty or influences or attempts to influence a public servant to violate the public servant's known legal duty [.]” TEX. PENAL CODE ANN. § 36.03(a)(1). The penal code defines “coercion” as “a threat, however communicated” to take certain actions. *Id.* § 1.07(a)(9) (West, Westlaw through Ch. 46, 2015 R.S.). Thus, “coercion” must involve a “threat.” Because the penal code does not define “threat,” we must give the term its common ordinary meaning. *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 563–64 (Tex.2014). “Threat” is defined, in relevant part, as “an expression of intention to inflict evil, injury, or damage.” *See* Merriam-Webster's Online Dictionary, <<http://www.merriamwebster.com/dictionary/threat>> (last visited July 2, 2015).

According to GPA, Hicks “threatened the school board members that if the CCISD retained GPA to administer the CCISD's self-funded health insurance plan, then the Hospital Defendants would refuse to work with the CCISD's self-funded health insurance plan and would instead ‘be forced to bill CCISD employees.’ ” We do not construe Hicks's emails as expressing an intention to inflict evil, injury, or damage, and therefore, the emails do not constitute a “threat.” *See Id.* Accordingly, Hicks's emails do not constitute coercion of a public servant.

Because we have held that Hicks's emails—which formed the basis for GPA's claims of coercion of a public servant and conspiracy and joint enterprise—constitute protected conduct under the TCPA, we must next determine whether GPA met its burden to establish, by clear and specific evidence, a prima facie case for every essential element of its claims. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 27.005(c).

Because we have already concluded that Hicks's emails do not constitute a “threat,” GPA cannot establish a prima facie case for coercion of a public servant. *See* TEX. PENAL CODE ANN. §§ 1.07(a)(9), 36.03(a)(1). In other words, GPA has not met its burden of establishing by clear and specific evidence a prima facie case for the “threat” element of this claim. *See id.*; TEX. CIV. PRAC. & REM.CODE ANN. § 27.005(c).

Civil conspiracy requires (1) two or more persons who agree upon an object, (2) a meeting of minds on the object to be accomplished, and (3) one or more overt, unlawful acts committed in furtherance of the conspiracy, (4) which results in damages.

Guevara v. Lackner, 447 S.W.3d 566, 582 (Tex.App.—Corpus Christi 2014, no pet.). The elements of a joint enterprise are (1) an agreement (express or implied) among the members of the group, (2) a common purpose to be carried out by the group, (3) a community of pecuniary interest among the members in that common purpose, and (4) an equal right to direct and control the enterprise. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 525, 530 (Tex.2003). An appellate court first looks to the evidence of an agreement or agreements among the members of the group to ascertain their possible common purposes, and then it considers if the evidence supports a finding of a joint enterprise with respect to each possible common purpose. *Id.* at 531.

In its amended petition, in the section asserting a claim for “conspiracy and joint enterprise,” GPA asserts that the defendants “collaborated their efforts to engage in the unlawful practices set forth above.” As to GPA’s “joint enterprise” theory, GPA’s amended petition does not identify any “agreement” or parties to it, does not identify any “common purpose,” and does not identify any “community of pecuniary interest” involved in the alleged joint enterprise. *See id.*

Our review of GPA’s amended petition reveals that the only allegedly “unlawful practice” about which GPA complains as a basis for its conspiracy and joint enterprise claim is Hicks’s emails. GPA has not provided evidence of—or even identified—any other “unlawful practice.” We have already determined that Hicks met her initial burden of showing by a preponderance of the evidence that her statements were made in connection with a matter of public concern so that the TCPA applies to GPA’s “conspiracy and joint enterprise” claim. GPA offers no other evidence regarding the alleged unlawful nature of Hicks’s act of sending the emails. Therefore, we conclude that GPA has not established, by clear and specific evidence, a prima facie case on its claims for conspiracy or joint enterprise. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 27.005(c).

*10 We therefore hold that because Hicks established by a preponderance of the evidence that GPA’s conspiracy and joint enterprise and coercion of a public servant claims are based on, relate to, or are in response to her exercise of her right to free speech, and because GPA failed to establish a prima facie case on any essential element of its conspiracy and joint enterprise or coercion of a public servant claims, the trial court erroneously denied Hicks’s Motion to dismiss those claims under the TCPA. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 27.005(b), (c). We reverse that part of the trial court’s order denying Hicks’s Motion to dismiss GPA’s conspiracy and joint enterprise and coercion of a public servant claims against Hicks and render judgment dismissing those claims against Hicks.

B. The Hospital Defendants’ Motion to Dismiss

By a single issue, the Hospital Defendants contend on appeal that the trial court erred in denying their Motion.

In their Motion, the Hospital Defendants argued that: (1) they can show by a preponderance of the evidence that all of GPA’s claims against them are based on Hicks’s emails, in which she was exercising her right of free speech and right to petition; and (2) GPA cannot establish by clear and specific evidence a prima facie case for each essential element of its claims. *See id.* In its amended petition, GPA asserted against the Hospital Defendants the same claims it asserted against Hicks: business disparagement, tortious interference with prospective contract, and conspiracy and joint enterprise. All of GPA’s claims are based on Hicks’s emails.

In its response, GPA argued that: (1) its claims are not covered by the TCPA under the “commercial speech” exception, *see id.* § 27.010(b); (2) Hicks’s emails are not covered by the TCPA “because they amount to criminal coercion”; (3) the Hospital Defendants failed to meet their burden to show that Hicks’s emails are covered by the TCPA; and (4) GPA made a prima facie showing as to each essential element of its claims.

We have already determined that (1) Hicks’s emails constitute protected conduct under the TCPA, (2) the emails do not fall within the “commercial speech” exemption, and (3) the emails do not constitute criminal coercion. For the reasons discussed above, we find that the Hospital Defendants have established by a preponderance of the evidence that all of GPA’s claims are based on Hicks’s exercise of her right to free speech. *See id.* § 27.005(b). To defend against the Hospital Defendants’ Motion, GPA’s burden under the TCPA was to establish by clear and specific evidence a prima facie case for each essential element of its claims against the Hospital Defendants. *See id.* § 27.005(c).

1. Business Disparagement

“Business disparagement or ‘injurious falsehood applies to derogatory publications about the plaintiff’s economic or commercial interests.’ ” *In re Lipsky*, 460 S.W.3d at 591 (quoting 3 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 656, at 615 (2d ed.2011)). “To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff.’ ” *Id.* at 592 (quoting *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex.2003)). In their Motion, the Hospital Defendants asserted that GPA “cannot present by clear and specific evidence a prima facie case that [Hicks’s] statements were false, committed with malice and without privilege, or caused [GPA] special damages—i.e., caused [GPA] to lose the bid from the School District.”

In its response, GPA pointed to the following evidence in support of its claim: (1) Hicks’s emails; (2) an unsworn “declaration” by Lynn Huckaby, branch director of GPA’s San Antonio, Texas, office; and (3) an unsworn “declaration” by Jeff McPeters, a GPA senior sales executive.⁶ Huckaby’s declaration states, in relevant part, that: (1) on Friday, October 26, 2012, Huckaby and other GPA staff members met with Xavier Gonzalez, CCISD Assistant Superintendent; (2) on the afternoon of October 26, 2012, Gonzalez said that GPA had won the CCISD business; and (3) around 5:00 p.m. on October 26,⁷ Gonzalez called and said “GPA did not end up getting the business after all, despite what he had said earlier.” The McPeters declaration states, in relevant part:

*11 Because of the business disparagement and interference by Gloria Hicks and Corpus Christi Medical Center with GPA’s prospective relations with the Corpus Christi Independent School District, GPA suffered direct pecuniary loss by losing the fees to service the subject contract in the approximate amount of \$2,289,528, which includes \$603,792 for fees for claims administration, \$129,384 for utilization review, and approximately \$30,000 for other servicing fees on a yearly basis.

⁶ We note that neither declaration includes a jurat as specified in [section 132.001\(d\) of the civil practice and remedies code](#). See [TEX. CIV. PRAC. & REM.CODE ANN. § 132.001\(d\)](#) (West, Westlaw through Ch. 46, 2015 R.S.).

⁷ We note the declaration states Gonzalez called at 5:00 p.m. “on Friday, October 29, 2012.” We assume that “29” is a typographical error.

In their reply to GPA’s response, the Hospital Defendants objected to McPeters’s declaration as conclusory “because it fails to provide underlying facts to support the conclusion these Defendants disparaged or interfered with GPA’s prospective relations and it contains unsupported legal conclusions.” Similarly, the Hospital Defendants objected to Huckaby’s declaration as containing inadmissible hearsay, i.e., Gonzalez’s statements to Huckaby.

Assuming, without deciding, that the declarations are adequate substitutes for an affidavit, see [TEX. CIV. PRAC. & REM.CODE ANN. § 132.001\(a\)](#) (West, Westlaw through Ch. 46, 2015 R.S.), we agree that McPeters’s declaration is conclusory. In *Lipsky*, the supreme court found “general averments of direct economic losses and lost profits” insufficient to satisfy the minimum requirements of the TCPA. See *In re Lipsky*, 460 S.W.3d at 593. The Court noted that “[o]pinions must be based on demonstrable facts and a reasoned basis.” *Id.*

With regard to GPA’s hearsay objection to Huckaby’s declaration, we note that an objection that a declaration contains hearsay is an objection to the form of the declaration. *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 374 (Tex.App.—Dallas 2011, no pet.). A defect in the form of a declaration must be objected to in the trial court and failure to obtain a ruling from the trial court on an objection to the form of a declaration waives the objection. *Id.* Here, although the Hospital Defendants raised their hearsay objection to the trial court, the record does not reflect that the trial court ruled on the objection. Therefore, the Hospital Defendants waived their hearsay objection. See *id.* Nonetheless, even considering the hearsay, we conclude that the Huckaby declaration provides no evidence of causation. The declaration simply states that, on the afternoon of October 26,

Gonzalez said that GPA had won the CCISD business and then later that day, said that it had not. The declaration provides no clear and specific evidence that Hicks's emails caused CCISD to award the contract to another bidder.

Even if we consider GPA's pleadings, we find no evidence establishing that Hicks's emails caused CCISD to award the contract to another bidder. GPA alleged in its amended petition: "Mr. Gonzalez told Mr. McPeters that the Superintendent and some board members received an email that really stirred them up (i.e., the October 26 email), that the email was 'political,' and that due to the email, CCISD decided not to award the contract to GPA." However, as noted above, McPeters's declaration does not expressly state that Hicks's emails caused CCISD to award the contract to another bidder.

***12** We conclude that GPA's supporting evidence does not establish, by clear and specific evidence, a prima facie case on the essential element of causation. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(c\)](#).

2. Tortious Interference with Prospective Business Relations

To prevail on a claim for tortious interference with prospective business relations, a plaintiff must establish that (1) a reasonable probability existed that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result. [McGregor](#), 438 S.W.3d at 860 (citing [Coinmach Corp. v. Aspenwood Apartment Corp.](#), 417 S.W.3d 909, 923 (Tex.2013); [Wal-Mart Stores, Inc. v. Sturges](#), 52 S.W.3d 711, 726 (Tex.2001)). In GPA's response to the Hospital Defendants' Motion, it asserts, in a section addressing its tortious interference claim, that "[d]efendants' interference caused CCISD to not award the contract to [GPA], as CCISD had intended and informed [GPA] it would." As evidence to support this claim, GPA cites Huckaby's declaration. As we have noted, however, Huckaby's declaration provides no such evidence of causation. We conclude that GPA's supporting evidence does not establish, by clear and specific evidence, a prima facie case on the essential element of causation in its claim for tortious interference with prospective business relations. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(c\)](#); [McGregor](#), 438 S.W.3d at 860–61 ("The fact that Schimmel's alleged conduct occurred roughly contemporaneously with the City of Galveston's and the Department of Public Safety's consideration of whether to move forward with the purchases does not establish that Schimmel's conduct *caused* the governmental agencies to act as they did.") (emphasis in original).

3. Conspiracy and Joint Enterprise and Coercion of a Public Servant

As noted earlier, the sending of Hicks's emails is the only allegedly "unlawful practice" that the Hospital Defendants are accused of "conspiring" to engage in. We have already determined that Hicks met her burden of showing that her statements were made in connection with a matter of public concern so that the TCPA applies to GPA's conspiracy and joint enterprise claim. Because GPA's conspiracy and joint enterprise claims against the Hospital Defendants are based solely on Hicks's emails, and because we have found that GPA failed to establish a prima facie case on the essential element of causation on either of GPA's alleged underlying torts, we conclude that GPA has not established, by clear and specific evidence, a prima facie case on its claims against the Hospital Defendants for conspiracy and joint enterprise. See [West Fork Advisors, LLC v. SunGard Consulting Services, LLC](#), 437 S.W.3d 917, 920 (Tex.App.—Dallas 2014, pet. filed) ("Conspiracy is a derivative tort because 'a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.'").

***13** We also have already determined that GPA did not establish coercion of a public servant by clear and specific evidence. Accordingly, GPA's claim of coercion of a public servant against the Hospital Defendants also fails.

We hold that the trial court erred in denying the Hospital Defendants' Motion to dismiss GPA's claims. We sustain the Hospital Defendants' sole issue.

IV. CONCLUSION

In appellate cause number 13–14–607–CV, we affirm that part of the trial court's order denying Hicks's Motion to dismiss GPA's claims of business disparagement and tortious interference with prospective relations against her, and remand those claims to the trial court. We reverse that part of the trial court's order denying Hicks's Motion to dismiss GPA's claims of conspiracy and joint enterprise and coercion of a public servant against her, and render judgment dismissing those claims.

In appellate cause number 13–14–608–CV, we reverse the trial court's order denying the Hospital Defendants' Motion to dismiss GPA's claims against the Hospital Defendants and render judgment dismissing GPA's claims against the Hospital Defendants. We remand both causes for further proceedings consistent with this opinion, including consideration by the trial court of an award of costs and fees relating to the motions to dismiss under section 27.009 of the TCPA. *See id.* § 27.009 (West, Westlaw through Ch. 46, 2015 R.S.).

All Citations

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438 S.W.3d 829
Court of Appeals of Texas,
San Antonio.

ESTATE OF Paul Edward CHECK, Deceased.

No. 04–13–00388–CV. | July 9, 2014.

Synopsis

Background: Decedent's brother filed a will contest objecting to the probate of the will. Executor counterclaimed alleging defamation. Brother nonsuited his action and filed a motion to dismiss counterclaim pursuant to anti-SLAPP statute. The Probate Court, Bexar County, [Polly Jackson Spencer, J.](#), refused to grant motion. Brother appealed.

Holdings: The Court of Appeals, [Marialyn Barnard, J.](#), held that:

[1] evidence was sufficient to establish service of original counterclaim, and

[2] motion was untimely.

Affirmed.

West Headnotes (7)

[1] **Process** 🔑 Presumptions and burden of proof

In the absence of a certificate of service or some other evidence, a court cannot presume notice was received.

[Cases that cite this headnote](#)

[2] **Wills** 🔑 Citation or other process in probate court

In probate contestant's action objecting to probate of will, although there was no certificate of service on executor's original defamation counterclaim filed with the clerk's office, no officer's return, and no affidavit, there was sufficient evidence, beyond statements of contestant's attorney that he hadn't received service of original counterclaim, presented to probate court to establish service of original counterclaim; executor produced documents establishing service including a facsimile transmission cover sheet of counterclaim which included a certificate of service stating service by facsimile, and a facsimile confirmation report showing seventeen pages were successfully faxed to contestor's attorney that day. [Vernon's Ann.Texas Rules Civ.Proc., Rule 21.](#)

[1 Cases that cite this headnote](#)

[3] **Process** 🔑 Presumptions and burden of proof

Process 🔑 Evidence to impeach or contradict return, certificate, or affidavit of service

Opposing evidence sufficient to overcome the presumption of service includes an affidavit from counsel averring that he never received the document in question.

[Cases that cite this headnote](#)

[4] Evidence 🔑 [Nature and scope in general](#)

A statutory presumption is nothing more than a rule for the guidance of the trial court in locating the burden of production at a particular time.

[Cases that cite this headnote](#)

[5] Evidence 🔑 [Rebuttal of presumptions of fact](#)

Once evidence contradicting a statutory presumption is produced, the presumption merely disappears and cannot be treated as evidence.

[Cases that cite this headnote](#)

[6] Evidence 🔑 [Rebuttal of presumptions of fact](#)

After a statutory presumption is neutralized, by evidence contradicting the presumption, the facts giving rise to the presumption do not vanish, rather, they remain part of the evidence to be considered by the trier of fact.

[Cases that cite this headnote](#)

[7] Pleading 🔑 [Application and proceedings thereon](#)

Despite probate contestant's contention that his attorney was not served with notice of original defamation counterclaim, sixty-day limitation period governing motion to dismiss under anti-SLAPP statute began to run from date of service of original counterclaim, not from date amended counterclaim was filed, where there was neither a basis nor a compelling reason to reset the original sixty-day deadline. [V.T.C.A. Civil Practice & Remedies Code § 27.003\(b\)](#).

[4 Cases that cite this headnote](#)

Attorneys and Law Firms

***830** [Mark A. Lindow](#), Lindow & Treat, L.L.P., San Antonio, TX, for Appellant.

[Elizabeth Conry Davidson](#), Attorney at Law, [K.T. Whitehead](#), Attorney at Law, [Theodore C. Schultz](#), San Antonio, TX, for Appellee.

Sitting: [MARIALYN BARNARD](#), Justice, [REBECA C. MARTINEZ](#), Justice, [PATRICIA O. ALVAREZ](#), Justice.

OPINION

Opinion by: [MARIALYN BARNARD](#), Justice.

Appellee Rachelle Marie Powers was appointed Independent Executor of the Estate of Paul Edward Check (“Paul”) pursuant to the decedent's will. Appellant Patrick A. Check, the decedent's twin brother, filed a will contest objecting to the probate of the will. In response to the will contest, and certain actions allegedly taken by Check, Powers filed, among other things, a

counterclaim alleging defamation. Check filed a motion to dismiss the counterclaim pursuant to the Texas Citizens' Participation Act “(the Act”), also known as the Anti–SLAPP statute.¹ The motion to dismiss was overruled by operation of law because the probate court did not rule on it within the time prescribed by the Act.² On appeal, Check contends the trial court erred by failing to grant his *831 motion to dismiss. We affirm the probate court's judgment.

¹ “SLAPP” is an acronym for “Strategic Lawsuits Against Public Participation.” *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 719 (Tex.App.-Houston [14th Dist.] 2013, pet. denied).

² The probate court recognized the motion was denied by operation of law, rendering an order on July 18, 2013, in which the court stated the motion to dismiss was denied by operation of law.

BACKGROUND

A detailed rendition of the facts is unnecessary to our disposition of the appeal. Accordingly, we provide only those background and procedural facts necessary for context and our disposition.

After an argument with his brother concerning Powers's alleged influence over Paul and his finances, Paul changed his will. Under the terms of the will, Powers was named executor and sole beneficiary; Check and his wife were disinherited. After Paul died, Powers filed the will for probate and it was admitted. The will specifically stated, “I have deliberately made no provisions for the benefit of my brother Patrick Allen Check and his wife Carla A. Check.” Check filed a will contest, asserting Powers unduly influenced Paul while he lacked mental capacity. He claimed Powers “exerted dominion and control over Paul ... in order to secure access to Paul's funds during his lifetime and upon his death,” and “took actions to prevent [Check] from having access to Paul.” Check claimed Powers had and would “continue to take actions to embezzle and pilfer [the] estate” He alleged Powers committed fraud, conversion, and breach of fiduciary duty.

In response, Powers filed an answer and counterclaims. In her counterclaims, Powers alleged defamation and bad faith. Powers referenced complaints made by Check to her employer, the SAPD, and his report to Adult Protective Services. She also alleged Check contacted coworkers and others, making defamatory statements about her with regard to her relationship with Paul. Powers asserted Check persisted even after the SAPD determined his claims were “unfounded.”

Several months after filing the will contest, Check nonsuited the action. Thereafter, in March, he filed a motion to dismiss Powers's counterclaims pursuant to the Act. Powers filed a response and a motion for sanctions. The probate court held a hearing on Check's motion to dismiss and Powers's motion for sanctions. However, the probate court did not rule on the motion to dismiss within thirty days of the date of the hearing. Accordingly, the motion to dismiss was overruled by operation of law. *See TEX. CIV. PRAC. & REM.CODE ANN. §§ 27.005(a), 27.008(a)* (West Supp.2013).³ The probate court denied the motion for sanctions. Check thereafter perfected this appeal.

³ After the statutory deadline passed, the probate court rendered an order denying Check's motion to dismiss.

ANALYSIS

In a single issue, Check contends the probate court erred in failing to grant his motion to dismiss. He argues the probate court should have granted his motion to dismiss Powers's counterclaims because: (1) the claims were based on, related to, and in response to Check's exercise of free speech and right to petition; (2) there is no evidence to support any elements of the counterclaims asserted by Powers; and (3) the motion to dismiss was timely. Because we find the motion to dismiss was untimely, we hold the probate court did not err in failing to grant Check's motion to dismiss.

This appeal focuses on a recently enacted statute called the Texas Citizens Participation Act, which is codified in Chapter 27 of the Texas Civil Practice and Remedies Code. *See id.* §§ 27.001–.011. The issue regarding the timeliness of Check's motion *832 to dismiss implicates section 27.003(b) of the Act, which states that “[a] motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action.” *Id.* §§ 27.003(b). Section 27.001(6) defines “legal action” as “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.” *Id.* § 27.001(6). Powers contends Check's motion was not filed within the deadline set forth in section 27.003(b), thereby waiving his right to a dismissal. Check, however, contends his motion to dismiss was timely. Therefore, according to Check, the timeliness of his motion to dismiss did not provide a basis upon which the probate court could refuse to grant his motion.

Resolving the issue of the timeliness of Check's motion to dismiss requires us to construe the relevant provisions of the Act —sections 27.001(6) and 27.003(b). Issues of statutory construction are reviewed de novo. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex.2011); *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex.2010). When construing a statute, our primary objective is to ascertain and give effect to the Legislature's intent. *Molinet*, 356 S.W.3d at 411; TEX. GOV'T CODE ANN. § 312.005 (West 2013). “The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.” *Molinet*, 356 S.W.3d at 411; *see Texas Lottery Comm'n*, 325 S.W.3d at 635.

The purpose of the Act is “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” TEX. CIV. PRAC. & REM.CODE ANN. § 27.002. The Act provides a means for a defendant, *early in the litigation*, to seek dismissal of certain claims, including defamation claims. *Id.* § 27.003(b).

Check contends his motion was timely because it was filed March 20, 2013, within sixty days of Powers's January 22, 2013 amended petition, the first petition “served” upon Check. Powers counters that her original petition was served on Check by facsimile through his original counsel on September 28, 2012, rendering Check's motion to dismiss untimely. *Id.* Check asserts there was no evidence of service of the original counterclaim because there was no certificate of service attached to the original counterclaim that appears in the clerk's record.

The plain language of section 27.003 establishes that a motion to dismiss under the Act must be filed sixty days from the date of service of the legal action. The question here concerns whether Powers established service of the original petition so as to render Check's motion untimely. We hold that she has.

[1] Admittedly, Powers's original counterclaim that was filed in the clerk's office did not contain a certificate of service. In the absence of a certificate of service or some other evidence, a court cannot presume notice was received. *See Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex.2005). Check, relying on *Mathis*, presumes that because the document contained within the clerk's record does not include the certificate of service, this ends the inquiry. We disagree and do not believe *Mathis* mandates such a holding.

In *Mathis*, the issue was whether the defendant established her nonappearance at trial was neither intentional nor the *833 result of conscious indifference so as to allow her to set aside a default judgment. *Id.* at 744. The defendant filed a sworn motion for new trial in which she asserted she did not receive notice of the trial setting. *Id.* At the hearing, counsel for the plaintiff testified he sent the notice; the defendant testified she did not receive it. *Id.* at 745. There was no other evidence submitted at the hearing. *See id.*

Upon review, the supreme court held the defendant established her nonappearance was neither intentional nor the result of conscious indifference because there was no evidence of service of the notice of trial setting other than counsel's “oral assurance.” *Id.* at 745–46. In reaching its decision, the court noted that unlike service of citation, Rule 21 a of the Texas Rules of

[Civil Procedure](#) allows service by anyone competent to testify, and when a party or the attorney of record includes a certificate of service on the filed instrument, this constitutes prima facie evidence of service. *Id.* at 745. In addition to a certificate of service, an officer's return or an affidavit may also be prima facie evidence of service, resulting in a presumption of service. *Id.* In *Mathis*, however, there was no certificate of service, no return, and no affidavit certifying service. *Id.* Indeed, there was nothing more than “the oral assurance of counsel.” *Id.* Accordingly, there was no presumption of service and therefore no evidence the defendant received the notice, i.e., was served. *Id.* The court held that testimony by the plaintiff's counsel that notice was sent did not established notice was received. *Id.* Even if the trial court did not believe the defendant's claim that she never received service, the oral assurance of the defendant's counsel would not provide “affirmative evidence that service occurred.” *Id.* Finally, the court held that because “[n]o other alternatives established service,” the trial court erred in denying the defendant's motion for new trial. *Id.* at 745–46.

[2] Although in this case there was no certificate of service on the counterclaim filed with the clerk's office, no officer's return, and no affidavit, there was evidence presented to the probate court to establish service of the original counterclaim on September 28, 2012. After the hearing on Check's motion to dismiss, Check filed a “Post-Hearing Brief” in support of his motion to dismiss. In that document, Check argued, as he does here, that the motion to dismiss was timely because it was filed within sixty days of the first amended counterclaim, the first counterclaim he contends he was served with. Powers filed a response to this document, contesting Check's claim of lack of service. In support of her response, Powers attached documents to establish service of the original counterclaim: (1) a facsimile transmission cover sheet dated September 28, 2012, over a copy of a document entitled “Executor's Answer, Counter Claims and Special Exceptions to Contest of Will,” which included a certificate of service stating service by facsimile on September 28, 2012; and (2) a facsimile confirmation report dated September 28, 2012, showing seventeen pages were successfully faxed to Check's attorney. These documents are evidence of service of the counterclaim upon Check through his counsel of record. It would appear that the document filed with the clerk's office failed to include the certificate of service, which according to Check deprived Powers of the [Rule 21](#) a presumption. *See id.* at 745. However, *Mathis* did not hold that a certificate of service, return of service, or affidavit were the only means by which a presumption of service would arise. *See id.* To the contrary, the court in *Mathis* specifically stated that not only was there a lack of a certificate, return, or affidavit, there was a *834 complete absence of any evidence, other than counsel's bare assertion—“[n]o other alternatives established service”—and it was this complete absence of evidence that precluded a presumption of service. *See id.*

Here, there is evidence beyond Powers's counsel's “oral assertion” at the hearing on the motion to dismiss. The probate court was presented with evidence attached to a post-hearing pleading that established service on Check's former counsel by facsimile of the original counterclaim on September 28, 2014. Powers provided a copy of the entire original counterclaim, including the certificate of service missing from the copy in the record, the facsimile coversheet, and confirmation and transmission reports showing the original counterclaim was sent to Check's counsel on September 28, 2012. We hold this was adequate to establish a presumption that the original counterclaim was indeed served upon Check through his attorney. Accordingly, we hold the burden shifted to Check to prove he was not served.

Check seems to suggest that in the absence of a certificate of service, there can be no prima facie proof of service, and therefore no presumption. However, neither *Mathis*—as explained above—nor the other case relied upon by Check—*In re E.A.*, 287 S.W.3d 1 (Tex.2009)—stands for such a proposition. As we explained above with regard to *Mathis*, the supreme court made it clear that if there was no evidence beyond counsel's oral assertion, no presumption of service arose. *See id.* However, *Mathis* does not hold that a certificate of service alone may be used to create the presumption. *See id.* Likewise, in the other case relied upon by Check, the supreme court did not hold that only a certificate of service creates a presumption of service. *See E.A.*, 287 S.W.3d at 5.

In *E.A.*, the supreme court held that presumption of service of an amended petition was “negated by the amended petition's return as unclaimed.” *Id.* The court held that a certificate of service creates a presumption of service. *Id.* However, just as in *Mathis*, the court did not hold a certificate of service is the only evidence that might give rise to such a presumption. *See id.* There was simply no discussion of other evidence that might have given rise to a presumption of service. *See id.*

As stated above, once Powers was imbued with the presumption of service, Check was required to rebut the presumption with an offer of proof negating service. Check submitted an affidavit from his former counsel—the person to whom the facsimile, which included the original counterclaim, was transmitted. In the affidavit, counsel avers Powers “never served, delivered to or provided me a copy of” the original counterclaim filed with the clerk on September 28, 2012. He stated he was unaware such a document was filed until he was so informed by Check's current counsel on May 9, 2013. We hold this verified evidence is sufficient to overcome the presumption of service created by the evidence produced by Powers.

[3] In *Wembley Inv. Co. v. Herrera*, the supreme court stated that although a presumption of service had arisen, the presumption is “not ‘evidence’ and it vanishes when opposing evidence is introduced that the [document] was not received.” 11 S.W.3d 924, 927 (Tex.1999) (quoting *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex.1987)). Opposing evidence sufficient to overcome the presumption includes an affidavit from counsel averring that he never received the document in question. *Herrera*, 11 S.W.3d at 927.

This, however, does not end the inquiry. Check seems to assume that once he overcame the presumption by virtue of his *835 former counsel's affidavit, an absence of service was conclusively established. We disagree.

[4] [5] [6] A presumption is nothing more than a rule for the guidance of the trial court in locating the burden of production at a particular time. *Texas A & M Univ. v. Chambers*, 31 S.W.3d 780, 783–84 (Tex.App.-Austin 2000, pet. denied). A presumption shifts the burden of production to the party against whom it operates. *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex.1993). Once evidence contradicting the presumption is produced, the presumption merely disappears and cannot be treated as evidence. *Id.* However, after the presumption is neutralized, the facts giving rise to the presumption do not vanish. See *Estate of Glover*, 744 S.W.2d 197, 200 (Tex.App.-Amarillo 1987), writ denied, 744 S.W.2d 939 (Tex.1988). Rather, they remain part of the evidence to be considered by the trier of fact. *Id.*

For example, in whistleblower cases, a statutory presumption of retaliation relieves the plaintiff of the initial burden to prove that she was terminated for reporting allegedly illegal activities. *Chambers*, 31 S.W.3d 780, 784. However, the defendant can overcome the presumption by disclosing facts sufficient to support a finding of non-retaliation. *Id.* If the defendant is successful, the case proceeds as if no presumption ever existed. *Id.* The defendant's ability to overcome the presumption does not conclusively establish non-retaliation, but merely requires the plaintiff to establish she was terminated in retaliation for being a whistleblower. *Id.*

Similarly, in *Balawajder v. Tex. Dep't of Criminal Justice, Institutional Div.*, the court, quoting the supreme court, held that a presumption is nothing more than a rule of law requiring a fact finder to reach a certain conclusion in the absence of evidence to the contrary. 217 S.W.3d 20, 27 (Tex.App.-Houston [1st Dist.] 2006, pet. denied) (quoting *Temple Indep. Sch. Dist. v. English*, 896 S.W.2d 167, 169 (Tex.1995)). When evidence to the contrary is introduced, the presumption vanishes. *Id.* The court did not hold that overcoming the presumption conclusively establishes the matter. See *id.* In the summary judgment context, once a presumption is rebutted by some evidence, the presumption is neutralized and the standard summary judgment burden governs. See *id.* at 28.

[7] Here, once Check overcame the presumption of service, the presumption vanished. However, the absence of the presumption did not conclusively establish a lack of service of the original counterclaim, nor did Powers's evidence in support of service vanish. Rather, it remained part of the evidence to be considered by the probate court with regard to whether the motion to dismiss was timely filed. See *Glover*, 744 S.W.2d at 200.

Powers provided the probate court with a copy of the entire original counterclaim, including the certificate of service missing from the copy in the record, the facsimile coversheet and confirmation and transmission reports showing the original counterclaim was sent to Check's counsel on September 28, 2012, to support Powers's assertion that Check was served with the original counterclaim. Check merely provided an affidavit from his former counsel denying receipt of the original counterclaim.

Given the evidence, we cannot say the probate court erred in failing to grant Check's motion to dismiss—it would not have been unreasonable for the probate court to have determined, based on this evidence, that the original counterclaim was, in fact, served upon Check on September 28, 2012. If so served, Check was statutorily required to file his motion to dismiss on or before November 27, 2012—sixty days from the date of service of the *836 original counterclaim. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.003\(b\)](#).

Check contends, in a footnote, that even if this court determines his deadline for filing the motion to dismiss was triggered by service of the original counterclaim on September 28, 2012, the probate court had discretion, for good cause shown, to extend the deadline for filing the motion to dismiss. See *id.* Admittedly, the statute provides for an extension. *Id.* It appears, however, that although Check presented this possibility to the probate court, the probate court never ruled on the request. The Act provides that a motion to dismiss is overruled by operation of law if not ruled upon within thirty days after the date of the hearing on the motion. *Id.* §§ 27.005(a), 27.008(a). There is, however, no like provision with regard to a motion to extend time to file a motion to dismiss. Accordingly, we hold that without a ruling on the request to extend time to file the motion, nothing is preserved for our review. See [TEX.R.APP. P. 33.1\(a\)](#).

Check argues in the alternative that if he was served with the original counterclaim on September 28, 2012, his motion to dismiss is still timely because Powers filed an amended counterclaim in January 2013, and he filed his motion within sixty days of the date of the amended petition, which he contends is a “legal action” under the Act. In support of his position, Check relies upon section 27.002(6) of the Act, defining “legal action.” See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.001\(6\)](#).

[Section 27.001\(6\)](#) defines a “legal action” as “a lawsuit, cause of action, petition, complaint, cross-claim, counterclaim or any other judicial pleading or filing that request legal or equitable relief.” Check contends that because the amended counterclaim filed in January was a “judicial pleading or filing requesting legal or equitable relief,” his sixty-day deadline for filing the motion to dismiss ran from the date of service of that document. We disagree. Although the plain language of [section 27.003\(b\)](#), coupled with the definition of “legal action,” might seem to support Check's expansive interpretation of [section 27.001\(6\)](#), we hold such an interpretation would lead to absurd results not intended by the Legislature. See [Molinet](#), 356 S.W.3d at 411; [Texas Lottery Comm'n](#), 325 S.W.3d at 635.

Taking Check's interpretation to its logical conclusion, once a “legal action” is filed, a party's deadline for filing a motion to dismiss would invariably be extended by the filing of *any* substantive pleading relating to the Act, not just amended petitions or counterclaims. There are numerous substantive “pleadings” filed during the course of litigation, e.g., motions for sanctions, motions for summary judgment. To imply the filing of these pleadings, which do in fact seek legal or equitable relief, would reset the deadline for a motion to dismiss under [section 27.003\(b\)](#) is irrational and at odds with one of the purposes of the Act, which is to allow a defendant *early in the lawsuit* to dismiss claims that seek to inhibit a defendant's constitutional rights to petition, speak freely, associate freely, and participate in government as permitted by law. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.002](#); see also [Pickens v. Cordia](#), 433 S.W.3d 179, 182–83 (Tex.App.-Dallas 2014, no pet. h.) (noting Act provides means for expedited dismissal of unmeritorious suit); [Summersett v. Jaiyeola](#), No. 13–12–00442–CV, 438 S.W.3d 84, 85, 2013 WL 3757208, at *1 (Tex.App.-Corpus Christi July 18, 2013, pet. denied) (noting Act provides for *early* dismissal of legal actions).

Check's interpretation would likewise allow the sixty-day deadline for filing a motion to dismiss to reset each time a party amended a petition or counterclaim, even if the amended document did not add new claims or parties. This would likewise defeat *837 the Act's purpose of dismissing unmeritorious suits based on or related to the exercise of free speech early in the litigation or in an expeditious manner. See *id.* For example, under Check's interpretation an amended petition or counterclaim filed seven days before trial, as permitted by [Rule 63 of the Texas Rules of Civil Procedure](#)—even if it did not add new claims or parties—would renew the sixty-day deadline in [section 27.003\(b\)](#). See [TEX.R. CIV. P. 63](#) (stating party is permitted to file amended pleadings without leave of court up to seven days before trial unless the trial court has set out a scheduling order); [First State Bank of Mesquite v. Bellinger & Dewolf, LLP](#), 342 S.W.3d 142, 145–46 (Tex.App.-Dallas 2011, no pet.) (same). This would negate the early dismissal envisioned by the Act.

In support of his contention that Powers's amended counterclaim reset the sixty-day deadline, Check relies on *Better Bus. Bureau of Metro. Dallas, Inc. v. Ward*, 401 S.W.3d 440 (Tex.App.-Dallas 2013, pet. denied). However, rather than supporting Check's position, Ward actually undermines it.

In *Ward*, a law firm filed suit in 2011 against the local Better Business Bureau (“BBB”) alleging defamation and negligence. *Id.* at 442. In 2012, an amended petition was filed. *Id.* In the amended petition, an attorney in the firm was added as a plaintiff. *Id.* The BBB filed a motion to dismiss the individual attorney's claims pursuant to section 27.003(a) within sixty days of the date of the amended petition, which added the attorney as an individual defendant. *Id.* at 442–43. The individual attorney claimed the motion to dismiss was untimely because it was not filed within sixty days of the date of service of the original petition filed by the firm. *Id.* at 443.

On appeal, the Dallas court disagreed, holding the Act, specifically the definition of “legal action,” evinced an intent to treat any claim by any party on an individual and separate basis. *Id.* Thus, when the attorney served the BBB with an amended petition asserting *new, individual claims*, the deadline for filing a motion to dismiss as to those claims ran from the date the amended petition was served. *Id.* In other words, because the plaintiff had added new claims, a new deadline was mandated. *See id.*

Extrapolating from *Ward*, in the absence of new parties or claims, the deadline for filing a motion to dismiss would run from the date of service of the original “legal action.” *See id.* Here, when Powers amended her counterclaim, she did not add new parties or claims. Thus, there was neither a basis nor a compelling reason to reset the original sixty-day deadline. This interpretation comports with the Act's intent that suits under the Act be dismissed, if at all, early in the litigation. Our interpretation does not lead to absurd results, does not unduly restrict the rights of either the plaintiff or the defendant, and preserves the sixty-day deadline mandated by the Legislature.

Accordingly, we hold Check's motion to dismiss was untimely. In light of the untimeliness of the motion, we hold the probate court did not err in refusing to grant it. In light of our decision that the motion was untimely—providing a basis for the trial court's refusal to grant the motion—we need not address Check's remaining arguments with regard to the motion to dismiss.

CONCLUSION

Based on the foregoing, we overrule Check's issue and affirm the probate court's judgment.

All Citations

438 S.W.3d 829

 KeyCite Yellow Flag - Negative Treatment

Distinguished by [City of Houston v. Blackbird](#), Tex., July 14, 1965

163 Tex. 11
Supreme Court of Texas.

KEY WESTERN LIFE INSURANCE COMPANY, Appellant,

v.

STATE BOARD OF INSURANCE et al., Appellees.

No. A-8018. | Oct. 3, 1961. | Rehearing Denied Nov. 29, 1961.

Proceeding respecting approval of insurance policy form. The District Court of Travis County entered a judgment affirming action of Commissioner of Insurance and state board of insurance withdrawing approval of policy form and there was a direct appeal. The Supreme Court, Smith, J., held that insurer was entitled in review of Commissioner's decision to a trial de novo under the preponderance of evidence rule, and neither the Commissioner nor reviewing court was confined to policy itself in determining whether its provisions encouraged misrepresentation.

Reversed and remanded with directions.

Griffin, J., dissented.

West Headnotes (15)

[1] **Insurance**  [Judicial remedies and review](#)

Appeal from action of State Board of Insurance Commissioners withdrawing approval of insurer's policy form was to be determined by preponderance of evidence rule in trial de novo of issues heard and decided by Board, rather than substantial evidence rule. [Vernon's Ann.St.Const. art. 5, § 3-b](#); [Vernon's Ann.Civ.St. art. 1738a](#); [V.A.T.S. Insurance Code, arts. 1.04\(f\), 3.42\(g\), 21.44](#).

[7 Cases that cite this headnote](#)

[2] **Statutes**  [Acts Relating to One or More Subjects; Single-Subject Rule](#)

Constitutional provision that no bill may contain more than one subject which is expressed in its title helps assure that legislators will not approve legislation containing unnoticed and unwanted provisions even though in press of legislative affairs it is not always possible to examine all parts of each proposed bill. [Vernon's Ann.St.Const. art. 3, § 35](#).

[3 Cases that cite this headnote](#)

[3] **Insurance**  [Filing and approval](#)

Statutes  [Trade or business](#)

Statute authorizing Board of Insurance Commissioners to withdraw approval of policy form at any time does not violate constitutional requirement that no bill shall contain more than one subject which is expressed in its title. [V.A.T.S. Insurance Code, art. 342 and subd. \(c\)](#); [Vernon's Ann.St.Const. art. 3, § 35](#); [Acts 1957, c. 501](#).

[1 Cases that cite this headnote](#)

[4] **Insurance** 🔑 [Filing and approval](#)

Commissioners properly determined that option in policy authorizing insured to have insurer transmit guaranteed annual interim endowment benefits to security dealer for investment in mutual fund as neither rider nor endorsement but part of policy form subject to approval before delivery. [V.A.T.S. Insurance Code, art. 3.42\(b\)](#); Acts 1957, c. 501.

[Cases that cite this headnote](#)

[5] **Constitutional Law** 🔑 [Insurance](#)

Insurance 🔑 [Powers and duties](#)

Statute authorizing Board of Insurance Commissioners to disapprove any insurance policy form that contains provisions which encourage misrepresentation is not unconstitutional on ground that it is so vague that it results in unconstitutional delegation of legislative authority. [V.A.T.S. Insurance Code, art. 3.42](#).

[6 Cases that cite this headnote](#)

[6] **Insurance** 🔑 [Judicial remedies and review](#)

Judicial review of action by Board of Insurance Commissioners in withdrawing approval of insurance policy form may be constitutionally had under preponderance of evidence standard, and court could not substitute non-statutory standard for that prescribed by statute. [V.A.T.S. Insurance Code, arts. 1.04\(f\), 3.42\(g\), 21.44](#).

[3 Cases that cite this headnote](#)

[7] **Administrative Law and Procedure** 🔑 [Trial De Novo](#)

Administrative Law and Procedure 🔑 [Evidence](#)

Review of administrative decision by trial de novo has all attributes of original action and reviewing court and trial court must weigh evidence by preponderance of evidence standard, and trial de novo is not appeal but new and independent action.

[12 Cases that cite this headnote](#)

[8] **Administrative Law and Procedure** 🔑 [Trial De Novo](#)

Power or authority that cannot be lawfully delegated directly to judiciary by Legislature because of constitutional provision cannot be conferred upon courts by means of de novo trial after administrative hearing.

[10 Cases that cite this headnote](#)

[9] **Insurance** 🔑 [Powers and duties](#)

State Board of Insurance Commissioners may exercise only such authority as is conferred upon it by law in clear and unmistakable terms.

[14 Cases that cite this headnote](#)

[10] **Constitutional Law** 🔑 [Avoidance of constitutional questions](#)

If possible, court must construe statute to avoid repugnancy to Constitution.

[7 Cases that cite this headnote](#)

[11] Insurance 🔑 [Judicial remedies and review](#)

Determination by Board of Insurance Commissioners that proposed policy contains provisions that encourage misrepresentation or are unjust is quasi judicial and reviewable on appeal by trial de novo under preponderance of evidence rule. [V.A.T.S. Insurance Code, art. 3.42\(f\)](#).

[8 Cases that cite this headnote](#)

[12] Insurance 🔑 [Matters extrinsic to policies in general](#)

Court, in reviewing determination of Board of Insurance Commissioners that proposed insurance policy contains provisions that encourage misrepresentation or are unjust, is not limited to consideration of words and phrases of policy alone but may consider outside relevant factors. [V.A.T.S. Insurance Code, art. 3.42\(f\)](#).

[Cases that cite this headnote](#)

[13] Insurance 🔑 [Evidence](#)

Insurance 🔑 [Civil penalties](#)

Premium rate charged for policy was of evidentiary value to determine whether policy encouraged misrepresentation within statute authorizing Board of Insurance Commissioners to withdraw approval of policies which contained provisions encouraging misrepresentation. [V.A.T.S. Insurance Code, art. 3.42](#).

[1 Cases that cite this headnote](#)

[14] Insurance 🔑 [Matters extrinsic to policies in general](#)

Both Board of Insurance Commissioners and court on review of its decision are not confined to language of policy alone in determining whether policy has provisions which encourage misrepresentation. [V.A.T.S. Insurance Code, art. 3.42\(f\)](#).

[Cases that cite this headnote](#)

[15] Insurance 🔑 [Evidence](#)

Testimony concerning means by which insurance policy was sold or advertised was admissible in proceeding regarding withdrawal of approval of policy form on ground that it encouraged misrepresentation. [V.A.T.S. Insurance Code, art. 3.42\(f\)\(2, 3\)](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

*12 **840 Joe S. Moore, Graves, Dougherty & Gee, Austin, for appellant.

Will Wilson, Atty. Gen., Fred B. Werkenthin, Ray V. Loftin, Jr., Asst. Attys. Gen., for appellees.

Opinion

SMITH, Justice.

This is a direct appeal from a decision of the District Court of Travis County affirming an action of the Commissioner of Insurance and the State Board of Insurance. The appeal is authorized by [Section 3-b of Article 5 of the Texas Constitution](#), Vernon's Ann.St.; [Article 1738a](#), Vernon's Civil Statutes, and Rule 499-a, Texas Rules of Civil Procedure.

Appellant is a life insurance company with home offices in Abilene. Appellant's Policy Form Pic No. 1 was approved by the Commissioner of Insurance on August 27, 1957, in accordance with the provisions of [Article 3.42 of the Insurance Code](#), V.A.T.S., ****841** and appellant immediately began offering the policy to the public.

In March 1958, the Commissioner of Insurance initiated a series of hearings and inquiries regarding Policy Form Pic No. 1 which lasted until March 19, 1959, when the Commissioner withdrew approval of the policy form in Office Order 3675. The Commissioner gave several reasons for his action, including: that the premium charged was exceedingly high for the benefits provided in the contract and can be justified only by promising high returns from the investments provided for in Option 2, *infra*; in view of certain policy provisions and the evidence and testimony presented at the public hearing, the Commissioner was of the opinion that the policy form contained provisions which 'encouraged misrepresentation', and were 'unjust, unfair, inequitable, misleading, deceptive, or contrary to law and the public policy of this state'. Furthermore, the Commissioner found that the policy form violates Rule 20 of the Board's Official Order No. 957, dated May 26, 1958; the policy form is not a participating insurance policy authorized by the laws of this state; a 'Guaranteed Interim Endowment Option' obligated Key Western to engage in the investment, trust, banking, or other similar business on behalf of the policyholders, and the company was acting outside its charter powers; 'the Guaranteed Interim Endowment' provided by the policy was in reality the return of a portion of the premium paid. In view of all this, the Commissioner found that appellant's policy Form Pic No. 1, 'By its very terms and provisions, and within the written contract itself, encourages misrepresentation, is unjust, unfair, inequitable, deceptive and contrary to the public policy of this state, and is contrary to Rule 20 of Official Board Order No. 957 of the State Board of Insurance, and [Article 21.21, Texas Insurance Code](#), and obligates Key Western Life Insurance Company to engage in a business and function beyond its charter powers.' The Commissioner then ***14** found that 'these findings and conclusions, taken separately or together, subject the entire policy to disapproval under the provisions of Section (f)¹ of [Article 3.42, Texas Insurance Code](#). The Commissioner specifically finds that each of the separate conclusions is sufficient for disapproval of the policy under [Article 3.42](#).'

¹ The pertinent part of [Article 3.42](#) is Section (f) as follows:

'(f) The Board of Insurance Commissioners shall forthwith disapprove any such form, or withdraw any previous approval thereto if, and only if,

'(1) It is in any respect in violation of or does not comply with this Code.

'(2) It contains provisions which encourage misrepresentation or are unjust, unfair, inequitable, misleading, deceptive or contrary to law or to the public policy of this state.

'(3) It has any title, heading or other indication of its provisions which is misleading.'

This order was affirmed by the State Board of Insurance Order No. 1557, dated March 28, 1959. On March 31, 1959, appellant timely filed this suit in the 98th District Court of Travis County to have reviewed and set aside the action of the Commissioner of Insurance and the State Board of Insurance. The administrative order was attacked on grounds which included both a challenge of the constitutionality of the statute under which the action was taken ([Article 3.42 of the Insurance Code](#)) and assertions that the order withdrawing approval of the policy form was invalid for other than constitutional reasons. A permanent injunction was sought. After a trial before the court without a jury, judgment was entered denying all relief sought by plaintiff, the court reciting in its judgment 'that the orders complained of are in all things supported by substantial evidence'. This direct appeal followed.

Policy Form Pic No. 1 embodies a plan offered by Key Western in which insurance benefits and investment opportunities are offered in one policy. Some agents of ****842** Key Western were equipped with an audiovisual kit which presented the policy provisions in graphic form with discussions of the value of the policy as an investment set out in optimistic terms, to say the

least. An alternative oral presentation was substantially the same. All policyholders, regardless of age, have the same program which features the same cost and offers the same benefits to all policyholders, except that benefits above age 35 are reduced. All policyholders pay \$365 per year-(‘a dollar a day’).

Policy Form Pic No. 1 contains five ‘benefits’ provided by the policy; three are designated as ‘Death Benefits’, and two as ‘Endowment Benefits’. The death benefits at age 35 are payments to the beneficiary in the following amounts: (A) \$7,500 payable on death of the insured; (B) \$2,000 at the end *15 of 15 years from the date of insurance, and (C) \$100 on each contract anniversary date following the death of the insured. The returns characterized as ‘endowment benefits’ are payable to the insured, if living, and are characterized by the contract as: (A) a ‘guaranteed annual interim endowment’ whereby the company promises to pay \$50 when the first year’s premiums have been paid and \$100 each year thereafter when the succeeding years’ premiums have been paid; and (B) payment a ‘maturity endowment’ whereby Key Western promises to pay a single payment of \$2,000 on the maturity date of the contract. Under this ‘guaranteed annual interim endowment’ the policy provides that ‘the person controlling this contract may elect in writing on forms satisfactory to the Company to have the proceeds thereof applied according to one of the following options:

‘1. Toward payment of the Annual Premium due if the balance of such premiums is paid.

‘2. May authorize the Company to transmit the proceeds thereof with reasonable promptness to a registered or authorized security dealer, or to the agent of the underwriter of a mutual fund designated by the person controlling this Contract, to purchase shares or fractional shares or both at the current offering price for the account of the Insured in any mutual fund which the person controlling this Contract may designate and which is registered in the state of the Insured’s residence.’

According to the evidence, no policyholder has ever exercised Option 1. Option 2 is at the heart of this case. The actuary who designed the policy testified that Option 2 is what makes the Guaranteed Annual Interim Endowment ‘attractive’; that he doubted whether the company could sell the policy to any extent without Option 2; and that the policy was ‘designed to be sold on the merits of (Option 2)’. Since comparable insurance benefits can be obtained for approximately \$200, policyholders electing Option 2 in effect pay the company a fee of \$115 the first year and \$65 per year thereafter to simply mail the policyholder’s ‘guaranteed annual interim endowment’ (\$50 the first year, \$100 in subsequent years), to the investment company.

[1] Among other points presented, the appellant contends that appeals to the District Court from orders of the State Board of Insurance and the Commissioner of Insurance are to be determined by the preponderance of the evidence rule in a trial de novo of the issues heard and decided by the Board rather than being *16 determined by the substantial evidence rule as was done in this case. We have concluded to sustain this point under the facts of this case. Such action requires that the judgment of the trial court be reversed and the cause remanded to that court for a new trial. Before disposing of this point, however, we shall pass upon the points which challenge the authority of the State Board of Insurance and the Commissioner to withdraw approval of the policy form issued by the appellant. **843 Appellant’s first point of error is that the provision of Article 3.42(c)² of the Insurance Code which authorizes the Board of Insurance Commissioners to withdraw approval of a policy form ‘at any time’ is unconstitutional. Appellant insists that since the power to withdraw approval is not mentioned in the title of the 1957 amendment to [Article 3.42](#), then [Article III, Section 35, of the Texas Constitution](#) has been violated.³

² ‘(c) Every such filing hereby required shall be made not less than thirty days in advance of any such issuance, delivery or use. At the expiration of thirty days the form so filed shall be deemed approved by the Board of Insurance Commissioners unless prior thereto it has been affirmatively approved or disapproved by the written order of said Board. The Board of Insurance Commissioners may extend by not more than an additional thirty days the period within which it may so affirmatively approve or disapprove any such form, by giving notice of such extension before expiration of the initial fifteen day period and at the expiration of any such extended period, and in the absence of such prior affirmative approval or disapproval, any such form shall be deemed approved. The Board of Insurance Commissioners may withdraw any such approval at any time. Approval of any such form by such Board shall constitute a waiver of any unexpired portion of the waiting period, or periods, herein provided.’

³ ‘Sec. 35. No bill (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall

be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed.'

The title of Senate Bill 438 (55th Legislature, Regular Session, Acts of 1957, Ch. 501, p. 1463), by which [Article 3.42](#) was amended, is as follows:

'An Act to amend [Articles 3.42](#) and [3.43 of the Insurance Code](#) (Acts 1951, 52nd Legislature, Chapter 491, as amended) relating to the filing with and approval by the Board of Insurance Commissioners of all policy forms, endorsements, and riders issued by any life, accident, health, accident and health or hospitalization insurance company, doing business in this state; prescribing the method of filing and providing for its approval within thirty days unless disapproved or approved within such time by written order of the Board; providing (for) specific grounds for disapproval; providing for judicial review of any such orders; repealing all laws in conflict herewith; providing ***17** for a severability and saving clause; and declaring an emergency.'

[2] [3] [Section 35](#) helps assure that our legislators will not approve legislation containing unnoticed and unwanted provisions, even though in the press and din of legislative affairs it is not always possible for them to examine all the parts of each proposed bill. [Holman v. Cowden & Sutherland, Tex.Civ.App., 158 S.W. 571](#), wr. ref. [Gulf Insurance Co. v. James, 143 Tex. 424, 185 S.W.2d 966](#). Appellant maintains that the above title 'descends into details, purporting to reveal the substance of the changes wrought by the amendment, but gives no hint of other changes incorporated in the body of the bill.' Appellant cites cases which deal with various ways in which [Section 35](#) may be violated, including: new and independent subjects in an amendatory bill; captions which conceal the true purpose of a statute or do not reasonably apprise the legislator of the scope of the bill so as to prevent fraud or surprise; and provisions in the caption having no relevancy to the principal object of the Act. See [Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799](#); [Ward Cattle & Pasture Co. v. Carpenter, 109 Tex. 103, 105, 200 S.W. 521](#); [Board of Water Engineers v. City of San Antonio, 155 Tex. 111, 283 S.W.2d 722](#); [Hamilton v. St. Louis, S. F. & T. Ry. Co., 115 Tex. 455, 283 S.W. 485](#). However, the present case is more closely analogous to ****844** [Board of Ins. Com'rs v. Sproles Motor Freight Lines, Tex.Civ.App., 94 S.W.2d 769, 772](#), wr. ref. There the Court of Civil Appeals considered an attack on a statute giving the then Board of Insurance Commissioners the authority to fix premium rates for automobile insurance. The title of that Act (Chapter 253, Acts 40th Legislature, 1927) read: 'An Act to authorize the Commissioner of Insurance of the State of Texas to fix the rate of automobile insurance, providing a penalty for violation of the provisions thereof, and declaring an emergency.' The Act itself provided, among other things, that 'the Commissioner may withdraw * * * approval of any rate * * * if in his judgment such rate is unjust, unreasonable or inadequate to provide for the obligations assumed by the insurer.' Attack was made, as here, that the statute violated [Article 3, Section 35, of the Constitution](#), because, among other reasons, 'its title does not contain the subject-matter relative thereto.' The principal objection was that there was no provision in the title authorizing the Board to change the rates after once having approved them. The court considered the appropriate requirements of a title, and held 'the subject of the proposed legislation is sufficiently stated in the title to the act.' Faced with a similar problem, we hold that the title of [Article 3.42](#), supra, meets the constitutional requirements.

***18** Next, appellant contends that the Commissioner erred in disapproving Option 2 because the Commissioner's interpretation of [Article 3.42\(b\)](#) was too literal. With this contention we do not agree. [Article 3.42\(b\)](#) is as follows:

'No application form which is required to be or is attached to the policy, contract or certificate, and no rider or endorsement to be attached to, printed upon or used in connection with any policy, contract or certificate described in Paragraph (a) of this Article shall be delivered, issued or used in this state by any insurer described in Paragraph (a) of this Article unless the form of said application, rider or endorsement has been filed with the Board of Insurance Commissioners and approved by said Board as provided in Paragraph (c) of this Article. Provided, however, that this Article shall not apply to riders or endorsements which relate to the manner of distribution of benefits or to the reservation of rights and benefits under such policies, contracts and certificates, and which are used at the request of the holder of the policy, contract or certificate.' (Emphasis added.)

[4] The Commissioner obviously has not viewed Option 2, supra, as a ‘rider or endorsement’ within the meaning of the above Article, but rather considers Option 2 a part of the policy itself. Appellant argues that the same result achieved by Option 2 could have been achieved by the policyholder executing an assignment to a securities dealer, or the same provisions could have been attached to a separate piece of paper and would then have been without the control of the Commissioner. The option is neither a rider nor an endorsement in the literal sense, and the Commissioner chose to interpret the statute in the literal sense. The Commissioner did not err in so doing. The provision was actually, literally, and physically a part of the policy itself. The Commissioner may well have reasoned that the presence of the option in the body of the policy was probably instrumental in obtaining 100 per cent policyholder selection of Option 2 if for no other reason than it lulled the policyholder into acquiescence in the key option by its very physical presence in the body of the policy rather than emphasizing its presence by its being separate and apart as a rider.

[5] In its fourth point of error, appellant asserts: ‘[Article 3.42, Texas Insurance Code](#), is so vague and grants such sweeping powers, unbridled by any standard or guides, that it results in an unconstitutional delegation of authority by the Legislature to the Board of Insurance.’ Appellant **845 points out that action by the *19 Board under the ‘encourages misrepresentation’ provision necessarily means ‘a matter of opinion’, citing [Railroad Commission v. Shell Oil Company](#), 139 Tex. 66, 161 S.W.2d 1022, 1025:

* * * It is a well-established principle of constitutional law that any statute or ordinance regulating the conduct of a lawful business or industry and authorizing the granting or withholding of licenses or permits as the designated officials arbitrarily choose, without setting forth any guide or standard to govern such officials in distinguishing between individuals entitled to such permits or licenses and those not so entitled, is unconstitutional and void.’

The present case does not fall within the prohibition of the Shell case, supra. We hold that [Article 3.42](#) in this regard is constitutional. The present case is more closely analogous to [Jordan v. State Board of Insurance, Tex.](#), 334 S.W.2d 278, 279. That case upheld the standard ‘not worthy of the public confidence’. In upholding such standard, the court cited administrative Law Treatise, par. 2.03, by Professor Davis, wherein there were given numerous illustrations of phrases employing general terms which have been held sufficient as administrative standards, and we quote therefrom, as follows:

‘(T)he standards the Supreme Court (of the United States) has held adequate include ‘just and reasonable,’ ‘public interest,’ ‘unreasonable obstruction to navigation,’ ‘reciprocally unequal and unreasonable,’ ‘public convenience, interest, or necessity,’ ‘tea of inferior quality,’ ‘unfair methods of competition,’ ‘reasonable variations,’ ‘unduly or unnecessarily complicate the structure’ of a holding company system or ‘unfairly or inequitably distribute voting power among security holders.’“

The standard ‘encourage misrepresentation’ appears equally as definite as the standard ‘unworthy of the public confidence’, as well as the standards cited. The true test is whether the idea embodied in the phrase is reasonably clear. The phrase meets that test.

We come now to a consideration of appellant's contention that appeals to the district court from orders of the State Board of Insurance and the Commissioner of Insurance are to be determined by the preponderance of the evidence rule in a trial de novo and not by the substantial evidence rule. Appellant insists that the judicial review statutes are constitutional, and that the trial court erred in testing the orders complained of by the substantial evidence *20 rule, contrary to the express provisions of the applicable judicial review statutes. The pertinent statutes are:

[Article 3.42\(g\)](#) provides:

‘Appeals from any order of the Board of Insurance Commissioners issued under this Article may be taken to the District Court of Travis County, Texas, in accordance with [Article 21.44](#) of Sub-chapter F of this Insurance Code, or any amendments thereof.’

[Article 21.44](#) of Subchapter F provides, in part, that any party dissatisfied with any decision of the Board of Insurance Commissioners 'may file a petition setting forth the particular objections to such decisions' in the District Court of Travis County, Texas.

The statute sets forth a standard of review as follows:

'The action shall not be limited to questions of law and the substantial evidence rule shall not apply, but such action shall be tried and determined upon a trial de novo to the same extent as now provided for in the case of an appeal from the Justice Court to the County Court.' (Emphasis added.)

[Article 1.04\(f\) of the Insurance Code](#) is partly as follows:

****846** 'If any insurance company or other party at interest be dissatisfied with any decision, regulation, order, rate, rule, act or administrative ruling adopted by the State Board of Insurance, such dissatisfied company or party at interest after failing to get relief from the State Board of Insurance, may file a petition setting forth the particular objection to such decision, regulation, order, rate, rule, act or administrative ruling, or to either or all of them in the District Court of Travis County, Texas, and not elsewhere, against the State Board of Insurance as defendant. Said action shall have precedence over all other causes on the docket of different nature. The action shall not be limited to questions of law and the substantial evidence rule shall not apply, but such action shall be tried and determined upon a trial de novo to the same extent as now provided for in the case of an appeal from the Justice Court to the County Court.' (Emphasis added.)

It is clear that the district court has not afforded a trial de novo as provided by the above statutes, but to the contrary has ***21** reviewed the Board's ruling according to the 'substantial evidence rule' and held that Key Western's attack on the ruling failed. The Board's Order No. 7635 concludes:

'Therefore, all Premises Considered, it appears to the Commissioner of Insurance that Policy Form Pic No. 1 of the Keywestern Life Insurance Company, by its very terms and provisions, and within the written contract itself, encourages misrepresentation, is unjust, unfair, inequitable, misleading, deceptive and contrary to the public policy of this state, and is contrary to Rule 20 of Official Order No. 957 of the State Board of Insurance, and [Article 21.21, Texas Insurance Code](#), and obligates Keywestern Life Insurance Company to engage in a business and function beyond its charter powers. These findings and conclusions, taken separately or together, subject the entire policy to disapproval under the provisions of [Article 3.42, Texas Insurance Code](#). * * *'

[6] [7] The district court by reviewing the ruling of the Board under the substantial evidence rule has in effect found the applicable review statutes in this case to be unconstitutional in so far as they provide for 'preponderance of the evidence' review. In other words, the district court has held, in effect, that to afford Key Western a trial de novo, under the preponderance of the evidence rule, the court trespasses on that area of our government reserved to the legislature, thus violating [Article 2, Section 1, of the Texas Constitution](#). We hold that a review by the courts of the action taken by the Board of Insurance under [Article 3.42](#), supra, in this case may constitutionally be had under the 'preponderance of the evidence' standard. The district court was without authority to substitute a nonstatutory standard for that prescribed by the statute. Key Western was entitled to a review by trial de novo. Review by trial de novo has all the attributes of an original action in the reviewing court. The trial court must weigh the evidence by the 'preponderance of the evidence' standard. Trial de novo has been defined as 'A new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below.' See Black's Law Dictionary; *Ex parte Morales*, Tex.Cr.App., 53 S.W. 107, 108. Trial de novo is not an 'appeal', but is a new and independent action. See *Corporation Commission of Arizona v. People's Freight Line*, 1936, 41 Ariz. 158, 16 P.2d 420; *Investors Syndicate of America v. Hughes*, 1941, 378 Ill. 413, 38 N.E.2d 754.

The maximum scope of judicial review that may be provided for the ruling of an administrative agency is a problem that has vexed the courts of this and other jurisdictions numerous times. *22 There are numerous cases in Texas and other jurisdictions where the courts have applied the substantial **847 evidence rule to the review of administrative decisions where the particular statute involved in those cases apparently called for a complete redetermination of the issue. See for example, [Fire Department of City of Fort Worth v. City of Ft. Worth](#), 1949, 147 Tex. 505, 217 S.W.2d 664; [Bradley v. Texas Liquor Control Board](#), Tex.Civ.App.1937, 108 S.W.2d 300, no writ history; [Jones v. Marsh](#), 1949, 148 Tex. 362, 224 S.W.2d 198; [Appeal of Fredericks](#), 1938, 285 Mich. 262, 280 N.W. 464; [City of Jackson v. McLeod](#), 1946, 199 Miss. 676, 24 So.2d 319.

[8] The Texas Constitution provides that the powers of government shall be divided into three distinct departments: Legislative, Executive, and Judicial, and that except in instances expressly permitted by the Constitution, 'no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, * * *.' [Article 2, Sec. 1, Texas Constitution](#). Under this Section of [Article 2](#) (or similar provisions contained in the constitutions of other states) provisions in Acts of legislatures calling for the review of legislative determinations or executive rulings by a trial de novo in a judicial tribunal have been declared invalid as violative of the constitutional doctrine of separation of powers. A power or authority which cannot be lawfully delegated directly to the judiciary by the Legislature because of the constitutional provision cannot be conferred upon the courts by means of a de novo trial after an administrative hearing. [Davis v. City of Lubbock](#), Tex.1959, 326 S.W.2d 699; [Cromwell v. Jackson](#), 1947, 188 Md. 8, 52 A.2d 79; [Mississippi Insurance Commission v. Insurance Co. of North America](#), 1948, 203 Miss. 533, 36 So.2d 165.

'The criterion used (by the courts in determining the constitutionality of the review statute) is whether the reviewing court is required to exercise a function that is deemed nonjudicial, * * *. The perplexing problem is the determination of what is judicial and what is nonjudicial.' 4 Davis, *Administrative Law Treatise*, s 29.10 (1958). Many definitions of legislative functions and judicial functions have been set forth by various courts. The Supreme Court of the United States stated:

'A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.' *23 [Prentis v. Atlantic Coast Line](#), 211 U.S. 210, 29 S.Ct. 67, 69, 53 L.Ed. 150.

In 73 C.J.S. *Public Administrative Bodies and Procedure* s 8, p. 306, it is said:

'It has been stated that the nature of the final act and the character of the process and operation, rather than the general character of the authority exercised, is determinative. The action of an administrative body or officer is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rulemaking action, general and future in effect.'

These definitions aid us in reaching an answer to the specific question facing this Court: Is the determination that the policy form contains provisions which 'encourage misrepresentation or are unjust, unfair, inequitable, * * *' a 'judicial function' or a 'legislative function'?

Appellee urges that the determination made by the Board in the instant case is a legislative function in which the Board utilizes 'legislative discretion'. With this contention we do not agree. The instant case is not controlled, as claimed by appellee, by the holding of this Court in the case of [Davis v. City of Lubbock](#), Tex.1959, 326 S.W.2d 699. Appellee fails to appreciate that there is a distinction between the types **848 of decisions rendered by different administrative agencies. Some agencies perform judicial or quasi-judicial functions; others exercise powers which are essentially legislative. [In re Harmon](#), 1958, 52 Wash.2d 118, 323 P.2d 653.

[Article 3.42\(f\)](#) and the standard therein expressed are to be distinguished from the statute and applicable standard which were before this Court in the [Davis v. City of Lubbock](#) case, *supra*. In that case this Court held that Section 17 of the Urban Renewal

Act which provided for a review by trial de novo of any order or other act of the city or other agency was unconstitutional as a violation of [Article 2, Section 1, of the Constitution of Texas](#). In reaching this conclusion the court said:

‘* * * it is quite clear that a decision that it (a particular area) is a slum area under (3) of the definition is a decision of a question of pure public policy.’

‘A decision or conclusion by the agency that a particular area is a ‘Slum Area’ or a ‘Blighted Area’ is thus made to rest *24 upon a finding involving legislative discretion. A de novo judicial review of such a decision would clearly involve the exercise by the courts of nonjudicial powers.’ (Emphasis added.) [326 S.W.2d 699, 714](#).

Section (3) of the definition referred to by the court reads in part: ‘which is detrimental to the public health, safety, morals or welfare of the city.’ Section 4(h), Article 1269I-3, Vernon’s Annotated Texas Statutes.

Under [Article 3.42\(f\) of the Insurance Code](#) the Board of Insurance Commissioners may disapprove or withdraw previous approval of the policy form:

‘* * * if, and only if,

‘(1) it is in any respect in violation of or does not comply with this code.

‘(2) It contains provisions which encourage misrepresentation or are unjust, unfair, inequitable, misleading, deceptive or contrary to law or to the public policy of this state.

‘(3) It has any title, heading, or other indication of its provisions which is misleading.’ (Emphasis added.)

[9] ‘The board can exercise only such authority as is conferred upon it by law in clear and unmistakable terms and the same will not be construed as being conferred by implication.’ [Board of Insurance Commissioners v. Guardian Life Ins. Co., Tex.Com.App.1944, 142 Tex. 630, 180 S.W.2d 906, 908](#). See also [Humble Oil & Refining Co. v. Railroad Commission of Texas, 313 Tex. 330, 128 S.W.2d 9; Commercial Standard Ins. Co. v. Board of Insurance Commissioners, Tex.Civ.App., 34 S.W.2d 343, wr. ref.](#) Therefore, the Board in the instant case could exercise no more discretion than the terms of the statute clearly provide, and it appears from a literal reading of the statute that the Board was not to have broad legislative discretion. The Board of Insurance Commissioners is empowered to disapprove a form for certain specific reasons only and may not dictate to the insurance companies the particular form to be used. Its only duty is to determine whether the form of the policy submitted for its approval meets the standards prescribed by the statute. The action of the Board of Insurance Commissioners ‘is particular and immediate, rather than, as in the case of legislative or rulemaking action, general and future in effect.’

[10] [11] [12] *25 The dissimilarity between the standard set forth in [Article 3.42\(f\)](#) and the standard before the Court in the Davis case, supra, is readily apparent. The Board of Insurance Commissioners under [Article 3.42\(f\)](#) does not make a determination ‘of a question of pure public policy,’ as in the [Davis case, supra \(326 S.W.2d 714\)](#). The Board may disapprove a form ‘if, and only if’ it violates the provisions of the statute. Under the provisions of the statute, the State Board of Insurance is also empowered to disapprove or withdraw approval **849 of a policy form if the form is contrary to the public policy of the state. It is to be noted that this particular provision provides no standard by which public policy is to be measured. The absence of a standard or guide to govern the Commissioner of Insurance or the State Board of Insurance in the determination of what type of policy form would be contrary to public policy would leave it to the unbridled discretion of the Commissioner and the Board to disapprove in the first instance or withdraw previous approval of a policy form. This would leave the right to enter into insurance contracts subject to the arbitrary discretion of the Commissioner and the State Board of Insurance. This of itself would render the statute void. See [Railroad Commission v. Shell Oil Company, supra](#). However, if possible, it is the duty of the courts to construe a statute in such a way as to avoid repugnancy to the Constitution. This may be done by holding that the ‘public policy’ of which the statute speaks is defined in the statute itself. It is the right of the public to be free of insurance contracts which contain ‘provisions which encourage misrepresentation or are unjust, unfair, inequitable, misleading, deceptive * * *’. Thus, the determination made by the Board of Insurance Commissioners under [Article 3.42\(f\)](#) is clearly a

quasijudicial function. Such determination is reviewable on appeal by a trial de novo under the preponderance of the evidence rule. This is particularly made clear when we consider that the court, the trier of the facts, in determining whether or not the policy 'encourages misrepresentation' is not limited to a consideration of the words and phrases of the policy alone, but may consider outside, relevant factors, as herein pointed out, in its evaluation of these words and phrases.

The Supreme Court of Minnesota, in an early case dealing with the problem of determining whether a given function was 'legislative' or 'judicial', said:

'As a general proposition of law the Legislature cannot delegate legislative powers to the judiciary or require the judges of the various courts of the state to do any acts which are not in their nature judicial. [Kilbourn v. Thompson](#), 103 U.S. 168, 26 L.Ed. 377, and cases there cited; * * * But it is *26 not always easy to discover the line which marks the distinction between executive, judicial, and legislative functions, and when duties of an ambiguous character are imposed upon a judicial officer any doubt will be resolved in favor of the validity of the statute, and the powers held to be judicial. [Foreman v. Board County Com'rs](#), 64 Minn. 371, 67 N.W. 207. In many instances the acts which are to be done require the performance of functions, some of which are judicial and others legislative or executive, and these are often so interwoven and connected that they cannot readily be separated and distinguished. When this is the case the court will not attempt to unravel the combination, but will sustain the act against the constitutional objection.' [State ex rel. Patterson v. Bates](#), 1905, 96 Minn. 110, 104 N.W. 709, 711.

Appellee also relies upon the case of [Farmers and Merchants Ins. Co. v. State Board of Ins.](#), Tex.Civ.App., 321 S.W.2d 354, 357, wr. ref. n. r. e. In that case the Court of Civil Appeals considered a statute which authorized a trial de novo if an appellant were 'dissatisfied with any order of the Board respecting its application (for permission to write insurance for less than the maximum rate prescribed by the Board of Insurance)'. The court in holding the statute unconstitutional cited the case of [Southern Canal Co. v. State Board of Water Engineers](#), Tex.Civ.App., 311 S.W.2d 938.

The present case is distinguishable from the Farmers and Merchants case. That case involved the question of whether a rate is 'inadequate' or 'unfairly discriminatory'. The determination of whether or not a rate deviation should be granted **850 depends upon a variety of factors listed in the statute.⁴ These factors are such as would involve the use of 'legislative discretion' or the exercise of 'quasi-legislative' power. The Board may deny the application 'if it finds the resulting premium would be inadequate or unfairly discriminatory'. Such a determination is a question involving broad legislative discretion, and not susceptible to full redetermination by the judiciary. Therefore, it would appear that although the Farmers case, supra, was correctly decided, it does not govern the disposition of the instant case.

⁴ 'In considering any application * * * the Board shall give consideration to the factors applied by insurers or rating organizations generally used by such insurers or rating organizations in determining the bases for rates; the financial condition of the insurer; the method of operation and expenses of such insurer; the loss experience of the insurer, past and prospective, including where pertinent the conflagration and catastrophe hazards, if any, both within and without this state; to all factors reasonably related to the kind of insurance involved; to a reasonable margin for an underwriting profits for the insurer, and, in the case of participating insurers, to policyholders' dividends.' [Art. 5.26, Texas Insurance Code](#).

*27 Appellee points out numerous problems and difficulties which will be encountered by the courts in attempting to provide a de novo review for this type of administrative decision. This Court in [Southern Canal](#), supra, also emphasized the dire results possibly attendant from such a course of action. With these views this Court is in full accord.

However, the fact that a statute may have mischievous or even disastrous results is no basis for declaring the same to be unconstitutional. 'It should perhaps be reiterated that Courts have no concern with the wisdom of legislative acts, but it is our plain duty to give effect to the stated purpose or plan of the Legislature, although to us it may seem ill advised or impracticable.' [State Board of Insurance v. Betts](#), 1958, 158 Tex. 612, 315 S.W.2d 279, 281. See also, [Board of Insurance Commissioners of Texas v. Guardian Life Ins. Co.](#), 1944, 142 Tex. 630, 180 S.W.2d 906.

We therefore hold that in so far as the trial court held the judicial review statutes unconstitutional as applied to the instant case, it was in error. The function of the Board of Insurance Commissioners under [Article 3.42\(f\)](#) is quasi-judicial, and therefore the courts could properly make the same determination on trial de novo.

In view of another trial of the case, we deem it necessary to discuss the points of error raised by appellant pertaining to the relevancy and admission of certain evidence before the Board and the trial court.

[13] Appellant attacks the admission of the premium rates before the Board and contends that the Board has no authority to regulate premium rates. The trial court refused to allow testimony pertaining to the premium rates. We find that the premium rate charged is of evidentiary value in determining whether the policy ‘encouraged misrepresentation’. If the premium rates charged were so high that unreasonably high returns must be promised, this would encourage misrepresentation.

Appellant insists that ‘If the rate has to be looked to in order to discover the supposed inequity, then it is not the provisions of the policy which cause it but the rate.’ What appellant fails to recognize is that the rate has an undeniable effect on whether or not provisions of the policy might necessarily have to be misrepresented in order to sell the policy; therefore evidence of the rate charged is relevant in determining if the policy ‘encourages ***28** misrepresentation’ and if introduced in the trial court on retrial, would be admissible. The use of the premium rate charged as circumstantial evidence of whether or not the policy ‘encourages misrepresentation’ is not directly or indirectly an attempt to regulate rates.

Appellant next maintains that the meaning of the policy provisions are clear and ****851** unambiguous, and that such provisions, standing alone, do not misrepresent anything. Therefore, appellant reasons that it is error to consider the policy provisions in relation to anything outside the four corners of the policy itself. At this point we again turn our attention to a recurring question in this case. Should the Court and the Board be limited to a consideration of the words and phrases of the policy alone, or may the Court and the Board consider outside, relevant factors in its evaluation of these words and phrases?

[14] In determining what construction is to be placed on the phrase ‘encourages misrepresentation’ contained in Subdivision (2) and the language ‘If it (the policy) has any * * * other indication of its provisions which is misleading’ contained in [Subdivision \(3\) of Article 3.42\(f\)](#), supra, we are mindful of the following elementary rules of statutory construction summed up in 39 Texas Jurisprudence, at pages 217, 218, and supported by substantial Texas authority:

‘Thus it is settled that a statute will be construed with reference to its intended scope, its general purpose, and the ends or objects sought to be attained. * * * Where the statutory language * * * admits of more than one meaning it is to be taken in such a sense as will conform to the scope and intent of the act, and will best or most certainly accomplish its purpose, without doing violence to plain statutory language. Thus where a statute is designed to afford a remedy for existing evils, it should be given such signification as will afford a reasonable remedy. Contrariwise, a construction that is repugnant to the object of the law or that will defeat, thwart or unduly limit its plain purpose, will be avoided if possible.’

And see: [Ex parte Flake](#), 67 Tex.Cr.R. 216, 149 S.W. 146; [Crooms v. State](#), 40 Tex.Cr.R. 672, 51 S.W. 924, 53 S.W. 882; [Magnolia Petroleum Co. v. Walker](#), 125 Tex. 430, 83 S.W.2d 929, certiorari denied 296 U.S. 623, 56 S.Ct. 144, 8 L.Ed. 442; [Wray v. Citizens National Bank](#), Tex.Com.App., 288 S.W. 171; [Red v. Bounds](#), Tex.Com.App., 122 Tex. 614, 63 S.W.2d 544; [Trimmier v. Carlton](#), 116 Tex. 572, 296 S.W. 1070; [Highway Comm. of Texas v. Vaughn](#), Tex.Civ.App., 288 S.W. 875, er. ***29** ref.; [Adams v. Bida](#), Tex.Civ.App., 83 S.W.2d 420, reversed on other grounds at 125 Tex. 458, 84 S.W.2d 693; [Longoria v. State](#), 126 Tex.Cr.R. 362, 71 S.W.2d 268; [Oliver v. State](#), 65 Tex.Cr.R. 150, 144 S.W. 604; [Higgins v. Rinker](#), 47 Tex. 393; [Shelton v. Wade](#), 4 Tex. 148; [Imperial Irrigation Co. v. Jayne](#), 104 Tex. 395, 138 S.W. 575; [Texas Co. v. Schriewer](#), Tex.Civ.App., 38 S.W.2d 141, modified [Smith v. Texas Co.](#), Tex.Com.App., 53 S.W.2d 774; [First Texas State Ins. Co. v. Smalley](#), 111 Tex. 68, 228 S.W. 550; [Cannon's Administrator v. Vaughan](#), 12 Tex. 399; [Ex Parte Miller](#), 85 Tex.Cr.R. 263, 211 S.W. 451.

With this principle before us it becomes evident that the court and the Board would clearly be within their authority in considering all pertinent factors in arriving at their decision, and not just the words of the policy alone. As has been succinctly stated by a Louisiana court in a situation similar to our own:

* * * While it is true that the Secretary of State, not the Commission, has the responsibility and power to enjoin 'any unfair or deceptive act or practice prohibited', [LSA-R.S. 22:1215](#), we feel that the Commission could properly take notice of the large newspaper advertisements 'informing' the public of State Farm's membership fee plan which in the Commission's opinion were misleading. The Insurance Code is an integrated whole. The Commission is not required to leave the stable door unlocked until the horse is stolen.' *State Farm Mutual Automobile Insurance Co. v. Louisiana Insurance Rating Commission et al.*, La.App., 79 So.2d 888,894.

****852** Appellant contends that the Board and the Court must look only to the form of the policy. We do not agree. We hold that the Court will be justified in considering outside factors in its determination. The Board and the Court must have the power, in approving or disapproving a policy, to consider not only the terms of the policy form itself, but also the fact that the policy will be used in an undesirable scheme. Our conclusion does not give the Insurance Board unbridled opportunities to abuse its powers. The Legislature has carefully provided for appeal from orders of the Board to guard against such abuse. This present action is an excellent example of the extent to which such an appeal can be perfected.

[15] Finally, appellant contends, 'The trial court erred in receiving in evidence, and considering as a basis for upholding the orders in question, testimony and exhibits concerning the means by which the policy was sold or advertised for sale, because advertising materials or methods may not be utilized directly or *30 indirectly as a ground for disapproval of, or withdrawal of approval of, appellant's policy form.' Our answer to that contention is that it would be unreasonable to suppose that the Commissioner or the trial court must disregard facts which have a material relation to the matters under their inquiry, especially where, as here, the advertising was directly welded to the provision in question, Option 2, supra. Appellant urges that it was not the intent of the Legislature that deceptive advertising practices be a ground for disapproval of the policy form. With this we agree, but advertising practices may be relevant in determining if the statutory grounds exist. A consideration of the policy form aside from the advertising accompanying it would be to view the policy as if 'in a vacuum', as appellee has phrased it. We hold that the trial court may view policy provisions and advertising practices together to determine the acceptability of the policy itself. This is by no means an attempt by the Commissioner or the Court to regulate advertising.

The judgment of the district court is reversed and the case is remanded to that court with directions that any subsequent trial proceed in a manner not inconsistent with this opinion.

STEAKLEY, J., not sitting.

GREENHILL, Justice (concurring).

I agree that the trial de novo provisions of the statute are constitutional. But I disagree that the policy itself should be struck down because of oral representations or misrepresentations made by agents in connection with the selling of the policy. Any policy of insurance is capable of being misrepresented. And as I read it, this policy itself contains nothing which is illegal, which of itself is misleading or fraudulent, or which peculiarly lends itself to misrepresentation.

The Legislature has clothed the Board of Insurance with broad power in [Article 21.21 of the Insurance Code](#) to deal with and stop misrepresentations and false advertising made in connection with the sale of insurance policies. The Board is also given the power to call before it any person who is accused of deceptive acts or practices or unfair methods of competition in the business of insurance. It has authority to issue cease and desist orders to stop the objectionable practices. To me, this would have been the proper approach to the objectionable practices in this case.

31** As originally introduced in the Legislature, Senate Bill 438, which became [Article 3.42 of the Insurance Code](#), authorized the Board to disapprove a policy form '(d) If the purchase of such policy is being solicited by deceptive advertising.' This authority was deleted before enactment. This is evidence of legislative intent that misleading advertising and practices outside of the policy should be separately dealt *853** with, and that the policy should be judged by its own terms.

I agree that misleading and deceptive practices should be stopped. I disagree only in the manner in which they should be stopped.

CULVER, J., joins in this opinion.

GRIFFIN, Justice (dissenting).

I cannot agree with the majority opinion and I therefore respectfully dissent.

I dissent from the holding that the matter of the content and form of insurance policy provisions can be tried de novo. The content and form of insurance policies most certainly are administrative matters and not judicial matters. In the first instance, to permit the courts to write insurance policies would, in my opinion, lead to interminable confusion and great lack of uniformity. Such procedure would lead to the approval of one form of policy for one company, and approval of another and different form for another company.

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SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,

San Antonio.

Rowland Martin, Jr., Appellant

v.

Edward L. Bravenec and 1216 West Ave., Inc., Appellees

No. 04-14-00483-CV | Delivered and Filed: May 13, 2015

From the 285th Judicial District Court, Bexar County, Texas, Trial Court No. 2014-CI-07644, Honorable Dick Alcala, Judge Presiding

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Sitting: [Sandee Bryan Marion](#), Chief Justice, [Marialyn Barnard](#), Justice, [Luz Elena D. Chapa](#), Justice

MEMORANDUM OPINION

Opinion by: [Sandee Bryan Marion](#), Chief Justice

*1 This is an accelerated appeal of two orders. The first order grants a temporary injunction, and the second order denies a motion to dismiss filed pursuant to the Texas Citizens Participation Act.¹ We affirm both orders.

¹ By order dated December 8, 2014, this court limited this appeal to those two orders.

BACKGROUND

Appellee Edward L. Bravenec was a co-owner of a second lien on property located at 1216 West Avenue, San Antonio, Texas (the "Property"). In 2006, the owner of the first lien, Reliant Financial, Inc., sought to foreclose on the lien. A dispute arose between the lienholders, and Bravenec and his co-owner filed a lawsuit seeking to prevent the foreclosure sale. Eventually, the parties reached a settlement agreeing to dismiss the lawsuit; however, a petition to intervene in the lawsuit filed by appellant Rowland Martin, Jr. remained pending. In disposing of the lawsuit, the trial court signed two orders. The first order approved the settlement and dismissed the cause. The second order denied the intervention and expressly found "the foreclosure having taken place on the 3rd day of October, 2006 is valid."

In 2010, Martin filed a lawsuit in federal district court against Reliant Financial, Bravenec, and others alleging numerous causes of action relating to the ownership of the Property. The federal district court granted summary judgments in favor of all the defendants and entered a take nothing judgment on December 21, 2012. In the summary judgment granted in favor of Bravenec, the federal district court ordered Martin to show cause why monetary sanctions should not be imposed against him for: "(1)

repeatedly filing lawsuits for the purposes of harassment and the needless increase of litigation costs; and (2) continuing to assert claims that he knows are non-meritorious.” On February 1, 2013, the federal district court entered an order imposing sanctions by directing the district clerk's office not to accept for filing any further motions filed by Martin in that case or any new *pro se* complaints without the prior written approval of a district judge. The federal district court's order stated:

The Court observes that for years Plaintiff has engaged in a campaign of harassing, frivolous, and duplicative litigation. His lawsuits have served no purpose other than to increase the litigation costs of the Defendants and waste judicial resources. The Court finds that it is necessary to take some action to curtail the Plaintiff's propensity to burden the Court with meritless litigation.

The Fifth Circuit Court of Appeals affirmed the federal district court's judgment and also entered an order cautioning Martin that if “he continues to engage in frivolous and vexatious litigation—for example, asking for relief the court has repeatedly found is not warranted—sanctions may be imposed.”

After the Fifth Circuit affirmed the federal district court's judgment, the federal district court entered an order on March 5, 2014, commenting on Martin's history of filing notices of lis pendens against the Property as follows:

*2 On January 18, 2013, Rowland Martin filed a notice of Lis Pendens affecting the real property located at 1216 West Avenue, San Antonio, Texas (the Property). The notice of Lis Pendens indicated that Martin intended to appeal the judgment entered by this Court in the above styled and numbered cause. After the Fifth Circuit affirmed this Court's judgment and Martin refused to cancel his notice of Lis Pendens, this Court entered an order cancelling the Notice. Thereafter, Martin filed a motion for rehearing *en banc* in the Fifth Circuit as well as an amended Notice of Lis Pendens. On December 4, 2013, the Fifth Circuit denied his petition for a rehearing and the Court entered an order cancelling the amended notice of Lis Pendens. That same day, Plaintiff filed a third notice of Lis Pendens, this time indicating that title to the Property was affected by a Bexar County Probate Court matter styled *In re. Estate of Johnnie Mae King*, Cause No.2001-PC-1263. The notice of Lis Pendens asserts that Martin was the administrator of the Estate and that Defendant Edward Bravenec was “attorney of record.” It did not, however, clarify what bearing that probate matter has on the Property at issue in the instant suit.

After reciting the foregoing history, the federal district court found that it did not have jurisdiction to cancel the third lis pendens and recommended that a motion to expunge be filed in the Bexar County Probate Court. Bravenec followed the recommendation, and, on March 19, 2014, the Bexar County Probate Court entered an order finding that the estate did not have an interest in the Property and cancelled the notice of lis pendens filed on or about December 3, 2013, and a further notice of lis pendens filed on or about March 7, 2014.

On May 13, 2014, appellees Bravenec and 1216 West Ave., Inc. filed the underlying lawsuit, asserting a claim for tortious interference with contractual relations.² The lawsuit alleged that Martin's continued filings of notices of lis pendens and other documents has prevented the appellees from selling the Property, asserting, “A title company refuses to insure the transaction until a lis pendens is removed. Once the lis pendens is removed, Martin simply files another to delay the transaction.”

² The Property is owned by one or both appellees.

On May 14, 2014, the trial court entered a temporary restraining order cancelling another document filed by Martin asserting an interest in the Property and enjoining Martin from filing any further documents in the deed records relating to the Property. The order set a hearing for May 27, 2014, on whether to convert the temporary restraining order to an injunction; however, the parties agreed to a continuance and reset the hearing for July 9, 2014.

On June 2, 2014, Martin filed another notice of lis pendens in the pending lawsuit. On June 12, 2014, Bravenec filed a motion seeking to hold Martin in contempt for violating the temporary restraining order. The motion for contempt also was set for a

hearing on July 9, 2014. On July 9, 2014, Martin filed a document entitled “Special Appearance for Pleas to Jurisdiction and Texas Citizens Participation Act Motion to Dismiss.”

When the hearing was called on July 9, 2014, Bravenec agreed to a continuance on the motion for contempt and the hearing proceeded on the temporary injunction and Martin's motion to dismiss pursuant to the Texas Citizens Participation Act. At the conclusion of the hearing, the trial court announced its ruling. The trial court first granted the temporary injunction and stated, “It is rendered today.” The trial court then denied the motion to dismiss.

On July 10, 2014, Bravenec filed a motion to enter orders, attaching the draft orders. The motion was set for a hearing on July 17, 2014, and Bravenec's attorney presented the draft orders for the trial court to sign. Martin objected to the entry of the temporary injunction because he filed a notice of appeal of the trial court's order denying his motion to dismiss on July 9, 2014. Martin contended that his filing of the notice of appeal invoked the automatic stay provision set forth in [section 51.014\(b\) of the Texas Civil Practice and Remedies Code](#). Concluding that the stay did not take effect until the order was signed, the trial court signed the orders. From the reporter's record of the hearing, it appears that the trial court signed the order denying the motion to dismiss before signing the order granting the temporary injunction. Martin appeals those two orders.

ISSUES PRESENTED

*3 In his brief, Martin lists the following three issues as being presented for review:

Issue 1: The Temporary Injunction Order Employed a Treatment of the Interlocutory Appeal Statute That is Constitutionally Suspect As Applied to Comply with Open Courts Doctrine.

Issue 2: The Trial Court Departed From The Law That Governs Specificity Requirements For Temporary Injunction Orders Set Forth in [Tex.R. Civ. P. 683](#).

Issue 3: The Trial Court Misapplied The Texas Citizens Participation Act's Burden-Shifting Procedures By Failing To Treat Lis Pendens Notices As Incidental To The Exercise Of the Rights to Free Speech, To Petition And To Participate in Government To The Maximum Extent.

In briefing these issues, Martin makes legal arguments and raises sub-issues which often do not appear to relate to the general issue presented.³

³ To the extent Martin's reply brief raises additional issues, those issues are waived. See [Marin Real Estate Partners, L.P. v. Vogt](#), 373 S.W.3d 57, 72 (Tex.App.—San Antonio 2011, no pet.); [Lopez v. Montemayor](#), 131 S.W.3d 54, 61 (Tex.App.—San Antonio 2003, pet. denied).

“An issue is multifarious when it generally attacks the trial court's order with numerous arguments.” [Hamilton v. Williams](#), 298 S.W.3d 334, 338 n.3 (Tex.App.—Fort Worth 2009, pet. denied). “We may disregard any assignment of error that is multifarious.” *Id.*; see also [Shull v. United Parcel Serv.](#), 4 S.W.3d 46, 51 (Tex.App.—San Antonio 1999, pet. denied). “Alternatively, we may consider a multifarious issue if we can determine, with reasonable certainty, the error about which complaint is made.” [Hamilton](#), 298 S.W.3d at 338 n.3; see also [Shull](#), 4 S.W.3d at 51.

Applying this legal principle to Martin's brief, we can determine, with reasonable certainty, he complains about the following alleged errors:

(1) the trial court erred in signing the temporary injunction order in violation of the automatic stay set forth in [section 51.014\(b\) of the Texas Civil Practice and Remedies Code](#);

(2) the trial court erred in granting a temporary injunction because the appellees failed to plead a justiciable cause of action; and

(3) the trial court erred in denying his motion to dismiss under the Texas Citizens Participation Act because: (a) he met his burden to show that the underlying lawsuit was in response to his exercise of the right of free speech or petition; and (b) the appellees did not establish, by clear and specific evidence, a prima facie case for each essential element of their claim.

Accordingly, we address only these issues. See *Hamilton*, 298 S.W.3d at 338 n.3; *Shull*, 4 S.W.3d at 51.

TEMPORARY INJUNCTION ORDER AND AUTOMATIC STAY

In his first issue, Martin contends the trial court erred in signing the order granting the temporary injunction in violation of the automatic stay set forth in [section 51.014\(b\) of the Texas Civil Practice and Remedies Code](#) (“Code”). To support this contention, Martin relies on the reporter's record from the July 17, 2014 hearing on the motion to enter orders, from which it appears the trial court signed the motion denying Martin's motion to dismiss before signing the order granting the temporary injunction. Martin also relies on the premature notice of appeal he filed based on the trial court's verbal rulings at the July 9, 2014 hearing.

*4 [Section 51.014\(a\)\(12\)](#) of the Code allows a person to appeal from an interlocutory order of a trial court that denies a motion to dismiss filed under section 27.003 of the Texas Citizens Participation Act (“Act”). [TEX. CIV. PRAC. & REM. CODE ANN. § 51.014\(a\)\(12\)](#) (West 2015). Under [section 51.014\(b\)](#), an interlocutory appeal under [section 51.014\(a\)\(12\)](#) stays all proceedings in the trial court pending resolution of the appeal. *Id.* at § 51.014(b). “[T]he stay set forth in [section 51.014](#) is statutory and allows no room for discretion.” *Sheinfeld, Maley & Kay, P.C. v. Bellush*, 61 S.W.3d 437, 439 (Tex.App.—San Antonio 2001, no pet.); see also *Waite v. Waite*, 76 S.W.3d 222, 223 (Tex.App.—Houston [14th Dist.] 2002, no pet.).

[Section 51.014\(a\)\(12\)](#) only permits an appeal from the trial court's order, not a verbal ruling. *Id.* at § 51.014(a)(12). In this case, the trial court did not sign the order denying Martin's motion to dismiss until July 17, 2014. Martin contends that because he prematurely filed his notice of appeal before July 17, 2014, the stay imposed by [section 51.014\(b\)](#) immediately became effective when the trial court signed the order denying the motion to dismiss. As a result, Martin asserts the trial court lacked jurisdiction to sign the order granting the temporary injunction after the trial court signed the order denying the motion to dismiss. Because the trial court signed the order granting the temporary injunction after the order on the motion to dismiss was signed, Martin argues the order granting the temporary injunction violated the automatic stay and is void.

[Rule 27.1\(a\) of the Texas Rules of Appellate Procedure](#) provides, “In a civil case, a prematurely filed notice of appeal is effective and deemed filed *on the day of* but after, the event that begins the period for perfecting the appeal.” [Tex.R.App. P. 27.1\(a\)](#) (emphasis added). Accordingly, Martin's premature notice of appeal was deemed filed on the *day* that the trial court signed the order denying his motion to dismiss.

Martin suggests that [rule 27.1\(a\)](#) dictates that the trial court was subject to the [section 51.014\(b\)](#) stay the instant the trial court signed the order denying Martin's motion to dismiss. Under the circumstances of this case, we disagree.

In this case, the record clearly reflects that the trial court was simultaneously executing orders based on its prior verbal rulings. In pronouncing its verbal rulings, the trial court first granted the temporary injunction. Given these circumstances, interpreting [rule 27.1\(a\)](#) in the manner suggested by Martin would lead to an absurd result, *i.e.*, depriving a trial court of the authority to simultaneously execute orders in accordance with its prior verbal rulings. Just as this court will not construe statutes in a manner that leads to an absurd result, this court also will not construe an appellate rule in such a manner. See *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex.2010) (noting courts will not construe plain meaning of statute to lead to absurd result); see also *Verburt v. Corner*, 959 S.W.2d 615, 616 (Tex.1997) (noting Texas Supreme Court has instructed

the courts of appeals to construe the Rules of Appellate Procedure reasonably); *In re Emeritus Corp.*, 179 S.W.3d 112, 114 (Tex.App.—San Antonio 2005, orig. proceeding [mand. dism'd]) (noting courts apply same rules of construction to procedural rules as applied to statutes); *State v. Mercer*, 164 S.W.3d 799, 810–11 (Tex.App.—Corpus Christi 2005, pet. ref'd) (noting rules of statutory construction apply to construction of rules of appellate procedure); *Mercier v. State*, 96 S.W.3d 560, 562 (Tex.App.—Fort Worth 2002, pet. stricken) (same).

*5 Because the trial court simultaneously executed the order granting the temporary injunction and the order denying the motion to dismiss under section 27.003 based on its prior verbal rulings, we hold the section 51.014(b) automatic stay did not deprive the trial court of the jurisdiction to execute the order granting the temporary stay. Martin's first issue is overruled.

JUSTICIABLE CAUSE OF ACTION

In his second issue, Martin contends the temporary injunction is void because the appellees did not allege a justiciable cause of action in their pleadings. Martin specifically argues that neither an application to cancel a lis pendens nor an allegation of res judicata allege a cause of action sufficient to support the issuance of a temporary injunction.

“An injunction is an equitable remedy, not a cause of action.” *Brittingham v. Ayala*, 995 S.W.2d 199, 201 (Tex.App.—San Antonio 1999, pet. denied). “To obtain an injunction, a party must prove a probable right of recovery through a claim or cause of action.” *Id.* “If a claim or cause of action is not alleged, the trial court lacks authority to issue an injunction.” *Id.*

Although Martin's brief correctly acknowledges the foregoing legal principle, Martin does not properly construe the appellees' pleadings. In this case, the appellees' pleadings plainly allege a claim for tortious interference with contract.⁴ The appellees' petition contains a subheading entitled “Tortious Interference with Contractual Relations.” The petition sets forth the elements of such a claim and contains allegations relating to each of those elements. Texas has long-recognized a cause of action for tortious interference with contract. See *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 818 (Tex.2005); see also *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 712–13 (Tex.2001) (noting Texas also “has long recognized a tort cause of action for interference with a prospective contract or business relation”). Accordingly, because the appellees' pleading alleges a claim for tortious interference with contract, Martin's second issue is overruled.⁵

⁴ The appellees' brief refers to a second claim alleging the filing of a fraudulent lien which was added in an amended petition filed on July 8, 2014, the day before the trial court's hearing. Because we hold the tortious interference claim was sufficient to support the issuance of the temporary injunction, we do not address this second claim.

⁵ In this issue, Martin also refers to the requirement that a party must establish the existence of an imminent injury to obtain injunctive relief. See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex.2002) (listing “a probable, imminent, and irreparable injury in the interim” as an element an applicant for a temporary injunction must plead and prove). In addition to this reference making the issue multifarious, we note Martin refers to a “transfer to Torrabla” as evidence to defeat this element. This reference, however, relies on evidence outside our appellate record. This court may not consider matters outside the appellate record. See *Mauldin v. Clements*, 428 S.W.3d 247, 262 n.3 (Tex.App.—Houston [1st Dist.] 2014, no pet.); *In re D.A.M.*, No. 04–13–00601–CV, 2013 WL 6546950, at *1 (Tex.App.—San Antonio Dec. 11, 2013, pet. denied) (mem.op.); *Siefkas v. Siefkas*, 902 S.W.2d 72, 74 (Tex.App.—El Paso 1995, no writ).

TEXAS CITIZENS PARTICIPATION ACT

*6 In his final issue, Martin contends the trial court misapplied the burden shifting procedures of the Texas Citizens Participation Act (“Act”) by “neglecting to notice that lis pendens filings involve protected speech.” Martin also asserts the appellees failed to offer clear and specific evidence to substantiate each element of their cause of action.

A. Overview of the Act and Standard of Review

Among other purposes, the Act is designed to “encourage and safeguard the constitutional rights of persons to petition ... and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” [TEX. CIV. PRAC. & REM.CODE ANN. § 27.002 \(West 2015\)](#). The Act is to “be construed liberally to effectuate its purpose and intent fully.” *Id.* at § 27.011(b).

In order to promote these purposes, the Act “creates an avenue at the early stage of litigation for dismissing unmeritorious suits that are based on the defendant's exercise of the rights of free speech, petition, or association” as the Act defines those rights. *In re Lipsky*, 411 S.W.3d 530, 539 (Tex.App.—Fort Worth 2013, orig. proceeding [mand. pending]). In this regard, the Act contains “a burden-shifting mechanism” in seeking and defending against a dismissal. *Rio Grande H2O Guardian v. Robert Muller Fam. P'ship Ltd.*, No. 04–13–00441–CV, 2014 WL 309776, at *2 (Tex.App.—San Antonio Jan. 29, 2014, no pet.); *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 723 (Tex.App.—Houston [14th Dist.] 2013, pet. denied). The moving party must show by a preponderance of the evidence that the legal action it seeks to dismiss is “based on, relates to, or is in response to the party's exercise of” the right of free speech, petition, or association. [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(b\)](#) (West 2015); *see also* *Rio Grande H2O Guardian*, 2014 WL 309776, at *2; *In re Lipsky*, 411 S.W.3d at 539; *Rehak*, 404 S.W.3d at 723. If the moving party meets this burden, the burden shifts to the party bringing the legal action to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(c\)](#); *see also* *Rio Grande H2O Guardian*, 2014 WL 309776, at *2; *In re Lipsky*, 411 S.W.3d at 539; *Rehak*, 404 S.W.3d at 723–24. We review both steps in this analysis under a *de novo* standard of review. *See* *Rio Grande H2O Guardian*, 2014 WL 309776, at *2; *Rehak*, 404 S.W.3d at 724–27.

B. Exercise of Right to Petition

Focusing on the first step in our analysis, the appellees' tortious interference claim relates to Martin's continual filings of notices of lis pendens and documents with the district clerk and in the deed records clouding title to the Property. In fact, the appellees' motion for contempt that remains pending in the trial court directly relates to Martin's filing of a notice of lis pendens in the underlying cause notifying potential purchasers of his pending counterclaims regarding title to the Property.

The “exercise of the right to petition” includes a “communication in or pertaining to a judicial proceeding” and a “communication in connection with an issue under consideration or review by a ... judicial ... body.” [TEX. CIV. PRAC. & REM.CODE ANN. § 27.001\(4\)\(A\)\(i\), \(4\)\(B\)](#) (West 2015). In this case, the lis pendens and documents filed by Martin all relate to his pending claim in the underlying lawsuit that he has an interest in the Property. Accordingly, we hold Martin met his burden of showing by a preponderance of the evidence that the appellees' lawsuit is “based on, relates to, or is in response to [Martin's] exercise of” the right of petition. [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(b\)](#) (West 2015); *see also* *James v. Calkins*, 446 S.W.3d 135, 147–48 (Tex.App.—Houston [1st Dist.] 2014, pet. filed) (holding filing of notice of lis pendens and pleadings in lawsuit are communication in or pertaining to a judicial proceeding and lawsuit alleging claims based on those actions related to exercise of right to petition).

C. Clear and Specific Evidence

*7 Because Martin satisfied the first step of our analysis, the burden shifts to the appellees to establish “by clear and specific evidence a prima facie case for each essential element” of their tortious interference claim. [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(c\)](#); *see also* *Rio Grande H2O Guardian*, 2014 WL 309776, at *2; *In re Lipsky*, 411 S.W.3d at 539; *Rehak*, 404 S.W.3d at 723–24. The Act “does not define what sort of evidence satisfies the ‘clear and specific’ qualitative standard, but it expresses that in determining the propriety of dismissal, courts may consider ‘the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.’ ” *In re Lipsky*, 411 S.W.3d at 539 (quoting [TEX. CIV. PRAC. & REM.CODE ANN. § 27.006\(a\)](#)); *see also* *Rio Grande H2O Guardian*, 2014 WL 309776, at *2. “ ‘Clear and specific evidence’ has been described as evidence that is ‘unaided by presumptions, inferences, on intendments.’ ” *Rio Grande H2O Guardian*, 2014 WL 309776, at *2 (quoting *Rehak*, 404 S.W.3d at 726). “ ‘Prima facie evidence is evidence that, until its

effect is overcome by other evidence, will suffice as proof of a fact in issue.’ ” *Rio Grande H2O Guardian*, 2014 WL 309776, at *2 (quoting *Rehak*, 404 S.W.3d at 726). “ ‘In other words, a prima facie case is one that will entitle a party to recover if no evidence to the contrary is offered by the opposite party.’ ” *Rio Grande H2O Guardian*, 2014 WL 309776, at *2 (quoting *Rehak*, 404 S.W.3d at 726). “Therefore, in analyzing the second step, ‘we determine de novo whether the record contains a minimum quantum of clear and specific evidence that, unaided by inferences, would establish each essential element of the claim in question if no contrary evidence is offered.’ ” *Rio Grande H2O Guardian*, 2014 WL 309776, at *2 (quoting *Rehak*, 404 S.W.3d at 727). We also note that unlike other types of cases where pleadings are not considered evidence, section 27.006 of the Act, which is entitled “Evidence,” expressly provides, “In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.” *TEX. CIV. PRAC. & REM.CODE ANN* § 27.006(a). Therefore, we may consider the appellees’ pleadings as evidence in this case. *Rio Grande H2O Guardian*, 2014 WL 309776, at *3.

The elements of a tortious interference with contract claim are: (1) the existence of a contract subject to interference, (2) the occurrence of an act of interference that was willful and intentional, (3) the act was a proximate cause of the plaintiff’s damage, and (4) actual damage or loss occurred. *Holloway v. Skinner*, 898 S.W.2d 793, 795–96 (Tex.1995); *Benavides v. Mathis*, 433 S.W.3d 59, 63 n.3 (Tex.App.—San Antonio 2014, pet. denied). With regard to the existence of a contract, the pleadings alleged the appellees have a contract to sell the Property, and Bravenec identified the name of the prospective purchaser at the hearing. With regard to the occurrence of an act of interference, the pleadings alleged Martin had “admitted, in open court, his intention to obstruct [the] sale of the [P]roperty,” and evidence was introduced at the hearing of a series of willful, intentional acts taken by Martin to interfere with the appellees’ ability to sell the Property, including the filing of at least four prior lis pendens that were cancelled and expunged by various courts. The evidence also included the Perfected Notice of Lis Pendens filed by Martin in the underlying cause in response to which Bravenec filed his motion for contempt alleging Martin had violated the trial court’s temporary restraining order. The appellees’ pleadings further allege that Martin’s acts have prevented them from selling the Property since September of 2013, and the title company refused to insure the pending transaction until the lis pendens and other documents filed by Martin are removed. Bravenec also testified at the hearing that he had been trying to sell the Property for nine months, and Martin’s actions had prevented any sale. Having reviewed the pleadings and the entire record, we hold the appellees met their burden of establishing by clear and specific evidence a prima facie case for each essential element of their tortious interference claim.⁶

⁶ In arguing this issue in his brief, Martin again makes statements referring to a sale to Torrabla Properties as evidence to defeat the elements of the appellees’ tortious interference claim. As previously noted, however, this evidence is outside our record and will not be considered. See *Mauldin*, 428 S.W.3d at 262 n.3, *In re D.A.M.*, 2013 WL 6546950, at *1, *Siefkas*, 902 S.W.2d at 74. Additionally, in Martin’s reply brief, Martin makes several references to defenses to appellees’ tortious interference claim. It appears these references may be an effort to rely on section 27.005(d) of the Act which provides that if the non-movant satisfies its burden of establishing a prima facie case on each element of its claim, the trial court shall still dismiss the legal action if the moving party establishes each essential element of a valid defense. See *TEX. CIV. PRAC. & REM.CODE ANN*. § 27.005(d) (West 2015). As previously noted, this court will not consider issues raised for the first time in a reply brief. *Marin Real Estate Partners, L.P.*, 373 S.W.3d at 72; *Lopez*, 131 S.W.3d at 61. In briefing the issue regarding the trial court’s denial of his motion to dismiss under the Act in his initial brief, Martin did not argue that the trial court erred in denying his motion to dismiss because he presented evidence of each essential element of a valid defense under section 27.005(d). Accordingly, we will not consider that issue in resolving this appeal.

D. Conclusion

*8 Because Martin satisfied his burden of showing the underlying action related to his exercise of the right to petition, the burden shifted to the appellees to establish by clear and specific evidence a prima facie case for each essential element of their tortious interference with contract claim. Because we hold the appellees satisfied this burden, the trial court did not err in denying Martin’s motion to dismiss under the Act.

CONCLUSION

The trial court's orders granting a temporary injunction and denying Martin's motion to dismiss under the Act are affirmed.

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Court of Appeals of Texas,
El Paso.

MILLER WEISBROD, L.L.P., Lawrence Lassiter, Individually, and Les Weisbrod, Individually, Appellants,
v.
Jorge F. LLAMAS–SOFORO, M.D., Individually, and Jorge F. Llamas–Soforo, M.D., P.A., Appellees.

No. 08–12–00278–CV. | Nov. 25, 2014.

Synopsis

Background: Ophthalmologist brought action against attorneys and law firm, alleging that television commercials created by attorneys and law firm encouraging former patients to contact firm if they were left blind by treatment were slanderous, defamatory, and disparaging. The County Court at Law, No. 5, El Paso County, [Carlos Villa, J.](#), denied defendants' motions to dismiss. Defendants appealed.

Holdings: The Court of Appeals, [Yvonne T. Rodriguez, J.](#), held that:

[1] Court of Appeals had interlocutory jurisdiction over appeal of county court's denial of motions to dismiss pursuant to the Texas Citizens' Participation Act (TCPA), an anti-SLAPP statute;

[2] commercials were commercial speech within meaning of commercial speech exemption of TCPA, and thus firm and attorneys were exempt from TCPA's protection in defending action; and

[3] firm's motion to dismiss was an untimely “legal action” under the TCPA even though firm filed motion within 60 days of second amended petition.

Affirmed.

West Headnotes (13)

[1] **Appeal and Error** 🔑 Cases Triable in Appellate Court

A question of statutory construction is a legal one that is reviewed de novo.

[Cases that cite this headnote](#)

[2] **Statutes** 🔑 Language and intent, will, purpose, or policy

Statutes 🔑 Grammar, spelling, and punctuation

Statutes 🔑 Context

When construing statutes, courts ascertain and give effect to the legislature's intent by looking first and foremost at the statutory text, reading the words and phrases in context and construing them according to the rules of grammar and common usage. [V.T.C.A., Government Code § 311.011](#).

[1 Cases that cite this headnote](#)

- [3] **Statutes** 🔑 Plain language; plain, ordinary, common, or literal meaning

Statutes 🔑 Relation to plain, literal, or clear meaning; ambiguity

Where statutory text is clear, it is determinative of legislative intent unless the plain meaning of the statute's text would produce an absurd result.

[Cases that cite this headnote](#)

- [4] **Statutes** 🔑 Plain Language; Plain, Ordinary, or Common Meaning

Statutes 🔑 Context

Statutes 🔑 Relation to plain, literal, or clear meaning; ambiguity

The plain meaning of the statutory text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.

[1 Cases that cite this headnote](#)

- [5] **Statutes** 🔑 Intent

The court's primary objective in construing any statute is to determine the legislature's intent in enacting the particular provision, and to give that provision its intended effect.

[Cases that cite this headnote](#)

- [6] **Statutes** 🔑 Plain Language; Plain, Ordinary, or Common Meaning

Statutes 🔑 Superfluosness

Courts must interpret a statute according to the plain meaning of the language used and must read the statute as a whole without giving effect to certain provisions at the expense of others.

[Cases that cite this headnote](#)

- [7] **Statutes** 🔑 Language

Statutes 🔑 Absent terms; silence; omissions

Each word, phrase, or expression in a statute must be read as if it were deliberately chosen, and courts will presume that words excluded from a provision were excluded purposefully.

[1 Cases that cite this headnote](#)

- [8] **Appeal and Error** 🔑 On motions relating to pleadings

Court of Appeals has interlocutory jurisdiction over appeal of a trial court's denial of a defendant's motion to dismiss pursuant to the Texas Citizens' Participation Act (TCPA), an anti-SLAPP statute, when the court denies the motion by written order. [V.T.C.A., Civil Practice & Remedies Code § 27.008](#).

[1 Cases that cite this headnote](#)

[9] Pleading  Application and proceedings thereon

The party asserting the commercial speech exemption of the Texas Citizens' Participation Act (TCPA), an anti-SLAPP statute, bears the burden of proving its applicability. [V.T.C.A., Civil Practice & Remedies Code § 27.010\(b\)](#).

[Cases that cite this headnote](#)

[10] Attorney and Client  Duties and liabilities to adverse parties and to third persons

Pleading  Frivolous pleading

Lawyer advertising is commercial speech under the Texas Citizens' Participation Act (TCPA), an anti-SLAPP statute. [V.T.C.A., Civil Practice & Remedies Code § 27.010\(b\)](#).

[1 Cases that cite this headnote](#)

[11] Pleading  Frivolous pleading

Television commercials created by law firm and attorneys encouraging former patients of ophthalmologist to contact firm if they were left blind by his treatment were commercial speech within meaning of commercial speech exemption of the Texas Citizens' Participation Act (TCPA), an anti-SLAPP statute, and thus firm and attorneys were exempt from TCPA's protection in defending against ophthalmologist's claims that commercials were slanderous, defamatory, and disparaging; commercials' purpose was to locate potential clients with negligence claims against ophthalmologist and to encourage others to come forward and reveal relevant information which would have supported prosecuting for ongoing litigation against him, commercials were created not as a matter of public concern but primarily to attract clients injured by ophthalmologist, and speech arose from sale of legal services to potential customers. [V.T.C.A., Civil Practice & Remedies Code §§ 27.001\(7\), 27.010\(b\)](#).

[1 Cases that cite this headnote](#)

[12] Pleading  Application and proceedings thereon

Law firm's motion to dismiss ophthalmologist's claim alleging that commercials firm created were defamatory was an untimely "legal action" under the Texas Citizens' Participation Act (TCPA), an anti-SLAPP statute, even though firm filed motion within 60 days of second amended petition; first amended petition that joined firm was filed after effective date of TCPA and was duly served and put firm on notice of claim, first amended petition was the operative pleading to which firm should have responded, and general rule governing substituted pleadings contained exception for when it was necessary to look to prior pleading regarding a question of limitations. [V.T.C.A., Civil Practice & Remedies Code §§ 27.001\(6\), 27.002, 27.003\(b\)](#); [Vernon's Ann.Texas Rules Civ.Proc., Rule 65](#).

[1 Cases that cite this headnote](#)

[13] Appeal and Error  Motions

Law firm failed to preserve for appellate review its argument that trial court should have allowed its untimely motion to dismiss a defamation suit against it under the Texas Citizens' Participation Act's (TCPA) provision governing extension of time for good cause, where firm did not request, either orally or by written motion, an extension of time to file motion. [V.T.C.A., Civil Practice & Remedies Code §§ 27.001\(6\), 27.003\(b\)](#).

[2 Cases that cite this headnote](#)

Attorneys and Law Firms

Jeff Whitfield, Kelly Hart & Hallman LLP, Fort Worth, TX, for Appellants.

Steven C. James, Attorney at Law, El Paso, TX, for Appellees.

Before RIVERA, J., Not Participating, RODRIGUEZ, J., and LARSEN, Senior Judge (Sitting by assignment).

OPINION

YVONNE T. RODRIGUEZ, Justice.

*1 Three Appellants, Lawrence Lassiter, Les Weisbrod, and Miller Weisbrod, L.L.P. (the Law Firm) appeal the denial of their joint Motion to Dismiss (“the Motion”), pursuant to the Texas Citizens' Participation Act (“TCPA”), set forth in Chapter 27 of the [Texas Civil Practice and Remedies Code § 27.001](#) *et seq.* The Motion was filed in response to a lawsuit brought by Jorge F. Llamas–Soforo. Appellants, Lassiter and Weisbrod assert the [Texas Civil Practices and Remedies Code § 27.010\(b\)](#)(West Supp.2014) does not apply to lawyers as lawyers are not “primarily engaged” in the business of selling services. Appellant, the Law Firm, contends the Motion was timely filed as to the Law Firm and the trial court erred in holding otherwise. For the reasons set out below, we affirm.

BACKGROUND

Jorge F. Llamas–Soforo (“Llamas”) is an ophthalmologist, who resides and works in El Paso. Llamas treats medical conditions of the eye including [Retinopathy](#) of Prematurity (“ROP”), which affects the eyes of prematurely born infants. Dallas attorney Domingo Garcia and his law firm, Domingo Garcia, P.C. represented a number of Llamas' former patients as plaintiffs. Ultimately, Garcia referred them to the law firm, Miller Weisbrod, L.L.P. The Law Firm represented these parties in lawsuits against Llamas in Dallas County and El Paso County. Lawrence Lassiter is an attorney. Les Weisbrod is a partner with Miller Weisbrod and an attorney. The plaintiffs suffered from various levels of blindness which they alleged was the result of Llamas' improper diagnosis and/or treatment of premature babies with ROP.

In March of 2011, Appellants aired fifteen-second television commercials in El Paso regarding the cases against Llamas (“the Advertisement”).¹ The purpose of the Advertisement was two-fold: (1) to locate potential clients with negligence claims against Llamas; and (2) to encourage others to come forward and reveal relevant information which would support prosecution of ongoing litigation against Llamas.

The commercials aired in English and Spanish, with narration stating:

Male Voice: If your child was treated by Dr. Jorge Llamas–Soforo for [retinopathy](#) of prematurity and their vision was damaged or they were left blind by treatment, please call the number on your screen. Your child may be entitled to compensation.

Female Voice: We're currently representing children who had bad results by Dr. Jorge Llamas Soforo. We can help you, too.

Seven lawsuits were eventually filed.

Garcia initially said his firm paid for the Advertisement, however, later he stated that the Law Firm had paid for it. The decision to air the Advertisement was made jointly by Weisbrod and Garcia. Weisbrod suggested the Advertisement should be aired. Lassiter conducted the legal research regarding the Advertisement before it was aired.

On March 15, 2011, shortly after the Advertisement was first aired, Llamas filed a lawsuit against Garcia alleging the Advertisement was “slanderous, defamatory and disparaging.” On August 10, 2011, a First Amended Petition was filed which added the Law Firm as a defendant. On March 27, 2012, a Second Amended Petition was filed joining Lawrence Lassiter and Les Weisbrod, individually, as defendants. On May 31, 2012, Appellants filed a motion to dismiss pursuant to the TCPA, under Chapter 27 of the Texas Civil Practice & Remedies Code.

*2 In June 2012, the trial court held a hearing, limiting it to two issues. The first was whether the Motion was timely filed by the Law Firm in accordance with the TCPA. Second, whether Lassiter and Weisbrod are entitled to protection under TCPA or if they were exempt under 27.010(b). Two weeks following the hearing, the trial court issued a written order denying the Motion. In the order, the trial court found the Law Firm had not timely filed their TCPA Motion. The trial court also ruled Weisbrod and Lassiter were not entitled to protection under the TCPA because the exemption set out in [Section 27.010\(b\)](#) applied. Appellants timely filed their notice of appeal within sixty days. *See* [TEX.CIV.PRAC. & REM.CODE ANN. § 27.008\(a\)](#)(West Supp.2014).

DISCUSSION

Appellants present two issues. Appellants, Lassiter and Weisbrod, assert the [Texas Civil Practices and Remedies Code § 27.010\(b\)](#) does not apply to lawyers as lawyers are not “primarily engaged” in the business of selling services. Appellant, the Law Firm, argues the Motion to Dismiss was timely filed as to the Law Firm and the trial court erred in holding otherwise.

Llamas, on the other hand, questions whether the Court of Appeals has jurisdiction over this appeal arguing the TCPA does not authorize this type of interlocutory appeal.² We will address the jurisdictional issue first.

Standard of Review

[1] [2] [3] [4] A question of statutory construction is a legal one that we review *de novo*. *In re ReadyOne Industries, Inc.*, 394 S.W.3d 680, 684 (Tex.App.-El Paso 2012, orig. proceeding), *citing* *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex.2009). When construing statutes, we ascertain and give effect to the legislature's intent. *In re ReadyOne Industries, Inc.*, 394 S.W.3d at 684. We do so by looking first and foremost at the statutory text, reading the words and phrases in context and construing them according to the rules of grammar and common usage. *Summers*, 282 S.W.3d at 437; *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex.2006); [TEX.GOV'T CODE ANN. § 311.011](#) (West 2013). Where statutory text is clear, it is determinative of legislative intent unless the plain meaning of the statute's text would produce an absurd result. *Summers*, 282 S.W.3d at 437. “The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.” *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex.2011); *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex.2010).

[5] [6] [7] Our primary objective in construing any statute is to determine the legislature's intent in enacting the particular provision, and to give that provision its intended effect. *Emeritus Corporation v. Blanco*, 355 S.W.3d 270, 276 (Tex.App.-El Paso 2011, *pet. denied*). We must interpret the statute according to the plain meaning of the language used, and must read the statute as a whole without giving effect to certain provisions at the expense of others. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex.2003); *Emeritus Corp.*, 355 S.W.3d at 276. Each word, phrase, or expression must be read as if it were deliberately chosen, and we will presume that words excluded from a provision were excluded purposefully. *Emeritus Corp.*, 355 S.W.3d at 276; *Gables Realty Ltd. Partnership v. Travis Central Appraisal District*, 81 S.W.3d 869, 873 (Tex.App.-Austin 2002, *pet. denied*). Our analysis of the statutory text is also informed by the presumptions “the entire statute is intended to be

effective” and “a just and reasonable result is intended.”*In re S.S.A.*, 319 S.W.3d 796, 799 (Tex.App.-El Paso 2010, no pet.), quoting [TEX.GOV'T CODE ANN. § 311.021\(2\) & \(3\)](#) (West 2013). We are also instructed to consider: (1) the object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; and (4) consequences of a particular construction. *Id.*, quoting [TEX.GOV'T CODE ANN. § 311.023\(1\), \(2\), \(3\), \(5\)](#).

*3 We may consider TCPA's language and purpose in construing the statute. The Legislature explained its purpose in enacting the TCPA was “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.”[TEX.CIV.PRAC. & REM.CODE ANN. § 27.002](#) (West Supp.2014). We are also directed to “construe liberally to effectuate its purpose and intent fully.”[TEX.CIV.PRAC. & REM.CODE ANN. § 27.011\(b\)](#).

Jurisdiction of Interlocutory Appeal

Llamas asserts the plain language of the TCPA does not authorize an interlocutory appeal of a trial court's order written order granting or denying a motion to dismiss. His position is an interlocutory appeal is only permitted if the trial court fails to rule on a TCPA motion to dismiss. He directs this Court to [Jennings v. WallBuilder Presentations, Inc., ex rel. Barton](#), 378 S.W.3d 519 (Tex.App.-Fort Worth 2012, pet. denied) in support of his position that a plain reading of the statute does not explicitly allow for an interlocutory appeal from a written order, only from a trial court's failure to rule and, thus, deprives this court of jurisdiction.

The purpose of the TCPA, is to:

[E]ncourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time protect the rights of a person to file meritorious lawsuits for demonstrable injury.

[TEX.CIV.PRAC. & REM.CODE ANN. § 27.002](#) (West Supp.2014).

The TCPA is considered an anti-SLAPP law, designed to provide defendants in so-called SLAPP (“Strategic Lawsuits Against Public Participation”) lawsuits the ability to have these suits dismissed early on. House Research Org., Bill Analysis, Tex. H.B. 2973, 82nd Leg, R.S. (2011); Senate Research Ctr., Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011).*See, e.g. Jennings*, 378 S.W.3d at 521 n. 1.

If a legal action is “based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action,” provided the motion to dismiss is filed not later than “the 60th day after the date of service of the legal action.”[TEX.CIV.PRAC. & REM.CODE ANN. § 27.003\(a\) and \(b\)](#) (West Supp.2014). A hearing on the motion to dismiss must be set not later than the 30th day after the date of service of the motion.[TEX.CIV.PRAC. & REM.CODE ANN. § 27.004\(a\)](#) (West Supp.2014). The trial court must rule on a Chapter 27 motion to dismiss not later than the 30th day following the date of the hearing on the motion. [TEX.CIV.PRAC. & REM.CODE ANN. § 27.005\(a\)](#) (West Supp.2014).

Section 27.008 is entitled “Appeal” and provides as follows:

*4 (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by [Section 27.005](#), the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An 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](#).

- (c) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by [Section 27.005](#) expires, as applicable.

[TEX.CIV.PRAC. & REM.CODE ANN. § 27.008](#) (West Supp.2014).

In *Jennings*, the trial court held a hearing on a TCPA motion to dismiss and denied the motion in a written interlocutory order. [378 S.W.3d at 522](#). The Fort Worth Court of Appeals determined it lacked appellate jurisdiction, based on its reading of [Section 27.008\(a\)](#). *Id.* at 524–529. The Court found an interlocutory appeal is permitted only if the trial court fails to rule on the motion within the statutory deadline, thereby resulting in the motion being denied by operation of law. *Id.* The Court also analyzed [Section 27.008\(b\)](#) and determined, while the subsection mandates an appeal be expedited, it does not allow for an interlocutory appeal if the trial court enters an order either denying or granting the motion to dismiss. *Id.* at 525. The *Jennings* court suggested the filing of a writ of mandamus could provide a possible remedy. Further, if a trial court denied the motion to dismiss, the party seeking the TCPA dismissal may still utilize a no-evidence summary judgment motion as a possible resolution. *Jennings*, [378 S.W.3d at 525–27](#). *Jennings* noted the text of [Section 27.008](#) was clear on its face, however, they found that a review of the legislative history did not support the appellant's arguments. *Id.* at 528. *Jennings* dismissed the appeal for lack of jurisdiction but granted a motion requesting the appeal be considered as an original proceeding. *Id.* at 529. *See also Lipsky v. Range Prod. Co.*, No. 02–12–00098–CV, 2012 WL 3600014, at *1 (Tex.App.-Fort Worth Aug. 23, 2012, pet. denied) (mem. op.) (citing *Jennings*, [378 S.W.3d at 529](#)) (adopting *Jennings* rationale dismissing appeal for want of jurisdiction); *In re Lipsky*, 411 S.W.3d 530, 538 (Tex.App.-Fort Worth 2013, orig. proceeding).

However, the majority of our sister courts who have considered this argument have rejected *Jennings* and invariably found TCPA conferred appellate jurisdiction over interlocutory appeals either denying or granting a motion to dismiss. *See KTRK TV., Inc. v. Robinson*, 409 S.W.3d 682, 688 (Tex.App.-Houston [1st Dist.] 2013, pet. denied) (finding jurisdiction over order denying motion); *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC*, No. 14–12–00896–CV, 2013 WL 407029 (Tex.App.-Houston [14th Dist.] Jan. 24, 2013, order) (finding jurisdiction over order granting motion); *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 351–52 (Tex.App.-Houston [1st Dist.] 2013, pet. denied) (finding jurisdiction over order denying motion); *KBMT Operating Co., LLC, v. Toledo*, 434 S.W.3d 276, 281 (Tex.App.-Beaumont 2014, pet. filed) (finding jurisdiction over order denying motion); *Avila v. Larrea*, 394 S.W.3d 646, 656 (Tex.App.-Dallas 2012, pet. denied) (finding jurisdiction TCPA motion to dismiss denied by operation of law); *Head v. Chicory Media, LLC*, 415 S.W.3d 559, 560 (Tex.App.-Texarkana 2013, no pet.) (the plain meaning of TCPA allows for interlocutory appeal); *Better Business Bureau of Metropolitan Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 306–07 (Tex.App.-Dallas 2013, pet. denied) (finding jurisdiction over order denying motion); *Better Bus. Bureau of Metro. Dallas, Inc. v. Ward*, 401 S.W.3d 440, 443 (Tex.App.-Dallas 2013, pet. denied) (finding jurisdiction over order denying TCPA motion).

*5 The trial court in *Beacon Hill* issued a written order dismissing a legal action pursuant to TCPA which was appealed. [2013 WL 407029](#), at *1. The appellees filed a motion to dismiss the appeal, arguing TCPA does not allow an interlocutory appeal if the trial court signs an express ruling granting dismissal. *Id.*, at *2. The Court of Appeals noted at the outset of their order, “[i]t is undisputed that this express dismissal order is interlocutory because the trial court has not adjudicated or severed ...” the counterclaims in the underlying suit. ³ *Id.*, at *1. The *Beacon Hill* court declined to follow *Jennings* and found the argument, “impermissibly renders portions of subsections (b) and (c) meaningless in contravention of statutory construction precepts.” *Id.*, at *3. The court analyzed the language of subsections (b) and (c) and held several portions of these subsections are “rendered meaningless” and “superfluous” if there were no interlocutory appeal available when a trial court expressly rules on the motion to dismiss by signed order. *Id.* at *3–*4. The court of appeals denied the appellees motion to dismiss the appeal for want of jurisdiction under TCPA. *Id.*, at *4.

After *Beacon Hill* was decided, the Corpus Christi Court of Appeals compared the holdings in *Jennings* and *Beacon Hill* and concluded [Section 27.008](#) permits an interlocutory appeal when the trial court denies the defendant's TCPA motion to dismiss by written order. *San Jacinto Title Services of Corpus Christi, LLC v. Kingsley Properties, LP*, No. 13–12–00352–CV, —S.W.3d —, —, 2013 WL 1786632, *5 (Tex.App.-Corpus Christi April 25, 2013, pet. denied). As the Corpus Christi court notes:

Subsection (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](#).” [TEX.CIV.PRAC. & REM.CODE ANN. § 27.008\(b\)](#).... The plain language of subsection (b) indicates that the legislature contemplated two situations: (1) an appeal from a trial court's *order* on a motion to dismiss brought under chapter 27 and (2) an appeal from the trial court's *failure* to issue an order on the motion to dismiss. Additionally, subsection (c) provides that an appeal or other writ must be filed with the court of appeals sixty days ‘after the trial court's order is signed’ or the time for the court to rule expires. To give [section 27.008](#) the construction appellee requests would render the language in subsections (b) and (c) meaningless. [Emphasis in orig.].

[San Jacinto Title](#), — S.W.3d at —, 2013 WL 1786632, at *4.

The court of appeals provides an example of a likely result if the *Jennings* argument is adopted:

Under appellee's reading of [section 27.008](#), whether a defendant receives appellate relief under the TCPA does not depend on whether they suffered the harm the TCPA was designed to prevent, but on the trial court's attentiveness to the motion to dismiss. A defendant whose motion was denied by written order would have no choice but to go to trial and receive a judgment before raising a First Amendment defense on appeal, but a second defendant sued under identical circumstances could immediately take an interlocutory appeal if the trial court failed to timely rule on his motion. The first defendant would effectively have no remedy under the TCPA even if the suit against him was the quintessential SLAPP suit. Appellee's interpretation creates an absurdity by drawing an artificial distinction within the class of defendants the TCPA was designed to protect regardless of whether they suffered the harm for which the legislature addressed by enacting the TCPA.

*6 [San Jacinto Title](#), — S.W.3d at —, 2013 WL 1786632, at *4.

Since this case has been pending on appeal, the Texas Legislature has amended the TCPA to allow an interlocutory appeal for a TCPA motion to dismiss filed under [Section 27.003](#) regardless whether the trial court rules on the motion or not. *See* Act of May 24, 2013, 83rd Leg., R.S., ch. 1042, H.B. 2935, § 4(12), 2013 Tex.Gen.Laws 2499, 2500 (codified at [TEX.CIV.PRAC. & REM.CODE ANN. § 51.014\(a\)\(12\)](#)(West Supp.2014))(the amendment). The amended Act does not provide for retroactive application.⁴ *Id.*

[8] We find the reasoning in *Beacon Hill*, *San Jacinto Title* and its progeny persuasive. We hold we have interlocutory appellate jurisdiction pursuant to [Section 27.008](#) when a trial court denies a defendant's motion to dismiss by written order. [TEX.CIV.PRAC. & REM.CODE ANN. § 27.008](#).

Commercial Speech Exemption

In their only issue, Appellants, Lassiter and Weisbrod, contend the trial court erred in finding they are “primarily engaged in the business of selling or leasing goods or services” and are not afforded the protection of the TCPA, pursuant to the exclusion set out in [Section 27.010\(b\)](#). Appellants contend lawyers are not “primarily engaged” in “selling services,” but are “primarily engaged in the profession of representing [their] clients.” The parties have extensively briefed and argued this issue. Appellants insist “lawyers [are] not *primarily engaged* in the business of selling services.” [Emphasis in orig.]. However, they also concede “a lawyer is secondarily ... engaged in selling services” but is not a “lawyer's *primary* business.” [Emphasis in orig.]. They argue “primarily” should be accorded its plain meaning, and point out the statute is “not intended to exempt those primarily engaged” in other businesses even if they sell or lease goods and services. However, those positions are contrary to a number of recently decided cases. A careful review of cases interpreting anti-SLAPP statutes and their application to lawyers' advertising suggest each case must be evaluated on its individual merits.

Section 27.010 sets out certain exceptions to the applicability of the TCPA. Subsection (b) provides TCPA:

[D]oes not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

TEX.CIV.PRAC. & REM.CODE ANN. § 27.010(b)(West Supp.2014).⁵

[9] This subsection can be described as a “commercial speech” exception. See *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88 (Tex.App.-Houston [1st Dist.] 2013, pet. denied), citing *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal.4th 12, 109 Cal.Rptr.3d 329, 230 P.3d 1117 (Cal.2010) (interpreting similar “commercial speech” provision under California anti-SLAPP law); *Schimmel v. McGregor*, 438 S.W.3d 847, 857 (Tex.App.-Houston [1st Dist.] 2014, no pet.). Further, the party asserting the exemption bears the burden of proving its applicability. See *Newspaper Holdings*, 416 S.W.3d at 89; *Pena v. Perel*, 417 S.W.3d 552, 555 (Tex.App.-El Paso 2013, no pet.); *Kinney*, 2014 WL 1432012, at *6.

*7 [10] First, we note the case law appears settled “lawyer advertising is commercial speech.” See *Neely v. Commission For Lawyer Discipline*, 196 S.W.3d 174, 181 (Tex.App.-Houston [1st Dist.] 2006, pet. denied), citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S.Ct. 2371, 2375, 132 L.Ed.2d 541 (1995).

A California appellate court provides a brief discussion regarding the applicability of an anti-SLAPP statute to lawyers' advertising, which we find pertinent to our analysis:

To be clear, we are not holding that lawyers are categorically excluded from the commercial speech exemption to the anti-SLAPP statute. Like proprietors of other commercial enterprises, the lawyer sells his services to prospective ‘buyer[s] or customer[s].’ It is also clear that lawyers engage in ‘commercial speech’ when they advertise their services. *Leoni v. State Bar*, (1985) 39 Cal.3d 609, 614, 627, 217 Cal.Rptr. 423, 704 P.2d 183 [analyzing as commercial speech an attorney's ‘massive advertising campaign’ in the form of personalized mailings to individuals named as defendants in pending lawsuits]. Consequently, we can envisage circumstances—such as a ‘massive advertising campaign’ divorced from individualized legal advice—under which the commercial speech exemption to the anti-SLAPP statute conceivably might apply to a lawyer's conduct. However, this is not such a case. As the trial court observed, this is not a case where Evans ‘sent out a bunch of mailers or a bunch of cold calls trying to get new clients [T]here is no evidence of any solicitation by mail or telephone or other media’

Taheri Law Group v. Evans, 160 Cal.App.4th 482, 491–92, 72 Cal.Rptr.3d 847, 854–55 (Cal.App. 2 Dist.2008).

We also note a case from Massachusetts, cited and argued by the parties, involving the applicability of the Massachusetts anti-SLAPP law to statements posted on an attorney created website. In *Cadle Co. v. Schlichtmann*, 448 Mass. 242, 859 N.E.2d 858 (Mass.2007) a debt collection company brought a lawsuit alleging defamation, among other claims, against an attorney. The defendant attorney moved to dismiss the lawsuit under the anti-SLAPP statute. The trial court denied the attorney's motion to dismiss and he appealed. In *Cadle*, the attorney created a website in which he described alleged illegal business practices' of the plaintiff. The website stated the attorney “now represents several other victims of Cadle's unlawful business practices.”*Id.* at 861. Further, it provided contact information to a telephone number solely owned by the attorney “[t]o find out more or if you believe you have been victimized by The Cadle Company”*Cadle*, 859 N.E.2d at 861. Additionally, he made numerous statements to media outlets regarding the same alleged illegal practices. *Id.* at 861.

The Massachusetts' Supreme Judicial Court found the website was created for commercial reasons, namely, in order to attract customers for the attorney's business. Thus, the lawsuit filed against the attorney could not be dismissed as having been based

solely and exclusively on the attorney's "petitioning activity." *Id.* at 864–66. The Supreme Judicial Court stated the attorney published the statements:

*8 [N]ot as a member of the public who had been injured by these alleged practices, but as an attorney advertising his legal services. The Web site was, in essence, designed ... to disseminate to the public information about [the collections company] and, by doing so, to attract clients to [the attorney's] law practice.

Id. at 864. The trial court's denial of the motion to dismiss was affirmed. *Id.* at 858.

Appellants contest the relevance of the *Cadle* case, arguing the Massachusetts anti-SLAPP statute is narrower than the TCPA. In support, they point to that portion of the *Cadle* opinion discussing the anti-SLAPP statute, arguing the Massachusetts version applies only to "five types of statements that comprise 'a party's exercise of its right of petition.'" *Id.* at 863. However, a subsequent Massachusetts decision notes:

No definition of the phrase ['a party's exercise of its right of petition'] will encompass every case that falls within the statute's reach, and some difficult factual situations will have to be assessed on a case-by-case basis. What we seek to do is to limit the statute's protection, in accordance with the legislative intent, to the type of petitioning activity the Constitution envisions in which parties petition their government as citizens, not as vendors of services.

Dickey v. Warren, 75 Mass.App.Ct. 585, 915 N.E.2d 584, 590 n. 7 (Mass.App.Ct.2009) (citing *Kobrin v. Gastfriend*, 443 Mass. 327, 332 n. 8, 821 N.E.2d 60, 64 (2005)), review denied, 920 N.E.2d 44, 455 Mass. 1107, cert. denied, 560 U.S. 926, 130 S.Ct. 3333, 176 L.Ed.2d 1223 (2010). We find Appellants' attempt to distinguish *Cadle* unpersuasive.

In *NCDR*, the Fifth Circuit concluded lawyer advertising under TCPA is commercial speech and subject to the exemption in Section 27.010(b). *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 755 (5th Cir.2014); *Lamons Gasket Co. v. Flexitallic, L.P.*, 9 F.Supp.3d 709, 711–12 (S.D.Tex.2014). The appellants in *NCDR* were two Texas lawyers and their law firm. *Id.* at 745. Appellants sponsored an advertising campaign that ran television, radio and internet advertisements to solicit former patients of appellees to represent. *Id.* The advertising campaign asserted that Appellee, Kool Smiles, a national chain of dental clinics, was the subject of government investigations of Medicaid Fraud and had performed harmful, unnecessary dental work on children for government reimbursements. *NCDR*, 745 F.3d at 745. Kool Smiles brought numerous causes of action to include defamation. *Id.* at 746. Appellants filed a TCPA motion to dismiss. *Id.* The trial court denied the motion to dismiss because it found that Appellants' were "primarily engaged in selling legal services to clients and that the ads offered those services to potential customers." *Id.* at 753. Thus, the advertising campaign was held to be commercial speech under TCPA. *Id.* Appellants' sole issue on appeal was that the trial court had incorrectly interpreted the commercial speech exemption under TCPA. *Id.* The Fifth Circuit ultimately found Appellants' "ads and other client solicitation are exempted from TCPA's protection because [Appellant's] speech arose from the sale of services where the intended audience was an actual or potential customer." *Id.* at 755.

*9 [11] Turning to the instant case, it is undisputed a television commercial was created by Appellants, a law firm and two attorneys. It was aired in English and Spanish in El Paso. The purpose of the Advertisement was, firstly, to locate potential clients with negligence claims against Llamas. Secondly, encourage others to come forward and reveal relevant information which would support prosecution of ongoing litigation against Llamas. The contents of the commercial are not disputed and stated:

Male Voice: If your child was treated by Dr. Jorge Llamas–Soforo for [retinopathy](#) of prematurity and their vision was damaged or they were left blind by treatment, please call the number on your screen. Your child may be entitled to compensation.

Female Voice: We're currently representing children who had bad results by Dr. Jorge Llamas Soforo. We can help you, too.

We find the television commercial was created, not as a "matter of public concern," (a term specifically defined by the TCPA) ⁶, but primarily to attract clients allegedly injured by Llamas. Like *NCDR*, Appellants' speech arose from the sale of their legal

services to potential customers. We hold the trial court did not err in finding Weisbrod and Lassiter advertisements were commercial speech and, thus, exempt from the protection of TCPA pursuant to [Section 27.010\(b\)](#). Lassiter and Weisbrod's sole issue is overruled.

Timeliness of Motion to Dismiss

Appellant, the Law Firm, in their sole issue, asserts the trial court incorrectly interpreted the TCPA by finding the Motion was filed untimely. A motion to dismiss is a “legal action” under TCPA and must be filed “not later than the 60th day after the date of service of the legal action.” [TEX.CIV.PRAC. & REM.CODE ANN. § 27.003\(b\)](#). The Law Firm concedes the Motion would be timely “if it were filed within 60 days of *either* the First Amended Petition or the Second Amended Petition” [Emphasis in orig.]. The issue is whether the TCPA sixty day deadline can be extended to the Second Amended Petition.

The Law Firm argues TCPA's use of the term “legal action” encompasses the Second Amended Petition. First, they urge us to define the term “legal action” broadly to include any subsequent pleading filed in a lawsuit. Second, under [Rule 65 of the Texas Rules of Civil Procedure](#) (providing that substituted pleadings take the place of prior pleadings), they posit would allow the Second Amended Petition to stand in the place of the First Amended Petition. Therefore, the TCPA sixty-day deadline would apply to each defendant, Garcia, the Law Firm, Lassiter, and Weisbrod upon service of the Second Amended Petition. Under this construction, the Law Firm concludes the motion is timely.

The TCPA was enacted and became effective on June 17, 2011. *See* Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 3, 2011 TEX.GEN.LAWS 961, 964. A “legal action” is defined by the TCPA as “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.” [TEX.CIV.PRAC. & REM.CODE ANN. § 27.001\(6\)](#). A “legal action” has been construed as “broad and evidences a legislative intent to treat any claim by any party on an individual and separate basis.” [Ward](#), 401 S.W.3d at 443.

*10 Like the case at hand, the Ward Law Firm filed an original petition against the Better Business Bureau (BBB) on May 13, 2011, which was prior to TCPA's effective date, June 17, 2011. *Id.* at 443. Ward, individually, was subsequently joined as a party plaintiff in an amended petition asserting individual claims against BBB on January 25, 2012. *Id.* The BBB filed a motion to dismiss pursuant to the TCPA and Ward argued it was untimely because it was not filed within sixty days of the original petition of May 13, 2011. *Id.* The Ward court found BBB had sixty days from service of the amended petition filed in January 2012 to file a TCPA motion to dismiss against Ward on his individual claims. *Id.* The record reflected BBB had timely filed their motion to dismiss, therefore, the Ward court concluded it had appellate jurisdiction to review the denial of BBB's TCPA motion to dismiss. *Id.*

In *James*, the Court stated “if a lawsuit was filed before June 17, 2011, but a new plaintiff joined the lawsuit after June 17, 2011, that plaintiff's claims are subject to dismissal under the TCPA.” [James v. Calkins](#), No. 01–13–00118–CV, 446 S.W.3d 135, —, 2014 WL 4100692, at *5 (Tex.App.-Houston [1st Dist.] Aug. 21, 2014, no pet. h.) (holding defendant's joined after the TCPA's effective date are subject to the TCPA); *see also San Jacinto Title Servs. of Corpus Christ, LCC v. Kingsley Props., LP*, No. 13–12–00352–CV, —S.W.3d —, —, 2013 WL 1786632, at *5–*6 (Tex.App.-Corpus Christi Apr. 25, 2013, pet. denied).

In *Check*, the appellant argued that a “legal action” encompassed an amended counter-claim and his sixty days deadline ran from the service of that document as opposed to the service of the original counterclaim upon him. [In re Estate of Check](#), 438 S.W.3d 829, 836 (Tex.App.-San Antonio 2014, no pet.). The court disagreed, stating “such an interpretation would lead to absurd results not intended by the Legislature.” *Id.* The court concluded if the interpretation were taken “to its logical conclusion ... a party's deadline for filing a motion to dismiss would invariably be extended by the filing of *any* substantive pleading relating to the Act, not just amended petitions and counterclaims.” [Emphasis in orig.]. *Id.* Further, these type of pleadings “would reset the deadline for a motion to dismiss under [Section 27.003\(b\)](#) [which] is irrational and at odds with one of the purposes of the Act, which is to allow a defendant *early in the lawsuit* to dismiss claims that seek to inhibit a defendant's constitutional rights to

petition, speak freely, associate freely, and participate in government as permitted by law.”*Id.* at 836. The court held appellant's motion to dismiss was untimely because it was not filed within sixty days of service of the original counterclaim. *Id.* at 837.

[12] After reading the statute as a whole in light of the Legislature's stated purpose for enacting it, we conclude that adopting the Law Firm's proposed interpretation of “legal action” leads to an absurd result. *Check*, 438 S.W.3d at 836. The Legislature's stated purpose in enacting the TCPA was to “encourage and safeguard” the exercise of First Amendment rights by Texans “to the maximum extent permitted by law” while also protecting the rights of persons to file lawsuits for “demonstrable injury.” [TEX.CIV.PRAC. & REM.CODE ANN. § 27.002](#). It is evident that the Legislature intended to effectuate the purpose of the TCPA by ensuring that courts will dismiss SLAPP suits quickly and without the need for prolonged and costly proceedings.⁷ The Law Firm's interpretation of “legal action” supposes that a motion to dismiss could be filed at almost any point, so long as a subsequent pleading qualifies as a “legal action.” We see nothing in the statute or its history and purpose to indicate the Legislature intended to create a perpetual opportunity to file a motion to dismiss whenever a pleading qualifies as a “legal action” under [Section 27.001\(6\).TEX.CIV.PRAC. & REM.CODE ANN. § 27.001\(6\)](#)(West Supp.2014).

*11 The original petition, filed by Llamas on March 15, 2011, named Garcia and his law firm as defendants. On August 10, 2011, the First Amended Petition added the Law Firm for the first time as a defendant. About seven months later, the Second Amended Petition, on March 27, 2012, added Lassiter and Weisbrod, individually, as defendants. On May 31, 2012, Lassiter and Weisbrod, individually and the Law Firm filed the Motion, however, the certificate of service indicates it was served on May 25, 2012 by mail. We find the First Amended Petition which joined the Law Firm and the Second Amended Petition which joined Lassiter and Weisbrod, were filed after the effective date, June 17, 2011, so therefore, subject to the TCPA. *Ward*, 401 S.W.3d at 443; *James*, 446 S.W.3d at —, 2014 WL 4100692, at *5.

The trial court denied the Law Firm's Motion on the sole basis of their late filing. The Law Firm does not dispute they were first served and named as a defendant upon the filing of the First Amended Petition in August 2011. Triggering the sixty day filing deadline for a TCPA motion to dismiss upon initial notice and service upon a party fulfills the Act's purpose in expediting these cases as the legislature intended. Given that they were duly served and put on notice of Llamas' claims in the First Amended Petition, we find it is the operative pleading the Law Firm should have responded to.

Therefore, the Law Firm needed to have filed a TCPA motion to dismiss within sixty days of the date of service of the First Amended Petition. According to the certificate of service the First Amended Petition was served upon the Law Firm on August 10, 2011. The Law Firm would have had to file its Motion no later than October 11, 2011. Even allowing a few days for receipt of the First Amended Petition, the Law Firm did not file their Motion for almost nine months, on May 31, 2012. The Law Firm's Motion was filed after sixty days and was untimely.

We note Appellant's argument that [TEX.R.CIV.P. 65](#) allows for substituted pleadings to take the place of the prior pleadings, so therefore, the Law Firm asserts the Motion was timely as to the last live pleading. However, [Rule 65](#) is the “general rule” and not absolute. *McCormick v. Stowe Lumber Co.*, 356 S.W.2d 450, 458 (Tex.Civ.App.-Austin 1962, writ ref'd n.r.e.); *Denton County Elec. Co-op., Inc. v. Hackett*, 368 S.W.3d 765, 772–73 (Tex.App.-Fort Worth 2012, pet. denied). The rule itself identifies an exception; in those instances when it is necessary to look to the prior pleading regarding a question of limitations. [TEX.R.CIV.P. 65](#). Given the precedent and the legislature's intent to expeditiously resolve TCPA cases, we find this argument unpersuasive. *Check*, 438 S.W.3d at 836; *Pickens*, 433 S.W.3d at 182–83; *Summersett*, 438 S.W.3d at 85.

[13] Alternatively, the Law Firm argues the court should allow the late filing under [Section 27.003\(b\)](#) “[t]he court may extend the time to file a motion under this section on a showing of good cause.” [TEX.CIV.PRAC. & REM.CODE ANN. § 27.003\(b\)](#). A careful review of the record, however, indicates the Law Firm neither, orally or by written motion, requested an extension of the time to file their Motion. Thus, without a request and a ruling, this issue has not been preserved for review. See [TEX.R.APP.P. 33.1\(a\)](#); *Check*, 438 S.W.3d at 836.

*12 The Law Firm fails to acknowledge the result such a holding would create. If we were to adopt the position that any subsequent filed document meets the definition of “legal action,” it would then create an unending opportunity to file a motion to dismiss which would ultimately defeat the purpose of the sixty day deadline. The Law Firm's issue is overruled.

CONCLUSION

Having overruled both of the Appellants' issues, the ruling of the trial court is hereby affirmed.

1 The clerk's record does not contain a DVD containing the Advertisement, although the trial court record includes the DVD. However, the parties do not dispute the contents of the Advertisement and a transcription of the Advertisement does appear in the clerk's record.

2 This was not presented as an issue on appeal, but appears in his argument and comprised the greater portion of his oral argument.

3 The same situation is present in this case, as the trial court did not reach the merits of the cause of action in deciding the Appellant's Motion to Dismiss.

4 We note the Austin court of appeals recently decided the amended Act did apply retroactively to a pending appeal filed before the adoption of the amendment. We decline to address the issue of retroactive application of the amended Act after having decided we have appellate jurisdiction based on statutory construction and precedent. See *Kinney v. BCG Att'y Search, Inc.*, No. 03–12–00579–CV, 2014 WL 1432012, at *3–*4 (Tex.App.-Austin April 11, 2014, pet. filed) (mem. op.)(determined TCPA 2013 amendment confers appellate jurisdiction retroactively); *Combined Law Enforcement Ass'ns of Tex. v. Sheffield*, No. 03–13–00105–CV, 2014 WL 411672, at *4 (Tex.App.-Austin Jan. 31, 2014, pet. filed) (mem. op.)(same). We likewise decline the parties' suggestion to address the retroactive application of the Act's amended appellate timelines. See *Spencer v. Pagliarulo*, No. 01–14–00376–CV, — S.W.3d —, —, 2014 WL 4851677, at *1–*2 (Tex.App.-Houston [1st Dist.] Sept. 30, 2014, no pet. h.).

5 The TCPA does not define the term “primarily engaged.” [TEX.CIV.PRAC. & REM.CODE ANN. § 27.001](#).

6 “Matter of public concern” includes an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace. [TEX.CIV.PRAC. & REM.CODE ANN § 27.001\(7\)](#)(West Supp.2014).

7 *Pickens v. Cordia*, 433 S.W.3d 179, 182–83 (Tex.App.-Dallas 2014, no pet.); *Summersett v. Jaiyeola*, 438 S.W.3d 84, 85 (Tex.App.-Corpus Christi 2013, pet. denied).

All Citations

--- S.W.3d ----, 2014 WL 6679122

2015 WL 3982687
Supreme Court of Texas.

Ashish Patel, Anverali Satani, Nazira Momin, Minaz Chamadia,
and Vijay Lakshmi Yogi, Petitioners/Cross-Respondents,

v.

[Texas Department of Licensing and Regulation](#), et al., Respondents/Cross-Petitioners

NO. 12-0657 | Argued February 27, 2014 | OPINION DELIVERED: June 26, 2015

Synopsis

Background: Commercial eyebrow threaders and owners of salons that employed them filed suit against Texas Department of Licensing and Regulation, Commission of Licensing and Regulation, and others, under Uniform Declaratory Judgments Act (UDJA), seeking declaratory and injunctive relief based on claim that cosmetology licensing statutes and regulations violated their right to substantive due course of law, as applied to threaders. The 200th Judicial District Court, Travis County, [Gisela D. Triana-Doyal, J.](#), denied State defendants' plea to jurisdiction, but granted their motion for summary judgment and denied plaintiffs' motion for summary judgment. Plaintiffs appealed. The [Austin Court of Appeals, 2012 WL 3055479](#), affirmed. Petition for review was granted.

Holdings: The Supreme Court, Johnson, J., held that:

[1] doctrine of sovereign immunity did not apply to suit against state defendants in which plaintiffs sought only equitable relief;

[2] constitutional challenge to cosmetology licensing scheme was viable;

[3] because eyebrow threaders had standing to challenge constitutionality of licensing scheme, trial court was not required to consider whether owners of salons had standing to raise same challenge;

[4] constitutional claim by unlicensed threader who had not suffered administrative sanction was ripe for judicial review;

[5] “redundant remedies” doctrine did not apply to require dismissal of claim under UDJA; and

[6] cosmetology licensing scheme violated substantive due course of law as applied to commercial eyebrow threaders who were required to obtain esthetician license to practice their trade.

Reversed and remanded.

Willett, J., filed concurring opinion in which [Lehrmann](#) and [Devine, JJ.](#), joined.

Boyd, J., filed concurring opinion.

Hecht, C.J., filed dissenting opinion in which [Guzman](#) and [Brown, JJ.](#), joined.

[Guzman, J.](#), filed dissenting opinion.

West Headnotes (25)

[1] **States**  **Declaratory judgment**

Doctrine of sovereign immunity did not apply to suit by eyebrow threaders and their salon employers against Texas Department of Licensing and Regulation and Commission of Licensing and Regulation, under Declaratory Judgment Act, in which plaintiffs challenged constitutionality of cosmetology statutes and regulations governing licensure requirements as applied and sought only declaratory and injunctive relief. [Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq.](#); [Tex. Occ. Code Ann. § 1602.257\(b\)](#); [16 Tex. Admin. Code §§ 83.10\(36\), 83.20\(b\)](#).

[Cases that cite this headnote](#)

[2] **States**  **Liability and Consent of State to Be Sued in General**

Sovereign immunity implicates a trial court's jurisdiction, and, when it applies, precludes suit against a state governmental entity.

[Cases that cite this headnote](#)

[3] **States**  **Particular Actions**

Sovereign immunity is inapplicable when a suit challenges the constitutionality of a statute and seeks only equitable relief.

[Cases that cite this headnote](#)

[4] **States**  **What are suits against state or state officers**

To fall within the “ultra vires” exception to sovereign immunity, a suit must allege that a state official acted without legal authority or failed to perform a purely ministerial act, rather than attack the officer's exercise of discretion; the governmental entities themselves remain immune from suit, though, because unlawful acts of officials are not acts of the State.

[Cases that cite this headnote](#)

[5] **States**  **What are suits against state or state officers**

The premise underlying the “ultra vires” exception to immunity is that the State is not responsible for unlawful acts of officials.

[Cases that cite this headnote](#)

[6] **Health**  **Immunity of boards and officers**

Claim by eyebrow threaders and their salon employers under Declaratory Judgment Act against Department of Licensing and Regulation and Commission for Licensing and Regulation, based on assertion that cosmetology statutes and regulations establishing licensing requirements for estheticians violated due course of law as applied to eyebrow threaders, was viable, and thus, was not subject to dismissal on plea to jurisdiction on basis of immunity. [Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq.](#); [Tex. Occ. Code Ann. § 1602.257\(b\)](#); [16 Tex. Admin. Code §§ 83.10\(36\), 83.20\(b\)](#).

[Cases that cite this headnote](#)

[7] **Pleading** 🔑 Statement of cause of action in general

Claims against state officials—like all claims—must be properly pleaded in order to be maintained.

[Cases that cite this headnote](#)

[8] **Constitutional Law** 🔑 Occupation, employment, and profession

Eyebrow threaders had standing to challenge constitutionality of statutes and regulations governing licensing requirements for estheticians, as they had suffered actual restrictions under challenged cosmetology scheme and were subject to regulatory proceedings against them for alleged violations of same, and therefore, trial court was not required to consider whether owners of salons where eyebrow threaders provided such services had standing to raise same challenge. [Tex. Occ. Code Ann. § 1602.257\(b\)](#); [16 Tex. Admin. Code §§ 83.10\(36\), 83.20\(b\)](#).

[Cases that cite this headnote](#)

[9] **Action** 🔑 Persons entitled to sue

Declaratory Judgment 🔑 Proper Parties

The standing doctrine identifies suits appropriate for judicial resolution; it assures there is a real controversy between the parties that will be determined by the judicial declaration sought.

[1 Cases that cite this headnote](#)

[10] **Action** 🔑 Persons entitled to sue

Constitutional Law 🔑 Persons Entitled to Raise Constitutional Questions; Standing

In order to have standing to challenge a statute, a plaintiff must both suffer some actual or threatened restriction under the statute and contend that the statute unconstitutionally restricts the plaintiff's rights.

[Cases that cite this headnote](#)

[11] **Action** 🔑 Persons entitled to sue

Generally, courts must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges.

[Cases that cite this headnote](#)

[12] **Declaratory Judgment** 🔑 Proper Parties

Injunction 🔑 Persons entitled to apply; standing

Where there are multiple plaintiffs in a case, who seek injunctive or declaratory relief (or both), who sue individually, and who all seek the same relief, a court need not analyze the standing of more than one plaintiff, so long as that plaintiff has standing to pursue as much or more relief than any of the other plaintiffs; the reasoning is fairly simple: if one plaintiff prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs.

[Cases that cite this headnote](#)

[13] Action 🔑 **Persons entitled to sue**

Standing is determined at the beginning of a case, and whether the relief ultimately granted is the same for all parties is not determinative of the question.

[Cases that cite this headnote](#)

[14] Health 🔑 **Proceedings in general**

Claim by unlicensed eyebrow threader and owners of salons that employed unlicensed threaders that statutes and regulations governing licensure requirements violated due course of law as applied was ripe for judicial review, even if threader and salon owners had not yet faced administrative enforcement, where one of owner's two salons had received two warnings for employing unlicensed threaders and owner was referred to Texas Department of Licensing and Regulation's legal department for enforcement, both owners risked \$5,000 in penalties daily for employing unlicensed threaders, and unlicensed threader worked for same salon against which prior notice of violation had issued. [Tex. Const. art. 1, § 19](#); [Tex. Occ. Code Ann. § 1602.257\(b\)](#); [16 Tex. Admin. Code §§ 83.10\(36\), 83.20\(b\)](#).

[Cases that cite this headnote](#)

[15] Action 🔑 **Moot, hypothetical or abstract questions**

Under the “ripeness” doctrine, courts must consider whether, at the time a lawsuit is filed, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote; thus, the ripeness analysis focuses on whether a case involves uncertain or contingent future events that may not occur as anticipated or may not occur at all.

[Cases that cite this headnote](#)

[16] Declaratory Judgment 🔑 **Statutory remedy**

“Redundant remedies” doctrine did not apply to require dismissal of unlicensed eyebrow threaders' claim against Texas Department of Licensing and Regulation and Commission of Licensing and Regulation, under Uniform Declaratory Judgments Act (UDJA), that cosmetology statutory and regulatory scheme establishing licensing requirements for estheticians violated due course of law as applied to threaders, based on State's claim that Administrative Procedures Act (APA) provided them with adequate alternative remedies to challenge disciplinary citations, namely, petition for judicial review alleging that administrative decision violated constitutional or statutory provision, or suit for pre-enforcement declaratory judgment that application of licensure requirements threatened to interfere with or impair legal right or privilege, where remedies available under APA would have been limited to reversal of administrative citations, while threaders were also seeking prospective, injunctive relief against future citations. [Tex. Gov't Code Ann. §§ 2001.038\(a\), 2001.174\(2\)\(A\)](#); [Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq.](#)

[Cases that cite this headnote](#)

[17] Declaratory Judgment 🔑 **Alternative, substitute or supplemental remedy**

Under the “redundant remedies” doctrine, courts will not entertain an action brought under the Uniform Declaratory Judgments Act (UDJA) when the same claim could be pursued through different channels. [Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq.](#)

[Cases that cite this headnote](#)

[18] Declaratory Judgment  [Statutory remedy](#)

When a plaintiff files a proceeding that only challenges the validity of an administrative rule, the parties are bound by the Administrative Procedure Act (APA) and may not seek relief under the Uniform Declaratory Judgments Act (UDJA), because such relief would be redundant. [Tex. Gov't Code Ann. § 2001.038](#); [Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq.](#)

[Cases that cite this headnote](#)

[19] Constitutional Law  [Economic rights and regulation](#)

The standard of review for as-applied substantive “due course of law” challenges to economic regulation statutes includes an accompanying consideration: whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest. [Tex. Const. art. 1, § 19](#).

[Cases that cite this headnote](#)

[20] Constitutional Law  [Presumptions and Construction as to Constitutionality](#)

Statutes are presumed to be constitutional.

[1 Cases that cite this headnote](#)

[21] Constitutional Law  [Economic rights and regulation](#)

The proponent of an as-applied challenge to an economic regulation statute under the Texas Constitution's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest, or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest; this standard includes the presumption that legislative enactments are constitutional and places a high burden on parties claiming a statute is unconstitutional. [Tex. Const. art. 1, § 19](#).

[Cases that cite this headnote](#)

[22] Constitutional Law  [Due process](#)**Constitutional Law**  [Due process](#)

The presumption of constitutionality of economic legislative enactments and the high burden to show their unconstitutionality under the Due Course of Law Clause of the Texas Constitution applies as well to regulations adopted by an agency pursuant to statutory authority. [Tex. Const. art. 1, § 19](#).

[Cases that cite this headnote](#)

[23] Constitutional Law  [Questions of law or fact](#)

Although whether a law is unconstitutional is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties.

[Cases that cite this headnote](#)

[24] Constitutional Law  [Barbers, beauticians, and cosmetologists](#)

Health 🔑 **Validity**

Cosmetology licensing scheme, which required 750 hours of instruction in state-approved training program for esthetician license, when considered as whole, was so burdensome as to be oppressive in light of State's interest in sanitation and safety requirements to protect public health, and thus, violated substantive due course of law as applied to commercial eyebrow threaders who were required to obtain esthetician license to practice their trade; even assuming that 430 of 750 required hours were arguably relevant to what commercial eyebrow threaders did in practice, threaders were still required to undergo equivalent of eight 40-hour weeks of training unrelated to health and safety as applied to threading, and threaders had to pay for such training, while being deprived at same time of opportunity to make money actively practicing their trade. [Tex. Const. art. 1, § 19](#); [Tex. Occ. Code Ann. § 1602.254\(b\)\(3\)](#); [16 Tex. Admin. Code §§ 83.20\(a\)\(6\)](#).

[Cases that cite this headnote](#)

[25] Licenses 🔑 **Eligibility for license**

It is not for courts to second-guess decisions of regulatory agencies as to the necessity for and the extent of training that should be required for different types of commercial service providers.

[Cases that cite this headnote](#)

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS.

Opinion

Justice [Johnson](#) delivered the opinion of the Court, in which Justice [Green](#), Justice [Willett](#), Justice [Lehrmann](#), and Justice [Devine](#) joined.

*1 In this declaratory judgment action several individuals practicing commercial eyebrow threading and the salon owners employing them assert that, as applied to them, Texas's licensing statutes and regulations violate the Texas Constitution's due course of law provision. They claim that most of the 750 hours of training Texas requires for a license to practice commercial eyebrow threading are not related to health and safety or what threaders actually do. The State concedes that over 40% of the required hours are unrelated, but maintains that the licensing requirements are nevertheless constitutional.

The trial court and court of appeals agreed with the State. We do not. We reverse and remand to the trial court for further proceedings.

I. Background

Eyebrow threading is a grooming practice mainly performed in South Asian and Middle Eastern communities. It involves the removal of eyebrow hair and shaping of eyebrows with cotton thread. "Threading," as it is most commonly known, is increasingly practiced in Texas on a commercial basis. Threaders tightly wind a single strand of cotton thread, form a loop in it with their fingers, tighten the loop, and then quickly brush the thread along the skin of the client, trapping unwanted hair in the loop and removing it. In 2011, commercial threading became regulated in Texas when the Legislature categorized it as a practice of "cosmetology." [See TEX. OCC. CODEE § 1602.002\(a\)\(8\)](#) (" '[C]osmetology' means the practice of performing or offering to perform for compensation ... [the] remov[al] [of] superfluous hair from a person's body using depilatories, preparations, or tweezing techniques...."). That categorization and its effects underlie this case.

In order to legally practice cosmetology in Texas a person must hold either a general operator's license or, in certain instances, a more limited but easier-to-obtain esthetician license. *Id.* § 1602.251(a). Licensing requirements for general operators include completing a minimum of 1,500 hours of instruction in a licensed beauty culture school and passing a state-mandated test. *Id.* § 1602.254; 16 TEX. ADMIN. CODE § 83.20(a). Requirements for an esthetician license include completing a minimum of 750 hours of instruction in an approved training program and passing a state-mandated test. TEX. OCC. CODEE § 1602.257(b); 16 TEX. ADMIN. CODE § 83.20(b). Commercial eyebrow threaders must have at least an esthetician license. *See* TEX. OCC. CODEE §§ 1602.002(a)(8), .257; *see also* 16 TEX. ADMIN. CODE § 83.10(36).

The Texas Department of Licensing and Regulation (TDLR or the Department), which is governed by the Texas Commission of Licensing and Regulation (the Commission), is charged with overseeing individuals and businesses that offer cosmetology services. TEX. OCC. CODEE §§ 51.051, .201(a), 1602.001–.002, 1603.001–.456. The executive director of TDLR is authorized to impose administrative fines of as much as \$5,000 per violation, per day. *See id.* §§ 51.302, 1602.251.

*2 In late 2008 and early 2009, TDLR inspected Justringz—a threading business with kiosk locations in malls across Texas—and found Nazira Nasruddin Momin and Vijay Lakshmi Yogi performing eyebrow threading without licenses. TDLR issued Notices of Alleged Violations to them for the unlicensed practice of cosmetology. Minaz Chamadia was also performing threading at Justringz without a license, but she was not cited by TDLR. The administrative hearings and fines pending against Momin and Yogi have been stayed pursuant to a Rule 11 Agreement. *See* TEX. R. CIV. P. 11.

Ashish Patel and Anverali Satani own threading salons named Perfect Browz. The State has not taken any administrative action related to Perfect Browz. Satani is the sole owner of another threading business, Browz and Henna. TDLR inspected and investigated Browz and Henna on the basis of complaints filed against it. Although Satani received two warnings for Browz and Henna employing unlicensed threaders, the Department did not issue a Notice of Alleged Violation. Like the proceedings against Momin and Yogi, prosecution of Browz and Henna has been stayed by agreement of the parties.

In December 2009, Patel, Satani, Momin, Chamadia, and Yogi (collectively, the Threaders) brought suit against TDLR, its executive director, the Commission, and the Commission's members (collectively, the State) pursuant to the Uniform Declaratory Judgments Act (UDJA) seeking declaratory and injunctive relief. *See* TEX. CIV. PRAC. & REM. CODEE §§ 37.001–.004, .006, .010. The Threaders alleged that the cosmetology statutes and administrative rules issued pursuant to those statutes (collectively, the cosmetology scheme) were unreasonable as applied to eyebrow threading and violated their constitutional right “to earn an honest living in the occupation of one's choice free from unreasonable governmental interference.” They specifically sought declaratory judgment that, as applied to them, the cosmetology statutes and associated regulations violate the privileges and immunities and due course guarantees of Article I, § 19 of the Texas Constitution. They also sought a permanent injunction barring the State from enforcing the cosmetology scheme relating to the commercial practice of eyebrow threading against them.

The Threaders moved for summary judgment, contending that “application of the state's cosmetology laws and administrative rules to the commercial practice of eyebrow threading is unconstitutional because it places senseless burdens on eyebrow threaders and threading businesses without any actual benefit to public health and safety.” The motion urged that the State could not constitutionally regulate the commercial practice of eyebrow threading as conventional cosmetology unless it could establish a real and substantial relationship between the statutes and regulations and the public's health and safety, and the State could not meet this standard. The State filed both a plea to the jurisdiction and a traditional motion for summary judgment. By its plea to the jurisdiction, the State challenged the Threaders' standing, contending that their claims were barred by sovereign immunity and the redundant remedies doctrine. In its motion for summary judgment, the State asserted that the Threaders failed to show that Texas's regulation of the practice of eyebrow threading deprived the Threaders of any substantive due process right protected by Article I, § 19 or to plead a privileges and immunities claim different from their substantive due process claim.

*3 The district court denied the State's plea to the jurisdiction, granted its motion for summary judgment, and denied the Threaders' motion for summary judgment. Both parties appealed.

The court of appeals affirmed. *Patel v. Tex. Dep't of Licensing & Regulation*, — S.W.3d — (Tex.App.–Austin 2012). As to the State's jurisdictional issues, the court held that the Threaders' suit was not barred by sovereign immunity or the redundant remedies doctrine, the Threaders had standing, and their claims were ripe. *Id.* at —. As to the merits, the appeals court concluded that under either the real and substantial or rational basis test, the State established that the challenged cosmetology scheme, as applied to the Threaders, does not violate [Article I, § 19](#). *Id.* at —.

In this Court the Threaders argue that (1) the real and substantial test governs substantive due process challenges to statutes and regulations affecting economic interests when the challenges are brought under [Article I, § 19 of the Texas Constitution](#); (2) the cosmetology statutes and rules are unconstitutional as applied to the Threaders because they have no real and substantial connection to a legitimate governmental objective; and (3) even if rational basis review is the correct constitutional test, under the appropriate test, the statutes and regulations are unconstitutional as applied to the Threaders.

The State contends that (1) it is immune from declaratory judgment claims raising constitutional challenges to statutes; (2) the Threaders' claims lack both justiciability and ripeness; (3) the claims are barred by the redundant remedies doctrine; (4) the business owners lack standing; (5) there is no real difference between the “real and substantial” and “rational relationship” tests for due process concerns; and (6) threading raises public health concerns, implicating valid governmental concerns, thus the challenged licensing statutes and regulations that address these concerns comport with the substantive due process requirements regardless of which test is applied.¹

¹ *Amicus curiae* briefs have been submitted by the Pacific Legal Foundation (in support of the Threaders); Houston Belt & Terminal Railway Co., BNSF Railway Co., and Union Pacific Railway Co.; and South Texas College of Law 2014 State Constitutional Law Class (not submitted in support of either party).

We address the arguments in turn, necessarily beginning with the jurisdictional issues the State raises. See *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex.2012) (noting that if a court does not have jurisdiction, its opinion addressing any issues other than jurisdiction is advisory).

II. Jurisdiction

A. Sovereign Immunity

[1] [2] [3] Sovereign immunity implicates a trial court's jurisdiction, and, when it applies, precludes suit against a governmental entity. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex.2004); *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 853 (Tex.2002). The State acknowledges this Court's decisions to the effect that sovereign immunity is inapplicable when a suit challenges the constitutionality of a statute and seeks only equitable relief. See *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex.2007) (concluding “that the appeals court did not err by refusing to dismiss the plaintiffs' claims [against the city] for injunctive relief on alleged constitutional violations”); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex.1995) (determining that a plaintiff whose constitutional rights have been violated may sue the State for equitable relief). But referencing *Texas Department of Insurance v. Reconvoyance Services, Inc.*, 306 S.W.3d 256, 258–59 (Tex.2010), and *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370–72 (Tex.2009), the State argues that our more recent decisions indicate that we may be departing from that rule. We are not.

*4 [4] In *Heinrich* we decided that sovereign immunity does not prohibit suits brought to require state officials to comply with statutory or constitutional provisions. 284 S.W.3d at 372. But, to fall within this “ultra vires exception,” a suit must allege that a state official acted without legal authority or failed to perform a purely ministerial act, rather than attack the officer's exercise of discretion. *Id.* The governmental entities themselves remain immune from suit, though, because unlawful acts of officials are

not acts of the State. *Id.* at 372–73. Thus, we concluded that suits complaining of ultra vires actions may not be brought against a governmental unit, but must be brought against the allegedly responsible government actor in his official capacity. *Id.* at 373.

We reconfirmed the point in *Reconveyance*, where we held that the trial court lacked jurisdiction to hear a suit against the Texas Department of Insurance. 306 S.W.3d at 258–59. We concluded that the claims were substantively ultra vires claims because the pleadings alleged the Department of Insurance had acted beyond its statutory authority. *Id.* That being so, the claims should have been brought against the appropriate state officials in their official capacities. *Id.*

[5] In this case, the Threaders did not plead that the Department and Commission officials exceeded the authority granted to them; rather, they challenged the constitutionality of the cosmetology statutes and regulations on which the officials based their actions. The State proposes that an official can act ultra vires either by acting inconsistently with a constitutional statute or by acting consistently with an unconstitutional one. It urges that the Threaders' claims fall within the “acting consistently with an unconstitutional statute” category. But the premise underlying the ultra vires exception is that the State is not responsible for unlawful acts of officials. *Heinrich*, 284 S.W.3d at 372. The State's proposal would effectively immunize it from suits claiming a statute is unconstitutional—an illogical extension of that underlying premise.

Contrary to the State's position, *Heinrich* and *Reconveyance* do not represent a departure from the rule that sovereign immunity is inapplicable in a suit against a governmental entity that challenges the constitutionality of a statute and seeks only equitable relief. *See id.* at 373 n.6. To the contrary, in *Heinrich* we clarified that “[f]or claims challenging the validity of ... statutes ... the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity.” *Id.* (citing *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex.1994)). And we have reiterated the principle more recently. *See Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 & n.3 (Tex.2011) (restating that state entities can be—and in some instances such as when the constitutionality of a statute is at issue, must be—parties to challenges under the UDJA); *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634 (Tex.2010) (holding that allegations against the lottery commissioner were not ultra vires allegations because the claim challenged a statute and was not one involving a government officer's action or inaction). Accordingly, because the Threaders challenge the validity of the cosmetology statutes and regulations, rather than complaining that officials illegally acted or failed to act, the ultra vires exception does not apply. The Department and the Commission are not immune from the Threaders' suit.

B. Viability

[6] [7] Next, the State contends that the officials are immune from suit because the Threaders had to prove their claims in order to survive a plea to the jurisdiction. *See Heinrich*, 284 S.W.3d at 372 (“To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.”). The State argues that because the trial court granted summary judgment to the State on the merits, the Threaders did not prove a valid claim, rendering their pleadings insufficient to give the trial court jurisdiction. The State relies on *Andrade v. NAACP of Austin*, in which we held that the Secretary of State was immune from suit because the constitutional claims against her were non-viable. 345 S.W.3d 1, 6, 11–12, 18 (Tex. 2011). But, our conclusion there simply followed a line of decisions in which we held that claims were not viable due to basic pleading defects. *Id.* at 13–14. *Andrade* stands for the unremarkable principle that claims against state officials—like all claims—must be properly pleaded in order to be maintained, not that such claims must be viable on their merits to negate immunity. *Id.* Because the Threaders' pleadings presented a viable claim, they were sufficient.

C. Justiciability

*5 Next, the State employs the doctrines of standing, ripeness, and redundant remedies to argue that the courts below, and this Court, lack jurisdiction because the claims of the Threaders are not justiciable. We consider each doctrine in turn.

1. Standing

[8] [9] [10] The standing doctrine identifies suits appropriate for judicial resolution. *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex.2001). Standing assures there is a real controversy between the parties that will be determined by the judicial declaration sought. *Id.* (quoting *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517–18 (Tex.1995)). “[T]o challenge a statute, a plaintiff must [both] suffer some actual or threatened restriction under the statute” and “contend that the statute unconstitutionally restricts the plaintiff’s rights.” *Garcia*, 893 S.W.2d at 518. The State argues that Patel and Satani—whose claims are based solely on their status as threading salon owners—lack standing because they fail both prongs of the standing test.

[11] [12] Generally, courts must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 152 (Tex.2012). However, “where there are multiple plaintiffs in a case, who seek injunctive or declaratory relief (or both), who sue individually, and who all seek the same relief[,] ... the court need not analyze the standing of more than one plaintiff—so long as that plaintiff has standing to pursue as much or more relief than any of the other plaintiffs.” *Id.* at 152 n.64. The reasoning is fairly simple: if one plaintiff prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs. *Id.*; see also *Andrade*, 345 S.W.3d at 6 (“Because the voters seek only declaratory and injunctive relief, and because each voter seeks the same relief, only one plaintiff with standing is required.”).

Here, Momin and Yogi, the threaders who received Notices of Alleged Violation, have standing, and the State does not contend otherwise. First, they have suffered some actual restriction under the challenged statute because TDLR initiated regulatory proceedings against each of them pursuant to their alleged violations of the Texas cosmetology statutes and regulations. And second, they are contending that the statute unconstitutionally restricts their rights to practice eyebrow threading. Accordingly, because Momin and Yogi have standing, we need not analyze the standing of Patel and Satani.

[13] The State also argues that because the Threaders seek attorneys’ fees, the relief ultimately awarded will not necessarily be identical. But standing is determined at the beginning of a case, and whether the relief ultimately granted is the same for all parties is not determinative of the question. Here, Momin and Yogi have standing to seek relief and that is all we need to determine. See *Andrade*, 345 S.W.3d at 6–11; *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626–27 (Tex.1996); *Garcia*, 893 S.W.2d at 518–19.

2. Ripeness

[14] The State next argues that the claims brought by Patel, Satani, and Chamadia are not ripe because Patel, Satani, and Chamadia have not faced administrative enforcement. We disagree.

*6 [15] Under the ripeness doctrine, courts must “consider whether, *at the time a lawsuit is filed*, the facts are sufficiently developed ‘so that an injury has occurred or is likely to occur, rather than being contingent or remote.’” *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex.2000) (emphasis in original) (citations omitted). Thus, the ripeness analysis focuses on whether a case involves uncertain or contingent future events that may not occur as anticipated or may not occur at all. *Id.* at 852.

Here, although Patel, Satani, and Chamadia have not yet faced administrative enforcement, the threat of harm is more than conjectural, hypothetical, or remote. Satani’s business, Browz and Henna, has received two warnings for employing unlicensed threaders, and he has been referred to TDLR’s legal department for enforcement. Patel and Satani risk \$5,000 in penalties daily for employing unlicensed threaders. **TEX. OCC. CODEE §§ 51.302(a), 1602.403(c)(1)**. And Chamadia works at the same threading salon where Momin and Yogi were cited. Because at the time the lawsuit was filed Chamadia was performing

threading services without a cosmetology license and Patel and Satani were employing threaders who did not have cosmetology licenses, these individuals were subject to a real threat of likely civil and criminal proceedings, as well as administrative proceedings that could result in penalties and sanctions. See *Mitz v. Tex. State Bd. of Veterinary Med. Exam'rs*, 278 S.W.3d 17, 26 (Tex.App.–Austin 2008, pet. dismissed by agr.) (holding that a constitutional challenge to a state-licensing law is ripe when enforcement of the law is “sufficiently likely” to occur). Therefore, their claims are ripe.

3. Redundant Remedies

[16] [17] The State also seeks to dismiss the claims of the Threaders who have received citations based on the redundant remedies doctrine. Under the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels. See, e.g., *Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 200 (Tex. 2007). The focus of the doctrine is on the initiation of the case, that is, whether the Legislature created a statutory waiver of sovereign immunity that permits the parties to raise their claims through some avenue other than the UDJA. See, e.g., *Aaron Rents, Inc. v. Travis Cent. Appraisal Dist.*, 212 S.W.3d 665, 669 (Tex.App.–Austin 2006, no pet.) (en banc) (“When a statute provides an avenue for attacking an agency order, a declaratory judgment action will not lie to provide redundant remedies.”); see also *Alamo Express, Inc. v. Union City Transfer*, 158 Tex. 234, 309 S.W.2d 815, 827 (1958) (holding “an action for declaratory judgment does not lie” in a suit that asserts a “direct attack upon the [agency's] order by appeal”).

The State maintains that the Legislature has provided Momin and Yogi two alternative avenues under the Administrative Procedures Act (APA): (1) a suit for judicial review alleging that the administrative decision was “in violation of a constitutional or statutory provision,” TEX. GOV'T CODE § 2001.174(2)(A); or (2) a suit for a pre-enforcement declaratory judgment alleging “that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.” *Id.* § 2001.038(a). The State contends that because either of those APA provisions permits Yogi and Momin to file suits that would redress their alleged injuries, they may not pursue relief under the UDJA.

*7 We disagree with the State's assertion that a favorable decision under Section 2001.174 of the APA—authorizing courts to review administrative decisions—would obviate the need for the relief the Threaders seek. See *id.* § 2001.174 (allowing state courts to reverse or remand existing agency orders, but not enjoin future ones). The available remedies on appeal from an administrative finding are limited to reversal of the particular orders at issue. *Id.* But the Threaders seek more than a reversal of the citations issued to Momin and Yogi. They seek prospective injunctive relief against future agency orders based on the statutes and regulations. Accordingly, because the declaration sought goes beyond reversal of an agency order, Section 2001.174 of the APA does not provide a redundant remedy.

[18] The State's contention that Section 2001.038 of the APA creates an avenue for pre-enforcement declaratory judgment that an agency rule is invalid and would redress the Threaders' alleged injuries is likewise unavailing. When a plaintiff files a proceeding that only challenges the validity of an administrative rule, the parties are bound by the APA and may not seek relief under the UDJA because such relief would be redundant. See *Leeper*, 893 S.W.2d at 443–44. The APA defines a rule as:

- (A) ... a state agency statement of general applicability that:
 - (i) implements, interprets, or prescribes law or policy; or
 - (ii) describes the procedure or practice requirements of a state agency;
- (B) includ[ing] the amendment or repeal of a prior rule; and
- (C) ... not includ[ing] a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

TEX. GOV'T CODE § 2001.003(6). Here the Threaders challenge both rules as defined by the APA and statutes. Because the Threaders cannot attack the constitutionality of the statutes pursuant to Section 2001.038 of the APA, their UDJA claims are not barred by the redundant remedies doctrine.

Having concluded that the lower courts had jurisdiction, we turn to the merits.

III. Constitutionality of the Statutes and Regulations

A. Due Course of Law

Article I, § 19 of the Texas Constitution provides that

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEX. CONST. art. I, § 19.

We have at least twice noted that Texas courts have not been entirely consistent in the standard of review applied when economic legislation is challenged under Section 19's substantive due course of law protections. See *Trinity River Auth. v. URS Consultants, Inc.–Tex.*, 889 S.W.2d 259, 263 & n.5 (Tex.1994); *Garcia*, 893 S.W.2d at 525. The Threaders go beyond those two cases. They assert that courts considering as-applied substantive due process challenges under Section 19 have mixed and matched three different standards of review through the years. They label those standards as: (1) real and substantial, (2) rational basis including consideration of evidence, and (3) no-evidence rational basis.

The Threaders argue that the first referenced standard—“real and substantial”—is exemplified by cases such as *State v. Richards*, 157 Tex. 166, 301 S.W.2d 597 (1957); *Aladdin's Castle, Inc. v. City of Mesquite*, 713 F.2d 137, 138 n.2 (5th Cir.1983) (applying Texas law); *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 215 (Tex.App.–Austin 2008, no pet.); *Texas State Board of Pharmacy v. Gibson's Discount Center, Inc.*, 541 S.W.2d 884, 887–89 (Tex.Civ.App.–Austin 1976, writ ref'd n.r.e.); *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 779 (Tex.Civ.App.–Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Humble Oil & Refining Co. v. City of Georgetown*, 428 S.W.2d 405, 407–08 (Tex.Civ.App.–Austin 1968, no writ); and *City of Coleman v. Rhone*, 222 S.W.2d 646, 649 (Tex.Civ.App.–Eastland 1949, writ ref'd). They interpret this standard as one in which the reviewing court considers whether (1) the legislative purpose for the statute is a proper one, (2) there is a real and substantial connection between that purpose and the language of the statute as the statute functions in practice, and (3) the statute works an excessive or undue burden on the person challenging the statute in relation to the statutory purpose. They argue that the distinguishing characteristic of cases employing the standard is that the courts using it consider evidence concerning both the government's purpose for a law and the law's real-world impact on the challenging party.

*8 The Threaders recognize that the real and substantial test affords less deference to legislative judgments than does the federal rational basis standard. But they point to *In the Interest of J.W.T.*, 872 S.W.2d 189, 197–98 & n.23 (Tex.1994); *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex.1992); and *LeCroy v. Hanlon*, 713 S.W.2d 335, 338–41 (Tex.1986), as examples of cases in which this Court specifically said or implied that certain language in the Texas Constitution affords more protection than comparable text in the federal Constitution. They also reference the United States Supreme Court as having noted in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), that Article I, § 19 of the Texas Constitution might afford more protections than does the Fourteenth Amendment. They claim that twenty other states utilize the “real and substantial” test.²

2 The Threaders cite the following to support their position: *Khan v. State Bd. of Auctioneer Exam'rs*, 577 Pa. 166, 842 A.2d 936, 946–48 & n.7 (2004) (upholding auctioneer regulations designed to prevent fraud); *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 758 A.2d 777, 780 (2000) (upholding commercial traffic limits that reduced congestion, pollution, and property damage); *Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis.2d 397, 475 N.W.2d 156, 158–59 (1991) (striking down taxicab dress code because it lacked a substantial relation to improving city's public image); *Katz v. S.D. State Bd. of Med. & Osteopathic Exam'rs*, 432 N.W.2d 274, 278–79 & n.6 (S.D.1988) (upholding medical-practice regulations designed to prevent malpractice and fraud); *Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm'n*, 217 Neb. 487, 351 N.W.2d 701, 704–06 (1984) (striking down liquor wholesale price controls because they lacked any substantial relationship to public welfare); *Myrick v. Bd. of Pierce Cnty. Comm'rs*, 102 Wash.2d 698, 677 P.2d 140, 143–47 (1984) (en banc), amended by 102 Wash.2d 698, 687 P.2d 1152 (striking down most provisions of massage parlor regulations); *Red River Constr. Co. v. City of Norman*, 624 P.2d 1064, 1067 (Okla.1981) (striking down municipal ordinance prohibiting sand trucks from using certain streets because the ordinance actually increased traffic and the risk of accidents); *Rockdale Cnty. v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465, 254 S.E.2d 846, 847 (1979) (reversing lower court ruling that zoning requirements were facially unconstitutional, but remanding to allow the plaintiff to show that the requirements had no real and substantial relationship to public health and safety); *In re Fla. Bar*, 349 So.2d 630, 634–35 (Fla.1977) (per curiam) (rejecting maximum contingency-fee schedule that failed to meaningfully address problem of excessive fees); *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 258 N.W.2d 414, 422, 427–29 (1977) (upholding law requiring employers to pay 70% of workers' compensation award while appeal of the award was pending); *Dep't for Natural Res. & Envtl. Prot. v. No. 8 Ltd. of Va.*, 528 S.W.2d 684, 686–87 (Ky.1975) (striking down law that conditioned the grant of strip-mining permits on obtaining the surface owner's consent because it was ineffective as an environmental-protection measure); *Hand v. H & R Block, Inc.*, 258 Ark. 774, 528 S.W.2d 916, 923 (1975) (striking down minimum price for franchise agreements because it bore no relation to public health and safety); *Leatham v. McGinn*, 524 P.2d 323, 325 (Utah 1974) (striking down law restricting cosmetologists to women's hair); *Md. State Bd. of Barber Exam'rs v. Kuhn*, 270 Md. 496, 312 A.2d 216, 224–25 (1973) (same); *Colo ex rel. Orcutt v. Instantwhip Denver, Inc.*, 490 P.2d 940, 943–45 (Colo.1971) (striking down ban on so-called “filled milk” products because the ban bore no relationship to protecting public safety or preventing fraud); *Brennan v. Ill. Racing Bd.*, 42 Ill.2d 352, 247 N.E.2d 881, 882–84 (1969) (striking down regulation that conditioned a horse trainer's license on his horses' drug-testing results); *Coffee-Rich, Inc. v. Comm'r of Pub. Health*, 348 Mass. 414, 204 N.E.2d 281, 286–89 (1965) (striking down law banning the sale of imitation coffee cream because the law did not prevent fraud or market confusion); *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 80 Nev. 483, 396 P.2d 683, 691–93 (1964) (striking down law that bound third parties to non-compete provisions in private contracts because the law did not promote competition); *Berry v. Koehler*, 84 Idaho 170, 369 P.2d 1010, 1014–15 (1961) (upholding regulation of dental prosthetics as licensed dentistry because licensure meaningfully protected the public); *Christian v. La Forge*, 194 Or. 450, 242 P.2d 797, 804 (1952) (en banc) (striking down fixed barbering prices because they only benefitted barbers, not the public).

*9 The Threaders present the second standard—“rational basis including consideration of evidence”—as being exemplified by cases such as *City of San Antonio v. TPLP Office Park Properties, L.P.*, 218 S.W.3d 60, 65–66 (Tex.2007); *Garcia*, 893 S.W.2d at 525–26; *Limon v. State*, 947 S.W.2d 620, 627–29 (Tex.App.–Austin 1997, no writ); and *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 590–600 (Tex.Civ.App.–Austin 1969, writ ref'd n.r.e.). Courts applying this test, the Threaders posit, lean heavily on the federal rational basis test and often weigh evidence—including expert testimony—to determine the purpose of a law and whether the law enacted to effect that purpose is reasonable.

The Threaders reference the third standard as “no evidence rational basis,” which they say is embodied in cases such as *Barshop*, 925 S.W.2d at 625, 632–33; *Garcia v. Kubosh*, 377 S.W.3d 89, 98–100 (Tex.App.–Houston [1st Dist.] 2012, no pet.); *Lens Express v. Ewald*, 907 S.W.2d 64 (Tex.App.–Austin 1995, no writ); and *Texas Optometry Board v. Lee Vision Center, Inc.*, 515 S.W.2d 380, 385–86 (Tex.Civ.App.–Eastland 1974, writ ref'd n.r.e.). Under the no-evidence version of the rational basis test, they argue, economic regulations do not violate Section 19 if they have any conceivable justification in a legitimate state interest, regardless of whether the justification is advanced by the government or “invented” by the reviewing court, and evidence “seldom” matters.

The Threaders say both the “real and substantial” and “rational basis including consideration of evidence” standards have two prongs, with the first being the primary difference between them. The first prong of the real and substantial standard, they maintain, is whether the challenged statute or regulation has a real and substantial connection to a legitimate governmental objective. They contrast that test with the rational basis including consideration of evidence standard, which they argue is more lenient and favorable toward the government because it asks only whether a statute or regulation arguably *could* bear some

rational relationship to a legitimate governmental objective. They further maintain that for both standards the second prong is whether, on balance, the challenged statute or rule imposes an arbitrary or unduly harsh burden on the challenger in light of the government's objective.

In light of the parties' contentions, we first briefly review the history of the due course of law language in [Article I, § 19](#).

B. Development of the Standard

The Declaration of Rights of the 1836 Republic of Texas Constitution included three separate rights guaranteeing “due course of law” or the “due course of the law of the land”: (1) the sixth, which (among other protections) prevented an accused in a criminal proceeding from being “deprived of life, liberty, or property, but by due course of law”; (2) the eleventh, which provided that an injured person “shall have remedy by due course of law”; and (3) the seventh, which provided that “[n]o citizen shall be deprived of privileges, outlawed, exiled, or in any manner disenfranchised, except by due course of the law of the land.” REP. OF TEX. CONST. OF 1836, Declaration of Rights 6–7, 11, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1083 (Austin, Gammel Book Co. 1898).

In 1845, a group of delegates met to draft and propose Texas's first state constitution. The committee responsible for drafting the Bill of Rights proposed including two due course of law clauses—not the three clauses in the Declaration of Rights of the 1836 Republic of Texas Constitution. Comm. on Bill of Rights & Gen. Provisions, *Journals of the Convention, Assembled at the City of Austin on the Fourth of July, 1845, for the Purpose of Framing a Constitution for the State of Texas, assembled July 11, 1845*, at 34 (Austin, Mine & Cruger 1845), *available at* <http://tarlton.law.utexas.edu/constitutions/texas1845/journals>. One of the suggested clauses protected an injured party's right to have “remedy by due course of law.” *Id.* The other clause incorporated the criminal due course of law protections from Section 6 of the Republic's Declaration of Rights into a composite due course guarantee: “No citizen of this state shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disenfranchised, except by due course of the law of the land.” *Id.* Thus, the committee's proposal added “life, liberty, property” to the existing due course of law guarantee, while removing the same phrase from the protections for the criminally accused. *Id.* The proposal also added “of this state” after the word “citizen.” The proposal was ratified as [Article I, § 16 of the Texas Constitution](#) of 1845.

*10 The language in the Due Course of Law Clause was not changed in the Texas Constitutions adopted in 1861, 1866, and 1869. *See* [TEX. CONST. OF 1861, art. I, § 16](#); [TEX. CONST. OF 1866, art. I, § 16](#); [TEX. CONST. OF 1869, art. I, § 16](#). But the Constitutional Convention of 1875 reexamined the clause and proposed changing it to its current language. Comm. on Bill of Rights, *Journal of the Constitutional Convention of the State of Texas, Begun and Held at the City of Austin, September 6th, 1875, assembled Oct. 2, 1875*, at 274 (Galveston, News Office 1875), *available at* <http://tarlton.law.utexas.edu/constitutions/texas1876/journals>. The proposals were adopted, resulting in the clause reading as it now does. *See* [TEX. CONST. art. I, § 19](#).

In 1873, two years before the convention that proposed the 1875 Texas Constitution, the United States Supreme Court interpreted the phrase “privileges or immunities” in the United States Constitution in the *Slaughter–House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873). There, several butchers challenged a Louisiana statute granting a single slaughtering company a monopoly on the butchering of animals in New Orleans. *Id.* at 38–39. The statute was challenged under the Thirteenth and Fourteenth Amendments to the federal Constitution. *Id.* at 58–59. In rejecting the butchers' claims, the Court discerned a distinction in the text of the Fourteenth Amendment between the “privileges and immunities of citizens of the United States” and those of “citizens of the several states,” and concluded that the Fourteenth Amendment protected only privileges and immunities which owed their existence to the federal government. *Id.* at 74, 78–79. It was the obligation of the states, according to the Supreme Court, to protect “privileges or immunities” founded in state citizenship, including even such fundamental rights as the right to acquire and possess property and to pursue and obtain happiness and safety. *Id.* at 74–78. Thus, discussions preceding proposal and adoption of the 1875 Texas Constitution were held against the backdrop of recent Supreme Court mandates placing guardianship

of non-federal rights of individuals squarely in the hands of the states. See DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, 292 (Seth S. McKay ed., Univ. of Tex. 1930).

Ratification of the Fourteenth Amendment to the United States Constitution in 1868 seemed to hasten development of substantive due process jurisprudence. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 354–56 (1868). The view in Texas was the same, as exemplified by cases such as *Milliken v. City Council of Weatherford*, 54 Tex. 388 (1881).³ There the Court addressed a claim by Weatherford's mayor that he had been improperly removed from office for violating a city ordinance that barred renting rooms to prostitutes without respect to whether the rooms were used for prostitution. *Id.* at 393. The Court concluded that the city could not prohibit prostitutes as a class from renting rooms because such action would be “unreasonable and in contravention of common right.” *Id.* at 394. Although the Court did not mention “due course” or “due process” of law, its supporting citations included Article I, § 19. See *id.* And in *Houston & Texas Central Railway Co. v. City of Dallas*, 98 Tex. 396, 84 S.W. 648 (1905), the Court considered the constitutionality of a municipal ordinance governing railroad crossing grades. The Court explained that

*11 it may often become necessary for courts, having proper regard to the constitutional safeguard ..., to inquire as to the existence of the facts upon which a given exercise of the [police] power rests, and into the manner of its exercise, and if there has been an invasion of property rights under the guise of this power, without justifying occasion, or in an unreasonable, arbitrary, and oppressive way, to give to the injured party that protection which the Constitution secures.

Id. at 653. In accord with decisions from the United States Supreme Court, this Court rejected the city's contention that a legislative judgment was conclusive. *Id.* at 653–54. The Court determined that the lower courts erred by upholding the ordinance without providing the railroad an opportunity to present evidence regarding the unreasonableness of the ordinance. *Id.*

³ As to procedural due process relationships between the Fourteenth Amendment and Article I, § 19, see *City of Sherman v. Henry*, 928 S.W.2d 464, 472–73 & n.5 (Tex.1996) (citing *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex.1995)), and *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252–53 (1887).

Texas judicial decisions in the nineteenth and early twentieth century indicated that the Texas Due Course of Law Clause and the federal Due Process Clause were nearly, if not exactly, coextensive. Such decisions generally tracked the thinking expressed by the Court in *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252–53 (1887), where the Court held that Article I, § 19 was not violated under the facts of that case because of the United States Supreme Court's interpretation of the Fourteenth Amendment in a similar case. During this period, Texas courts frequently addressed whether a legislative enactment was a proper exercise of the governmental unit's police power, examining justifications for the enactment and typically relying on decisions from the United States Supreme Court as guidance. See, e.g., *Mabee v. McDonald*, 107 Tex. 139, 175 S.W. 676, 680 (1915) (“ ‘Due process of law,’ as used in the fourteenth amendment, and ‘due course of the law of the land,’ as used in Article I, § 19, of the Constitution of Texas, ... according to the great weight of authority, are, in nearly if not all respects, practically synonymous.”), *rev'd on other grounds*, 243 U.S. 90, 92, 37 S.Ct. 343, 61 L.Ed. 608 (1917) (holding that federal Due Process Clause was violated); *St. Louis Sw. Ry. Co. of Tex. v. Griffin*, 106 Tex. 477, 171 S.W. 703, 704–07 (1914) (holding statute impairing corporation's right to discharge employees at will violated liberty of contract protected by both federal and state Constitutions); *Bruhl v. State*, 111 Tex.Crim. 233, 13 S.W.2d 93, 94–95 (1928) (statute prohibiting non-optometrist merchant from assisting a customer in purchase of eyeglasses violated both Article I, § 19 and the Fourteenth Amendment). Occasionally, Texas courts mentioned that a proper review involved examining the enactment for a “real or substantial” relationship to the government's police power interest in public health, morals, or safety—a standard consistent with decisions of the United States Supreme Court. See, e.g., *Ex parte Flake*, 67 Tex.Crim. 216, 149 S.W. 146, 148–50 (1911) (quoting *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887)).

As to federal due process standards, this period before 1935 is sometimes referred to as the “*Lochner* period” in reference to the United States Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). There,

the Court considered a statute regulating the number of hours that bakers could work, enacted ostensibly for the purpose of protecting the health of bakers. *Id.* at 45–47, 58, 25 S.Ct. 539. The Court determined that the legislatively declared purpose for an enactment could be disregarded by a court reviewing challenges to the statute and that

*12 [t]he purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose....

...[T]his section of the statute ... has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law.

Id. at 64, 25 S.Ct. 539. The Court held that the law was intended only “to regulate the hours of labor between the master and his employees” despite the legislature’s stated purpose of concern for the health of bakers. *Id.* Because the Fourteenth Amendment did not permit such a regulation without a legitimate health and safety justification, the Court struck down the law. Justice Holmes, in dissent, advanced a much more deferential standard of review:

We [have] said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists *only* when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.... *If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere.*

Id. at 68, 25 S.Ct. 539 (Holmes, J., dissenting) (emphasis added) (internal quotation marks omitted).

The Court remained within the bounds charted by *Lochner* for several years. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 38 S.Ct. 337, 62 L.Ed. 772 (1918); *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), *overruled in part by Phelps Dodge Corp. v. Nat'l Labor Relations Bd.*, 313 U.S. 177, 187, 61 S.Ct. 845, 85 L.Ed. 1271 (1941); *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908), *overruled in part by Phelps Dodge Corp.*, 313 U.S. at 187, 61 S.Ct. 845. Basically, then, during the “*Lochner* era,” substantive due process was a touchstone by which courts analyzed both the purpose and the effect of governmental economic regulation by scrutinizing them with a somewhat equivocal deference to the legislative body’s pronounced purpose for a law and its choice of the method embodied in the law to achieve that purpose.

The federal landscape changed in 1938. In *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), the Supreme Court pronounced that

regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis.

Id. at 152, 58 S.Ct. 778. Ensuing federal decisions tracked *Carolene Products*’ guidance that economic regulatory laws were presumed to be constitutional absent evidence or judicially known facts demonstrating that no rational basis existed for the regulation. For example, in 1955 in *Williamson v. Lee Optical of Oklahoma, Inc.*, the Supreme Court explained that

*13 [t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Texas courts were faced with the question of whether, after *Carolene Products*, to stay the course as to prior decisions interpreting Article I, § 19's due course of law provision, or follow the lead of the United States Supreme Court as to the Fourteenth Amendment's Due Process Clause. That is, Texas courts had to decide whether “due process of law,” as used in the Fourteenth Amendment, and “due course of law of the land,” as used in Article I, § 19 of the Texas Constitution, remained “in nearly if not all respects, practically synonymous,” or whether the meaning of the Texas Constitution remained the same as it had been earlier interpreted because the Constitution's language had not been amended through the political process. See *Mabee*, 175 S.W. at 680. As the parties to this case—and numerous Texas courts and commentators—have pointed out, the answer has not been made clear as to substantive due process challenges to governmental regulation of economic interests. As set out more fully above, the Threaders argue that in some cases this Court⁴ as well as courts of appeals have continued using a less deferential, heightened-scrutiny standard of review, while in some cases different ones have been applied.

⁴ See, e.g., *Tex. Power & Light Co. v. City of Garland*, 431 S.W.2d 511, 517–20 (Tex.1968) (holding ordinance must be reasonable exercise of city's police power, meaning ordinance must directly promote the general health, safety, welfare, or morals, and must have a “real and substantial” relation to such purpose); *State v. Richards*, 157 Tex. 166, 301 S.W.2d 597, 602 (1957) (explaining it is essential that the police power “be used for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists”).

[19] Following the lead of our prior jurisprudence, we conclude that the Texas due course of law protections in Article I, § 19, for the most part, align with the protections found in the Fourteenth Amendment to the United States Constitution. But, that having been said, the drafting, proposing, and adopting of the 1875 Constitution was accomplished shortly after the United States Supreme Court decision in the *Slaughter–House Cases* by which the Court put the responsibility for protecting a large segment of individual rights directly on the states. Given the temporal legal context, Section 19's substantive due course provisions undoubtedly were intended to bear at least some burden for protecting individual rights that the United States Supreme Court determined were not protected by the federal Constitution. That burden has been recognized in various decisions of Texas courts for over one hundred and twenty-five years. We continue to do so today: the standard of review for as-applied substantive due course challenges to economic regulation statutes includes an accompanying consideration as reflected by cases referenced above: whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest. See, e.g., *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex.1998) (stating that an ordinance “will violate substantive due process only if it is clearly arbitrary and unreasonable”) (emphasis in original); *Garcia*, 893 S.W.2d at 525 (determining statute was “sufficiently rational and reasonable to meet constitutional due course requirements”) (emphasis added); *Trinity River Auth.*, 889 S.W.2d at 264 (identifying statute as constitutional because it “strikes a fair balance” between the legislative purpose and rights of litigants) (emphasis added); *Hous. & Tex. Cent. Ry. Co.*, 84 S.W. at 653 (noting the constitutional inquiry was whether statute's effect was justified, or operated in “an unreasonable, arbitrary, and oppressive way”); *Milliken*, 54 Tex. at 394 (stating the constitutional inquiry was whether statute operated “unreasonabl[y] and in contravention of common right”).

*14 [20] [21] In sum, statutes are presumed to be constitutional. To overcome that presumption, the proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.

[22] [23] To be clear, the foregoing standard includes the presumption that legislative enactments are constitutional, e.g., *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex.1968), and places a high burden on parties claiming a statute is unconstitutional. See, e.g., *Tex. State Bd. of Barber Exam'rs v. Beaumont Barber Coll., Inc.*, 454 S.W.2d 729, 732 (Tex.1970). The presumption of constitutionality and the high burden to show unconstitutionality would apply as well to regulations adopted by an agency pursuant to statutory authority. See *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424, 428 (1946). Although whether a law

is unconstitutional is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties. *Garcia*, 893 S.W.2d at 520.

C. Application: The Texas Cosmetology Statutes and Regulations

[24] The Threaders do not contend that the State's licensing of the commercial practice of cosmetology is not rationally related to a legitimate governmental interest.⁵ But they strongly urge that the number of hours of training required to obtain even an esthetician license has an arbitrary and unduly burdensome effect as applied to them because the 750-hour requirement has no rational connection to reasonable safety and sanitation requirements, which the State says are the interests underlying its licensing of threaders. In resolving the issue, we consider the entire record. *Garcia*, 893 S.W.2d at 520.

⁵ The State has regulated the practice of cosmetology since 1935. *See* Act of Apr. 25, 1935, 44th Leg., R.S., ch. 116, 1935 Tex. Gen. Laws 304, 304–11, *repealed by* Act of May 13, 1999, 76th Leg., R.S., ch. 388, §§ 1, 6, 1999 Tex. Gen. Laws 1431, 2182–2206, 2439–40 (repealing former Act while also adopting the Occupations Code). The stated intent of the initial legislation was to “prevent the spreading of contagious and infectious diseases.” *Id.* at 304, 311 (observing that the purpose of the Act was to “protect the public from inexperienced and unscrupulous beauty parlors and beauty culture schools” in response to the public being “daily exposed to disease due to insufficient care as to sanitation and hygiene”).

Several statutes address safety standards and sanitary conditions relating to cosmetology. *See* TEX. OCC. CODEE §§ 1602.001, 1603.001. Commission rules also address public safety and sanitary conditions. *E.g.*, 16 TEX. ADMIN. CODE §§ 83.50(a), .53(a)-(b), .70(i), .71(b), .100–.115. To address competency of cosmetologists in Texas, the Legislature and Commission have imposed specific educational and training requirements for cosmetologists, estheticians, and salon operators. TEX. OCC. CODEE §§ 1602.001, .254, .255, .257. To become a licensed esthetician, threaders must take at least 750 hours of instruction in a Commission-approved training program, *id.* § 1602.254(b)(3), and take State-prescribed practical and written examinations. *See* 16 TEX. ADMIN. CODE §§ 83.20(a)(6), .21(c), .21(e). Those training programs must devote at least 225 hours of instruction to facial treatments, cleansing, masking, and therapy; 90 hours to anatomy and physiology; 75 hours to electricity, machines, and related equipment; 75 hours to makeup; 50 hours to orientation, rules, and laws; 50 hours to chemistry; 50 hours to care of clients; 40 hours to sanitation, safety, and first aid; 35 hours to management; 25 hours to superfluous hair removal; 15 hours to aroma therapy; 10 hours to nutrition; and 10 hours to color psychology. *Id.* § 83.120(b). Commission-approved beauty schools are not required to teach threading techniques. The schools are required to provide 25 hours of instruction in superfluous hair removal, which encompasses threading, but individual schools decide which techniques to teach. The record reflects that fewer than ten of the 389 Commission-approved Texas beauty schools teach threading techniques, and only one of those devotes more than a few hours to them. Further, threading techniques are not required to be part of the mandated tests. Both the practical and written tests are administered and scored by a third-party testing firm. The firm's testing guidelines show that the practical examination is an hour and thirty minutes in length and includes sanitation, disinfection and hair removal, but does not include threading, although a test-taker may *elect* to remove six hairs from the model's eyebrow using thread instead of tweezers during part of the exam. Nor does the written examination include questions as to threading techniques, although it includes globally relevant questions about sanitation, disinfection, and safety.

*15 As shown above, of the 750 hours of required instruction for an esthetician license, 40 are required to be directly devoted to sanitation, safety, and first aid. *Id.* But in addition, hygiene and sanitation are covered as they relate to four other portions of the curriculum: facial treatment, anatomy, rules and laws, and superfluous hair removal. Hygiene and sanitation are also addressed in the written and practical licensing exams, along with other topics including disinfection and safety.

One argument the Threaders make, which at its core challenges the rationality of *any* required training, is that the unlicensed practice of eyebrow threading is simply not a threat to public health and safety. In support of the argument they reference their expert witness who submitted a report addressing all of the available medical literature on eyebrow threading, as well as her own empirical analysis of the technique's safety. Based on her investigation and professional experience with eyebrow threading, the expert concluded that threading is safe and, from a medical perspective, requires nothing more than basic sanitation training.

But the Threaders' expert also raised public health concerns during her testimony. She testified that threading may lead to the spread of highly contagious bacterial and viral infections, including [flat warts](#), skin-colored lesions known as *molluscum contagiosum*, pink eye, [ringworm](#), [impetigo](#), and *staphylococcus aureus*, among others. She also agreed that failure to utilize appropriate sanitation practices—for example, proper use of disposable materials, cleaning of work stations, effective hand-washing techniques, and correct treatment of skin irritations and abrasions—can further expose threading clients to infection and disease.

Moving beyond the argument that threading does not pose health risks to begin with, the Threaders contend that as many as 710 of the required 750 training hours for an esthetician license are not related to properly training threaders in hygiene and sanitation, considering the activities they actually perform. The State argues that the Threaders greatly exaggerate the number of unrelated hours, but concedes that as many as 320 of the curriculum hours are not related to activities threaders actually perform.

[25] Differentiating between types of cosmetology practices is the prerogative of the Legislature and regulatory agencies to which the Legislature properly delegates authority. And it is not for courts to second-guess their decisions as to the necessity for and the extent of training that should be required for different types of commercial service providers. But we note in passing that persons licensed to apply eyelash extensions—a specialty involving the use of chemicals and a high rate of adverse reactions—are required to undergo only 320 hours of training. *See id.* We also note that when the Threaders filed suit, hair braiders were required to undergo only 35 hours of training, 16 of which were in health and safety. *See id.* § 83.120(b). Hair braiding, however, has since been deregulated by the Legislature. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 1, sec. 1602.002(2), 1999 Tex. Gen. Laws 1431, 2186, *repealed by* Act of May 22, 2015, 84th Leg., R.S., H.B. 2717 (to be codified at [TEX. OCC. CODEE §§ 1601.003, 1602.003\(b\)\(8\)](#)).

The fact that approximately 58% of the minimum required training hours are arguably relevant to the activities threaders perform, while 42% of the hours are not, is determinative of the aspect of the second prong of the as-applied standard which asks whether the effect of the requirements as a whole could be rationally related to the governmental interest. They could be. But the percentage must also be considered along with other factors, such as the quantitative aspect of the hours represented by that percentage and the costs associated with them when determining the other aspect of the second prong—whether the licensing requirements as a whole are so burdensome as to be oppressive to the Threaders. Where the number of hours required and the associated costs are low, the ratio of required hours to arguably relevant hours is less important as to the burdensome question. But its importance increases as the required hours increase. For example, if the statute and Commission's rules required ten hours of training for a threader to be licensed and 58 percent, or 5.8 hours, were arguably relevant to what threaders do, the burden of the irrelevant hours would weigh less heavily in determining whether the effect of the requirements as a whole on aspiring threaders is oppressive. In the case of the Threaders, however, the large number of hours not arguably related to the actual practice of threading, the associated costs of those hours in out-of-pocket expenses, and the delayed employment opportunities while taking the hours makes the number highly relevant to whether the licensing requirements as a whole reach the level of being so burdensome that they are oppressive.

*16 The dividing line is not bright between the number of required but irrelevant hours that would yield a harsh, but constitutionally acceptable, requirement and the number that would not. Even assuming that 430 hours (a number the Threaders dispute) of the mandated training are arguably relevant to what commercial threaders do in practice, that means threaders are required to undergo the equivalent of eight 40-hour weeks of training unrelated to health and safety as applied to threading. The parties disagree about the costs of attending cosmetology training required for a license to practice threading. The Threaders point to evidence that the cost averages \$9,000. The State says the \$9,000 cost is for private schools while public schools charge only \$3,500. Given the record as to the number of hours of training required for subjects unrelated to threading, our decision neither turns on, nor is altered by, the exact cost. But the admittedly unrelated 320 required training hours, combined with the fact that threader trainees have to pay for the training and at the same time lose the opportunity to make money actively practicing their trade, leads us to conclude that the Threaders have met their high burden of proving that, as applied to them,

the requirement of 750 hours of training to become licensed is not just unreasonable or harsh, but it is so oppressive that it violates [Article I, § 19 of the Texas Constitution](#).

IV. Response to the Dissents

The dissenting Justices say four things that bear responding to. First, they say that measuring the effects of the provisions by an “oppressive” standard is to measure it by no standard at all. *Post* at — (Hecht, C.J., dissenting); *post* at — (Guzman, J., dissenting). The actuality of the matter is that the standard they propose for measuring the effects of the provisions is for all practical purposes no standard. The only way an enactment could fail the test the dissenters advocate is if the purpose of the enactment were completely mismatched with—that is, it bore no rational relationship to—the provisions enacted to effect it. For example, assume in this case the record demonstrated conclusively, or the State conceded, that the Threaders are right and only 40 hours of the required training are relevant to safety and sanitation in performing threading. It would not matter under the CHIEF JUSTICE'S proposed standard. For under that standard, so long as at least some part of the required training could be rationally related to safety and sanitation, the entire 750 hours are rationally related because the provisions as a whole “might achieve the objective.” *Post* at —. The logical result of such standard would be that if the State were to require 1,500 or even more hours of training, the increased requirement would pass constitutional muster. Why is that so? Because if 40 hours of training might conceivably effect the Legislature's purpose and be constitutional, then any greater number that included that same 40 hours would also.

Second, the CHIEF JUSTICE references a small minority of other states that require threaders to be licensed either explicitly or by generally requiring licensing of those who commercially remove superfluous hair. *Post* at —. But the Threaders neither contest the rationality of the State's requiring them to be licensed, nor the requirement that they take training in subjects such as sanitation and hygiene. What they contest is the excessiveness of the training requirements given the magnitude of the irrelevant training. And whether that excessive requirement violates the Texas Constitution is not determined by the relationship between other states' statutes and regulations and their respective constitutions.

Third, the CHIEF JUSTICE says that articulating and weighing factors such as the cost and relevance of the required training in considering the constitutionality of the provisions is “generally referred to as legislating” and should not be done by judges, *post* at —, and JUSTICE GUZMAN asserts that any line drawing in this case should be done by the Legislature, *post* at —. But providing standards for measuring the constitutionality of legislative enactments is not only a judicial prerogative—it is necessary in order to make the law predictable and not dependent on the proclivities of whichever judge or judges happen to be considering the case. Indeed, the dissenting Justices would reach the result they propose by measuring the licensing provisions against standards—the standards of “rational relationship” jurisprudence—just different standards. *Post* at —. Expressing factors by which a statute's constitutionality is to be measured and by which we reach our decision is not legislating; it is judging and providing guidance for courts to use in future challenges to statutes or regulations, which history tells us will come.

*17 Fourth, the CHIEF JUSTICE refers to rediscovering and unleashing “the *Lochner* monster” if legislative enactments are measured against a standard other than the rational relationship standard. *Post* at —. But as discussed above, Texas courts, including this Court, have expressed and applied various standards for considering as-applied substantive due process claims for over a century. And it is those decisions on which the standards we set out today are based. Surely if those cases represented a “monster” running amuck in Texas, this Court would have long ago decisively dealt with it.

Courts must extend great deference to legislative enactments, apply a strong presumption in favor of their validity, and maintain a high bar for declaring any of them in violation of the Constitution. But judicial deference is necessarily constrained where constitutional protections are implicated.

V. Conclusion

The provisions of the Texas Occupations Code and Commission rules promulgated pursuant to that Code requiring the individual Threaders to undergo at least 750 hours of training in order to obtain a state license before practicing commercial threading violate the Texas Constitution.

We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings in accordance with this opinion.

Justice Willett filed a concurring opinion, in which Justice Lehrmann and Justice Devine joined.

Justice Boyd filed a concurring opinion.

Chief Justice Hecht filed a dissenting opinion, in which Justice Guzman and Justice Brown joined.

Justice Guzman filed a dissenting opinion.

Justice Willett, joined by Justice Lehrmann and Justice Devine, concurring.

*To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—that it was mine—that my hands were my own, and could earn more of the precious coin.... I was not only a freeman but a free-working man, and no master Hugh stood ready at the end of the week to seize my hard earnings.*¹

¹ FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 259 (photo. reprint 2001) (1882).

Frederick Douglass's irrepressible joy at exercising his hard-won freedom captures just how fundamental—and transformative—economic liberty is. Self-ownership, the right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.²

² Honest work, Pope Francis recently reflected, means more than just earning our daily bread: “Where there is no work, there is no dignity.” Pope Francis (Pontifex). June 11, 2014, 1:11 a.m. Tweet. Available at <https://twitter.com/Pontifex/status/608909299704709120>.

Texans are doubly blessed, living under two constitutions sharing a singular purpose: to secure individual freedom, the essential condition of human flourishing. In today's age of staggering civic illiteracy—when 35 percent of Americans cannot correctly name a single branch of government—it is unsurprising that people mistake majority rule as America's defining value.³ But our federal and state charters are not, contrary to popular belief, about “democracy”—a word that appears in neither document, nor in the Declaration of Independence. Our enlightened 18th- and 19th-century Founders, both federal and state, aimed higher, upended things, and brilliantly divided power to enshrine a *promise* (liberty), not merely a *process* (democracy).

³ Press Release, Annenberg Pub. Policy Ctr. of the Univ. of Penn., Americans know surprisingly little about their government, survey finds (Sept. 17, 2014), available at <http://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/Civics-survey-press-release-09-17-2014-for-PR-Newswire.pdf> (last visited June 25, 2015); see also ANNENBERG PUB. POLICY CTR., CIVICS SURVEY APPENDIX at 2 (2014) (providing the methodology for the study), <http://www.annenbergpublicpolicycenter.org/wp-content/uploads/Civics-survey-appendix-09-17-14.pdf> (last visited June 25, 2015).

*18 One of our constitutions (federal) is short, the other (state) is long—like *really* long—but both underscore liberty's primacy right away. The federal Constitution, in the first sentence of the Preamble, declares its mission to “secure the Blessings of Liberty.”⁴ The Texas Constitution likewise wastes no time, stating up front in the Bill of Rights its paramount aim to recognize

and establish “the general, great and essential principles of liberty and free government.”⁵ The point is unsubtle and undeniable: Liberty is not *provided* by government; liberty *preexists* government. It is not a gift from the sovereign; it is our natural birthright. Fixed. Innate. Unalienable.

⁴ U.S. CONST. pmbi.

⁵ TEX. CONST. art. I.

Democracy is two wolves and a lamb voting on what to have for lunch. Liberty is a well-armed lamb contesting the vote.⁶

⁶ Widely, if not assuredly, attributed to Benjamin Franklin.

This case concerns the timeless struggle between personal freedom and government power. Do Texans live under a presumption of liberty or a presumption of restraint? The Texas Constitution confers power—but even more critically, it constrains power. What *are* the outer-boundary limits on government actions that trample Texans' constitutional right to earn an honest living for themselves and their families? Some observers liken judges to baseball umpires, calling legal balls and strikes, but when it comes to restrictive licensing laws, just how generous is the constitutional strike zone? Must courts rubber-stamp even the most nonsensical encroachments on occupational freedom? Are the most patently farcical and protectionist restrictions nigh unchallengeable, or are there, in fact, judicially enforceable limits?

This case raises constitutional eyebrows because it asks building-block questions about constitutional architecture—about how we as Texans govern ourselves and about the relationship of the citizen to the State. This case concerns far more than whether Ashish Patel can pluck unwanted hair with a strand of thread. This case is fundamentally about the American Dream and the unalienable human right to pursue happiness without curtsying to government on bended knee. It is about whether government can connive with rent-seeking factions to ration liberty unrestrained, and whether judges must submissively uphold even the most risible encroachments.

The U.S. Supreme Court has repeatedly declared that the right to pursue a lawful calling “free from unreasonable governmental interference” is guaranteed under the federal Constitution,⁷ and is “objectively, deeply rooted in this Nation's history and tradition.”⁸ A pro-liberty presumption is also hardwired into the Texas Constitution, which declares no citizen shall be “deprived of life, liberty, property, [or] privileges or immunities”⁹—phrasing that indicates citizens already possess these freedoms, and government cannot take them “except by the due course of the law of the land.”¹⁰ Texans are thus presumptively free, and government must justify its deprivations. So just how nonsensically can government stifle your constitutional right to put your know-how and gumption to use in a gainful trade?

⁷ *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959).

⁸ *Washington v. Glucksberg*, 521 U.S. 702, 703, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *427 (“At common law every man might use what trade he pleased....”).

⁹ TEX. CONST. art. I, § 19 (emphasis added).

¹⁰ *Id.*

I recognize the potential benefits of licensing: protecting the public and preventing charlatanry. I also recognize the proven benefits of constitutional constraints: protecting the public and preventing collectivism. Invalidating irrational laws does not beckon a Dickensian world of run-amok frauds and pretenders. The Court's view is simple, and simply stated: Laws that impinge your constitutionally protected right to earn an honest living must not be preposterous.

*19 By contrast, the dissents see government power in the economic realm as infinitely elastic, and thus limited government as entirely fictive, troubling since economic freedom is no less vulnerable to majoritarian oppression than, say, religious freedom—perhaps more so. Exalting the reflexive deference championed by Progressive theorists like Justice Oliver Wendell Holmes, Jr., the dissents would seemingly uphold even the most facially protectionist actions. Stranger still, the principal dissent, while conceding that our state and federal Constitutions protect economic liberty, quotes liberally from Justice Holmes, who rejected that the Fourteenth Amendment does any such thing.¹¹

¹¹ The principal dissent dramatically—and predictably—accuses the Court of seeking to unleash the “*Lochner* monster,” trying to resurrect *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), in which the U.S. Supreme Court invalidated on federal “liberty of contract” grounds a state maximum-hours law for bakery workers. Post, at 12. (Hecht, C.J., dissenting). The *Lochner* bogeyman is a mirage but a ready broadside aimed at those who apply rational basis rationally. As one constitutional law scholar noted a generation ago, “‘*Lochnerizing*’ has become so much an epithet that the very use of the label may obscure attempts at understanding.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 435 (1st ed. 1978).

I doubt the 3–0 panel of the U.S. Court of Appeals for the Fifth Circuit and Judge Sparks of the Western District of Texas believed they were unleashing any monsters, or, scarier still, *legislating from the bench!*—when they recently struck down state economic regulations on rational-basis grounds. See *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir.), cert. denied, — U.S. —, 134 S.Ct. 423, 187 L.Ed.2d 281 (2013) (invalidating the Louisiana “casket cartel”); *Brantley v. Kuntz*, No. A–13–CA–872–SS, — F.Supp.3d —, 2015 WL 75244 (W.D.Tex. Jan. 5, 2015) (invalidating Texas barber-school regulations as applied to African hair braiding). Indeed, the Fifth Circuit in the casket cartel case dismissed the tired *Lochner* charge head-on, denying that the “ghost of *Lochner* [was] lurking about.” *St. Joseph Abbey*, 712 F.3d at 227.

In any event, as Justice Holmes cruelly proved, dogmatic majoritarianism can exact a ruthless price. In *Buck v. Bell*, the U.S. Supreme Court considered whether Carrie Buck, a Virginia teenager raped and impregnated by her foster parents' nephew, could be forcibly sterilized on grounds that she was “feeble minded.”¹² Speaking through Justice Holmes, the Court credulously accepted at face value the government's assertion that public welfare was a good-enough reason to forbid the “manifestly unfit from continuing their kind.”¹³ Compulsory sterilization was preferable to waiting to “execute degenerate offspring for crime, or to let them starve for their imbecility.”¹⁴ Nothing—not even coercive eugenics—trumped judicial submissiveness to whatever the majority decreed. Justice Holmes was unyielding, thundering one of the most heartless, ignominious lines in Supreme Court history: “Three generations of imbeciles are enough.”¹⁵

¹² 274 U.S. 200, 205, 47 S.Ct. 584, 71 L.Ed. 1000 (1927).

¹³ *Id.* at 207, 47 S.Ct. 584.

¹⁴ *Id.*

¹⁵ *Id.*

Justice Holmes later boasted to a friend that “[it] gave me pleasure, establishing the constitutionality of a law permitting the sterilization of imbeciles.”¹⁶ Unquestioning deference necessarily meant civil liberties were trampled, but Justice Holmes's pro-statism minced no words: “a law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell.”¹⁷ In fact, said Justice Holmes, “if my fellow citizens want to go to Hell I will help them. It's my job.”¹⁸

¹⁶ Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (May 19, 1927), in *THE HOLMES–EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903–1935* 267 (James Bishop Peabody, ed., 1964).

¹⁷ KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 151 (2004).

¹⁸ Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Mar. 4, 1920), in *1 HOLMES–LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935* 249 (Mark DeWolfe Howe ed., 1953).

Holmesian deference was praised by turn-of-the-century Progressives who craved a pervasive regulatory state, and got it via the New Deal-era U.S. Supreme Court.

*20 Like the Court, I favor a less hard-hearted and more liberty-minded view for Texas, one that sees the judiciary as James Madison did when he introduced the Bill of Rights, as an “impenetrable bulwark” against imperious government.¹⁹ The Texas Constitution enshrines structural principles meant to advance individual freedom; they are not there for mere show. Our Framers opted for constitutional—that is, *limited*—government, meaning majorities don't possess an untrammelled right to trammel. The State would have us wield a rubber stamp rather than a gavel, but a written constitution is mere meringue if courts rotely exalt majoritarianism over constitutionalism, and thus forsake what Chief Justice Marshall called their “painful duty”—“to say, that such an act was not the law of the land.”²⁰

¹⁹ See 1 ANNALS OF CONG. 439 (1789) (Joseph Gales ed., 1843).

²⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423, 4 L.Ed. 579 (1819).

To be sure, the Capitol, not this Court, is the center of policymaking gravity, and judges are lousy second-guessers of the other branches' economic judgments. Lawmakers' policy-setting power is unrivaled—but it is not unlimited. Preeminence does not equal omnipotence. Politicians decide if laws pass, but courts decide if those laws pass muster. Cases stretching back centuries treat economic liberty as constitutionally protected—we crossed that Rubicon long ago—and there is a fateful difference between active judges who defend rights and activist judges who concoct rights. If judicial review means *anything*, it is that judicial restraint does not allow *everything*. The rational-basis bar may be low, but it is not subterranean.

I support the Court's “Don't Thread on Me” approach: Threaders with no license are less menacing than government with unlimited license.

I.

This case lays bare a spirited debate raging in legal circles, one that conjures legal buzzwords and pejoratives galore: activism vs. restraint, deference vs. dereliction, adjudication vs. abdication. The rhetoric at times seems overheated, but the temperature reflects the stakes. It concerns the most elemental—if not elementary—question of American jurisprudence: the proper role of the judiciary under the Constitution.

Judicial duty requires courts to act judicially by adjudicating, not politically by legislating. So when *is* it proper for a court to strike down legislative or executive action as unconstitutional? There are people of goodwill on both sides, and as this case demonstrates, it seems a legal [Rorschach test](#), where one person's “judicial engagement” is another person's “judicial usurpation.”²¹

²¹ When it comes to the “judicial activism” label, some observers throw up their hands entirely and insist it all turns on whose ox is gored. Justice Kennedy responds to charges of judicial activism this way: “An activist court is a court that makes a decision you don't like.” Hon. Anthony Kennedy, Address at Forum Club of the Palm Beaches, Florida (May 14, 2010), *available at* <http://www.c-span.org/video/?293521-1/justice-kennedy-remarks-supreme-court>.

There are competing visions, to put it mildly, of the role judges should play in policing the other branches, particularly when reviewing economic regulations. On one side is the Progressive left, joined by some conservatives, who favor absolute judicial deference to majority rule. Judge Robert Bork falls into this camp. A conservative luminary, Bork is heir to a Progressive luminary, Justice Holmes, who also espoused judicial minimalism. Both men believed the foremost principle of American government was not individual liberty but majoritarianism.²² As Judge Bork put it, “majorities are entitled to rule, if they wish, simply because they are majorities.”²³

²² Judge Bork believed legislative majorities should wield near-absolute power, not just with economic policy as favored by turn-of-the-century Progressives, but across the board, including the unenumerated rights enshrined during the so-called “rights revolution” of the mid–20th century.

²³ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 139 (1990).

*²¹ The other side advocates “judicial engagement” whereby courts meaningfully enforce constitutional boundaries, lest judicial restraint become judicial surrender.²⁴ The pro-engagement camp argues the judiciary should be less protective of Leviathan government and more protective of individual freedom. Government exists, they contend, to secure pre-existing rights, as the Declaration makes clear in its first two paragraphs.²⁵ Thus, when it comes to judicial review of laws burdening economic freedoms, courts should engage forthrightly, and not put a heavy, pro-government thumb on the scale.

²⁴ TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING—ECONOMIC FREEDOM AND THE LAW* (2010) (tracing the history of the right to earn a living as it was understood by the Founders, through the Civil War Amendments, the Progressive era, and current controversies over restrictive licensure laws); DAMON ROOT, *OVERRULED—THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT* (2014) (chronicling the conflicting visions of judicial review and the degree to which courts should intervene to protect individual rights against government encroachment).

²⁵ See *THE DECLARATION OF INDEPENDENCE* para. 1–2 (U.S. 1776).

This much is clear: Spirited debates over judicial review have roiled America since the Founding, from *Marbury v. Madison*,²⁶ to *Worcester v. Georgia*²⁷ (against which President Jackson bellowed, “John Marshall has made his decision—now let him enforce it.”²⁸), to the late 19th and early 20th centuries, when Progressives opposed judicial enforcement of economic liberties, all the way to present-day battles over the Patient Protection and Affordable Care Act.²⁹ In the 1920s and 1930s, liberals began backing judicial protection of noneconomic rights, while resisting similar protection for property rights and other economic freedoms. The Progressives' preference for judicial nonintervention was later embraced by post-New Deal conservatives like Judge Bork. The judicial-review debate, both raucous and reasoned, is particularly pitched today within the broader conservative legal movement. A prominent fault line has opened on the right between traditional conservatives who champion majoritarianism and more liberty-minded theorists who believe robust judicial protection of economic rights is indispensable to limited government.³⁰

²⁶ 5 U.S.(1 Cranch 137) 2 L.Ed. 60 (1803).

²⁷ 31 U.S. (6 Pet. 515) 8 L.Ed. 483 (1832).

²⁸ HORACE H. HAGAN, *EIGHT GREAT AMERICAN LAWYERS* 79 (Fred B. Rothman & Co. 1987) (1923).

²⁹ See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, — U.S. —, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012); *Burwell v. Hobby Lobby Stores, Inc.*, — U.S. —, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014); *King v. Burwell*, 759 F.3d 358 (4th Cir.2014), *affirmed*, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2015 WL 2473448 (2015).

³⁰ Judge Bork favored both constitutional originalism and judicial deference to the democratic process, two ideals that sometimes clash, producing what Professor Ilya Somin calls the “Borkean dilemma.” Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension Between Originalism and Democracy*, 80 U. OF CHI. L. REV. DIALOGUE 243 (2013). Originalism sometimes requires judicial invalidation of laws that contradict the Constitution's original meaning. But striking down laws contradicts Bork's preference for judicial minimalism. So while Judge Bork favored judicial deference, he also criticized as “judicial activism” certain New Deal-era Court decisions that expanded government control over the economy. BORK, *supra* note 23, at 56–57 (discussing *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), and lamenting that the Court's “new, permissive attitude toward congressional power was a manifestation of judicial activism”).

*²² When it comes to regulating the economy, Holmesian deference still dominates, as seen in the Supreme Court's landmark 2012 decision upholding the constitutionality of the Affordable Care Act.³¹ During oral argument, the Solicitor General—

echoing the dissenters in today's case—admonished that striking down President Obama's signature health-care law would amount to judicial activism that would “import *Lochner*-style substantive due process.”³² The Court, he implored, “has a solemn obligation to respect the judgments of the democratically accountable branches of government.”³³ A few days later, the President himself charged it would constitute raw judicial activism if the Court took the “unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress,”³⁴ adding, “We have not seen a court overturn a law that was passed by Congress on an economic issue ... for decades”—“We're going to the '30s, pre-New Deal.”³⁵ We know how the story ended. The Court upheld the ACA on tax-power grounds, with Chief Justice Roberts famously stating, “It is not our job to protect the people from the consequences of their political choices.”³⁶

³¹ *NFIB*, 132 S.Ct. at 2566.

³² Transcript of Oral Argument at 30, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, — U.S. —, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012), available at <http://www.archives.gov/research/court-records/supreme-court/11-398-tuesday.pdf>.

³³ *Id.* at 110. The Chief Justice rejected the *Lochner* epithet and turned the tables, saying if the Court adopted the government's theory of the Commerce Clause, limited only to regulating insurance, it “would be going back to *Lochner*”—with courts selectively allowing Congress to use its commerce power to impose a health-insurance mandate but not an eat-your-broccoli mandate. *Id.* at 39.

³⁴ Jeff Mason, *Obama takes a shot at Supreme Court over healthcare*, REUTERS, Apr. 2, <http://www.reuters.com/article/2012/04/02/us-obama-healthcare-idUSBRE8310WP20120402>.

³⁵ Greg Jaffe, *Why does President Obama criticize the Supreme Court so much?*, WASH. POST, June 20, 2015, http://www.washingtonpost.com/politics/why-does-president-obama-criticize-the-supreme-court-so-much/2015/06/20/b41667b4-1518-11e5-9ddc-e3353542100c_story.html.

³⁶ *NFIB*, 132 S.Ct. at 2579. Two years earlier, however, in a political-speech case that involved a more searching standard of review, the Chief Justice declared, “there is a difference between judicial restraint and judicial abdication.” *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 375, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

Today's case arises under the *Texas* Constitution, over which we have final interpretive authority, and nothing in its 60,000—plus words requires judges to turn a blind eye to transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right—antecedent to government—to earn an honest living. Indeed, even if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom.

The principal dissent claims “the rational basis standard invokes objective reason as its measure,” a contention difficult to take seriously.³⁷ Legal fictions abound in the law, but the federal “rational basis test” is something special; it is a misnomer, wrapped in an anomaly, inside a contradiction. Its measure often seems less objective reason than subjective rationalization. The dissent also says the fact that other states regulate threading provides “strong evidence that Texas's regulatory framework has a rational basis.”³⁸ In my view, what happens in the Aloha State makes not the slightest constitutional difference in the Lone Star State. Unconstitutional encroachments reach across time zones and centuries. Just this week, in a case that took almost 80 years to bring, the U.S. Supreme Court struck down as unconstitutional a New Deal-era, raisin-confiscation regime that had spanned thirteen Presidents.³⁹

³⁷ Post, at —. (Hecht, C.J., dissenting).

³⁸ *Id.*

³⁹ *Horne v. Dep't of Agric.*, No. 14–275, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2015 WL 2473384 (U.S. June 22, 2015).

*23 The test adopted today bears a passing resemblance to “rational basis”-type wording, but this test is rational basis with bite, demanding actual *rationality*, scrutinizing the law's actual *basis*, and applying an actual *test*.⁴⁰ In my view, the principal dissent is unduly diffident, concluding the threading rules, while “excessive”⁴¹ and “obviously too much”⁴² are not “clearly arbitrary.”⁴³ If these rules are not arbitrary, then the definition of “arbitrary” is itself arbitrary. Without discussing (or even citing) recent federal cases striking down nonsensical licensing rules under the supine federal test,⁴⁴ the dissents sever “rational” from “rational basis,” loading the dice—relentlessly—in government's favor.⁴⁵ Their test is tantamount to no test at all; at most it is pass/fail, and government never fails.⁴⁶

40 While the dissenting Justices favor federal-style deference in economic matters, there is a notable distinction between the Texas Constitution and the federal Constitution as interpreted by federal courts. The Texas Constitution protects not just life, liberty, and property, but also “privileges or immunities,” language the U.S. Supreme Court read out of the Fourteenth Amendment in the *Slaughter–House Cases*, 83 U.S. (16 Wall. 36) 21 L.Ed. 394 (1872). *Slaughter–House* involved special-interest favoritism masquerading as a public-health measure, a law granting a private corporation an exclusive benefit at the expense of hundreds of local butchers. A few years earlier, when the Fourteenth Amendment was adopted to counter the Black Codes and other oppressive state laws, the amendment's author, antislavery Representative John Bingham, confirmed the liberties it protected included “the right to work in an honest calling and contribute by your toil in some sort to the support of your fellowmen and to be secure in the enjoyment of the fruits of your toil.” CONG. GLOBE, 42D CONG., 1ST SESS., 86 app. (1871). The Fourteenth Amendment was a response to a host of post-Civil War actions to oppress former slaves. Section One, drafted by Representative Bingham, includes three clauses to safeguard individual rights: the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause. So what *are* an American citizen's privileges and immunities? According to perhaps the leading Fourteenth Amendment history, anti-slavery abuses spurred Congress to fortify all Americans' civil rights against overbearing state governments, and to restore the Constitution's original purpose as “a document protecting liberty.” MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 7 (1986). See also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 166 (1998) (noting that the words “privileges,” “immunities,” “rights,” and “freedoms” are “roughly synonymous”). Citing Madison and other founders who used the words “rights,” “liberties,” “privileges,” and “immunities” interchangeably, CURTIS, *supra* at 64–65, Curtis found similar usage in William Blackstone's influential 1765 *Commentaries on the Laws of England*, which described “privileges and immunities” as a blend of rights and liberties—although Curtis notes that Blackstone “divided the rights and liberties of Englishmen into those ‘immunities’ that were the residuum of natural liberties and those ‘privileges’ that society had provided in lieu of natural rights.” CURTIS, *supra* at 64. Boiled down, privileges are state-given civil rights while immunities are God-given natural rights.

When the Court in *Slaughter–House* upheld 5–4 the Louisiana monopoly law, it stressed that the Privileges or Immunities Clause only protected rights guaranteed by the United States and did not restrict state police power. What's the consensus view today of *Slaughter–House*? “Virtually no serious modern scholar—left, right, or center—thinks [that *Slaughter–House*] is a plausible reading of the [Fourteenth] Amendment.” Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 n.327 (2000).

The important point for today's case is that *Slaughter–House*, while holding that the Fourteenth Amendment's Privileges or Immunities Clause offered no protection for individual rights against state officials, underscored that states themselves possess power to protect their citizens' privileges or immunities, including the right to pursue an honest living against illegitimate state intrusion. As the Court correctly notes, the drafters of the Texas Constitution were doubtless aware of this reservation of power to the states when they passed our own Privileges or Immunities Clause just two years later in 1875. One question lurking in today's case was whether this Court would do to *our* Privileges or Immunities Clause what the U.S. Supreme Court did to the federal clause—nullify it by judicial fiat.

41 Post, at ——. (Hecht, C.J., dissenting).

42 *Id.*

43 *Id.* at ——.

44 See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir.), *cert. denied*, — U.S. —, 134 S.Ct. 423, 187 L.Ed.2d 281 (2013); *Brantley v. Kuntz*, No. A–13–CA–872–SS, — F.Supp.3d —, 2015 WL 75244 (W.D.Tex. Jan. 5, 2015).

45 The principal dissent cites our 1957 decision in *State v. Richards*, 157 Tex. 166, 301 S.W.2d 597 (1957), the last time we examined the constitutional protections due innocent property owners facing government seizure of their property. It merits mention that at least three members of this Court believe the modern asset-forfeiture regime “deserves attentive constitutional reconsideration, if not recalibration.” *El-Ali v. State*, 428 S.W.3d 824, 826 (Tex.2014) (Willett, J., joined by Lehrmann, J., and Devine, J., dissenting to denial of pet.). And two others are open to reconsidering *Richards* in a future case. *Id.* at 824 (Boyd, J., concurring, joined by Guzman, J.).

46 The dissents side with Justice Holmes's oft-quoted *Lochner* dissent, even though Justice Holmes rejected there what the dissents reaffirm here: The Constitution *does* protect economic liberty. Justice Holmes indeed seems to exalt majority rule above all—except when he doesn't. After he famously said, “I think that the word ‘liberty,’ in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion,” he added this sweeping caveat: “unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.” *Lochner v. New York*, 198 U.S. 45, 76, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). This proviso, according to Judge Robert Bork, “spoiled it all” and prompted Bork to accuse Justice Holmes, a fellow judicial minimalist, of activism himself. BORK, *supra* note 23, at 45. (“So Holmes, after all, did accept substantive due process, he merely disagreed ... about which principles were fundamental.”).

A quick word on *Lochner*. While the vote was 5–4, eight of nine Justices (all but Justice Holmes) agreed that the Constitution protects economic liberty. And *Lochner* was not the first Supreme Court case to say so. That happened eight years earlier in *Allgeyer v. Louisiana*, which defined “liberty” in the Fourteenth Amendment to include the freedom “to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.” 165 U.S. 578, 589, 17 S.Ct. 427, 41 L.Ed. 832 (1897). As Justice Harlan acknowledged in the principal *Lochner* dissent, “there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment.” 198 U.S. at 68, 25 S.Ct. 539 (Harlan, J., dissenting). Government may not “unduly interfere with the right of the citizen to enter into contracts” or to “earn his livelihood by any lawful calling, to pursue any livelihood or avocation.” *Id.* at 65, 25 S.Ct. 539.

Historical note: This is the *first* Justice Harlan, The Great Dissenter, not his grandson who served on the Court in the mid–20th century. The first Justice Harlan, a strong proponent of natural rights, famously dissented in *Plessy v. Ferguson*, 163 U.S. 537, 552, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Ed.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and also in the *Civil Rights Cases*, 109 U.S. 3, 33, 3 S.Ct. 18, 27 L.Ed. 835 (1883) (Harlan, J., dissenting), that struck down federal antidiscrimination laws. Some scholars believe that Justice Harlan's dissent in *Lochner* had initially garnered a five-vote majority, but someone switched his vote.

While Justice Harlan's dissent, unlike Justice Holmes's dissent, believed economic liberty was constitutionally enshrined, he understood that states have a valid police-power interest in advancing public welfare. *Id.* (“liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society”). A law should be struck down only if there is “no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation.” *Id.* at 69, 25 S.Ct. 539. Justice Harlan would have upheld the New York maximum-hours law, but he stressed the presumption of constitutionality can be rebutted by evidence showing the restriction was arbitrary, unreasonable, or discriminatory. He simply found the government's health-and-safety justification plausible.

Importantly, there was no disagreement—none—between the *Lochner* majority and Justice Harlan's dissent over whether courts can legitimately scrutinize economic regulations. Nobody seriously disputes a state's omnibus power to safeguard its citizens' health and safety via economic regulation. Of course states have broad, inherent police power to enact general-welfare laws. Indeed, a few months after *Lochner*, the Court reaffirmed states' “firmly established” authority “to prescribe such regulations as may be reasonable, necessary and appropriate” to advance “the general comfort, health, and general prosperity of the state.” *Cal. Reduction Co. v. Sanitary Reduction Workers*, 199 U.S. 306, 318, 26 S.Ct. 100, 50 L.Ed. 204 (1905). And just three years later, the Court upheld a maximum hours law for women. *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908). In fact, the *Lochner*-era Court upheld many more economic regulations than it overturned. Thomas Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 539–40 (2015). The disagreement in *Lochner* was over who bears the burden—the government to prove legitimacy, or the challenger to prove illegitimacy. Justice Harlan believed the latter: “when the validity of a statute is questioned, the burden of proof ... is upon those who assert it to be unconstitutional.” *Lochner*, 198 U.S. at 68, 25 S.Ct. 539 (citations omitted) (Harlan, J., dissenting). The Court today agrees, adopting an approach some might say tracks the principal *Lochner* dissent more than the *Lochner* majority.

The core question is one of constitutional limitation. Should judges blindly accept government's health-and-safety rationale, or instead probe more deeply to ensure the aim is not suppressing competition to benefit entrenched interests? A century and a

half of pre-*Lochner* precedent allowed for judicial scrutiny of laws to ensure the laws actually intend to serve the public rather than a narrow faction. *See generally* HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (discussing the origins of *Lochner*-era jurisprudence). *Lochner* focused on a narrow issue: whether the maximum-hours law was truly intended to serve the general welfare or “other motives,” namely to advantage the bakers' union and unionized bakeries over small, non-union bakeries, many of which employed disfavored immigrants.

Interestingly, some of the Texas commentary immediately following *Lochner* was quite favorable, including in the Dallas Morning News, which wrote “The right of contract is one of the most sacred rights of the freeman, and any interference with such privilege by Legislatures or courts is essentially dangerous and vicious.” In Which the Right of Contract is Upheld, DALLAS MORNING NEWS, Apr. 20, 1905, at 6.

A wealth of contemporary legal scholarship is reexamining *Lochner*, its history and correctness as a matter of constitutional law, and its place within broader originalist thought, specifically judicial protection of unenumerated rights such as economic liberty. *See supra* note 24. Long story short: Legal orthodoxy about *Lochner* is evolving among many leading constitutional theorists. *See, e.g.,* Colby & Smith, *supra* at 527; DAVID E. BERNSTEIN, *REHABILITATING LOCHNER—DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

II.

*You take my house when you do take the prop /
That doth sustain my house; you take my life /
When you do take the means whereby I live.*⁴⁷

⁴⁷ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4 sc. 1.

*24 Government understandably wants to rid society of quacks, swindlers, and incompetents. And licensing is one of government's preferred tools, aiming to protect us from harm by credentialing certain occupations and activities. You can't practice medicine in Texas without satisfying the Board of Medical Examiners. You can't zoom down SH-130 outside Austin at 85 miles per hour (reportedly the highest speed limit in the Western Hemisphere) without a driver's license. Sensible rules undoubtedly boost our quality of life. And senseless rules undoubtedly weaken our quality of life. Governments at every level—national, state, and local—wield regulatory power, but not always with regulatory prudence, which critics say stymies innovation, raises consumer prices,⁴⁸ and impedes economic opportunity with little or no concomitant public benefit.⁴⁹ The academic literature has attained consensus: “a licensing restriction can only be justified where it leads to better quality professional services—and for many restrictions, proof of that enhanced quality is lacking.”⁵⁰

⁴⁸ Licensing restrictions impact price “along four dimensions” according to one recent study:

First, professional licensing can act as a barrier to entry into the profession. Second, licensing can establish rules of practice, like advertising bans, that restrict competition. Third, state boards can suppress interstate competition by recognizing licenses only from their own state. Finally, a profession can prevent competition by broadening the definition of its practice, bringing more potential competitors under its licensing scheme. These ‘scope-of-practice’ limitations tend to oust low-cost competitors that operate at the fringes of an established profession.

Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1112 (2014) (footnotes and citations omitted).

⁴⁹ Some government labor economists have concluded that “mandatory entry requirements of licensing cannot necessarily be relied upon to raise the quality of services.” CAROLYN COX & SUSAN FOSTER, *BUREAU OF ECON., FTC, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION* 21–27, 40 (1990), available at http://www.ramblenuse.com/articles/cox_foster.pdf.

⁵⁰ Edlin and Haw, *supra* note 48, at 1111–12 n.101 and accompanying text (citing numerous academic studies questioning the putative benefits of licensure).

It merits repeating: Judicial duty does not include second-guessing everyday policy choices, however improvident. The question for judges is not whether a law is sensible but whether it is constitutional. Does state “police power”—the inherent authority to enact general-welfare legislation—*ever* go too far? Does a Texas Constitution inclined to limited government have *anything* to say about government irrationally subjugating the livelihoods of Texans?

A.

The Republic of Texas regulated just one profession: doctors.⁵¹ In 1889, the State of Texas added one more: dentists.⁵² Until the mid-20th century, occupational regulation in the Lone Star State was rare (aside from the post-Prohibition alcohol industry)⁵³ and was generally limited to professions with a clear public-safety impact: nurses, pharmacists, optometrists, engineers, etc.

⁵¹ INTERIM REPORT TO THE 83RD TEX. LEG., 82D TEX. H. COMM. ON GOV'T EFFICIENCY & REFORM 57 (Jan. 2013), available at http://www.house.state.tx.us/_media/pdf/committees/reports/82interim/House-Committee-on-Goverement-Efficiency-and-Refrom-Interim-Report.pdf.

⁵² *Id.*

⁵³ Traditionally, only the medical and legal professions were subject to occupational licensing. J.R.R., II, *Note, Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1097 (1973). Later, as women, minorities and immigrants—those lacking political power—entered the labor market, incumbent interests lobbied politicians to erect barriers to thwart newcomers. For example, California called a constitutional convention in 1878 to combat what the Workingmen's Party called the “Chinese Menace,” an influx of immigrant laborers from China. The result, cheaper labor costs and thus cheaper goods and services, was intolerable to incumbent interests, who imposed severe barriers to entry. One convention delegate confessed his goal forthrightly: “to hamper them in every way that human ingenuity could invent.” SANDEFUR, *supra* note 24, at 146.

One such xenophobic law targeted Chinese laundrerers, who dominated San Francisco's laundry market. The U.S. Supreme Court said no. In *Yick Wo v. Hopkins*, the Court rejected efforts to persecute disfavored interests through arbitrary permitting laws. 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (striking down San Francisco's laundry-permitting ordinance, which, while couched in public-safety rhetoric, plainly aimed to eliminate competition from Chinese operators). The Court minced no words: “the very idea that one man may be compelled to hold his life, or the means of living ... at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.” *Id.* at 370, 6 S.Ct. 1064.

*25 Since World War II, however, the economy, both nationally and here in Texas, has undergone a profound shift. States now assert licensing authority over an ever-increasing range of occupations, particularly in the fast-growing service sector, which makes up “three-quarters of gross domestic product and most job growth in the U.S.”⁵⁴ During the 1950s, fewer than five percent of American workers needed a state license.⁵⁵ By 1970 it had doubled to 10 percent, and by 2000 had doubled again.⁵⁶ In 2006, nearly one-third of U.S. workers needed government permission to do their job.⁵⁷

⁵⁴ Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J., Feb. 7, 2011, available at <http://www.wsj.com/articles/SB10001424052748703445904576118030935929>.

⁵⁵ Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, BRITISH J. OF INDUSTRIAL RELATIONS 676, 678 (2010).

⁵⁶ *Id.* at 679.

⁵⁷ *Id.* at 678. See also MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 1 (W.E. Upjohn Institute for Employment Research, 2006); MORRIS M. KLEINER, *Occupational Licensing: Protecting the Public Interest or Protectionism?* 1 (W.E. Upjohn Institute for Employment Research, Policy Paper No. 2011-009, 2011).

This spike in licensing coincides with a decline in labor-union membership. “In fact, [occupational licensing] has eclipsed unionization as the dominant organizing force of the U.S. labor market.”⁵⁸ Twice as many workers today are covered by licensing as by labor contracts.⁵⁹ Moreover, the pervasiveness of licensing seems unrelated to whether a state is labeled “red” or “blue” politically. Occupational regulation seems wholly disconnected from party-specific ideology. In addition, most economic regulations are enacted not by legislatures answerable to voters but by administrative bodies, often with scant oversight by elected officials.

⁵⁸ Edlin and Haw, *supra* note 48, at 1102. Today, licensing substitutes to some extent for unionization. See Suzanne Hoppough, *The New Unions*, FORBES, Feb. 25, 2008, available at http://www.forbes.com/part_forbes/2008/0225/100.html.

⁵⁹ Alan B. Krueger, *Do You Need a License to Earn a Living? You Might Be Surprised at the Answer*, N.Y. TIMES, Mar. 2, 2006, at C3.

The Lone Star State is not immune from licensure proliferation. An ever-growing number of Texans must convince government of their fitness to ply their trade, spurring the House Committee on Government Efficiency and Reform in 2013 to lament the kudzu-like spread of licensure: “The proliferation of occupational licensing by the State of Texas can be to the detriment of the very consumer the licensing is professing to protect.”⁶⁰ Today the number of regulated occupations exceeds 500⁶¹—about 2.7 million individuals and businesses,⁶² roughly one-third of the Texas workforce,⁶³ higher than the national average⁶⁴—with many restrictions backed by heavy fines and even jail time. Importantly, these statistics reflect state-only regulations; local and federal rules raise the number of must-be-licensed workers higher still.⁶⁵

⁶⁰ INTERIM REPORT, *supra* note 51, at 58.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* (citing KLEINER, LICENSING OCCUPATIONS, *supra* note 57, at 12).

⁶⁵ Kleiner & Krueger, *supra* note 55, at 678.

Unlike some states, Texas doesn't yet require florists,⁶⁶ interior designers,⁶⁷ horse massagers,⁶⁸ ferret breeders,⁶⁹ or fortune tellers⁷⁰ to get state approval (though the soothsayers would presumably see it coming). But the Lone Star State *does* require state approval to be a shampoo apprentice.⁷¹ And to be an in-person auctioneer⁷² (though not to be an *internet* auctioneer). And while you don't need a license to be a bingo caller in Texas, you must be listed on the Registry of Approved Bingo Workers in order to yell out numbers and letters.⁷³

⁶⁶ Louisiana is the only state in the country that requires licenses for florists. See LA. REV. STAT. ANN. §§ 3:3804(A)(2), (3), (4), (C), (D), 3:3809 (2014). And until 2010, part of the licensing exam for aspiring florists included a flower-arranging demonstration ... judged by their future competition. See *id.* § 3:3807(B)(2) (2008), amended by H.B. 1407, 2010 Leg., Reg. Sess. (La. 2010); see also Robert Travis Scott, *Florist bill delivered to Gov. Bobby Jindal's desk*, THE TIMES-PICAYUNE E (June 16, 2010), available at http://www.nola.com/politics/index.ssf/2010/06/florists_bill_delivered_to_gov.html.

⁶⁷ See, e.g., FLA. STAT. ANN. §§ 481.213 (West 2015); LA. REV. STAT. ANN. § 37:3176 (West 2014); NEV. REV. STAT. ANN. § 623.180(1) (West 2014); D.C. CODE § 47-2853.103 (2015).

⁶⁸ In Arizona and Nebraska, you can't be a horse masseuse without a license. See ARIZ. REV. STAT. ANN. § 32-2231(A)(4) (West 2015) (defining practice of veterinary medicine); 172 NEB. ADMIN. CODE § 182-004.02D (2015) (eligibility for licensure as an Animal Therapist in Massage Therapy); see also ANIMAL MASSAGE LAWS BY STATE, INT'L ASSOC. OF ANIMAL MASSAGE AND BODYWORK, <http://www.iaamb.org/reference/state-laws-2013.html> (last visited June 25, 2015).

⁶⁹ See, e.g., MASS. GEN. LAWS ANN. ch. 131 § 77(2) (West 2015) (“[N]o person shall possess a ferret for breeding purposes without obtaining a license from the director....”).

⁷⁰ See *id.* ch. 140 § 185I(2) (“No person shall tell fortunes for money unless a license therefor has been issued by the local licensing authority.”).

⁷¹ TEX. OCC. CODEE § 1602.267. In Tennessee, a shampoo license has a 300 hour instructional requirement. See Shampoo Technician, TN. DEPT OF COMM. & INS. (last visited June 25, 2015), <https://www.tn.gov/commerce/article/cosmo-shampoo-technician>. Alabama also requires a license to practice as a “shampoo assistant.” See ALA. CODE § 34-7b-1(21) (2014). See also Simon, *supra* note 54 (surveying trade regulations in several states, including shampooing regulations in Texas and barber regulations in California).

⁷² TEX. OCC. CODEE § 1802.051(a).

⁷³ 16 TEX. ADMIN. CODE § 402.402(b).

*²⁶ The “sum of good government,” Thomas Jefferson said in his first inaugural, was one “which shall restrain men from injuring one another”—indisputably true—but “shall leave them otherwise free to regulate their own pursuits of industry and improvements.”⁷⁴ Without question, many licensure rules are justified by legitimate public health and safety concerns. And isolating the point at which a rule becomes unconstitutionally “irrational” eludes mathematical precision. But it is no more imprecise as when judges ascertain under the Constitution when a search is “unreasonable”⁷⁵ or bail “excessive”⁷⁶ or cause “probable”⁷⁷ or punishment “cruel and unusual.”⁷⁸ Degree of difficulty aside, judges exist to be judgmental, hence the title.

⁷⁴ President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 3–4 (Henry A. Washington ed., 1854).

⁷⁵ U.S. CONST. amend. IV.

⁷⁶ *Id.* amend. VIII.

⁷⁷ *Id.* amend. IV.

⁷⁸ *Id.* amend. VIII.

The Texas Constitution has something to say when barriers to occupational freedom are absurd or have less to do with fencing out incompetents than with fencing in incumbents. As Nobel economist Milton Friedman observed, “the *justification*” for licensing is always to protect the public, but “the *reason*” for licensing is shown by observing who pushes for it—usually those representing not consumers but vested, already-licensed practitioners.⁷⁹ In other words, government's coercive power is often wielded to quash newcomers. As two federal appellate judges provocatively put it, “The practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free reign to subjugate the common good and individual liberty to the electoral calculus of politicians, the whims of majorities, or the self-interest of factions.”⁸⁰ Summarizing: “Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.”⁸¹

⁷⁹ MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 240 (1980) (emphasis in original).

⁸⁰ *Hettinga v. United States*, 677 F.3d 471, 482–83 (D.C.Cir.2012) (Brown, J., joined by Sentelle, C.J. concurring).

⁸¹ *Id.* at 483.

Indeed, some fret that the focus of occupational regulation has morphed from protecting the public from unqualified providers to protecting practitioners from unwanted competition. Courts are increasingly asking whether societal benefits are being subordinated to the financial benefits of those lucky enough to be licensed. The U.S. Court of Appeals for the Fifth Circuit recently buried the so-called “casket cartel” in Louisiana, siding 3–0 with a group of woodworking Benedictine monks who supported their monastery by selling handcrafted pine coffins. State-licensed funeral directors found the competition

unwelcome, and the monks were threatened with a fine and jail time for breaching Louisiana law that said only state-licensed funeral directors could sell “funeral merchandise.” In striking down the anticompetitive law, the Fifth Circuit explained: “The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or to the context of its adoption nor does it require courts to accept nonsensical explanations for regulation.”⁸² While acknowledging that *Williamson v. Lee Optical*⁸³—the Supreme Court’s authoritative treatment of rational-basis scrutiny—dictates deference to state policymakers, the Fifth Circuit underscored that “*Williamson* insists upon a rational basis,” adding, “a hypothetical rationale, even post hoc, cannot be fantasy” or impervious to “evidence of irrationality.”⁸⁴

⁸² *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir.), cert. denied, — U.S. —, 134 S.Ct. 423, 187 L.Ed.2d 281 (2013).

⁸³ 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

⁸⁴ *Id.* at 223.

*27 A similar casket-cartel law was invalidated in 2002 by the U.S. Court of Appeals for the Sixth Circuit, the first federal appellate court since the New Deal to invalidate an economic regulation for offending economic liberties secured by the Fourteenth Amendment.⁸⁵ The court found no sensible connection between the onerous licensing requirements and the law’s alleged “health and safety” purpose. The court rejected the state’s predictable cries of “*Lochnerism*” and said the alleged bases for the law came close to “striking us with ‘the force of a five-week-old, unrefrigerated dead fish.’”⁸⁶ The Sixth Circuit concluded it was ludicrous to see the law as anything but “an attempt to prevent economic competition,”⁸⁷ and that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”⁸⁸ Granting special economic favors to preferred interests may be a *common* government purpose—“the favored pastime of state and local governments,” as the Tenth Circuit put it⁸⁹—but common doesn’t mean constitutional. Merely asserting—and accepting—“Because government says so” is incompatible with individual freedom. Courts need not be contortionists, ignoring obvious absurdities to contrive imaginary justifications for laws designed to favor politically connected citizens at the expense of others.

⁸⁵ *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir.2002). The U.S. Supreme Court grounds economic liberty in the Fourteenth Amendment, but as discussed above, it does so within the judicially invented concept of “substantive due process” rather than within the textual Privileges or Immunities Clause of the Fourteenth Amendment. The Clause, drafted by the Committee on Reconstruction, was specifically enacted to relieve rigid constraints on economic liberty, including post-Civil War licensing systems that hamstrung the economic activities of freed slaves. See generally HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 319 (1982). Constitutionalizing well-understood rights, including the economic rights protected by the Civil Rights Act of 1866—making freedom actually meaningful—was the overriding point. And these protected economic rights included the right to practice a chosen trade. Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1250–51 (1998). As noted above, the Clause’s abolitionist author explained that it was intended to safeguard “the liberty ... to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil.” CONG. GLOBE, 42D CONG., 1ST SESS., 86 app. (1871). The Fourteenth Amendment’s legislative record is replete with indications that “privileges or immunities” encompassed the right to earn a living free from unreasonable government intrusion. *Id.*

As explained above, the U.S. Supreme Court’s nullification of the federal Privileges or Immunities Clause in *Slaughter-House* began the process of undermining the amendment’s civil-rights protections for black Americans in the South. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1875); *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) overruled by *Brown v. Bd. of Ed.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). *Slaughter-House* has been accused of “strangling the privileges or immunities clause in its crib.” Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1259 (1992). Worse, it emboldened legislatures to enact notorious Jim Crow laws. Scholars across the political spectrum agree that *Slaughter-House* reflects a deeply flawed understanding of constitutional history.

⁸⁶ *Craigmiles*, 312 F.3d at 225 (quoting *United States v. Searan*, 259 F.3d 434, 447 (6th Cir.2001)).

⁸⁷ *Id.*

88 *Id.* at 224.

89 *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir.2004).

More and more, courts—even comedians⁹⁰—are scrutinizing the entry barriers imposed by occupational regulations. Earlier this year, a federal district court in Austin rejected the state's attempt to force a teacher of African hair braiding to meet state barber-school regulations.⁹¹ Isis Brantley was vexed as to why her Institute of Ancestral Braiding needed a 2,000–square foot facility, 10 barber chairs, and 5 sinks to teach people how to twist and braid hair.⁹² The court examined means and ends and agreed the requirements were senseless.⁹³ Why require sinks, for example, when braiders don't wash hair, and state law allows braiders to use just hand sanitizer?⁹⁴ The court refused to accept blindly the state's purported justifications. It conducted an actual judicial inquiry and observed the state was trying to “shoehorn two unlike professions ‘into a single, identical mold, by treating hair braiders—who perform a very distinct set of services—as if they were [barbers].’ ”⁹⁵ The court stressed “the logical disconnect inherent in the scheme which contemplates the existence of hair-braiding schools but makes it prohibitively difficult for a hair-braiding school to enter the market.”⁹⁶ The court concluded the rules lacked any “rational relationship to any legitimate government interest”⁹⁷ and were thus unconstitutional under the Fourteenth Amendment.⁹⁸

90 A few years ago, Jon Stewart's *The Daily Show* lampooned state efforts to regulate hair braiding. *See The Daily Show* (Comedy Central television broadcast June 3, 2004), available at [http:// thedailyshow.cc.com/videos/adygsa/the-braidy-bill](http://thedailyshow.cc.com/videos/adygsa/the-braidy-bill).

91 *See Brantley v. Kuntz*, No. A–13–CA–872–SS, —F.Supp.3d —, —, 2015 WL 75244, *8 (W.D.Tex. Jan. 5, 2015) (“[T]he regulatory scheme ... exclude[s] Plaintiffs from the market absent a rational connection ...”).

92 *See id.* at —, 2015 WL 75244 at *2.

93 *See id.* at —, 2015 WL 75244 at *7.

94 *See id.* at —, 2015 WL 75244 at *6. *The Oregonian* recently profiled a hair braider in Oregon, where braiders must have a cosmetology license, who daily crosses the border into Washington, where braiders are exempt. Most of her clients cross the border, too. The options for customers are simple: pay the cartel price or find an illicit braider. *See* Anna Griffin, *Braiding African American Hair at center of overregulation battle in Oregon*, THE OREGONIAN (Aug. 11, 2012), [http:// www.oregonlive.com/politics/index.ssf/2012/08/braiding_african_american_hair.html](http://www.oregonlive.com/politics/index.ssf/2012/08/braiding_african_american_hair.html).

95 *Brantley*, — F.Supp.3d at —, 2015 WL 75244, at *7 (quoting *Clayton v. Steinagel*, 885 F.Supp.2d 1212, 1215 (D.Utah 2012)) (quoting *Clayton v. Steinagel*, 885 F.Supp.2d 1212, 1215 (D.Utah 2012)).

96 *Id.*

97 *Id.* at —, 2015 WL 75244 at *8.

98 *Id.*

*28 Tellingly, the state declined to appeal, saying it would instead launch “a comprehensive review of the barber and cosmetology statutes” and “work with [the] legislative oversight committees on proposals to remove unnecessary regulatory burdens for Texas businesses and entrepreneurs.”⁹⁹ Legislative response was swift—and unanimous—and Governor Abbott 15 days ago signed House Bill 2717 to deregulate hair braiding.¹⁰⁰ But as with many matters (*e.g.*, public school finance), it took a judicial ruling on constitutionality to spark legislative action.

99 Angela Morris, *Braider Wins Against State Barber Regulations*, TEXAS LAWYER, Jan. 19, 2015, available at [http:// www.texaslawyer.com/id=1202715320677/Braider-Wins-Against-State-Barber-Regulations](http://www.texaslawyer.com/id=1202715320677/Braider-Wins-Against-State-Barber-Regulations).

100 Act of May 22, 2015, 84th Leg., R.S., ch. 413, § 2, 2015 Tex. Sess. Law Serv. 2717 (to be codified at [Tex.Occ.Code § 1601.003\(2\)\(E\)](#)), available at [http:// www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB02717F.pdf#navpanes=0](http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB02717F.pdf#navpanes=0).

The U.S. Supreme Court itself recently examined how states regulate professions, scrutinizing whether licensing boards dominated by industry incumbents are rightly focused on weeding out scammers and inept practitioners or wrongly focused on weeding out newcomers.¹⁰¹ Earlier this year in *North Carolina State Board of Dental Examiners v. FTC*,¹⁰² the High Court held that a state dental board controlled by “active market participants” could be sued under federal antitrust law for cracking down on non-dentists who were offering teeth-whitening treatments.¹⁰³ The decision brought a smile to licensure critics who had long argued that self-regulation invites self-dealing and that state licensing boards prone to regulatory capture deserved no immunity for Sherman Act¹⁰⁴ abuses. Ever since *Parker v. Brown* 80-plus years ago,¹⁰⁵ such boards were deemed outside the Act's ban on cartels because, unlike traditional cartels, they were sanctioned by the state.¹⁰⁶ No more. *Parker* no longer insulates regulated regulators regulating to anticompetitive effect. Licensing boards comprised of private competitors will face Sherman Act liability if they flex power to smother aspiring entrepreneurs.¹⁰⁷

¹⁰¹ See Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPECTIVES 189, 191 (2000) (describing the composition of state licensing boards).

¹⁰² — U.S. —, 135 S.Ct. 1101, 191 L.Ed.2d 35 (2015).

¹⁰³ *Id.* t 1110.

¹⁰⁴ See generally 15 U.S.C. §§ 1–7 (2004).

¹⁰⁵ 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). See also *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (stating two standards for *Parker* state action immunity: (1) state articulation of its purpose to displace competition, and (2) active state supervision).

¹⁰⁶ See *Parker*, 317 U.S. at 351, 63 S.Ct. 307 (“The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.”).

¹⁰⁷ See *N.C. State Bd. of Dental Exam'rs*, 135 S.Ct. at 1110–11 (“But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor.... For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself.”) (citation omitted).

B.

As today's case shows, the Texas occupational licensure regime, predominantly impeding Texans of modest means, can seem a hodge-podge of disjointed, logic-defying irrationalities, where the burdens imposed seem almost farcical, forcing many lower-income Texans to face a choice: submit to illogical bureaucracy or operate an illegal business? Licensure absurdities become apparent when you compare the wildly disparate education/experience burdens visited on various professions. The disconnect between the strictness of some licensing rules and their alleged public-welfare rationale is patently bizarre:

***29** *Emergency Medical Technicians*. EMTs are entrusted with life-and-death decisions. But in Texas, entry-level EMTs need only 140 hours of training before rendering life-saving aid.¹⁰⁸ Contrast that with the radically more onerous education/experience requirements for barbers (300 hours),¹⁰⁹ massage therapists (500 hours),¹¹⁰ manicurists (600 hours),¹¹¹ estheticians (750 hours),¹¹² and full-service cosmetologists (1,500 hours).¹¹³

Backflow Prevention Assembly Testers. Of the number of states and the District of Columbia that require licenses for backflow prevention assembly testers, the Lone Star State is the only place where it takes more than two weeks of training/experience —way more. Fifty times more. Not two weeks but two years.¹¹⁴

- 108 25 TEX. ADMIN. CODE § 157.32(c)(2)(B).
- 109 TEX. OCC. CODE § 1601.253(c)(2).
- 110 *Id.* § 455.156(b)(1).
- 111 *Id.* § 1601.257(b)(3).
- 112 *Id.* § 1602.257(b)(3).
- 113 *Id.* § 1602.254(b)(3). A Class A Barber who completes an additional 300 hours of instruction in cosmetology—total of 600 hours of training—may also be eligible to become a full-service cosmetologist. *Id.* § 1602.254(c).
- 114 See TEX. HEALTH & SAFETY CODE § 341.034(c); 30 TEX. ADMIN. CODE § 30.60. Although one can begin working as a backflow prevention assembly tester with only 40 hours of instruction in Texas, obtaining a license requires two years of work experience. See, e.g., 30 TEX. ADMIN. CODE § 30.60(4)–(5). In contrast, other states do not require pre-licensure work experience in addition to knowledge-based examinations. See IDAHO ADMIN CODE ANN. § r.24.05.01.335 (2014) (requirements for a backflow assembly tester license); MINN. STAT. § 326B.42 (West 2015) (defining “backflow prevention tester” as an individual qualified by training prescribed by the Plumbing Board); MINN. DEPT OF LABOR & INDUS. , Minnesota backflow agreement 2013, ASSE INT’L Ltr. (Oct. 15, 2013) (determining the requirements for certification), available at http://www.dli.mn.gov/CCLD/PDF/pe_agree.pdf; MO. CODE REGS. Tit. 10, § 60–11.030 (2015) (providing for certification upon completion of a written exam); UTAH ADMIN. CODE r. 309–305–5 (2015) (providing for certification upon completion of written and practical examinations).

State licensing impacts our lives from head to toe. Literally. Starting at the top, where does hair end and the beard begin? Texas law has been quite finicky on the matter, leading Texas barbers and cosmetologists to spend years splitting legal hairs and clogging Texas courts. Both of these state-licensed professionals may cut hair, but until 2013 only barbers, not cosmetologists, had state permission to wield a razor blade to shave *facial* hair. Before 2013, if you wanted your beard shaved, you had to visit a barber (probably a man) and not a cosmetologist (probably a woman).¹¹⁵ And what *is* a “beard” anyway? Why, it’s the facial hair below the “line of demarcation” as defined in the Administrative Code.¹¹⁶ Even the Attorney General of Texas got all shook up wondering whether Elvis’s famous sideburns “were hair which a cosmetologist might trim, or a partial beard which could be serviced only [by] a barber.”¹¹⁷

- 115 Prior to the 1960s and 1970s, rigid state laws codified sexual stereotypes that distinguished male barbers and barbershops from female cosmetologists (or beauticians) and beauty parlors. Unisex hair salons became in vogue in the late 1960s through the 1970s as courts invalidated these state statutes under the equal protection clause of the Fourteenth Amendment.

Today, although there is hardly a distinction between most barber and cosmetology services, there is plenty of opportunity for overzealous regulators to tag unsuspecting shop owners with “gotcha” fines. See, e.g., *Tex. Dep’t of Licensing & Regulation v. Roosters MGC, LLC*, No. 03–09–00253–CV, 2010 WL 2354064 (Tex.App.–Austin June 10, 2010, no pet.) (discussing whether a cosmetologist’s use of a safety razor to remove hair from a customer’s neck or face violates state law controlling what services can be provided exclusively by barbers).

- 116 16 TEX. ADMIN. CODE §§ 82.10(8), (23).
- 117 *Tex. Att’y Gen. Op. No. JC–0211 (2000)* (“We think it likely that most observers would consider the sideburns worn by the late Elvis Presley at the time of his early success in 1956 as part of his hair. On the other hand, whether the muttonchops which adorned his face at the time of his death were hair which a cosmetologist might trim, or a partial beard which could be serviced only a barber, is a question which in the absence of any articulated standard might well present difficulties to a cosmetologist who wished to remain within his or her licensed practice.”).

*30 At the other bodily extreme, what’s the demarcation between the foot (which podiatrists can treat) and the ankle (which they can’t)? These are high-stakes disputes, and sometimes the licensing bodies have jurisdictional spats with each other, usually over “scope of practice” issues. So where *does* the foot end and the ankle begin? In 2010, this Court ended a nearly ten-year legal battle between, in one corner, the Texas Medical Association and Texas Orthopedic Association, and in the other, the Texas State Board of Podiatric Medical Examiners and Texas Podiatric Medical Association.¹¹⁸

¹¹⁸ *Tex. Orthopaedic Ass'n v. Tex. State Bd. of Podiatric Med. Exam'rs*, 254 S.W.3d 714 (Tex. App–Austin 2008, pet. denied) (invalidating the Texas State Board of Podiatric Medical Examiners rule defining the word “foot”).

According to the academic literature, the real-world effects of steroidal regulation are everywhere: increased consumer cost; decreased consumer choice; increased practitioner income; decreased practitioner mobility¹¹⁹—plus shrunken economic prospects for lower income, would-be entrepreneurs.¹²⁰ Thomas Edison, with little formal schooling, likely could not be a licensed engineer today, nor could Frank Lloyd Wright be a licensed architect.¹²¹

¹¹⁹ See e.g., SANDEFUR, *supra* note 24, at 24.

¹²⁰ *Id.* (noting that monopoly laws and restrictive licensing schemes were “often used to give economic favors to politically influential lobbyists ...”).

¹²¹ One powerful way regulations handicap innovation is through sweeping, inflexible, one-size-fits-all measures that crowd out novel services. For example, in the recent teeth-whitening case at the U.S. Supreme Court, the state dental board defined dentistry broadly to include teeth whitening. *N.C. State Bd. of Dental Exam'rs, — U.S. —*, 135 S.Ct. 1101, 1120, 191 L.Ed.2d 35 (2015). In today's case, eyebrow threaders want to thread eyebrows—and *only* want to thread eyebrows—but Texas defines the regulated trade of cosmetology so broadly, and irrationally, that threaders must take pricey and time-consuming classes to learn, well, *nothing* about threading but *lots* about non-threading. These Texans aim to provide a single service, but the government—exercising maximum will but minimum judgment—shackles creativity and innovation by lumping threading in with licensed, full-fledged cosmetology and requiring people to spend untold hours and dollars learning wholly irrelevant cosmetology techniques. The result, disproportionately affecting the poor, is the so-called “Cadillac effect”: would-be entrepreneurs squashed by exorbitant start-up costs, and would-be consumers forced to either (1) pay a higher-than-necessary price (a Cadillac) when all they want to buy is a discrete service at a lower price (a Kia), or (2) go without, or perhaps try to do it themselves.

III.

*No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.*¹²²

¹²² THE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

*31 Anyone acquainted with human nature understands, as Madison did, that when people, or branches of government, are free to judge their own actions, nothing is prohibited. The Court recognizes that Texans possess a basic liberty under [Article I, Section 19](#) to earn a living. And to safeguard that guarantee, the Court adopts a test allergic to nonsensical government encroachment. I prefer authentic judicial scrutiny to a rubber-stamp exercise that stacks the legal deck in government's favor.

My views are simply stated:

1. *The economic-liberty test under Article I, Section 19 of the Texas Constitution is more searching than the minimalist test under the Fourteenth Amendment to the United States Constitution.*

Even under the lenient rational-basis test—“the most deferential of the standards of review”¹²³—the would-be threaders should win this case. It is hard to imagine anything more irrational than forcing people to spend thousands of dollars and hundreds of hours on classes that teach everything they don't do but nothing they actually do. Not one of the 750 required hours of cosmetology covers eyebrow threading. Government-mandated barriers to employment should actually bear some meaningful relationship to reality.

¹²³ BLACK'S LAW DICTIONARY 1453 (10th ed. 2009).

It is instructive to consider the U.S. Supreme Court's first occupational licensing case, from 1889. In *Dent v. West Virginia*¹²⁴—which has never been overruled and is still cited approvingly¹²⁵—the Court upheld a physician-licensing regime, calling it a way to protect “the general welfare of [the] people” and “secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.”¹²⁶ But the Court cautioned that constitutional limits exist. Government is free to mandate requirements “appropriate to the calling or profession,” but not those that “have no relation to such calling or profession.”¹²⁷ Why? Because that would “deprive one of his right to pursue a lawful vocation.”¹²⁸ Restrictions must have a reasonable connection to the person's fitness or capacity. That explains the High Court's 1957 ruling in *Schware v. Board of Bar Examiners*,¹²⁹ the only time the Court has struck down a licensing restriction under rational-basis review. In *Schware*, the Court invalidated New Mexico's attempt to bar a Communist Party member from practicing law: “any qualification must have a rational connection with the applicant's fitness or capacity to practice.”¹³⁰

¹²⁴ 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889).

¹²⁵ See, e.g., *Conn v. Gabbert*, 526 U.S. 286, 292, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999) (citing *Dent* with approval but declining to extend).

¹²⁶ *Dent*, 129 U.S. at 122, 9 S.Ct. 231.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 353 U.S. 232, 238–39, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (holding that former communist ties are not sufficiently related to the practice of law to warrant disbarment).

¹³⁰ *Id.* at 239, 77 S.Ct. 752.

The federal rational-basis requirement debuted amid Depression-era upheaval in 1934, when the Court in *Nebbia v. New York*,¹³¹ criminalizing the sale of milk below the government-approved price, held “a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare,”¹³² so long as it is not “unreasonable or arbitrary.”¹³³ *Nebbia* was a constitutional bombshell, and its abandonment of strong judicial protection for economic liberty presaged a vast expansion of government power. Twenty years later came the Court's authoritative guidance on Fourteenth Amendment review of economic regulation: *Williamson v. Lee Optical*.¹³⁴ In *Lee Optical*, the Court, while implicitly recognizing a liberty right to pursue one's chosen occupation, held that economic regulation—here, forbidding opticians from putting old lenses in new frames—would be upheld if the court could conjure out of thin air any hypothetical reason why lawmakers *might* have enacted the law.¹³⁵ Uncertainty has persisted for decades, partly because, as the Court acknowledges, “Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate government interest.’ ”¹³⁶ Some federal circuits, including the Fifth, have held it is improper to regulate solely to insulate incumbent business from competition.¹³⁷ But with a few notable exceptions, like the recent “casket cartel”¹³⁸ and African hair-braiding cases,¹³⁹ rational-basis review under the Fourteenth Amendment is largely a judicial shrug.

¹³¹ 291 U.S. 502, 530, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

¹³² *Id.* at 537, 54 S.Ct. 505.

¹³³ *Id.* at 530, 54 S.Ct. 505.

¹³⁴ 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

¹³⁵ *Id.* at 487–89, 75 S.Ct. 461.

136 *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). Indeed, the label “rational basis” is misleading because the federal test doesn't require the law to actually make sense. Rather, it asks whether a lawmaker maybe, possibly, conceivably, plausibly, imaginably, hypothetically *might* have thought it was a good idea. It doesn't even matter if lawmakers actually *intended* to violate the Constitution. The law will be upheld so long as a court can conjure *any* legitimate public purpose for the law. One complication: The U.S. Supreme Court has yet to articulate with precision what constitutes a “legitimate” government interest. But how can one make sense of the “legitimate state interest” requirement unless and until the Court explains what purposes are and are not acceptable? Answering the question would necessarily require the Court to state straightforwardly that some things are illegitimate state interests.

137 See, e.g., *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir.2002); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir.2008); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir.), *cert. denied*, — U.S. —, 134 S.Ct. 423, 187 L.Ed.2d 281 (2013).

138 See *St. Joseph Abbey*, 712 F.3d at 215.

139 *Brantley v. Kuntz*, No. A–13–CA–872–SS, — F.Supp.3d —, 2015 WL 75244 (W.D.Tex. Jan. 5, 2015).

*32 Indeed, federal-style scrutiny is quite unscrutinizing, with many burdens acing the rational-basis test while flunking the straight-face test. As the U.S. Supreme Court held almost 80 years ago in *United States v. Carolene Products*,¹⁴⁰ government has no obligation to produce evidence to sustain the rationality of its action; rather, “the existence of facts supporting the legislative judgment is to be presumed.”¹⁴¹ Courts “never require a legislature to articulate its reasons for enacting a statute” and will uphold a law “if there is any reasonably conceivable state of facts that could provide a rational basis” for it.¹⁴² Indeed, it is “entirely irrelevant” whether the purported justification for a burdensome law “actually motivated the legislature.”¹⁴³ Challengers must negate every conceivable basis that might support it,¹⁴⁴ and judges are exhorted to invent a colorable justification if the one articulated by the government falls short. All this explains why critics charge the test is less “rational basis” than “rationalize a basis.”

140 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

141 *Id.* at 152.

142 *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

143 *Id.* at 307, 315, 113 S.Ct. 2096.

144 *Id.* at 314–15, 113 S.Ct. 2096.

The dissents would subordinate concrete scrutiny to conjectural scrutiny that grants a nigh-irrebuttable presumption of constitutionality. It is elastic review where any conceivable, theoretical, imaginary justification suffices. In my view, Texas judges should instead conduct a genuine search for truth—as they do routinely in countless other constitutional areas—asking “What is government actually up to?” When constitutional rights are imperiled, Texans deserve actual scrutiny of actual assertions with actual evidence.

- Should Texas courts reflexively accept disingenuous or smokescreen explanations for the government's actions? No.
- Is government allowed to prevail with purely illusory or pretextual justifications for a challenged law? No.
- Must citizens negate even purely hypothetical justifications for the government's infringement of liberty? No.
- Are Texas courts obliged to jettison their truth-seeking duty of neutrality and help government contrive post hoc justifications? No.

Texas judges should discern whether government is seeking a constitutionally valid end using constitutionally permissible means. And they should do so based on real-world facts and without helping government invent after-the-fact rationalizations.

I believe the Texas Constitution requires an earnest search for truth, not the turn-a-blind-eye approach that prevails under the federal Constitution.¹⁴⁵

¹⁴⁵ As mentioned above, the Texas Constitution has its own “privileges or immunities”-like language, and while *Slaughter-House* nullified federal protection, the U.S. Supreme Court declared that states were proper guardians of the “privileges or immunities” of state citizenship, including the right to pursue a calling. *Slaughter-House Cases*, 83 U.S. (16 Wall. 36), 77–78, 21 L.Ed. 394 (1873). Texas did exactly that in its 1875 Constitution, acting quickly on the Court's statement that protection of individuals' non-federal privileges and immunities was a state concern. As the Court notes, however, the plaintiffs did not raise a separate privileges or immunities challenge.

2. The Texas Constitution narrows the difference in judicial protection given to “fundamental” rights (like speech or religion) and so-called “non-fundamental” rights (like the right to earn a living).

The jurisprudential fact of the matter is that courts are more protective of some constitutional guarantees than others. One bedrock feature of 20th-century jurisprudence, starting with the U.S. Supreme Court's New Deal-era decisions, was to relegate economic rights to a more junior-varsity echelon of constitutional protection than “fundamental” rights. Nothing in the federal or Texas Constitutions requires treating certain rights as “fundamental” and devaluing others as “non-fundamental” and applying different levels of judicial scrutiny, but it is what it is: Economic liberty gets less constitutional protection than other constitutional rights.

*³³ This is not opinion but irrefutable, demonstrable fact. Ever since what is universally known as “the most famous footnote in constitutional law”¹⁴⁶—footnote four in *Carolene Products* in 1938¹⁴⁷—the U.S. Supreme Court has applied varying tiers of scrutiny to constitutional challenges. Simplified, the Court divides constitutional rights into two discrete categories: fundamental and non-fundamental. Upshot: Your favored First Amendment speech rights receive stronger judicial protection than your disfavored Fifth Amendment property rights. The fragmentation is less logical than rhetorical, and is anchored less in principle than in power. Under the post-New Deal picking and choosing, speech gets preferred status while economic liberty is treated as “a poor relation”¹⁴⁸—despite the Due Process Clause's explicit inclusion of “property” (and given the High Court's nullification of the Privilege or Immunities Clause in *Slaughter-House*). Speech rights get no-nonsense “strict scrutiny” to ensure government is behaving itself while property rights get servile, pro-government treatment.

¹⁴⁶ See, e.g., Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 465 S. TEX. L. REV. 163, 165 (2004).

¹⁴⁷ 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) (creating a dichotomy between laws that regulate economic affairs, which get deferential judicial review, and laws that curtail important personal liberties or that target “discrete and insular minorities,” which get more searching judicial scrutiny).

¹⁴⁸ *Dolan v. City of Tigard*, 512 U.S. 374, 392, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

For example, when courts decide an Establishment Clause challenge under the First Amendment, they normally defer to a State's asserted secular purpose. But such deference is not blind. Courts don't simply take government's word for it; they are careful to ensure that a “statement of such purpose be sincere and not a sham.”¹⁴⁹ Same with gender classifications. The Court in 1996 struck down Virginia's exclusion of women from Virginia Military Institute, explaining that government's asserted justification must be “genuine,” as opposed to one that's been “hypothesized or invented *post hoc* in response to litigation.”¹⁵⁰

¹⁴⁹ *Edwards v. Aguillard*, 482 U.S. 578, 586–87, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987).

¹⁵⁰ *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

Digital privacy under the Fourth Amendment is another constitutional area where the U.S. Supreme Court requires real-world evidence rather than putting a pro-government thumb on the scale. Recently, in the landmark case *Riley v. California*,¹⁵¹ prosecutors, citing concerns for officer safety and preserving evidence, insisted they did not need a warrant before searching an arrested suspect's smartphone. The Court unanimously rejected the prosecutors' excuses, making clear that justifications for burdening constitutional rights must be concrete, non-imaginary concerns "based on actual experience."¹⁵² The Court held there was no real and documented evidence that warrantless searches were necessary to protect officers.¹⁵³ As for evidence destruction, the Court was likewise unmoved, noting again the absence of actual evidence to back the State's assertion, adding that in any event, law enforcement has "more targeted ways to address those concerns."¹⁵⁴

¹⁵¹ — U.S. —, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

¹⁵² *Id.* at 2485.

¹⁵³ *Id.* at 2494.

¹⁵⁴ *Id.* at 2487.

Some constitutional rights fall somewhere in between, like "commercial speech," not because the Constitution draws that distinction but because judges do. Commercial speech—advertisements and other business-related speech—is a hybrid under U.S. Supreme Court precedent, involving speech rights (protected vigorously) and economic rights (protected not so vigorously).¹⁵⁵ Imagine a law that makes it illegal to advertise Axe Body Spray because lawmakers believe it endangers the public. This law plainly burdens speech, but it burdens *economic* speech, which receives less judicial protection than, say, political speech.¹⁵⁶ Nonetheless, commercial speech restrictions still get meaningful judicial review. Courts would examine three factors: (1) whether government has a "substantial interest" in burdening the speech; (2) whether the restriction actually furthers that interest; and (3) whether there are less restrictive ways to achieve the stated goal so that speech is restricted as little as necessary.¹⁵⁷ Government bears the burden of proof, and the law receives a serious judicial pat-down, including whether it was honestly driven by a desire to serve public interests or was merely a pretext to serve private interests. Now imagine a different law, one banning the *sale* of Axe Body Spray. With this law, the legal deck is shuffled differently, and a judge would apply a less-rigorous test because the law targets not commercial *speech* but commercial *activity*, a so-called *non-fundamental* right. Because this law focuses on economic activity, government wouldn't have to prove its health claims, or show that less restrictive means were available, or convince a judge that the law's purported purpose was a pretext to mask its true purpose.¹⁵⁸

¹⁵⁵ The Court first recognized the right "to follow any lawful calling, business, or profession he may choose" in *Dent v. West Virginia*, 129 U.S. 114, 121, 9 S.Ct. 231, 32 L.Ed. 623 (1889). For 126 years the Court has reaffirmed that right, even though judicial protection of it has waned. See *supra* notes 124–29 and accompanying text.

¹⁵⁶ *Sorrell v. IMS Health Inc.*, — U.S. —, 131 S.Ct. 2653, 2672, 180 L.Ed.2d 544 (2011) ("Indeed the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.' ") (citations omitted).

¹⁵⁷ *Id.* at 2672–84.

¹⁵⁸ The constitutional double standard becomes perplexing in cases where fundamental and non-fundamental rights overlap. A few years ago, the Eleventh Circuit upheld the constitutionality of an Alabama law banning the commercial distribution of sex toys. *Williams v. Morgan*, 478 F.3d 1316 (11th Cir.2007). The case involved the collision of sexual activity (deemed fundamental) and commercial activity (deemed non-fundamental). Plaintiffs aimed for strict scrutiny by framing the case in sexual-privacy terms because they knew if the case was treated as an economic-rights case, the ban would likely survive rational-basis review. The Eleventh Circuit applied rational-basis review and upheld the law, viewing the case as one about *accessing* sex toys and not about *using* sex toys. Result: Purchasing items for the bedroom can be regulated, but using them consensually cannot. The Fifth Circuit held the opposite way, saying a similar Texas ban violated the Due Process Clause in *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 740 (5th Cir.2008).

*34 But “economic” and “noneconomic” rights indisputably overlap. As the U.S. Supreme Court has recognized, freedom of speech would be meaningless if government banned bloggers from owning computers. Economic freedom is indispensable to enjoying other freedoms—for example, buying a Facebook ad to boost your political campaign. A decade (and three days) ago in *Kelo v. City of New London*,¹⁵⁹ the landmark takings case that prompted a massive national backlash,¹⁶⁰ Justice Thomas's dissent lamented the bias against economic rights this way: “Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.”¹⁶¹

¹⁵⁹ 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) (upholding the power of government to condemn private property for economic-development purposes).

¹⁶⁰ In the wake of *Kelo*, 45 states enacted property-rights reform to curb eminent domain. See Ilya Somin, *The political and judicial reaction to Kelo*, WASH. POST, June 4, 2015, available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/>.

¹⁶¹ *Kelo*, 545 U.S. at 518, 125 S.Ct. 2655 (Thomas, J., dissenting).

Kelo is indeed illustrative, as the rational-basis test applies in eminent-domain cases, too, notwithstanding the assurance in footnote four of *Carolene Products* that alleged violations of the Bill of Rights deserve heightened scrutiny. Even though the Fifth Amendment explicitly protects property, the U.S. Supreme Court has supplanted the *Carolene Products* bifurcation with rational-basis deference in takings cases. The *Kelo* Court stressed its “longstanding policy of deference to legislative judgments,”¹⁶² and its unwillingness to “second-guess”¹⁶³ the city's determination as to “what public needs justify the use of the takings power.”¹⁶⁴ Justice O'Connor's scathing dissent, her final opinion on the Court, forcefully accused her colleagues of shirking their constitutional duty.¹⁶⁵

¹⁶² *Id.* at 469, 125 S.Ct. 2655.

¹⁶³ *Id.* at 488, 125 S.Ct. 2655.

¹⁶⁴ *Id.* at 483, 125 S.Ct. 2655.

¹⁶⁵ *Id.* at 494, 125 S.Ct. 2655 (O'Connor, J., dissenting).

A few years later in *District of Columbia v. Heller*,¹⁶⁶ which struck down D.C.'s ban on handguns and operable long guns, the Court divided on what measure of deference was appropriate in the Second Amendment context. In dissent, Justice Stevens lauded New Deal-era Justice Frankfurter and accused the Court of aggressive activism, chastising, “adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.”¹⁶⁷

¹⁶⁶ 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

¹⁶⁷ *Id.* at 680 n.39, 128 S.Ct. 2783 (Stevens, J., dissenting).

I would not have Texas judges condone government's dreamed-up justifications (or dream up post hoc justifications themselves) for interfering with citizens' constitutional guarantees. As in other constitutional settings, we should be neutral arbiters, not bend-over-backwards advocates for the government. Texas judges weighing state constitutional challenges should scrutinize government's *actual* justifications for a law—what policymakers *really* had in mind at the time, not something they dreamed up after litigation erupted. And judges should not be obliged to concoct speculative or far-fetched rationalizations to save the government's case.

3. Texas courts need not turn a blind eye to the self-evident reasons why an increasing number of Texans need a government permission slip to work in their chosen field.

Today's decision recognizes another key contributor to the irrationalities afflicting occupational licensing: the hard-wired inclination to reduce competition. This metabolic impulse—Human Nature 101—has always existed.

English courts protected the right to earn a living since the early Seventeenth Century, long before the U.S. Constitution was adopted. In 1614, the Court of King's Bench invalidated a law that required an apprenticeship with the local guild before someone could become an upholsterer, dismissing the cries of licensed upholsterers who warned of inexpert practitioners. Lord Chief Justice Coke, Britain's highest judicial officer, was unpersuaded, holding “no skill” was required, “for [someone] may well learn this in seven hours.”¹⁶⁸ Lord Coke wrote that Magna Carta (now 800 years old) and English common law safeguarded the right of “any man to use any trade thereby to maintain himself and his family.”¹⁶⁹ He compared the proponents of barriers, invariably incumbent businesses, to someone rowing a boat: “they look one way and row another: they pretend public profit, intend private.”¹⁷⁰ That is, they speak of public welfare (increasing competence) but seek private welfare (decreasing competition). Guilds in England wielded licensing to create “artificial scarcity,” prompting English courts to declare the right to earn a living one of “nationalistic concern for increasing the wealth of the realm.”¹⁷¹ Lord Coke said legal redress, not licensing, was preferred for most occupations, explaining the “possibility that a practitioner might do a bad job was not a good excuse for restricting economic freedom, raising costs to consumers, and depriving entrepreneurs of economic opportunity.”¹⁷²

¹⁶⁸ *Allen v. Tooley*, (1613) 80 Eng. Rep. 1055 (K.B.) 1057; 2 Bulstrode 186, 189.

¹⁶⁹ *Id.* at 1055.

¹⁷⁰ R.H. COASE, *The Lighthouse in Economics* (1974), in *THE FIRM, THE MARKET, AND THE LAW* 187, 196 (1988) (quoting Chief Justice Sir Edward Coke) (spelling modernized).

¹⁷¹ SANDEFUR, *supra* note 24, at 23.

¹⁷² *Id.*

*35 Adam Smith echoed Coke a century and a half later in *The Wealth of Nations*, calling efforts to thwart people from exercising their dexterity and industry as they wish “a plain violation of this most sacred property.”¹⁷³ Economic freedom was indeed prized in the colonies, which lacked a guild system, but the right was extolled less as a national wealth creator and more as man's natural birthright. In 1775, Thomas Jefferson previewed a principle he would underscore in the Declaration—the right to pursue happiness¹⁷⁴—lamenting British laws that “prohibit us from manufacturing, for our own use, the articles we raise on our own lands, with our own labour.”¹⁷⁵ Like what? Colonists were forbidden from making iron tools. Why? To enrich British toolmakers. Colonists were forbidden from making their own hats from the fur of American animals. Why? To enrich British hatmakers. Adam Smith, who considered economic choice “the most sacred and inviolable of rights,” likewise observed the tendency of trades to raise wages by reducing the supply of skilled craftsmen.¹⁷⁶

¹⁷³ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 122 (Edwin Cannon, ed., Random House 1937).

¹⁷⁴ Jefferson echoed phrasing from the Virginia Declaration of Rights, written by Jefferson's friend George Mason just one month before Jefferson's masterpiece was issued, who extolled “the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” See Va. Declaration of Rights § 2 (1776), in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 234–35 (1971).

¹⁷⁵ THOMAS JEFFERSON, *A Summary View of the Rights of British America* (1774), in *THE JEFFERSONIAN ENCYCLOPEDIA* 963, 964 (John P. Foley ed., Funk & Wagnalls Co. 1900).

¹⁷⁶ SMITH, *supra* note 173, at 121–22.

What is past is indeed prologue.¹⁷⁷ Fast forward almost 250 years, and a prized taxi medallion in New York City now costs \$1.25 million, quadruple the price of just a decade ago.¹⁷⁸ But the unalienable right to pursue happiness is not merely the right to possess things or to participate in activities we enjoy; it necessarily includes the right to improve our lot in life through industry and ingenuity.

¹⁷⁷ See WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

¹⁷⁸ Matt Flegenheimer, *\$1 Medallions Stifling the Dreams of Cabdrivers*, N.Y. TIMES, Nov. 14, 2013, at A24.

A raft of modern research by Nobel Prize-winning economist Gary Becker and various social scientists confirms that practitioners desire to stifle would-be competitors.¹⁷⁹ In 2013, the Texas House Committee on Government Efficiency and Reform found this anticompetitive impulse alive and well in Texas, where licensure affords “clear advantages to members of the licensed profession, such as reduced competition and increased earnings.”¹⁸⁰ The Committee observed that stiffer occupational regulations rarely originate with consumer and consumer advocacy groups; rather, they are pushed by entrenched industry members to secure “less competition, improved job security, and greater profitability.”¹⁸¹ The Committee, recognizing the myriad harms of occupational overregulation—measured in damage to “job growth and consumer choice”¹⁸²—and fearing that Texas was headed towards “more, large-scale occupational licensing programs,”¹⁸³ made this recommendation: “The Legislature should implement a process to review proposals to regulate new occupations, as well as existing licensing programs, based on real and documented harm to the public.”¹⁸⁴

¹⁷⁹ Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, Q.J. ECON., 371–400 (1983).

¹⁸⁰ INTERIM REPORT, *supra* note 51, at 59.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 60.

¹⁸⁴ *Id.* at 62.

The Legislature responded by passing House Bill 86, which creates a mechanism to critically examine whether existing occupational regulations are still needed, and to phase out those deemed unnecessary. Specifically, the new law requires the Sunset Advisory Commission, in assessing “an agency that licenses an occupation or profession,” to probe whether, and how, existing occupational regulations actually serve the public interest.¹⁸⁵ The new law also allows a legislator to submit to the Commission for review and analysis any proposed legislation that would create a new or significantly modify an existing occupational licensing program.¹⁸⁶

¹⁸⁵ TEX. GOV'T CODE § 325.0115(b). The Commission is required to assess:

- (1) whether the occupational licensing program:
 - (A) serves a meaningful, defined public interest; and
 - (B) provides the least restrictive form of regulation that will adequately protect the public interest;
- (2) the extent to which the regulatory objective of the occupational licensing program may be achieved through market forces, private or industry certification and accreditation programs, or enforcement of other law;
- (3) the extent to which licensing criteria, if applicable, ensure that applicants have occupational skill sets or competencies that correlate with a public interest and the impact that those criteria have on applicants, particularly those with moderate or low incomes, seeking to enter the occupation or profession; and
- (4) the impact of the regulation, including the extent to which the program stimulates or restricts competition and affects consumer choice and the cost of services. *Id.* at § 325(b)(1)–(4).

¹⁸⁶ The new law authorizes the Commission's chair to deny such a request for review on the recommendation of the executive director. The bill requires the Commission to report its review findings to the Legislature before the start of the next legislative session. The bill also requires the Commission, in analyzing legislation proposing the creation of an occupational licensing program, to determine whether the unregulated practice of the occupation would be inconsistent with the public interest, whether the public can reasonably be expected to benefit from an assurance of initial and continuing professional skill sets or competencies, and whether the public can be more effectively protected by means other than state regulation. *Id.* § 325.023(c)(1)–(3).

*³⁶ Courts need not be oblivious to the iron political and economic truth that the regulatory environment is littered with rent-seeking by special-interest factions who crave the exclusive, state-protected right to pursue their careers. Again, smart regulations are indispensable, but nonsensical regulations inflict multiple burdens—on consumers (who pay more for goods and services, or try to do the work themselves),¹⁸⁷ on would-be entrepreneurs (who find market entry formidable, if not impossible), on lower-income workers (who can't break into entry-level trades), and on the wider public (who endure cramped economic growth while enjoying no tangible benefit whatsoever).¹⁸⁸

¹⁸⁷ HOWARD BAETJER, JR., *FREE OUR MARKETS—A CITIZENS' GUIDE TO ESSENTIAL ECONOMICS* 95–96 (2013).

¹⁸⁸ KLEINER, *LICENSING OCCUPATIONS*, *supra* note 57, at 53.

IV.

*In Europe, charters of liberty have been granted by power. America has set the example ... of charters of power granted by liberty.*¹⁸⁹

¹⁸⁹ James Madison, *Charters* (Jan. 19, 1792), in *JAMES MADISON—WRITINGS* S 733, 736 (Jack N. Rakove ed., 1999). *See also* 1 *JAMES WILSON, Of the Study of the Law in the United States*, in *THE WORKS OF JAMES WILSON: ASSOCIATE JUSTICE OF THE SUPREME COURT, AND PROFESSOR OF LAW IN THE COLLEGE OF PHILADELPHIA* 1, 6–7 (James De Witt Andrews ed., Callaghan & Co. 1895) (“Without liberty, law loses its nature and its name, and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness.”).

The Founders pledged their lives, fortunes, and sacred honors to birth a new type of nation—one with a radical design: three separate, co-equal, and competing branches. Three rival branches deriving power from three unrivaled words: “We the People.” Both the Texas and federal Constitutions presume the branches will be structural adversaries—that legislators, for example, will jealously guard their lawmaking prerogative if the executive begins aggrandizing power. Indeed, inter-branch political competition is a precondition to advancing inter-firm economic competition—that is, the judicial branch asserting judicial power to ensure that the political branches don't arbitrarily insulate established practitioners from newcomers.

Madison, lead architect of the U.S. Constitution, saw his bedrock constitutional mission as ensuring that America does not “convert a limited into an unlimited Govt.”¹⁹⁰ Enlightenment philosopher Montesquieu likewise warned of power concentrated: “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”¹⁹¹ Madison paid homage to “the celebrated Montesquieu” in Federalist 10, which gave voice to Madison's gravest worry: the risk of runaway majorities trampling individual liberty.¹⁹² Madison turned 85 on the day delegates adopted the Constitution of the Republic of Texas. “He lived barely 100 days more, just long enough to see Texas free.”¹⁹³ And just like Madison's handiwork, the *Texas* Constitution—then and today—exists to secure liberty.

¹⁹⁰ James Madison, *Letter to Spencer Roane* (Sept. 2, 1819), in *JAMES MADISON: WRITINGS*, *supra* note 189, at 736.

¹⁹¹ 1 *CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS* 181 (1st Amer. from the 5th London ed. 1802).

¹⁹² *THE FEDERALIST* No. 51, at 298 (James Madison) (Clinton Rossiter ed., 1961) (citing Montesquieu for the proposition that the three branches of government, yet intertwined, do not violate the principle of separation of powers).

193 *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 808 n.38 (Tex.2014).

A.

As mentioned earlier, the term “judicial activism” is a legal [Rorschach test](#). I oppose judicial activism, inventing rights not rooted in the law. But the opposite extreme, judicial passivism, is corrosive, too—judges who, while not activist, are not *active* in preserving the liberties, and the limits, our Framers actually enshrined. The Texas Constitution is irrefutably framed in proscription, imposing unsubtle and unmistakable limits on government power. It models the federal Constitution in a fundamental way: dividing government power so that each branch checks and balances the others. But as we recently observed, “the Texas Constitution takes Madison a step further by including, unlike the federal Constitution, an explicit Separation of Powers provision to curb overreaching and to spur rival branches to guard their prerogatives.”¹⁹⁴ The Texas Constitution constrains government power in another distinctive way: It lacks a Necessary and Proper Clause, often invoked to expand Congress's powers beyond those specifically enumerated.¹⁹⁵ Moreover, as noted above, it contains a Privileges or Immunities Clause that, unlike the federal version, has never been judicially nullified.¹⁹⁶

194 *Id.* at 808 n.39 (citing TEX. CONST. art. II, § 1).

195 U.S. CONST. art. I, § 8, cl. 18.

196 *See supra* notes 40, 86, and 146, and accompanying text.

*37 As judges, we have no business second-guessing *policy* choices, but when the Constitution is at stake, it is not impolite to say “no” to government. Liberties for “We the People” necessarily mean limits on “We the Government.” That's the very reason constitutions are written: to stop government abuses, not to ratify them. Our supreme duty to our dual constitutions and to their shared purpose—to “secure the Blessings of Liberty”¹⁹⁷—requires us to check constitutionally verboten actions, not rubber-stamp them under the banner of majoritarianism. For people to live their lives as they see fit, a government of limited powers must exercise that power not with force but with reason. And an independent judiciary must *judge* government actions, not merely rationalize them. Judicial restraint doesn't require courts to ignore the nonrestraint of the other branches, not when their actions imperil the constitutional liberties of people increasingly hamstrung in their enjoyment of “Life, Liberty and the pursuit of Happiness.”¹⁹⁸

197 U.S. CONST. pmb. *See also* TEX. CONST. art. I (declaring its utmost mission to safeguard “the general, great and essential principles of liberty and free government”).

198 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (underscoring that governments are “instituted among Men” in order to “secure” our “unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”).

The power to “protect the public” is a heady and fearsome one.¹⁹⁹ Government is charged with promoting the general welfare, but it must always act within constitutional constraints. Our two constitutions exist to advance two purposes: individual liberty through limited government. Our federal and state Founders saw liberty as America's natural, foundational value, and our rights as too numerous to be exhaustively listed. Liberty both *justifies* government (to erect basic civic guardrails) and *limits* government (to minimize abridgements on human freedom). In other words, our dual constitutional charters exist not to *exalt* majority rule but to protect prepolitical rights that *limit* majority rule. Majoritarianism cannot be permitted to invert our bottom-line constitutional premise. The might of the majority, whatever the vote count, cannot trample individuals' rights recognized in both our federal and state Constitutions, not to mention in our nation's first law, the Declaration.²⁰⁰

199 *See, supra* notes 12–18 (discussing *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), which upheld forcible sterilization of the “feeble-minded”).

200 Congress placed the Declaration of Independence at the outset—page 1, volume 1—of the United States Code, under this heading: “Organic Laws of the United States of America.” Lincoln describes the Declaration of Independence as a lens through which just laws become clear—as the framework for interpreting the law—when he calls the Declaration an “apple of gold,” and the Constitution the “frame of silver” around it. ABRAHAM LINCOLN, *Fragment on the Constitution and the Union* (Jan. 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Roy P. Basler ed., 1953). The Constitution, indeed all laws, must not be considered independently of the ultimate purpose for which they are designed: not to unhinge democracy, but to secure liberty.

B.

Our State Constitution, like Madison's Federal handiwork, is infused with Newtonian genius: three rival branches locked in synchronous orbit by competing interests—ambition checking ambition. 201

201 *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 808 (2014).

Isaac Newton died in 1727, before James Madison, the Father of the U.S. Constitution, was even born, but our Founders, both state and federal, understood political physics: “power seized by one branch necessarily means power ceded by another.” 202 Newton's Third Law of Motion, while a physical law, also operates as a political law. When one branch of government exerts a force, there occurs an equal and opposite counterforce. The Laws of Constitutional Motion require these rival branches to stay within their sphere, flexing competing forces so that power is neither seized nor ceded.

202 *Id.*

*38 Our Framers understood that government was inclined to advance its own interests, even to the point of ham-fisted bullying, which is precisely why the Constitution was written—to keep *government* on a leash, not We the People. But individual liberty pays the price when our ingenious system of checks and balances sputters, including when the judiciary subordinates liberty to the congeries of group interests that dictate majoritarian outcomes. Daily and undeniably, there exist government incursions that siphon what Thomas Jefferson called our “due degree of liberty” 203 —“siphoning that often occurs subtly, with such drop-by-drop gentleness as to be imperceptible.” 204

203 Letter from Thomas Jefferson to James Madison, Paris (1787), in THE JEFFERSONIAN ENCYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 277 (John P. Foley ed., 1900). See also Edmund Burke, *Speech on Moving His Resolutions for Conciliation with the Colonies*, Mar. 22, 1775, in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 147, 158 (Peter J. Stanlis ed., Doubleday & Co. 1968) (“In this character of the Americans a love of freedom is the predominating feature which marks and distinguishes the whole: and as an ardent is always a jealous affection, your colonies become suspicious, restive, and untractable, whenever they see the least attempt to wrest from them by force, or shuffle from them by chicane, what they think the only advantage worth living for. This fierce spirit of liberty is stronger in the English colonies, probably, than in any other people of the earth ...”).

204 *Robinson v. Crown Cork & Seal, Inc.*, 335 S.W.3d 126, 165 (Tex.2010) (Willett, J., concurring). Or, as 18th-century philosopher David Hume cautioned, “It is seldom, that liberty of any kind is lost all at once.” Rather, suppression “must steal in upon [people] by degrees, and must disguise itself in a thousand shapes, in order to be received.” DAVID HUME, OF THE LIBERTY OF THE PRESS (1741), in DAVID HUME: POLITICAL ESSAYS 3 n.4 (Knud Haakonssen ed., 1994).

Police power is undoubtedly an attribute of state sovereignty, but sovereignty ultimately resides in “the people of the State of Texas.” 205 The Texas Constitution limits government encroachments, and does so on purpose. “Our Bill of Rights is not mere hortatory fluff; it is a purposeful check on government power.” 206 And everyday Texans, and the courts that serve them, must remain vigilant. Government will always insist it is acting for the public's greater good, but as Justice Brandeis warned in his now-celebrated *Olmstead* dissent: “Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.” 207

205 TEX. CONST. pmbl.

206 *Robinson*, 335 S.W.3d at 164 (Willett, J., concurring).

207 *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Before solving a problem, you must first define it. The Lone Star State boasts a spirit of daring and rugged independence, virtues essential to personal and economic dynamism, but bureaucratic headwinds imperil that vitality. Almost two centuries ago, around the time of Texas independence, Alexis de Tocqueville, a keen observer of early America, warned of “soft despotism” wrought by government that “covers the surface of society with a network of small complicated rules” that “even the most original and energetic characters cannot penetrate.”²⁰⁸ Tocqueville's warnings for 1835 America apply equally to 2015 Texas, where “administrative despotism,” though doubtless well meaning, inflicts a real-world toll on honest, hardworking Texans:

*39 The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting. Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which government is the shepherd.²⁰⁹

208 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 319 (P. Bradley ed. 1994).

209 *Id.*

Government's conception of its own power as limitless is hard-wired. But under the Texas Constitution, government may only pursue constitutionally permissible ends. Naked economic protectionism, strangling hopes and dreams with bureaucratic red tape, is not one of them. And such barriers, often stemming from interest-group politics, are often insurmountable for Texans on the lower rungs of the economic ladder (who unsurprisingly lack political power)—not to mention the harm inflicted on consumers deprived of the fruits of industrious entrepreneurs. Irrational licensing laws oppress hard-working Texans of modest means, men and women struggling to do what Texans of all generations have done: to better their families through honest enterprise.²¹⁰

210 To the degree that “footnote four” of *Carolene Products* says “discrete and insular minorities” in the political arena deserve special judicial protection, it is tough to imagine a group more disadvantaged by the majoritarian political process than would-be entrepreneurs denied their calling by Byzantine, State-enforced barriers enacted at the behest of entrenched, politically powerful interests.

V.

*[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.*²¹¹

211 *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir.2004).

Governments are “instituted among Men” to “secure” preexisting, “unalienable Rights.”²¹² Our federal and Texas Constitutions are charters of liberty, not wellsprings of boundless government power. Madison adroitly divided political power because he prized a “We the People” system that extolled citizens over a monarchical system of rulers and subjects. The trick was to give government its requisite powers while structurally hemming in that power so that fallible men wouldn't become as despotic as the hereditary monarchs they had fled and fought.

212 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Economic liberty is “deeply rooted in this Nation's history and tradition,”²¹³ and the right to engage in productive enterprise is as central to individual freedom as the right to worship as one chooses. Indeed, Madison declared that “protection” of citizens’ “faculties of acquiring property” is the “first object of government,”²¹⁴ and admonished that a government whose “arbitrary restrictions” deny citizens “free use of their faculties, and free choice of their occupations” was “not a just government.”²¹⁵ When it comes to occupational licensing—often less about protecting the public than about bestowing special privileges on political favorites—government power has expanded unchecked. But government doesn't get to determine the reach of its own power, something that subverts the original constitutional design of limited government. The Texas Constitution imposes limits, and imposes them intentionally.²¹⁶ Bottom line: Police power cannot go unpoliced.

²¹³ *Washington v. Glucksberg*, 521 U.S. 702, 703, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

²¹⁴ THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

²¹⁵ MADISON, *Property* (Mar. 29, 1792), in JAMES MADISON: WRITINGS, *supra* note 189, at 516. The author of the Declaration agreed: “[E]very one has a natural right to choose that [vocation] which he thinks most likely to give him comfortable subsistence.” THOMAS JEFFERSON, THOUGHTS ON LOTTERIES (1826), in THE JEFFERSONIAN ENCYCLOPEDIA 609 (John P. Foley ed., Funk & Wagnalls Co. 1900).

²¹⁶ As discussed above, *see supra* notes 194–96 and accompanying text, the Texas Constitution does not mirror exactly the U.S. Constitution, and our Privileges or Immunities Clause, best I can tell, is alive and well, unlike its federal counterpart.

*40 I believe judicial passivity is incompatible with individual liberty and constitutionally limited government. Occupational freedom, the right to earn a living as one chooses, is a nontrivial constitutional right entitled to nontrivial judicial protection. People are owed liberty by virtue of their very humanity—“endowed by their Creator,” as the Declaration affirms.²¹⁷ And while government has undeniable authority to regulate economic activities to protect the public against fraud and danger, freedom should be the general rule, and restraint the exception.

²¹⁷ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The Founders understood that a “limited Constitution” can be preserved “no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”²¹⁸ Judicial duty—“so arduous a duty,” Hamilton called it—requires courts to be “bulwarks of a limited Constitution against legislative encroachments,”²¹⁹ including holding irrational anticompetitive actions unconstitutional. Such is life in a constitutional republic, which exalts constitutionalism over majoritarianism precisely in order to tell government “no.” That's the paramount point, to tap the brakes rather than punch the gas.

²¹⁸ THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²¹⁹ *Id.* at 469.

The Court today rejects servility in the economic-liberty realm, fortifying protections for Texans seeking what Texans have always sought: a better life for themselves and their families. There remains, as Davy Crockett excitedly wrote his children, “a world of country to settle.”²²⁰

²²⁰ Letter from David Crockett to his children (Jan. 9, 1836), in H.W. BRANDS, LONE STAR NATION 332 (2004).

Justice [Boyd](#), concurring in judgment.

I concur in the Court's judgment but do not fully agree with its reasoning. Specifically, I do not agree with the Court's adoption of a new alternative test under which the Texas Constitution's “due course of law” provision invalidates any law that is

“so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest.” *Ante* at ——. Nevertheless, I conclude that the Texas statute requiring the petitioners—who merely remove superfluous hair using tweezing techniques—to obtain an esthetician's license is arbitrary and unreasonable, and therefore oppressive, because it has no rational relationship to a legitimate government interest.

The Texas Constitution provides that “[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” TEX. CONST. art. I, § 19. Under our precedent, this guarantee “contains both a procedural component and a substantive component.” *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 632 (Tex.1996). The issue here is whether requiring the petitioners to obtain an esthetician's license as a condition for practicing their trade of eyebrow threading violates their substantive rights to liberty, property, privileges, or immunities without due course of law.

As the Court notes, this Court has “not been entirely consistent” in its articulation of the standard by which we review the constitutionality of economic regulations under the due course of law provision. *Ante* at ——. Through the years, for example, we have variously said that laws are presumed to be constitutional and a law is invalid only if:

- it is “unreasonable and in contravention of common right,” *Milliken v. City Council of Weatherford*, 54 Tex. 388, 394 (1881);
- it invades rights “without justifying occasion, or in an unreasonable, arbitrary, and oppressive way,” *Hous. & Tex. Cent. Ry. Co. v. City of Dall.*, 84 S.W. 648, 653 (Tex.1905);
- it is not “sufficiently rational and reasonable,” *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex.1995);
- it has “no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense,” *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex.1998) (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 187–88, 48 S.Ct. 447, 72 L.Ed. 842 (1928));
- it is not “designed to accomplish an objective within the government's police power and [no] rational relationship exists between the ordinance and its purpose,” *id.*;
- the “enacting body could [not] have rationally believed at the time of enactment that the ordinance would promote its objective,” *id.*;
- it is not “at least fairly debatable that the [Legislature's] decision was rationally related to legitimate government interests,” *id.*; or
- it is “clearly arbitrary and unreasonable,” *id.*

These precedents illustrate the difficulty the Court has had articulating the appropriate standard. I would read our prior descriptions together, to provide that a law violates the substantive due course of law provision only if it is arbitrary and unreasonable, and therefore oppressive, because it has no rational relationship to a legitimate government interest. The Court, by contrast, holds that a law is invalid if its “purpose could not arguably be rationally related to a legitimate governmental interest” or “when considered as a whole, [its] actual, real-world effect as applied to the challenging party could not arguably be rationally related to, *or is so burdensome as to be oppressive in light of*, the governmental interest.” *Ante* at — (emphasis added). In other words, the Court holds that a law is invalid if it is “burdensome” and “oppressive in light of” the legitimate governmental interest, even if it is rationally related to that interest. As the CHIEF JUSTICE notes in his dissent, “[n]either this Court nor any other the Court can find has ever used ‘oppressive’ as a test for substantive due process.” *Post* at —; see *Hous. & Tex. Cent. Ry. Co.*, 84 S.W. at 653 (holding Constitution prohibits laws that invade substantive rights “without justifying occasion, or in an unreasonable, arbitrary, and oppressive way,” not “*or* oppressive way”).

I agree that the Court's new burdensome/oppressive standard is "loose"—too "loose," in fact, to be useful in our analysis of these types of constitutional challenges. *See post* at — (Hecht, C.J., dissenting). Determining what "burdensome" or "oppressive" means in this context will be nigh impossible, unless we use those terms, as we have in our prior opinions, to refer to the burdens that result from a law that is not rationally related to a legitimate government interest. Like JUSTICE GUZMAN, "I have significant doubts that this standard is workable in practice." *Post* at —. And like both dissenting Justices, I believe the burdensome/oppressive standard makes it too easy for courts to invalidate regulations for their own personal policy reasons. *See post* at — (Hecht, C.J., dissenting); *post* at — (Guzman, J., dissenting). Because, as JUSTICE GUZMAN notes, courts cannot and should not "legislate from the bench," *post* at —, the bar should be set very high, to ensure that it is indeed the Constitution, and not merely a court, that invalidates a law.

*42 But the bar cannot be insurmountable, and if the application of any regulatory licensing scheme were ever constitutionally invalid, this one is. I need not repeat my colleagues' descriptions, because everyone (including the State and both dissenting Justices) agrees that requiring eyebrow threaders to complete the current requirements necessary to obtain an esthetician's license "is obviously too much." *Post* at — (Hecht, C.J., dissenting); *post* at — (Guzman, J., dissenting). Certainly, "[i]f there is room for a fair difference of opinion as to the necessity and reasonableness of a legislative enactment on a subject which lies within the domain of the police power, the courts will not hold it void." *State v. Richards*, 301 S.W.2d 597, 602 (1957). But there is no difference of opinion here: requiring eyebrow threaders to obtain an esthetician's license is neither necessary nor reasonable. Requiring them to obtain training in sanitation and safety is rational, but requiring them to get an esthetician's license is not.

The CHIEF JUSTICE suggests that "there is ... evidence from which the Legislature could reasonably conclude that the required instruction and testing would further its goal of protecting public health and safety through the regulation of cosmetology." *Post* at —. I agree that protecting public health and safety is a legitimate government interest, but I do not agree that requiring eyebrow threaders to meet the current requirements for obtaining an esthetician's license is *rationally* related to achieving that interest. Under the dissenting Justices' approach, if the Legislature decided to require eyebrow threaders to obtain a medical license, we would have to uphold that decision because that licensing scheme also "instruct[s] in general sanitation and safety practices." *Post* at — (Hecht, C.J., dissenting).

It may be convenient to impose the existing esthetician licensing scheme on eyebrow threaders, but in my view it is also arbitrary and unreasonable, and therefore oppressive, because doing so is not rationally related to the legitimate government interest in promoting public health and safety. Courts should not second-guess the Legislature, but in the end, as the CHIEF JUSTICE agrees, "the final authority to interpret and apply the Constitution belongs to the Judiciary[.]" *Post* at —. Although that authority is "not lightly to be exercised," *post* at — (Hecht, C.J., dissenting), the Court is right to exercise it here.

I therefore concur in the judgment.

Chief Justice [Hecht](#), joined by Justice [Guzman](#) and Justice [Brown](#), dissenting.

This is one of those cases in which, once the Court has decided whom it wants to win, the less said the better. Result is an inapt tool for shaping principle; it's supposed to work the other way around. And when principle ends up being mutilated, it can no longer be used to guide other results. Since it turns out that the Court thinks substantive due process means whatever judges say it means, it would be best to leave bad enough alone rather than pretend the idea has any support in the Constitution's text or history. The Court runs the risk that what passes for constitutional analysis around here will be seen as just picking words out of the air.

The Threaders deserve to have the yoke of the regulatory state thrown off, the shackles on their free enterprise shattered, in short —although brevity is not the hallmark of some of today's writings—to stick it to the man. And what better way to do all that than by having judges hold the State's 80-year-old cosmetology licensing scheme, also found in ten other states, unconstitutional

as applied to eyebrow threading. The trouble is, this Court, like the United States Supreme Court, has repeatedly held that a statute with a rational basis does not violate substantive due process, and applying that standard here will not help the Threaders. Casting about, the Court comes up with “oppressive”, a brand-new entrant in the substantive due process lexicon. Neither this Court nor any other the Court can find has ever used “oppressive” as a test for substantive due process. Which is great because the Court is now free—as free as the grateful Threaders from public health and safety regulation—to make up substantive due process from scratch.

*43 Whether eyebrow threaders need 750 hours' training, or only 430, or 40, or 1, to practice their trade on the public is not for us to say, as long as the Legislature, whose job it is to say, is making a rational effort to protect public health and safety. As the Court acknowledges at one point, “it is not for courts to second-guess [legislative and agency] decisions as to the necessity for and the extent of training that should be required for different types of commercial service providers.”¹ The question for us is whether, by requiring 750 hours' training, the Legislature has violated substantive due process by depriving eyebrow threaders of their fundamental liberty without the due course of law guaranteed by the Texas Constitution.

¹ *Ante* at ———.

Because the final authority to interpret and apply the Constitution belongs to the Judiciary, only the people themselves, by constitutional amendment, can alter the Court's substantive due process decisions. The Judiciary's authority is enormous and not lightly to be exercised. Justice Powell once observed that “[t]he history of substantive due process counsels caution and restraint.”² The history to which he referred was the Supreme Court's own adventure with substantive due process beginning with *Lochner v. New York*,³ in which the Court abrogated a state statute as “unreasonable, unnecessary and arbitrary”,⁴ and ending with *United States v. Carolene Products Company*,⁵ in which the Court established that a statute with any rational basis will be upheld. The Court disregards the federal courts' experience with substantive due process in *Lochner* and its progeny, invents a new test unprecedented in American jurisprudence, and ushers in a new era of government by judges.

² *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (Powell, J., concurring) (citations omitted).

³ 198 U.S. 45, 58–59, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

⁴ *Id.* at 56, 25 S.Ct. 539.

⁵ 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

The Court, and JUSTICE WILLETT'S concurring opinion in its wild championing of economic liberty, seem oblivious to the reality that social liberty is no less important. The same substantive due process that can free eyebrow threaders from onerous training requirements can also be used to establish a right of privacy not otherwise to be found in the Constitution.⁶ Are restrictions on abortion “oppressive”? How about restrictions on marriage? Unconstrained by any meaningful standard, substantive due process allows judges to define liberty according to their personal policy preferences. History and reason warn that the Court has gone too far.

⁶ *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

I respectfully dissent.

I

The Legislature has regulated cosmetic services for 80 years. The original impetus was concern for public health and safety. “[T]he public,” the Legislature found in the Cosmetology Act of 1935, “is daily exposed to disease due to insufficient care as

to sanitation and hygiene [and should be protected by the Act] from inexperienced and unscrupulous beauty parlors and beauty culture schools”.⁷ Protection of the public health and welfare remains the driving force for regulating cosmetology.⁸ Beauty schools, salons, and practitioners are subject to “sanitation rules to prevent the spread of an infectious or contagious disease”,⁹ inspections to ensure compliance,¹⁰ and investigation of public complaints.¹¹ The 1935 Act made it unlawful to practice, provide, or teach cosmetology—broadly defined to include any practice for beautifying the upper body¹²—without a license.¹³ Applicants were required to complete 1,000 hours of training at a licensed school of beauty culture and pass an examination.¹⁴

⁷ Act of Apr. 25, 1935, 44th Leg., R.S., ch. 116, § 26, 1935 Tex. Gen. Laws 304, 311, *amended by* Act of Nov. 14, 1935, 44th Leg., 2d C.S., ch. 469, §§ 1–2, 1935 Tex. Gen. Laws 1846, 1846–1848. The 1935 Act and its successor provisions were codified first as article 734b in the former Penal Code, later as former article 734c, then “transferred” to former [article 8451a of the Texas Revised Civil Statutes](#), which was in turn replaced by Chapter 1602 of the new Occupations Code. *See* Act of May 28, 1971, 62d Leg., R.S., ch. 1036, § 49, 1971 Tex. Gen. Laws 3389, 3402 (adopting a new Penal Code and repealing former articles); Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 5, 1973 Tex. Gen. Laws 883, 995, 996a, 996c (adopting a new Penal Code and transferring certain provisions to the Revised Civil Statutes); Act of May 13, 1999, 76th Leg., R.S., ch. 388, §§ 1, 6, 1999 Tex. Gen. Laws 1431, 2182–2206, 2439–2440 (adopting the Occupations Code, including Chapter 1602, and repealing former [article 8451a](#)); *see also* Act of May 28, 2005, 79th Leg., R.S., ch. 798, §§ 1.01, 6.01–.02, 2005 Tex. Gen. Laws 2734, 2735, 2759–2760 (adopting Chapter 1603 of the Occupations Code and repealing or amending related provisions in Chapters 1601 and 1602).

Before 1935, a statute required registration, but not licensing, of “beauty parlor” owners and operators, imposed certain health and cleanliness requirements, and set fines for statutory violations. *See* Act of 1921, 37th Leg., R.S., ch. 79, 1921 Tex. Gen. Laws 155, 155–158, codified in TEX. PEN. CODEE arts. 728–733 (Vernon’s 1925).

⁸ *See* House Comm. on Gov’t Org., Bill Analysis, Tex. S.B. 384, 66th Leg., R.S. (1979) (“The need for regulation has primarily been based on the protection of the public health and welfare.”); House Comm. on Public Health, Bill Analysis, Tex. S.B. 127, 69th Leg., R.S. (1985) (“The need for regulation has primarily been based on the protection of the public health and welfare.”).

⁹ TEX. OCC. CODEE § 1603.102.

¹⁰ *Id.* §§ 1603.103, 1603.104.

¹¹ *Id.* § 51.252; *see also id.* § 1603.151.

¹² Act of Apr. 25, 1935, 44th Leg., R.S., ch. 116, § 3(a), 1935 Tex. Gen. Laws at 304, codified as former TEX. PEN. CODEE art. 734b, § 3(a) (“Any person who with hands, or mechanical or electrical apparatus or appliances, or by the use of cosmetological preparations, antiseptics, tonics, lotions or creams, engages in any one or combination of the following practices for remuneration or pay, to-wit: cleansing, beautifying, or any kindred work of the scalp, face, neck, arm, bust, or upper part of the body or manicuring the nails of any person, shall be construed to be practicing the occupation of a cosmetologist.”).

¹³ *Id.* § 1, 1935 Tex. Gen. Laws at 304, codified as former TEX. PEN. CODEE art. 734b, § 1.

¹⁴ *Id.* §§ 9, 11(a), 1935 Tex. Gen. Laws at 306–307, codified as former TEX. PEN. CODEE art. 734b, §§ 9, 11(a).

*44 In 1971, the Legislature rewrote the Act. An expanded definition of cosmetology specifically included “removing superfluous hair from the body by use of depilatories¹⁵ or tweezers”.¹⁶ The revised Act was more discriminating, creating five classes of licenses with different restrictions on the activities in which a holder could engage.¹⁷ Training requirements ranged from 1,500 hours down to 150 hours,¹⁸ and applicants had to pass written and practical examinations.¹⁹ Since then, the Legislature has repeatedly adjusted the kinds of licenses and the training requirements for each.²⁰ There are now six classes of licenses with required training ranging from 1,500 hours to 320 hours.²¹

¹⁵ A depilatory is “a cosmetic for the temporary removal of undesired hair”. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 605 (2002).

- 16 Act of May 28, 1971, 62d Leg., R.S., ch. 1036, § 1(3)(C), 1971 Tex. Gen. Laws 3389, 3389, codified as former TEX. PEN. CODEE art. 734c, § 1(3)(c).
- 17 *Id.* §§ 13–17, 1971 Tex. Gen. Laws at 3392–3394, codified as former TEX. PEN. CODEE art. 734c, §§ 13–17.
- 18 *Id.*
- 19 *Id.* §§ 4(d), 13–17, 1971 Tex. Gen. Laws. at 3391–3394, codified as former TEX. PEN. CODEE art. 734c §§ 4(d), 13–17.
- 20 *See, e.g.*, Act of May 28, 1979, 66th Leg., R.S., ch. 606, § 1, 1979 Tex. Gen. Laws 1340, 1343–1344 (amending former TEX. REV. CIV. STAT. art. 8451a, §§ 10–12); Act of May 27, 1991, 72d Leg., R.S., ch. 626, § 11, 1991 Tex. Gen. Laws 2260, 2265 (adding § 13A to former TEX. REV. CIV. STAT. art. 8451a); Act of May 27, 2011, 82d Leg., R.S., ch. 1241, §§ 15–17, 2011 Tex. Gen. Laws 3319, 3325–3326 (amending TEX. OCC. CODEE § 1602.257 and adding §§ 1602.2571, 1602.2572, and 1602.261).
- 21 TEX. OCC. CODEE §§ 1602.254–.2572, 1602.261, amended by Act of May 22, 2015, 84th Leg., R.S., H.B. 2717, available at <http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB02717F.pdf>.

In 2005, the Legislature assigned the regulation of cosmetology to the Texas Department of Licensing and Regulation (“the Department”),²² “the primary state agency responsible for the oversight of businesses, industries, general trades, and occupations that are regulated by the state and assigned to the department by the legislature.”²³ The Department is managed by an executive director²⁴ and governed by the Texas Commission of Licensing and Regulation (“the Commission”).²⁵ The Commission is comprised of seven members appointed by the Governor and confirmed by the Senate,²⁶ each of whom must be “a representative of the general public.”²⁷ The Commission soon became aware of the practice of eyebrow threading, and in 2008 it began to insist that threading be included in the regulatory scheme like other forms of hair removal. In a 2011 case, the court of appeals was skeptical of the Department's position,²⁸ but after the decision issued, the Legislature amended the definition of cosmetology to include “removing superfluous hair from a person's body using depilatories, preparations, or tweezing techniques”.²⁹ The Department then amended its regulations to define “tweezing techniques” as “the extraction of hair from the hair follicle by use of ... an instrument, appliance or implement ... made of ... thread or other material.”³⁰

- 22 Act of May 28, 2005, 79th Leg., R.S., ch. 798, §§ 1.01, 6.01–.02, 2005 Tex. Gen. Laws 2734, 2735, 2759–2760 (adopting Chapter 1603 of the Occupations Code and repealing or amending related provisions in Chapters 1601 and 1602); *see* TEX. OCC. CODEE § 1603.002.
- 23 TEX. OCC. CODEE § 51.051(a).
- 24 *Id.* §§ 51.101, 51.103.
- 25 *Id.* § 51.051(b).
- 26 *Id.* § 51.052(a).
- 27 *Id.* § 51.053(a).
- 28 *Kuntz v. Khan*, No. 03–10–00160–CV, 2011 WL 182882, *7–8 (Tex.App.–Austin, Jan. 21, 2011, no pet.) (mem. op.), available at <http://www.search.txcourts.gov/Case.aspx?cn=03-10-00160-CV&=coa03>. In an interlocutory appeal from the trial court's partial denial of the governmental defendants' plea to the jurisdiction and temporary injunction barring defendants from taking any action to further investigate, regulate, or otherwise disrupt Khan's business, the Department argued that eyebrow threading constitutes the practice of cosmetology in three ways: threading involves “beautifying a person's face” using an “appliance”, “administering a facial treatment”, and “removing superfluous hair from a person's body using depilatories”. *See* TEX. OCC. CODEE §§ 1602.002(7), 1602.002(8), 1602.002(9). In affirming the temporary injunction, the court of appeals concluded, *inter alia*, that the trial court reasonably determined that Khan had shown “a probable right to recovery based on the plain language of the statute”. *Khan*, 2011 WL 182882, at *8.

²⁹ Act of May 27, 2011, 82d Leg., R.S., ch. 1241, § 12, 2011 Tex. Gen. Laws 3319, 3323–3324 (emphasis in original) (amending [TEX. OCC. CODE E § 1602.002\(a\)\(9\)](#) to substitute “tweezing techniques” for “mechanical tweezers”).

³⁰ 37 Tex. Reg. 681, 681 (Feb. 10, 2012), codified at [16 TEX. ADMIN. CODE § 83.10\(36\)](#).

*⁴⁵ The Department requires an esthetician specialty license for threading.³¹ The license covers various skin care treatments such as facials and cleansing, “beautifying a person’s face, neck, or arms” with preparations or other products, and removing superfluous hair from the skin.³² An applicant for an esthetician specialty license must complete 750 hours of instruction in a licensed beauty culture school,³³ half the hours required for an “operator license” allowing the performance of “any practice of cosmetology.”³⁴ The instruction for an esthetician specialty license covers the following subjects³⁵:

orientation, rules and laws...50 hours

sanitation, safety, and first aid...40 hours

anatomy and physiology...90 hours

facial treatment, cleansing, masking, therapy...225 hours

superfluous hair removal...25 hours

electricity, machines, and related equipment...75 hours

makeup...75 hours

chemistry...50 hours

care of client...50 hours

management...35 hours

aroma therapy...15 hours

nutrition...10 hours

color psychology...10 hours

Depending on the school, the training can take from nine to sixteen months and cost anywhere from \$3,500 for a public junior college to \$22,000 for a private school. Threading is not a required part of the curriculum, which generally covers “superfluous hair removal”, and only a handful of schools offer instruction in threading. Health, safety, and sanitation issues are covered as part of the first five subjects listed above; these subjects account for 430 of the prerequisite hours.

³¹ [TEX. OCC. CODEE § 1602.257](#) (eligibility for esthetician specialty license).

³² *Id.* § 1602.257(a) (setting out the services that the holder of an esthetician license is authorized to perform).

³³ *Id.* § 1602.257(b)(3).

³⁴ *Id.* §§ 1602.254(a) (permitting “any practice of cosmetology”), (b)(3) (required hours).

³⁵ [16 TEX. ADMIN. CODE § 83.120\(b\)](#) (esthetician curriculum).

An applicant must also pass a written and a practical examination.³⁶ The examinations test on safety, sanitation, and disinfectant criteria as well as the ability to perform various services. Hair removal is part of the practical exam, though threading is not, but an applicant may use threading to demonstrate her hair-removal ability.³⁷

³⁶ *Id.* §§ 83.20(a)(6), (b)(6), 83.21; *see also* TEX. OCC. CODE E §§ 1602.254(c)(3), 1602.262(a)(2).

³⁷ Petitioners argue that they could not do so because the examinee is required to “hold the [client’s] skin taut” while removing the hairs, and the threading technique requires two hands. But the record shows that it is nevertheless necessary that the client’s skin be held taut during threading and that the usual practice is to direct the client to hold her own skin taut during the threading process. The record does not tell us whether or not this would suffice during the examination.

Cosmetology regulations require eyebrow threaders, like other cosmetologists, to wash their hands or use a liquid hand sanitizer before performing any services on a customer; dispose of all single-use items that have come in contact with the client’s skin; store thread in sealed bags or covered containers and in a clean, dry, and debris-free storage area; and clean, disinfect, and sterilize or sanitize all multi-use items prior to each service.³⁸ Regulations further require cosmetologists and estheticians to clean the client’s skin before performing hair removal services.³⁹ Special precautions must be taken with items such as creams, astringents, lotions, and other preparations, which are subject to possible cross-contamination.⁴⁰ Single-use items used to apply these products—such as tissue, cotton pads, or cotton balls—must be discarded in a trash receptacle that is emptied daily and kept clean by washing or using plastic liners.⁴¹ Facial chairs, beds, and headrests must be cleaned and disinfected before service is provided to a client.⁴² Regulations also provide specific procedures to follow whenever a cosmetology service causes bleeding.⁴³

³⁸ 16 TEX. ADMIN. CODE §§ 83.102(c), (d), (f), 81.104(a), (d), (e), 83.105(a), (c), (e), (f).

³⁹ *Id.* § 83.105(b).

⁴⁰ *Id.* § 83.104(g).

⁴¹ *Id.* §§ 83.102(i), 83.104(e).

⁴² *Id.* § 83.104(c).

⁴³ *Id.* § 83.111.

*⁴⁶ The Threaders acknowledge that threading poses health risks. In the trial court, they offered evidence from a physician, Dr. Patel (no relation to Petitioner Ashish Patel), that removing a hair from its follicle opens a portal through which bacteria or a virus can permeate the skin. Dr. Patel opined that threading may lead to “redness, swelling, itching, inflammation of the hair follicles, discoloration, and ... superficial bacterial and viral infections.” She testified that threading could cause the spread of infections such as flat warts, skin-colored lesions known as molluscum contagiosum, pink eye, ringworm, impetigo, and methicillin-resistant staphylococcus aureus (often called a “staph infection”). She opined that a threader’s failure to use appropriate sanitation practices—such as using disposable materials properly, cleaning the work station, using effective hand-washing techniques, and correctly treating skin irritations and abrasions—can expose threading clients to infection and disease. She also testified that these health risks can be fully addressed by giving threaders one hour’s training in sanitation and hygiene.

The Threaders allege that, as applied to them, the cosmetology licensing scheme violates substantive due process—that is, that it deprives them of economic liberty without due course of law in violation of Article I, Section 19 of the Texas Constitution. The Threaders assert that Texas’ regulation of cosmetology “places senseless burdens on eyebrow threaders and threading businesses without any actual benefit to public health and safety.” But the Threaders acknowledge that Texas’ longstanding regulation of cosmetology, including superfluous hair removal, is needed to protect the public health. They argue only that it is excessive.

II

On our record, Texas' regulation of threading seems excessive and misguided as a matter of policy, though I hasten to add, nothing of what prompted the regulation is before us. We have conducted no investigations and held no hearings. As in any case, we know what the parties have told us, and nothing more. This distinguishes the Judiciary from the Legislature. We are ill-equipped to set policy because we have no way of summoning the various interests for input or exploring all considerations. But on this record, threading regulation is obviously too much.

Is it also unconstitutional? Federal and Texas constitutional protections of due process are closely related. The Fifth Amendment to the United States Constitution, adopted by Congress in 1789 and ratified by the states two years later, provides that no person shall “be deprived of life, liberty, or property, without due process of law”.⁴⁴ The Fourteenth Amendment, ratified in 1868, prohibits the states from violating the same guarantee.⁴⁵ In between, in 1845, the first Constitution for the State of Texas provided that “[n]o citizen of this State shall be deprived of life, liberty, [or] property ... except by due course of the law of the land.”⁴⁶ The provision is now [Article I, Section 19 of the Texas Constitution](#).

⁴⁴ U.S. CONST. amend. V.

⁴⁵ U.S. CONST. amend. XIV, § 1.

⁴⁶ TEX. CONST. OF 1845, art. I, § 16.

A

This Court has recognized that Texas' due course of law guarantee protects both procedural and substantive rights.⁴⁷ But we have been mindful that applying substantive due process doctrine to economic regulation has never met with recognized success. The United States Supreme Court has vacillated in its view of the scope of federal due process protection. In *Lochner v. New York*, the Supreme Court famously took a broad view, holding that New York's regulation of bakers' working hours violated the Fourteenth Amendment.⁴⁸ Finding an implicit right of contract in the United States Constitution, the Supreme Court concluded that whether the state regulation deprived bakers of this right depends on whether it is:

a fair, reasonable, and appropriate exercise of the police power of the state, or [rather] an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family[.]⁴⁹

⁴⁷ *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 632 (Tex.1996).

⁴⁸ 198 U.S. 45, 58–59, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

⁴⁹ *Id.* at 56, 25 S.Ct. 539.

*⁴⁷ Justice Oliver Wendell Holmes dissented, warning:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law[.] It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples.... Some of these laws embody convictions or prejudices which judges are likely to share.

Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.⁵⁰

Subsequent cases proved true Holmes' warning that a mere reasonableness standard for substantive due process was unworkable and that judges cannot practically or legally constitutionalize economic theory.⁵¹ *Lochner's* substantive due process adventure soon ended.

⁵⁰ *Id.* at 75–76, 25 S.Ct. 539 (Holmes, J., dissenting).

⁵¹ See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (striking down a state law prohibiting the sale of ice without a permit as unreasonable because the sale of ice was not a “public business” that could be so regulated); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 113–114, 49 S.Ct. 57, 73 L.Ed. 204 (1928) (prohibition on anyone not a licensed pharmacist owning a pharmacy or drug store struck down because the state had not shown a “reasonable relationship to the public health”); *Adams v. Tanner*, 244 U.S. 590, 596–597, 37 S.Ct. 662, 61 L.Ed. 1336 (1917) (finding a statute prohibiting employment agencies from demanding or receiving fees from workers “arbitrary and oppressive” and “unduly restrict[ive]”); *Bunting v. Oregon*, 243 U.S. 426, 433–434, 438, 37 S.Ct. 435, 61 L.Ed. 830 (1917) (law that prohibited employees in factories from working more than 10 hours a day, or 13 hours a day if paid overtime, upheld as a reasonable exercise of the police power). Compare *Adkins v. Children's Hosp.*, 261 U.S. 525, 559, 43 S.Ct. 394, 67 L.Ed. 785 (1923) (minimum wage requirement for women is an unconstitutional intrusion on freedom of contract, not proper exercise of the police power), with *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (minimum wage requirement for women and children is proper exercise of police power, as a means of protection for those “in an unequal position with respect to bargaining power”); compare *Muller v. Oregon*, 208 U.S. 412, 416, 423, 28 S.Ct. 324, 52 L.Ed. 551 (1908) (limitation on hours worked in “any mechanical establishment, or factory, or laundry” by women upheld as a valid exercise of the police power aimed at the protection of women), and *Holden v. Hardy*, 169 U.S. 366, 395, 18 S.Ct. 383, 42 L.Ed. 780 (1898) (limitation on hours worked in underground mines a valid exercise of the police power for the protection of those employed in a dangerous profession), with *Lochner*, 198 U.S. at 58, 25 S.Ct. 539 (limitation on hours worked in a bakery is not a valid exercise of the police power).

*48 Thirty-three years later, the Supreme Court recanted *Lochner*, stating matter-of-factly, as if it should always have been obvious:

regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis....⁵²

This requirement that economic regulation need only bear a rational relationship to a legitimate state interest is far more deferential to state legislatures than *Lochner's* reasonableness test. Later reflecting on the passing of the *Lochner* era, Justice Douglas wrote for the Supreme Court:

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.... For protection against abuses by legislatures the people must resort to the polls, not to the courts.⁵³

⁵² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

⁵³ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (citations omitted) (quoting *Munn v. Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77 (1876)).

B

The United States Constitution does not, of course, prohibit the states from experimenting with substantive due process based in their own constitutions,⁵⁴ and Texas has done a bit of that. Twenty years ago we summarized the case law thusly:

Texas courts have not been consistent in articulating a standard of review under the due course clause. Our courts have sometimes indicated that section 19 provides an identical guarantee to its federal due process counterpart. Under federal due process, a law that does not affect fundamental rights or interests—such as the economic legislation at issue here—is valid if it merely bears a rational relationship to a legitimate state interest. On other occasions, however, our Court has attempted to articulate our own independent due course standard, which some courts have characterized as more rigorous than the federal standard.⁵⁵

But, in the decades since the federal courts adopted the rational basis test, we have not wandered far from that standard. Even in *State v. Richards*—the case relied on principally by the Threaders to support heightened scrutiny of economic regulation—the Court's reasoning and result were deferential to the legislation at issue. We concluded that a provision authorizing forfeiture of a vehicle that had been used in furtherance of a crime without the owner's knowledge did not contravene the Texas Constitution.⁵⁶ We explained:

A large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. If there is room for a fair difference of opinion as to the necessity and reasonableness of a legislative enactment on a subject which lies within the domain of the police power, the courts will not hold it void.⁵⁷

Though we did not refer to the federal rational basis test, our analysis was consistent with it.

⁵⁴ *Slaughter–House Cases*, 83 U.S. (16 Wall.) 36, 74–78, 21 L.Ed. 394 (1872).

⁵⁵ *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex.1995) (citations omitted) (internal quotation marks omitted); *see also Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 263 & n.5 (Tex.1994).

⁵⁶ *State v. Richards*, 157 Tex. 166, 301 S.W.2d 597, 599–600, 602–603 (1957) (on certified questions from court of civil appeals).

⁵⁷ *Id.* at 602.

*49 For the past 20 years, we have consistently adhered to the rational basis test. In *Barshop v. Medina County Underground Water Conservation District*, we upheld water regulations against a substantive due process challenge as “rationally related to legitimate state purposes in managing and regulating this vital resource.”⁵⁸ In *City of San Antonio v. TPLP Office Park Properties*, we applied the rational basis test to city street regulations.⁵⁹ We explained that the proper inquiry “is whether the actions rationally could have been related to a proper exercise of its police power.”⁶⁰ And in *Mayhew v. Town of Sunnyvale*, we upheld a zoning ordinance, explaining:

A generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose. This deferential inquiry does not focus on the ultimate effectiveness of the ordinance, but on whether the enacting body could have rationally believed at the time of enactment that the ordinance would promote its objective. If it is at least fairly debatable that the decision was rationally related to legitimate government interests, the decision must be upheld. The ordinance will violate substantive due process only if it is *clearly* arbitrary and unreasonable.⁶¹

Under our precedent, a clearly arbitrary and unreasonable regulation is one that has no rational relationship to its purpose in furthering a legitimate state interest.

58 925 S.W.2d 618, 631–633 (Tex.1996).

59 218 S.W.3d 60, 65 (Tex.2007) (per curiam).

60 *Id.*

61 964 S.W.2d 922, 938–939 (Tex.1998) (emphasis in original) (citations omitted).

The Court instead opts to concoct an entirely new standard from the differing terminology used in our precedents. To avoid violating substantive due process, a statute must not be “clearly arbitrary and unreasonable”, must be sufficiently “rational and reasonable”, must “strike [] a fair balance” between the legislative purpose and individual rights, must be “justified”, and must not be “oppressive” or “in contravention of common right”.⁶² Put all these words in a blender and out pours the correct standard: a statute must not be “so unreasonably burdensome that it becomes oppressive”. Reasonable burdensomeness is okay. And I think the Court really means *unduly* oppressive, as distinguished from the oppressiveness of the government in general. The analysis would be laughable if the consequences were not so serious.⁶³ One cannot distill a single test from common elements of the rational basis and “fair balance” standards; one must choose between them. Instead, the Court breeds a strict, deferential standard with a loose, non-deferential one, and the resulting misbegot is ... loose and non-deferential.

62 *Ante* at ———.

63 As we recently observed in a different setting, “the test for determining whether something is oppressive will necessarily vary from one context to the next, and thus the term has multiple meanings, depending on the circumstances.” *Ritchie v. Rupe*, 443 S.W.3d 856, 867 (Tex.2014).

While substantive due process has been the subject of many cases and much study since *Lochner*, the Court cannot find a Texas case, a case from an American jurisdiction, or a scholarly treatise or article to cite in support of its “oppressive” test.⁶⁴ The obvious reason is that it is no standard at all. Oppression is very much in the eye of the beholder. In this case, the Court takes into account the amount, cost, and apparent usefulness of the required training, a threader's lost income-earning opportunity, and the danger to public health and safety. I suppose the Court would agree that it should also take into account the number and severity of incidents of harm due to poor training and the benefit to threaders and the public. This process is what is generally referred to as legislating. It should be done. It should not be done by judges.

64 Three *Lochner*-era cases reference the impropriety of “arbitrary or oppressive” legislation, but not one uses the phrase as a formal test for substantive due process. *Adams v. Tanner*, 244 U.S. 590, 595–596, 37 S.Ct. 662, 61 L.Ed. 1336 (1917); *McLean v. Arkansas*, 211 U.S. 539, 547, 29 S.Ct. 206, 53 L.Ed. 315 (1909); *accord Hous. & Tex. Cent. Ry. Co v. City of Dall.*, 84 S.W. 648, 653 (Tex.1905) (noting that without justification, an “invasion of [] rights under the guise of [the State's police] power” would be properly characterized as “unreasonable, arbitrary, [or] oppressive”). The Court instead focused its *Lochner*-ian sights on the existence of a “just relation to the protection of the public within the scope of legislative power,” and finding none, concluded that the legislature had overstepped its constitutional bounds. *Adams*, 244 U.S. at 596, 37 S.Ct. 662; *McLean*, 211 U.S. at 547, 29 S.Ct. 206; *cf. Hous. & Tex. Cent. Ry. Co*, 84 S.W. at 653.

*50 The Court's answer is that a rational basis standard is no better because if, as in the present case, the State could rationally require some training, the State could require an unlimited amount of training.⁶⁵ The argument is nonsense. That some training is rational does not mean that more is. There are no bright lines for setting a permissible training requirement under either test. The difference is that the rational basis standard invokes objective reason as its measure, while the “oppressive” test is nothing more than an appeal to a judge's predilections.

65 *Ante* at ———.

The subjectiveness of the Court's new test is clear from its response to the fact that Texas is not the only state that has concluded threading should be regulated as part of the practice of cosmetology or esthetics. Eight other states explicitly regulate threading in this way: Delaware, Hawaii, Illinois, Iowa, Louisiana, Mississippi, Oklahoma, and West Virginia.⁶⁶ Two others define cosmetology to encompass any type of superfluous hair removal.⁶⁷ These states each require aspiring cosmetologists and estheticians to complete hours of coursework in numbers similar to those required in Texas.⁶⁸ This is strong evidence that Texas' regulatory framework has a rational basis; it is common to many states. The Court's response is "so what". The reasoned judgment of multiple state legislatures is irrelevant to the Court because whether the training requirements are excessive and oppressive depends on what Texas judges think. The Court's "oppressive" test is pure judicial policy.

⁶⁶ 24 DEL. ADMIN. CODE § 5100–14.7 (listing "threading" as an example of "hair removal" and providing that "[h]air removal shall be performed by a licensed cosmetologist or licensed aesthetician only"); HAW. REV. STAT. § 439–1 (" 'Esthetician' means any person who, with hands or nonmedically prescribed mechanical or electrical apparatus or devices ... engages for compensation in ... [r]emoving superfluous hair about the body of any person."); 225 ILL. COMP. STAT. 410 / 3–1 (cosmetology includes "removing superfluous hair from the body of any person by the use of depilatories, waxing, threading, or tweezers"); *id.* / 3A–1(a) (3) (esthetics includes "removing superfluous hair from the body of any person"); IOWA CODE § 157.1(5)(c) (" 'Cosmetology' means ... [r]emoving superfluous hair from the face or body of a person with the use of depilatories, wax, sugars, threading, or tweezing"); *id.* § 157.1(12)(c) (esthetics includes "[r]emoving superfluous hair"); LA. REV. STAT. ANN. § 37:563(6) (esthetics includes "hair removal by cosmetic preparations, threading, waxing, or other similar means"); MISS. CODE ANN. § 73–7–2(b) (iv) (cosmetology includes "[a]rching eyebrows, to include tweezing, waxing, threading or any other methods of epilation"); *id.* § 73–7–2(d)(ii) (esthetics includes the same); OKLA. ADMIN. CODE § 175:10–9–55(a) ("Only licensed Facialist/Estheticians, Cosmetologists or Barbers may perform threading."); W. VA. CODE § 30–27–3(a)(4) (esthetics includes "[t]he waxing, tweezing and threading of hair on another person's body").

⁶⁷ 63 PA. CONS. STAT. § 507 (cosmetology includes "the removal of superfluous hair"); S.D. CODIFIED LAWS § 36–15–2(4) (the practice of cosmetology includes "removal of superfluous hair by nonpermanent means").

⁶⁸ Like Texas, Illinois and Louisiana require applicants for a cosmetology license to complete 1,500 hours of coursework. 225 ILL. COMP. STAT. 410 / 3–2(1)(c); LA. ADMIN. CODE tit. 46 § 301. And, like Texas, they require applicants for a more limited esthetician's license to complete 750 hours of coursework. 225 ILL. COMP. STAT. 410 / 3A–2(c); LA. ADMIN. CODE tit. 46 § 303. Delaware, Mississippi, and Oklahoma require applicants for a cosmetology license to complete 1,500 hours of coursework. DEL. CODE ANN. tit. 24 § 5107; MISS. CODE ANN. § 73–7–13; OKLA. ADMIN. CODE § 175:10–3–34. These states require applicants for an esthetics license to complete 600 hours of coursework. DEL. CODE ANN. tit. 24 § 5135; MISS. CODE ANN. § 73–7–18; OKLA. ADMIN. CODE § 175:10–3–39. Hawaii and West Virginia require 1,800 hours of coursework for cosmetology and 600 hours for esthetics. HAW. REV. STAT. § 439–12(b), (d); W. VA. CODE R. §§ 3–1–5.1, 3–1–9.1. Iowa and South Dakota require 2,100 hours of coursework for a cosmetology license and 600 hours for an esthetics license. IOWA CODE § 157.10(1); IOWA ADMIN. CODE r. 645.61.14, S.D. ADMIN. R. 20:42:06:09, 20:42:06:09.02. Pennsylvania requires 1,250 hours of coursework for a cosmetology license and 300 hours for an esthetics license. 63 PA. CONS. STAT. §§ 510(a)(3), 511(b)(1). Some states allow aspiring cosmetologists and estheticians to complete an apprenticeship in lieu of or in combination with classroom work. *See, e.g.,* DEL. CODE ANN. tit. 24 § 5107(a)(3)(b)–(c); HAW. REV. STAT. § 439–12(b), (d); 63 PA. CONS. STAT. §§ 510(a), 510.3, 516; S.D. ADMIN. R. 20:42:07:06–07.

*51 As long as judicial policy is made in the name of substantive due process, the Court argues, it is judging, not legislating. But the Court cannot, simply by invoking a constitutional doctrine, mask the true policy-making character of its ruling. One could take the Court's analysis of the costs and benefits of regulating eyebrow threaders and offer it in evidence at a legislative hearing, only there would also be evidence relating to the needs of the public and the cosmetology industry generally, evidence that the Court does not have and cannot weigh. The substantive due process doctrine empowers the Judiciary to check regulation that is a clearly arbitrary deprivation of economic liberty in violation of due course of law. The rational basis test for making this determination is not a disclaimer of judicial responsibility but a legal and practical recognition that "[t]he wisdom or expediency of the law is the Legislature's prerogative, not ours."⁶⁹

⁶⁹ *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex.1995) (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex.1968)).

III

That the Court has gone where no one has gone before is proudly declared by JUSTICE WILLETT'S concurring opinion. Gone are the constraints of the rational basis standard, a standard dismissed as a “rubber stamp” and a “judicial shrug”. JUSTICE WILLETT'S rhetorical torrent against economic regulation carries along its ultimate demand: Texas judges must conduct an investigation “asking” what the “government [is] actually up to”, weighing “what policymakers *really* had in mind at the time,” “scrutin[izing]” “actual assertions with actual evidence.”⁷⁰ All this *Sturm und Drang* announces a new day. And to be sure, all this “asking” and “scrutiniz[ing]” is not judicial activism. It is merely judicial un-passivism.

⁷⁰ *Ante* at — (emphasis in original).

I agree with JUSTICE WILLETT about one thing: “[t]his case concerns far more than whether Ashish Patel can pluck unwanted hair with a strand of thread.”⁷¹ It is about a dramatic arrogation of power by the Court. Economic regulation is invalid whenever a majority of this Court feels it is oppressive.

⁷¹ *Ante* at —.

Hair stylists could make the same argument the Threaders do: why should they be required to have instruction and examination in facial treatment, manicuring, massage, and the removal of unwanted hair? Whether to create various licensing classification schemes, and which practices to include within each, have been questions central to cosmetology regulation since 1971. It is the kind of line-drawing that the Legislature and the Department, not courts, are equipped to do. More importantly, the Constitution gives this line-drawing power—this policymaking—to the Legislature and the Executive, not to the Judiciary.

The same issue applies to other occupational regulation. There is an ongoing debate regarding whether law school should have a third year, whether students should be allowed to sit for the bar exam earlier, and whether a lawyer should be allowed to obtain a special, limited-practice license with less instruction. Further, students intent on pursuing a particular area of practice—tax law, for example—question why they should be required to take other courses, including those, like civil procedure, thought to be part of a fundamental first-year curriculum. Medical education is similarly questioned. Why should students intent on confining their practice to particular areas or specialties be required to take unrelated courses? The answer is often that subjects unrelated to a particular field of practice are nevertheless part of the background information important to the discipline. But even when this rationale is lacking, substantive due process is not violated merely because medical education is not tailor-made for each student. Our inquiry is whether the cosmetology licensing scheme is unconstitutional, not whether we think the lines chosen by the Legislature are well-placed as a matter of policy.

*52 And while *Lochner* justified judicial invalidation of economic regulation in the name of substantive due process to protect a liberty interest grounded in an implied constitutional right to contract, liberty is not solely, not even primarily, an economic concept. Other constitutional rights have been found by implication in our constitutions.⁷² Scholars argue that the right to privacy implied by the United States Supreme Court in the federal Constitution provides the basis for protecting personal liberty from social regulation.⁷³ The Court's power grab will not be limited to the “regulation of economic interests”,⁷⁴ but will be wielded in future cases against all manner of legislation, maybe not by members of this Court, but by others who see today as precedent. The *Lochner* monster, rediscovered and unleashed by the Court, will stray far from the Judiciary's proper sphere of authority—and to places far afield of the economic realm to which the Court is sympathetic. Judicial usurpation of authority over the State's policies may provide protection for the economic liberties on which the concurrence waxes eloquent, but it also gives rise to such decisions as *Roe v. Wade*.⁷⁵ JUSTICE WILLETT applauds the Court for “narrow[ing] the difference” between fundamental rights—a varsity team (to use his metaphor) that includes not only rights protected by the First Amendment, but also privacy-based liberty interests discovered solely in the due process clause itself—and the economic interests asserted here. JUSTICE WILLETT'S concurring opinion fills the Court's sails and sets a *Lochner*-ian course.

⁷² For a recent discussion of the development of substantive due process and the fundamental rights it has been held to protect, see Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275, 280, 328–334 (2014) (discussing the demise of the *Lochner*-era police powers jurisprudence and its replacement with modern fundamental-rights jurisprudence, and arguing that this shift occurred because the Supreme Court came to find “personal moral choice” and “self-development”—such as the “right of privacy” the Court protected in *Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)—to be more “compelling” types of liberty than the private property protections that were the aim of the *Lochner* era).

⁷³ See, e.g., David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 60 (2003) (arguing that “*Lochnerian* fundamental rights analysis returned in mutated form” in modern fundamental-rights decisions striking down laws as violative of “unenumerated due process rights”); David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 640–642 (2008) (discussing the liberty of contract cases that were used as groundwork for the Supreme Court's later protections of a “right to privacy”).

⁷⁴ *Ante* at ____.

⁷⁵ 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

IV

I would apply the test established by our precedent: regulation is unconstitutional only if it lacks a rational relationship to a legitimate government interest.⁷⁶ The parties' evidence, the State's purpose in its regulatory scheme, and the effects of that regulation are all to be considered.⁷⁷ But our precedent makes clear that judges are not to weigh the evidence to determine whether the State's purpose and approach are reasonable or whether they will be successful; the role of judges is instead to decide whether, in light of the evidence presented, the enacting body “could have rationally ... decided that the measure might achieve the objective.”⁷⁸ Unlike the Court's “oppressive” test, this inquiry is objective, looking not to whether the governmental body subjectively believed the purpose would be accomplished, but to whether a reasonable governmental body could have so believed in light of the evidence. It is not for the Judiciary to correct a mere error in judgment by the policymaking branches.

⁷⁶ See *City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 64–66 (Tex.2007) (per curiam); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938–939 (Tex.1998); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 631–633 (Tex.1996); *State v. Richards*, 157 Tex. 166, 301 S.W.2d 597, 602–603 (1957).

⁷⁷ In *Barshop*, we considered the entire record in determining that (1) the State has a legitimate purpose in regulating the use of water in the Edwards Aquifer, which is a scarce resource; and (2) that the challenged provisions were rationally related to the State's “purposes in managing and regulating this vital resource.” 925 S.W.2d at 625, 633. We explained that, because *Barshop* was a facial challenge, “we should presume” the existence of any facts under which the Act would be constitutional “without making a separate investigation ... or attempting to decide whether the Legislature has reached a correct conclusion with respect to the facts.” *Id.* at 625. This presumption exists because a facial challenge requires the challenger to show that the challenged regulation is unconstitutional under “any possible state of facts.” *Id.* Although this burden is high, a plaintiff challenging a law on its face nevertheless has the opportunity to put on evidence that the challenged law is unconstitutional in all possible applications.

⁷⁸ *TPLP Office Park Props.*, 218 S.W.3d at 64–65 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 n.3, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)).

*53 The Threaders do not dispute that, in general, Texas' long-standing regulation of cosmetology is rationally related to the State's legitimate interest in protecting public health and safety.⁷⁹ The Threaders argue only that the regulation as applied to eyebrow threading—specifically, the training and testing required for licensure—is so excessive as to deprive them of their liberty in choosing an occupation. The State does not dispute that as many as 320 of the required 750 hours are not useful to eyebrow threaders,⁸⁰ but it argues that the requirements are not clearly arbitrary, as they must be to violate substantive due process under the correct test.

79 We note that Texas has regulated a related practice, barbering, since 1907. Act of Apr. 18, 1907, 30th Leg., R.S., ch. 141, 1907 Tex. Gen. Laws 273. We have twice held that regulation of barbering is important to public health and safety. *Tex. State Bd. of Barber Exam'rs v. Beaumont Barber Coll.*, 454 S.W.2d 729, 731 (Tex.1970); *Gerard v. Smith*, 52 S.W.2d 347, 350 (Tex.Civ.App.–El Paso 1932, writ ref'd).

80 At oral argument, the State agreed that “430 hours of the 750–hour curriculum are addressed to subject matter relevant to eyebrow threading” and explained that it “has not argued that the remaining 320 hours of instruction are [] necessary.”

The health risks of commercial hair removal cannot be minimized. Dr. Patel, the expert offered by the Threaders in the trial court, testified that avulsive hair removal opens a portal through which bacteria can enter the body through the skin. For this reason, she explained, she trains threaders in her medical spa to use an antiseptic on the eyebrow area before beginning the threading process and to apply an astringent to the skin after the process is complete. The astringent helps to close up the hair follicle to make it difficult for bacteria to enter. Patel testified that she also trains threaders on methods of keeping their work area clean, keeping the thread sanitary, and on the importance of always using a new piece of thread (and any other single-use items) on each client. She testified that threaders may need to be able to identify skin infections or other conditions that would make threading unsafe for a particular client. Patel recognized that threading may lead to the spread of various contagious bacterial and viral infections and that a threader's failure to utilize appropriate sanitation can further expose threading clients to infection and disease.

Applicants for a general cosmetology license or an esthetician speciality license are instructed in general sanitation and safety practices, and each of the specific procedures they learn incorporates the hygiene and safety practices pertinent to that procedure. If they attend a school that teaches threading, they learn to apply these concepts specifically to that practice, and if instead they attend a school that does not instruct in threading, they nevertheless learn these safety implications and requirements as applied to other avulsive forms of hair removal. Moreover, although there is evidence that only a few cosmetology schools currently teach threading, the Legislature could reasonably have concluded that more schools will teach it as demand for the procedure grows. Although there is evidence that no more than an hour of sanitation training is necessary for threading, there is other evidence from which the Legislature could reasonably conclude that the required instruction and testing would further its goal of protecting public health and safety through the regulation of cosmetology.

Texas' cosmetology regulation as applied to threading is, to quote Justice Holmes, “injudicious”, though I would not go so far as to say “tyrannical”, and certainly not clearly arbitrary. I would hold that the regulation is rationally related to the State's legitimate interest in protecting the health and safety of the public.

*54 The Court pooh-poohs the *Lochnerian* “monster”. A word of caution: those who cannot remember the past are condemned to repeat it. ⁸¹

81 I GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (Charles Scribner's Sons, 2d ed. 1929). I would affirm the judgment of the court of appeals. Accordingly, I respectfully dissent.

Justice [Guzman](#), dissenting.

This Court has long maintained that it does not legislate from the bench. Today, it does just that. Worse yet, it does so in the context of revivifying substantive due process, one of the most volatile doctrines in constitutional history. ¹ Like the accompanying dissent, I maintain that while the regulation seems excessive as a matter of policy, it is nevertheless not unconstitutional as a matter of law. Further, I harbor doubts that the test propounded by the Court to evaluate issues of this nature will provide any guidance in future cases. Thus, I write separately to underscore my conception of the judicial role. Because I unequivocally believe that policymaking is a prerogative properly and constitutionally vested in the Legislature, I respectfully dissent.

¹ See, e.g., Op. at — (Hecht, C.J., dissenting) (“Judicial usurpation of authority over the State’s policies may provide protection for the economic liberties on which the concurrence waxes eloquent, but it also gives rise to such decisions as *Roe v. Wade*.”).

The Court’s opinion ably sets out the facts, and describes the somewhat byzantine web of regulations that apply to cosmetologists, a class that includes eyebrow threaders like the petitioners (“Threaders”). To legally practice cosmetology in Texas, a license is required. TEX. OCC. CODEE §§ 1602.251(a), .257. A general operator license requires training a minimum of 1,500 hours, whereas an esthetician specialty license requires a minimum of 750 hours.² *Id.* §§ 1602.254, .257; see also 16 TEX. ADMIN. CODE § 83.20(a), (b). Individuals engaged in the business of eyebrow threading are required to obtain at least an esthetician specialty license. See TEX. OCC. CODEE §§ 1602.002(a)(9), .257(a); see also 16 TEX. ADMIN. CODE § 83.10(11).

² For the operator license, up to 500 hours of public vocational school may be credited toward the 1,500 hours. TEX. OCC. CODEE § 1602.254(b)(3)(B).

The record shows that of the 750 hours required for an esthetician license, 40 hours are devoted to sanitation. Sanitation and hygiene issues are also intermittently addressed elsewhere during training, albeit in the context of instruction on other subjects. The fact that health and safety instruction comprises at least part of the required instruction is no small matter, given that the Threaders’ own expert observed that improper threading procedures can contribute to the spread of highly contagious bacterial and viral infections, including flat warts, skin-colored lesions known as molluscum contagiosum, pink eye, ringworm, impetigo, staphylococcus aureus, and other similarly unpleasant maladies.

The central dispute concerns the training requirements, specifically the amount of time they necessarily require. The Threaders contend that as many as 710 of the 750 training hours for an esthetician license are unnecessary, given that they concern procedures unrelated to threading. The State disputes that math, but even its estimate concedes that as many as 320 of the curriculum hours are unrelated to health and safety issues engendered by eyebrow threading. In the Threaders’ view, the licensure courses require too much time and feature too much irrelevant material, and by mandating them for eyebrow threading, the State of Texas violates the guarantee of the Texas Constitution that “[n]o citizen of this State shall be deprived of ... liberty ... except by the due course of the law of the land.” TEX. CONST. art. I, § 19.

*55 The Court propounds a novel test in resolving this core dispute. The second prong of this test holds that an as-applied challenge to an economic regulation statute under section 19’s substantive-due-course-of-law requirement will fail to overcome the presumption that the statute is constitutional, unless the challenging party demonstrates that the statute’s “actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.” Op. at — — —. Relying on this element of the test, the Court estimates that approximately 42 percent of the minimum required training hours are “arguably” not relevant to the actual work performed by eyebrow threaders. *Id.* at —. While this is not “determinative” of the constitutional question, the Court says that “the percentage must also be considered along with other factors, such as the quantitative aspect of the hours represented by that percentage and the costs associated with them.” *Id.*

I have significant doubts that this standard is workable in practice.³ As the Court itself concedes, “[t]he dividing line is not bright between the number of required but irrelevant hours that would yield a harsh, but constitutionally acceptable, requirement and the number that would not.” *Id.* at —. But this concession seems to prove the folly of the enterprise in the first place. Lacking a standard that can be implemented consistently, how can a court be expected to make determinations of this nature in future cases (which, I hasten to add, will surely follow in the wake of this opinion)? I recognize that in many areas of the law, bright-line tests are simply not appropriate nor attainable.⁴ But here the Court, with only the information gleaned from the limited record before us, is marching into a fraught area—substantive due process—armed only with an imprecise standard.

³ Whether a test is “workable” is something this Court has considered before. See, e.g., *Trevino v. Ortega*, 969 S.W.2d 950, 956 (Tex.1998) (“The *National Tank* test is workable in the spoliation context; yet, it must be modified somewhat.”).

⁴ See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 34, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (noting that “the Court has consistently eschewed bright-line rules” in the Fourth Amendment context, “instead emphasizing the fact-specific nature of the reasonableness inquiry”).

The Court agrees with the Threaders' characterization of the regulation as arbitrary, but alas, that same adjective could be applied to the line-drawing necessarily involved here and in future cases. Is 750 hours too much to require for threading? From the Threaders' perspective, perhaps. But from the vantage of someone injured by these procedures, perhaps not. Some threading techniques reportedly rely on placing one end of the string in the threader's mouth, which would seem to invite a host of bacterial infections ([superficial folliculitis](#), for instance). Different skin sensitivities could be placed at different risks by these procedures. The crucial point is that these considerations, and their relation to training programs, are quintessential legislative inquiries. Thus, I agree with the Court when it admits: “Differentiating between types of cosmetology practices is the prerogative of the Legislature and regulatory agencies to which the Legislature properly delegates authority,” and likewise with the statement that “it is not for courts to second-guess their decisions as to the necessity for and the extent of training that should be required for different types of commercial service providers.” *Id.* at ——. In my view, the plain truth of these statements suggests a contrary approach.

This case involves first principles, and timeless precepts bear repeating. By design, our system of government rests on checks and balances and separation of powers. The genius of the Founders lay in their prescience. Frankly acknowledging human frailty, they designed a system of government that apportions power among the three branches, allowing a proper balance of interests and ambitions. In order for this equipoise to persist, however, denizens of government's separate branches must properly conceive of their relative roles. For the judiciary, as with the other branches, this means recognizing the limits on its own authority. This is no easy matter, given that human nature tilts to the arrogation of power; as Justice Antonin Scalia once waggishly noted, this enduring trait is why Lord Acton never uttered “ ‘[p]ower tends to purify.’ ” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 981, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Scalia, J., concurring in part and dissenting in part).

*56 Were I a member of the Legislature, there is little question that I would look to reduce the burden placed on eyebrow threaders, as I agree with the accompanying dissent's sense that “on this record, threading regulation is obviously too much.”⁵ *Op.* at — (Hecht, C.J., dissenting). But I am not a legislator; I am a judge. Accordingly, I am duty-bound to apply the law regardless of my policy preferences. The difficult line-drawing problems involved in this case are best resolved by the Legislature, which by dint of its experience and competence is better equipped to decide these questions than this tribunal. The question is not whether these regulations are prudent, but whether they violate the Texas Constitution's due-course-of-law provision. That is a different matter entirely. Because I disagree with the Court on this fundamental query, I respectfully dissent.

⁵ Assuming, of course, that the record before this Court is complete. As the accompanying dissent wisely observes, “nothing of what prompted the regulation is before us. We have conducted no investigations and held no hearings. As in any case, we know what the parties have told us, and nothing more.” *Op.* at — (Hecht, C.J., dissenting).

All Citations

--- S.W.3d ----, 2015 WL 3982687, 58 Tex. Sup. Ct. J. 1298

 KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [People v. McGraw-Hill Companies, Inc.](#), Cal.App. 1 Dist., August 18, 2014

115 Cal.App.4th 1315
Court of Appeal, Fourth District, Division 3, California.

The PEOPLE ex rel. Bill LOCKYER as Attorney General., Plaintiff and Respondent,
v.
Harpreet BRAR, Defendant and Appellant.

No. G033116. | Feb. 24, 2004.

Synopsis

Background: Attorney General filed complaint against attorney to obtain order to make him stop filing lawsuits under California's unfair competition law. The Superior Court, Orange County, No. 03CC08825, [Kim Dunning, J.](#), denied attorney's motion to dismiss complaint as SLAPP suit (strategic lawsuit against public participation). Attorney appealed.

Holdings: The Court of Appeal, [Sills, P.J.](#), held that:

[1] attorney's appeal was frivolous, and

[2] dismissal of appeal was proper procedure.

Appeal dismissed.

West Headnotes (5)

[1] **Pleading**  Frivolous pleading

Torts  Resort to or conduct of legal remedies

For purpose of anti-SLAPP statute (strategic lawsuit against public participation), the exercise of petition rights can include the filing of lawsuits. [West's Ann.Cal.C.C.P. § 425.16.](#)

[9 Cases that cite this headnote](#)

[2] **Appeal and Error**  Proceedings frivolous or for delay

Attorney's appeal from denial of his SLAPP (strategic lawsuit against public participation) motion, made in response to Attorney General's complaint for order to stop attorney from filing lawsuits under unfair competition law, was frivolous; SLAPP statute exempted actions by Attorney General, attorney's ad hominem argument alleging Attorney General's political motives was irrelevant, and there was ample circumstantial evidence of attorney's motivation to delay proceedings. [West's Ann.Cal.C.C.P. § 425.16.](#)

See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 640, 831 et seq.; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 11:97 (CACIVAPP Ch. 11-E); Cal. Jur. 3d, Appellate Review, § 491.

[8 Cases that cite this headnote](#)

[3] **Appeal and Error** 🔑 [Proceedings frivolous or for delay](#)

California courts have the inherent power to dismiss frivolous appeals.

[10 Cases that cite this headnote](#)

[4] **Appeal and Error** 🔑 [Proceedings frivolous or for delay](#)

Court's power to dismiss frivolous appeals should not be used except in the absolutely clearest cases.

[15 Cases that cite this headnote](#)

[5] **Appeal and Error** 🔑 [Proceedings frivolous or for delay](#)

Dismissal, rather than affirmance, was proper procedure for attorney's frivolous appeal from trial court's denial of his SLAPP (strategic lawsuit against public participation) motion, where evidence showed that appeal was motivated by attempt to delay, especially in light of automatic stay of proceedings during appeal from a denial of a SLAPP motion.

[West's Ann.Cal.C.C.P. § 425.16\(j\)](#).

[10 Cases that cite this headnote](#)

Attorneys and Law Firms

****845 *1316** Harpreet Brar, in pro. per., for Defendant and Appellant.

Bill Lockyer, Attorney General, [Herschel T. Elkins](#), Senior Assistant Attorney General, [Albert Norman Sheldon](#) and Howard Wayne, Deputies Attorney General, for Plaintiff and Respondent.

OPINION

SILLS, P.J.

In July 2003 the Attorney General filed a complaint against attorney Harpreet Brar to obtain an order to make him stop filing lawsuits under California's unfair competition law ([Bus. & Prof.Code, § 17200](#)). Allegedly, Brar has engaged in the sort of abuse of California's unfair ***1317** competition law which made the Trevor Law Group a household name in California in 2002 and 2003. The abuse is a kind of legal shakedown scheme: Attorneys form a front “watchdog” or “consumer” organization. They scour public records on the Internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization. Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business (often owned by immigrants for whom English is a second language), and point out that a quick settlement (usually around a few thousand dollars) would be in the business's long-term interest. For the Trevor Law Group, the usual targets were auto repair shops. Brar's main targets are nail salons.

California also has another law which is designed to put a quick end to lawsuits when they are based on the exercise of free speech and petition rights, generally known as the anti-SLAPP suit statute. ([Code Civ. Proc., § 425.16](#).) SLAPP stands for “strategic lawsuit against public participation.” The archetype is when a developer sues neighborhood activists for having spoken out against the developer's project in some public forum. The developer will often sue the activists for the torts of defamation or

intentional interference with economic advantage. The anti- ****846** SLAPP law allows the activists to obtain quick relief by filing an “anti-SLAPP suit” motion under the statute. If it is determined that the suit really is one based on the exercise of free speech or petition rights, then the plaintiff, say our hypothetical developer, bears the burden of coming forward with some evidence showing it has a viable case. If not, the suit is quickly kicked out of court.

[1] Ironically, Brar, the sue-er, decided to use the anti-SLAPP suit law to his own advantage to try to dismiss the Attorney's General lawsuit against him. It is established that the exercise of petition rights can include the filing of lawsuits. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77–78, 124 Cal.Rptr.2d 519, 52 P.3d 695.) So he filed an anti-SLAPP suit motion. It was, of course, denied. As we discuss below, a provision of the anti-SLAPP statute specifically exempts actions by the Attorney General from anti-SLAPP motions.

But the anti-SLAPP suit law has an interesting feature—the right to appeal even the *denial* of the motion. (Code Civ. Proc., § 425.16, subd. (j).) Typically, if you lose a motion in the trial court, you have to wait until the suit is over and there is a final judgment before you have the *right* to appeal.

The right to appeal has a certain logic to it. After all, what use is a mechanism to allow you to get out of a case *early* if it is undercut by an erroneous decision of the trial judge? The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights. The right to appeal a denial of an ***1318** anti-SLAPP motion is important because it protects the interest validated by the anti-SLAPP statute.

But the right to appeal has its own consequences. As we write, at least one appellate court has drawn the correlative conclusion that an appeal from the denial of anti-SLAPP motion also *stays* proceedings in the trial court. (See *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1190, 121 Cal.Rptr.2d 794.) You don't just get the right to go to the appellate court, you also get a free time-out in the trial court.¹

¹ There is, as we write, one nonfinal decision which disagrees with *Mattel* on the point, *Varian Medical Systems, Inc. v. Delfino* (2003) 113 Cal.App.4th 273, 309–311 footnote 16, 6 Cal.Rptr.3d 325, petition for review filed December 23, 2003 (S121400).^{*} Depending on what the Supreme Court does, that case may, or may not, disappear from the Official Reports any day now. In any event, however, *Mattel* will remain at least competing authority for the short term.

^{*} Reporter's Note: Review granted March 4, 2004.

[2] [3] [4] That brings us to the reason for this opinion, which is the Attorney General's motion to dismiss the appeal, as frivolous, now pending before us. California courts have the inherent power to *dismiss* frivolous appeals. (See *Ferguson v. Keays* (1971) 4 Cal.3d 649, 658, 94 Cal.Rptr. 398, 484 P.2d 70 [“we emphasize that the appellate courts possess the further inherent power to summarily dismiss any action or appeal which has as its object to delay, vex, or harass the opposing party or the court, or is based upon wholly sham or frivolous grounds”]; *Zimmerman v. Drexel Burnham* (1988) 205 Cal.App.3d 153, 161, 252 Cal.Rptr. 115 [“Appellate courts have an inherent power to summarily dismiss any appeal which is designed for delay or which is based on sham or frivolous grounds.”].) Of course, it is a power that should not be used except in the absolutely clearest cases. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, 183 Cal.Rptr. 508, 646 P.2d 179, quoting *People v. Sumner* ****847** (1968) 262 Cal.App.2d 409, 415, 69 Cal.Rptr. 15.)

The motion must be granted. This is about as patently frivolous an appeal taken for purposes of delay as is imaginable.

The anti-SLAPP statute *specifically exempts* actions brought by public prosecutors, including the Attorney General: “This section shall not apply to any enforcement action brought in the name of the People of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.” (Code Civ.Proc., § 425.16, subd. (d).)

Against this plain statutory language, Brar posits only an ad hominem argument. (For a discussion of ad hominem arguments in legal and other rhetorical contexts, see *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1430, 115 Cal.Rptr.2d 439 [e.g., “Jane, you ignorant etcetera....”].) It goes like this: Brar is doing nothing more than the unfair

competition law allows, but the unfair competition law, as written, has *1319 become an embarrassment to what might be called in general terms “the plaintiff’s bar.” (Who are often referred to as “trial lawyers” when discussed on newspaper op.-ed. pages; one can log onto to many Internet discussions of California’s unfair competition law and see that whether the law should be reformed is currently a hot topic indeed in the legal and business communities.) The Attorney General, according to Brar, is merely trying to curry the favor of the plaintiff’s bar by taking this action against him, so as to defuse public (and particularly business) pressure to reform the unfair competition law. Brar thus argues that he is being made scapegoat for the Attorney General’s ulterior political motives.

It is, like all ad hominem arguments, quite irrelevant. Neither the statute nor anything in the Constitution contains an implied exception for times when the public prosecutor acts with a political motive. Surely it is safe to say that public prosecutors sometimes act with political motives, and if the Legislature had wanted to insert a “political motive” exception to the public prosecutor exemption in the anti-SLAPP statute it most certainly could have done so. We may therefore readily conclude that Brar’s one substantive argument is a loser, at a “mere glance.” (Cf. *In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 650, fn. 6, 183 Cal.Rptr. 508, 646 P.2d 179.)

One of the reasons that the power to dismiss an appeal must be used with extreme rarity is that determination of whether an appeal is frivolous entails at least a peek at the merits—if not, as is usually the case, a thorough review of the record—and, having taken that look, the appellate court is in a position to affirm whatever was appealed rather than dismiss the appeal. As our Supreme Court said in *People v. Wende* (1979) 25 Cal.3d 436, 443, 158 Cal.Rptr. 839, 600 P.2d 1071, “[W]e deem it appropriate to affirm the judgment rather than to dismiss the appeal as frivolous. Once the record has been reviewed thoroughly, little appears to be gained by dismissing the appeal rather than deciding it on its merits.”

[5] In the case before us, though, much appears to be gained by dismissal rather than affirmance—specifically, prevention of the abuse of the anti-SLAPP statute to buy time from the day of reckoning in the trial court. Here, Brar’s appeal practically has the words “brought for reasons of delay” virtually tattooed on its forehead. Consider that under a rule of automatic stay, as envisioned by the *Mattel* case, the incentive to appeal even the denial of a patently *frivolous* anti-SLAPP motion is overwhelming. As we have noted, the defendant gets a very cheap hiatus in the proceedings, and that hiatus becomes doubly important in a situation where, as here, **848 a public prosecutor is seeking an injunction to prevent the defendant from *continuing* the ongoing abuse of the legal system. Review on the merits, after briefing (as distinct from review, as here, of the papers on a motion to dismiss) only rewards a frivolous appeal.

*1320 As we said, if this appeal is not frivolous at a glance, no appeal is. A statute directly on point, an ad hominem argument to try to avoid that statute’s clear application, and ample circumstantial evidence of a motivation to delay proceedings in the trial court all demand immediate dismissal.

One more point: This court has the power to shorten the finality of this decision to “prevent frustration of the relief granted.” (Cal. Rules of Court, rule 24(b)(3).) Accordingly, to prevent further delay occasioned by Brar’s appeal, this decision shall be final five days after its filing date. Our opinion is also without prejudice to the Attorney General to seek sanctions in the trial court against Brar for taking a frivolous appeal. It is to there that the case should now return.

WE CONCUR: RYLAARSDAM and IKOLA, JJ.

All Citations

115 Cal.App.4th 1315, 9 Cal.Rptr.3d 844, 04 Cal. Daily Op. Serv. 1624, 2004 Daily Journal D.A.R. 2424

 KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [People v. McGraw-Hill Companies, Inc.](#), Cal.App. 1 Dist., August 18, 2014

87 Cal.App.4th 442, 104 Cal.Rptr.2d 618, 01 Cal. Daily Op. Serv. 1711, 2001 Daily Journal D.A.R. 2121

THE PEOPLE, Plaintiff and Respondent,

v.

HEALTH LABORATORIES OF NORTH AMERICA, INC., et al., Defendants and Appellants.

No. A089749.

Court of Appeal, First District, Division 5, California.

Jan. 30, 2001.

SUMMARY

Two county district attorneys brought an action on behalf of the People against a manufacturer of a weight loss product alleging false or misleading advertising and unfair competition ([Bus. & Prof. Code, §§ 17200, 17500, 17508](#)). Asserting that the People brought the action to chill their valid exercise of free speech through an abuse of the judicial process, defendant filed a special motion to strike the complaint under [Code Civ. Proc., § 425.16](#), the anti-SLAPP (strategic lawsuit against public participation) statute. The trial court denied defendant's motion, based on [Code Civ. Proc., § 425.16](#), subd. (d), which exempts enforcement actions brought by district attorneys from the purview of the statute. (Superior Court of Napa County, No. 26-05137, W. Scott Snowden, Judge.)

The Court of Appeal affirmed, holding that the provision of the anti-SLAPP statute exempting public prosecutors from its strictures does not violate the equal protection clauses ([U.S. Const., Amend. XIV, § 1](#); [Cal. Const., art. I, § 7](#)). The history of the anti-SLAPP statute reflects the Legislature's concern that, while there was a critical need to prevent suits brought only to chill the exercise of the defendant's rights under [U.S. Const., 1st Amend.](#), any such protection should not be at the expense of a public prosecutor's ability to enforce consumer protection laws. The classification created by [Code Civ. Proc., § 425.16](#), subd. (d), exempting public prosecutors' enforcement actions, bears directly on furthering the state's legitimate interest of allowing prosecutors to pursue actions to enforce laws, unencumbered by delay, intimidation, or distraction. (Opinion by Jones, P. J., with Stevens, J., and Richman, J., * concurring.)

* Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

HEADNOTES

Classified to California Digest of Official Reports

(1)

Appellate Review § 145--Scope--Questions of Law and Fact--Statutory Interpretation.

The interpretation of a statute and the determination of its constitutionality are questions of law. In such cases, appellate courts apply a de novo standard of review.

(2a, 2b)

Pleading § 93--Motion to Strike Pleading--Anti-SLAPP Statute-- Exemption for Prosecutors' Enforcement Actions-- Constitutionality--Equal Protection.

In an action brought on behalf of the People by two county district attorneys against a manufacturer of a weight loss product alleging false or misleading advertising and unfair competition ([Bus. & Prof. Code, §§ 17200, 17500, 17508](#)), the trial court did not err in denying defendant's motion to strike the complaint under [Code Civ. Proc., § 425.16](#), the anti-SLAPP (strategic lawsuit against public participation) statute. The history of the anti-SLAPP statute reflects the Legislature's concern that, while there was a critical need to prevent suits brought only to chill the exercise of the defendant's rights under [U.S. Const., 1st Amend.](#), any such protection should not be at the expense of a public prosecutor's ability to enforce consumer protection laws. [Code Civ. Proc., § 425.16](#), is merely a procedural screening mechanism. Statutes that classify and impose differing procedural requirements on litigants are generally valid if the classification is supported by a rational basis. The classification created by [Code Civ. Proc., § 425.16](#), subd. (d), exempting public prosecutors' enforcement actions from anti-SLAPP motions, bears directly on furthering the state's legitimate interest of allowing prosecutors—who did not create the SLAPP problem—to pursue actions to enforce laws, unencumbered by delay, intimidation, or distraction. It therefore does not violate the equal protection clauses ([U.S. Const., Amend. XIV, § 1](#); [Cal. Const., art. I, § 7](#)).

[See 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 964.]

(3)

Constitutional Law § 81--Equal Protection--Classification.

The equal protection clause of [U.S. Const., 14th Amend.](#), essentially directs that all persons similarly situated should be treated alike. Although most statutes differentiate somehow between classes of people, the equal protection clause does not forbid classifications so long as the classification is not arbitrary but is based on some difference in the classes having a substantial relation to a legitimate object to be accomplished. Statutory classifications are analyzed under [Cal. Const., art. I, § 7](#), by the same rules applicable to challenges to the Fourteenth Amendment. Most statutes challenged on equal protection grounds are tested by the rational basis standard. Only when the classification jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic is the statute subject to the heightened review employed in strict scrutiny test. To pass constitutional muster in that case, statutes must be suitably tailored to serve a compelling state interest. For purposes of the strict scrutiny test, a fundamental right means a fundamental constitutional right.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 599.]

COUNSEL

Gary Lieberstein, District Attorney (Napa), Daryl Arthur Roberts, Deputy District Attorney; J. Michael Mullins, District Attorney (Sonoma), and David B. Copenhaver, Deputy District Attorney, for Plaintiff and Respondent.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Herschel T. Elkins, Assistant Attorney General, and Ronald A. Reiter, Deputy Attorney General, as Amici Curiae on behalf of Plaintiff and Respondent.

Bowles & Verna, Michael P. Verna, David W. Trotter, Donald A. Velez; The Lustigman Firm and Sheldon S. Lustigman for Defendants and Appellants.

JONES, P. J.

Health Laboratories of North America, Inc., and its officer, Marc J. Kaplan, appeal an order denying their motion pursuant to the anti-SLAPP statute ([Code Civ. Proc., § 425.16](#))¹ to strike the People's action for a permanent injunction enjoining them from making unsubstantiated advertising claims and for civil penalties for having made false or misleading advertisements. Appellants contend the statute's provision exempting *445 public prosecutors from its strictures violates the equal protection clauses of the United States and California Constitutions. ([U.S. Const., Amend. XIV, § 1](#); [Cal. Const., art. I, § 7](#).)

¹ Unless otherwise stated, all further section references are to the Code of Civil Procedure. SLAPP is an acronym for strategic lawsuits against public participation. (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 542, fn. 1 [46 Cal.Rptr.2d 880].)

Background

Appellants manufacture a weight loss product called Berry Trim Plus. The District Attorneys of Napa and Sonoma Counties on behalf of the People, brought an action against appellants, alleging that their advertising claims for the product violated various statutes governing false or misleading advertising and unfair competition. (Bus. & Prof. Code §§ 17200, 17500, 17508.) As amended, the complaint sought an injunction against appellants' advertising claims, civil penalties for each of their acts of unfair competition and each false or misleading statement, and an order for restitution to all victims of appellants' acts of unfair competition. (Bus. & Prof. Code, §§ 17203, 17206, 17536.)

Asserting that the People brought the action to chill their valid exercise of free speech through an abuse of the judicial process, appellants filed a special motion to strike the amended complaint under section 425.16, the anti-SLAPP statute. Appellants acknowledged that the statute states that it “shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor” (§ 425.16, subd. (d); hereafter subdivision (d)), but contended that subdivision (d) is unconstitutional. They argued that subdivision (d) arbitrarily discriminated against them and violated their right to equal protection of the law because private plaintiffs who sue a defendant for conduct which is in furtherance of the defendant's free speech rights are subject to the anti-SLAPP statute but public prosecutors are not.

The trial court denied appellants' special motion, concluding that under either rational basis or strict scrutiny analysis, subdivision (d) is constitutional.

Discussion

I. Standard of Review

([1]) The interpretation of a statute and the determination of its constitutionality are questions of law. In such cases, appellate courts apply a de novo standard of review. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801 [35 Cal.Rptr.2d 418, 883 P.2d 960].) *446

II. The Anti-SLAPP Statute

Section 425.16 was enacted in response to a legislative concern that “there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.” (§ 425.16, subd. (a).) Section 425.16 addresses this concern by providing that a cause of action against a person arising from any act of that person in furtherance of his constitutional right of petition or free speech in connection with a public issue shall be subject to a special motion to strike, unless the person asserting the cause of action establishes by pleading and affidavit a probability that he will prevail. (§ 425.16, subd. (b)(1).)

For purposes of the anti-SLAPP statute, acts in furtherance of a defendant's constitutional rights of petition and free speech in connection with a public issue include “any written or oral statement or writing made in a place open to the public ... in connection with an issue of public interest” and any “other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e)(3) & (4).) The People do not dispute that advertisements for a product to treat a medical condition that affects a large number of people may be the kind of act that can satisfy the statutory definition of an act in furtherance of the manufacturer's right of free speech. (See *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567 [92 Cal.Rptr.2d 755].)

([2a]) The history of the anti-SLAPP statute reflects the Legislature's concern that, while there was a critical need to prevent suits brought only to chill the exercise of the defendant's First Amendment rights, any such protection should not be at the expense of a public prosecutor's ability to enforce consumer protection laws.

In the 1990 legislative session, an anti-SLAPP bill was introduced to the Senate (Sen. Bill No. 2313 (1989-1990 Reg. Sess.)). It closely resembled the present anti-SLAPP statute, by establishing a procedure for early dismissal of an action brought against a person arising from any act of that person in furtherance of his or her free speech rights. However, it did not contain any exemption for public prosecutors. The bill analysis by its sponsoring Senate Judiciary Committee noted that the state Attorney General, although not *447 opposed to the bill, was concerned that it could have “the unintended consequence of hindering enforcement of certain consumer protections laws by state and local agencies, e.g., enforcement of new commercial fundraiser for charitable purpose law; enforcement of law prohibiting false, misleading or deceptive advertising.” The bill, as passed by the Legislature, was not amended to address this concern. In September 1990, the Governor vetoed the bill.

In the 1991 legislative session, another anti-SLAPP bill (Sen. Bill No. 10, 1991-1992 Reg. Sess.) was introduced, again without addressing the Attorney General's concerns. Following introduction of Senate Bill No. 10, the California District Attorneys Association wrote its sponsoring senator to object to it because it “will seriously inhibit or prevent prosecutions for consumer or environmental violations.” The association gave as a specific example the bill's restraint on the ability of the district attorney to bring a consumer action for false advertising. Thereafter, Senate Bill No. 10 was amended to add a provision that it “shall not apply to any action brought in the name of the people of the State of California by the Attorney General, any district attorney, or any city attorney acting as a public prosecutor.” Senate Bill No. 10 was subsequently incorporated into Senate Bill No. 341, which was passed by the Legislature but vetoed by the Governor.

In the 1992 legislative session a third anti-SLAPP bill was introduced. (Sen. Bill No. 1264 (1991-1992 Reg. Sess.)) This bill contains the present subdivision (d) language, which differs from Senate Bill No. 341 of 1991 only by adding the modifier “enforcement” before action, i.e., the statute shall not apply to any “enforcement” action brought by the Attorney General or other public prosecutor. This bill was approved by the Governor (Stats. 1992, ch. 726, § 2, pp. 3523-3524) and, together with subsequent amendments, is the present [section 425.16](#).

III. The Equal Protection Clause

([3]) “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. [Citation.]” (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 [105 S.Ct. 3249, 3254, 87 L.Ed.2d 313] (*Cleburne*)). Although most statutes differentiate somehow between classes of people, the equal protection clause does not forbid classifications. (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 10 [112 S.Ct. 2326, 2331-2332, 120 L.Ed.2d 1].) So long as the classification is not arbitrary but *448 is based on some difference in the classes having a substantial relation to a legitimate object to be accomplished, Legislatures may make reasonable classifications of persons, businesses and activities. (8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 599, p. 61, & citations therein.)

The equal protection clause of the California Constitution similarly states that a person “may not be denied equal protection of laws” (*Cal. Const., art. I, § 7*), and statutory classifications challenged thereunder are analyzed by the same rules applicable to challenges to the Fourteenth Amendment. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913 [13 Cal.Rptr.2d 245, 838 P.2d 1198]; *Graham v. Kirkwood Meadows Pub. Util. Dist.* (1994) 21 Cal.App.4th 1631, 1642 [26 Cal.Rptr.2d 793].)

Legislative classifications are presumed valid and will be sustained if the classification is rationally related to a legitimate state interest. Most statutes challenged on equal protection grounds are tested by this rational basis standard. (*Cleburne, supra*, 473 U.S. at p. 440 [105 S.Ct. at pp. 3254-3255].) Only when the classification jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic is the statute subject to the heightened review employed in strict scrutiny test. (*Nordlinger v. Hahn, supra*, 505 U.S. at p. 10 [112 S.Ct. at pp. 2331-2332].) To pass constitutional muster in

that case, such statutes must be suitably tailored to serve a compelling state interest. (*Cleburne, supra*, 473 U.S. at p. 440 [105 S.Ct. at pp. 3254-3255].) For purposes of the strict scrutiny test, a fundamental right means a fundamental constitutional right. (*Graham v. Kirkwood Meadows Pub. Util. Dist., supra*, 21 Cal.App.4th at p. 1642.)

IV. Section 425.16-Rational Basis or Strict Scrutiny Test?

([2b]) By exempting public prosecutors from its special motion to strike procedure, section 425.16 impliedly classifies defendants in a SLAPP action into two groups: those who may avail themselves of the motion to strike remedy because they are parties to an action brought by a plaintiff other than a public prosecutor, and those to whom the anti-SLAPP remedy is unavailable because they are parties to an action brought by a public prosecutor. Appellants argue that this classification between SLAPP defendants jeopardizes their constitutional right to free speech because it precludes them from “vindicating their free speech rights by filing a special motion to strike,” and therefore section 425.16 must be tested by strict scrutiny.

Section 425.16 is tangentially related to the constitutional right of free speech, insofar as it was enacted to prevent unscrupulous plaintiffs from *449 filing meritless lawsuits in order to stymie a person's exercise of free speech or petition for redress of grievances. However, it does not in essence impinge upon or implicate the fundamental right of free speech. Its classification does not withhold the right to exercise free speech to anyone. Nor is the basis of its classification the actual exercise of free speech, e.g., it does not differentiate between those who may or may not exercise the right, or draw distinctions based on the content of the speech. (Cf. *Dunn v. Blumstein* (1972) 405 U.S. 330, 334-338 [92 S.Ct. 995, 999-1001, 31 L.Ed.2d 274] [statute that classifies voters by duration of residence implicates fundamental rights of voting and interstate travel, so is tested by strict scrutiny standard].) It does not, in short, curtail speech protected by the First Amendment. Rather, section 425.16 is merely “a procedural screening mechanism for determining whether a plaintiff can demonstrate sufficient facts to establish a prima facie case to permit the matter to go to a trier of fact. [Citation.]” (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 356 [42 Cal.Rptr.2d 464].)

Statutes that classify and impose differing procedural requirements on litigants are generally valid if the classification is supported by a rational basis. (See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 865 [44 Cal.Rptr.2d 46] and cases cited therein (*Lafayette*).) In *Lafayette*, a SLAPP plaintiff challenged section 425.16 as violative of its right to equal protection on the ground the statute infringed on its ability to gain access to the judicial system. (*Lafayette, supra*, 37 Cal.App.4th at p. 865.) In other words, according to the plaintiff, the statute chilled its own constitutional right to petition for redress of grievances. However, we concluded, section 425.16 does not bar a plaintiff's complaints that arise from another person's exercise of his or her free speech or petition rights, “but only provides a mechanism through which such [plaintiff's] complaints can be evaluated at an early stage of the litigation process.” (*Lafayette, supra*, at p. 865.)

The corollary to our conclusion in *Lafayette* is that section 425.16, and particularly subdivision (d) thereof, does not prevent SLAPP defendants from exercising free speech. Neither does it deprive a defendant who believes a public prosecutor's action violates his right of free speech from access to the judicial system to challenge the prosecutor's action. Therefore, the fact that the procedure set forth in section 425.16 is unavailable to defendants who characterize a public prosecutor's complaint against them, as a SLAPP action does not create a legislative classification subject to strict scrutiny. We therefore determine whether the statute passes the rational basis test. *450

V. Section 425.16-Rationally Related to Legitimate State Interest

SLAPP suits are typically characterized as suits brought not to vindicate a legal right but to interfere with the defendant's ability to pursue his or her interest. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 645 [49 Cal.Rptr.2d 620].) SLAPP plaintiffs do not care so much about winning their lawsuits as they care about delaying and distracting the defendant from his or her objective, which is generally economically adverse to those of the SLAPP plaintiff. SLAPP plaintiffs achieve their goal if their suits deplete the defendant's resources and energy. (*Ibid.*; *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741 [36 Cal.Rptr.2d 687].) The legislative history of section 425.16 plainly implies that its purpose was to prevent the harm caused by such plaintiffs.

By contrast, a public prosecutor's enforcement action is not motivated by a retaliatory attempt to gain a personal advantage over a defendant who has challenged his or her economic ambition. The prosecutor's motive derives from the constitutional mandate to assure that the laws of the state are uniformly enforced and to prosecute any violation of these laws, so that order is preserved and the public interest protected. (*Cal. Const., art. V, § 13; D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15 [112 Cal.Rptr. 786, 520 P.2d 10].) Nothing in the legislative history of [section 425.16](#) implies that the problem the Legislature sought to rectify thereby was created by prosecutors bringing meritless enforcement actions. The state may properly limit a regulation to the class of persons as to whom it thinks the need for regulation is more crucial or imperative. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644 [88 Cal.Rptr.2d 283, 982 P.2d 154].)

To enable prosecutors to perform their constitutional duties thoroughly and effectively, laws have been enacted to insulate them from actions that would hinder or deter their enforcement actions. They are not subject to defamation actions for statements made in the proper discharge of official duties or in the initiation or course of any proceeding authorized by law. (*Civ. Code, § 47*, subs. (a), (b)(4).) They cannot be enjoined to prevent the execution of a public statute for the public benefit. (*Civ. Code, § 3423*, subd. (d).) They are not liable for injuries caused from their discretionary acts or from instituting or prosecuting any judicial or administrative proceeding. (*Gov. Code, §§ 820.2, 821.6*.)

The exclusion of public prosecutors from the anti-SLAPP motion procedure is consistent with the rationale of these immunity statutes. Subjecting them to such a procedure could unduly hinder and undermine their efforts to ***451** protect the health and safety of the citizenry at large by delaying an enforcement action. Not only would prosecutors have to respond to the motion at the trial level, they could become ensnared in an appeal, insofar as the grant or denial of a SLAPP motion is immediately appealable. ([§ 425.16](#), subd. (j).) False advertising enforcement actions could be particularly susceptible to delay by the moving manufacturer's easy assertion that the prosecutor's action interfered with its commercial free speech rights.

We conclude that the classification created by subdivision (d)'s exemption of public prosecutors' enforcement actions from anti-SLAPP motions bears directly on furthering the state's legitimate interest of allowing prosecutors-who did not create the SLAPP problem-to pursue actions to enforce laws, unencumbered by delay, intimidation, or distraction. It therefore does not violate the equal protection clause of either the United States or California Constitution.

Disposition

The order is affirmed.

Stevens, J., and Richman, J.,* concurred.

* Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

On February 28, 2001, the opinion was modified to read as printed above. ***452**

228 Cal.App.4th 1382
Court of Appeal,
First District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,

v.

The MCGRAW–HILL COMPANIES, INC. et al., Defendants and Appellants.

A140922 | Filed August 18, 2014

Synopsis

Background: The People brought action against credit rating agencies under California False Claims Act (CFCA). The Superior Court, City and County of San Francisco, No. CGC–13–528491, [Curtis E.A. Karnow, J.](#), denied anti-strategic lawsuit against public participation (SLAPP) motion. Agencies appealed.

[Holding:] The Court of Appeal, [Richman, J.](#), held that denial of anti-SLAPP motion is not appealable in enforcement action brought in the name of the People.

Appeal dismissed.

West Headnotes (2)

[1] Appeal and Error  On motion relating to pleadings

Denial of an anti-strategic lawsuit against public participation (SLAPP) motion is not appealable in an enforcement action brought in the name of the People, notwithstanding the statute providing that an appeal may be taken from “an order granting or denying a special motion to strike” under the anti-SLAPP statute. [Cal. Civ. Proc. Code §§ 425.16\(d\), \(i\), 904.1\(a\)\(13\)](#).

[1 Cases that cite this headnote](#)

[2] Courts  Previous Decisions as Controlling or as Precedents

Courts  Operation and effect in general

Language in a judicial opinion is to be understood in accordance with the facts and issues before the court, and an opinion is not authority for propositions not considered.

See 5 Witkin, [Cal. Procedure \(5th ed. 2008\) Pleading, § 1025](#).

[2 Cases that cite this headnote](#)

****497** Trial Court: Superior Court of the City and County of San Francisco. Trial Judge: Honorable Curtis E.A. Karnow. (San Francisco City & County Super. Ct. No. CGC–13–528491)

Attorneys and Law Firms

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Opinion

[Richman, J.](#)

*1385 The People, by and through the Attorney General, brought this action against McGraw–Hill Companies, Inc. and Standard & Poor's Financial Services LLC (defendants) for statutory violations arising out of defendants' alleged business practice of inflating their credit ratings of various structured finance securities. The complaint alleged four causes of action, including two for violations of the California's False Claims Act ([Gov. Code, § 12650 et seq.](#); CFCA). Defendants filed a special motion to strike the CFCA causes of action pursuant to *1386 [section 425.16, subdivision \(b\) of the Code of Civil Procedure](#), the anti-SLAPP statute.¹ The superior court denied the motion on the ground that the People's enforcement action was exempt from the special motion to strike procedure pursuant to [section 425.16, subdivision \(d\)](#), which provides that “[t]his section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.” Defendants filed a notice of appeal.

¹ All statutory references are to the Code of Civil Procedure. And, to facilitate a clear analysis, we refer to the relevant provisions of [section 425.16](#) by their subdivision designations.

The People filed a motion to dismiss the appeal, challenging this court's jurisdiction to review the trial court's order, relying on the express language of subdivision (d). Defendants opposed the motion, contending that this appeal is authorized by the express language of subdivision (i), which provides that “[a]n order granting or denying a special motion to strike shall be appealable under Section 904.1.” The motion was thoroughly briefed, and we held oral argument, which was vigorous indeed. We now rule, concluding that the order is not appealable, and we therefore grant the motion to dismiss the appeal.²

² In light of our disposition of this motion, we deny defendants' request for judicial notice that was filed in support of the merits of their appeal.

BACKGROUND

[Section 425.16](#)

“In 1992, the Legislature enacted [section 425.16](#), the anti-SLAPP statute, to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. [Citation.]” (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315, 86 Cal.Rptr.3d 288, 196 P.3d 1094; see also *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192, 25 Cal.Rptr.3d 298, 106 P.3d 958 (*Varian*) [[section 425.16](#) enacted in order “to prevent and deter” **498 SLAPP suits “ ‘brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’ ”].)

“[Section 425.16](#) authorizes a defendant to file a special motion to strike any cause of action arising from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. It establishes a procedure by which the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citations.]” (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1546–1547, 110 Cal.Rptr.3d 129.)

*1387 This special motion to strike procedure implements subdivision (b) of the statute which states: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

When section 425.16 was originally proposed, the Attorney General expressed concern that it “might impair the ability of state and local agencies to enforce certain consumer protection laws.” (*City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 307–308, 3 Cal.Rptr.3d 473 (*City of Long Beach*)). Thereafter, the Governor vetoed versions of the bill that failed to address this concern. (See *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 447, 104 Cal.Rptr.2d 618 (*Health Labs*)). Eventually, a provision was added to the proposed statute which recognized a prosecutorial exemption for enforcement actions to protect the consumer and/or the public. With the addition of this express exemption, the anti-SLAPP statute was enacted in 1992. (*Ibid.*) This exemption is set forth in subdivision (d), which states that section 425.16 “shall not apply to any enforcement action” brought by a public prosecutor.

“As originally enacted in 1992, section 425.16 contained no provision for an immediate appeal of orders made pursuant to that section. [Citation.] Orders made pursuant to section 425.16 could be reviewed only as an appeal after judgment [citation] or by petition for an extraordinary writ.... [¶] In 1999 the Legislature added former section 425.16, subdivision (j) [citation], providing an appeal may be taken directly from an order granting or denying a special motion to strike under section 425.16.” (*Doe v. Luster* (2006) 145 Cal.App.4th 139, 144–145, 51 Cal.Rptr.3d 403 (*Doe*)). “The Legislature found it necessary to enact [former] subdivision (j) because, without the ability to appeal, a SLAPP ‘defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated.’ [Citation.]” (*Varian, supra*, 35 Cal.4th at p. 194, 25 Cal.Rptr.3d 298, 106 P.3d 958.) This direct appeal provision is now set forth in subdivision (i), which states that orders granting or denying a special motion to strike “shall be appealable under Section 904.1.” And it is subdivision (i) on which defendants base their appeal.³

³ Actually, defendants also cite to section 904.1, subdivision (a)(13), which states that an appeal may be taken from “an order granting or denying a special motion to strike under Section 425.16.” That subdivision was added to section 904.1 in 1999, to accommodate the newly added section 425.16, subdivision (j), now subdivision (i). (Stats.1999, ch. 960 (A.B. 1675).) It thus adds nothing to defendants’ position.

**499 *1388 *The Parties’ Contentions*

The People contend that this appeal must be dismissed because the express language of subdivision (d) exempts this action from the direct appeal procedure set forth in subdivision (i). According to the People, the phrase “this section shall not apply” in subdivision (d) means what it says: that all of section 425.16, including subdivision (i), does not apply to a prosecutor’s enforcement action. The People also contend that the Legislature never intended for subdivision (d) findings to be subject to immediate appellate review.

Defendants contend the trial court’s subdivision (d) order is made appealable by subdivision (i). They argue that there is nothing unclear or ambiguous about subdivision (i)’s statutory language which explicitly authorizes their appeal from the order denying their special motion to strike. Defendants also argue that the history of the anti-SLAPP statute reflects a legislative intent to create a right to immediately appeal any order granting or denying a special motion to strike.

DISCUSSION

Although each party invokes a different provision of the anti-SLAPP statute, their respective interpretations are mutually exclusive. To resolve this conflict, we apply settled rules of statutory construction.

“ ‘When interpreting a statute our primary task is to determine the Legislature's intent. [Citation.] In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent.’ [Citations.] The Supreme Court has emphasized that the words in a statute selected by the Legislature must be given a ‘commonsense’ meaning when it noted: ‘ ‘Our first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. [Citations.]’ [Citation.]’ [Citation.] Further, our Supreme Court has noted, ‘ ‘ ‘If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute)....’ ” [Citations.]’ ” (*Goldstein v. Ralphs Grocery Co.* (2004) 122 Cal.App.4th 229, 233, 19 Cal.Rptr.3d 292.)

Because this case requires us to interpret language from two subdivisions of the anti-SLAPP statute, we are particularly guided by the rule requiring us to “consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the *1389 legislative purpose.” (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063, 103 Cal.Rptr.2d 751, 16 P.3d 166.)

Applying these rules leads to several conclusions.

First, subdivision (b) is the linchpin of the anti-SLAPP statute: it authorizes the motion to strike procedure established by the Legislature in order to protect acts in furtherance of the constitutional rights to free speech and petition.

Second, subdivision (d) completely exempts public enforcement actions from the subdivision (b) motion to strike procedure. Thus, for example, a subdivision (d) order does not require any judicial assessment of the nature of the defendant's conduct or substantive evaluation of the merits of the plaintiff's lawsuit. Rather, as stated by our colleagues in Division Five, the “anti-SLAPP remedy is unavailable” to a defendant in an action brought by a public prosecutor. (*Health Labs, supra*, 87 Cal.App.4th at p. 448, 104 Cal.Rptr.2d 618.)

Third, the direct appeal right created by subdivision (i) unequivocally applies to an **500 order granting or denying a special motion to strike pursuant to the procedures promulgated to implement subdivision (b).

Finally, the direct appeal provision in subdivision (i) cannot be stretched to apply to a trial court determination that an action is exempt from the anti-SLAPP statute under subdivision (d). Subdivision (i) authorizes a direct appeal from a ruling on the merits of a subdivision (b) special motion to strike. A subdivision (d) order is not a ruling on the merits of a special motion to strike, but rather a determination that the entire anti-SLAPP procedure does not apply to the case.

Defendants contend that the broad language of subdivision (i) manifests the Legislature's “unambiguous intent that an immediate appeal should be available from any order granting or denying a motion to dismiss under [section 425.16](#).” However, interpreting subdivision (i) as authorizing an immediate appeal from a subdivision (d) finding would undermine the very function of the subdivision (d) exemption, subjecting the public prosecutor's action to a specific type of judicial scrutiny that the exemption expressly prohibits. Moreover, defendants' overbroad construction of subdivision (i) not only fails to account for the language in subdivision (d), it would render that exemption meaningless, something a reasonable Legislature would not have intended.

[1] Defendants argue that the timing of the adoption of the two subdivisions reflects a legislative intent to authorize an immediate appeal from a subdivision (d) order. As noted above, subdivision (d) was part of the original *1390 anti-SLAPP statute enacted by the Legislature in 1992. Subdivision (i), on the other hand, was added by a 1999 amendment. So, defendants reason, if the Legislature had intended to except public enforcement actions from the broad right to an immediate appeal created by subdivision (i), “it would have said so.” This argument, however, ignores what the plain language of subdivision (d) actually says: the anti-SLAPP statute does not apply to prosecutor enforcement actions. In light of this preexisting exemption, it was not necessary for the Legislature to expressly carve out another exemption for public prosecutor actions in the text of subdivision (i).⁴

4 This also disposes of defendants' reliance on exemptions to the anti-SLAPP statute contained in section 425.17, which was added in 2003. (See generally *Goldstein, supra*, 122 Cal.App.4th at p. 232, 19 Cal.Rptr.3d 292.) Defendants argue that section 425.17, subdivision (e) shows that the Legislature knew how to create an exemption from the right of immediate appeal under subdivision (i) (and section 904.1, subd. (a)(13)), but did not do so for public prosecution actions. However, nothing more was needed for public prosecutor actions because of the clear language of subdivision (d) and its legislative history.

Defendants also contend that published authority compels the conclusion that subdivision (d) orders are immediately appealable under subdivision (i), citing three cases: *Health Labs, supra*, 87 Cal.App.4th 442, 104 Cal.Rptr.2d 618; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 37 Cal.Rptr.3d 632; and *People ex re Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 9 Cal.Rptr.3d 844. The essence of defendants' argument is that in these cases the courts considered the merits of appeals from subdivision (d) orders.

[2] As best we can determine—and, from comments by defendants' counsel at oral argument, as best he can determine—no party in any of these three cases questioned the appellate court's jurisdiction. Certainly, the opinions do not address the question whether a subdivision (d) order is appealable under subdivision (i). They thus do not avail defendants: “It is axiomatic ****501** that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.” [Citation.]” (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680, 36 Cal.Rptr.3d 495, 123 P.3d 931; see also *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689 [“Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered”]; *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278, 135 Cal.Rptr.2d 654, 70 P.3d 1067 [quoting *Ginns*].)

Citing *Olson v. Cory* (1983) 35 Cal.3d 390, 398, 197 Cal.Rptr. 843, 673 P.2d 720 (*Olson*), defendants contend that an appellate court “necessarily” affirms its jurisdiction by hearing an appeal “[b]ecause courts are required to consider jurisdictional issues without regard to whether they are ***1391** raised by the parties.” Defendants' reliance on *Olson* is misplaced. In that case, one party filed a brief suggesting that the appeal had been taken from a nonappealable order, but all of the material parties urged the court to review the ruling on the merits. Rejecting that proposal, the *Olson* court stated that “since the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion.” (*Id.* at p. 398, 197 Cal.Rptr. 843, 673 P.2d 720.) *Olson* is relevant here because, as happened there, doubt about the appealability of the order in question has been brought to the court's attention. *Olson* does not, however, support defendants' very different contention: that appellate courts must search for jurisdictional problems never raised by the parties.

Furthermore, defendants overlook *Doe, supra*, 145 Cal.App.4th 139, 51 Cal.Rptr.3d 403, a case holding that the denial of a motion for attorney fees pursuant to subdivision (c) of section 425.16 is not immediately appealable under subdivision (i). There, the defendant argued that the order was appealable because other appellate courts had entertained interlocutory appeals from subdivision (c) orders. (*Id.* at p. 150, 51 Cal.Rptr.3d 403.) Rejecting the argument, the court concluded, among other things, that a judicial opinion addressing the merits of an appeal which “does not suggest either that the parties raised the jurisdictional issue or that the court considered it” is not authority for the proposition that the order is actually appealable. (*Ibid.*)

As noted at the outset of our analysis, both parties claim support for their respective theories in the legislative history of the anti-SLAPP statute. We question the need to resort to arguments about what the Legislature may have intended. (See *Goldstein, supra*, 122 Cal.App.4th at p. 233, 19 Cal.Rptr.3d 292 [if statutory language is clear, no need to resort the legislative history].) Section 425.16 is not ambiguous when its subdivisions are considered together rather than at odds with each other.

But were it relevant to this discussion, the legislative history of section 425.16 reinforces our conclusion that decisions against defendants under subdivision (d) are not immediately appealable. “The legislative history of section 425.16 plainly implies” that its purpose was to prevent the harm caused by SLAPP plaintiffs, litigants who “do not care so much about winning their lawsuits as they care about delaying and distracting the defendant from his or her objective, which is generally economically adverse to those of the SLAPP plaintiff. SLAPP plaintiffs achieve their goal if their suits deplete the defendant's resources and

energy. [Citations.]” ****502** (*Health Labs, supra*, 87 Cal.App.4th at p. 450, 104 Cal.Rptr.2d 618; see also *City of Long Beach, supra*, 111 Cal.App.4th at pp. 308–309, 3 Cal.Rptr.3d 473.)

But by their very definition public prosecutor enforcement actions are not SLAPP cases. “[A] public prosecutor's enforcement action is not motivated ***1392** by a retaliatory attempt to gain a personal advantage over a defendant who has challenged his or her economic ambition. The prosecutor's motive derives from the constitutional mandate to assure that the laws of the state are uniformly enforced and to prosecute any violation of these laws, so that order is preserved and the public interest protected. [Citations.] Nothing in the legislative history of [section 425.16](#) implies that the problem the Legislature sought to rectify thereby was created by prosecutors bringing meritless enforcement actions.” (*Health Labs, supra*, 87 Cal.App.4th at p. 450, 104 Cal.Rptr.2d 618.)

To the contrary, the legislative history shows that the subdivision (d) exemption was enacted in order to preclude defendants from using the anti-SLAPP statute to impair the ability of state and local agencies to enforce consumer protection laws. (*Health Labs, supra*, 87 Cal.App.4th at pp. 446–447, 104 Cal.Rptr.2d 618; *City of Long Beach, supra*, 111 Cal.App.4th at pp. 307–308, 3 Cal.Rptr.3d 473.) Subjecting public prosecutors to the direct appeal process authorized by subdivision (i) would undermine legislative intent, because it would impede the public prosecutor's efforts to protect the health and safety of the citizenry, delaying the enforcement action while the defendant pursues an appeal of the subdivision (d) determination.

Defendants contend that the legislative history leading to subdivision (i) reflects an intent that every ruling on a special motion to strike would be subject to immediate appellate review. Specifically, they rely on evidence that proponents of the immediate appeal provision expressed concern that without the ability to directly appeal a [section 425.16](#) order, a defendant in an actual SLAPP suit might have to incur the cost of a lawsuit before having his or her right to free speech vindicated. (See *Brar, supra*, 115 Cal.App.4th at p. 1317–1318, 9 Cal.Rptr.3d 844; *Doe, supra*, 145 Cal.App.4th at p. 147, 51 Cal.Rptr.3d 403.)

As we recognized in a case that did not involve the subdivision (d) exemption, the right to appeal can be important to the extent it protects defendants from the consequences of an erroneous denial of a meritorious anti-SLAPP motion. (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 1000, 119 Cal.Rptr.3d 835.) That said, we went on in *Grewal*, in a section entitled “A Losing Defendant's Right to Appeal Is the Aspect of the Anti-SLAPP Statute Most Subject to Abuse” (*id.* at p. 1000–1003, 119 Cal.Rptr.3d 835), to discuss Supreme Court and Court of Appeal opinions reflecting on the possibility for abuse, including quoting this observation by the Supreme Court in *Varian, supra*, 35 Cal.4th at p. 195, 25 Cal.Rptr.3d 298, 106 P.3d 958: “In light of our holding today, some anti-SLAPP appeals will undoubtedly delay litigation even though the appeal is frivolous or insubstantial. As the Court of Appeal observed and plaintiffs contend, such a result may encourage defendants to ‘misuse the [anti-SLAPP] motions to delay meritorious litigation or for other purely strategic purposes.’ ” These concerns are a fortiori applicable here—an enforcement action by a public prosecutor.

1393** *Health Labs, supra*, 87 Cal.App.4th 442, 104 Cal.Rptr.2d 618, one of the cases relied on by defendants, concludes with this terse summation, one pointedly applicable here: “We conclude that the classification created by subdivision (d)'s exemption of public prosecutors' enforcement actions from *503** anti-SLAPP motions bears directly on furthering the state's legitimate interest of allowing prosecutors—who did not create the SLAPP problem—to pursue actions to enforce laws, unencumbered by delay, intimidation, or distraction.” (*Id.* at p. 451, 104 Cal.Rptr.2d 618.)

DISPOSITION

The appeal is dismissed.

We concur:

[Kline, P.J.](#)

[Brick, J.](#) *

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

All Citations

228 Cal.App.4th 1382, 176 Cal.Rptr.3d 496, 14 Cal. Daily Op. Serv. 9614, 2014 Daily Journal D.A.R. 11,247

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452 S.W.3d 343
Court of Appeals of Texas,
Corpus Christi–Edinburg.

[SAN JACINTO TITLE SERVICES OF CORPUS CHRISTI, LLC.](#), San
Jacinto title Services of Texas, LLC., and Mark Scott, Appellants,
v.
KINGSLEY PROPERTIES, LP., Appellee.

No. 13–12–00352–CV. | April 25, 2013. | Rehearing Overruled July 3, 2013.

Synopsis

Background: Golf course owner brought action against escrow agent and its officer after potential purchaser ended negotiations in response to officer's letter as part of successful city council campaign to oppose subdivision development. Owner alleged business disparagement, breach of fiduciary duty, and tortious interference with prospective relations. The County Court at Law No. 2, Nueces County, denied motion to dismiss under Texas Citizens Participation Act (TCPA). Agent and officer filed interlocutory appeal.

Holdings: The Court of Appeals, [Longoria](#), J., held that:

[1] it had jurisdiction, but

[2] the Act did not apply to lawsuit filed before its effective date.

Affirmed.

West Headnotes (12)

[1] **Appeal and Error**  Cases Triable in Appellate Court

Statutory construction is a question of law reviewed de novo.

[Cases that cite this headnote](#)

[2] **Statutes**  Intent

A court's primary object in construing a statute is to give effect to the legislature's intent.

[Cases that cite this headnote](#)

[3] **Statutes**  Plain Language; Plain, Ordinary, or Common Meaning

Statutes  Relation to plain, literal, or clear meaning; ambiguity

Courts construing a statute rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results.

[1 Cases that cite this headnote](#)

[4] **Statutes** 🔑 Purpose

Statutes 🔑 Construction in View of Effects, Consequences, or Results

In interpreting a statute, courts consider the objective the legislature sought to achieve through the statute as well as the consequences of a particular construction.

[Cases that cite this headnote](#)

[5] **Appeal and Error** 🔑 Necessity of final determination

Appellate courts possess jurisdiction only over final judgments unless a statute authorizes an interlocutory appeal.

[Cases that cite this headnote](#)

[6] **Appeal and Error** 🔑 Organization and Jurisdiction of Lower Court

Jurisdiction over an interlocutory order when not expressly authorized by statute is jurisdictional fundamental error.

[1 Cases that cite this headnote](#)

[7] **Appeal and Error** 🔑 Interlocutory and Intermediate Decisions

Statutes 🔑 Jurisdictional statutes

Courts normally strictly construe statutes that grant interlocutory appeals.

[Cases that cite this headnote](#)

[8] **Appeal and Error** 🔑 On motions relating to pleadings

Texas Citizens Participation Act (TCPA), an anti-SLAPP statute, permitted interlocutory appeal from denial of defendants' dismissal motion by written order; permitting interlocutory appeal only from denial of motion by operation of law would lead to absurd result and render meaningless statutory requirement to expedite appeal, whether interlocutory or not, from trial court order on motion to dismiss or from failure to rule on that motion and statutory deadline of filing appeal within 60 days after order was signed. [V.T.C.A., Civil Practice & Remedies Code § 27.008](#).

[10 Cases that cite this headnote](#)

[9] **Statutes** 🔑 Prior or existing law in general

Courts presume that the legislature enacted a statute with complete knowledge of the existing law and with reference to it.

[Cases that cite this headnote](#)

[10] **Appeal and Error** 🔑 Origin, nature, and scope of remedies in general

“Appeal” refers to a review by a superior court of an inferior court's decision.

[Cases that cite this headnote](#)

[11] Statutes  Presumptions and inferences

In applying a new statute, courts begin with the presumption that it applies prospectively unless it is expressly made retroactive.

[Cases that cite this headnote](#)

[12] Parties  Nature and grounds of change in general

Pleading  Frivolous pleading

Texas Citizens Participation Act (TCPA), an anti-SLAPP statute, did not apply to lawsuit filed before its effective date, even though defendant merged into another corporation and plaintiff amended petition to name corporation as successor in interest after TCPA took effect; when defendant appeared by filing an answer and responding to plaintiff's requests for discovery, it did not exist as an entity separate from successor, and this suit was pending against successor at the time. [V.T.C.A., Business Organizations Code § 10.008\(a\)\(1\)](#); [V.T.C.A., Civil Practice & Remedies Code §§ 27.001\(6\), 27.003](#).

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

***345** [Jacob G. Munoz](#), Corpus Christi, David George, Houston, [Daniel O. Gonzalez](#) and [John David Bell](#), Wood, Boykin & Wolter, Corpus Christi, [John T. Flood](#), Flood & Flood, Corpus Christi, for Appellants.

Craig Stokley, Kimberly M.J. Sims, Palter, Stokley, Sims, Wright, PLLC, Dallas, [Nathanial Martinez](#), Dallas, for Appellees.

Before Chief Justice [VALDEZ](#) and Justices [BENAVIDES](#) and [LONGORIA](#).

OPINION

Opinion by Justice [LONGORIA](#).

****1** Appellants, San Jacinto Title Services of Texas (“SJT”), San Jacinto Title Services of Corpus Christi (“SJCC”) (collectively, “San Jacinto”), and Mark Scott, filed an interlocutory appeal of the trial court's order denying their motion to dismiss under the Texas Citizens Participation Act (“TCPA”), the Texas anti-SLAPP statute.¹ *See* Act of May 18, 2011, 82nd Leg. R.S., ch. 341, § 2, 2011 Tex. Sess. Law Serv. 341 (West) (codified at [TEX. CIV. PRAC. & REM.CODE ANN. §§ 27.001–.011](#) (West Supp.2011)).² For the reasons stated below, we agree with appellants that we have jurisdiction over this appeal, but we conclude that the TCPA does not apply to the lawsuit appellee, Kingsley Properties, filed against appellants. Accordingly, we affirm the trial court's denial of appellants' motion to dismiss.

¹ A SLAPP suit can be defined as a lawsuit that is “without substantial merit that stop[s] citizens from exercising their political rights or to punish them for having done so.” GEORGE W. PRING & PENELOPE CANAN, “*Strategic Lawsuits Against Public Participation*” (“*SLAPPS*”): *An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L.REV. 937, 942 (1992) (internal quotations omitted); *see generally* SHANNON HARTZLER, Note, *Protecting Informed Public Participation: Anti-SLAAP Law and*

the Media Defendant, 41 VAL. U.L.REV. 1235 (collecting and analyzing state anti-SLAAP laws). As discussed below, we take no position on whether the underlying lawsuit in this case constitutes a SLAPP suit.

² All statutory references in opinion are to Chapter 27 of the Texas Civil Practice and Remedies Code unless otherwise noted.

I. BACKGROUND

Appellee owns land (“the Property”) in Corpus Christi, Texas on which a golf course and country club facilities are located. San Jacinto acted as Kingsley’s escrow agent during appellee’s purchase of the Property in 2005. Scott, who serves as Vice President of San Jacinto, was apparently briefly present at the closing but not involved in the actual proceedings. In 2009, Jim Robichaux, a homeowner in the King’s Crossing Subdivision adjacent to the Property, sent an open letter to the Corpus Christi City Council asserting that appellee intended to close the golf course and club, re-plat the Property and develop it commercially.³ Robichaux asserted that appellee’s alleged plans would substantially decrease the value of his home, stated his strong opposition to appellee’s plans, and asked to know the Council’s opinion on the matter. Scott, who was a (ultimately successful) candidate for the city council at the time, responded with what the parties refer to as the “Hobbs Letter,” a mass mailing to all the residents of the subdivision. In the Hobbs Letter, which was sent on Scott’s campaign stationery, Scott stated his opposition to the plan and invited people to contact him regarding that issue *346 or any other. Scott provided his contact information, including his office phone number at San Jacinto.

³ Robichaux’s statements apparently arose from pleadings that appellee filed in a separate, unrelated lawsuit where Robichaux stated that appellee asserted that it had the right to develop the Property without restriction. Appellee’s pleadings in that lawsuit, if any, are not part of the record in this appeal.

In February 2010, appellee filed suit for business disparagement, breach of fiduciary duty, and tortious interference with prospective relations against Scott and San Jacinto, and for breach of contract against San Jacinto alone.⁴ Appellee further alleges that Scott acted in the course and scope of his employment with San Jacinto when he sent the Hobbs Letter and that San Jacinto is therefore vicariously liable for Scott’s actions. All of appellee’s claims arise from the Hobbs Letter, and the effect it allegedly had on appellee’s negotiations with Philip Hurst, a Corpus Christi businessman who had been negotiating with appellee to purchase the Property at the time. Hurst testified in an affidavit that after seeing the Hobbs Letter, he was no longer willing to pay appellee’s asking price of \$5,000,000. Negotiations between appellee and Hurst eventually broke down completely.

⁴ Appellee filed three amended petitions that added and non-suited various claims. We take this list of claims from appellee’s Third Amended Petition, its live petition.

**2 Appellants filed a motion to dismiss under the TCPA, which requires a trial court to dismiss a lawsuit that “is based on, relates to, or is in response to” the defendant’s exercise of any of their constitutional rights of free speech, petition, or association. *Id.* § 27.005(b). The moving party must prove by a preponderance of the evidence that they are being sued on this basis. *Id.* The party bringing the action can prevent dismissal by showing that they have established “by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(c). Once a defendant brings a motion to dismiss under this chapter, all discovery in the lawsuit is suspended. *Id.* § 27.003(c).

In this case, without specifically ruling that the TCPA applied, the trial court denied appellants’ motion. Appellants filed a request for findings of fact pursuant to section 27.007(a). The trial court issued findings of fact that appellee’s lawsuit was not brought to “deter or prevent” either defendant from exercising their constitutional rights, or for an improper purpose. Appellants subsequently perfected this interlocutory appeal challenging the trial court’s denial of their motion to dismiss.

II. DISCUSSION

A. Jurisdiction

As a threshold matter, appellee argues that we do not have jurisdiction over this appeal because section 27.005 does not create an interlocutory appeal when the trial court denies a motion to dismiss by written order. For the reasons stated below, we conclude that we do possess jurisdiction over this appeal.

1. Standard of Review

[1] [2] [3] [4] Statutory construction is a question of law that we review de novo. *Railroad Comm'n of Tex. v. Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 624 (Tex.2011). Our primary object in construing a statute is to give effect to the legislature's intent. *Id.* at 628; *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex.2010). “We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results.” *Tex. Lottery Comm'n*, 325 S.W.3d at 635; see *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex.2003). The Texas Supreme Court instructs appellate courts to read a statute as a whole and *347 give effect to every part. *Tex. Citizens*, 336 S.W.3d at 628; *City of San Antonio*, 111 S.W.3d at 25. In interpreting a statute, we “consider the objective the legislature sought to achieve through the statute as well as the consequences of a particular construction.” *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex.2009).

2. Applicable Law

[5] [6] [7] Appellate courts possess jurisdiction only over final judgments unless a statute authorizes an interlocutory appeal. *CMH Homes v. Perez*, 340 S.W.3d 444, 447–48 (Tex.2011). “Jurisdiction over an interlocutory order when not expressly authorized ... by statute is jurisdictional fundamental error.” *N.Y. Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 679 (Tex.1990). We normally strictly construe statutes that grant interlocutory appeals, *CMH Homes*, 340 S.W.3d at 447, but the legislature instructed us in this case to liberally construe the TCPA in order to “effectuate its purpose and intent fully.” TEX. CIV. PRAC. & REM.CODE § 27.011(b).

3. Section 27.008 of the TCPA

**3 Section 27.008 of the TCPA is titled “Appeal,” and contains the TCPA's only language regarding appeals. It reads in whole:

- (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.
- (b) An 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.
- (c) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

§ 27.008.

4. Analysis

[8] Appellee argues that we lack jurisdiction because the plain language of section 27.008(a) only creates an interlocutory appeal when the trial court constructively denies a motion to dismiss after sixty days, and the plain language of subsections (b) and (c) do not expressly create an interlocutory appeal when the trial court denies the motion by written order.

Only two other courts of appeals have considered jurisdiction of an appeal under Chapter 27 in these circumstances, and they have come to divergent conclusions. In *Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519, 524–29 (Tex.App.-Fort Worth 2012, pet. filed), the court of appeals concluded that it did not possess jurisdiction for the same reasons argued by

appellee in this case. See also *Lipsky v. Range Prod. Co.*, No. 02–12–00098–CV, 2012 WL 3600014, at *1 (Tex.App.-Fort Worth Aug. 23, 2012, pet. filed) (mem. op.). The Fourteenth Court of Appeals, in contrast, recently issued an opinion in support of an order that denied a motion to dismiss an appeal on these same jurisdictional grounds for reasons we will discuss below. *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC*, No. 14–12–00896–CV, 2013 WL 407029, at *3–4 (Tex.App.-Houston [14th Dist.] Jan. 24, 2013, order).

Appellee argues, as the *Jennings* court reasoned, that the legislature uses specific language to create an interlocutory appeal. See, e.g., TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(a)(1) (West Supp.2011) (providing that “a person may appeal from an interlocutory order of a ... court” and listing a series of appealable interlocutory orders.); *id.* § 150.002(f) (West 2011) (“An order *348 granting or denying a motion for dismissal [based on this section] is immediately appealable as an interlocutory order.”); *id.* § 15.003(b) (West Supp.2011) (“[A]n interlocutory appeal may be taken of a trial court’s determination....”). Section 27.008(a) contains similar language that creates an appeal when the trial court does not timely rule on the motion, but the legislature does not use the same language in subsections (b) or (c). Appellee reads subsection (b) as ordering appellate courts to expedite appeals brought under section 27.008 and subsection (c) as providing the time frame to file an appeal.

**4 Appellee argues that interpreting section 27.008 in this way does not reach an absurd result and is actually consistent with the logic of the TCPA. Appellee argues that the purpose of the TCPA is to provide a defendant who claims he is being sued for exercising his constitutional rights “one opportunity to have the issue heard and actually decided.” Appellee interprets subsection (a) as furthering that purpose by providing that appellate courts will consider and rule on a defendant’s claims if the trial court fails to do so within the time periods laid out by the TCPA.

We decline to adopt appellee’s interpretation of section 27.008 because to do so would render portions of section 27.008(b) and (c) meaningless. *Tex. Citizens*, 336 S.W.3d at 628; see also *Fresh Coat, Inc. v. K–2, Inc.*, 318 S.W.3d 893, 901 (Tex.2010) (observing that courts “avoid treating statutory language as surplusage where possible”). Subsection (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.” TEX. CIV. PRAC. & REM.CODE § 27.008(b) (emphasis added). The plain language of subsection (b) indicates that the legislature contemplated two situations: (1) an appeal from a trial court’s order on a motion to dismiss brought under chapter 27 and (2) an appeal from the trial court’s failure to issue an order on the motion to dismiss. Additionally, subsection (c) provides that an appeal or other writ must be filed with the court of appeals sixty days “after the trial court’s order is signed” or the time for the court to rule expires. To give section 27.008 the construction appellee requests would render the language in subsections (b) and (c) meaningless. Our opinion comports with the holding of the Fourteenth Court of Appeals that “if no signed order can be the subject of an interlocutory appeal,” then the language in subsections (b) and (c) is superfluous. *Direct Commercial Funding*, 2013 WL 407029, at *3–4.

[9] [10] We are mindful that courts “are not responsible for omissions in legislation” and that even if it appears that the legislature did not accomplish something in a statute that we think it intended, “courts are not empowered to ‘fix’ the mistake by disregarding direct and clear statutory language that does not create an absurdity.” *Tex. Lottery Comm’n*, 325 S.W.3d at 638. However, after reading the statute as a whole in light of the legislature’s stated purpose for enacting it, we conclude that adopting appellee’s proposed interpretation of section 27.008 leads to an absurd result. The legislature’s stated purpose in enacting the TCPA was to “encourage and safeguard” the exercise of First Amendment rights by Texans “to the maximum extent permitted by law” while also protecting the rights of persons to file lawsuits for “demonstrable injury.” § 27.002. It is evident that the legislature intended to effectuate the purpose of the TCPA by ensuring that courts will dismiss SLAAP suits quickly and without the need for *349 prolonged and costly proceedings.⁵ The legislature chose to title section 27.008 “appeal,” indicating that they intended to provide for quick appellate review on trial court rulings on motions to dismiss brought under this chapter. Under appellee’s reading of section 27.008, whether a defendant receives appellate relief under the TCPA does not depend on whether they suffered the harm the TCPA was designed to prevent, but on the trial court’s attentiveness to the motion to dismiss. A defendant whose motion was denied by written order would have no choice but to go to trial and receive a judgment before raising a First Amendment defense on appeal, but a second defendant sued under identical circumstances could immediately

take an interlocutory appeal if the trial court failed to timely rule on his motion. The first defendant would effectively have no remedy under the TCPA even if the suit against him was the quintessential SLAPP suit. Appellee's interpretation creates an absurdity by drawing an artificial distinction within the class of defendants the TCPA was designed to protect regardless of whether they suffered the harm for which the legislature addressed by enacting the TCPA. We see nothing in the statute or its history that indicates the legislature intended to actually draw this distinction when granting appellate rights in [section 27.008](#).⁶

⁵ Almost all motions to dismiss under this chapter will be heard by the trial court within 120 days of the date the defendant is first served with the lawsuit. See *Jennings*, 378 S.W.3d at 526 n. 6.

⁶ Additionally, we presume that the legislature enacted a statute “with complete knowledge of the existing law and with reference to it.” *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex.1990). In Texas law, an “appeal” refers to “a review by a superior court of an inferior court's decision.” *Bigby v. State*, 892 S.W.2d 864, 871 (Tex.Crim.App.1994); see also *Waters–Pierce Oil Co. v. State*, 107 Tex. 1, 106 S.W. 326, 331 (1907) (“appellate jurisdiction ... is defined to be the power and authority conferred upon a superior court to rehear and determine causes which have been tried in inferior courts”). The procedure appellee discerns in [section 27.008](#) is not an “appeal” in the sense that it is used in Texas law, but is essentially a grant of original jurisdiction to the courts of appeals to rule on a Chapter 27 motion to dismiss if the trial court did not make a timely motion. Although the legislature may confer original jurisdiction on the courts of appeals by statute, the fact remains that they chose to enact an “appeal” section of the TCPA, and we see no evidence in the statute that they intended for that word to bear a different meaning than it normally bears in Texas law.

****5** Normally, statutes conferring interlocutory appeals are strictly construed, *CMH Homes*, 340 S.W.3d at 447, but the legislature expressly instructed us to liberally construe the TCPA in order to “effectuate its purpose and intent fully.” § [27.011\(b\)](#).⁷ We conclude that our construction furthers the legislature's intent in enacting the statute by allowing for quick review of all timely motions to dismiss under this chapter that are denied by the trial court. Interpreting [section 27.008](#) in this way also gives full effect to the language the legislature employed in 27.008(b) and (c). See *Direct Commercial Funding*, 2013 WL 407029, at *3–4. In sum, we conclude that [section 27.008](#) permits an interlocutory appeal when the trial court denies the defendant's motion by written order.

⁷ The *Jennings* court did not address the legislature's direction to liberally construe the TCPA.

B. Application of the Statute

Appellee argues that even if we have jurisdiction over this appeal, the statute does not apply to appellee's suit because appellee filed before the statute's effective date. Appellee filed suit in February 2010 and the TCPA went into effect on June 17, ***350** 2011. Act of May 18, 2011, 82nd Leg. R.S., ch. 341, § 3, 2011 Tex. Sess. Law Serv. 341 (West). Appellants argue that the TCPA applies to this suit because the Act broadly defines the “legal actions” subject to dismissal under the TCPA as “more than just [a] lawsuit.” Therefore, appellant argues that the TCPA applied from the date of appellee's first amended petition, which added a cause of action for business disparagement. Alternatively, San Jacinto of Texas (“SJT”) argues alone that the TCPA applies to the suit against it because it was not added as a party until after the TCPA's effective date.

1. Applicable Law

[11] In applying a new statute, we begin with the presumption that it applies prospectively unless it is expressly made retroactive. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex.2002); TEX. GOV'T CODE ANN. § [311.022](#) (West 2005). As always, our primary goal in interpreting statutory language is to give effect to the legislature's intent. *Tex. Citizens*, 336 S.W.3d at 624; *Tex. Lottery Comm'n*, 325 S.W.3d at 635.

2. Analysis

[12] The TCPA defines a “legal action” as a “lawsuit, cause of action, petition, complaint, cross-claim or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.” § [27.001\(6\)](#). Appellants argue that this expansive definition refers to “more than just [a] lawsuit,” so that the TCPA applies whenever a pleading in any case makes a claim

that could be construed as a SLAPP claim, even if the plaintiff commenced the lawsuit before the effective date of the TCPA. However, appellant does not address language the legislature enacted as section 3 of the TCPA:

“[t]he change in law made by this Act applies only to a legal action filed on or after the effective date of this Act. A legal action filed before the effective date of this Act is governed by the law immediately before that date, and that law is continued in effect for that purpose.”

****6** Act of May 18, 2011, 82nd Leg. R.S., ch. 341, § 3, 2011 Tex. Sess. Law. Serv 341 (West).

The legislature has made it quite clear with this language that the TCPA applies only to a “legal action,” of any sort, that is filed after the TCPA's effective date. See *In re Omni Hotels Mgmt. Corp.*, 159 S.W.3d 627, 629 n. 4 (Tex.2005) (noting that almost identical language in an amendment to the probate code meant that it did not apply to a case filed before the amendment's effective date); *Tex. Dept. of Protective and Regulatory Serv. v. Sherry*, 46 S.W.3d 857, 860 n. 1 (Tex.2001) (same, for an amendment to the family code). Far from overcoming the presumption that a new statute applies prospectively, we interpret this language as legislative confirmation of that presumption for the TCPA. See *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex.2008) (“When a statute's language is clear and unambiguous, it is inappropriate to resort to the rules of construction or extrinsic aids to construe the language.”).

SJT argues that its motion was timely because SJT was not sued until after the TCPA became effective. SJT reasons that SJCC had become a “nonexistent entity” at the time appellee filed suit, so appellee did not actually commence a “legal action” against SJT within the meaning of the TCPA until the First Amended Petition, which was filed after the effective date. However, Texas law provides that when one corporation merges into another, it no longer has a separate existence from the surviving entity. **TEX. BUS. ORG.CODE ANN. § 10.008(a)(1)** (West Supp.2011). When ***351** SJCC appeared by filing an answer and responding to appellee's requests for discovery, it did not exist as an entity separate from SJT, and this suit was pending against SJT at the time. Lawyers for SJT and Mark Scott eventually informed appellee of the merger in their responses to discovery, and appellee accordingly amended its petition to name SJT as the successor in interest to SJCC. Because suit was pending against SJT from the time of appellee's Original Petition, we conclude that the TCPA is inapplicable to appellee's legal action against SJT for the same reasons that we discussed above: appellee filed suit before the TCPA's effective date

In sum, we conclude that the TCPA does not apply to appellee's suit against any of the named appellants. We overrule appellants' remaining issues on appeal, all of which related to the TCPA.

III. CONCLUSION

We affirm the trial court's denial of appellants' motion to dismiss.

All Citations

452 S.W.3d 343, 2013 WL 1786632

438 S.W.3d 847
Court of Appeals of Texas,
Houston (1st Dist.).

Bruce I. SCHIMMEL, Appellant

v.

Gary McGREGOR, Teri McGregor, Kris Hall, Soledad Pineda, Larry Bishop,
Cynthia Bishop, George Clark, Deborah Clark, and Carol Severance, Appellees.

No. 01–13–00721–CV. | July 10, 2014. | Rehearing Overruled Sept. 18, 2014.

Synopsis

Background: Homeowners sued homeowners' association's attorney for tortious interference with prospective business relations in connection with the sale of their respective beachfront properties to city. Attorney moved to dismiss under Texas Citizens Participation Act (TCPA). The 113th District Court, Harris County, denied motion. Attorney appealed.

Holdings: The Court of Appeals, [Evelyn V. Keyes, J.](#), held that:

- [1] motion was timely filed;
- [2] attorney's statements did not come within "commercial speech" exemption from application of Act;
- [3] attorney's statements were "matters of public concern," supporting motion to dismiss;
- [4] homeowners failed to establish a prima facie case on their claim;
- [5] remand on issue of attorney fees was warranted.

Reversed and remanded.

West Headnotes (12)

[1] **Pleading** 🔑 Application and proceedings thereon

A "prima facie case" within meaning of Texas Citizens Participation Act (TCPA) prohibiting dismissal if plaintiff establishes by clear and specific evidence a prima facie case for each essential element represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true. [V.T.C.A., Civil Practice & Remedies Code § 27.005\(c\)](#).

[3 Cases that cite this headnote](#)

[2] **Pleading** 🔑 Application and proceedings thereon

Although attorney filed his motion to dismiss homeowners' tortious interference lawsuit, under Texas Citizens Participation Act (TCPA), one day late, in making a statement concerning the timeliness of the motion, trial court

implicitly ruled that if attorney technically filed the motion late he had good cause for the late filing, therefore, motion was timely filed. [V.T.C.A. Civil Practice and Remedies Code § 27.003\(b\)](#).

[Cases that cite this headnote](#)

[3] **Pleading** ➡ Frivolous pleading

Statements allegedly made by attorney to city, which homeowners alleged tortiously induced city to back out of its agreements to purchase homeowners' properties, did not arise out of the sale or lease of goods, services, or an insurance product, or a commercial transaction, as required to come within commercial speech exception to application of Texas Citizens Participation Act (TCPA); when attorney made the statements he was undisputedly working as an attorney for homeowners association, attorney did not represent the city, nor was the city a “potential buyer or customer” of his legal services. [V.T.C.A. Civil Practice and Remedies Code § 27.010\(b\)](#).

[3 Cases that cite this headnote](#)

[4] **Pleading** ➡ Frivolous pleading

Statements of homeowners' association's attorney, forming basis of homeowners' action for tortious interference with sale of their respective beachfront properties to city, were “matters of public concern,” supporting attorney's motion to dismiss under Texas Citizens Participation Act (TCPA); challenged statements, regardless of to whom the statements were made, were related to the dispute between homeowners and association about city's purchase of properties, and were made “in connection with an issue under consideration or review” by the city and the Texas Department of Public Safety. [V.T.C.A. Civil Practice and Remedies Code § 27.001\(7\)](#).

[1 Cases that cite this headnote](#)

[5] **Pleading** ➡ Application and proceedings thereon

Attorney's affidavits, in support of his motion under Texas Citizens Participation Act (TCPA), stating that he was “personally acquainted with facts stated therein,” instead of stating that they were based on personal knowledge, were, nonetheless, competent and admissible.

[Cases that cite this headnote](#)

[6] **Torts** ➡ Prospective advantage, contract or relations; expectancy

To prevail on a claim for tortious interference with prospective business relations, the plaintiffs must establish that (1) a reasonable probability existed that the plaintiffs would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiffs injury; and (5) the plaintiffs suffered actual damage or loss as a result.

[1 Cases that cite this headnote](#)

[7] **Torts** ➡ Improper means; wrongful, tortious or illegal conduct

Conduct that is merely “sharp” or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations.

[Cases that cite this headnote](#)

[8] Pleading 🔑 Frivolous pleading**Pleading** 🔑 Application and proceedings thereon**Torts** 🔑 Attorneys

Homeowners' conclusory statements, unsupported by any facts, that actions of homeowner associations' attorney caused city to fail to close on the purchases of their properties, did not establish, by clear and specific evidence, a prima facie case on the essential element of causation, as required to prevail on a claim for tortious interference with prospective business relations, and, therefore, trial court erroneously denied attorney's motion to dismiss under Texas Citizens Participation Act (TCPA); even if attorney had induced the city not to close on the purchase of the properties, the homeowners would have no cause of action against him for inducing city to do that which it had a right to do, which was not to purchase the homeowners' properties. [V.T.C.A., Civil Practice & Remedies Code § 27.005\(b, c\)](#).

[2 Cases that cite this headnote](#)**[9] Torts** 🔑 Contracts

Merely inducing a contract obligor to do what it has a right to do is not actionable interference.

[Cases that cite this headnote](#)**[10] Appeal and Error** 🔑 Ordering New Trial, and Directing Further Proceedings in Lower Court

When an appellate court determines that the trial court erroneously denied a defendant's motion to dismiss under the Texas Citizens Participation Act (TCPA), the appropriate disposition of the case is to reverse the trial court's denial of the motion and remand for the trial court to conduct further proceedings to determine damages and costs and to order dismissal of the suit. [V.T.C.A., Civil Practice & Remedies Code § 27.009\(a\)\(1\)](#).

[1 Cases that cite this headnote](#)**[11] Costs** 🔑 Evidence as to items

Proof of attorney's fees should include the basic facts underlying the lodestar, which are: (1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked.

[Cases that cite this headnote](#)**[12] Appeal and Error** 🔑 Ordering new trial of certain issues only

Remand for further proceedings on issue of amount of attorney fees was warranted, given that appellant was entitled to attorney fees and costs by establishing his entitlement to dismissal of tortious interference with prospective business relations suit under Texas Citizens Participation Act (TCPA). [V.T.C.A., Civil Practice & Remedies Code § 27.009\(a\)\(1\)](#).

[1 Cases that cite this headnote](#)**Attorneys and Law Firms**

*849 [Daniel Goldberg](#), Houston, TX, for Appellant.

Wayne H. Paris, Paris Law Group, PLLC, Houston, TX, for Appellees.

Panel consists of Justices [KEYES](#), [BLAND](#), and [BROWN](#).

OPINION

[EVELYN V. KEYES](#), Justice.

In this interlocutory appeal, appellees Gary McGregor, Teri McGregor, Kris Hall, Soledad Pineda, Larry Bishop, Cynthia Bishop, George Clark, Deborah Clark, and Carol Severance (collectively, “the Buy–Out Owners”), sued Bruce Schimmel, an attorney hired by The Sands of Kahala Beach HOA, Inc. (“SOKB”), the homeowners' association for the subdivision in which the Buy–Out Owners lived, for tortious interference with prospective business relations, specifically, the sale of their respective beachfront properties to the City of Galveston. Schimmel moved to dismiss the Buy–Out Owners' tortious interference claim pursuant to the Texas Citizens Participation Act (“TCPA”).¹ The trial court denied Schimmel's motion to dismiss. In two issues, Schimmel contends that the trial court erroneously (1) found that Schimmel's complained-of actions did not involve “matters of public concern” and did not implicate the exercise of his right to petition, right of free speech, or right of association and thus erroneously denied his motion to dismiss; and (2) refused to award Schimmel court costs, reasonable attorney's fees, and other expenses incurred in defending the action against him.

¹ See [TEX. CIV. PRAC. & REM.CODE ANN. §§ 27.001–.011](#) (Vernon Supp.2013).

We reverse and remand for further proceedings.

Background

The Buy–Out Owners all own beachfront property in the Sands of Kahala Beach, a small, gated subdivision located on Galveston Island. In September 2008, Hurricane Ike made landfall in the region and caused extensive property damage to numerous homes, including those of the Buy–Out Owners. Because their homes were allegedly more than fifty percent damaged, the Buy–Out Owners sought to sell their properties to the City of Galveston under a Federal Emergency Management Agency (“FEMA”) program called the Hazard Mitigation Grant Program (“HMGP”). The Texas Department of Public Safety assists in administering this program. The Buy–Out Owners and an attorney for the City of Galveston signed agreements in September 2009 concerning the purchase of the respective properties.

SOKB and the remaining owners who owned property in the subdivision but did not wish to sell their property to the City of Galveston (“the Remaining Owners”) opposed the Buy–Out Owners' plans to sell. Under the HMGP, the properties that the City of Galveston purchased “were to be kept as open space in perpetuity.” *850 This requirement concerned the SOKB, the entity in charge of collecting assessments and fees from the property owners within the subdivision, and the Remaining Owners, who believed that the required public use of the purchased land and the loss of a private roadway and utility easement would cause the value of their properties to drop.

Due to the dispute between the Buy–Out Owners, SOKB, and the Remaining Owners, in October 2009, the City of Galveston added a condition to the purchase of the Buy–Out Owners' properties: the president of SOKB's Board of Directors (“the Board”) needed to sign a document releasing the City from paying future homeowners' dues and other fees and assessments to SOKB once it purchased the properties. In December 2009, SOKB hired Schimmel, an attorney, to represent its interests and those of the Remaining Owners in the dispute with the Buy–Out Owners. SOKB refused to sign the releases and the Board voted to amend SOKB's by-laws to raise the voting requirement to remove directors from the Board, purportedly on Schimmel's advice. The Buy–Out Owners subsequently held a special meeting of the Board and elected new directors, including Kris Hall, one

of the appellees, as the new President. Hall then signed the releases for the Buy-Out Owners' properties and delivered them to the City of Galveston.

Schimmel continued to work on behalf of SOKB and the Remaining Owners to convince the City of Galveston not to buy the Buy-Out Owners' properties until February 1, 2011, when he withdrew from representation. Ultimately, the time period to participate in the HMGP expired without the City of Galveston's having closed on the purchases of the Buy-Out Owners' properties.

The Buy-Out Owners, joined by SOKB, sued Schimmel on January 28, 2013, asserting claims for breach of fiduciary duty and equitable fee forfeiture. Neither of those claims is at issue in this interlocutory appeal.

On March 28, 2013, the Buy-Out Owners and SOKB filed their first amended petition. In addition to the breach of fiduciary duty and fee forfeiture claims, the Buy-Out Owners asserted a claim against Schimmel for tortious interference with prospective business relations.² The Buy-Out Owners alleged that a reasonable probability existed that they would have entered into a business relationship with the City of Galveston, that Schimmel intentionally interfered with the relationship, and that Schimmel's conduct was independently tortious and unlawful "in that Defendant Schimmel made fraudulent statements about these Plaintiffs to third parties and persuaded others to illegally boycott these Plaintiffs."

² SOKB did not join the homeowners in asserting this claim against Schimmel, and SOKB is not a party to this appeal, which concerns only the Buy-Out Owners' tortious interference claim.

The Buy-Out Owners alleged that Schimmel made several misrepresentations that interfered with the purchase of their properties by the City of Galveston. For example, in response to an article in the Houston Chronicle about the potential sale of the properties, Schimmel allegedly wrote to the author of the article and stated that if the City purchased the properties the Remaining Owners would lose their access to a nearby state highway because the private road in the subdivision would be demolished. He also allegedly misrepresented to the author that all of the properties were behind the vegetation line and "repairable for less than 50% of *851 their value," which would preclude them from participation in the HMGP. Schimmel also allegedly made misrepresentations to the Board concerning how the HMGP's definition of "substantial damage" to the properties was calculated;³ to lot owners in the subdivision that the buyout would not include the opportunity to buy out all of the properties in the subdivision; and to various individuals that he "had no intention of changing any more By-Laws," that the SOKB had been working with the Buy-Out Owners to settle the dispute, and that developers no longer owned lots in the subdivision, even though they did.

³ The Buy-Out Owners alleged that Schimmel told the Board that "the definition of Substantial Damage is damages that total at least 50% of the pre-event fair value of the property," but he allegedly knew that the fair market value of the property was based on the local appraisal district's value for the structure, which did not include the value of the land. According to the Buy-Out Owners, "This is a significant distinction which the BOD later misrepresented to FEMA when they alleged false damage estimates."

The Buy-Out Owners also alleged that Schimmel had "systematically excluded members from voting [at resident meetings] in order to boycott the Buyout owners," such as by quickly setting a voting eligibility date to prevent owners who had not paid their annual assessments from voting at meetings and by recommending the elimination of voting by proxy, which would affect the Buy-Out Owners who used their properties as vacation homes but did not live permanently in the subdivision. The Buy-Out Owners further alleged that Schimmel had stated that neither SOKB nor its Board had the power to waive assessments as required by the City of Galveston to purchase the properties, and "[w]ithout releases, the [City] would not close on the properties and [Schimmel] had the [Board] refuse to sign [the] release[s] which was an unreasonable restraint or alienation. Defendant Schimmel's position was that the Buy-[O]ut owners would not be allowed to sell to the [City] under any circumstances." The Buy-Out Owners alleged that they had suffered economic damages consisting of the difference between the proposed buy-out values and the market values of their properties.

On May 28, 2013, Schimmel filed a motion to dismiss under the TCPA. In this motion, Schimmel stated that the Buy-Out Owners served him with their first amended petition on March 28, 2013, and that this motion to dismiss addressed only the tortious interference claim raised for the first time in that amended petition.

Schimmel stated that he advised the Board and the Remaining Owners that he thought the issue concerning the value of the repairs to the Buy-Out Owners' properties, which was relevant to their eligibility to participate in the HMGP, was "a matter between [the Buy-Out Owners] and governmental agencies" and should not be pursued by SOKB, "but that if any lot owner wanted to pursue that issue on his or her own, it would aid [SOKB] by distracting [the Buy-Out Owners]." Schimmel argued that the TCPA protected these statements because they involved his right of association and right to petition regarding a matter of public concern. He argued that his statements to the Houston Chronicle reporter were "a 'communication' which is 'an exercise of the right of free speech' and related to an exercise of the right of petition" and were made "in connection with a matter of public concern" because the statements related to the expenditure of government money and "interference with the community of the Subdivision and economic concerns." He asserted that those statements were also "reasonably likely to encourage consideration or review *852 of an issue by" an executive or other governmental body or were "reasonably likely to enlist public participation in an effort to effect consideration of an issue by" an executive or other governmental body. With respect to his alleged statements to the Board, Schimmel argued that those statements were "an exercise of the right of association" and thus were entitled to protection under the TCPA.

Schimmel also argued that he was entitled to mandatory court costs, reasonable attorney's fees, and other expenses incurred in defending the claim pursuant to [Civil Practice and Remedies Code section 27.009\(a\)](#). Schimmel attached an affidavit setting out the amount of attorney's fees he had incurred in defending against the Buy-Out Owners' claims. This affidavit set out the billing rate, the date tasks were performed, the hours spent, and a description of the tasks completed.

Schimmel attached numerous exhibits to his motion to dismiss. One of these exhibits was an order of dismissal in a suit filed by the Buy-Out Owners in the Southern District of Texas against the City of Galveston and several Department of Public Safety officials involved in the administration of the HMGP. The Buy-Out Owners had raised claims under the Fourteenth Amendment and Section 1983,⁴ arguing that the City of Galveston's failure to close on the purchase of their properties deprived them of funds under the HMGP without due process of law. The district court granted the defendants' motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) and, in its order, noted that state agencies involved with administering the HMGP have "wide discretion in administering the program." The court stated, "Nothing in the regulations [governing the HMGP] dictates that qualified property owners are entitled to participate in the program or limits the State's discretion in determining a property owner's qualifications for the program or reviewing those qualifications at any time in the process." The court concluded that the Buy-Out Owners "have no entitlement to HMGP funds or a property right to such funds" and ultimately dismissed their suit.

⁴ See [42 U.S.C. § 1983 \(2006\)](#) (providing civil cause of action for deprivation of rights).

In response to Schimmel's motion to dismiss, the Buy-Out Owners argued that their claim fell within a statutory exemption to the TCPA because Schimmel was engaged in the business of selling his legal services, he was paid to render legal services by SOKB and the Remaining Owners, and his conduct at issue in the suit occurred while he was rendering legal services. The Buy-Out Owners also argued that Schimmel had not timely filed his motion to dismiss because the TCPA required such motions to be filed not later than the sixtieth day after service of the legal action and Schimmel filed his motion to dismiss on the sixty-first day after the homeowners served him with their amended petition.

The Buy-Out Owners further stated,

The individual Plaintiffs['] claims are not based on, related to, or in response to a right of Schimmel to voice free speech, have a right of association or a right to petition. It is totally about his tortious interference with Plaintiffs' prospective business and contractual relations which caused the individual Plaintiffs money damages. Plaintiffs' claims are based upon the independent torts of fraud, misrepresentations and illegal boycott.

They further argued, “Schimmel’s conduct is at issue here, not anyone’s free speech, right to associate, or to file a lawsuit.” The Buy–Out Owners also challenged the affidavits that Schimmel had submitted *853 with his motion to dismiss on the ground that Schimmel stated that he is “personally acquainted with the facts stated herein, except where I state that I am testifying on information and belief, in which case I am testifying based on information and my belief thereof.” The Buy–Out Owners argued that these affidavits did not constitute competent evidence because “personal acquaintance” is not “personal knowledge.” The homeowners also challenged Schimmel’s attorney’s fees affidavit on the ground that it did not meet the requirements for establishing reasonable and necessary attorney’s fees as set out by the Texas Supreme Court in *El Apple I, Ltd. v. Olivas*.

The Buy–Out Owners attached their own affidavits to their response and argued that these affidavits established a prima facie case for tortious interference with prospective business relations.⁵ The affidavits were substantively identical. The affidavits set out numerous representations allegedly made by Schimmel that, according to the Buy–Out Owners, caused the City of Galveston to fail to purchase their properties. As an example, Kris Hall, one of the Buy–Out Owners, averred:

⁵ Although the Buy–Out Owners pleaded a claim for tortious interference with prospective relations, the Buy–Out Owners admit in their affidavits submitted in opposition to Schimmel’s motion to dismiss that they had signed contracts with the City of Galveston to purchase the properties for specified amounts.

But for Schimmel’s misrepresentations and conduct there is a reasonable probability that all of our buy-out contracts would have closed.... Schimmel’s independent misrepresentations and boycott, set out above, prevented our agreements from closing and the purchase of our property by the [City]. Schimmel’s acts, set out above, were done with a conscious desire to prevent our sales and purchases from occurring. I, as well as the other Buy–Out Owners, have suffered actual damages as a result of this interference of Schimmel. We have incurred thousands of dollars in legal fees and have lost the difference between the buy-out values that we were to be paid and the lesser amounts that our properties now are valued at. There was a reasonable probability that I, as well as the rest of the Buy–Out Owners, would have entered into a business relationship and closed our contracts with the [City].

The Buy–Out Owners did not attach affidavits from attorneys with the City of Galveston or from personnel with the Department of Public Safety, which assisted in administering the HMGP, nor did they attach any other evidence from persons involved with the City’s decision not to close on the purchase of the Buy–Out Owners’ properties.

Schimmel filed a reply and asserted that he had timely filed his motion to dismiss. He argued that although the Buy–Out Owners filed their amended petition with the trial court on March 28, 2013, the Buy–Out Owners did not serve him with a copy of the petition. He did not see a copy of the petition until April 1, when a legal assistant to his attorney in the case downloaded the petition from the ProDoc eFiling service. In the alternative, Schimmel moved the trial court to allow late filing of the motion to dismiss, as is permitted by the TCPA. Schimmel also argued that the Buy–Out Owners’ supporting affidavits were conclusory and not supported by evidence that a reasonable probability existed that their buy-out contracts with the City of Galveston would have closed but for Schimmel’s allegedly tortious actions. He further argued that the Buy–Out Owners did not provide “any evidence that any act of Schimmel’s caused the [Texas Department *854 of Public Safety] to order the City not to close the alleged contracts.”

After an oral hearing, the trial court issued an order denying Schimmel’s motion to dismiss. The order stated:

The parties announced on the record their stipulation that the Motion relates only to the Plaintiffs’ cause of action for damages resulting from an alleged tortious interference with a prospective relationship between Plaintiffs and the City of Galveston....

The Court finds that the Motion was timely filed.

The Court finds that the docket conditions in the court prevented the scheduling of the hearing on the Motion within 30 days following the date of its filing.

The Court finds that the Plaintiffs’ tortious interference claim does not affect Schimmel’s right to participate in government.

The Court finds that Schimmel's actions alleged as the basis of the tortious interference claim concerned matters disputed between individual parties, and the statements alleged as a basis of the claim were not made in connection with a matter of public concern.

The Court finds that Schimmel's actions alleged as the basis of the tortious interference claim were not a part of Schimmel's exercise of the right of association defined in TEX. CIV. PRACT. & REM.CODE § 27.001(2).

The Court finds that Schimmel's actions alleged as the basis of the tortious interference claim do not concern Schimmel's right to petition defined in TEX. CIV. PRACT. & REM.CODE § 27.001(4).

The Court finds that the tortious interference claim was not brought to deter or prevent Schimmel's exercise of his constitutional rights, for an improper purpose, for harassment, to cause unnecessary delay, or to increase litigation costs.

The trial court did not award attorney's fees or costs to either party. This interlocutory appeal followed.

Texas Citizens Participation Act

In his first issue, Schimmel contends that the trial court erroneously determined that his communications that are the basis of the Buy-Out Owners' tortious interference claim did not involve “matters of public concern” and did not implicate his “exercise of the right to petition,” “exercise of the right of free speech,” or “exercise of the right of association.”

A. Standard of Review and Applicable Law

In enacting the TCPA, the Legislature stated that the purpose of the statute “is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” TEX. CIV. PRACT. & REM.CODE ANN. § 27.002 (Vernon Supp.2013); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 688 (Tex.App.-Houston [1st Dist.] 2013, pet. denied). The TCPA created “an avenue at the early stage of litigation for dismissing unmeritorious suits that are based on the defendant's exercise” of certain constitutional rights. *In re Lipsky*, 411 S.W.3d 530, 539 (Tex.App.-Fort Worth 2013, orig. proceeding). The Legislature has directed courts to construe the statute liberally “to effectuate its purpose and intent fully.” TEX. CIV. PRACT. & REM.CODE ANN. § 27.011(b) (Vernon Supp.2013); *Robinson*, 409 S.W.3d at 688.

Under the TCPA, if a party files a legal action that is “based on, relates to, or is in response to” the defendant's exercise of *855 the right of free speech, right to petition, or right of association, the defendant may file a motion to dismiss the action. TEX. CIV. PRACT. & REM.CODE ANN. § 27.003(a) (Vernon Supp.2013). The TCPA statutorily defines “exercise of the right of association,” “exercise of the right of free speech,” and “exercise of the right to petition.” *See id.* § 27.001(2)-(4) (Vernon Supp.2013). The TCPA defines “exercise of the right of association” as “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” *Id.* § 27.001(2). “Communication” is further defined as “the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” *Id.* § 27.001(1). The TCPA defines “exercise of the right of free speech” as “a communication made in connection with a matter of public concern.” *Id.* § 27.001(3). “Matter of public concern” includes issues relating to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace. *Id.* § 27.001(7). The statutory definition of “exercise of the right to petition” includes, among other things, “a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding.” *Id.* § 27.001(4)(B).

A party filing a motion to dismiss under the TCPA must file the motion “not later than the 60th day after the date of service of the legal action.” *Id.* § 27.003(b). The trial court may extend the time to file a motion to dismiss upon a showing of good cause. *Id.*

When deciding whether to grant a motion to dismiss a lawsuit pursuant to the TCPA, the trial court must “consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.” *Id.* § 27.006(a) (Vernon Supp.2013); *Robinson*, 409 S.W.3d at 688. The court must determine, after a hearing, whether the moving defendant has demonstrated by a preponderance of the evidence that the legal action is “based on, relates to, or is in response to the party’s exercise of the right of free speech, the right to petition, or the right of association.” TEX. CIV. PRAC. & REM.CODE ANN. § 27.005(b) (Vernon Supp.2013); *Robinson*, 409 S.W.3d at 688. We review de novo the trial court’s determination whether the defendant carried this burden. *Robinson*, 409 S.W.3d at 688.

[1] If the trial court determines that the defendant has met his burden, the burden then shifts to the plaintiff to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” TEX. CIV. PRAC. & REM.CODE ANN. § 27.005(c); *Robinson*, 409 S.W.3d at 688. The Legislature’s use of “prima facie case” in the second step of the inquiry implies a minimal factual burden: “[a] prima facie case represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true.” *Robinson*, 409 S.W.3d at 688; *Rodriguez v. Printone Color Corp.*, 982 S.W.2d 69, 72 (Tex.App.-Houston [1st Dist.] 1998, pet. denied). The statute requires that the plaintiff’s proof address and support each “essential element” of every claim and that the proof constitute “clear and specific evidence.” *Robinson*, 409 S.W.3d at 688. Because the statute does not define “clear and specific,” we apply the ordinary meaning of these terms. *Id.* at 689. “Clear” means “unambiguous,” “sure,” or “free from doubt,” and “specific” means “explicit” or “relating to a particular named thing.” *Id.* We review the pleadings and evidence in the light *856 most favorable to the plaintiffs. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80–81 (Tex.App.-Houston [1st Dist.] 2013, pet. denied). Accordingly, here, if we determine that Schimmel carried his initial burden of proof, we must examine the pleadings and the evidence presented in response to Schimmel’s motion to dismiss to determine whether the Buy–Out Owners marshaled “clear and specific” evidence to support each element of their tortious interference claim. See *Robinson*, 409 S.W.3d at 689.

B. Applicability of TCPA to the Buy–Out Owners’ Claim

1. Timeliness of Motion to Dismiss

The Buy–Out Owners argue that this Court should affirm the trial court’s ruling denying Schimmel’s motion to dismiss on the basis that he did not timely file the motion.

Section 27.003(b) provides that a party filing a motion to dismiss must file the motion “not later than the 60th day after the date of service of the legal action.” TEX. CIV. PRAC. & REM.CODE ANN. § 27.003(b). The statute further provides, however, that the trial court may extend the time to file a motion to dismiss “on a showing of good cause.” *Id.*; see also *Newspaper Holdings*, 416 S.W.3d at 79 (“The TCPA sets strict deadlines for filing, hearing, and ruling on a motion to dismiss. Absent a showing of good cause, the defendant must move to dismiss pursuant to the TCPA ‘not later than the 60th day after the date of service of the legal action.’”).

[2] Here, the Buy–Out Owners’ first amended petition, which was the first pleading in which the Buy–Out Owners raised the tortious interference claim against Schimmel, bears a file-stamped date of March 28, 2013. Schimmel filed his motion to dismiss on May 28, 2013, sixty-one days later. In his initial motion to dismiss, Schimmel stated, “On March 28, 2013, Plaintiffs served Schimmel with their Plaintiffs’ Amended Petition, in which, for the first time, Natural Plaintiffs added a separate cause of action against Schimmel alleging tortious interference with prospective relations.”

In response to the motion to dismiss, the Buy–Out Owners argued that the motion was untimely because Schimmel filed his motion on the sixty-first day after he had been served with the action and he could not demonstrate that good cause existed for his late filing. In reply, Schimmel asserted that his motion was not untimely because, although he received notice that the first amended petition had been filed on March 28, 2013, the Buy–Out Owners did not serve him with a copy of the petition on that

date. Instead, he did not receive a copy of the petition until April 1, 2013, when his counsel's legal assistant downloaded the amended petition from the ProDoc eFiling service. In the alternative, Schimmel sought leave of court to allow the late filing of his motion.

In the order ruling on the motion to dismiss, the trial court explicitly stated, “The Court finds that the Motion was timely filed.” We conclude that, although Schimmel filed his motion to dismiss one day late, in making a statement concerning the timeliness of the motion, the trial court implicitly ruled that if Schimmel technically filed the motion late he had good cause for the late filing. We therefore decline to dismiss this suit on the ground that Schimmel did not timely file his motion to dismiss.

2. Applicability of Services Exclusion

The Buy–Out Owners also argue that the TCPA does not apply to this case because this case falls under the statutory *857 exemption for commercial speech found in [section 27.010\(b\)](#).

[Section 27.010\(b\)](#) states:

[The TCPA] does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

[TEX. CIV. PRAC. & REM.CODE ANN. § 27.010\(b\)](#) (Vernon Supp.2013). The party asserting the exemption bears the burden of proving its applicability. *See Newspaper Holdings*, 416 S.W.3d at 89; *see also Pena v. Perel*, 417 S.W.3d 552, 555 (Tex.App.-El Paso 2013, no pet.) (“The burden of proving the applicability of an exemption under [Section 27.010](#) is on the party asserting it.”).

The Buy–Out Owners argue that their tortious interference claim falls within this exemption because (1) Schimmel was primarily engaged in the business of selling his legal services; (2) the Buy–Out Owners' cause of action arose from Schimmel's conduct consisting of representations of fact about Schimmel's services; (3) Schimmel's conduct occurred in the course of delivering his legal services; and (4) the intended audience of his conduct was a potential buyer, the City of Galveston. We disagree that Schimmel's conduct falls within this exemption.

The El Paso Court of Appeals addressed a similar situation in *Pena*. In that case, Pena, who had been indicted on two counts of intoxicated manslaughter and two counts of failure to stop and render aid, hired Dolph Quijano to represent him. *Pena*, 417 S.W.3d at 553. A jury ultimately convicted Pena, assessed punishment at confinement in the Texas Department of Criminal Justice, and imposed a total of \$30,000 in fines. *Id.* at 553–54. Pena and his wife then began running advertisements that were critical of Quijano. *Id.* at 554. Quijano hired Bobby Perel to represent him, and Perel sent letters to local newspapers and to the Texas Board of Pardons and Paroles to inform it of Pena's conduct. *Id.* One of Perel's letters to the Board of Pardons and Paroles informed it that he believed Pena had not taken responsibility for his underlying criminal actions and that Pena was responsible for “vicious ads” attacking Quijano, and he requested that the Board consider this information when making decisions about Pena's parole. *Id.* Pena filed suit against Quijano and Perel, asserting, among other things, that they had conspired to slander and defame him by sending the letter to the Board. *Id.* The trial court granted Perel's motion to dismiss pursuant to the TCPA. *Id.*

On appeal, Pena argued that the trial court erred in dismissing his claims because his claims fell within the “commercial speech” exemption to the TCPA. *Id.* at 555. The El Paso Court of Appeals noted that Pena's suit was based on the letter that Perel had sent to the Board. *Id.* The court reasoned, “The letter does not arise out of the sale or lease of goods, services, or an insurance product or a commercial transaction. Further, the Board of Pardons and Parole is not an actual or potential buyer or customer of any goods or services sold by Perel.” *Id.* The court held that Pena failed to establish the applicability of the exemption. *Id.*

[3] Here, Schimmel allegedly made statements that, according to the Buy-Out Owners, induced the City of Galveston to back out of its agreements to purchase the Buy-Out Owners' properties. When Schimmel made the statements at issue, he *858 was undisputedly working as an attorney for SOKB and the Remaining Owners. The ultimate intended audience for his statements, however, was the City of Galveston. Schimmel did not represent the City of Galveston, nor was the City a “potential buyer or customer” of Schimmel's legal services. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.010\(b\)](#). We therefore conclude, as the El Paso Court of Appeals did in *Pena*, that the Buy-Out Owners have failed to establish the applicability of the “commercial speech” exemption. See *id.*; see also *Pena*, 417 S.W.3d at 555; *Newspaper Holdings*, 416 S.W.3d at 89 (“With respect to the newspaper, it is undisputed that NHI was in the business of reporting community events, but the Hotel's complained—of statements do not arise out of the lease or sale of the goods or services that NHI sells—newspapers.”).

3. Whether the Buy-Out Owners' Claim Falls Under the TCPA

The Buy-Out Owners complain about numerous actions and statements allegedly made by Schimmel during the course of his representation of SOKB and the Remaining Owners. All of these statements, whether they were made to a journalist at the Houston Chronicle, attorneys with the City of Galveston, or members of the Board, concerned or were related to the City's plan to purchase the Buy-Out Owners' properties and were made to further Schimmel's clients' interest in ensuring that should the purchase of the properties go forward SOKB would receive compensation for the loss of future assessments on the purchased properties.

The TCPA defines “exercise of the right to petition” as including “a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body” [TEX. CIV. PRAC. & REM.CODE ANN. § 27.001\(4\)\(B\)](#). The statute defines “exercise of the right of free speech” as “a communication made in connection with a matter of public concern.” *Id.* § 27.001(3). And a “matter of public concern” is further defined as “an issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace.” *Id.* § 27.001(7). None of these statutory definitions includes a requirement that the communications be made to a particular individual or entity, such as a governmental body, to constitute protected conduct.

[4] SOKB and the Remaining Owners retained Schimmel to represent their interests during the dispute concerning the buy-out of the Buy-Out Owners' properties. All of Schimmel's challenged statements, regardless of to whom the statements were made, related to this dispute and were made “in connection with an issue under consideration or review” by the City of Galveston and the Texas Department of Public Safety, both of which are governmental bodies. See *id.* § 27.001(4)(B) (defining “exercise of the right to petition”). The Buy-Out Owners' action for tortious interference with prospective business relations is therefore “based on, relates to, or is in response to” Schimmel's exercise of the right to petition on behalf of his clients. See *id.* § 27.003(a) (providing that defendant may move to dismiss legal action that is based on, relates to, or is in response to exercise of right to petition).

Moreover, the Buy-Out Owners' claim implicates not just Schimmel's exercise of the right to petition on behalf of his clients but also Schimmel's exercise of his right to freedom of speech on behalf of his clients. See *id.* § 27.001(3) (defining “exercise of the right of free speech” as “a communication made in connection with a matter of *859 public concern”); *id.* § 27.001(7) (defining “matter of public concern”). Contrary to the trial court's determination, in its order denying Schimmel's motion to dismiss, that the dispute at issue “concerned matters disputed between individual parties” and thus “were not made in connection with a matter of public concern,” Schimmel's statements all related to and were made in connection with the purchase by the City of Galveston, a governmental entity, of five properties in a small subdivision, the purchase of which would allegedly damage the values of the neighboring properties and would damage the future revenue stream of SOKB, the homeowners' association, by denying it the ability to collect future assessments on the bought-out properties. In addition to relating to the government, the dispute at issue also relates to “economic or community well-being,” all of which are issues included in the statutory definition of “matter of public concern” under the TCPA. See *id.* § 27.001(7).

In arguing that their claim is not based on, does not relate to, and is not in response to Schimmel's exercise of constitutionally protected rights, the Buy-Out Owners focus on the fact that their claims “are based upon the independent torts of fraud, misrepresentations and illegal boycott,” which do not implicate constitutional protections. That argument, however, is relevant to the *second* step of the inquiry—whether the Buy-Out Owners have demonstrated a prima facie case for relief on every essential element of their tortious interference claim. See *In re Lipsky*, 411 S.W.3d at 543 (“But chapter 27 dictates that we should review evidence concerning whether [the defendants'] statements were defamatory and thus actionable in the second part of our review, in which [the plaintiff] has the burden of establishing ‘by clear and specific evidence a prima facie case for each essential element of the claim in question.’”).

[5] The Buy-Out Owners also argue that Schimmel's affidavits supporting his motion to dismiss are incompetent and inadmissible because they state that he is “personally acquainted with facts stated therein,” instead of stating that they are based on personal knowledge, and that some portions state that Schimmel is testifying based on information and belief. We first note that, in making a determination on a motion to dismiss, the trial court is not limited to considering only supporting and opposing affidavits, but the court “shall consider the pleadings” as well. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.006\(a\)](#). Thus, even if Schimmel's affidavits do not constitute competent and admissible evidence, his motion to dismiss does not necessarily fail. Secondly, we agree with Schimmel that there is no meaningful distinction between “personal knowledge” and “personal acquaintance,” and to hold otherwise is to impose an unduly restrictive reading on the personal knowledge requirement for affidavits. See *WEBSTER'S NEW COLLEGIATE DICTIONARY* 8 (1956) (defining “acquaintance” as “[p]ersonal knowledge (of a person or thing) which results from becoming acquainted”). We therefore conclude that Schimmel's affidavits are competent and admissible to support his motion to dismiss.

We hold that Schimmel met his initial burden to show, by a preponderance of the evidence, that the Buy-Out Owners' claim is based on, relates to, or is in response to his exercise of the right to petition and his exercise of the right of free speech. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(b\)\(1\)-\(2\)](#).

4. Buy-Out Owners' Prima Facie Case

[6] [7] Because we have held that Schimmel's statements forming the basis of the Buy-Out Owners' tortious interference claim constitute protected conduct under the TCPA, we must now determine whether the Buy-Out Owners met their burden to establish, by clear and specific evidence, a prima facie case for every essential element of their tortious interference claim. See *id.* § 27.005(c). To prevail on a claim for tortious interference with prospective business relations, the plaintiffs must establish that (1) a reasonable probability existed that the plaintiffs would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiffs injury; and (5) the plaintiffs suffered actual damage or loss as a result. See *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex.2013); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex.2001) (holding that plaintiff must establish that defendant's conduct was independently tortious or wrongful, meaning that defendant's conduct “would be actionable under a recognized tort”). “Conduct that is merely ‘sharp’ or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations” *Sturges*, 52 S.W.3d at 726.

One of the essential elements for which the Buy-Out Owners had to establish a prima facie case is causation, that is, whether Schimmel's interference proximately caused their injury, which, in this case, is the City of Galveston's failure to close on the purchase of their properties. See *Coinmach Corp.*, 417 S.W.3d at 923 (listing causation as element of tortious interference with prospective relations claim). As evidence to support their contention that they are entitled to relief on their tortious interference claim, the Buy-Out Owners presented to the trial court identical affidavits from each property owner as well as copies of several e-mails between Schimmel and members of the Board. They did not present any affidavits or other admissible evidence from any individual at the City of Galveston, the city attorney's office, the Texas Department of Public Safety, which allegedly

informed the City to put a hold on the transactions while officials conducted a new “substantial damage determination” of the Buy–Out Owners’ properties, or any other official or agency with decision-making authority concerning the City’s purchase of the properties. Instead, the only evidence of this element that the Buy–Out Owners produced is the statements in their identical affidavits that “[b]ut for Schimmel’s misrepresentations and conduct there is a reasonable probability that all of our buy-out contracts would have closed,” that “Schimmel’s independent misrepresentations and boycott, set out above, prevented our agreements from closing and the purchase of our properties by the [City],” and that “Schimmel’s action and conduct, set out above, caused me and the other Buy–Out Owners money losses ... that would not have occurred, but for [Schimmel’s] conduct.”

[8] We agree with Schimmel that the Buy–Out Owners presented only their conclusory statements, unsupported by any facts, that Schimmel’s actions caused the City of Galveston to fail to close on the purchases. Evidence of Schimmel’s conduct, by itself, is not evidence that, with respect to communications made to other individuals and entities, that conduct caused the City not to purchase the Buy–Out Owners’ properties. The fact that Schimmel’s alleged conduct occurred roughly contemporaneously with the City of Galveston’s and the Department of Public *861 Safety’s consideration of whether to move forward with the purchases does not establish that Schimmel’s conduct *caused* the governmental agencies to act as they did.

Furthermore, in October 2009, the City of Galveston required the Buy–Out Owners to obtain a release from future assessments, signed by SOKB, as a condition for the purchases to close, two months before SOKB and the Remaining Owners hired Schimmel to represent their interests. The Buy–Out Owners contend that Schimmel tortiously interfered with their prospective contracts with the City of Galveston because he urged the Board not to sign the required releases, and, as a result of the Board’s refusal to sign the releases, the City did not proceed with the purchases. Ultimately, however, one of the appellees, Kris Hall, signed the releases on behalf of SOKB once he became president of the Board, but the City of Galveston did not close on the purchases.

Additionally, in the federal suit between the Buy–Out Owners and the City of Galveston and several Department of Public Safety employees the district court ruled that governmental entities have “wide discretion” in administering the HMGP and that nothing in the regulations governing the HMGP “dictates that qualified property owners are entitled to participate in the program or limits the State’s discretion in determining a property owner’s qualifications for the program or reviewing those qualifications at any time in the process.” The court thus concluded that the Buy–Out Owners had no “entitlement to HMGP funds or a property right to such funds.” Thus, a court has already determined during the litigation arising out of this dispute that the City of Galveston and the Department of Public Safety acted within their discretionary authority when they declined to close on the purchase of the Buy–Out Owners’ properties.

[9] As the Texas Supreme Court has held, “merely inducing a contract obligor to do what it has a right to do is not actionable interference.” *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex.1997); *Newspaper Holdings*, 416 S.W.3d at 87. Even if Schimmel induced the City of Galveston and the Department of Public Safety not to close on the purchase of the Buy–Out Owners’ properties, as the Buy–Out Owners allege, the Buy–Out Owners would have no cause of action against him for inducing the City or the Department to do that which they had a right to do—not to purchase the Buy–Out Owners’ houses.

We also note that, in this regard, the Buy–Out Owners have made no argument, with citation to authority, that SOKB and the Board were legally required or obligated to sign the releases that the City of Galveston required to close on the purchases, and they have produced no evidence on such a point. The Buy–Out Owners have thus presented no evidence that Schimmel induced the Board to take an action that it was not legally authorized to take. This is, therefore, not a situation in which Schimmel, as a corporate agent, induced the corporation, SOKB, to breach a contractual obligation. *See, e.g., Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex.1995) (noting that “a party cannot tortiously interfere with its own contract” and holding that even when corporate agent induces corporation to breach contractual obligation, agent will not be held liable for tortious interference with corporation’s contract unless plaintiff can demonstrate that agent “acted in a fashion so contrary to the corporation’s best interests that his actions could only have been motivated by personal interests”).

*862 We conclude that the Buy–Out Owners’ supporting evidence does not establish, by clear and specific evidence, a prima facie case on the essential element of causation. *See* [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(c\)](#) (“The court may

not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for *each essential element* of the claim in question.”) (emphasis added); *Coinmach Corp.*, 417 S.W.3d at 923 (stating that interference as proximate cause of plaintiff’s injury is essential element of tortious interference with prospective relations claim).

We therefore hold that because Schimmel established by a preponderance of the evidence that the Buy–Out Owners’ tortious interference claim is based on, relates to, or is in response to his exercise of his right to petition on behalf of his clients and his right of free speech and because the Buy–Out Owners failed to establish a prima facie case on every essential element of their tortious interference claim, the trial court erroneously denied Schimmel’s motion to dismiss under the TCPA. See [TEX. CIV. PRAC. & REM.CODE ANN. § 27.005\(b\), \(c\)](#).

We sustain Schimmel’s first issue.

Award of Costs and Attorney’s Fees

In his second issue, Schimmel contends that because the trial court erroneously denied his motion to dismiss it also erroneously failed to award him mandatory costs, reasonable attorney’s fees, and expenses incurred in defending against the claim, as required by the TCPA.

[10] [Section 27.009\(a\)\(1\)](#) provides that if the court orders dismissal of a legal action pursuant to the TCPA, the court “shall award to the moving party court costs, reasonable attorney’s fees, and other expenses incurred in defending against the legal action as justice and equity may require.” [TEX. CIV. PRAC. & REM.CODE ANN. § 27.009\(a\)\(1\)](#) (Vernon Supp.2013). When an appellate court determines that the trial court erroneously denied a defendant’s motion to dismiss under the TCPA, the appropriate disposition of the case is to reverse the trial court’s denial of the motion and remand for the trial court to conduct further proceedings pursuant to [section 27.009\(a\)](#) and to order dismissal of the suit. See *Newspaper Holdings*, 416 S.W.3d at 90.

The Buy–Out Owners contend that, even if the trial court erroneously denied Schimmel’s motion to dismiss, remand is not appropriate in this case because Schimmel’s affidavit on attorney’s fees was “incompetent evidence of reasonableness and necessity” under the Texas Supreme Court’s decision in *El Apple I, Ltd. v. Olivas*.

Olivas involved a claim for sex discrimination and retaliation pursuant to the Texas Commission on Human Rights Act, under which courts calculate attorney’s fees using the lodestar method, or the number of hours worked multiplied by prevailing hourly rates. See 370 S.W.3d 757, 758–59 (Tex.2012). The court explained that the lodestar method of calculating attorney’s fees involves two steps: (1) the court first determines the reasonable number of hours spent by counsel in the case and a reasonable hourly rate for such work; and (2) the court then multiplies the number of such hours by the applicable rate, which yields the lodestar, which may then be adjusted up or down to reach a reasonable fee for the case. *Id.* at 760. The court held that a party seeking attorney’s fees when the lodestar method is used “bears the burden of documenting the hours expended on the litigation and the value of those hours.” *Id.* at 761.

*863 [11] Unlike the attorneys in *Olivas*, who presented only their aggregate number of hours spent on the case and their respective billing rates without further indicating how they spent their time, Schimmel’s attorney’s fees affidavits stated the date on which work was performed, the number of hours spent, the particular tasks involved, and the applicable billing rate. See *id.* at 763 (“[P]roof [of attorney’s fees] should include the basic facts underlying the lodestar, which are: (1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked.”); see also *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex.2013) (“In *El Apple*, we said that a lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work.”). We therefore do not agree with the homeowners that Schimmel’s attorney’s fees affidavits are insufficient under *Olivas*.

[12] Finally, even if Schimmel's attorney's fees evidence presented with his motion to dismiss were insufficient to establish the reasonableness and necessity of the fee amount, because Schimmel is statutorily entitled to an award of attorney's fees, the appropriate disposition of this case would be to remand the attorney's fees issue back to the trial court for further proceedings. See *Alphonso v. Deshotel*, 417 S.W.3d 194, 202 (Tex.App.-El Paso 2013, no pet.) (“[G]iven that Appellees are entitled to attorney's fees and costs under the [TCPA] because the trial court granted their motion to dismiss and we have upheld that ruling on appeal, the proper disposition in this case is to reverse the award of attorney's fees and costs [which was not supported by an affidavit admitted into evidence] and remand that issue back to the trial court for a new trial.”); see also *Uhl v. Uhl*, 524 S.W.2d 534, 538 (Tex.Civ.App.-Fort Worth 1975, no writ) (“When a [party] is clearly entitled to attorney's fees in some amount but where there had been no proof in the trial court of the amount there may be severance of that issue with remand to the trial court for a new trial on that issue.”).

We hold that because Schimmel has established his entitlement to dismissal under the TCPA, he is entitled to “court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require.” TEX. CIV. PRAC. & REM.CODE ANN. § 27.009(a)(1); see also *Newspaper Holdings*, 416 S.W.3d at 90 (“We therefore reverse the trial court's denial of the defendants' motions to dismiss, and we remand the case to the trial court for further proceedings as required by the statute and to order dismissal of the suit.”).

We sustain Schimmel's second issue.

Conclusion

We reverse the trial court's order denying Schimmel's motion to dismiss and remand the case to the trial court for further proceedings relating to Schimmel's attorney's fees, costs, and expenses and to order dismissal of the suit.

All Citations

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103 A.3d 547
Supreme Judicial Court of Maine.

TOWN OF MADAWASKA

v.

Richard CAYER et al.

Docket No. Aro-14-51. | Submitted on Briefs: Sept. 23, 2014. | Decided: Nov. 4, 2014.

Synopsis

Background: Property owners filed a special motion to dismiss town's amended complaint alleging zoning violations pursuant to the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. The Superior Court, Aroostook County, [Cuddy, J., 2013 WL 8289741](#), denied motion. Owners appealed.

[Holding:] The Supreme Judicial Court, [Alexander, J.](#), held that town's zoning enforcement action against property owners for a violation of shoreland zoning ordinance was not an appropriate occasion for application of the anti-SLAPP statute.

Affirmed.

West Headnotes (4)

[1] **Appeal and Error** 🔑 [On motions relating to pleadings](#)

Although ordinarily the trial court must issue a final judgment in order for an appeal to be cognizable, Supreme Judicial Court allows interlocutory appeals from denials of special motions to dismiss brought pursuant to the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. [14 M.R.S.A. § 556](#).

[Cases that cite this headnote](#)

[2] **Appeal and Error** 🔑 [Cases Triable in Appellate Court](#)

Review of a trial court's ruling on a special motion to dismiss pursuant to anti-SLAPP (Strategic Lawsuit Against Public Participation) statute is de novo. [14 M.R.S.A. § 556](#).

[Cases that cite this headnote](#)

[3] **Pleading** 🔑 [Application and proceedings thereon](#)

Under the second step of the anti-SLAPP (Strategic Lawsuit Against Public Participation) analysis, the court must dismiss the nonmoving party's lawsuit or claim unless the nonmoving party makes a prima facie showing that at least one of the moving party's petitioning activities was devoid of any reasonable factual support or any arguable basis in law and caused actual injury to the nonmoving party. [14 M.R.S.A. § 556](#).

[Cases that cite this headnote](#)

[4] **Pleading** 🔑 [Frivolous pleading](#)

Town's zoning enforcement action against property owners for a violation of shoreland zoning ordinance was not an appropriate occasion for application of the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute; nothing in the anti-SLAPP statute or its history expressed or implied that it would protect property owners from the town's efforts to enforce an ordinance limiting the number of trailers that they were permitted to maintain on their land. [14 M.R.S.A. § 556](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

*[547](#) [Luke M. Rossignol](#), Esq., Bemis & Rossignol, LLC, Presque Isle, for appellants Richard Cayer and Ann Cayer.

[Richard L. Currier](#), Esq., and Jon P. Plourde, Esq., Currier & Trask, P.A., Presque Isle, for appellee Town of Madawaska.

Panel: [SAUFLEY](#), C.J., and [ALEXANDER](#), [SILVER](#), [MEAD](#), [JABAR](#), and [HJELM](#), JJ.

Opinion

[ALEXANDER](#), J.

[¶ 1] Richard and Ann Cayer appeal from an order entered by the Superior Court (Aroostook County, *Cuddy, J.*) denying as untimely their special motion to dismiss filed pursuant to Maine's anti- *[548](#) SLAPP¹ statute, [14 M.R.S. § 556 \(2013\)](#). The pleading that the Cayers seek to dismiss is an amended land use citation and complaint, *see* [M.R. Civ. P. 80K\(b\)\(1\)\(A\)](#), filed against the Cayers by the Town of Madawaska for violations of a shoreland zoning ordinance. The Cayers maintain that the land use citation was a retaliatory effort by the Town to punish them for exercise of their right to petition local government, and that the special motion to dismiss was timely in relation to the Town's amended complaint. In the alternative, they argue that the court abused its discretion by refusing to allow them to file the motion to dismiss after the sixty-day statutory time period following filing of the Town's pleading. *See* [14 M.R.S. § 556](#).

¹ Strategic Lawsuit Against Public Participation.

[¶ 2] Since its enactment by P.L. 1995, ch. 413, § 1 (effective Sept. 29, 1995), Maine's anti-SLAPP statute has provided a mechanism for the disposal of baseless claims brought to punish or deter a petitioning party from exercising its constitutional right to petition the government. *See* [Nader v. Me. Democratic Party \(Nader II\)](#), [2013 ME 51](#), ¶ 12 n. 8, [66 A.3d 571](#). This is not such a case. Based upon the plain language of the statute and its limited scope of application, we conclude that the anti-SLAPP statute cannot, in ordinary circumstances such as those presented here, be invoked to thwart a local government enforcement action commenced to address the defendants' alleged violations of law. Because the trial court reached the correct result in denying the special motion to dismiss in the context of this land use enforcement action, we affirm, albeit for a different reason.

I. CASE HISTORY

[¶ 3] On June 3, 2010, the Code Enforcement Officer (CEO) for the Town of Madawaska inspected the Cayers' property and discovered that two travel trailers had been added to a lot where one mobile home was already located. As the Cayers had not submitted an application to the Town to allow the additional trailers, the CEO issued a notice of violation alerting them to their possible violation of section 15(A)(5) of the Madawaska Shoreland Zoning Ordinance.² After a June 29 hearing before the Town Board of Selectmen, during which the Board members heard testimony from the Cayers and the CEO, the Board found the Cayers in violation of the ordinance and directed them to remove the one remaining trailer by July 2010, pay a civil penalty,

and enter into the recommended resolution through a signed consent agreement. The Cayers did not appeal the Board's June 2010 decision to the Superior Court pursuant to [M.R. Civ. P. 80B](#).

² Section 15(A)(5) of the Madawaska Shoreland Zoning Ordinance provides, in relevant part:

15. Land Use Standards. All land use activities within the shoreland zone shall conform with the following provisions, if applicable.

A. Minimum Lot Standards

....

(5) If more than one residential dwelling unit, principal governmental, institutional, commercial or industrial structure or use, or combination thereof, is constructed or established on a single parcel, all dimensional requirements shall be met for each additional dwelling unit, principal structure, or use.

[¶ 4] As of August 2010, the Cayers had not paid the assessed civil penalty or signed a consent agreement. On August 10, the Town filed a land use citation and complaint in District Court pursuant to [30–A M.R.S. § 4452 \(2013\)](#) and [*549 M.R. Civ. P. 80K](#). The Cayers timely requested removal to the Superior Court for a jury trial pursuant to [M.R. Civ. P. 38](#).

[¶ 5] Two years then passed without significant progress on the case, until November 14, 2012, when the Town filed a motion to amend its complaint. The amended complaint alleged an additional violation of section 15(D)(1) of the ordinance, but alleged no additional facts.³ On January 24, 2013, the court granted the Town's motion pursuant to [M.R. Civ. P. 15\(a\)](#) to amend the pleading.

³ Section 15(D)(1) of the ordinance provides, in pertinent part:

....

D. Campgrounds. Campgrounds shall conform to the minimum requirements imposed under State licensing procedures and the following:

(1) Campgrounds shall contain a minimum of five thousand (5,000) square feet of land, not including roads and driveways, for each site. Land supporting wetland vegetation, and land below the normal high-water line of a water body shall not be included in calculating land area per site.....

[¶ 6] On March 25, 2013, the Cayers filed a special motion to dismiss the amended complaint pursuant to the anti-SLAPP statute, [14 M.R.S. § 556](#), alleging that the Town's complaint was a meritless lawsuit brought for the purpose of punishing or deterring the Cayers' First Amendment right to petition local government. In support of this allegation, the Cayers submitted an affidavit recounting a twenty-plus-year history of disputes with the Town, its Board of Selectmen, and its CEO.⁴

⁴ Specifically, Richard Cayer recounted a list of disputes involving neighboring landowners and the Town dating back to 1993, several of which Cayer litigated before the Superior Court and the Law Court. In 2005, Cayer filed a [Rule 80B](#) appeal of the Town's grant of a land use permit to neighboring property owners, and was successful on this appeal as well as a later challenge to a consent agreement between the Town and neighbors. Most recently, in 2009, Cayer filed an unsuccessful motion for contempt against the Town pursuant to [M.R. Civ. P. 66\(d\)](#) for an alleged failure to comply with court orders to conduct further hearings on the contested permit. This case came before the Law Court in December 2009, and we affirmed the Superior Court's judgment. *See Cayer v. Town of Madawaska*, [2009 ME 122](#), [984 A.2d 207](#). Cayer also cites a 2007 case in which neighboring landowners appealed the Town's issuance of two permits to the Cayers to build a boat landing and new deck, and which ultimately resulted in issuance of the permits.

[¶ 7] Although the Cayers filed the special motion to dismiss 131 days after the Town filed its motion to amend, they did not request leave from the court to file the motion beyond the anti-SLAPP statute's sixty-day time limitation. The court denied the special motion to dismiss by an order entered January 7, 2014, concluding that the Cayers' motion was filed outside the time limitation.⁵ The court further concluded that there was no basis in the record to allow filing of the motion outside the sixty-day time period. The Cayers timely appealed.

⁵ Citing *Bradbury v. City of Eastport*, [2013 ME 72](#), ¶ 11 n. 3, [72 A.3d 512](#), the court determined that the statutory limitation period runs from the date of service of the challenged pleading. Because the Town's amended complaint included no additional facts, the

court further concluded that the amended complaint “related back” to the original pleading with a date of service of August 13, 2010, pursuant to [M.R. Civ. P. 15\(c\)\(2\)](#). By this reasoning, the Cayers’ special motion to dismiss was filed over a year and a half outside of the time limitation.

II. LEGAL ANALYSIS

[1] [2] [¶ 8] The anti-SLAPP statute, [14 M.R.S. § 556](#), allows a defendant to file a special motion to dismiss a lawsuit or claim that is brought “with the intention of *550 chilling or deterring the free exercise of the defendant’s First Amendment right to petition the government.” [Schelling v. Lindell](#), 2008 ME 59, ¶ 6, 942 A.2d 1226. Although ordinarily the trial court must issue a final judgment in order for an appeal to be cognizable, we allow interlocutory appeals from denials of special motions to dismiss brought pursuant to the anti-SLAPP statute. [Nader II](#), 2013 ME 51, ¶ 12, 66 A.3d 571. Review of a trial court’s ruling on a special motion to dismiss is de novo. *Id.*

[3] [¶ 9] We have adopted a two-step analysis that courts must follow to determine whether a special motion to dismiss should be granted. [Nader v. Me. Democratic Party \(Nader I\)](#), 2012 ME 57, ¶ 15, 41 A.3d 551. The first step requires the court to determine whether the moving party has demonstrated that the nonmoving party’s claim is “based on the moving party’s exercise of the ... right of petition under the Constitution of the United States or the Constitution of Maine.” [14 M.R.S. § 556](#); [Nader II](#), 2013 ME 51, ¶ 13, 66 A.3d 571; [Nader I](#), 2012 ME 57, ¶ 15, 41 A.3d 551. If the moving party makes this initial showing, the burden then shifts to the nonmoving party, and under the second step the court must dismiss the nonmoving party’s lawsuit or claim unless the non moving party makes a prima facie showing that at least one of the moving party’s petitioning activities was “devoid of any reasonable factual support or any arguable basis in law and ... caused actual injury to the [nonmoving party].” [Nader II](#), 2013 ME 51, ¶ 14, 66 A.3d 571. We address only the first step.

[¶ 10] The statute broadly defines “a party’s exercise of its right of petition” to include

any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

[14 M.R.S. § 556](#); *see also* [Schelling](#), 2008 ME 59, ¶ 11, 942 A.2d 1226.

[4] [¶ 11] The Cayers contend that this language authorizes individuals to invoke the anti-SLAPP laws to obtain dismissal of State or local actions seeking to enforce laws with which the individuals disagree or do not wish to comply—particularly when, as here, the individuals have had prior disagreements with the State or local government seeking to enforce the law. Nothing in the anti-SLAPP statute or its history expresses or even implies that it would protect the Cayers from the Town’s efforts to enforce an ordinance limiting the number of trailers that they are permitted to maintain on their land.

[¶ 12] Although the statute is silent with regard to how a moving party must show that the opponent’s claim is “based on” this right of petition, we have implicitly accepted the approach that the moving party must show that the claims at issue are “based on the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.” [Nader I](#), 2012 ME 57, ¶ 22, n. 9, 41 A.3d 551 (citing [Duracraft Corp. v. Holmes Products Corp.](#), 427 Mass. 156, 691 N.E.2d 935, 943 (1998)). This limitation on the applicability of the anti-SLAPP law has *551 been discussed mainly in the context of the statute’s constitutional implications, which require balancing of the moving party’s right to petition with the nonmoving party’s right of access to the courts. *See* [Nader I](#), 2012 ME 57, ¶ 22, n. 9, 41 A.3d 551. The reasoning, however, is also applicable to the present issue: whether a government enforcement action can be defended or barred by the filing of an anti-SLAPP motion to dismiss the action.

[¶ 13] Recent precedent suggests that an anti-SLAPP motion is appropriate when the plaintiff's lawsuit or claim is a retaliatory effort based solely on the moving party's petitioning conduct.⁶ See *Bradbury v. City of Eastport*, 2013 ME 72, ¶ 16, 72 A.3d 512 (noting that counterclaims for tortious interference with a contract and slander explicitly stated that they were based on the filing of the plaintiff's complaint); *Morse Bros., Inc. v. Webster*, 2001 ME 70, ¶¶ 7, 19, 772 A.2d 842 (stating that parties did not contest that the claims were based on moving parties' exercise of their constitutional rights to challenge permits and licensing). The case before us arises from efforts of defendants in a local enforcement action to thwart such enforcement through the use of the anti-SLAPP special motion to dismiss. Although zoning disputes make up many of the classic anti-SLAPP cases, the context for such cases has generally occurred when citizens who publically oppose development projects are sued by companies or other citizens, rather than by a government entity alleging violation of a land use ordinance. See, e.g., *Morse Bros.*, 2001 ME 70, ¶ 19, 772 A.2d 842.

⁶ Accordingly, SLAPP lawsuits have most often taken the form of ordinary tort claims, including defamation, business torts, conspiracy, constitutional-civil rights violations, and nuisance claims. See generally George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Evtl. L. Rev. 3, 9 (1989) (testimony of Rep. Richardson, submitted to Joint Comm. on the Judiciary, L.D. 781 at 7 (117th Legis. 1995)).

[¶ 14] Unlike statutes in some other states, Maine's anti-SLAPP statute does not expressly exempt government enforcement actions from its application.⁷ Further, there is limited legislative history to shed light on the question of its scope.⁸ However, the plain meaning of the statutory language requiring that the original *552 claim at issue be "based on" the defendant's First Amendment right to petition the government makes it evident that the anti-SLAPP statute does not apply in the circumstances of this case. See *Driscoll v. Mains*, 2005 ME 52, ¶ 6, 870 A.2d 124 ("When construing a statute, we look to its plain meaning and try to give effect to the legislative intent."); see also *Marabello v. Boston Bark Corp.*, 463 Mass. 394, 974 N.E.2d 636, 641–42 (2012) (concluding that the dismissal of the claim was unwarranted under the Massachusetts anti-SLAPP statute because the plaintiff landlord's claims were based on zoning violations and the tenant's failure to remove mulch from the landlord's property).

⁷ The California and Texas anti-SLAPP statutes expressly exempt government enforcement actions brought in the name of the state. See Cal. Civ.Code § 425.16(d) (West 2011); *Tex. Civ. Prac. & Rem.Code Ann. § 27.010(a)* (West 2013). Exactly which civil actions by cities and towns are exempt appears to be a developing question of law, but some California state appellate courts have extended this exemption to include at least "all civil actions brought by state and local agencies to enforce laws aimed at consumer and/or public protection." *City of Long Beach v. California Citizens for Neighborhood Empowerment*, 111 Cal.App.4th 302, 3 Cal.Rptr.3d 473, 478 (2003). But see *City of Los Angeles v. Animal Def. League*, 135 Cal.App.4th 606, 37 Cal.Rptr.3d 632, 642 (2006) (refusing to extend exemption for City's workplace violence petition, stating that "only actions brought by a governmental agency to enforce laws aimed generally at public protection qualify for this exemption to anti-SLAPP scrutiny").

⁸ The enacting bill's brief statement of fact does indicate, however, that the Legislature intended for a special motion to dismiss to apply to those claims or counterclaims filed for retributory or otherwise frivolous reasons:

This bill allows a person exercising the first amendment right to bring an action and if a counterclaim is filed against that person for apparently dilatory expense incurring reasons or other frivolous reasons for seeking redress and accord, then that person has a right to a motion to dismiss and have that motion advanced so that the motion can be heard as soon as possible and if the motion to dismiss is granted, to have the case dismissed as soon as possible.

L.D. 781, Statement of Fact, at 2 (117th Legis. 1995).

[¶ 15] Other remedies exist for a citizen whose rights to petition the government are allegedly suppressed due to government ordinances or enforcement actions, including a federal section 1983 action or a state constitutional challenge. See *Me. Const. art. I, § 4*; 42 U.S.C. § 1983 (2012); *Cutting v. City of Portland*, No. 2:13–CV–359–025, 2014 WL 580155, *9 (D.Me. Feb. 12, 2014) (striking down a Portland City ordinance barring panhandling in median strips of local highways as a content-based restriction on free speech).

[¶ 16] Accordingly, because, except possibly in extraordinary circumstances not presented here, the Town's enforcement action against the Cayers for a land use violation is not an appropriate occasion for application of the anti-SLAPP statute, the Cayers' special motion to dismiss should have been denied.

[¶ 17] We need not reach the Cayers' arguments that the special motion to dismiss was timely, or, alternatively, that the court abused its discretion in refusing to allow filing of the motion outside of the sixty-day period. [14 M.R.S. § 556](#); *see also Bradbury*, [2013 ME 72](#), ¶¶ 11–12, [72 A.3d 512](#). Because we conclude that this was not an appropriate circumstance for application of the anti-SLAPP statute, we affirm the judgment for reasons different from those stated by the trial court. *See Fitch v. Doe*, [2005 ME 39](#), ¶ 21, [869 A.2d 722](#).

The entry is:

Judgment affirmed.

All Citations

103 A.3d 547, 2014 ME 121

2009 WL 793764

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Houston (1st Dist.).

Victor WOODARD, Appellant

v.

The OFFICE OF the ATTORNEY GENERAL of Texas and Trristaan Chole Henry, Appellees.

No. 01-07-00954-CV. | March 26, 2009.

On Appeal from the 308th District Court, Harris County, Texas, Trial Court Cause No.2006-08565.

Panel consists of Chief Justice RADACK and Justices ALCALA and HANKS.

MEMORANDUM OPINION

ELSA ALCALA, Justice.

*1 Appellant, Victor Woodard, appeals from the trial court's judgment in favor of appellees, Trristaan Henry and the Texas Attorney General. In three issues, Woodard challenges the trial court's jurisdiction, refusal to grant a de novo hearing, and the factual sufficiency of the evidence to support several rulings concerning child support and possession of his child. We conclude that the trial court had jurisdiction over this case, and that the trial court erred by denying Woodard's request for a de novo hearing. We reverse and remand, without addressing the sufficiency of the evidence.

Background

In 2006, the Texas Attorney General petitioned to establish the parent-child relationship between Woodard and K.J.W., a young boy. According to the clerk's docket sheet, on May 1, 2007, "NCP [Woodard] appeared, CP [Henry] made Default. Hearing held, Default J granted & Orders Submitted." However, the parties disputed whether a default judgment occurred. The clerk's record does not contain a signed default judgment.

At a hearing before the associate judge on August 14, 2007, the associate judge established Woodard's paternity, established the parent-child relationship, appointed Henry managing conservator, appointed Woodard possessory conservator, set visitation, ordered current child support, and ordered cash medical support. The associate judge signed the order with these determinations on August 17, 2007.

On August 15, 2007, the day after the hearing, Woodard filed a notice of appeal from the associate judge's ruling requesting that the district court review the associate judge's rulings. Woodard's notice of appeal provided, in part,

In the Associate Judge's proposed Order Establishing the Parent-Child Relationship, Respondent was ordered to pay current child support in the amount of \$342.00, in excess of guidelines. Further, the current child support order disregards child support he currently pays for two other children who are not before the Court.

The Court ordered Respondent to pay [Tristaan] Henry cash medical support of \$224.00 without evidence of insurance costs from Ms. Henry and without allowing Respondent to directly provide health insurance for the child. The Court improperly ordered medical support arrears of \$165.79.

The Court did not appointed [sic] Respondent as Possessory Conservator instead of Joint Managing Conservator of the Child. The Court did not order a geographic restriction to the primary residence of the child.

The Court ordered limited possession and access to the child by Respondent which is not pursuant to the Standard Possession Order of the Family Code and not in the best interest of the child.

The Court ordered the child support provisions and the cash medical support provisions an obligation of the estate of Victor Woodard which contradicts the code.

Victor Woodard objects to each finding and/or conclusions of the Associate Judge indicated above.

(Emphasis added). Woodard requested the court set the matter on the docket for a hearing.

*2 Henry responded with a “motion to deny appeal” acknowledging that Woodard “filed what appears to be a timely notice of appeal to the referring court.” However, Henry asserted Woodard's notice of appeal failed to comply with the Family Code because it failed to specify the findings and conclusions of the associate judge to which the party objects. On September 25, 2007, the district court signed an order denying the appeal to the district court. Woodard then appealed to the court of appeals.

Jurisdiction

In his second issue, Woodard contends that the trial court lost jurisdiction of the case 30 days after May 1, 2007, the date on which the docket sheet indicates that a default judgment was granted, making the subsequent orders void.

A trial court “has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.” TEX.R. CIV. P. 329b(d); see *L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 443 (Tex.1996) (per curiam) (“A party must file a motion for new trial no later than the thirtieth day after the judgment was signed.”); *Coinmach, Inc. v. Aspenwood Apt. Corp.*, 98 S.W.3d 377, 380 (Tex.App.-Houston [1st Dist.] 2003, no pet.).

Here, although the docket entry mentions a default judgment, the record does not contain a *signed* default judgment. See *Childs*, 929 S.W.2d at 443. Because there was never a signed default judgment, the court had continuing jurisdiction. See *id.* Thus, the subsequent orders are not void. See *id.* Accordingly, we overrule Woodard's second issue.

De Novo Hearing

In his first issue, Woodard asserts, and the Office of the Attorney General agrees, that the trial court erred when it refused Woodard's request for a de novo hearing. “The Family Code authorizes trial courts to refer certain family law matters to associate judges.” *Attorney Gen. of Tex. v. Orr*, 989 S.W.2d 464, 467 (Tex.App.-Austin 1999, no pet.) (citing TEX. FAM.CODE ANN. §§ 201.001-.017 (Vernon 2008)). After a matter is referred, the associate judge is authorized to conduct a hearing at which evidence is presented, to make findings of fact based on the evidence, to formulate conclusions of law, and to recommend an order to be rendered in a case. *Id.* Any party may appeal the associate judge's report to the referring court by timely filing a notice of appeal containing the findings and conclusions to which the party objects. *Id.*; *In re E.M.*, 54 S.W.3d 849, 852 (Tex.App.-Corpus Christi 2001, no pet.). A party who files a notice of appeal to the referring court in compliance with the Family Code is entitled to a de novo hearing before the referring court. *Orr*, 989 S.W.2d at 467. “Judicial review by trial *de novo* is not a traditional

appeal, but a new and independent action characterized by all the attributes of an original civil action.”*Id.* (citing *Key W. Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 846 (Tex.1961)).

*3 Section 201.015 of the Texas Family Code covers de novo hearings before a referring court. TEX. FAM.CODE ANN. § 201.015 (Vernon 2008). For suits affecting the parent-child relationship filed before September 1, 2007, the statute provided,

(a) A party may appeal an associate judge's report by filing notice of appeal not later than the third day after the date the party receives notice of the substance of the associate judge's report as provided by Section 201.011.

(b) An appeal to the referring court must be in writing specifying the findings and conclusions of the associate judge to which the party objects. The appeal is limited to the specified findings and conclusions.

Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 201.015(a), (b), 1995 Tex. Gen. Laws 241 (amended 2007) (current version at TEX. FAM.CODE ANN. § 201.015(a),(b) (Vernon 2008)).

Here, the version of section 201.015 for suits affecting the parent-child relationship filed before September 1, 2007 applies, because this suit affecting the parent-child relationship was filed February 8, 2006. *See* Act of May 23, 2007, 80th Leg., R.S., ch. 1235, § 14, 2007 Tex. Gen. Laws 4154. Woodard filed his notice of appeal within the time constraints of section 201.015(a). Henry contends that Woodard's notice of appeal to the trial court was late “because appellant listed his objections to the orders of the Associate Judge as opposed to the findings and conclusions.” Although Woodard uses the word “objects” in his notice of appeal when addressing the associate judge's findings and conclusions, he identifies the findings and conclusions clearly enough to entitle him to a hearing de novo on those issues. *Chacon v. Chacon*, 222 S.W.3d 909, 913 (Tex.App.-El Paso 2007, no pet.)¹ (Section 201.015(b) “is intended to limit the appealing party's ability to raise issues he has not specifically appealed in the *de novo* hearing,” and “[i]s not a limit on the referring court's jurisdiction.”). Because Woodard filed a notice of appeal in compliance with the Texas Family Code, he is entitled to a de novo hearing. *Orr*, 989 S.W.2d at 467. Therefore, we sustain Woodard's first issue and consequently do not reach Woodard's third issue concerning sufficiency of evidence.

¹ As in the instant matter, the pre-September 1, 2007 version of section 201.015(b) was at issue in *Chacon. Chacon v. Chacon*, 222 S.W.3d 909, 912 (Tex.App.-El Paso 2007, no pet.).

Conclusion

We sustain Woodard's first issue, reverse the denial of his appeal, and remand the case to the referring trial court to hold a hearing de novo.

All Citations

Not Reported in S.W.3d, 2009 WL 793764

Arizona Revised Statutes Annotated
Title 12. Courts and Civil Proceedings
Chapter 6. Special Actions and Proceedings by Individual Persons
Article 15. Public Participation in Government (Refs & Annos)

A.R.S. § 12-752

§ 12-752. Strategic lawsuits against public participation; motion to dismiss

Effective: April 28, 2006

[Currentness](#)

A. In any legal action that involves a party's exercise of the right of petition, the defending party may file a motion to dismiss the action under this section. When possible, the court shall give calendar preference to an action that is brought under this subsection and shall conduct an expedited hearing after the motion is filed with the court and notice of the motion has been served as provided by court rule.

B. The court shall grant the motion unless the party against whom the motion is made shows that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual compensable injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating facts on which the liability or defense is based. At the request of the moving party, the court shall make findings whether the lawsuit was brought to deter or prevent the moving party from exercising constitutional rights and is thereby brought for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the court finds that the lawsuit was brought to deter or prevent the exercise of constitutional rights or otherwise brought for an improper purpose, the moving party is encouraged to pursue additional sanctions as provided by court rule.

C. The motion to dismiss may be filed within ninety days after the service of the complaint or, in the court's discretion, at any later time on terms that the court deems proper.

D. If the court grants the motion to dismiss, the court shall award the moving party costs and reasonable attorney fees, including those incurred for the motion. If the court finds that a motion to dismiss is frivolous or solely intended to delay, the court shall award costs and reasonable attorney fees to the prevailing party on the motion. For the purposes of this subsection, "costs" means all costs that are reasonably incurred in connection with a motion to dismiss pursuant to this section and includes filing fees, record preparation and document copying fees, documented time away from employment to confer with counsel or attend case related proceedings, expert witness fees, travel expenses and any other costs that the court deems appropriate.

E. This article does not:

1. Affect, limit or preclude the right of the moving party to any remedy otherwise authorized by law.
2. Apply to an enforcement action that is brought in the name of this state or a political subdivision of this state.

3. Create any privileges or immunities or otherwise affect, limit or preclude any privileges or immunities authorized by law.

4. Limit or preclude a legislative or executive body or a public agency from enforcing the rules of procedure and rules of order of the body or agency.

Credits

Added by [Laws 2006, Ch. 234, § 1, eff. April 28, 2006](#).

A. R. S. § 12-752, AZ ST § 12-752

Current through the First Regular Session of the Fifty-Second Legislature

End of Document

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West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 6. Of the Pleadings in Civil Actions
Chapter 2. Pleadings Demanding Relief (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

West's Ann.Cal.C.C.P. § 425.16

§ 425.16. Anti-SLAPP motion

Effective: January 1, 2015

[Currentness](#)

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to [Section 128.5](#).

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to [Section 6259](#), [11130](#), [11130.3](#), [54960](#), or [54960.1](#) of the [Government Code](#). Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to [subdivision \(d\) of Section 6259](#), or [Section 11130.5](#) or [54960.5](#), of the [Government Code](#).

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, “act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, “complaint” includes “cross-complaint” and “petition,” “plaintiff” includes “cross-complainant” and “petitioner,” and “defendant” includes “cross-defendant” and “respondent.”

(i) An order granting or denying a special motion to strike shall be appealable under [Section 904.1](#).

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Credits

(Added by [Stats.1992, c. 726 \(S.B.1264\), § 2](#). Amended by [Stats.1993, c. 1239 \(S.B.9\), § 1](#); [Stats.1997, c. 271 \(S.B.1296\), § 1](#); [Stats.1999, c. 960 \(A.B.1675\), § 1, eff. Oct. 10, 1999](#); [Stats.2005, c. 535 \(A.B.1158\), § 1, eff. Oct. 5, 2005](#); [Stats.2009, c. 65 \(S.B.786\), § 1](#); [Stats.2010, c. 328 \(S.B.1330\), § 34](#); [Stats.2014, c. 71 \(S.B.1304\), § 17, eff. Jan. 1, 2015](#).)

West's Ann. Cal. C.C.P. § 425.16, CA CIV PRO § 425.16

Current with urgency legislation through Ch. 291 of 2015 Reg.Sess.

West's Louisiana Statutes Annotated
Louisiana Code of Civil Procedure (Refs & Annos)
Book II. Ordinary Proceedings
Title I. Pleading (Refs & Annos)
Chapter 4. Written Motions (Refs & Annos)

LSA-C.C.P. Art. 971

Art. 971. Special motion to strike

Effective: August 1, 2012

[Currentness](#)

A. (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.

(2) In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability of success on the claim, that determination shall be admissible in evidence at any later stage of the proceeding.

B. In any action subject to Paragraph A of this Article, a prevailing party on a special motion to strike shall be awarded reasonable attorney fees and costs.

C. (1) The special motion may be filed within ninety days of service of the petition, or in the court's discretion, at any later time upon terms the court deems proper.

(2) If the plaintiff voluntarily dismisses the action prior to the running of the delays for filing an answer, the defendant shall retain the right to file a special motion to strike within the delays provided by Subparagraph (1) of this Paragraph, and the motion shall be heard pursuant to the provisions of this Article.

(3) The motion shall be noticed for hearing not more than thirty days after service unless the docket conditions of the court require a later hearing.

D. All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this Article. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. Notwithstanding the provisions of this Paragraph, the court, on noticed motion and for good cause shown, may order that specified discovery be conducted.

E. This Article shall not apply to any enforcement action brought on behalf of the state of Louisiana by the attorney general, district attorney, or city attorney acting as a public prosecutor.

F. As used in this Article, the following terms shall have the meanings ascribed to them below, unless the context clearly indicates otherwise:

(1) “Act in furtherance of a person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue” includes but is not limited to:

(a) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.

(b) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official body authorized by law.

(c) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(2) “Petition” includes either a petition or a reconventional demand.

(3) “Plaintiff” includes either a plaintiff or petitioner in a principal action or a plaintiff or petitioner in reconvention.

(4) “Defendant” includes either a defendant or respondent in a principal action or a defendant or respondent in reconvention.

Credits

Added by [Acts 1999, No. 734, § 1](#). Amended by [Acts 2004, No. 232, § 1](#); [Acts 2012, No. 449, § 1](#).

LSA-C.C.P. Art. 971, LA C.C.P. Art. 971

Titles 1, 2, 4, 5, 7, 8, 10, 16, 19, 20, 21, 24, 41, 50, 52, 53, 54 and 55 of the Revised Statutes and the Civil Code and Code of Criminal Procedure are current through the 2015 Regular Session with Acts effective on or before December 31, 2015. All other statutes and codes are current through the 2014 Regular Session.

Oklahoma Statutes Annotated
Title 12. Civil Procedure (Refs & Annos)
Chapter 24A. Oklahoma Citizens Participation Act

12 Okl.St. Ann. § 1439

§ 1439. Actions excluded

Currentness

The Oklahoma Citizens Participation Act shall not apply to:

1. An enforcement action that is brought in the name of this state or a political subdivision of this state by the Attorney General or a district attorney;
2. A legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct the action is based upon arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer;
3. A legal action seeking recovery for bodily injury, wrongful death or survival or to statements made regarding that legal action; or
4. A legal action brought under the Oklahoma Insurance Code or arising out of an insurance contract.

Credits

Laws 2014, c. 107, § 10, eff. Nov. 1, 2014.

12 Okl. St. Ann. § 1439, OK ST T. 12 § 1439

Current with laws from the First Regular Session of the 55th Legislature, effective through September 1, 2015

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West's Oregon Revised Statutes Annotated
Title 3. Remedies and Special Actions and Proceedings
Chapter 31. Tort Actions (Refs & Annos)
Special Motion to Strike

O.R.S. § 31.155
Formerly cited as OR ST § 30.146

31.155. Exempt actions; effect upon substantive law

Currentness

- (1) [ORS 31.150](#) and [31.152](#) do not apply to an action brought by the Attorney General, a district attorney, a county counsel or a city attorney acting in an official capacity.
- (2) [ORS 31.150](#) and [31.152](#) create a procedure for seeking dismissal of claims described in [ORS 31.150 \(2\)](#) and do not affect the substantive law governing those claims.

Credits

Formerly 30.146.

O. R. S. § 31.155, OR ST § 31.155

Current with emergency legislation through Ch. 848 of the 2015 Reg. Sess. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article III. Legislative Department

Vernon's Ann.Texas Const. Art. 3, § 24a

§ 24a. Texas Ethics Commission

[Currentness](#)

Sec. 24a. (a) The Texas Ethics Commission is a state agency consisting of the following eight members:

(1) two members of different political parties appointed by the governor from a list of at least 10 names submitted by the members of the house of representatives from each political party required by law to hold a primary;

(2) two members of different political parties appointed by the governor from a list of at least 10 names submitted by the members of the senate from each political party required by law to hold a primary;

(3) two members of different political parties appointed by the speaker of the house of representatives from a list of at least 10 names submitted by the members of the house from each political party required by law to hold a primary; and

(4) two members of different political parties appointed by the lieutenant governor from a list of at least 10 names submitted by the members of the senate from each political party required by law to hold a primary.

(b) The governor may reject all names on any list submitted under Subsection (a)(1) or (2) of this section and require a new list to be submitted. The members of the commission shall elect annually the chairman of the commission.

(c) With the exception of the initial appointees, commission members serve for four-year terms. Each appointing official will make one initial appointment for a two-year term and one initial appointment for a four-year term. A vacancy on the commission shall be filled for the unexpired portion of the term in the same manner as the original appointment. A member who has served for one term and any part of a second term is not eligible for reappointment.

(d) The commission has the powers and duties provided by law.

(e) The commission may recommend the salary of the members of the legislature and may recommend that the salary of the speaker of the house of representatives and the lieutenant governor be set at an amount higher than that of other members. The commission shall set the per diem of members of the legislature and the lieutenant governor, and the per diem shall reflect reasonable estimates of costs and may be raised or lowered biennially as necessary to pay those costs, but the per diem may not exceed during a calendar year the amount allowed as of January 1 of that year for federal income tax purposes as a deduction

for living expenses incurred in a legislative day by a state legislator in connection with the legislator's business as a legislator, disregarding any exception in federal law for legislators residing near the Capitol.

(f) At each general election for state and county officers following a proposed change in salary, the voters shall approve or disapprove the salary recommended by the commission if the commission recommends a change in salary. If the voters disapprove the salary, the salary continues at the amount paid immediately before disapproval until another amount is recommended by the commission and approved by the voters. If the voters approve the salary, the approved salary takes effect January 1 of the next odd-numbered year.

Credits

Adopted Nov. 5, 1991.

[Notes of Decisions \(1\)](#)

Vernon's Ann. Texas Const. Art. 3, § 24a, TX CONST Art. 3, § 24a
Current through the end of the 2015 Regular Session of the 84th Legislature

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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.001

§ 27.001. Definitions

Effective: June 17, 2011

[Currentness](#)

In this chapter:

- (1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.
- (2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.
- (3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.
- (4) "Exercise of the right to petition" means any of the following:
 - (A) a communication in or pertaining to:
 - (i) a judicial proceeding;
 - (ii) an official proceeding, other than a judicial proceeding, to administer the law;
 - (iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;
 - (iv) a legislative proceeding, including a proceeding of a legislative committee;
 - (v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;
 - (vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) “Official proceeding” means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) “Public servant” means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Credits

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\), § 2, eff. June 17, 2011](#).

V. T. C. A., Civil Practice & Remedies Code § 27.001, TX CIV PRAC & REM § 27.001
Current through the end of the 2015 Regular Session of the 84th Legislature

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.002

§ 27.002. Purpose

Effective: June 17, 2011

[Currentness](#)

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Credits

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\), § 2, eff. June 17, 2011.](#)

V. T. C. A., Civil Practice & Remedies Code § 27.002, TX CIV PRAC & REM § 27.002

Current through the end of the 2015 Regular Session of the 84th Legislature

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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.003

§ 27.003. Motion to Dismiss

Effective: June 17, 2011

[Currentness](#)

(a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by [Section 27.006\(b\)](#), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Credits

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\), § 2, eff. June 17, 2011](#).

V. T. C. A., Civil Practice & Remedies Code § 27.003, TX CIV PRAC & REM § 27.003

Current through the end of the 2015 Regular Session of the 84th Legislature

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.005

§ 27.005. Ruling

Effective: June 14, 2013

[Currentness](#)

(a) The court must rule on a motion under [Section 27.003](#) not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under [Section 27.003](#), a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Credits

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\), § 2, eff. June 17, 2011](#). Amended by [Acts 2013, 83rd Leg., ch. 1042 \(H.B. 2935\), § 2, eff. June 14, 2013](#).

V. T. C. A., Civil Practice & Remedies Code § 27.005, TX CIV PRAC & REM § 27.005

Current through the end of the 2015 Regular Session of the 84th Legislature

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.010

§ 27.010. Exemptions

Effective: June 14, 2013

[Currentness](#)

(a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Credits

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\), § 2, eff. June 17, 2011](#). Amended by [Acts 2013, 83rd Leg., ch. 1042 \(H.B. 2935\), § 3, eff. June 14, 2013](#).

V. T. C. A., Civil Practice & Remedies Code § 27.010, TX CIV PRAC & REM § 27.010
Current through the end of the 2015 Regular Session of the 84th Legislature

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 5. Open Government; Ethics (Refs & Annos)
Subtitle B. Ethics
Chapter 571. Texas Ethics Commission
Subchapter C. General Powers and Duties

V.T.C.A., Government Code § 571.061

§ 571.061. Laws Administered and Enforced by Commission

Effective: September 1, 2007

[Currentness](#)

(a) The commission shall administer and enforce:

(1) Chapters 302, 303, 305, 572, and 2004;

(2) Subchapter C, Chapter 159, Local Government Code, ¹ in connection with a county judicial officer, as defined by [Section 159.051, Local Government Code](#), who elects to file a financial statement with the commission;

(3) Title 15, Election Code; ² and

(4) [Sections 2152.064](#) and [2155.003](#).

(b) The commission shall perform any other powers or duties given to the commission under a law listed in Subsection (a).

Credits

Added by [Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993](#). Amended by [Acts 1997, 75th Leg., ch. 506, § 3, eff. Sept. 1, 1997](#); [Acts 1997, 75th Leg., ch. 507, § 3, eff. Sept. 1, 1997](#); [Acts 1997, 75th Leg., ch. 1154, § 5, eff. Sept. 1, 1997](#); [Acts 2007, 80th Leg., ch. 937, § 3.07, eff. Sept. 1, 2007](#).

Footnotes

¹ V.T.C.A., [Local Government Code § 159.051 et seq.](#)

² V.T.C.A., [Election Code § 251.001 et seq.](#)

V. T. C. A., [Government Code § 571.061, TX GOVT § 571.061](#)

Current through the end of the 2015 Regular Session of the 84th Legislature

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West's Vermont Statutes Annotated
Title Twelve. Court Procedure
Part 2. Proceedings Before Trial
Chapter 27. Pleading and Practice
Subchapter 2. Pleadings Generally

12 V.S.A. § 1041

§ 1041. Exercise of rights to free speech and to petition
government for redress of grievances; special motion to strike

Currentness

(a) A defendant in an action arising from the defendant's exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the United States or Vermont Constitution may file a special motion to strike under this section.

(b) A special motion to strike under this section shall be filed with the court and served on all parties not more than 60 days after the filing of the complaint. A party may file a response to the motion not more than 15 days after the motion is served on the party. The court may extend the time limits of this subsection for good cause shown.

(c)(1) The filing of a special motion to strike under this section shall stay all discovery proceedings in the action. Except as provided in subdivision (2) of this subsection, the stay of discovery shall remain in effect until the court rules on the special motion to strike.

(2) The court, on motion and for good cause shown, may order that limited discovery be conducted for the purpose of assisting its decision on the special motion to strike.

(d) The court shall hold a hearing on a special motion to strike not more than 30 days after service of the motion unless good cause exists for an extension.

(e)(1) The court shall grant the special motion to strike, unless the plaintiff shows that:

(A) the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law; and

(B) the defendant's acts caused actual injury to the plaintiff.

(2) In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(f)(1) If the court grants the special motion to strike, the court shall award costs and reasonable attorney's fees to the defendant. If the court denies the special motion to strike and finds the motion is frivolous or is intended solely to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to the plaintiff.

(2) Neither the court's ruling on the special motion to strike nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the ruling.

(g) An order granting or denying a special motion to strike shall be appealable in the same manner as an interlocutory order under [Rule 5 of the Vermont Rules of Appellate Procedure](#).

(h) This section shall not apply to any enforcement action or criminal proceeding brought by the State of Vermont or any political subdivision thereof.

(i) As used in this section, “the exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the United States or Vermont Constitution” includes:

(1) any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

(2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) any written or oral statement concerning an issue of public interest made in a public forum or a place open to the public; or

(4) any other statement or conduct concerning a public issue or an issue of public interest which furthers the exercise of the constitutional right of freedom of speech or the constitutional right to petition the government for redress of grievances.

Credits

[2005, Adj. Sess., No. 134, § 2.](#)

12 V.S.A. § 1041, VT ST T. 12 § 1041

The statutes are current through Law No. 63 with the exception of Laws No. 38, 46, 48, 51, 54, 57, 58, 61, and 64 of the First Session of the 2015-2016 Vermont General Assembly (2015).