

No. 12-0776

IN THE SUPREME COURT OF TEXAS

JUDY A. JENNINGS AND REBECCA BELL-METEREAU,

Petitioners

vs.

**WALLBUILDER PRESENTATIONS, INC., THROUGH ITS PRESIDENT,
DAVID BARTON; WALLBUILDERS, L.L.P., THROUGH ITS
PRESIDENT, DAVID BARTON; AND DAVID BARTON, INDIVIDUALLY,**

Respondents.

On Petition for Review from the
Second Court of Appeals at Fort Worth, Texas
No. 02-12-00047-CV

**BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 21 MEDIA AND PUBLIC ADVOCACY
ORGANIZATIONS IN SUPPORT OF THE PETITIONERS**

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INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee is an unincorporated association that has no parent corporation and issues no stock. The Reporters Committee, its attorneys and counsel from Haynes and Boone, LLP have not received, nor will receive, any fee for preparing this brief and will provide all attorney fees incurred in connection with this brief. No other listed *amici* has received, nor will they receive, any fee related to the preparation of this brief.

ABC, Inc., alone and through its subsidiaries, owns and operates, inter alia, ABC News, abcnews.com and local broadcast television stations which regularly gather and report news to the public. Programs produced and disseminated by ABC News include “World News Tonight with Diane Sawyer,” “20/20,” “Nightline,” “Good Morning America” and “This Week.” ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

A&E Television Networks, LLC (“AETN”) is an international media company organized under the laws of the State of Delaware with its principal place of business in New York. AETN is comprised of television networks including A&E, HISTORY, Lifetime, Bio., Military HISTORY, and Crime & Investigation Network. AETN is a limited liability company, with interests held by a number of companies. No publicly held corporation owns 10% or more of an interest in AETN with the exception of The Walt Disney Company, which indirectly holds an interest of 10% or more.

A. H. Belo Corporation is headquartered in Dallas, Texas, and owns four daily newspapers. The publicly traded company publishes several daily newspapers, including The Dallas Morning News, Texas’ leading newspaper and winner of nine Pulitzer Prizes, as well as The Denton Record Chronicle. A. H. Belo also operates a diversified group of websites. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, daily newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers. Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Belo Corp. owns and operates 20 television stations and their related websites, four of which are in Texas: WFAA-TV in Dallas, KHOU-TV in Houston, KENS-TV in San Antonio and KVUE-TV in Austin. The Dallas, Texas-based company also created the 24-hour regional cable channel Texas Cable News, Inc. (“TXCN”). It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The Associated Press (“AP”) is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. AP’s members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP reports news in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries. The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

CBS Broadcasting Inc. produces and broadcasts news, public affairs and entertainment programming. Its CBS News Division produces morning, evening and weekend news programming, as well as news and public affairs newsmagazine shows, such as “60 Minutes” and “48 Hours.” CBS Broadcasting Inc. also directly

owns and operates television stations across the country, including WCBS-TV in New York City. CBS Broadcasting Inc. is an indirect, wholly owned subsidiary of CBS Corporation, which is a publicly traded company.

Dow Jones & Company, Inc. is the publisher of The Wall Street Journal, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, Barron's, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires, as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services. News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones, and Ruby Newco LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company owns 10% or more of Dow Jones' stock.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the

Washington-based Scripps Media Center, home of the Scripps Howard News Service. The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

Directly and through affiliated companies, Fox Television Stations, Inc., owns and operates 27 local television stations throughout the United States, including KRIV in Houston, KDFW and KDFI in Dallas-Fort Worth (operated by NW Communications of Texas, Inc.) and KTBC in Austin (operated by NW Communications of Austin, Inc.). The 27 stations have a collective market reach of 37 percent of U.S. households. Each of the 27 stations also operates Internet websites offering news and information for its local market. Fox Television Stations, Inc., NW Communications of Texas, Inc. and NW Communications of Austin, Inc., are indirect subsidiaries of News Corporation, a publicly held company. No other publicly held company owns 10% or more of News Corporation stock.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and

integrated with its publishing or broadcasting operations. Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company holds 10% or more of its stock.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38 weekly newspapers, including the Houston Chronicle, San Francisco Chronicle and Albany (N.Y.) Times Union; interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include The Denver Post and The Salt Lake Tribune; nearly 200 magazines around the world, including Good Housekeeping, Cosmopolitan and O, The Oprah Magazine; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a minority joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate. Hearst Corporation is privately held by the Hearst Family Trust and has no other parent. None of Hearst's subsidiaries or affiliates is publicly held, with the exception of the following companies, in which Hearst and/or its subsidiaries own minority interests: MediaNews Group, Inc., Fimilac SA (owner of Fitch Group, Inc.), Local.com, drugstore.com and Sirius Satellite Radio, Inc.

KVIA-TV is an ABC-affiliated broadcast television station based in El Paso, Texas. The station reaches approximately 270,000 households in El Paso, Hudspeth and Culbertson counties. The television station's parent company, News-Press and Gazette, is a private, family-owned business headquartered in St. Joseph, Missouri. The News-Press and Gazette issues no stock.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 30 daily newspapers and related websites, including the Fort Worth Star-Telegram, as well as numerous community newspapers and niche publications. The McClatchy Company does not have a parent corporation. The McClatchy Company is publicly traded on the New York Stock Exchange under ticker symbol MNI. No publicly held corporation owns 10% or more of the stock of The McClatchy Company.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in

1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment. The MLRC has no parent corporation and issues no stock.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press." NBCUniversal Media, LLC is indirectly owned 51% by Comcast Corporation and 49% by General Electric Company.

The New York Times Company is the publisher of The New York Times, The Boston Globe, International Herald Tribune and 15 other daily newspapers. It also owns and operates more than 50 websites, including nytimes.com, Boston.com and About.com. The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

Public Citizen, Inc., is a non-profit national consumer advocacy organization with 300,000 members and supporters – 14,000 of whom reside in Texas. Since its founding in 1971, Public Citizen has advocated a variety of protections for consumers, citizens and employees. It defends the First Amendment rights of citizens who participate in public debate in many federal and state courts across the country, and has often invoked anti-SLAPP statutes for its clients. Further, Public Citizen often participates as amicus curiae arguing for appellate jurisdiction in such cases. Public Citizen is organized as a non-profit corporation with no parent corporation and issues no stock.

The Public Participation Project (“PPP”) is an organization chiefly engaged in securing the passage of federal anti-SLAPP legislation. The PPP also monitors SLAPP developments in legislatures and courts across the country. It provides online educational resources, including compendia of state speech laws and First Amendment scholarship, and commentary on current SLAPP cases and legislation on its blog. The PPP has no parent corporation and no stock.

The Texas Association of Broadcasters is a non-profit association that represents more than 1,300 television and radio stations across the state of Texas with a tradition of community-oriented, free, over-the-air broadcasting. The Texas Association of Broadcasters was founded in 1951 and incorporated one year later and performs numerous services on behalf of its members, including sponsoring

and promoting 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 the voice of the state’s newspaper industry, representing some 475 paid newspapers of general circulation. The association promotes the welfare of Texas newspapers, encourages higher standards of journalism, and plays an important role in protecting the public’s right to know as an advocate of First Amendment liberties. Founded more than 130 years ago, the TPA is one of the nation’s oldest and largest newspaper trade organizations. It is a non-profit trade association with two affiliates: Texas Press Service Inc., the for-profit advertising and sales arm of TPA; and the Texas Newspaper Foundation, a 501(c)(3) nonprofit corporation which supports education and training opportunities for working journalists.

SUMMARY OF THE ARGUMENT

This Court should accept review to make clear the scope of the appellate rights in the Texas Citizens Participation Act (“TCPA”). TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011 (Vernon 2011). The Second Court of Appeals in Fort Worth circumscribed an appeal provision that expressly contemplates interlocutory appeals from orders on dismissal by limiting immediate judicial review to cases where trial court judges do not decide an anti-SLAPP motion within the time limits required by the statute. The court’s interpretation of the statute is at odds with the law’s stated purpose and effectively eliminates the right to an appeal for any defendants whose special motions to dismiss were denied by a trial court order. Such an interpretation turns the appeals provision on its head by permitting potentially frivolous claims to move forward without the scrutiny of immediate appellate review. This incongruous result was not the outcome the Legislature intended when enacting these important protections for free speech.

This state’s anti-SLAPP statute was not designed in a vacuum. Indeed, the TCPA is part of a nationwide movement of legislation enacted state-by-state to curtail time-consuming and costly litigation aimed at silencing individuals exercising their First Amendment rights. What began more than two decades ago as a project by two professors to shed light on the rise of such frivolous litigation has led to the enactment of legislation in more than half of the states aimed

precisely at curtailing such lawsuits. The intent of these various statutes, including the TCPA, is clear: the new laws provide not merely a procedural mechanism to dispose of claims on an expedited basis but a substantive protection meant to ward off frivolous litigation. The appeals provision written into the TCPA is meant to further enforce these valuable statutory guarantees. A number of state and federal courts have examined the right of appeal under state anti-SLAPP statutes and have overwhelmingly found a strong justification for interlocutory appeal that is consistent with the legislative intent of the TCPA. Given the important First Amendment interests at stake, this Court should accept review to determine whether the appeals procedure as envisioned by the Court of Appeals is consistent with the legislative intent of the statute and furthers the stated purpose of the TCPA.

ARGUMENT

I. This Court should accept review to construe the appeal provision of the anti-SLAPP statute to preserve its ultimate purpose to protect vital First Amendment interests from the chilling effect of meritless cases.

The purpose of the Texas Citizens Participation Act (“TCPA”), TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011 (Vernon 2011), is to quickly dispose meritless cases affecting the First Amendment rights of speakers engaged in public controversies. As the statute declares, Texas wanted

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.

§27.002.

The appeals provision, § 27.008, promotes the overriding goal of the anti-SLAPP law. First, it allows an immediate appeal if the trial judge does not act on a motion to dismiss under the statute within the required time. § 27.008(a). Second, it provides that:

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.

§ 27.008(b). This provision commands appellate courts to speed the resolution of appeals under this section. It does not distinguish between the entry of an order and a lack of action by the trial court.

A. The language of the TCPA must be read to provide for interlocutory appeal whether the trial court issues a ruling or fails to act on a motion.

The Court of Appeals turns the appeals provision language on its head by creating an artificial distinction between the constructive denial of an anti-SLAPP motion and an actual order denying relief. *Jennings v. Wallbuilder Presentations, Inc.*, __ S.W.3d __, No. 02-12-00047-CV, 2012 WL 3500715 (Tex. App.-Fort Worth Aug. 16, 2012, pet. filed). In doing so, the court would allow an interlocutory appeal only in the former scenario and not in the latter. The

interpretation by the Court of Appeals effectively transforms the appeals provision from a right of appeal to a right of one-time judicial review – a motion under the TCPA is either reviewed by the trial court or by the appellate court, but never by both.

In reaching its conclusion, the Court of Appeals simply concluded that the legislative history “do[es] not support” the position that interlocutory appeals were available from both trial court orders and through the court’s inaction. *Jennings*, No. 02-12-00047-CV, 2012 WL 3500715 at *7. The Legislature’s own bill analysis makes no mention of the unique procedural scheme envisioned by the Court of Appeals where appellate review is allowed only when a trial court had not signed an order. House COMM. ON JUDICIARY AND CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2973, 82nd Leg. R.S. (2011). As both the bill analysis and Section 27.008(c) makes clear, an appeal would have to be filed within 60 days “after the date the trial court order is signed or the time [prescribed by Section 27.005] expires, as applicable.”

If the interpretation by the Court of Appeals were to stand, it would violate rules of statutory construction mandated by this Court. According to this Court,

[i]t is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into statutory provisions.

Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540 (Tex. 1981) (citations omitted). Texas courts, whenever possible, must give effect to every sentence, clause and word of a statute so that no part is rendered superfluous or inoperative, and further, read the statute as a whole rather than in isolated portions. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003) (internal citations omitted).

The Court of Appeals read the statute in a way that ignores the context and purpose of the statutory scheme taken as a whole. The lower court's reading of the appeals provision in Section 27.008 ignores specific language in the statute, and in doing so changes the meaning of the law. In particular, Section 27.008(b)'s instruction 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," was read as only allowing for appeals when the order is granted, while the statute makes no such distinction. The phrase "interlocutory or not" is affirmative textual proof that the Legislature authorized interlocutory review. There is no language in the statute limiting this right.

The opinion creates an appeals procedure that does not embrace the legislative intent of the statute, which is to quickly and efficiently dispose of frivolous lawsuits "aimed at retaliating against someone who exercises the person's right of association, free speech, or right of petition." House COMM. ON

JUDICIARY AND CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2973, 82nd Leg. R.S. (2011). Ultimately, the Court of Appeals failed to follow both the statute's own wording and the legislature's purpose, which was meant to be construed broadly. § 27.011 (b) ("This chapter shall be construed liberally to effectuate its purpose and intent fully."); *see also Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 745 (Tex. 2012) (noting Texas Supreme Court precedent stating that remedial and curative statutes are to "be given the most comprehensive and liberal construction possible," and "certainly should not be given a narrow, technical construction.") (citing *City of Mason v. West Tex. Utilities Co.*, 237 S.W.2d 273, 280 (Tex. 1951)).

Texas is certainly no stranger to meritless libel litigation, particularly the type sought to be curtailed by enactment of the TCPA. In 2010, for instance, a man who had applied for a license to open a taxicab franchise was sued for defamation by his former employer for statements he made at a city council meeting when trying to obtain his franchise. *Means v. ABCABCO, Inc.*, 315 S.W.3d 209 (Tex. App.-Austin 2010, no pet.). The lawsuit was eventually dismissed for lack of evidence, but not until after the defendant was forced to fight the suit in litigation lasting more than three years. *Id.* at 216. In *Palestine Herald-Press Co. v. Zimmer*, an assistant high school football coach sued a local sports editor and his newspaper for defamation after the editor had criticized in his

weekly column the coach's on-field conduct at a game. 257 S.W.3d 504 (Tex. App.-Tyler 2008, pet. denied). The newspaper ultimately prevailed on its summary judgment motion, but only after a successful appeal to the Twelfth Court of Appeals. *Id.* at 512.

The Court of Appeals' observation that "the party seeking chapter 27 dismissal may nonetheless later avail itself of a no-evidence summary judgment motion" also does not solve the problem it has created. *Jennings*, No. 02-12-00047-CV, 2012 WL 3500715 at *5. While other procedures do exist to dispose of claims that infringe the constitutional rights of free speech and petition, they lack the protections contained in the TCPA, such as expedited review and the award of costs and attorney fees. Further, a no-evidence summary judgment is available only after a period of potentially costly and time-consuming discovery. TEX. R. CIV. P. 166a (i). The TCPA, and its appeals provision were enacted precisely to alleviate such harassment by providing defendants with an expeditious means of dismissing a case and forcing plaintiffs to bear the cost of meritless litigation.

B. The statute must be read to effectuate the intent of the Texas Legislature to create meaningful protections from the burdens of litigation.

Recognizing a right of interlocutory appeal in the text of the TCPA would be consistent with how other jurisdictions have read similar anti-SLAPP statutes. Numerous state high courts and federal circuit courts have analyzed anti-SLAPP

laws to see whether they create rights that are severable from an underlying action and thus warrant interlocutory review. *Amici* recognize that Texas courts allow interlocutory appeals only if provided by statute, but we believe that the right of appeal is clearly intended in this statute. The experience of these other courts is illustrative of the type of review intended in any anti-SLAPP statute and should inform this Court’s reading of the words of the TCPA. As all of these laws come from a common source, the solution accepted by other jurisdictions should similarly be embraced by this Court – the rights protected by anti-SLAPP statutes rise to the nature of an immunity from frivolous litigation, and such rights can only be protected by allowing immediate review if an anti-SLAPP motion is denied.

The nationwide campaign to combat civil lawsuits against individuals who speak out about matters relating to the public interest began more than 20 years ago when state legislatures started to enact laws that recognized that “[t]he costs immediately imposed on the ... targets can be substantial, including not only attorney’s fees, court costs, and litigation expenses but also time and dollar resources diverted from the campaign [on which the suit was based], lost wages, potential credit problems, insurance cancellations, and extreme psychological insecurity.” See 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).¹ SLAPP suits are less aimed at succeeding on the merits than on “chilling the politically outspoken as well as observers, and chilling important public discussion and dispute.” *Id.* at 944. What began as two professors’ attempt to highlight a troublesome trend has led to remedial legislation nationwide: Twenty-eight states, along with the District of Columbia and U.S. territory of Guam, have enacted anti-SLAPP laws.² Although the procedures required and protections afforded under anti-SLAPP statutes vary among states, all are rooted in First Amendment interest in preserving individuals’ constitutional rights to speak on matters of public concern and protecting potential

¹ Pring and Canan, University of Denver professors at the time, first coined the term “SLAPP” in 1988 during a study of 100 such lawsuits. See Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, Soc. Probs., Dec. 1988, at 506 (defining SLAPPs as “attempts to use civil tort action to stifle public expression” and lawsuits that “claim injury resulting from citizen efforts to influence the government or sway voters on an issue of public significance”).

² See ARIZ. REV. STAT. ANN. §§ 12-751–12-752 (2011); ARK. CODE ANN. §§ 16-63-501–16-63-508 (West 2011); CAL. CIV. PROC. CODE § 425.16 (West 2011); DEL. CODE ANN. tit. 10, §§ 8136–8138 (West 2011); D.C. CODE §§ 16-5501–16-5505 (2011); FLA. STAT. ANN. §§ 720.304(4), 768.295 (West 2011); GA. CODE ANN. §§ 9-11-11.1, 51-5-7(4) (West 2011); 7 GUAM CODE ANN. §§ 17101–17109 (2011); HAW. REV. STAT. §§ 634F-1–634F-4 (West 2011); 735 ILL. COMP. STAT. ANN. 110/1–110/99 (West 2011); IND. CODE ANN. §§ 34-7-7-1–34-7-7-10 (West 2011); LA. CODE CIV. PROC. ANN. art. 971 (2011); ME. REV. STAT. ANN. tit. 14, § 556 (2011); MD. CODE ANN., Cts. & Jud. Proc. § 5-807 (West 2011); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2011); MINN. STAT. ANN. §§ 554.01–554.05 (West 2011); MO. ANN. STAT. § 537.528 (West 2011); NEB. REV. STAT. §§ 25-21,241–25-21,246 (2011); NEV. REV. STAT. ANN. §§ 41.637–41.670 (West 2010); N.M. STAT. ANN. § 38-2-9.1 (West 2011); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2011); N.Y. C.P.L.R. §§ 3211(g), 3211(h) (McKinney 2011); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2011); OR. REV. STAT. ANN. §§ 31.150–31.155 (West 2011); 27 PA. CONS. STAT. ANN. §§ 7707, 8301–8303 (West 2011); R.I. GEN. LAWS ANN. §§ 9-33-1–9-33-4 (West 2011); TENN. CODE ANN. §§ 4-21-1001–4-21-1004 (West 2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011 (Vernon 2011); UTAH CODE ANN. §§ 78B-6-1401–78B-6-1405 (West 2011); VT. STAT. ANN. tit. 12, § 1041 (West 2011); WASH. REV. CODE ANN. §§ 4.24.500–4.24.525 (West 2011).

defendants from plaintiffs who have the means to pursue time-consuming and expensive litigation.

Against this backdrop, the Texas Legislature enacted the TCPA because, as a state committee report asserted,

[c]itizen participation is at 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 TCPA] 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.

House COMM. ON JUDICIARY AND CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2973, 82nd Leg. R.S. (2011). The TCPA and its appeals provision create a significant and substantial protection from the burdens of defending against frivolous litigation in order to protect valuable First Amendment rights. An interlocutory order denying a motion under the TCPA must be immediately appealable to preserve those rights, and reading the statute to allow for such appeal is not only consistent with the text, but with the very purpose of the new anti-SLAPP law.

At least three state supreme courts and three federal circuit courts of appeals have similarly recognized the intent of state legislatures in their jurisdictions to confer strong protections that merit immediate review through enactment of the state anti-SLAPP legislation. The common history of all anti-SLAPP laws shows

that they were meant to protect a right – avoiding the costs and harassment associated with discovery in meritless suits – that would be lost if the denial of an anti-SLAPP motion were not immediately appealable. The collective experience of courts around the country construing anti-SLAPP protections suggests the TCPA should be read to allow such appeals as well.

The First, Fifth and Ninth Circuits, when confronted with this issue of interlocutory appeal rights, each recognized the importance of reading anti-SLAPP statutes consistently with the intent of the respective state legislatures to create a substantial right to protect speakers from meritless litigation, thus preserving important First Amendment rights. In taking account of such legislative intent, each circuit granted interlocutory appeal rights following a trial court’s ruling on a special motion to dismiss.³ The Fifth Circuit in *Henry v. Lake Charles American Press, L.L.C.*, for instance, found that the denial of an anti-SLAPP motion under Louisiana’s statute was immediately appealable because of the important interests at stake. 566 F.3d 164 (5th Cir. 2009). When Louisiana’s anti-SLAPP statute was enacted in 1999, the Legislature stated,

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

³ While all three federal circuits relied on the federal “collateral order doctrine,” *see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), Texas has not adopted such a doctrine. *Amici* instead rely on these cases for the proposition that state anti-SLAPP statutes such as the TCPA must be read consistently with the intent of the legislatures.

judicial process. To this end, it is the intention of the legislature that the Article enacted pursuant to this Act shall be construed broadly.

LA. CODE CIV. PROC. ANN. art. 971 (2011). State courts articulating the Legislature's intent in creating Article 971 explained the statutory enactment as a device to "screen meritless claims pursued to chill one's constitutional rights under the First Amendment." *Lee v. Pennington*, 830 So.2d 1037, 1041 (La.App. 4th Cir. 2002).

The court in *Henry* went further in interpreting the state legislature's intent, declaring the statute serves the public interest in protecting First Amendment rights by "immunizing speakers from suits stemming from the exercise of First Amendment rights." *Henry*, 566 F.3d at 177. The court further held that denial of an anti-SLAPP motion would be unreviewable on final judgment. Waiting until final disposition of the case to appeal would "effectively destroy[]" the immunity right created by the anti-SLAPP statute because the appeal would not remedy the fact that a defendant was compelled to defend against a meritless claim. *Id.* at 178. Finally, the court held that the "importance" of the underlying issue was an essential element of its analysis. *Id.* at 179 ("[A]n order is immediately appealable when the interests in permitting immediate appeals are sufficiently important to outweigh the interests of finality in denying immediate appeals."). The court noted the importance of the issue is elevated when questions of immunity from suit arise and when First Amendment rights are involved. *Id.* at 179-80. "Indeed, as

[Louisiana’s anti-SLAPP statute] embodies a legislative determination that parties should be immune from certain abusive tort claims that have the purpose or effect of imperiling First Amendment rights, there is little room for the judiciary to gainsay its importance.” *Id.* at 181 (internal quotations and citations omitted).

The Ninth Circuit, in examining the California anti-SLAPP law, CAL. CIV. PROC. CODE § 425.16 (West 2011), also found that “a defendant’s rights under the anti-SLAPP statute are in the nature of immunity: They protect the defendant from the burdens of trial, not merely from ultimate judgments of liability.” *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003). In coming to this conclusion, the court noted that there was an appeals provision written directly into the statute, as well as clear legislative history established through statements made by the California State Judiciary Committee before the law’s enactment:

Without [the right of immediate appeal], a defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated. ... [W]hen a meritorious anti-SLAPP motion is denied, the defendant, under current law, has only two options. The first is to file a writ of appeal, which is discretionary and rarely granted. The second is to defend the lawsuit. If the defendant wins, the anti-SLAPP law is useless and has failed to protect the defendant’s constitutional rights.

Id. at 1025 (quoting CAL. SEN. JUDICIARY COMM. REP. on AB 1675, at 4). “This provision, along with the legislative history behind [the anti-SLAPP law] demonstrates that California lawmakers wanted to protect speakers from the trial itself rather than merely from liability.” *Id.*

Similarly, the First Circuit in *Godin v. Schencks* held that a district court order refusing to apply the Maine anti-SLAPP statute was directly appealable. 629 F.3d 79, 84-85 (1st Cir. 2010). In doing so, the court noted state court precedent, *id.* at 85, interpreting the legislature’s intent “to deter the filing of lawsuits whose purpose is to intimidate defendants from petitioning the government to redress grievances or from making statements designed to elicit public support for the defendants’ position.” *Maietta Const., Inc. v. Wainwright*, 847 A.2d 1169, 1177 (Me. 2004).

The protection from meritless litigation conferred by a state anti-SLAPP statute such as the TCPA is so important that at least two state high courts have also recognized that the right would be meaningless without the ability to immediately appeal.

In *Fabre v. Walton*, the Massachusetts Supreme Judicial Court found that interlocutory orders that “would interfere with rights in a way that cannot be remedied on appeal from the final judgment” should be immediately appealable. 781 N.E.2d 780, 784 (Mass. 2002). The court concluded that the anti-SLAPP law provided more than a mere defense against liability; it granted immunity from suit that was “in large measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process.” *Id.* While the state statute itself is silent on issues of appeal, the court noted it was

the state legislature's intent to "immunize parties from claims based on their petitioning activities," and the statute provided broad protections for citizens exercising such rights. *Id.* at 783. In recognizing interlocutory appeal rights in the anti-SLAPP context, the Massachusetts high court drew an analogy to the interlocutory appeal rights present in claims of government immunity from suit, noting that denial of a special motion to dismiss "interferes with rights in a way that cannot be remedied on appeal from the final judgment." *Id.* at 784.

Similarly, in *Morse Bros., Inc. v. Webster*, the Maine Supreme Judicial Court found that the state's anti-SLAPP statute was specifically enacted to protect citizens exercising their speech rights from frivolous litigation and held that postponing an appeal until the end of proceedings would constitute an irreparable loss. 772 A.2d 842, 848 (Me. 2001). "Precluding the moving party from appealing a decision on the motion would result in continued litigation, which is the precise harm that the statute seeks to prevent. ... [T]o deny review would have a chilling effect on the petitioning rights of the parties whom the statute seeks to protect." *Id.*

A Georgia appellate court also granted interlocutory review of the denial of a motion to dismiss under the state's anti-SLAPP statute filed by a defendant in a defamation lawsuit despite having no express interlocutory appeal right written

into the statute. *Harkins v. Atlanta Humane Society*, 264 Ga. App. 356 (Ga. Ct. App. 2003).

Here, as in the above-mentioned cases, the statute protects defendants from the burdens of trial, not merely from ultimate judgments of liability. As the Fifth Circuit noted in *Henry*, waiting until final judgment of the trial to review such appeals would “effectively destroy” the rights created under an anti-SLAPP statute. As such, a post-judgment appeal would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression. In creating anti-SLAPP protections for its citizens, Texas has joined a growing body of jurisdictions in conclusively protecting expression central to self-government. Enforcing these guarantees through immediate appellate review is consistent with the plain language of the TCPA, especially when it is “construed liberally to effectuate its purpose and intent fully.” § 27.011 (b).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant the Petition for Review.

CERTIFICATE OF COMPLIANCE

The length of this *Amici Curiae* Brief was computed using Microsoft Word. The word count is 4,452 words, excluding the parts of the brief exempted by Rule 9.4(i)(1) and Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure.

/s/Laura Lee Prather

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record listed below in accordance with Rule 11(d) of the Texas Rules of Appellate Procedure via U.S. First Class Mail and/or facsimile on this the 12th day of February, 2013.

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