No. 13-25-00386-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH DISTRICT OF TEXAS
AT CORPUS CHRISTI-EDINBURG

TONI MAREK,
Appellant,

v.

PHI THETA KAPPA HONOR SOCIETY,
Appellee.

On Appeal from Cause No. 25-03-92211-D,
in the 377th Judicial District Court, Victoria County, Texas

BRIEF OF *AMICI CURIAE* THE FIRST AMENDMENT LAWYERS ASSOCIATION, THE CENTER FOR AMERICAN LIBERTY, EUGENE VOLOKH, AND DEREK BAMBAUER, IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

The First Amendment Lawyers Association ("FALA") is a nonprofit organization composed of attorneys across the United States with a shared commitment to preserving and advancing the rights guaranteed by the First Amendment. Since its founding in the 1960s, FALA has actively participated in cases concerning free expression, freedom of the press, and restrictions on speech in public spaces. FALA members are often on the front lines of First Amendment litigation, and the organization frequently appears as *amicus* to protect against government encroachment on constitutional expression.

The Center for American Liberty ("CAL") is a 501(c)(3) nonprofit public interest law firm. CAL is dedicated to defending free speech, religious liberty, civil rights, and individual liberties against government overreach, corporate censorship, and retaliatory litigation. Through strategic litigation and *amicus* advocacy, CAL fights to protect the constitutional rights of Americans—particularly those whose First Amendment freedoms are threatened by powerful institutions, SLAPP suits, and unconstitutional prior restraints. CAL has participated as *amicus curiae* in numerous cases involving core free-speech protections before the U.S. Supreme Court and federal and state appellate courts.

CAL has a direct and substantial interest in this appeal. This case presents a

prior restraint on the publication of a whistleblower's book exposing alleged misconduct in a national educational honor society that affects millions of students, faculty, and families. It also involves an attempt to circumvent the Texas Citizens Participation Act ("TCPA"), Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.*, which was enacted to discourage meritless lawsuits designed to chill speech on matters of public concern. CAL routinely represents or supports individuals and organizations facing similar attempts to weaponize the courts to suppress truthful information and public discourse.

As an organization committed to combating the growing trend of anti-free-speech tactics—including gag orders, confidentiality weaponization, and abuse of privilege claims to censor public debate—CAL is well-positioned to assist the Court. The resolution of this appeal will have significant implications for the ability of whistleblowers, authors, and publishers to disseminate information of legitimate public importance without facing judicial censorship or burdensome retaliatory litigation. CAL has no financial interest in the parties or the outcome of this case and submits this brief solely to advance the vital constitutional principles at stake.

Eugene Volokh is the Thomas M. Siebel Senior Fellow at the Hoover Institution at Stanford University, and the Gary T. Schwartz Distinguished Professor of Law Emeritus at UCLA School of Law. During his 30 years at UCLA,

he taught, among other things, First Amendment law and tort law. He has written extensively on libel law in particular. His only interest in this case is in the sound interpretation of anti-SLAPP statutes.

Derek E. Bambauer is the Irving Cypen Professor of Law at the University of Florida Levin College of Law. A National Science Foundation-funded investigator, he researches Internet censorship, artificial intelligence, and cybersecurity. As a research fellow at the Berkman Klein Center for Internet & Society at Harvard Law School, he was a member of the OpenNet Initiative, which studied Internet censorship worldwide. Bambauer's only interests in this case are the protection of freedom of expression and the concomitant need for sound, rigorous application of anti-SLAPP statutes such as those enacted in Texas and Florida.

No fee has been paid or will be paid for the preparation of this *amicus* brief. The undersigned counsel for *amici* prepared this brief *pro bono*.

SUMMARY OF ARGUMENT

Anti-SLAPP statutes exist because some litigants abuse the machinery of the courts, filing suits not to redress meritorious legal injuries, but to punish people for speaking. The Texas Citizens Participation Act is one such statute. Codified in Chapter 27 of the Texas Civil Practice & Remedies Code, "Actions Involving the Exercise of Certain Constitutional Rights," the TCPA's banner 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" while balancing the rights of litigants to file "meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002.

With the enactment of the TCPA, the Texas Legislature made a set of deliberate policy choices. A successful TCPA movant is entitled not merely to dismissal—which a nonsuit would equally accomplish—but to dismissal with prejudice, mandatory attorney's fees, and discretionary sanctions. Tex. Civ. Prac. & Rem. Code §§ 27.005, 27.009(a). This statutory mandate is unusual in Texas civil practice because it reflects an overt legislative judgment that *deterrence* of censorious litigation requires something more than the mere termination of the lawsuit aimed at silencing speech. It requires vindication of the right suppressed.

To permit a TCPA respondent to avoid these consequences through a

voluntary nonsuit would transform the TCPA from a substantive deterrent into a paper tiger—one that any plaintiff could defang by cutting and running the moment its case becomes the subject of a meritorious TCPA motion. That cannot be the law, and it is not—under Texas Rule of Civil Procedure 162, a party's voluntary nonsuit does not affect its opponent's claims for affirmative relief. A TCPA motion—which affords the movant relief far beyond what a nonsuit alone provides—constitutes precisely such a claim.

This brief makes three points. First, the TCPA's remedial structure is designed to deter censorship and vindicate First Amendment rights—not merely to dismiss a meritless claim. A preemptive nonsuit cannot deprive a movant of the full scope of that relief. Second, the First Amendment's structural principles independently support this conclusion; the TCPA's protections serve the same function as other First Amendment doctrines designed to prevent the suppression of protected expression. Third, allowing litigants to dodge TCPA liability by nonsuit and procedural delay without affording redress for a successful TCPA movant would create perverse incentives that undermine the TCPA's framework.

ARGUMENT

I. The TCPA Provides Substantive Affirmative Relief That Survives Nonsuit.

The Texas Supreme Court has made clear that "[a] plaintiff has an absolute right to nonsuit a claim before resting its case-in-chief, but a nonsuit 'shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief,' . . . such as a counterclaim." *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 300–01 (Tex. 2013) (quoting Tex. R. Civ. P. 162); *see also Villafani v. Trejo*, 251 S.W.3d 466, 470 (Tex. 2008) ("Removing a defendant's ability to appeal a denial of a motion for sanctions after a nonsuit frustrates this purpose; a claimant could simply nonsuit a meritless claim and later re-file the claim with impunity.").

As the First Court of Appeals stated plainly, "a motion to dismiss under the TCPA constitutes a claim for affirmative relief[.]" *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 467 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd). A successful TCPA motion yields three forms of relief: (1) dismissal with prejudice; (2) mandatory costs and reasonable attorney's fees incurred in defending against the legal action; and (3) discretionary sanctions "sufficient to deter the party who brought the legal action from bringing similar actions." Tex. Civ. Prac. & Rem. Code §§ 27.005, 27.009(a). A nonsuit, by contrast, provides only a dismissal without

prejudice at the discretion of the nonsuiting party, typically leaving the TCPA movant to bear out-of-pocket fees and costs incurred to defend against a frivolous action.

The difference is not merely quantitative; it is qualitative. The TCPA movant is seeking a judicial determination that the plaintiff's "legal action" was, in fact, "based on or is in response to" the exercise of free speech rights—the very kind of speech-suppressing litigation the TCPA was devised to combat. Tex. Civ. Prac. & Rem. Code § 27.005(b).

To that end, Texas appellate courts consistently hold that a nonsuit does not relieve a plaintiff of the consequences of a pending TCPA motion. "A motion to dismiss under the TCPA survives a non-suit because a victory on the motion to dismiss, which may include attorneys' fees and sanctions, would afford the movants more relief than a non-suit would." *In re Diogu Law Firm PLLC*, No. 14-18-00878-CV, 2018 WL 4997322, at *1 (Tex. App.—Houston [14th Dist.] Oct. 16, 2018, no pet.) (citing *Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at *14 (Tex. App.—Houston [14th Dist.] June 26, 2018, no pet.) (mem. op.)); *see Galleria Loop Note Holder, LLC v. Lee*, No. 13-20-00334-CV, 2021 WL 2694773, at *2 (Tex. App.—Corpus Christi–Edinburg July 1, 2021, no pet.) ("Rule 162 permits the trial court to hold hearings and enter orders affecting

attorney's fees even after a notice of nonsuit is filed because the court retains plenary power.") (citation and quotation marks omitted).

Those holdings are entirely consistent with other states' anti-SLAPP laws, which likewise provide that a voluntary dismissal does not deprive the movant of affirmative relief. In jurisdictions that have enacted the Uniform Public Expression Protection Act[1] ("UPEPA")—an analogue to the TCPA—the rationale is straightforward: a litigant cannot silence their opponent through speech-quelling litigation and then claim no damage was done. The suit itself is the harm anti-SLAPP laws were created to prevent. *See, e.g.*, *Jacobson v. Clack*, 309 A.3d 571, 581 (D.C. 2024) ("If Jacobson were correct that a voluntary dismissal nullifies any right to attorneys' fees, then plaintiffs could inflict the harm the Anti-SLAPP Act was meant to combat—siphoning defendants' money, time, and resources—without recompense."); *see also Satz v. Starr*, 482 N.J. Super. 55, 61 (App. Div. 2025) ("further harm would be visited on SLAPP suit defendants when a plaintiff dismisses their complaint without prejudice, as occurred here, only then to re-start the litigation at some future point.").

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[1] In 2020, the Uniform Law Commission adopted UPEPA, a model law that over a dozen states have used as the basis for their own anti-SLAPP enactments. *See* Public Expression Protection Act, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home?communitykey=4f486460-199c-49d7-9fac-05570be1e7b1 (*last visited* May 10, 2026).

II. The TCPA's Deterrent Function Embodies a Structural First Amendment Principle.

Here is the broader point—the TCPA is not merely a run-of-the-mill procedural mechanism that tests pleadings, *see, e.g.*, Tex. R. Civ. P. 91a, nor is it an accelerated summary judgment motion dressed up in constitutional garb. It reflects a fundamental structural principle buttressing First Amendment protections: the government—including the judicial branch—must not be used as an instrument of speech suppression. *See, e.g.*, *Kinney v. Barnes*, 443 S.W.3d 87, 99 (Tex. 2014) ("Trial courts are simply not equipped to comport with the constitutional requirement not to chill protected speech in an attempt to effectively enjoin defamation.").

The Texas Legislature made that purpose clear. The TCPA exists "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[.]" Tex. Civ. Prac. & Rem. Code § 27.002. This purpose is not served by dismissal alone. A nonsuit only achieves dismissal. What a nonsuit does not achieve is deterrence of censorship-via-litigation. That deterrent purpose is an animating feature of the TCPA, just as it shapes many First Amendment doctrines.

Consider a few parallels. The First Amendment imposes a heightened "actual malice" burden in the context of public officials claiming defamation to deter "the

threat of damage suits" launched to silence public debate. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282–86 (1964). The overbreadth doctrine is described as "a judicially created doctrine designed to prevent the chilling of protected expression," *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989), as it allows "a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak," *United States v. Hansen*, 599 U.S. 762, 770 (2023). And because prior restraints have "an immediate and irreversible sanction" on speech, they carry a "heavy presumption" against their constitutional validity. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558-59, 570 (1976).

So too with the TCPA, albeit with a different target—disincentivizing private actors who enlist the judiciary as their speech-chilling agent. But instead of elevating the litigant's burden of proof (though the TCPA arguably does that too, through its "clear and specific evidence" standard), it imposes direct costs on parties who leverage the judicial system against protected expression. The mandatory fee-shifting, in particular, is not a prize for the TCPA movant's trouble in having to find and pay a lawyer; it is legislatively mandated relief that makes the filing of a retaliatory lawsuit a losing proposition from the outset, disincentivizing meritless suits designed to suppress expression.

III. The Facts of This Case Illustrate Why These Principles Matter.

If a plaintiff could file a censorious lawsuit, impose the costs of defense on a speaker, and then evade all consequences by filing a nonsuit the moment the speaker fights back, the TCPA's remedial force would be entirely neutered. A savvy litigant would simply bring the suit, extract whatever chilling effect it can during the pendency of the litigation—particularly injunctive relief—and dismiss before the court can impose repercussions.

The facts here are, regrettably, a textbook illustration of the problem the TCPA and other anti-SLAPP statutes were enacted to solve. Appellee Phi Theta Kappa ("PTK")—a large, well-resourced international organization by its own account—filed a lawsuit to prevent a private individual from publishing a book critical of the organization. The organization sought a declaratory judgment that would have given it editorial veto over Appellant Toni Marek's forthcoming book, and it obtained an *ex parte* temporary restraining order suppressing publication. And when Marek responded by opposing the prior restraint and filing a TCPA motion, PTK nonsuited its action—crying 'no harm, no foul.'

But the message and harm are unmistakable: PTK used the court system to suppress Marek's speech and then attempted to walk away without paying the statutory price. This is, by any measure, censorship without consequence. And the

product of judicial inaction is clear: any litigant who wishes to suppress criticism can file a lawsuit, obtain temporary relief (or at a minimum impose significant defense costs), and then nonsuit before a TCPA ruling can issue.

Notably, the parties' briefing reflects a procedural variant of the typical blueprint: nonsuit, drag the hearing date outside the statutory window over the movant's objections, and then invoke the trial court-imposed postponement as a forfeiture defense. But if the admixture of nonsuit, scheduling filibuster, and trial court acquiescence is enough to nullify TCPA relief, the statute becomes a dead letter, transforming the Texas Legislature's explicit purpose of encouraging and protecting constitutional rights into little more than an aspirational statement.

That cannot be right. The TCPA is to "be construed liberally to effectuate its purpose and intent fully." Tex. Civ. Prac. & Rem. Code § 27.011. Texas courts have long recognized that "[c]urative or remedial statutes are generally to be given the most comprehensive construction possible, and certainly should not be given a construction that would defeat the very purpose for which the statute was enacted." *Westphal v. Palmer*, 480 S.W.2d 277, 280 (Tex. App.—Houston [14th Dist.] 1972, no writ) (citing *City of Mason v. W. Tex. Utilities Co.*, 237 S.W.2d 273, 280 (Tex. 1951)). The TCPA's prophylactic function is not served by allowing the offending party to escape the consequences of its conduct by running out the clock.

CONCLUSION

The TCPA is not a mere procedural shortcut. The statute is a substantive expression of legislative policy—one that embodies structural First Amendment principles about the use of litigation as a weapon against protected expression. The statute's mandatory remedial framework is designed to deter retaliatory litigation, not merely note case closure on a court's docket. A litigant who brings a speech-inhibiting suit and then strategically nonsuits has already inflicted the harm the statute is designed to prevent; the suit imposes costs on the speaker, chills expression, and exploits the judicial process.

The Court should hold that PTK's nonsuit and calendar maneuvering did not moot or forfeit Marek's TCPA relief, reverse the trial court's order, and grant the affirmative relief Texas law affords Marek.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief of *amici curiae* complies with the form and length requirements of Texas Rule of Appellate Procedure 9.4. Excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1), the relevant sections of this document contain 2,671 words based on the word count of the computer program used to prepare the brief.

This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point font and 12-point font in footnotes.

Dated: May 11, 2026

/s/ William X. King
William X. King

CERTIFICATE OF SERVICE

I certify that on May 11, 2026, a true and correct copy of the above and foregoing document has been served via electronic service on all counsel of record for Appellant and Appellee.

/s/ William X. King
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