REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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By email March 30, 2023

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

Re: Concerns about HB 2781 and SB 896.

Dear Chairman Leach,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Reporters Committee for Freedom of the Press

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